

Court of Appeal File No.: 59310
Court of Appeal File No.: 59311
Court of Appeal File No.: 59320

COURT OF APPEAL FOR ONTARIO

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
(Respondents in Appeal)

-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 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 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, OMILACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants
(Appellants and Respondents in Appeals and Cross-Appeals)

- and -

PRIVACY COMMISSIONER OF CANADA

Intervener

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

UPDATED REPLY FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE RESPONDENT, ASSEMBLY OF FIRST NATIONS TO THE CROSS-APPEALS

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OVERVIEW

1. These are the submissions of the Respondent, the Assembly of First Nations (“**AFN**”) in Reply to the Facta of the Cross-Appellants: the Attorney General of Canada (“**Canada**”); the Truth and Reconciliation Commission (“**TRC**”); the National Centre for Truth and Reconciliation (“**NCTR**”); and Independent Counsel.
2. Contrary to the positions outlined in the facta of Canada, TRC and NCTR, the Cross-Appellants’ arguments that the federal privacy legislation conforms to the Indian Residential Schools Settlement Agreement (“**Settlement Agreement**”), protects confidentiality of the Independent Assessment Process (“**IAP**”) and safeguards the privacy interest of all individuals involved, the AFN submits there are limits to the level of privacy protection under federal legislation. The degree of protection offered under the *Privacy Act* falls short of the level of privacy and confidentiality provisions of the Settlement Agreement and the promises of confidentiality made to IAP Claimants.
3. Canada’s and the TRC’s assertion that all IAP records and documents are government documents is incorrect. Canada’s assertion ignores the fact that the IAP is not a government program and is not under Canada’s control. Rather, the IAP is a court ordered process created to resolve claims of serious physical and sexual abuse and other wrongful acts. As such, IAP records and documents are governed by the court orders, and not by federal legislation.

4. The AFN submits the Motions Judge was correct in ruling that IAP records are confidential, generated for purposes outside a government program and subject to the court's jurisdiction. The Motions Judge made the only reasonable decision available in that IAP records can only be archived or disclosed on the terms agreed to by the parties in the Settlement Agreement, which requires the consent of IAP claimants.

5. The AFN submits that the Supervising Judge was correct on each of the following issues:
 - i. IAP documents are to be destroyed upon completion of an IAP claim and/or after expiry of a 15 year retention period.
 - ii. IAP documents were not government records under the control of a government institution.
 - iii. A court-approved notice plan with respect to IAP documents to be developed to permit claimants the option to consent to the transfer of the documents to the NCTR.
 - iv. The destruction of IAP documents is an express or implied term of the IRSSA.
 - v. The Agreement for the Transfer of Archival Records signed August 7, 2012, its Appendix, and the *Records Disposition Authority (ROA) 20111010* between Aboriginal Affairs and Northern Development Canada ("**AANDC**") and Library and Archives Canada ("**LAC**") was null and void.

6. The reply factum of the Assembly of First Nations (“**AFN**”) will address the following issues raised in the submissions of various parties:

- A. The Privacy and LAC acts do not apply to IAP records
- B. Documents generated for the IAP are not government;
- C. The IRSSA contemplates destruction of the IAP records;
- D. Deemed undertaking;
- E. Breach of confidence;
- F. Court has jurisdiction over records;

A. THE PRIVACY AND LAC ACTS DO NOT APPLY TO IAP RECORDS

7. The Motions Judge determined that the *Privacy Act*, the *Access to Information Act* and the *Library and Archives Canada Act* applied in a limited manner to the IAP Documents on the basis that the IRSSA mentioned this legislation.¹ The Motions Judge closely relied on the IAP Application Guide to reach this conclusion.

8. The AFN submits that IAP Application Guide is not part of the Settlement Agreement. Its purpose is to provide guidance to assist one in completing an IAP application. As such, reference to federal privacy legislation in the IAP Application Guide does not form part of the agreement by the Parties to the Settlement Agreement.

