

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**LARRY PHILIP FONTAINE** in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOISAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

-and-

**THE ATTORNEY GENERAL OF CANADA**, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASKA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. - LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON- THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE -ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE - THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMLACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

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**FACTUM OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA**  
**(Re: St. Anne's Residential School)**

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## **PART I: OVERVIEW**

1. This Request for Direction is about whether the Truth and Reconciliation Commission of Canada (the “**Commission**”) will be provided with certain records that are central to its mandate, and that are acknowledged to be in the possession of Canada. At issue is whether Canada is required to produce to the Commission the records (the “**records**”) in its possession regarding an investigation by the Ontario Provincial Police (the “**OPP**”) into abuse at St. Anne’s residential school in Fort Albany.
2. The incidents of physical and sexual abuse at St. Anne’s residential school are egregious. They include reports of the use of an electric chair and ill children being forced to eat their own vomit.
3. The OPP’s investigation spanned four years and led to the collection of numerous statements from victims and witnesses as well as the creation of databases and the seizure of nearly 7,000 documents from The Oblates and other sources, among other documents.
4. Canada first acknowledged having possession of the records in June 2013. Until then, the documents furnished to the Commission did not specifically mention the existence of the records, despite Canada’s obligations under the Settlement Agreement to produce all relevant documents to the Commission. Since then, the Commission has unsuccessfully attempted to obtain the records from Canada.
5. The Commission submits that the records are relevant and that they are in the possession or control of Canada. Therefore, the records must be produced to the Commission pursuant to Schedule “N” of the Indian Residential Schools Settlement Agreement (the “**Settlement Agreement**”) dated May 8, 2006.

6. The records are unquestionably relevant to the mandate of the Commission. The Commission is of the view that the records relate to “the effect and consequences of residential schools (including systemic harms, intergenerational consequences and the impact on human dignity)”, and in particular, the sexual and physical abuse suffered by students at St Anne’s Residential School.<sup>1</sup> Moreover, because of the significance of the abuse that occurred at St. Anne’s residential school, the records shed light on an important aspect of the history of residential schools in Canada. Canada does not appear to dispute relevance.

7. Canada admits to having possession of the records. However, Canada contends that the records are not producible because they are protected by the implied undertaking rule.

8. The Commission submits that the implied undertaking rule does not apply to the records. This is because the implied undertaking rule only prevents the use of the fruits of production and/or discovery from one proceeding in a different, unrelated proceeding. The Commission requests the records in the context of the very same litigation in which they were obtained from the OPP. As such, the implied undertaking rule does not apply.

9. Even if the implied undertaking rule applied to the records, it does not prevent the production of the records to the Commission. The public interest in disclosing the records, namely the fulfillment of the Commission’s mandate, outweighs the public interest in the efficient conduct of civil litigation and any privacy interest of the OPP as a non-party to the litigation.

10. The Commission therefore submits that this Honourable Court ought to order, subject to the Commission’s obligation to comply with applicable privacy legislation, that the records be produced.

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<sup>1</sup> Schedule “N” of the Settlement Agreement.

## **PART II: FACTUAL OVERVIEW**

### **A. Indian Residential Schools**

11. Between the 1860s and 1990s more than 150,000 First Nations, Inuit and Métis children were required to attend Indian Residential Schools, institutions largely operated by religious organizations under the funding of the federal government.

12. Numerous allegations of sexual and physical abuse led to thousands of former students taking legal action in the mid-1990s. The former students sought compensation for injuries and for loss of language and culture. Several large class action suits were brought forward in the hopes of seeking redress for the former students and judicial recognition for the harms they suffered. These class actions culminated in the historic Settlement Agreement and the formation of the Commission.

### **B. Abuse at St. Anne's Residential School**

13. St Anne's residential school in Fort Albany, Ontario is the site of some of the most egregious allegations of abuse within the Indian Residential School system. It is alleged, for example, that an electric chair was used to electrocute students as young as six years old. Furthermore, it is alleged that staff at St Anne's residential school would force ill students to eat their own vomit. There are numerous other allegations of physical and sexual abuse.

