

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**REQUEST FOR DIRECTION**

BETWEEN:

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

Plaintiffs

-and-

**THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODISTCHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE**

**METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE 2 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 JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ 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 MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.**

Defendants

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992. C.6

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## **REQUEST FOR DIRECTION**

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### **1. PARTY REQUESTING DIRECTIONS**

This request for directions is being brought by the Truth and Reconciliation Commission (the “Commission”).

### **2. THE MATTER IN ISSUE**

By way of overview, the Commission seeks this Honourable Court's guidance through judicial interpretation of express terms set out in the Indian Residential Schools Settlement Agreement (the “Settlement Agreement”) on questions relating to the Commission's document collection mandate and the corresponding document production obligations of the Defendant Canada.

### **3. RELIEF REQUESTED**

The Commission respectfully requests this Honourable Court determine 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) A determination of the application of section 8(2) of the *Privacy Act*, R.S.C. 1985, c. P-21 which is being raised by Canada as an impediment to the complete production of all relevant documents in the respondent's possession despite the Commission's status as a federal department governed by the applicable privacy and freedom of information legislation;
- (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 that incorporates as Schedule N the mandate of the Commission;
- (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 that incorporates as Schedule N the mandate of the Commission;
- (E) An interpretation of the provisions of Order in Council PC 2008-0793 that incorporates as Schedule N the mandate of the Commission 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;
- (F) A declaration that Canada is in breach of its obligation to provide all relevant documents pursuant to Order in Council PC 2008-0793 that incorporates paragraph 11 of Schedule N of the Settlement Agreement;

- (G) An order that Canada comply with its obligations to provide all relevant documents in an organized manner pursuant to Order in Council PC 2008-0793 that incorporates paragraph 11 of Schedule N of the Settlement Agreement;
- (H) 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;
- (I) 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;
- (J) 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;
- (K) An order that all issues of document production by Canada to the Commission be subject to case management by Chief Justice Winkler or his designate, with case management appointments every sixty days until such further order is made;
- (L) An order that Canada comply with a schedule for the provision of documents to the Commission pursuant to Order in Council PC 2008-0793 that incorporates paragraph 11 of Schedule N of the Settlement Agreement;
- (M) 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 that incorporates Schedule N of the Settlement Agreement;
- (N) The costs of this proceeding; and
- (O) Such further and other relief as counsel may advise at this Honourable Court may permit.

#### **4. RELIEF IS OPPOSED**

Canada opposes the relief sought.

## **5. THE POSITION OF THE PARTIES**

### **The Commission's Position**

1. The Commission takes the position that Canada is failing to fulfil its document production obligations as outlined in Schedule "N" of the Settlement Agreement. 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.
  
2. 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.

3. 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.
4. The Commission has used its best efforts to resolve the disputes regarding the provision of documents.
5. 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.

6. 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.

### **Canada’s Position**

7. Canada takes the position that it is fulfilling its document production obligations to the Commission as outlined in Schedule “N” of the Indian Residential Schools Settlement Agreement. Canada has produced some 936,114 documents to date and continues to make disclosure of documents as they become available.
8. Canada anticipates that 23 government departments may ultimately produce relevant documents to the Commission in the coming months. Those departments are reviewing their documents and will provide inventories to the Commission of potentially relevant documents.
9. While Canada takes the position that documents acquired from third parties as a result of past litigation are subject to an implied undertaking not to disclose, Canada has sought waivers from third parties to disclose the acquired documents. Canada has received waivers from all but 10 church parties and has disclosed the third party documents where permissible.
10. In December, 2011, A Memorandum of Understanding was executed as between the Minister of Indian Affairs and Northern Development Canada and the Commission granting the Commission’s researchers Departmental Researcher Status giving them access to Canada’s archives held a Library and Archives Canada. A further nine departments have similarly provided Memorandums of Understanding to the Commission for that purpose.



11. Canada further takes the position that notwithstanding the parties to the Settlement Agreement and the Commission having failed to agree upon a definition of the term “relevant” as used in Schedule “N” of the Settlement Agreement, its document production accords with the spirit and intention of Schedule “N”.
12. Canada notes that the Commission has not followed the dispute resolution process as required under subsection 2(1) of Schedule “N” to the Settlement Agreement which provides that the Commission “may refer to the NAC for determination of disputes involving document production, document disposal and archiving...”nor did the Commission “...make best efforts to resolve the matter itself before referring it to the NAC” as mandated by subsection 2(1) of Schedule “N”.
13. Having regard to Canada’s document production efforts to date, Canada says this application is premature and respectfully requests that the relief requested by the Commission be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5<sup>th</sup> DAY OF APRIL, 2012

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**LARRY PHILIP FONTAINE et al.**  
**Plaintiffs**

**-and-**

**THE ATTORNEY GENERAL OF CANADA et al.**  
**Defendants**

Court File No. 00-CV-192059

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

**Proceeding commenced at Toronto**

**REQUEST FOR DIRECTION**

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