Arbitration and the IRSSA

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I argue that the Independent Assessment Process (IAP) of the Indian Residential Schools Settlement Agreement should have been considered an arbitration. After briefly describing the IAP, I identify a test for determining whether a process is an "arbitration" according to the case law. I argue that the IAP meets this test. I then argue that treating the IAP as an arbitration would have clarified the availability of judicial recourse from IAP decisions, the role of the supervising courts, the role of the Chief Adjudicator, and the relevance of procedural fairness in IAP decision-making

I. INTRODUCTION

The Indian Residential Schools Settlement Agreement (IRSSA)[1] became the largest class action settlement in Canadian history when it was formed by the parties and approved by the courts[2] in December 2006.[3] As the name

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[1] Indian Residential Schools Settlement Agreement (2006) [IRSSA], online (pdf): <www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf> [perma.cc/HBZ5-78EQ].

[2] The courts of Yukon, Northwest Territories, Nunavut, Alberta, British Columbia, Saskatchewan, Manitoba, Ontario, and Quebec all separately approved the matter, with Ontario's courts asserting power to do so over persons in the Atlantic provinces: *IRSSA*, Art 1.01, *sv* "Appropriate Court," A similar assertion of jurisdiction was approved in *Meeking v Cash Store Inc*, 2013 MBCA 81 at para 97 [*Meeking*].

[3] Mayo Moran, "The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools: The Residential Schools Litigation and Settlement" (2014) 64:4 UTLJ

suggests, the IRSSA settled claims brought by Indian Residential Schools survivors against both Canada and the religious organizations that operated the schools.

I will not repeat the horrors of the residential schools here — others have addressed these matters far more ably than I could.[4] Nor will I discuss the long history of attempts by claimants to seek redress for those harms and how that history culminated in the IRSSA. Again, such matters have been discussed in detail by others, who had personal experience both with the litigation and with the negotiations.[5]

In this paper, I approach the IRSSA jurisprudence from an internal perspective of the Canadian (non-Indigenous) legal system. This approach distinguishes this paper from prior evaluations of the Canadian legal system from an external perspective.[6] From an external perspective one might question the Canadian legal system's handling of residential schooling, and

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529 at 529.

[4] See "The Final Report of the Truth and Reconciliation Commission" (2015), online: *National Centre for Truth and Reconciliation* <http://nctr.ca/records/reports.php> [https://perma.cc/S7FP-FSX3].

[5] See John Borrows, "Residential Schools, Respect, and Responsibilities for Past Harms The Residential Schools Litigation and Settlement" (2014) 64:4 UTLJ 486 at 500; Trevor C W Farrow, "Residential Schools Litigation and the Legal Profession: The Residential Schools Litigation and Settlement" (2014) 64:4 UTLJ 596; Kathleen Mahoney, "The Settlement Process: A Personal Reflection The Residential Schools Litigation and Settlement" (2014) 64:4 UTLJ 505; Kathleen Mahoney, 'The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History Part III: Forum: Rights in Times of Challenge' (2018) 69 UNBLJ 198; Lara Fullenwieder & Adam Molnar, "Settler Governance and Privacy: Canada's Indian Residential School Settlement Agreement and the Mediation of State-Based Violence" (2018) 12:0 International Journal of Communication 18; Mayo Moran, "The Problem of the Past: How Historic Wrongs Became Legal Problems" (2019) 69 UTLJ 421.

[6] For example, Borrows suggests that Indigenous laws and philosophies contain useful criteria for evaluating Canadian legal and political methods of dealing with harm (*supra* note 5 at 501–02; see also Mahoney, "The Untold Story" *supra* note 5), Moran (*supra* note 5), and Maegan Hough both evaluate the IRSSA as a means of providing redress ("The Harms Caused: A Narrative of Intergenerational Responsibility" (2019) 56:3 Alta L Rev 841), Mahoney considers whether the IRSSA can fulfil the goal of reconciliation ("The Settlement Process", *supra* note 5 at 528), Fullenweider & Molnar (*supra* note 5) suggest that certain IRSSA decisions reproduced forms of settler colonialism, and Farrow (*supra* note 5) and Jennifer Leitch ("A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 49) ask whether legal professional norms have helped achieve justice.

whether it is consistent with broader notions of justice or Indigenous legal principles. From an internal perspective, the question shifts to whether the almost 200 judicial decisions concerning the IRSSA are consistent with the Canadian legal system. From this internal perspective, the histories of residential schooling, the attempts to seek relief, and the settlement process itself are relevant only as context.

Commentary thus far has focused on two major components of the IRSSA: the Truth and Reconciliation Commission (TRC) and the Common Experience Program (the CEP). The TRC documented the history and legacy of residential schooling in Canada, ultimately producing a six-volume report in 2015.[7] The CEP, meanwhile, provided compensation for every eligible survivor of the residential schools covered by the agreement — $10,000 for the first year of attendance at a residential school, and $3,000 for every year thereafter.[8]

This paper focuses on the third and final major component of the IRSSA, the Independent Assessment Process (IAP). The IAP determined compensation for serious, specific harms suffered by residential school survivors in a private dispute resolution process. The IAP has prompted many court decisions, including two judgments from the Supreme Court of Canada (SCC).[9]

This litigation features an ongoing dispute about the jurisprudential nature of the IRSSA generally and the IAP specifically. Some, including the Chief Adjudicator of the IAP,[10] saw the IRSSA and the IAP as essentially public in nature; others saw the IRSSA as a private law agreement. The former position emphasized the factual context of the IRSSA, the latter the Canadian legal framework in which the IRSSA arose. A majority at the SCC eventually resolved the matter in favour of the latter, more legalistic understanding of the agreement.

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[7] *Supra* note 3.

[8] See, e.g., Moran, *supra* note 3 at 532.

[9] *Canada (AG) v Fontaine*, 2017 SCC 47 *[Fontaine (IAP Records – SCC)]*; *JW v Canada (AG)*, 2019 SCC 20 *[JW]*.

[10] See, e.g., Daniel Ish, "The Chief Adjudicator's Responsibility to Promote Consistency, Coherence and Quality in IAP Decisions" (June 2009) at 1, online (pdf): *IAP* <www.iap-pei.ca/media/information/publication/pdf/directives/gp-5-sch-a-eng.pdf> [perma.cc/BEU3-YGKR].

In this paper, I suggest that the courts did not err in focusing on this legalism, but rather erred by being insufficiently legalistic. Or, put another way, I suggest that the courts should have treated the IRSSA more like a conventional legal object, rather than a sui generis one. In this respect, I echo old debates about the virtues and vices of rules versus standards: conventional legal objects, like rules, have the virtues of predictability, and sui generis ones, like standards, have the potential for flexibility.[11] The echo is modulated, however. In some respects, the courts handled the IRSSA creatively and flexibly;[12] in others, they were quite rigid. The result, as I will discuss, was unpredictable rigidity. I argue the courts would have been more predictable as well as more flexible in certain important areas had they treated the IRSSA more like a conventional legal object.

Specifically, I contend that the IRSSA was a private-law agreement and therefore that the IAP was an arbitration. Not recognizing the IAP as an arbitration has led to jurisprudential confusion, decisions lacking analytical rigour, and a failure to consider relevant statutes (in particular, the arbitration acts of various provinces).[13] This lack of recognition has also complicated litigation for the parties and inhibited the development of Canadian jurisprudence more generally.

This paper has five parts. First, I describe the IAP. Second, I describe arbitration. Third, I explain why the IAP should be considered arbitration. Fourth, I identify specific legal consequences of treating the IAP as arbitration. I identify cases where either the outcome or the reasoning may have changed. In some cases, these changes may have aided claimants who

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[11] On these virtues and vices, see, Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1975) 89:8 Harv L Rev 1685, 1710; Pierre Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev at 379, 403.

[12] For example, the courts were creative when they decided that all IAP-related requests for direction should be channeled to judges of two provinces (Winkler RSJ, "Fontaine Implementation Order" (March 8, 2007), online (pdf): *Class Action Services* <http://www.classactionservices.ca/irs/documents/OntarioImplementationOrder.pdf>[perma.cc/ZYA8-LKSM] s 20, Court Administration Protocol), and were flexible when they did not insist upon the creation of the regional administration committees contemplated in the agreement (David Paterson & William Blakeney, "IRSSA Lesson Learned: Two Perspectives on the Experience of Legal Counsel" (2019) unpublished, on file with author), and in making orders to the Chief Adjudicator (*Fontaine v Canada (Attorney General)* 2018 ONSC 5197 [*Fontaine (Chief Adjudicator Direction #1)*]).

[13] Where this last point occurred, the decisions may even be *per incuriam*: *R v George*, [1966] SCR 267 at 278–279.

were denied relief in the IAP. Finally, I discuss broader consequences of the courts not considering the IAP as arbitration. In so doing, I offer only an outsider's perspective, looking at the IAP through the diffracted prism of court decisions and publicly posted documents.

II. THE INDEPENDENT ASSESSMENT PROCESS

The IAP is the mechanism through which the IRSSA provides financial compensation to Indian Residential Schools (IRS) survivors who suffered sexual or physical assaults as IRS students, or who were the victims of other wrongful acts that "caused serious psychological consequences."[14]

The IAP has up to five stages. First, the claimant must submit an application that identifies the wrongful act(s) for which they seek compensation.[15] Second, the Indian Residential Schools Adjudication Secretariat (IRSAS)[16] decides whether the claim falls within the scope of the IAP.[17] Third, if the Secretariat accepts the claim,[18] the claim proceeds to a fact-finding hearing. The claimant and the defendants submit documentary evidence and call witnesses before an IAP adjudicator. This part of the process is inquisitorial: only the adjudicator questions witnesses, not counsel for the parties. [19] The adjudicator makes findings of fact based on the evidence adduced and, based on these facts, applies a points-based compensation "grid" to determine the amount owed to the claimant.[20]

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[14] "Indian Residential School Settlement Agreement—Schedule D — Independent Assessment Process (IAP) for Continuing Indian Residential School Abuse Claims" (May 2006), online (PDF): *Residential School Settlement* <http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF> [https://perma.cc/7WHK-937C] [IRSSA Sched D] s I. IRSSA Art 6 establishes the IAP, and Sched D defines the IAP's mandate.

[15] *Ibid*, Appendix I.

[16] In Sched D, the Secretariat is termed the "IAP Secretariat". Today, it is more frequently known as the IRSAS. They are staff of the IAP who report to the Chief Adjudicator of the IAP: *ibid* s III(t).

[17] *Ibid*, Appendix II, s i.

[18] If the Secretariat finds the claim outside the scope of the IAP, the claimant can seek review of the Secretariat's decision by the Chief Adjudicator: *ibid*, Appendix II, s ii.

[19] *Ibid*, s III(e)(i)–(iv).

[20] See *ibid*, s II.

Fourth, a claimant or defendant can ask for a second adjudicator to "review" the initial adjudicator's decision. The reviewing adjudicator can intervene if the adjudicator either did not properly apply the IAP Model or made a palpable and overriding error. [21] Fifth, the parties can seek review from a third adjudicator to argue the reviewing adjudicator did not properly apply the IAP model.[22]

There are further nuances to this five-stage structure. The process is more complex when the claimant seeks compensation for proven actual income losses, or for wrongful acts that do not have predefined points on the grid.[23] The process also can continue in the courts when there is evidence the harm suffered by the claimant would require greater compensation than the maximum available in the IAP.[24]

III. Defining Arbitration

This second section addresses the meaning of the term "arbitration." I identify a three-element test to establish whether a process constitutes an arbitration. I will apply this test to the IAP in the next section.

The first two elements of this test come from the provincial statutes that govern arbitration in the common-law Canadian provinces.[25] These statutes indicate that arbitration involves two parties agreeing to submit a present or future dispute to a third party for resolution.[26] "Resolving" a dispute implies that the parties grant the third party the power to make a final determination

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[21] *Ibid*, s III(l). Note that the rights in this process are asymmetric: claimants can seek review in more circumstances than can defendants: *Ibid*.

[22] *Ibid*, s I.

[23] *Ibid*, s III(b)(ii).

[24] *Ibid*, s III(b)(iii).

[25] I will not consider the definition of arbitration in Quebec.

[26] See, e.g., *Arbitration Act*, RSBC 1996, c 55 s 1 *sv* "arbitration agreement" [*BCAA*].

on the merits[27] and that recourse to the coercive power of the state will be available to enforce that final decision.[28]

Common law provides the third element. The statutory definitions are incomplete, because two parties can agree to submit a dispute to a third party for resolution without agreeing to arbitration — notably, they may instead be agreeing to valuation or seeking the opinion of an expert. The statutes are sufficiently tautological that they provide no clear guidance on this matter,[29] instead, recourse instead must be had to case law.

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[27] See, e.g., *Freedman v Freedman Holdings Inc*, 2020 ONSC 2692 at paras 236–241. Although non-arbitral proceedings can be final and binding (such as expert determinations), a non-final proceeding cannot be an arbitration. For example, an adjudication under the *Construction Act*, RSO 199, c C30 is not an arbitration because it is not final (*Construction Act* s 13.15).