### **C. The OPP Investigation**

14. The OPP began its investigation of St. Anne's residential school in 1992 and completed it in 1996. The investigation led to charges against eight alleged perpetrators based on the

evidence of 23 witnesses.<sup>2</sup> Over the course of its investigation, the OPP obtained and created a voluminous collection of documents regarding St. Anne's residential school and the abuses that took place there.

15. The records are highly relevant to the IRS system and legacy. For example, the records include statements of former residential school students, OPP databases produced over the course of the investigation and documents of The Oblates and other sources in respect of St. Anne's residential school seized by the OPP.<sup>3</sup>

#### **D. Canada Obtained Possession of the Records**

16. In 2003, Canada was mired in litigation arising from claims of 152 former students at St. Anne's residential school. During the course of this litigation, Canada moved to have the OPP records produced on the basis that the records were "relevant and necessary" to the adjudication of the claims and that it would be "unfair" to require Canada to proceed to trial without production of the records.<sup>4</sup>

17. On August 1, 2003, the Honourable Mr. Justice R. G. Trainor of the Ontario Superior Court of Justice issued an order regarding the production of the records to Canada. With respect to the OPP files that relate to the plaintiffs, Justice Trainor ordered that counsel for the parties have an opportunity to inspect and copy the contents of the files. With respect to the OPP files that relate to non-plaintiffs, Justice Trainor ordered that a mutually convenient date and means of obtaining copies of the documentation relating to non-plaintiffs was to be arranged between Canada and the OPP.

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<sup>2</sup> Affidavit of H. Sheikh at para. 17

<sup>3</sup> As parties to the Settlement Agreement, the Catholic entities are subject to the same document production obligation as Canada. Accordingly, these documents sought by the Commission would be producible directly to the Commission by the Catholic entities.

<sup>4</sup> Notice of Motion of the Crown Defendant at p. 29

**E. Canada Failed to Disclose it has Possession or Control of the Records**

18. The Attorney General of Canada first acknowledged publicly that Canada was in possession or control of the records in June 2013.<sup>5</sup>

19. Canada's admission came on the heels of repeated assertions by former residential school students at Independent Assessment Process ("IAP") hearings that the St Anne's residential school narratives were incomplete. Canada prepares a report on each residential school in respect of which IAP claims are made. These reports are known as narratives. Since December 2012, counsel to the claimants have stated to IAP adjudicators that the St Anne's residential school narrative was incomplete. Counsel to the claimants argued that the narrative was missing crucial information about the OPP investigation and criminal proceedings.

20. On August 20, 2012, Canada produced a list of documents held by the Attorney General of Canada to the Commission in connection with its document production obligations. In this document, Canada indicated that it possessed documents relating to ongoing litigation regarding St. Anne's residential school and asserted privilege with respect to these documents. Canada did not particularize that it was in possession of, and was asserting privilege in relation to, the records (i.e. the criminal investigation records of the OPP).

21. In June 2013, Canada acknowledged that it was in possession of the records in an email from the Federal government to counsel to the claimants, Sack Goldblatt Mitchell LLP.<sup>6</sup>

22. In correspondence dated August 27, 2013, Falconers LLP, counsel to the Commission, requested that Canada produce the records or advise the Commission as to the basis upon which Canada refused to produce the records.

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<sup>5</sup> Amended Request for Direction of the Claimants dated September 25, 2013 at para 6.

<sup>6</sup> Factum of the IAP Claimants at paragraph 176.

23. In correspondence dated September 12, 2013, Catherine A. Coughlan, General Counsel of the Department of Justice Canada Prairie Region, advised that Canada would not produce the records on the basis that the records are subject to an implied undertaking not to use the documents for any purpose other than the litigation or pursuant to the express terms of the third party production order of the Ontario Superior Court of Justice.