¹ Decision, at paras 309-323, Joint Compendium of Documents, Vol 1, Tab 4, pgs. 76-79.

9. Canada asserts at paragraph 70 of its factum that it would be an “absurd result to find that the *Privacy Act* and the *Access to Information Act* apply on a partial and limited basis only to a retention period arbitrarily created by Justice Perell. Further, this contradicts the legislation”.
10. The AFN is of the view that Canada, like any other organization, has internal processes to inventory and protect confidential information it receives. Many organizations routinely apply their own policies on retention and protection to any documents that come into their office. In doing so, it does not change the nature of any documents outside their organization or the ownership/position of the originator. The AFN submits that this paradigm applies to the IAP. That Canada was applying its own privacy policies to guide its employees on processing IAP applications.
11. The AFN submits that Canada is reaching too far in asserting that where Canada chose to apply its own privacy regime to IAP documents it received from third parties, that all such documents would now fall under federal privacy legislation. This is not correct and contrary to the Settlement Agreement.
12. Federal privacy legislation is mentioned once in the Application Form whereby IAP Claimants give permission to LAC and AANDC to research their claim. The application provides the following:

I give my permission to the Library and Archives of Canada, Indian and Northern Affairs Canada, and any other federal, provincial or territorial government department having records relevant to my claim to share them with Indian Residential Schools Resolution Canada. This permission will allow the government to research my claim.

I understand that my personal information, including the details of any claim of abuse, may be shared with the government, the decision-maker, any participating church organizations, person(s) I identify as having abused me, and witnesses. Information provided to the person(s) I identify as having abused me and witnesses will not include my contact details or other information not relevant to their role in the claim, unless I want it to be shared. [Emphasis added]

13. The above noted provision simply allows government to search its historical records to verify the IAP applicant attended an Indian Residential School, Persons of Interest were working/present at the said school during the alleged timeframes, and/or any other pertinent information.² Nowhere in the application does an individual consent to their IAP Application and other documents to be deposited in LAC.

14. Schedule D mentions the *Privacy Act* only once where Canada's obligation to disclose existing government records relevant to a particular IAP claim is described.

The section provides:

Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the Privacy Act.³
[Emphasis added]

15. The Appendix VIII covers documents in Canada's historical collection that contains an individual's personal information, requiring such information to be redacted to

² Schedule D, Appendix VIII: Government Document Disclosure, Joint Compendium of Documents, Vol 1, Tab 24, p. 361.

³ Schedule D, Appendix VIII: Government Document Disclosure, Joint Compendium of Documents, Vol 1, Tab 24, p. 361.

protect each person's personal information, "as required by the *Privacy Act*." There is no reference to LAC or the *Access to Information Act*. The provision allows Canada to produce historical government documents it already possesses and likely already stored in LAC for the purposes of the IAP. However, this provision does not purport to capture all new documents produced in the IAP under the *Privacy Act*.

16. Contrary to Canada's position, the Settlement Agreement contains a number of provisions relating to the protection of information created for the IAP. The federal privacy legislation conflict with these contractual provisions and obligations. Thus, federal privacy legislation cannot apply to IAP documents and records.
17. For instance, section 8 of the *Privacy Act* permits the disclosure of personal information without the consent of an individual. These include providing personal information to LAC for archival purposes, providing personal information to any person or body for research purposes, or where, in the opinion of the head of the institution, the public interest in disclosure outweighs any invasion of privacy.⁴
18. In addition, after a retention period of 2 years, a federal department may transfer their records to LAC for archiving or destruction. The *Privacy Act* provides that documents in the possession of LAC may be disclosed in accordance with the regulations to any person or body for research or statistical purposes. This includes

⁴ *Privacy Act*, ss. 8(2) (l), (j), (m)

the power to disclose any and all personal information 110 years after the birth of the individual concerned without any restriction.⁵