[28] Peter Cane, *Responsibility in Law and Morality* (Hart Pub.: Oxford, UK, 2002) at 227.

[29] For example, the British Columbia legislature defines "arbitration" as "a reference before an arbitrator to resolve a dispute under this Act or an arbitration agreement", defined an "arbitrator" as a "person who, under this Act or an arbitration agreement, resolves a dispute that has been referred to the person, and includes an umpire", and an "arbitration agreement" as "a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named" *BCAA*, *supra* note 26 s 1. The arbitration acts of Alberta, Saskatchewan, Manitoba, and Ontario all define the terms similarly, while the territories are even more pithy. *Arbitration Act*, RSA 2000, c A-43 2000 s 1(1)(a)-(b), ABAA [*ABAA*], *The Arbitration Act, 1992*, SS 1992, c A-24.1 s 2, SKAA [*SKAA*], *The Arbitration Act*, CCSM c A120 s 1(1), MBAA [*MBAA*], *Arbitration Act, 1991*, SO 1991, c17 [*ONAA*]; Arbitration Act, RSY 2002, c 8 s 1(1) [*YUAA*]; *Arbitration Act*, RSNWT (Nu) 1988, c A-5 s 1(1). Other statutory sources that might be informative are generally not. The Uniform Law Commission of Canada's (ULCC's) Model Law, on which many of the provinces based their legislation, provides no greater insight: Uniform Law Conference of Canada, *Uniform Arbitration Act (1990)* (1990) at 2.3-2.4. The Acts incorporating the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration are likewise no more illuminating: the *Model Law* defines "arbitration" as "any arbitration" (Art 2(a)). Nor is the United Kingdom act helpful: the drafters of the *Arbitration Act, 1996*, (UK) c. 23 refrained from defining "arbitration" in the text, but understood it as a "dispute resolution system based on obtaining a binding decision from a third party on the matters at issue": *Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill*, by Mark Oliver Saville (1996) at para 18. I focus here on the versions of the statutes that were in operation from 2006–2020. Some of these statutes have since been repealed or amended: for example, the *BCAA* has now been replaced by the *Arbitration Act* SBC 2020, c 2.

The leading authority on the definition of arbitration is *Zittrer*, an SCC case interpreting the Quebec Civil Code.[30] In *obiter*, *Zittrer* addressed the common-law distinction between an agreement to arbitrate and an agreement for "valuation."[31] The distinction mattered because arbitrators enjoy immunity for negligent decisions, but valuators do not. [32] Justice L'Heureux-Dubé, writing for four members of a five-judge panel, identified six indicia in Canadian and English common-law jurisprudence to make this distinction:[33]

1. The terminology used by the parties;
2. That there is a dispute or difference between parties that has been formulated;
3. That the disputing parties have requested a third party resolve the dispute by exercising a judicial function;
4. Where appropriate, that the disputing parties have the opportunity to present evidence and/or make submissions in support of their respective claims before the third party;
5. That the disputing parties have agreed to accept the decision of the third party or, put another way, that the third party's decision is intended to be final and binding; and
6. The professional status of the third party.

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[30] *Sport Maska Inc v Zittrer*, [1988] 1 SCR 564, SCJ No 19 [*Zittrer*].

[31] Attempting to understand "arbitration" by looking at definitions of valuation is a mug's game: valuation is primarily defined in contradistinction to arbitration.

[32] *Precision Drilling Corp v Matthews Equipment Ltd*, 2000 ABQB 499 [*Precision Drilling*] at para 26, citing J Brian Casey, *International and Domestic Commercial Arbitration* (Scarborough: Carswell, 1993), 1.4(d), *Palmieri v Alaimo*, 2015 ONSC 4336.

[33] *Zittrer*, *supra* note 30 at para 62, citing *Arenson v. Casson Beckman Rutley & Co.*, [1975] 3 All ER 901 at 915-16; *Re Premier Trust Co. and Hoyt and Jackman* (1969), 1969 CanLII 480, 3 DLR (3d) 417 (ON CA) at 419; *Sutcliffe v. Thackrah*, [1974] 1 All ER 859 at 877; *Re Carus-Wilson and Greene* (1886), 18 QBD 7 at 9; *Pfeil v. Simcoe & Erie General Insurance Co.* (1986), 19 CCLI 91 (SK CA) at 97. These indicia were applied by Canadian common law courts post-*Zittrer*: see, e.g., *Durham (Regional Municipality) v Oshawa (City of)*, 2003 CanLII 23462 [*Durham*]., *Concord Pacific Developments Ltd v British Columbia Pavilion Corporation*, 1991 CanLII 5733 at paras 7–15 [*Concord Pacific*], *Strofolino v Helmstadter*, 2001 CanLII 27985 at paras 26–28 [*Strofolino*], *2004357 Ontario Ltd v Kashruth Council of Canada*, 2006 CanLII 24332 at paras 3–8, 31–32 [*Kashruth Council*]. *Applied Industrial Technologies, LP v Sirois*, 2018 ABQB 818 [*Sirois*] at paras 114–120.

Some of these factors are more useful than others. The first is probably the least important, on the principle that substance trumps form.[34] Even if parties explicitly contract for "expert determination", and not "arbitration", if the substance of their agreement consists of arbitration, then the courts will treat it as an arbitration. Parties cannot agree to what is in substance an arbitration and yet avoid the application of the arbitration statutes by not using the magic word.[35] The fifth factor, meanwhile, repeats the statutory requirement that there be a third party that "resolves" the dispute.

The better focus is on the second, third, fourth, and sixth factors. These factors overlap, and point to a general principle that arbitration involves a third party listening to the competing parties and making a decision on the merits from their arguments. This, after all, is the essence of a "judicial function."[36] It is also consistent with there being a dispute that has been "formulated:" the requirement of "formulation" appears to necessitate that the third party respond to submissions. If there is no "formulated" dispute, then the process may be simply to "avoid" a dispute.[37] Finally, the profession of the third party will indicate whether that party will be reacting to submissions (as one would expect from a lawyer)[38] or whether they will be bringing their personal insight, knowledge, or analysis of public information to bear (as one would expect in the case of a scientist).[39]

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[34] See *Hanzek v TRM (Canada) Corporation*, 2007 BCSC 418 at paras 21–23; *Walkinshaw v Diniz*, [1999] WL 33105608 (EWHC) (even when a contract "was clearly drafted with the greatest care by lawyers", the presence or absence of the word "arbitration" did not decide the matter).

[35] *Sirois*, *supra* note 33 at para 120.

[36] A "judicial determination", as a signal in favour of arbitration, is said to be one that is in accordance with the principles of procedural fairness: *England and Wales Cricket Board Ltd v Kaneria*, [2013] EWHC 1074 [*Kaneria*]. In addition to the factors identified in *Zittrer*, the court considered the impartiality of the chosen adjudicator, including whether the adjudicator "receive[d] unilateral communication from one party": *Walkinshaw*, *supra* note 34.

[37] *Montgomery Agencies Ltd. v. Krischke*, [1989] CanLII 4557 at para 8, 76 Sask R 143, appr'd of in *Telecommunication Employees Association of Manitoba Inc v Manitoba Telecom Services Inc*, 2012 MBCA 13 at para 60.

[38] See also *McPeak v Herald Insurance Co*, [1991] 115 AR 83, AJ No 222; *JA Brink Investments Ltd v BCR Properties Ltd*, 2009 BCSC 1369 at para 56 [*JA Brink*].

[39] Precision Drilling, supra note 32 at paras 27–29; JA Brink, supra note 38 at para 60; Cummings v Solutia SDO Ltd (2008), 49 BLR (4th) 307 (Ont Sup Ct J), 2008 CanLII

Combining this principle with the two statutory requirements leads me to identify a three-element test: an arbitration is any process (1) that is agreed to by at least two primary parties; (2) wherein a third party resolves a dispute between the agreeing parties; and (3) the third party does so relying primarily on the agreeing parties' evidence and submissions. Although, in my view, the three elements I identified above provide a complete definition of arbitration, this definition may be in tension with some cases, including *Downey*,[40] *Ferreira*,[41] *Strofolino*,[42] and *Highbourne Enterprises*.[43]

Downey[44] and *Ferreira*[45] both found that a union disciplinary procedure is not an arbitration, seemingly on the principle that "offence-finding" or "criminal or quasi-criminal" determinations cannot be arbitration.[46] This principle is generally correct, because most offences are matters of public law. Public law offences do not involve a dispute between the parties, but rather a dispute between the state and one party, thus violating the second element of the test that I proposed above. On an account of union disputes that sees the legal force of union constitutions emanating from statute rather than free consent,[47] these cases are consistent with my proposed test. If, however, one sees union disputes as fundamentally contractual,[48] then a union dispute would lie between the parties.[49] On this contractual understanding of the

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42017 at paras 40–41, aff'd Cummings v Solutia SDO Ltd, 2009 ONCA 510 [Cummings].

[40] Downey v Leitner, 2004 CanLII 34927 [Downey].

[41] Universal Workers Union (Labourers' International Union of North America, Local 183) v Ferreira, 2009 ONCA 155 [Ferreira].

[42] Strofolino, supra note 33.

[43] International Air Transport Association v Highbourne Enterprises Inc, 2007 CanLII 11317 (Ont Sup Ct J) [Highbourne Enterprises].

[44] Downey, supra note 40 at para 8.

[45] Ferreira, supra note 41.

[46] Ibid at paras 51–52.

[47] See Brian Langille and Cole Eisen. "Category Mistake: The Private Law of Contract Is the Wrong Way to Think about Our Public Law of Freedom of Association" (2021) 23:1 Canadian Lab & Emp LJ 1.

[48] As suggested in Berry v Pulley, 2002 SCC 40 at para 48 [Berry], and extended in Brown v Hanley, 2019 ONCA 395.

[49] A point not recognized in Downey, supra note 40 at para 9 (wherein the union is analogized to a law society, a public body).

nature of unions, these cases would be inconsistent with my proposed test because they would have wrongly found that a union disciplinary procedure is not an arbitration. If this latter understanding of the nature of unions is correct, then I would suggest that these cases were wrongly decided.

Ferreira's reasoning also conflicts with my proposed test. It saw a clause that limited recourse to the courts for disciplinary measures as inconsistent with arbitration.[50] This aspect of *Ferreira* is simply incorrect. It contradicts both the fifth *Zittrer* factor and common sense, since arbitration is often intended as an alternative to litigation.

Strofolino and *Highbourne Enterprises* could be seen as suggesting that my proposed test is underinclusive. They find that there is a "presumption towards finding a dispute resolution procedure to be an arbitration where the nature of the process is in doubt."[51] This finding is erroneous. It purportedly rests on *Onex*, which does not support it. *Onex* suggested that courts interpret the scope of arbitration agreement generously, not that any form of dispute resolution is presumed to be arbitration.[52]

A further challenge to my proposed test may come from those who would impose additional requirements to find an arbitration. For example, some would say that an arbitration requires impartiality[53] or that a contractual power to revoke a third-party decision-maker's appointment means there is no arbitration.[54] In my view, these requirements are better understood as conditions subsequent rather than as conditions precedent. The arbitration statutes allow for the possibility of an arbitration by a partial adjudicator; such a process is still an arbitration, even if it is not a valid one.[55]

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[50] *Ferreira*, *supra* note 41 at para 54.

[51] See *Strofolino*, *supra* note 33 at para 27; *Highbourne Enterprises supra* note 43 at para 95, citing *Onex Corp v Ball Corp*, [1994] OJ No 98, CanLII 7537 at para 24 [*Onex*].

[52] See *Onex*, *supra* note 51 at paras 9, 24, and building on it, *Canadian National Railway Company v Lovat Tunnel Equipment Inc*, [1999] 174 DLR (4th) 385, 1999 CanLII 3751 [*Lovat Tunnel*] at paras 20–21, *Huras v Primerica Financial Services Ltd*, 2001 CanLII 17321 [*Huras*] at para 18 and *Bolands Ltd v Ivan Smith Holdings Ltd*, 2002 NSCA 146 [*Bolands*] at para 47.

[53] See, e.g., Mark Oliver Saville, The Denning Lecture 1995: Arbitration and the Courts (London, 1995).

[54] *Cummings*, *supra* note 39 at paras 40–41.

[55] See, e.g., *ONAA*, *supra* note 29 at ss. 11, 19.

The statutes also allow for an arbitration agreement to exist where a party can revoke the appointment.[56]

IV. Is the IAP Arbitration?

In this section, I argue that the IAP is an arbitration, both because it meets the test I proposed in the previous section and because this conclusion is consistent with *Zittrer*. I also identify and address seven counterarguments.

Applying the test I propose above supports the characterization of the IAP as an arbitration. First, the IAP is founded on an agreement between parties (the IRSSA), not a statute (as a public tribunal would be). Taking seriously the principle that class actions are a procedural vehicle that does not affect substantive rights[57], there is in law a separate but identical agreement between each class member and the defendants. Second, the IAP involves a third party (the Chief Adjudicator or his designate) resolving disputes between the parties. Third, the adjudicators execute their function relying primarily on the parties' evidence and submissions.