**F. The Commission Attempted to Obtain the Records from the OPP**

24. Separately, the Commission attempted to obtain the records directly from the OPP. In correspondence dated October 31, 2013, The Honourable Justice Murray Sinclair, Chair of the Commission, wrote to Chris D. Lewis, the Commissioner of the OPP, requesting that the records be provided to the Commission in the spirit of reconciliation. As of December 3, 2013, the OPP has not responded to the Commission's request.

**PART III: ISSUES**

25. Are documents relating to the OPP investigation into abuse at St. Anne's residential school in Fort Albany relevant to the Commission's mandate?

26. Are the documents in the possession or control of Canada i.e. does the implied undertaking rule apply to the documents *vis-à-vis* the Commission?

27. In the event that the implied undertaking rule is applicable, are there sufficient grounds to make an order pursuant to Rule 30.1.01(8) as a result of the compelling public interest in the production of the records to the Commission?

## **PART IV: LAW AND ANALYSIS**

### **A. Overview**

28. The Commission submits that the records are relevant to the Commission's mandate. Furthermore, the records are in the possession of Canada and the implied undertaking rule does not apply.

29. Even if the implied undertaking rule applies to the records, the Commission submits that this Honourable Court has jurisdiction to order that the implied undertaking rule does not apply to the production of the records to the Commission pursuant to Rule 30.1.01(8) of the *Rules of Civil Procedure*, which codifies and qualifies the common law implied undertaking rule.

30. In addition, there is no countervailing privacy interest of the former students or the OPP that would prevent the application of Rule 30.1.01(8). This is because the Commission is subject to federal privacy legislation. Furthermore, the National Research Centre, which will hold the documents collected by the Commission relating to residential schools pursuant to the Settlement Agreement, is subject to provincial privacy legislation.

### **B. The OPP Investigation Documents are Relevant to the Commission's Mandate**

31. The Commission submits that the records are relevant to the Commission's mandate of identifying sources and creating as complete a record as possible of the IRS system and legacy.<sup>7</sup>

32. Section 11 of the Settlement Agreement provides that "[i]n order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents

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<sup>7</sup> Schedule "N" of the Settlement Agreement at s. 1(e).



in their possession or control” to the Commission, subject to applicable privacy legislation. As such, Canada is obligated to produce “all relevant documents” to the Commission.

33. In *Fontaine v. Canada (Attorney General)*, Justice Goudge (sitting as a Judge of the Ontario Superior Court of Justice) ruled on Canada’s obligations in respect of relevant documents at Library and Archives Canada. Justice Goudge ruled that access by the Commission to “the information needed to prepare an historical record and a report is obviously a critical precondition” for the Commission to discharge the parts of its mandate relating to the creation of an archive.<sup>8</sup> Justice Goudge referred to section 11 of Schedule “N” of the Settlement Agreement and further held that “relevant documents are those that are reasonably required to assist the [Commission] to discharge its mandate”.<sup>9</sup> In defining relevance, Justice Goudge focused on the following aspects of the Commission’s mandate, delineated in section 1 of Schedule “N” of the Settlement Agreement:

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools[.]<sup>10</sup>

34. The information contained in the records falls within the core of the Commission’s mandate. The records include: (i) approximately 1000 signed statements of former students that specify the abuses they suffered or that they witnessed; (ii) expert medical evidence regarding

<sup>8</sup> *Fontaine v. Canada (Attorney General)* 2013 ONSC 684, 114 O.R. (3d) 263 at para 61.

<sup>9</sup> *Fontaine v. Canada (Attorney General)* 2013 ONSC 684, 114 O.R. (3d) 263 at para 80.

<sup>10</sup> Schedule “N” to the Settlement Agreement at paras 1(e) and (f).

the harms arising from residential school supervisors forcing ill children to eat their own vomit; (iii) OPP database records; (iv) OPP charts summarizing allegations against each supervisor; (v) Crown disclosure given to counsel to [REDACTED] and [REDACTED] in relation to the criminal trials; and (vi) approximately 7,000 documents seized by the OPP from The Oblates and other sources about operations at St Anne's residential school.

