

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE TRUTH AND RECONCILIATION COMMISSION OF CANADA

APPLICANT

AND

ATTORNEY GENERAL OF CANADA

RESPONDENT

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing on a date and time to be determined by the Registrar of the Superior Court at 393 University Avenue, Toronto, Ontario M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE: March 2, 2012

ISSUED BY:

Court Registrar
Ontario Court of Justice
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: Department of Justice Canada
Civil Litigation Section
234 Wellington Street, East Tower
Ottawa, Ontario
K1A 0H8

Paul Vickery and Catherine Coughlan
Tel: (613) 984-1483
Fax: (613) 941-5879

Counsel for the Respondent, the Attorney General of Canada

AND TO: Rueter Scargall Bennett LLP
Suite 600, 155 University Avenue
Toronto, Ontario
M5H 3B7

Randy Bennett
Tel: (416) 869-3538
Fax: (416) 869-3411

Court-Appointed Monitor

AND TO: Koskie Minsky LLP
900-20 Queen Street West
Toronto, Ontario
M5H 3R3

Kirk M. Baert
Tel: (416) 595-2117
Fax: (416) 204-2889

Counsel for the National Certification Committee

AND TO: Cassels Brock & Blackwell LLP

2100 Scotia Bank Plaza
40 King Street West
Toronto, Ontario
M5H 3C2

S. John Page

Tel: (416) 869-5481
Fax: (416) 360-8877

Counsel for the Anglican Church Entities

AND TO: McKercher LLP

374 Third Avenue South
Saskatoon, Saskatchewan
S7K 4B4

W. Roderick Donlevy

Tel: (306) 664-1331
Fax: (306) 653-2669

Counsel for the Catholic Entities

AND TO: Phillips Gill

33 Jarvis Street, Suite 200
Toronto Ontario
M5E 1N3

John Phillips

Tel: (416) 703-1267
Fax: (416) 703-1995

Counsel for the Assembly of First Nations

AND TO: **Nelligan O'Brien Payne**
50 O'Connor, Suite 1500
Ottawa, Ontario
K1P 6L2

Janice Payne
Tel: (613) 231-8245
Fax: (613) 788-3665

Counsel for the Inuit Organizations

AND TO: **Peter Grant & Associates**
900-777 Hornby Street
Vancouver, British Columbia
V6Z 1S4

Peter Grant
Tel: (604) 685-1229
Fax: (604) 685-0244

Thomson, Rogers
3100-390 Bay Street
Toronto, Ontario
M5H 1W2

Craig Brown
Tel: (416) 868-3163
Fax: (416) 868 3134

Merchant Law Group
#100 – Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

E.F. Anthony Merchant, Q.C.
Tel: (306) 359-777
Fax: (306) 522-3299

Counsel for the Plaintiffs

APPLICATION

By way of overview, the Truth and Reconciliation Commission of Canada (the “Commission”) seeks this Honourable Court's guidance through judicial interpretation of express terms set out in Order in Council PC 2008-0793 that incorporates as Schedule “N” the mandate of the Commission on questions relating to the Commission's document collection mandate and the corresponding document production obligations of the Respondent, the Government of Canada (“Canada”). The Commission was created as part of the Indian Residential Schools Settlement Agreement (the “Settlement Agreement”). Among other things, the Commission’s mandate includes the collection and maintenance of a legacy in respect of all relevant Residential Schools records held by Canada and certain church entities including the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and Roman Catholic Entities. The Commission has encountered serious difficulties in fulfilling its mandate within its prescribed term as a result of the ongoing failure on the part of Canada to meet its documentary production obligations.

THE APPLICANT MAKES APPLICATION FOR:

1. The Commission seeks this Honourable Court’s guidance pursuant to Rules 14.05(3)(d), (g) and (h) of the *Ontario Rules of Civil Procedure* in the form of declaratory relief in respect of the following:

- ~~(A) — A determination as to the scope and effect, if any, of the Implied/Deemed Undertaking Rule which is being raised by Canada as an impediment to the complete production of all relevant documents in the respondent’s possession;~~

- ~~(B) — In view of Canada’s reliance on applicable privacy and freedom of information legislation as an impediment to complete production of all relevant documents in its possession, a declaration that Canada is authorized under s. 8(2)(c) of the *Privacy Act*, R.S.C. 1985, c. P-21 to disclose records containing personal information to the Commission, and that s.8(2)(j) of the *Act* is inapplicable to the Commission by virtue of Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement;~~
- ~~(C) — In view of Canada's position that it need not organize, compile and produce residential schools documents in federal archives, an interpretation of the term “provide” within Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement;~~
- ~~(D) — In view of Canada's position that it need not organize, compile and produce residential schools documents in federal archives, an interpretation of the phrase “compile all relevant documents in an organized manner” within Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement;~~
- ~~(E) — An interpretation of the phrase “provide access to their archives” within Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement;~~
- ~~(F) — A declaration that Canada’s obligation to “provide all relevant documents” includes documents held by Library and Archives Canada;~~
- ~~(G) — An interpretation of the phrase “possession or control” within Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement;~~