Zittrer provides additional support for characterizing the IAP as an arbitration, aside from the formal point that the parties do not use the term "arbitration" in the IRSSA. The IAP provides a system to resolve a dispute (whether the claimant has a compensable claim for specific harms beyond those given recourse in the CEP) between claimants and Canada or the churches involved in the process. Although the IAP is funded by Canada,[58] the system provides for independent[59] adjudication. This adjudication is performed based on evidence provided by the parties and submissions made by the parties,[60] although adjudicators may bring their own expertise to bear and the Chief Adjudicator may train adjudicators for consistency's sake.[61] IAP decisions are intended to be final and binding after the internal review

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[56] See, e.g., *ibid* at ss. 3(1), 12.

[57] *Bisaillon v Concordia University*, 2006 SCC 19 at para 17.

[58] IRSSA, *supra* note 1, Arts 3.05, 6.03.

[59] *Baxter v Canada (AG)*, [2006] 83 OR (3d) 481 at para 38, CanLII 41673 [*Baxter (ON Certification)*].

[60] IRSSA Sched D, *supra* note 14, ss. III(e)–(h), (l)(vi), Appendices VI–VIII.

[61] *Ibid*, s-ss. III(m)–(n).

process,[62] which can be seen as part of the arbitration.[63] Finally, according to the agreement, IAP adjudicators are chosen based on their legal qualifications, not their technical expertise.[64]

The IAP also exhibits other indicia of arbitration in the case law, including that lawyers are expected to be present at the hearing,[65] that the process is private,[66] and that the adjudicators are not to receive unilateral communications from one party or another.

Why, then, have the courts not treated the IAP as arbitration? Seven interrelated factors may have pushed the courts away from seeing the IAP as an arbitration system. I address these factors, and the problems associated with each, below.

1. Seeing the IAP as under Court supervision per the Certification Order

When the settlement was originally approved in *Baxter (ON Certification)*, Winkler RSJ identified "[a]dministrative [d]eficiencies" in the settlement as first proposed.[67] He found the proposal unacceptable because it handed Canada the hats of both "administrator" and "respondent" of the IAP and because it did not provide for adequate oversight of the IAP by the courts.[68] His solution was for the courts to ultimately control the IAP administration

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[62] *Ibid*, s III(a)(v). As mentioned above, when the recourse sought is greater than can be provided for in the IAP process, the courts have a greater role to play.

[63] Internal appeals are common in arbitration: see, e.g., the British Columbia International Commercial Arbitration Centre "Domestic Commercial Arbitration Rules of Procedure" (September 2016) at 2, online, *Vancouver International Arbitration Centre* <https://vaniac.org/arbitration/rules-of-procedure/revised-domestic-commercial-arbitration-rules-of-procedure/> [https://perma.cc/8E8F-8F94].

[64] IRSSA Sched D, *supra* note 14, Appendix V, ss. (i), (iii)–(xi), (xiv). Adjudicators who have background information or personal knowledge can use it to inform their questioning of witnesses or testing of evidence, but cannot use it as an "independent basis for their conclusions of fact"; adjudicators can similarly employ information they learned in previous hearings: *Ibid*, Appendix X, ss (2), (4).

[65] IRSSA Sched D, s III(a)(ii); c.f. *McPeak v. Herald Insurance Co.*, supra note 38; *JA Brink*, supra note 38 at para 56.

[66] IRSSA Sched D, *supra* note 14, s III(p); c.f. *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2018 BCCA 468 at para 31; *Gea Group AG v Ventra Group Co*, [2009] 307 DLR(4th) 329 at paras 14-15, CanLII 17992.

[67] *Baxter (ON Certification)*, *supra* note 59 at paras 35-36.

[68] *Ibid* at paras 38, 50–52.

rather than Canada, in accordance with the courts' role in overseeing a class settlement.[69] Arbitral institutions are normally independent of courts, not overseen by courts, so this setup may have made the IAP appear less like arbitration.

The error here arises from conflating the Chief Adjudicator's two distinct roles. One is to lead the IRSAS as the administrator of a class settlement. Under this role, the Chief Adjudicator has a statutory duty to "administer the distribution of settlement funds [in a competent and diligent manner]," and the Chief Adjudicator is properly supervised by the courts.[70] The other role is to make findings of fact and adjudicate IAP claims. The Chief Adjudicator should not be supervised by the courts in the same way for this adjudicatory role as for the administrative role.

2. Seeing the IAP as individual issue determination

Courts may have seen arbitration as impossible because the IAP emerged from a class proceeding. One version of this view is that any method for determining individual, rather than class-wide, issues (such as the IAP) should be based on the individual issue determination process in the class proceedings acts. Each of these acts provides that when the participation of individual class members is required to determine individual issues, the court has three powers that it can choose among:

> (a) the power to itself determine the issues in further hearings;
> (b) the power to appoint someone to conduct a reference under the rules of court; or
> (c) "with the consent of the parties", the power to direct that the issues be determined in any other manner.[71]

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[69] *Ibid* at para 39.

[70] *Class Proceedings Act, 1992*, SO 1992, c. 6 (as amended Jun 22, 2006) s 27.1(13-15) [*ONCPA*].

[71] *Class Proceedings Act*, RSBC 1996 c 50 (as amended Nov 27, 2018) s 27(1) [*BCCPA*]; Class *Proceedings Act*, SA 2003, c C-16.5 (as amended Dec 17, 2014) s 28(1) [*ABCPA*]; *The Class Actions Act*, SS 2001, c C-12.01 s 29(1) [*SKCAA*], *Class Proceedings Act*, CCSM c C130 (as amended Jun 17, 2010) s 27(1) [*MBCPA*], *Class Proceedings Act, 1992*, SO 1992, c. 6 (as amended Jun 22, 2006) s 25(1) [*ONCPA*]. The territories do not have specific class proceedings statutes and certified the action under the Rules of Court for representative actions generally.

The IAP would be seen as a result of using the third power. This approach raises three potential hurdles to identifying an arbitration: first, that there is no agreement; second, that even if there is an agreement, it cannot be for an arbitration because a determination under the third power "is deemed to be an order of the court";[72] third, that even if there *could* be an arbitration,[73] one is not formed here.

The error here lies in conceiving the IAP as a statutory individual issue determination process. Doing so would be inconsistent with *Baxter (ON Certification)*. *Baxter (ON Certification)* refers to settlement approval and makes no mention of individual issue determination.[74] It also would sit uneasily with decisions that emphasize the contractual nature of the IRSSA to justify court non-intervention.[75] It would also have had significant juridical consequences that no court considered. Treating the IAP as an individual issue determination process would mean each IAP decision would be deemed an order of the supervising court. IAP decisions would then be appealable directly to provincial appellate courts on *Housen*[76] standards.

A second version of this view is that a settlement agreement to a class proceeding cannot ground an arbitration. There is no statutory support for this view: although courts must approve a settlement agreement, the statutes put no substantive limits on the content of a settlement. The same reasons that may drive individual parties to arbitration, such as a desire for privacy, could likewise apply to class proceedings.

A more sophisticated version of this view is that a settlement agreement to a class proceeding could ground an arbitration, but only if the magic word "arbitration" is used in the agreement. On this version, a court's blessing of an agreement shields it from otherwise-applicable mandatory law. In my view, this overstates the power of settlement approval. The purpose of settlement approval is to bind absent class members, not to allow the parties to class litigation to make otherwise-unenforceable agreements. Even if

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[72] *BCCPA* at s-s 27(7); *ABCPA* at s-s 28(7); *SKCPA* at s-s 29(7); *MBCPA* at s-s 27(7); *ONCPA* at s-s 25(7).

[73] As is adverted to by Perell J in *Lundy v VIA Rail Canada Inc*, 2015 ONSC 1879 at para 49.

[74] *Baxter (ON Certification)*, *supra* note 59 at paras 1, 79-81, 85.

[75] Among others, see *JW*, *supra* note 9; *Fontaine v Canada (AG)*, 2018 BCSC 471 at paras 7, 51 [*Fontaine (A-16800 RFD)*].

[76] *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

courts have jurisdiction to deem legislation inapplicable (that private parties otherwise could not), it would be surprising if they could do so implicitly, without recognizing the legislation they were overriding. Class proceedings acts do not include a judicial Henry VIII clause[77] and respect for legislative supremacy means one should not be read in.

3. Seeing the IAP as valuation

The courts may have implicitly seen the IAP as a procedure for valuation rather than arbitration. When class-wide issues are settled, valuation may allow class members and the defendant to avoid any further dispute about the value of their individual claim. The IAP certainly has elements that resemble valuation.

The error here is focusing on the presence of valuation, since arbitration can include valuation, but valuation cannot include arbitration. As discussed above, the *Zittrer* factors for distinguishing arbitration from valuation indicate that the IAP is an arbitration.

4. Treating the TAP as a public institution

The courts, again in part because of the oversight structure set out in *Baxter (ON Certification)*,[78] appear to have seen the IAP as essentially a public institution, rather than a private institution. The result is a legal category error, where courts and commentators repeatedly deployed public-law tools at a private-law problem.[79] This categorization reflects a conception of the IAP as a *sui generis* public-law tribunal rather than as a private decision-making institution. If the IAP had been created by a legislative or administrative act, then it would be a public-law institution.[80] It was not; it was created by agreement. The approval order alone cannot make the IAP

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[77] That is, a clause by which Parliament delegates the power to effectively amend primary legislation: see *R (on the application of the Public Law Project) v Lord Chancellor,* [2016] UKSC 39, para 25; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 para 85.

[78] *Supra* note 59.

[79] See, e.g., *Gottfriedson v Canada*, 2015 FC 706 at para 76 [*Gottfriedson (Certification)*]; *Fontaine v Canada (AG)*, 2013 ONSC 684 at para 56 [*Fontaine (TRC Document Production)*]; *Fontaine v Canada (AG)*, 2016 ONCA 241 at para 294 [*Fontaine (IAP Records – ONCA)*] (*per* Sharpe JA, dissenting); *NN v Canada (AG)*, 2017 BCCA 398 at para 6; *Canada (AG) v JW and Reo Law Corporation*, 2017 MBCA 54 [*JW – MBCA*]; Paul Daly, "The Limits of Public Law: *JW v Canada (AG)* 2019 SCC 20" (2019) 32 Can J Adm L & Prac 231; Ish, *supra* note 10 at 1.

[80] *JW*, *supra* note 9 at para 102 (*per* Côté J; see also para 178 *per* Brown J).

public law: judicial orders are not government action.[81] Nor does the Attorney General's consent to the settlement agreement make it public law. Neither the Attorney General nor the approving judges, singly or acting together, had the power to foist the IAP on the claimants, as would be the case with a public law tribunal. Rather, the IAP's force rests on the agreement of the individual claimants and the Attorney General. Private law governs such agreements.

5. Seeing the IRSSA as a treaty

Some saw the IRSSA more as a modern treaty conducted with Canada than as a contract that is subject to provincial law. This view was rejected as early as 2013,[82] but persisted until at least 2017.[83] There are multiple problems with this view. First, the IRSSA has a choice-of-law clause that states it is to be interpreted according to Ontario law.[84] A treaty that transcended provincial law would not need such an interpretation clause. Second, the IRSSA was created as an agreement between individuals, the Crown, and various Church defendants, all subject to court approval. No treaty between sovereignties would require court approval, nor is it viable to conceive of a treaty between an individual and a sovereign. That, after all, is one of the essential differences between a treaty and a contract: an agreement between the Crown and an individual (or between two individuals) is a contract; an agreement between sovereigns is a treaty.[85] Comparing the IRSSA with the Maa-nulth First Nations Final Agreement (MFNFA), a paradigmatic modern treaty, illustrates these differences. Unlike the IRSSA, the MFNFA's force depends on legislation, not the agreement alone.[86] This legislation allows the MFNFA to explicitly override provincial and Canadian law.[87] And, also

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[81] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 at para 36.

[82] *Fontaine v Canada (AG)*, 2014 ONSC 4585 at para 88 [*Fontaine (IAP Records – ONSC)*].

[83] *Assembly of Manitoba Chiefs v Canada (AG)*, 2017 MBCA 2 at para 2. The Manitoba Court of Appeal declined to address the issue.

[84] IRSSA *supra* note 1, s 18.03.

[85] *Francis v R*, [1956] SCR 618, 1956 CanLII 79 at 625 (*per* Rand J); *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20.

[86] "Maa-Nulth First Nations Final Agreement" (2009) at s 28.4.0, 28.5.0, online (pdf): *Maa-Nulth*<https://maanulth.backup.primalcom.ca/www.maanulth.ca/downloads/treaty/2010_maa-nulth_final_agreement_english.pdf> [https://perma.cc/22DB-TEME].