35. In support of Canada's 2003 motion to compel the disclosure of the records, Canada relied on an affidavit of Haniya Sheikh. At the time, Haniya Sheikh was counsel employed with the Department of Justice Canada. In her affidavit, Ms. Sheikh made a number of assertions that suggest that the records are highly relevant to the IRS system and legacy. She noted that the records would include interviews of perpetrators who had since become ill or passed away and that similar interviews of perpetrators that her office later conducted yielded information "about the school and how it was run at the various periods of time".

36. Ms. Sheikh also stated that Detective Constable Delguidice of the OPP advised her that to the best of his recollection, the OPP received "approximately 860 complaints and collected 992 witness statements" and that as a result of this investigation, "charges were laid against eight alleged perpetrators based on the evidence of 23 witnesses".<sup>11</sup>

37. Finally, Ms. Sheikh noted that the records will provide "additional information about the alleged abuses suffered and/or whether complaints were made to the staff or members of the Church".<sup>12</sup>

38. The records are unquestionably relevant to the Commission's mandate. The Commission is of the view that the records relate to "the effect and consequences of residential schools (including systemic harms, intergenerational consequences and the impact on human dignity)",

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<sup>11</sup> Affidavit of H. Sheikh at para. 17.

<sup>12</sup> Affidavit of H. Sheikh at para. 18.

and in particular, the sexual and physical abuse suffered by students at St Anne's Residential School.<sup>13</sup>

39. The records would also provide insight into the operation and supervision of St. Anne's residential school, and would document the specific forms of abuse inflicted upon students. It had been reported that electrocution and forcing children to eat their vomit were some of the forms of abuse endured by former students. The records may document other forms of abuse.

40. Finally, the records also show the extent of abuse inflicted by individual supervisors. Information about the impact of such abuse on direct victims and on indirect victims of abuse, *i.e.* the former students who witnessed the abuse, might also be provided in the records.

### **C. The Records are in the Possession or Control of Canada**

41. In order to trigger Canada's obligation to produce the records, it must be shown that the documents are in Canada's possession or control. *Fontaine v. Canada (Attorney General)* provides some guidance as to what documents fall within the ambit of Canada's production obligations. In this case, Justice Goudge ruled that the documents held at Library and Archives Canada, a government department, are clearly in Canada's possession or control.

42. The Commission's position is that Canada is in possession of the records and that they must therefore be produced to the Commission pursuant to the terms of the Settlement Agreement.

43. Canada admitted to being in possession of at least a portion of the records by correspondence to the Commission dated September 12, 2013.

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<sup>13</sup> Section 1(f) of Schedule "N" to the Settlement Agreement

(i) **The Records are not Subject to the Implied Undertaking Rule**

44. In correspondence dated September 12, 2013, the Department of Justice Canada, refused to produce the records to the Commission. In doing so, the Department of Justice Canada stated that the “documents remain OPP documents and are subject to the implied undertaking not to use the documents for any other purpose and the express terms of the Order”.

45. The deemed undertaking rule at rule 30.1.01(e) of the *Rules of Civil Procedure* is the codification of the common law implied undertaking rule in Ontario. It states that:

All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

46. The Commission submits that the deemed undertaking rule does not prevent Canada from producing the records to the Commission because it does not apply to the records for three reasons.

47. First, the codified expression of the implied undertaking rule at Rule 30.1.01(e) states that the evidence or information cannot be used for any purpose “other than those of the proceeding in which the evidence was obtained”. The proceeding by which Canada obtained the records is the same proceeding as that in which the Commission seeks production of the records.

48. Justice Trainor ordered that the OPP produce the records in class proceedings between former students of St. Anne’s residential school and Canada. The settlement of those proceedings culminated in the Settlement Agreement pursuant to which the Commission now demands that the records be produced.