- ~~(H) — An interpretation of the provisions of Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement with respect to Canada’s obligation to bear the cost of the provision of documents, including all copying, reproduction and compiling of documents, except where access is provided to originals;~~
- ~~(I) — A declaration that Canada is in breach of its obligation to provide all relevant documents pursuant to Order in Council PC 2008-0793 which incorporates paragraph 11 of Schedule “N” of the Settlement Agreement;~~
- ~~(J) — An order that Canada comply with its obligations to provide all relevant documents pursuant to Order in Council PC 2008-0793 which incorporates paragraph 11 of Schedule “N” of the Settlement Agreement;~~
- ~~(K) — An order that Canada produce a list of documents over which solicitor-client privilege is asserted, which list shall contain sufficient particulars to permit the Commission and the court to assess such privilege claim;~~
- ~~(L) — A determination as to whether the Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement permits Canada to withhold relevant documents from the Commission on the basis of Cabinet Confidences;~~
- ~~(M) — In the alternative, an order that Canada produce a particularized list of documents, complete with certifications pursuant to s.39(1) of the *Canada Evidence R.S.C., 1985, c. C-5*, in respect of all documents over which Cabinet Confidences are asserted;~~

~~(N) — An order that any additional costs associated with the Commission’s collection, review and preservation of documents attributable to Canada’s delayed compliance with its production obligations be assessed, and made payable by Canada.;~~

~~(O) — An order that all issues of document production by Canada to the Commission be subject to case management, with case management appointments every sixty days until such further order is made;~~

~~(P) — An order that Canada comply with a schedule for the provision of documents to the Commission pursuant to Order in Council PC 2008-0793 which incorporates paragraph 11 of Schedule “N” of the Settlement Agreement; and;~~

~~(Q) — That the Order be made without prejudice to the Commission returning before the court with respect to an extension of its term, arising from Canada’s delayed compliance with its obligations under Order in Council PC 2008-0793 which incorporates Schedule “N” of the Settlement Agreement.~~

(A) What are Canada’s obligations under the IRSSA with respect to archived documents at Library and Archives Canada (“LAC”)?

(B) What are Canada's obligations under the IRSSA in relation to the Commission’s legacy mandate?

(C) That any Order be made without prejudice to the Commission returning before the court with respect to any additional costs and any extension of its term, arising from Canada’s delayed compliance with its obligations under the IRSSA;

2. The costs of this application; and

3. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

1. In the 1990's, thousands of former students of Indian Residential Schools commenced class action proceedings in provincial and territorial courts against Canada, the General Synod of the Anglican Church of Canada, the Presbyterian Church of Canada, Roman Catholic Church entities and the United Church of Canada.
2. The plaintiffs were comprised of three groups represented by the National Consortium, the Merchant Law Group and independent counsel.
3. The litigation culminated in the signing of the Indian Residential Schools Settlement Agreement on May 8, 2006.
4. The Settlement Agreement was given court approval by this Honourable Court, and simultaneously by other provincial and territorial courts, in March 2007, and became effective on September 19, 2007. By Order in Council PC 2008-0793, the Commission was given the mandate as set out in Schedule "N" to the Settlement Agreement.
5. Schedule "N" of the Settlement Agreement provided for the creation of the Truth and Reconciliation Commission of Canada. The mandate of the Commission is *inter alia* as follows:
 - (a) To guide a process of reconciliation, including the conduct of national events, the support of community events and commemoration projects;
 - (b) The creation of a legacy, including the collection of all relevant records and the conduct of statement taking, and other truth sharing activities, the classification of such documentation, and the preservation of these records.

- (c) To establish a National Research Centre, to ensure preservation of the Commission's archives, with access for former students, their families and communities, the general public, researchers and educators.
- (d) To conduct research and to produce a report to the Parties of the Settlement Agreement of the Commission's historic findings and recommendations.

6. Schedule "N" imposes document production obligations on the defendants (including Canada) to "provide all relevant documents in their possession or control" to the Commission. Schedule "N" provides the following with respect to the defendants' document production obligations:

In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.

In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP) existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.

7. The Commission has encountered serious difficulties with respect to obtaining relevant documents from Canada. These difficulties arise primarily from differing interpretations of the

document production obligations as outlined in certain provisions in Schedule “N”. In particular, Canada has *inter alia*:

- (a) refused to provide certain documents that it obtained from the church entities in the course of the litigation on the basis of the implied undertaking rule;
- (b) refused to compile “archived” documents in an organized fashion;
- (c) failed to provide timely and unencumbered access to documents held by *Library and Archives Canada*;
- (d) failed to produce documents from any government department other than Aboriginal Affairs and Northern Development Canada (“AANDC”); and,
- (e) failed to provide a list, particularized or otherwise, of documents over which solicitor-client privilege, Cabinet Confidences, and/or secrecy is claimed.

8. The Commission has used its best efforts to resolve the disputes regarding the provision of documents.
9. The Commission has a serious interest in these issues, as the Commission is required to complete its mandate by July 1, 2014. The document production difficulties are sufficiently serious that the Commission’s ability to fulfill its mandate within the prescribed time and within its budget is now in jeopardy.
10. The Commission seeks judicial interpretations and guidance in respect of the document production terms of Schedule “N”, in order that it may complete its mandate in an expeditious and efficient manner.
11. Order in Council, PC 2008-0793.
12. The Ontario *Rules of Civil Procedure*, in particular, Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure*.

13. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

1. The Affidavit of Tom McMahon, General Counsel, Truth and Reconciliation Commission, dated March 29, 2012; and
2. The Reply Affidavit of Tom McMahon, dated June 19, 2012;
3. The Affidavit of Donald Worme, Q.C., dated March 10, 2012;
4. Such further and other material as counsel may advise and this Honourable Court permit.

DATE: March 2, 2012

Falconer Charney LLP

Barristers-at-law
8 Prince Arthur Avenue
Toronto, Ontario,
M5R 1A9

Julian N. Falconer (LSUC 29465R)
Julian K. Roy (LSUC 36894G)

Tel: (416) 964-3408
Fax: (416) 929-8179
Lawyers for the Applicants