[87] *Ibid* s 1.8.0-1.8.11.

unlike the IRSSA, the MFNFA is entered into between the Crown and First Nations, not individuals.[88]

6. Seeing the subject-matter as inapposite for arbitration

The courts may have thought that all arbitration must fall into a category such as "commercial," "family," "labour," or "inter-state." Most arbitrations do, and that is also the general focus of texts concerning arbitration.[89]

There is, however, no principled basis to limit the scope of the arbitration acts to these categories. Both the statutory language and the legislative history indicate these acts have plenary scope. Unlike the international commercial arbitration acts, which explicitly restrict the scope of their application to commercial affairs,[90] the plenary acts do not. For example, the scope of the *ONAA*'s typical, non-restrictive definition of arbitration includes (by necessary implication) both commercial arbitration and family arbitration. As *Wellman* noted,[91] the *ONAA* was intended to provide a "good and accessible method of seeking resolution for many kinds of disputes" to expedite the process and reduce the cost of going to court.[92] Moreover, the problem of how courts should treat an agreement to have a third party decide a question of law arises independently of the substance of the question of the substance of the question. This is the mischief the arbitration acts are meant to resolve.[93]

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[88] *Ibid* sv "Parties", "Maa-Nulth First Nations", "Maa-Nulth First Nation."

[89] To illustrate: of the 17 English titles tagged with the subject "Arbitration and award – Canada" by the University of Toronto Libraries, 11 clearly relate to commercial arbitration, 3 to arbitration between or with states, 1 to family arbitration, and 2 could be classed variously. ThomsonReuters, meanwhile, offers 1 family arbitration text, 3 labour arbitration texts, and 2 commercial arbitration texts.

[90] See, e.g., *International Commercial Arbitration Act*, RSO 1990, c I.9, at ss. 2(2), 10 [*ICAA(ON)*]; *UNCITRAL Model Law* on International Commercial Arbitration, Art. 1(1) (incorporated as Sched. 1 of *ICAA(ON)*); see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras 22–24.

[91] *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 83 [*Wellman*], quoting Legislative Assembly of Ontario, March 27, 1991, at 245.

[92] "[T]his statute overhauls the law relating to commercial and other arbitration in Ontario, with two exceptions [labour arbitrations and international commercial arbitrations]", The Hon. Mr. Hampton, *Legislative Assembly of Ontario*, November 5, 1991.

[93] When the *ONAA* was first introduced in the Ontario legislature, one of its features was said to be that "the ability of the courts to intervene in an arbitration is spelled out precisely

7. The parties did not raise the issue

The parties rarely advanced any discussion of arbitration before the courts. There are only five references to arbitration in the case law related to the IAP. The first is a passing reference in the British Columbia certification and class settlement order that referred to an "IAP arbitrator."[94] The second is more substantial and came in a Quebec decision related to whether an alleged abuser could seek annulment of an IAP decision. Chief Justice Rolland dismissed the application, reasoning *inter alia* that the IAP "is a private dispute-resolution method, not an arbitration."[95] This distinction is odd, since arbitration is a private dispute-resolution method. The third came in *Fontaine (IAP Records – ONSC)*, an Ontario decision related to the disposition of the IAP's records. Justice Perell described the IAP as a "alternative dispute resolution system" that he analogized to "arbitration" without recognizing it as such.[96] On appeal from that decision, Sharpe JA's dissent considered arbitration in passing. He saw the IAP as "radically different" from arbitration, essentially because of (as he saw it) its public-law character.[97] The error in seeing the IAP as having a public-law character has already been discussed above. The IAP is created by contract, not statute, and so it is an artefact of private law, not public law. The fifth and final reference came when Cameron JA of the Manitoba Court of Appeal analogized the IAP to arbitration. She was considering how courts should approach the factual findings made in the IAP when the claimant seeks to prove actual income loss greater than the maximum award available in the IAP.[98] Like Perell J, she did not consider whether the IAP was in fact arbitration, despite drawing the analogy.

Although these factors may explain why the courts did not consider the IAP an arbitration, none suggest that the courts were right. If the courts had

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and narrowly, so their role will be entirely constructive." The Hon. Mr. Scott, *Legislative Assembly of Ontario*, June 19, 1990.

[94] *Quatell v Canada (AG)*, 2006 BCSC 1840 at para 20.

[95] *Fontaine c Canada (PG)*, 2013 QCCS 553 at para 90 [*Fontaine (J.C. authorization motion)*] (CanLII translation not verified by SOUQUIJ).

[96] *Fontaine (IAP Records – ONSC)*, supra note 82 at paras 335–336.

[97] *Fontaine (IAP Records – ONCA)*, supra note 79 at para 293.

[98] *Fontaine v Canada (AG)*, 2014 MBCA 93 at paras 100–101 [*Fontaine (Kelly – Actual Income Loss – MBCA)*].

applied the test for whether a process is an arbitration, the courts should have found that the IAP was an arbitration.

V. The consequences of recognizing a process as an arbitration

The primary consequence of classifying an assessment procedure as arbitration is that the plenary arbitration statutes apply to proceedings under that procedure. The plenary arbitration statutes provide procedural rules, substantive default rules, and substantive mandatory rules. Among other things, they define the interface between courts and arbitrations, including matters as varied as time periods, when the court may intervene in an arbitral decision, and when the court may replace an arbitrator. Which arbitration acts apply depends on choice-of-law rules.

A. Choice of law for arbitrations other than international commercial arbitrations

In this subsection, I will explain which arbitration act provisions apply to the IAP. I conclude that courts should apply the procedural rules of their forum arbitration act, the default rules of the *ONAA*, and the mandatory rules both of their forum arbitration act and of the *ONAA*. Since the provincial arbitration acts are similar in their mandatory rules, it generally suffices to focus on the Ontario act for IAP-related proceedings.

Which arbitration acts apply depends on choice-of-law rules. For procedural matters, such as appeal rights or timelines, the rule is simple: apply the law of the forum.[99] Which substantive law applies is more complex.

Since an arbitration agreement is a contract, the choice-of-law rules governing contracts applies. The primary rule is that the substantive law of the jurisdiction with the "closest and most substantial" connection to the contract applies.[100] When a contract includes a choice-of-law clause, that jurisdiction will generally be the one identified in that clause.[101] The IRSSA

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[99] *Tolofson v Jensen*; *Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at 1049, 120 DLR (4th) 289 [*Tolofson*].

[100] *Imperial Life Assurance Co of Canada v Segundo Casteleiro Y Colmenares*, [1967] SCR 443 at 448–449, 62 DLR (2d) 13; *Vita Food Products Inc v Unus Shipping Company*, [1939] 2 DLR 1, 9 (PC), 1939 CanLII 269 [*Vita Food*].

[101] *Vita Food*, *ibid*.

includes a clause choosing the law of Ontario,[102] and so, provided a court is made aware of the clause, the court should take judicial notice of and apply relevant Ontario statutes, including the *ONAA*.[103] The *ONAA* both imposes mandatory provisions on arbitration agreements out of which the parties cannot contract.[104] It also supplies default terms that apply unless the contracting parties specify otherwise.[105]

Further substantive mandatory rules may come from other provincial jurisdictions,[106] but the point is complex. The relevant possible rules are contained in the arbitration statutes. These statutes do not include any jurisdiction-constraining or asserting language that would cabin the inquiry.[107]

The highest authority directly on the application of mandatory laws is the Privy Council's decision in *Vita Foods*. It says that mandatory laws of the

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[102] IRSSA, *supra* note 1, s 18.03.

[103] Both Ontario courts and most non-Ontario courts *must* take judicial notice of Ontario law: see, for Ontario, *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 13; for British Columbia, *Evidence Act*, RSBC 1996, c 124 s 24(2)(e); for Saskatchewan, *Evidence Act*, SS 2006 c E-11.2, para 40(2)(a); for Manitoba, *The Manitoba Evidence Act*, CCSM c E150, para 29(f); for New Brunswick, *Evidence Act*, RSNB 1973, c E-11 para 70(d); for Nova Scotia, *Evidence Act*, RSNS 1989, c 15 s-s 3(3); for Prince Edward Island, *Evidence Act*, RSPEI 1988, c E-11, para 21(2)(d); for Newfoundland and Labrador, *Evidence Act*, RSNL 1990, c E-16 s-s 26(1); for Yukon, *Evidence Act*, RSY 2002, c 78 para 30(d); for Northwest Territories, *Evidence Act*, RSNWT 1988, c E-8, para 38(d); for Nunavut, *Evidence Act*, RSNWT (Nu) 1988, c E-8, para 38(d). Alberta courts, however, choose whether to judicially notice statutes of other provinces: *Judicature Act*, RSA 2000, c J-2, s 12; *Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd*, 2021 ABCA 385 at paras 90–91. An Alberta court that chose not to notice Ontario law would apply Alberta law (*Tolofson*, *supra* note 99, at 1053), including the *ABAA* (*supra* note 29).

[104] *ONAA*, *supra* note 29, s 3.

[105] *Sirois*, *supra* note 33 at para 120; *Wellman*, *supra* note 91, at para 138 (*per* Abella and Karakatsanis JJ, dissenting).

[106] As a theoretical matter, foreign or Indigenous legal orders could also create relevant mandatory law; as a practical matter, this is less likely. Foreign legal orders seem unlikely to have a sufficient connection for their laws to apply. Indigenous communities would have a sufficient connection, but no statute indicates that the law of Indigenous legal orders can be judicially noticed (cf. note 101). Absent judicial notice, any Indigenous law alleged to have a mandatory impact on an arbitration agreement would need to be brought to the attention of a superior court through expert evidence.

[107] See, e.g., *BCAA*, *supra* note 26, s-s 2(1); *ONAA*, *supra* note 29, s-s 2(1).

forum also apply, but not the laws of any third jurisdiction.[108] Even forum mandatory laws would not apply when doing so would involve applying a provincial law extra-territorially. As the SCC held in *Unifund*, the legislative competence of a province extends to, and only to, matters that have a sufficient connection to the province, "conditioned by the requirements of order and fairness."[109]

More recent authority on the scope of provincial adjudicative competence gives reason to consider revisiting this aspect of *Vita Foods*. The adjudicative competence of a province is broader than its legislative competence,[110] most significantly because a real and substantial connection to *part* of a proceeding gives a court "jurisdiction over all aspects of the case."[111] This broad adjudicative competence means that multiple forums can sometimes exercise jurisdiction, especially in the class-action context.[112] On the *Vita Foods* rule, the substantive mandatory laws that apply will depend on which forum in fact takes jurisdiction. Such differences in substantive law may encourage forum shopping between Canadian provinces.

This kind of forum shopping can only be stopped if the applicable mandatory law does not depend on the forum. One option is to make *no* mandatory law apply, even that of the forum, other than that selected by the parties. This option would offend legislative supremacy. The second option is to apply the same test to all sources of mandatory law. This would entail making the test for applying a province's mandatory law mimic the test for the constitutional applicability of provincial law: to wit, that there is a sufficient connection to the province, "conditioned by the requirements of order and fairness."[113]

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[108] *Vita Food*, *supra* note 100 at 9–10.

[109] *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40 at para 56 [*Unifund*].

[110] *Ibid* at para 55.

[111] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 99; *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 67 [*Innu*]; see also *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (finding Ontario courts had jurisdiction over claims about legal advice non-Ontario lawyers gave to non-Ontario clients because the advice concerned an Ontario contract).

[112] *Meeking*, *supra* note 2.

[113] *Unifund*, *supra* note 109 at para 56.

The *Vita Foods* rule makes which mandatory law easy: only Ontario law and the law of the forum would apply. On the legislative competence rule, the question of which law applies would depend on what the connections are between the legislation and the matter.

The three most relevant factors for a real and substantial connection between a province's plenary arbitration act and the IAP are the location of the chosen law (as discussed above), the location of the parties, and the location of the arbitrator.[114]

The location of the parties is the most important because it engages the protective function of legislation. Rules regarding procedural fairness in an arbitration or incapacity are clearly intended to protect the parties to an arbitration; it would make sense for these rules to apply to all residents of the province.[115] The connection between residence and the agreement is

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[114] Other factors may be relevant in other contexts, including the "place" of the arbitration, the location of hearing, and the location of the dispute that is being arbitrated.

The "place" of the arbitration (that is, the location to whose courts the parties agreed to submit disputes regarding the arbitration) has limited relevance here. The IRSSA does not specify such a "place", nor do the plenary arbitration statutes put any weight on it. The plenary acts differ in this regard from the international commercial arbitration statutes. In these latter statutes, the province asserts legislative jurisdiction only over arbitrations that select the province as the place of the arbitration (the *lex loci arbitri*): *UNCITRAL Model Law*, *supra* note 29, Art. 1.2; see also George A Bermann, "Mandatory Rules of Law in International Arbitration" in Franco Ferrari & Stefan Kröll, eds, *Conflict of laws in international commercial arbitration* (2019) 513 at 518–520.

In the plenary statutes, the greatest relevance of the place of the arbitration is that this place may give arbitrators procedural rights before the courts (see, e.g., *BCAA*, *supra* note 26, at ss 13, 15) or absolute immunity for negligence in arbitration. Although this latter rule arises from common law, the immunity depends on "arbitrations", which are defined in the statute (if only tautologically).

The location of the hearing and of the dispute are of minimal relevance in the IAP context. The former might be relevant to the question of where a witness can be forced to attend (see, e.g., *ONAA*, *supra* note 29 at s 29) or to the extent of immunity defences to defamation, since the place of a tort determines which substantive law applies: *Tolofson*, *supra* note 99 at 1054. These issues did not arise in IAP litigation. The location of the dispute is also irrelevant in the IAP context; it is primarily of interest for arbitrability of the dispute, which is not in issue.