49. *Fantl v. Transamerica Life Canada* provides authority for the proposition that a court’s supervisory jurisdiction over a class action “continues through the ‘stages’ of the proceeding

until a final disposition, including the implementation of the administration of a settlement”.<sup>14</sup> This suggests that the adjudication of the class action and the administration of the settlement are one and the same proceeding. As is evident from Justice Winkler’s decision in *Fantl*, a class action proceeding continues throughout the administration of a settlement agreement until final implementation. As such, the residential school class action will not be completed until the work of the Commission, and the IAP, has ended.

50. The deemed undertaking rule is therefore inapplicable because the records Canada has withheld are to be produced to the Commission within the same “proceeding in which the evidence was obtained”.

51. Second, the deemed undertaking rule only prohibits the use of documents for purposes unrelated or extraneous to the litigation in which the documents were produced. The use of the records by the Commission cannot in any sense be characterized as unrelated or extraneous to the litigation. The use of the records by the Commission falls squarely within the purposes of the litigation in which they were produced by the OPP to Canada: the resolution of claims of abuse by former students at St. Anne’s residential school. In other words, the Commission was created with the intention of fulfilling a settlement of the very litigation through which the records were produced.

52. Third, Schedule “N” of the Settlement Agreement provides that the parties will produce “all relevant documents in their possession or control”. Canada expressly agreed to provide all documents in its possession or control to the Commission. The only exception to this obligation is in respect of solicitor client privileged documents. In particular, no reservation or limitation was included in the Settlement Agreement to limit Canada’s obligation to produce relevant documents in their possession based on how the documents came into their possession or control.

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<sup>14</sup> See e.g. *Fantl v. Transamerica Life Canada*, (2009), 95 OR (3d) 767; 249 OAC 58 (ON CA) at para 39.

53. If the parties to the Settlement Agreement intended to have the implied undertaking rule apply to the disclosure of the records to the Commission, they would have used the expression “possession and control” and not “possession or control”. Possession or control is a lower threshold for the production of records than possession and control. More to the point, if the Settlement Agreement used the expression “possession and control” then Canada’s document production obligation could be interpreted as being subject to the implied undertaking rule. This is because a party can only be said to have possession but not control when it obtains documents pursuant to documentary discovery. Accordingly, though Canada does not have control over the records, it is in possession of the records and Canada is required to produce the records pursuant to the terms of the Settlement Agreement which provides that Canada will produce “all relevant documents in [its] possession or control”.<sup>15</sup>

(ii) **There are Sufficient Grounds to Make an Order Pursuant to Rule 30.1.01(8) as a Result of the Compelling Public Interest in the Production of the Records**

54. The Commission submits that even if the deemed undertaking rule applies to the records, the interest of justice outweighs any prejudice that would result to the OPP if the records were produced to the Commission. Therefore, if this Honourable Court finds that the deemed undertaking rule applies to the records, it should order that, pursuant to Rule 30.1.01(8) of the *Rules of Civil Procedure*, the deemed undertaking rule does not apply to bar production of the records to the Commission.

55. Rule 30.1.01(8) provides that

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<sup>15</sup> Schedule “N” of the Settlement Agreement at s. 11.

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that sub-rule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

56. In *Juman v. Doucette*, the Supreme Court of Canada held that “[t]he undertaking is imposed in recognition of the examinee’s privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest”.<sup>16</sup>

57. The Court continued and held that “[a]n application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation”.<sup>17</sup>

58. The deemed undertaking should give way to the “more compelling public interest” represented by the work of the Commission.<sup>18</sup> The mandate of the Commission to create as complete an historical record as possible of the residential school system and legacy is a critical component of an agreement that was intended to “contribute to truth, healing and reconciliation” and to “establishing new relationships embedded in mutual respect that will forge a brighter future”.<sup>19</sup> Not only are these goals profoundly in the public interest, they were adopted by Canada through its execution of the Settlement Agreement.