[115] An analogy could be drawn to other legislation that imposes mandatory rules on contracts for protective purposes. In the investor-protection context, provincial legislation was found to apply to solicitations for purchase inside the province: *Avenue Properties Ltd v First City Development Corporation Ltd* (1986), 32 DLR 4th (40) at 15, 1986 CanLII 169 [*Avenue Properties*]. *Castel & Walker* also suggests that consumer protection legislation might likewise

particularly strong as regards the IRSSA because the IRSSA arose from a class action: the claimants are parties to the agreement only because the court of their place of residence[116] chose to bind them to it.

To summarize, the court should apply the procedural rules of its forum to govern the claim, as well as the substantive default rules of Ontario and the mandatory rules of Ontario and, for non-Ontario courts, probably also those of its forum. In circumstances where an arbitrator or hearing is located in a third province, the court should also apply the relevant mandatory provisions of that province's law.

B. The content of the statutory rules that govern arbitrations

As discussed above, the statutory rules that apply to arbitrations include procedural rules, substantive mandatory rules, and substantive default rules. This section will briefly lay out some of these. The *ONAA*'s procedural rules are illustrative and include:

- Time limits to apply to the court to challenge decisions made in the arbitration (s-ss 13(3), 13(6), 17(8), s 44, and s-s 47(1));
- The procedure for appeals (and applications for leave) (s-s 45(1)); and
- The power of a court on an appeal to confirm, vary, or set aside an award (s-s 45(5)).

The *ONAA*'s mandatory rules include:

- That "the parties shall be treated equally and fairly" (s 3, s-s 19(1));[117]
- That "[e]ach party shall be given an opportunity to present a case and to respond to the other parties' cases" (s. 3, s-s 19(2);

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affect contracts made in-province with consumers, even if the producer is outside the province: Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., ss 31.4(g)(i), 31.6(a). In those cases, the real and substantial connection came from the residence of the party the legislature sought to protect.

[116] Residents of the Atlantic provinces and international residents are exceptions to this rule. See *supra* note 2.

[117] Oddly, the requirement that an "arbitrator shall act impartially" (s. 11(1)) is not listed as non-derogable, but this requirement may be implicitly included in the s 19(1) requirement for equal and fair treatment of parties.

- That "[t]he court may extend the time within which the arbitral tribunal is required to make an award, even if the time has expired" (ss. 3, 39);
- That "the court may set aside an award" for a variety of reasons, including that "a party entered into the arbitration agreement while under a legal incapacity", that the procedures of the *ONAA* were violated, or that there was a reasonable apprehension of bias (ss. 3, 46).
- Possibly, that an appeal lies to the Ontario Superior Court on questions of law (s 45).[118]

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118 Whether appeals can be contracted out of depends on s 45's construction. Although s 45 is not included in the list of sections that cannot be "contracted out of" in s 3 of the ONAA, supra note 29, and is inelegantly drafted, it could nonetheless be read as mandatory. Subsection 45(1) provides for an appeal of arbitration agreements on a question of law with leave "[i]f the arbitration agreement does not deal with appeals on questions of law". Subsection 45(2) then establishes that arbitration agreements can waive the requirement for leave. Finally, s-s 45(3) establishes that arbitration agreements can expand the scope of appeal to include questions of fact or mixed fact and law. On one view, s-s 45(1) should have no application if an arbitration agreement says there is no appeal; on the other, s-s 45(1) applies to all appeals and the only permitted modification is to remove the requirement for leave (as set out in s-s 45(2)).

The ULCC Uniform Arbitration Act, 1990 [UAA, 1990] — implemented by the Ontario Legislature in the ONAA — provides strong support for the "mandatory rule" view. The official commentary to the UAA, 1990 clearly states that "[t]he right of appeal on a question of law, subject to leave, may not be waived by the parties": at p. 2-21. The policy of this rule is to avoid impeding the development of the common law, which is a public good that accrues to all litigants and potential litigants. Allowing parties to opt out of appeals would create a collective action problem, where all parties individually would rather there be no appeal, but collectively would benefit if other arbitrations were subject to an appeal. See also Alberta Law Reform Institute, Arbitration Act: Stay and Appeal Issues: Report for Discussion (Edmonton, 2012) at para 104.

Nonetheless, the "default rule" view is the more popular: see Wong v Wires Jolley LLP, 2010 ONSC 4835 at paras 33–38; Freedman, supra note 27 at para 98; and, implicitly, Denison Mines Ltd v Ontario Hydro, 2002 CanLII 20161 at paras 4, 16. 2006 amendments to the ONAA reflected this "default rule" view. The amendments made s 45 mandatory for family arbitration agreements, but not for general arbitration agreements: see s-s 3(2). The then–Attorney-General explained that "[u]nder the current system, participants of a family arbitration can waive their right to appeal an arbitrator's decision in court. Under our new bill... the right to appeal could not be waived": Ontario, Legislative Assembly, *Hansard*, 38th Leg, 2nd Sess, Vol L017, No. 41, 15 November 2005.

The default rules in the *ONAA* relate primarily to the powers of the arbitrator. They include that the arbitrator has the power to:

- ask the Court to determine a question of law (s-s. 8(2));
- decide its own jurisdiction (the so-called competence-competence principle) (s-s 17(1));
- determine questions of arbitral procedure (s-s 20(1));
- take evidence (s 21);
- require parties to produce records or documents that are in their possession (para 6(b));
- compel the attendance of a witness or the production of documents (s 29);
- correct a technical error or oversight error in an award (s. 44); and
- employ "applicable usages of trade" when construing an agreement (s. 33).

VI. Application to IAP cases

Applying these rules to judicial decisions concerning the IAP would have had a significant impact on the reasoning of many IAP cases, as well as the results of some. Overall, results are less frequently affected than are the reasons for those results: the courts tended to construct *sui generis* rules to govern the IAP that resembled those the legislatures had created through statute.

Many judicial decisions related to the IAP relate to at least one of the following topics, all of which are at least somewhat affected by treating the IAP as an arbitration:

- Judicial recourse to alter a decision of an IAP adjudicator;
- The disposition of the records of the IAP after its completion;
- The scope of the Chief Adjudicator's authority;
- Procedural fairness in the IAP;
- Timelines for applications before the IAP; and
- The revelation of new information that may alter the outcome of a prior decision.

A. Judicial recourse

One of the primary forms of court decision rendered in relation to the IAP has come to be called an application for "judicial recourse."[119] These applications involve an IAP claimant asking the court to overturn the result of the IAP process. In this section, I first explain the existing approach, wherein these applications are treated as Requests for Directions (RFDs). I then explain the alternative that emerges from recognizing the IAP as an arbitration. Finally, I identify three second-order consequences of treating the IAP as an arbitration.

1. The existing approach

Judicial recourse motions were treated as Requests for Direction (RFDs), invoking the courts' supervisory jurisdiction over a class settlement. This jurisdiction is asserted in the original implementation order:[120]

> THIS COURT ORDERS that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order.

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[119] Reported decisions related to judicial recourse include *Fontaine v Duboff Edwards Haight & Schachter*, 2012 ONCA 471 [*Schachter*]; *Fontaine v Canada (AG)*, 2014 MBQB 200 [*Fontaine (E.B.)*]; *Fontaine v Canada (AG)*, 2016 ONSC 4326 [DLM: No short form?]; *Fontaine v Canada (AG)*, 2016 ONCA 813 [*Fontaine (M.F. stay pending appeal)*]; *Fontaine v Canada (AG)*, 2016 BCSC 2218 [*Fontaine (F-10779 et al.)*]; *Fontaine v Canada (AG)*, 2017 ONCA 26 [*Fontaine (M.F. Appeal)*]; *Fontaine v Canada (AG)*, 2017 ONSC 2487 [*Fontaine (H-15019 #1)*]; *JW – MBCA*, *supra* note 2; *Fontaine v Canada (AG)*, 2017 BCSC 946 [*Fontaine (T-00178 et al)*]; *Fontaine v Canada (AG)*, 2017 ONSC 4275 [*Fontaine (H-15019 #2)*]; *Tourville v Fontaine*, 2017 BCCA 325; *Fontaine v Canada (AG)*, 2017 BCSC 1633 [*Fontaine (B-12357 and P-15871)*]; *NN v Canada (AG)*, 2018 BCCA 105 [*NN*]; *Fontaine c Procureur général du Canada*, 2018 QCCS 997 [*Fontaine (S.N. release)*]; *Fontaine c Procureur général du Canada*, 2018 QCCS 998 [*Fontaine (A.B.)*]; *Fontaine v Canada (AG)*, 2018 BCSC 471 [*Fontaine (A-16800 and H-12159)*]; *Fontaine (A-16800 RFD)*, *supra* note 75; *Fontaine v Canada (AG)*, 2018 ONCA 421 [*Fontaine (H-15019 RFD – ONCA)*]; *Fontaine v Canada (AG)*, 2018 ONSC 6893 [*Fontaine (E-10290 Re-opening)*]; *JW*, *supra* note 9; *Fontaine v Canada (AG)*, 2019 BCCA 178 [*Fontaine (Scout)*]; *Brown v Canada (AG)*, 2019 BCCA 245; *Fontaine v Canada (AG)*, 2019 BCCA 246 [*Fontaine (S-14128)*]; *Fontaine v Canada (AG)*, 2019 BCSC 1431 [*Fontaine (G-15264)*]; *Fontaine v Canada (AG)*, 2020 BCSC 21 [*Fontaine (K-11553)*]; *IAP Claimant H-15019 v Wallbridge*, 2020 ONCA 270; *DG v AG (Canada)*, 2020 BCCA 197. Some of these decisions address applications for judicial recourse from multiple IAP claimants within one set of reasons.

[120] *Fontaine Implementation Order*, *supra* note 12, s 23.

Schachter is the seminal decision on judicial recourse. *Schachter* concerned the right of counsel to an IAP claimant to challenge a cost assessment by the IAP adjudicators before the courts. Chief Justice Winkler (sitting as a Superior Court judge) rejected the possibility of such a challenge, saying that neither appeal nor judicial review was available.[121]

Justice Rouleau agreed on appeal.[122] He explained, correctly, that judicial review is not available because judicial review is limited to the exercise of statutory power.[123] No part of the IRSSA, including the IAP, involves the exercise of a statutory power.

Justice Rouleau nonetheless found "judicial recourse" was available in "very exceptional circumstances," where the Chief Adjudicator's decision "reflects a failure to comply with the terms of the [IRSSA] or the implementation orders."[124] Later cases grounded this authority in courts' general power under class proceedings statutes to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, [to] impose on one or more of the parties the terms it considers appropriate."[125]

The SCC substantially affirmed *Schachter* in *JW*. Justice Côté, writing for Moldaver J (and agreed with by Brown and Rowe JJ on this point[126]), would have affirmed *Schachter* and clarified that so long as the adjudicator turned their mind to the relevant terms, the adjudicator has complied with the terms of the agreement.[127] She also, albeit without the support of Brown and Rowe JJ, would have allowed for judicial recourse when there was a "gap" in the IAP provisions.[128] Justice Abella, writing for Wagner CJ and Karakatsanis J, also accepted *Schachter*. She, however, would have held that an interpretation

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[121] *Schachter*, *supra* note 119 at para 11.

[122] *Ibid* at paras 29, 50, 53.

[123] *Ibid* at para 52.

[124] *Ibid* at para 57.

[125] *BCCPA*, s 12; *ONCPA* s 12; see, e.g., *Fontaine v Canada (AG)*, 2012 BCSC 839 at paras 112, 120 [*Fontaine (Blott Prohibition)*]; *Fontaine v Canada (AG)*, 2013 BCSC 1955 at para 24 [*Fontaine (Vancouver Sun – Sealing Order)*]; *Fontaine v Canada (AG)*, 2014 ONSC 283 at paras 163–164 [*Fontaine (St. Anne's)*].

[126] See *JW*, *supra* note 9 at para 175.

[127] *Ibid* at paras 123–124.

[128] *Ibid* at paras 141, 145, 147.

of the IRSSA by the Chief Adjudicator that does not provide the benefits promised would be a failure to comply with the IRSSA's terms.[129]

The irony of *JW* is that all three judgments emphasized the contractual origins of the IRSSA (unlike *Schachter*, which emphasized the origins in a settlement approval order) without considering the jurisprudential nature of an agreement to have a third party make binding adjudicative decisions. Rather, all members of the Court reasoned from first principles as though arbitration was an unknown concept. As I will explain in the next section, recognizing the IAP as an arbitration would have altered the approach to many instances of judicial recourse.

2. The alternative: recognizing the IAP as an arbitration

Recognizing the IAP as an arbitration would have had two direct effects on many judicial recourse applications: they would have been considered appeals of an arbitral award or applications to set aside an arbitral award. As noted above, there is at least an argument that the *ONAA* mandates parties have the right to appeal (provided leave is sought and granted), and a right to apply to set aside an arbitral award is certainly mandatory. Treating the IAP as an arbitration would inherently limit the content of any appeal to questions of law.[130] Which questions should be characterized as "of law" is currently contested.

For judicial decisions regarding the IAP prior to *Sattva* in 2014,[131] questions of law would have included those regarding the interpretation of the IRSSA. An appeal thus would have been available. *Sattva* changed the characterization of such questions and thus the availability of an appeal.

After *Sattva*, questions of contractual interpretation normally give rise to questions of mixed fact and law, except where a question of law alone can be extricated.[132] Such questions of law alone include whether an incorrect principle has been applied or whether the required elements of a legal test have not been considered.[133]

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[129] *Ibid* at paras 32–35.

[130] *ONAA*, *supra* note 29, s 45.

[131] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 43–45 [*Sattva*].

[132] *Ibid* at paras 50, 53.

[133] *Ibid*.

A jurisdictional split is developing concerning when a question of law can be extricated from a factual matrix. Some British Columbia decisions hold that no question of law can be extricated when the original decision-maker expressly addressed the right test,[134] much like Côté J's approach in *JW*. In contrast, some Ontario decisions have, in a manner akin to Abella J's opinion in *JW*, held there was a question of law when a motion judge listed established principles of contractual interpretation, but did not properly consider some of them.[135] On the British Columbia/Côté J approach, the scheme is clear but it will certainly sometimes allow "wrong" decisions to stand. On the Ontario/Abella J approach, appellate courts can intervene when it feels it appropriate, but sufficiently skilled lawyers may be able to transmogrify any question into a question of law.

A further exception to *Sattva* was identified in *Ledcor*, which noted that a question of law could arise when "an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process."[136]

The SCC has declined to apply the *Ledcor* exception to IRSSA decisions. Although one might reasonably think the IRSSA is a standard-form contract, entered into between each class member and the defendants, there is a factual matrix between class counsel and the defendants that could be — indeed, has been — used to interpret it. This "factual matrix looms large in ascertaining the meaning of this particular contract."[137] Whether their reasoning is sound is another matter. Although there is a meaningful factual matrix, it is not "specific to the parties," if the class members are considered the parties. Determining the factual matrix will affect all class members.[138]

Nonetheless, characterizing IRSSA questions as ones of mixed fact and law is supported by the anti-*stare decisis* clause in the IAP.[139] Such a clause

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[134] *Richmont Mines Inc v Teck Resources Ltd*, 2018 BCCA 452 at paras 69, 70; *Ryan Mortgage Income Fund Inc v Alpine Credits Limited*, 2017 BCCA 206 at para 23.

[135] *Deslaurier Custom Cabinets Inc v 1728106 Ontario Inc*, 2017 ONCA 293 at para 75.

[136] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 24 [*Ledcor*]. For further discussion of *Ledcor*, including in relation to the IRSSA, see Peter Roy Cotton-O'Brien & Calvin Hancock, "The Limits of Ledcor: Persisting Problems with the Interpretation of Standard Form Contracts" (2019) 62:35 Can Bus LJ 19.

[137] *Fontaine (IAP Records – SCC)*, *supra* note 9, para 35.

[138] See, e.g., Mahoney (n 4) 212–22.

[139] *IRSSA Sched D*, Appendix X, s 5. Note, however, that this clause was interpreted narrowly,

signals that the parties did not intend for one IAP decision to create precedent for another. Such concerns about precedent motivated distinguishing questions of law from those of fact— as *Housen* puts it, questions of law attract correctness because "the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations."[140] Such a provision reflects a decision by the contracting parties to minimize the cost of making decisions (what economists call decision-cost), even at the risk of a greater possibility of decisions being made wrongly (what economists call error-cost). Prof. Paul Daly has explained the case against *stare decisis* thus:

> [i]f detailed arguments must be made about how to read relevant precedents, individuals may need to call on the services of lawyers and the [decision-maker] itself will need to spend more time in deliberations – thereby compromising cost-effective access to swift decisions.[141]

To summarize, if the IAP were treated as an arbitration, then an appeal may have been available. Post-*Sattva*, however, that appeal would have been limited to questions of law alone. Whether the interpretation of the IRSSA raises by an IAP adjudicator such questions is ambiguous because the scope of *Ledcor* and the extent to which questions of law can be extricated from the factual matrix.

If *JW* had been a case about arbitration appeal rights, a significant jurisprudential question about the nature of questions of law in contract may have been resolved. The courts could also have detailed the limits of procedural fairness in a way that would apply to all future arbitrations. By instead treating the IAP as *sui generis*, it is unclear if any of the IAP-related court decisions can be relied upon when considering future class settlements that create confidential dispute-resolution processes. This is not a mere hypothetical concern: there is now a settlement of the Indian Day School class action that uses a similar mechanism to the IAP.[142] Other future class settlements may also be impacted.

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and the IAP spent significant resources on assembling a body of IAP decisions for reference by counsel before the IAP. See, for example, Indian Residential Schools Adjudication Secretariat, *Desk Guide for Legal Counsel* (2014) s 11.1.2; Ish, *supra* note 6.

[140] *Housen*, *supra* note 76 at para 9.

[141] Paul Daly, "The Principle of Stare Decisis in Canadian Administrative Law" (2015) 49:3 RJT n.s 757–782 at 769.

[142] Robert J Winogron & Alex Lakroni, *McLean Settlement Agreement* (Federal Court File T-

The second set of RFDs that would have changed are those that were truly applications to set aside, based on one of the grounds in s 46(1) of the *ONAA*. The two reasons for setting aside an arbitration most likely to be relevant are that the party was under a legal incapacity when they entered the arbitration agreement (i.e., when the opt-out period for the class settlement expired) or that they were not treated equally and fairly.

Either way, the viability of an appeal or an application to set aside would then have been more predictable than the question of which circumstances are 'exceptional' enough to merit judicial recourse. Recognizing the IAP as an arbitration would have increased predictability in this respect.

3. Further consequences

Three salutary consequences would have obtained if the courts had separated out appeals and applications to set aside from other RFDs. First, the courts would not have unduly constrained their own power on an RFD; second, there would have been greater procedural clarity, because the truly class-wide procedures would be separated from the claimant-specific procedures; third, the courts would not have concentrated IAP supervision before two judges in two jurisdictions.

It appears from *JW* that the Court was concerned with the over-expansion of judicial oversight via its ill-defined general power to supervise class proceedings, and so put arbitrary, and ultimately inappropriate, constraints upon it. The general power would not have been threatening to become overexpansive if other provisions had been relied upon to do more juridical work.

The general power would have been asked to do less, if, as described above, the courts had recognized that some applications for judicial recourse were truly arbitration appeals or applications to set aside arbitral awards. British Columbia's courts could also have recognized that some individuals seeking an extension of time to submit to the IAP[143] were truly making an application under s 20 of the *BCAA*, which gives them a non-waivable right to do so.[144]

2168-16, 2019) [perma.cc/CMT5-AHTR].

[143] As in *Myers v Canada (AG)*, 2015 BCCA 95 at paras 10–12 [Myers]; and *Fontaine (Scout)*, *supra* note 119.

[144] See *BCAA*, *supra* note 126, s 44, cf s 35.

Freeing the general power of the need to address these individual issues would have put the focus back on the core purpose of judicial oversight of class actions: to protect the interests of absent class members.[145] Such supervision is necessary because class counsel's interests may not align with class members' interests, and the named plaintiff may not represent all members effectively.[146] This dynamic is acute in settlements: when class counsel are paid on a contingency-fee basis, class counsel bears the costs of trial and may settle for less than class plaintiffs would.[147] It is the court's duty to determine that a settlement is in class members' best interests. This duty is challenging for the court to discharge, since the court must make "prospective findings"[148] in a non-adversarial context[149] where relevant information may not be brought to the court's attention.[150]

Two questions should guide the court after settlement: is the settlement being realized in the manner that the court intended; and are there class members who would not have taken this settlement had they been aware of it? It would be unfair to class members to impose on them an unreasonable settlement.[151] Courts' general power over a class action should be seen as an ongoing source of authority to vary the settlement, if the court had not adequately assessed class members' interests. Although there is a question to

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[145] *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at paras 38–39 [*Fantl*]; *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92 [*Lavier (ONCA)*]; *Smith v National Money Mart*, 2010 ONSC 1334 at paras 27–31 [*National Money Mart*].

[146] *Ibid* at para 38.

[147] Jasminka Kalajdzic, "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal ethics and Class Action Praxis" (2011) 49:1 Osgoode Hall LJ 1 at 7.

[148] *Lavier (ONCA)*, *supra* note 145 at para 53.

[149] Kalajdzic, *supra* note 147 at 10–12.

[150] *National Money Mart*, *supra* note 145 at paras 27–32; *Lavier (ONCA)*, *supra* note 145 at para 53.

[151] Note that Perell J holds differently in *Lavier v MyTravel Canada Holidays Inc*, 2011 ONSC 3149 [*Lavier (ONSC)*]. He opines that courts lack the power to vary a class settlement after approving it: at para 33. If he is correct in this, then absent class members will bear the full burden of any deficiencies in the settlement agreement. The better approach is for this burden to be shared between class members and defendants; the judge should assess what the agreement would have been had the deficiencies been addressed. This approach would incentivize class counsel and class defendants to identify possible deficiencies in the settlement agreement, so that the judge can decide whether the settlement should be approved *ex ante*, rather than vary the agreement *ex post*.

be asked of whether the harm to the defendant that thought it had finalized its liability outweighs the salutary effect on class members., asking that question does not answer it. The court must decide who ought to bear the burden of the court approving an unfair settlement. The supervisory power of the court should be seen to allow it to answer this question.

I will give one illustration. In *Fontaine (K-11553)*, the court denied relief to a claimant who alleged she had been she had endured a serious sexual assault while being taken to enroll in a residential school.[152] This claim could not be admitted to the IAP because the sexual assault did not take place on the premises of the school and the claimant was not then a student.[153] The case came as an application for judicial recourse so the court applied the test in *JW*. It found there was no gap and no misapplication of the IAP model.[154] This result was probably correct on the case law.

Applying a more protective understanding of the supervisory power would change this result. It would have been unreasonable for the claimant in this case to agree to the settlement, because the IRSSA appears to both release[155] her sexual assault claim and deny her access to the IAP, which is intended to compensate such claims.[156] In a class of this size and complexity, it is unsurprising that some interests slip through the cracks. Loosening the restrictions on supervisory jurisdiction would have allowed the courts to address this issue. The courts could have done so by modifying the release or by modifying the scope of the IAP so that they better align.

A second impact of recognizing alternatives to RFDs would have been greater procedural clarity. In an RFD, it is appropriate that the court acts to

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[152] *Fontaine (K-11553)*, *supra* note 119 at para 15.

[153] *Ibid* at paras 60–66.

[154] *Ibid* at paras 55–56.

[155] The release contained in the IRSSA provides that every class member releases the defendants from all actions "directly or indirectly arising from or in any way relating to … or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools", which would appear on its face to include the fact pattern relating to this claimant. This broad release appears to be based on the (generally appropriate) assumption that all released claims could be compensated through the IAP or were appropriately compensated by the CEP. The CEP is not thought to appropriately compensate sexual assault: that is the purpose of the IAP. It is of course possible that Canada would have refrained from seeking strict application of the letter of the release, but this would be a matter of grace, not law.

[156] *IRSSA*, s 11.01(1)(a).

bind the whole class, and so all the class members are, formally, parties to that proceeding. In contrast, an appeal of arbitration award would have had only two parties: the claimant and Canada (the defendant). Knowing who the parties are would have clarified whom a decision binds through estoppel and who has the right to appeal a decision. Greater clarity as to the juridical nature of proceedings would have avoided the long discussion in *Fontaine (Scout)* concerning whether cause of action estoppel applied to RFDs.[157] It also could have avoided some confusion as to the appropriateness of cost awards.[158]

The third major consequence would have been to avoid the RFD status quo, wherein IAP-related matters are concentrated before the "Western Administrative Judge" (B Brown J of the British Columbia Supreme Court) and the "Eastern Administrative Judge" (Perell J of the Ontario Superior Court). At present, IAP-related matters are concentrated[159] before the "Western Administrative Judge" (B Brown J of the British Columbia Supreme Court) and the "Eastern Administrative Judge" (Perell J of the Ontario Superior Court).[160] This concentration is problematic both at a court-level and at a judge-level.

At a court level, there is an adjudicative jurisdiction problem: there is no real and substantial connection between a British Columbia court and an arbitration that occurred in Alberta pursuant to an agreement governed by Ontario law.[161]

At a judge-level, employing only two judges to decide these issues deprives the jurisprudence of the value of multiple perspectives. Tunnel vision is easier when there are few competing voices, or other judges to convince through reasons. Moreover, allocating all IAP decisions to two judges may reduce confidence in the administration of justice. When a judge demonstrates a consistent pattern of rulings in favour of one party,[162] the

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[157] *Fontaine (Scout)*, *supra* note 119 at paras 55–82.

[158] See *NN v Canada (AG)*, 2019 BCCA 286 [*NN (NR Costs)*].

[159] *Fontaine Implementation Order*, *supra* note 12, s 20, Court Administration Protocol.