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<sup>16</sup> *Juman v. Doucette*, 2008 SCC 8, [2008] 1 SCR 157, 290 DLR (4th) 193 at para. 30.

<sup>17</sup> *Juman v. Doucette*, 2008 SCC 8, [2008] 1 SCR 157, 290 DLR (4th) 193 at para. 32.

<sup>18</sup> *Juman v. Doucette*, 2008 SCC 8, [2008] 1 SCR 157 at para. 30.

<sup>19</sup> Schedule “N” of the Settlement Agreement.

(iii) **There is no Countervailing Privacy Interest of the Former Students or the OPP that Would Prevent the Application of Rule 30.1.01(8)**

59. There is no countervailing privacy interest that would justify maintaining the deemed undertaking. The Settlement Agreement requires the Commission, and thereafter the National Research Centre, respectively, to comply with federal and provincial privacy legislation. This means that, the privacy interests of complainants, witnesses and/or alleged perpetrators will continue to benefit from the protection that the law permits in relation to documents in the possession of government.

60. As with all other records of the Commission, the OPP records produced by Canada to the Commission and the National Research Centre would be subject to stringent privacy regulation.

Section 2(a) of Schedule “N” of the Settlement Agreement provides that the Commission is:

authorized and required in the public interest to archive all such documents, materials and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation. (emphasis added)

61. Section 2(j) of Schedule “N” of the Settlement Agreement further states that the Commission shall not:

[e]xcept as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual’s express consent.

62. The Commission and the National Research Centre were created with the knowledge that they would be the repositories of highly sensitive information about a traumatic period in the lives of many First Nation, Inuit and Métis people. Accordingly, Canada’s concerns about the



privacy of complainants to the OPP are misplaced. The Commission and the National Research Centre are respectively bound by federal and provincial privacy and access legislation.

63. As such, the public interest in preserving privacy and in the efficient conduct of civil litigation would not be defeated by denying the application of the deemed undertaking rule to the production of the records to the Commission.

64. For these reasons, the Commission submits that the deemed undertaking rule does not apply to the records. If this Honourable Court nonetheless finds the opposite to be true, the public interest in the production of the records to the Commission outweighs Canada's interest and the OPP's interest, if any, in withholding disclosure of the records.

#### **PART V: ORDER REQUESTED**

65. The Commission respectfully requests that this Honourable Court order Canada to fulfill its obligations under the Settlement Agreement and produce to the Commission any and all records in its possession or control in relation to the criminal investigation into the events at St. Anne's residential school.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3<sup>RD</sup> DAY OF DECEMBER, 2013.

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**SCHEDULE “A” – LIST OF AUTHORITIES**

1. *Fontaine v. Canada (Attorney General)* 2013 ONSC 684, 114 O.R.
2. *Fantl v. Transamerica Life Canada*, (2009), 95 OR (3d) 767; 249 OAC 58 (ON CA).
3. *Juman v. Doucette*, 2008 SCC 8, [2008] 1 SCR 157; 290 DLR (4th) 193.

**SCHEDULE “B” – LEGISLATION**

**RULE 30.1 DEEMED UNDERTAKING**

**APPLICATION**

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
  - (i) Rule 30 (documentary discovery),
  - (ii) Rule 31 (examination for discovery),
  - (iii) Rule 32 (inspection of property),
  - (iv) Rule 33 (medical examination),
  - (v) Rule 35 (examination for discovery by written questions); and
- (b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1). O. Reg. 61/96, s. 2.

***Deemed Undertaking***

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.

***Exceptions***

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents. O. Reg. 61/96, s. 2.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

- (a) evidence that is filed with the court;
- (b) evidence that is given or referred to during a hearing;
- (c) information obtained from evidence referred to in clause (a) or (b). O. Reg. 61/96, s. 2.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding. O. Reg. 61/96, s. 2.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action). O. Reg. 61/96, s. 2.

***Order that Undertaking does not Apply***

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just. O. Reg. 61/96, s. 2; O. Reg. 263/03, s. 3.