[160] Before Perell J took on this role, Winkler RSJ (and later CJO) held this role.

[161] Recognizing this may have avoided at least one appeal to ONCA: see *Fontaine v Canada (AG)*, 2020 ONCA 688 [*Fontaine (CAP Jurisdiction)*].

[162] For example, B. Brown J held for Canada in every one of the 16 reported decisions she rendered in RFDs concerning a dispute between Canada and a class member. See *Fontaine (F-10779 et al.)*, *supra* note 119 (addressing five claimant RFDs in one judgment); *Fontaine*

losing parties have available two inferences: that the judge holds prior (legal or factual) beliefs that prevent them from winning; or that the losing parties have simply always been on the wrong side of the law. This first, confidence-undermining inference is less available when decision-making is spread over multiple judges.

B. IAP records

Another major issue that reached the SCC was the treatment of the IAP's records.[163] As I will explain, treating the IAP as an arbitration would have a salutary effect on the reasoning in these judicial decisions, albeit only a minor one.

The question at issue in these cases was the applicability of federal archiving, privacy, and access to information legislation to the IAP records. This legislation would apply if the records were under the control of a federal government institution.[164] Canada asserted it had control over the records in two distinct roles: as the IAP Adjudicator; and as an IAP defendant. The IRSSA, meanwhile, imposed a duty of confidentiality on all its parties, without exceptions for the statutory duty of disclosure in the *Access to Information Act* [*ATIA*].[165]

The question in these cases arose because, stated baldly, the confidentiality commitments in the IRSSA are statutorily illegal. Canada cannot by contract agree to violate a federal statute. Between s-s 12(1) of the *Library and Archives of Canada Act* [*LACA*], which prohibits Canada from disposing of government records that have historic value,[166] and the *ATIA*,

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v Canada (AG), 2017 BCSC 939 [*Fontaine (C.P.)*]; *Fontaine (T-00178 et al)*, *supra* note 119 (addressing three claimant RFDs in one judgment); *Fontaine (B-12357 and P-15871)*, *supra* note 119 (addressing two claimant RFDs in one judgment); *Fontaine v Canada (AG)*, 2018 BCSC 63 [*Fontaine (Canada reopening)*]; *Fontaine v Canada (AG)*, 2018 BCSC 376 [*Fontaine (NAC Reopening)*]; *Fontaine (A-16800 and H-12159)*, *supra* note 119 (addressing two claimant RFDs in one judgment); *Fontaine (G-15264)*, *supra* note 119; *Fontaine (K-11553)*, *supra* note 119. She also ruled for Canada in her unreported decision of November 20, 2013 (BCSC), according to *Fontaine (St. Anne's)*, *supra* note 125 at para 160 and *Fontaine (H-15019 #1)*, *supra* note 119 at para 174.

[163] *Fontaine (IAP Records – ONSC)*, *supra* note 70; *Fontaine (IAP Records – ONCA)*, *supra* note 77; *Fontaine (IAP Records – SCC)*, *supra* note 9.

[164] *Fontaine (IAP Records – SCC)*, *supra* note 9 at para 30.

[165] RSC, 1985, c A-1, s 3(a).

[166] SC 2004, c 11, ss. 7, 12(1).

which mandates that Canada disclose government records, any IAP records in Canada's possession that have historical value must, eventually, be disclosed.[167] Meanwhile, tens of thousands of claimants gave their information to the IAP in reliance on the confidentiality guarantees.[168]

Justices Brown and Rowe, writing together for the Court, opted for the practical result: the IAP records would remain confidential by being destroyed. Their reasons rested on the courts' supervisory powers under provincial class-action legislation and the inherent jurisdiction of the courts.[169] They asserted that the supervisory judge could mandate the destruction of government records without the consent of the Librarian and Archivist of Canada, despite s-s 12(1) of the *LACA*, which reads "[n]o government or ministerial record … shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist."[170]

Treating the IAP as an arbitration would not have offered any better legal route to this result. It would, however, have clarified that the government records are in Canada's possession in its role as a defendant, not as the adjudicator. Seeing the Chief Adjudicator as an arbitrator would have clarified that the Chief Adjudicator is acting in a private capacity, not a public one, and so the Chief Adjudicator is not part of "Canada."

This clarification would have had a salutary effect on the treatment of IAP non-claim (administrative) records. The issue is currently in litigation.[171]

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[167] Canada could initially refuse to disclose IAP records under the "personal information" exception to access to information: *ATIA*, s-s 19(1). Twenty years after the death of the relevant persons, however, the information is deemed to no longer be "personal" and so could not be kept confidential on that basis: *ATIA*, s 3, *sv* "personal information"; *Privacy Act*, RSC 1985, c P-21 para 3(m) *sv* "personal information" .

[168] *Fontaine* (*IAP Records – ONSC*), supra note 70 at para 82.

[169] *Fontaine (IAP Records – SCC)*, supra note 9 at para 33.

[170] *Ibid*. Through one lens, it appears plenary powers given to class action judges in provincial legislation were allowed trump federal legislation (contrary to paramountcy); through another, it appears that the executive can ignore legislation provided the judiciary agrees to it (contrary to legislative supremacy). Justices Brown and Rowe's statements on the importance of the separation of powers in other cases make this result particularly surprising: see, e.g., *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 68 (*per* Rowe J); *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 139 (*per* Brown J); *ibid* at para 148 (*per* Rowe J); *Innu*, *supra* note 111 at para 217 (*per* Brown and Rowe JJ); *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at 159 (*per* Brown and Rowe JJ).

[171] *Fontaine v Canada (AG)*, 2020 ONSC 366 [*Fontaine (Non-claim Records)*]; rev'd in part and

These records are only held by the Chief Adjudicator, not by Canada directly. Since the records of arbitrators are not generally seen as possessed by the parties to the arbitration, it seems clear the *ATIA* would not apply to them.[172]

C. Role of the Chief Adjudicator

A third recurring issue in the case law relates to the role of the Chief Adjudicator and the IRSAS in the IAP. Matters related to this issue include:

1. The scope of the Chief Adjudicator's authority to assess IAP legal fees;[173]
2. The relationship between Chief Adjudicator and counsel before the IAP;[174]
3. Whether the Executive Director of the IAP Secretariat can be compelled to examination under oath related to the processes of the IAP;[175] and
4. The relationship between the Chief Adjudicator and the courts.[176]

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remanded, 2021 ONCA 203; 2021 ONCA 550.

[172] The Privacy Commissioner has expressed the view that arbitrators hired by government are not independent of the government: *Dispute Resolution Reference Guide: Confidentiality: Access to Information Act and Privacy Act*, by Department of Justice Government of Canada (2015) online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/07.html> [https://perma.cc/XF7C-GNT4]. This view would seem to be in severe tension with the requirement of arbitral independence. The better view is probably that arbitrators are not themselves government institutions because they are not a "department or ministry of state of the Government of Canada, or any body or office" that is listed in Schedule I of the *ATIA* (see s 3(a)).

[173] *Fontaine v AG of Canada*, 2010 BCSC 1208 [*Fontaine (IAP/CEP fees)*]; *Fontaine v AG Canada*, 2015 MBQB 158 [*Fontaine (REO Law legal fees)*].

[174] *Fontaine v Canada (AG)*, 2015 BCSC 68 at para 4 [*Fontaine (Bronstein negligence – standing)*] (referring to unreported decision).

[175] *Fontaine v Canada (AG)*, 2015 ONSC 1435 at para 20 [*Fontaine (Disclosure RFD – Executive Director examination)*].

[176] Fontaine (Chief Adjudicator Direction #1), supra note 12; Fontaine v Canada (AG), 2018 ONSC 5706 [Fontaine (Chief Adjudicator Direction #2)]; Fontaine v Canada (AG), 2018 ONCA 832 [Fontaine (Direction #2 Stay)]; Fontaine v Canada (AG), 2018 ONCA 1023 [Fontaine (Chief Adjudicator Direction – ONCA)].

Other than the first matter,[177] the others all could have been informed by treating the IAP as an arbitration.

If the IAP is an arbitration, the relationship between the adjudicators and counsel would be well-defined. There would be no dispute that counsel had ethical obligations to treat the adjudicators with courtesy and respect.[178] The Chief Adjudicator would probably also have the power to disqualify counsel, as part of his control over the arbitration process.[179] Arbitrators being unable to disqualify counsel for reasons that would suffice in court would not be "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process."[180]

The next question concerns *when* an arbitrator can disqualify counsel. In courts, such a power is generally used only when counsel is in a conflict of interest, because of the importance of protecting a party's right to counsel of their choice.[181] The power is grounded on maintaining public confidence in the integrity of the administration of justice by protecting clients from breaches of the duty of loyalty by counsel.[182] As *Neil* explains,

> [u]nless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to

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[177] The first issue arises because of s 18 of the Implementation Order, supra note 12. Section 18 empowers IAP adjudicators to assess the legal fees charged by lawyers to claimants for "fairness and reasonableness".

This section of the Orders appears to overstep the bounds of the Courts' competence. For example, in Ontario the Solicitors Act, RSO 1990, c S15 provides that assessment officers are to assess of a bill of costs (s. 6(2)). Only the Lieutenant-Governor in Council can appoint an assessment officer and only the Deputy Attorney General can grant the powers of an assessment officer to someone without that title: Courts of Justice Act, RSO 1990, c C43 [ONCJA] ss 73, 90. Moreover, the power to set aside an agreement for being unfair (as implicitly provided for in s 17 of the Implementation Order) is reserved to the Court: Solicitors Act, ss. 23–24. Courts (outside British Columbia: see BCAA, supra note 26, ss. 36–37) do not have the power to delegate such matters.

[178] An issue in Cherkewich (Re), 2014 SKLSS 3.

[179] ONAA, *supra* note 29, s 20(1).

[180] Wellman, *supra* note 91 at para 56.

[181] MacDonald Estate v Martin, 77 DLR (4th) 249 at 1263, 1990 CanLII 32 [MacDonald Estate]; R v Neil, 2002 SCC 70 at para 13 [Neil]; Strother v 3464920 Canada Inc, 2007 SCC 24 at para 62 [Strother].

[182] Neil, *ibid* at para 12.

> them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.[183]

Such an expansive understanding of the duty of loyalty is well-suited to the IAP, especially given many claimants' mistrust of lawyers.[184] Maintaining confidence in the IAP may well entail disqualifying counsel that have breached the duty of loyalty to one claimant (for example, by making an illegal contingency fee contract[185]) from representing other claimants.

The second matter could also be answered simply by considering the IAP an arbitration. The conventional view is that arbitrators enjoy immunity akin to judicial immunity.[186] The analogous immunity in the judicial context immunizes arbitrators from being compelled to testify about the decision-making process.[187]

The third matter would cut both ways by treating the IAP as an arbitration. The Chief Adjudicator would enjoy statutory insulation from much court oversight[188] and more matters would be determined by him rather than by the court. Between the competence-competence principle,[189] the generous scope afforded to arbitration agreements,[190] and the arbitrator's power to decide arbitral procedure, much less recourse would have been sought before the courts. On the other hand, the Chief Adjudicator would have much less of a role before the courts: an arbitrator is entitled to be heard by a court only when an allegation that the arbitrator committed a corrupt or fraudulent act or delayed unduly is considered.[191] Although the Chief Adjudicator might intervene before the courts on an application to amend

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[183] *Ibid.*

[184] Mahoney (2014), *supra* note 5 at 520; Mahoney (2018), *supra* note 6 at 215.

[185] See, e.g., *Fontaine et al v Canada (Attorney General) et al*, 2014 MBQB 113 at para 89 [*Fontaine (Form-Fillers)*].

[186] *Zittrer*, *supra* note 30 at paras 17, 20. A compelling argument can be made that *Zittrer* erred on this point: see Jonnette Watson Hamilton, "Doubts about Arbitrator Immunity", (28 April 2010), online: *ablawg.ca* <https://ablawg.ca/2010/04/28/doubts-about-arbitrator-immunity/> [perma.cc/KU5Y-K5D4].

[187] *MacKeigan v Hickman*, [1989] 2 SCR 796 at 811, 61 DLR (4th) 688, (*per* La Forest J.) and 830–831 (*per* McLachlin J.)

[188] See, e.g., *ONAA*, *supra* note 29, s 6.

[189] See, e.g., *ibid*, s 17(1).

[190] *Onex*, *supra* note 51 at paras 9, 24; *Lovat Tunnel*, *supra* note 52 at paras 20–21; *Huras*, *supra* note 52 at para 18; *Bolands*, *supra* note 52 at para 47.

[191] *ONAA*, *supra* note 29, s 15.

the IRSSA, this intervention might bring the courts more value, because the Chief Adjudicator would be seen as the authoritative interpreter of the IAP, not merely a subordinate to the courts.

D. Timelines for applications before the IAP

A fourth recurring issue in the case law relates to deadlines in the IAP process. The IRSSA set the deadline for applying to the IAP as September 19, 2012.[192] When potential claimants asked the courts for relief from this deadline, the courts determined they lacked the power to extend it.[193] In British Columbia, a mandatory provision of the *BCAA* gives courts the power to provide relief from a time limit for beginning arbitration when the court "considers that undue hardship would otherwise result."[194] It would be hard to say that denial of access to the IAP would not have caused an undue hardship to the claimant in *Scout* whose claim was filed one day late because his "lawyer inadvertently failed to include his application with others being mailed on that day."[195] Even if lawyers' insurance could have remedied any financial harm, it would not have provided the restorative benefits offered by the IAP based on Indigenous legal principles.[196] This power could have been used similarly in *Fontaine (C.P.)*, wherein the court said it "obviously sympathize[d]" with the claimant, but that its hands were tied.[197] In these cases, treating the IAP as an arbitration would have increased flexibility.

E. Procedural fairness and the revelation of new information

Treating the IAP as an arbitration would have had significant impact on a series of cases addressing whether procedural fairness was a component of the IAP, and if so, whether it governed the disclosure of new information.[198] In this series of cases, B. Brown J held that the concept of "procedural fairness" was inappropriate in the context of the IAP:[199]

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[192] *Myers*, *supra* note 143 at para 5.

[193] *Ibid.*

[194] BCAA, *supra* note 26, ss 20, 44.

[195] *Fontaine (Scout)*, *supra* note 119 at para 11.

[196] Mahoney (2018), *supra* note 5, 224–225.

[197] *Fontaine (C.P.)*, *supra* note 162 at para 32.

[198] *Fontaine (Canada reopening)*, supra note 162; *Fontaine (NAC Reopening)*, *supra* note 156; *Fontaine (A-16800 and H-12159)*, *supra* note 119; *Independent Counsel v Fontaine*, 2019 BCCA 269; *National Administration Committee v Canada (AG)*, 2019 BCCA 270.

[199] *Fontaine (Canada reopening)*, supra note 162 at para 103.

> Used in the context in which the Chief Adjudicator and his designates have used it in the IRSSA, "procedural fairness" is a misnomer, and one which erroneously invokes the administrative law paradigm. The IRSSA is a contract, and while the IAP Model provides an important means of providing redress to those who suffered abuse at IRSs, the courts and their officers such as the Chief Adjudicator and his designates must honour what the parties to that contract negotiated. Neither the courts nor the Chief Adjudicator and his designates should do anything that materially alters the bargain that the parties made. So far as the IAP is concerned, that bargain is set out in the IAP Model. When describing the concept of fairness in that context, the appropriate phrase – and one which should help to ensure that confusion does not arise in the future – is "IAP Model fairness", for that is what the parties bargained for and the Courts approved.

These decisions were affirmed on appeal.

Treating the IAP as arbitration would make B. Brown J's reasons here incorrect. Procedural fairness is an aspect of arbitration law, not merely administrative law.[200] As discussed above, an arbitration agreement cannot opt out of the statutory requirements that parties be treated "equally and fairly" and that parties have the opportunity to "present a case and to respond to the other parties' cases."[201] Knowing that procedural fairness applies then raises the questions of which procedures are fair.

In *Fontaine (A-16800 and H-12159)*, the procedural fairness issue that arose concerned communication between the adjudicators and two claimants. Claimant A-16800 alleged that she did not receive communications from the adjudicators that would have notified her of an internal IAP deadline. Claimant H-12159 alleged she had been unable to communicate with her lawyer for four years due to post-traumatic stress disorder. These are both plausible procedural fairness violations that should have been dealt with on the merits, rather than by asserting that procedural fairness does not apply.[202]

Other cases involving procedural fairness fundamentally concerned how the IAP should address claims where the success of one claim depends on evidence that may be adduced in other IAP claims. The most common of these are claims involving student-on-student (SOS) abuse. The success of such a claim in the IAP depends on whether an adult employee had, or reasonably should have had, knowledge that abuse of the kind was occurring

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[200] *Kaneria*, supra note 36.

[201] ONAA, *supra* note 29, s 19.

[202] *Fontaine (A-16800 and H-12159)*, *supra* note 119 at para 74.

at the IRS in the relevant time period.[203] The private nature of the abuse claims means that claimants are unlikely to share this information with each other before a hearing, and the privacy of the IAP structure means that the adjudicators and the defendant (Canada) will learn of other allegations when claimants will not. Other examples of such claims include those where a claimant's allegations are initially not believed but are later corroborated by others' evidence, as occurred in *NN*.[204]

Schedule N of the IRSSA dealt with this in part by placing the burden on Canada to report the relevant information to claimants.[205] Each claimant is entitled to require Canada provide them with:[206]

- documents confirming the claimant's attendance at the school;
- a report about the persons named as having abused the claimant and the documents Canada relied upon to make it;
- a report about the residential school the claimant attended, and the documents Canada relied upon to make it; and
- any documents mentioning sexual abuse at the residential school in question.

Moreover, for SOS abuse allegations, Schedule N provides that Canada "will work with the parties to develop admissions from completed examinations

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[203] *IRSSA Sched D*, Appendix IX, s (I)(B); *Fontaine (Canada reopening)*, *supra* note 162 at para 13.

[204] *NN*, *supra* note 79 (as regards claimant N.R.).

[205] Justice B. Brown refers to Canada's ongoing requirement to make relevant disclosure as a "progressive disclosure" obligation: *Fontaine (T-00178 et al)*, *supra* note 119; *Fontaine (Canada reopening)*, *supra* note 162; *Fontaine (NAC Reopening)*, *supra* note 162. This terminological choice was followed by BCCA judges in *NN*, *supra* note 79 at paras 232, 251, 253, 258, 262 (*per* Hunter JA) and *Independent Counsel v Fontaine*, *supra* note 198 at para 35. This choice is unfortunate and should not be repeated: "progressive disclosure" is a term in the IAP that has a specific meaning relating to how claimants who suffer trauma may progressively disclose information about the trauma. The term is used to indicate that claimants' credibility should not automatically be impeached by prior inconsistent statements when such inconsistencies can be explained by progressive disclosure: *IRSSA Sched D*, *supra* note 14 at sub-paras III(h)(iii)-(iv); *Fontaine (Blott Prohibition)*, *supra* note 125 at para 65; see also *Fontaine (Chief Adjudicator Direction #1)*, *supra* note 12 at para 43 (quoting para 92 of a factum of the Chief Adjudicator). It should not be used to refer to Canada's ongoing obligation to continue to make relevant disclosures of the evidence in its possession as it receives new information.

[206] *IRSSA Sched D*, *supra* note 14, Appendix VIII.

for discovery, witness or alleged perpetrator interviews, or previous [] decisions relevant to the Claimant's allegations."[207]

Even with this structure, however, procedural fairness concerns arise. *Which* claimants succeed will depend on the dice roll of scheduling appeal hearings. Although the first claimant may be unable to show that an adult should have known of their abuse, it is possible the fifth claimant making similar allegations could, based on evidence adduced in previous hearings and relayed to them by Canada. Similar parties in the same circumstances will receive different legal outcomes based on an arbitrary factor - (the relative scheduling of their appeal hearings). A process with only minor such errors[208] may not be problematic from a procedural fairness perspective,[209] but the procedural fairness concerns are exacerbated because the dice are loaded in favour of Canada.

Extending the above hypothetical, for every place with, say, twenty students who make true allegations, the first four will wrongfully be denied recourse (and Canada will wrongfully be immune from liability).[210] Overall,

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[207] *Ibid*, Appendix VIII.

[208] By "errors", I mean instances where the outcome of the legal process does not correspond to the optimal legal outcome given omniscience of the facts and perfect application of the law.

[209] "Procedural fairness does not require a perfect process": *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43.

[210] The presumed adjudicatory inferential process is set out semi-formally below:

if {few known instances of SOS abuse→few actual instances of SOS abuse many known instances of SOS abuse→many actual instances of SOS abuse

if {many actual instances of SOS abuse adult should have known few actual instances of SOS abuse adult should not have known.

Under this process, if there are few known instances of SOS abuse, the adjudicator will not then believe that there are many actual instances of abuse and will conclude that the adult should not have known about the abuse. However, if the adjudicator has evidence letting the adjudicator "know" there are many instances of abuse, then the adjudicator will change their beliefs about how many actual instances occurred and will conclude that an adult should have known of the abuse. The first-adjudicated claims may thus fail (because there were then few known instances), but later-adjudicated claims will succeed (because there now are many known instances).

I assume adjudicators do not update their beliefs. If they did, they might update for the order claims are heard. If it turned out that most of the time an early-filing claim is supported by further evidence in later claims, a Bayesian adjudicator would update their logic to infer

it is likely that Canada will be found liable for less harm than it would rightfully be responsible for, because initial claimants cannot lead the evidence of future claimants. Although some errors may be inevitable, and the presence of some errors does not offend procedural fairness, if the errors systemically favour one party (that is, the process is biased)[211] it is easier to say that the process is procedurally unfair.

Considering the IAP as arbitration would inject structure and define the potential methods of creating an unbiased process. After all, arbitrators are masters of their own process. One way to remove both the randomness and the bias would be for the adjudicators to start all the hearings of the claimants that make similar claims, take in all the initial evidence, then stay all the hearings.[212] Canada could then update its disclosure in each hearing based on the initial evidence, and the hearings could resume. This process may not be appropriate for courts, but it would suit the flexible nature of arbitration.

Considering the IAP as arbitration would also limit the role of courts in *reopening* a claim. The *ONAA* provides for an arbitration to be revived for the purposes of correcting a technical error, after an appeal, when an award is set aside, or for awarding costs.[213] New evidence of SOS abuse does not fit in any of these categories, since there is no provision for an appeal on questions of fact. Courts would only become involved to set aside the award for procedural unfairness or fraud.[214]

One other possibility remains, which is for an unsuccessful claimant to file a *new* claim in the IAP after new evidence is revealed. The application deadline has expired, so filing a new claim today would be blocked, unless a court granted leave to extend that deadline. Even then, the arbitrator would ordinarily block the re-litigation of a claim by applying cause of action estoppel. Canadian common law, however, recognizes an exception to cause of action estoppel when there is new evidence that was previously unavailable and conclusively impeaches the original results.[215] This exception may apply

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that there are many actual instances even when only knowing of a few inferences.

[211] By "biased", I mean that the errors are statistically skewed in favour of one of the parties.

[212] The procedure here is inspired by *ONCJA*, *supra* note 177, s-s 107(1) (allowing for proceedings to be stayed when there is a question of fact in common).

[213] Sections 6, 43(4).

[214] *ONAA*, *supra* note 29, ss. 46(1)(6), 46(1)(8).

[215] *Grandview v Doering*, [1976] 2 SCR 621, 635–637; *Toronto (City) v CUPE*, 2003 SCC 63 at para 52.

to SOS abuse cases, where later claims provided new evidence that impeaches the result for the earlier claimant.

VII. Conclusion

In this paper, I have set out technical arguments for why the courts ought to have treated the IAP as an arbitration. I have also identified some ways the courts' reasoning and results in individual cases involving IAP claimants may have been altered by treating the IAP as an arbitration. The significance of treating the IAP as an arbitration is not limited to the results of individual adjudications, however.

One of the broader consequences of not seeing the IAP as arbitration was that the courts treated the IAP as *sui generis*.[216] A court treating a matter as *sui generis* is a declaration that the court does not see itself as bound by existing law and that the court does not intend its decision to guide future law.

This phenomenon affects both the matter treated as *sui generis* and the rest of the legal system. I have detailed above some specific ways that IAP litigants were affected by the courts treating the IAP as *sui generis*: the courts ignored relevant statutes and constructed a procedural code from scratch. They did so with partial, but not total, success: the courts often reached similar results to what would have occurred with the relevant statute, but their path was circuitous. Moreover, without the signposts of statute, the courts' approach had the appearance of arbitrariness: when all that matters is equity, there is little to disguise that courts generally preferred contractual certainty over granting remedies for those injured by residential schools. This jurisprudence may give pause to those who hope to achieve social change through the courts and see increasing courts' discretion as a means to that end.

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[216] *Fontaine (St. Anne's)*, *supra* note 125 at para 72; *Fontaine v Canada (AG)*, 2015 ONSC 3611 at para 15 [*Fontaine (Bishop Horden Disclosure)*]; *Fontaine v Canada (AG)*, 2015 ONSC 5431 at para 18 [*Fontaine (Bishop Horden Disclosure – Costs)*]; *Fontaine (F-10779 et al.)*, *supra* note 119 at para 12; *Canada (AG) v Merchant Law Group LLP*, 2017 BCCA 198 at para 5; *Fontaine v Canada (AG)*, 2017 ONSC 5174 at para 30 [*Fontaine (C-14114 Process)*]; *Fontaine (IAP Records – SCC)*, *supra* note 9 at para 35; *Fontaine (Canada reopening)*, *supra* note 162 at para 5; *Fontaine (NAC Reopening)*, *supra* note 162 at para 36; *JW*, supra note 9 at para 172 (*per* Brown J.); *Fontaine (Scout)*, *supra* note 116 at paras 43, 67; *Fontaine (Non-claim Records)*, *supra* note 171 at para 108.

Treating a matter as *sui generis* also has impacts on the future. The courts' approach has deprived Canadian jurisprudence of some 200 cases worth of legal analysis.