19. The Motions Judge recognized the sensitivity and hardship that may result in the release of the IAP records without the consent of IAP Claimants where only federal legislation applies:

I pause here to note that it is a matter of concern raised by AFN and several others that pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Privacy Act*, R.S.C. 1985, c. P-21, LAC would be able to release information to third parties in specific circumstances, for example for research for statistical purposes, for native claims, or in the public interest. Further, the regulations to the *Privacy Act* provide that an individual's personal information that is transferred to LAC by a government institution may be disclosed for research purposes 110 years after the birth of the individual. This concerns the AFN because many IAP Claimants are elderly and although personal information would not be disclosed while they are alive, personal information about them would be disclosed during the lifetimes of their children and grandchildren.⁶

20. These types of disclosures are not what the parties of the Settlement Agreement bargained for and are contrary to the interests of IAP Claimants. The AFN submits that the confidentiality provisions of the Settlement Agreement must prevail over federal legislation.

B. IAP DOCUMENTS ARE NOT GOVERNMENT DOCUMENTS

21. Canada and the TRC assert that IAP Records are "government records" under Canada's control, as Canada currently has within its possession copies of the entire

⁵ *Privacy Act*, ss. 8(3), *Privacy Regulations*, s. 6 and 7

⁶ Decision at para 15, Joint Compendium of Documents, Vol 1, Tab 4, pgs. 29-30.

corpus of the IAP records currently in existence. Canada further asserts that if all pre-existing government records that form a significant part of the IAP records are documents in Canada's possession "and control", it follows that all additional documents created as a result of the IAP will be documents in Canada's possession "and control".

22. Canada assertion goes too far and is unfounded. The Courts have concluded that while physical possession is important, it is not the determining factor and possession of documents may not always lead to a finding of control.⁷

23. The IAP is either the commencement or a continuation of litigation.⁸ Where Canada obtains possession of documents as a result of litigation, Canada is limited in how it may use such records as a result of the court process or a specific court order and those records are not records in control of a government institution.

24. Canada and the TRC further refer to Canada as the administrator of the IAP, as Canada is required to provide supports to the Chief Adjudicator through the IRSAS. The IAP, however, is not a government program. Rather it is a component of a litigation settlement agreement between the multiple parties, given effect through a court order. Schedule D provides a customized adjudicative proceeding for the resolution of claims of serious physical abuse, sexual abuse or other wrongful acts

⁷ Ontario (Divisional Court) v. Ontario (Attorney General), 1997 CanLII 3017 (ON CA); documents in the possession of individual committee members were not under the control of the Ministry.

⁸ *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, at paras 183-84 Joint Book of Authorities, Vol 2, Tab 45.

suffered while attending an Indian Residential School covered under the IRSSA. The IAP is a private and confidential process.

25. The Chief Adjudicator directs the IAP Secretariat's operations and oversees all IAP hearings. The Chief Adjudicator operates independent of Canada, and under the control of the court. The Chief Adjudicator is also accountable to the Oversight Committee established by the Settlement Agreement and reports to the Courts on all aspects of the operation and implementation of the IAP.

26. The independence of the Chief Adjudicator was required by the court as a precondition of the approval of the Settlement Agreement. In *Baxter v. Canada*.⁹

The Court stated:

The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.¹⁰

27. The independence of the Chief Adjudicator and the IRSAS is relevant in assessing whether the IAP Records held by the IAP Secretariat are under AANDC's control and the AFN submits that this is the determinative factor.

⁹ *Baxter v. Canada (Attorney General)* 2006 CanLII 41673 (ON SC), Joint Book of Authorities, Vol 1, Tab

7.

¹⁰ *Ibid*, at para 39, Joint Book of Authorities, Vol 1, Tab 7.

28. The AFN submits that the independence of the Chief Adjudicator and the IAP process from AANDC supports the argument that IAP records are not under AANDC's control and therefore not subject to the *Privacy Act*.

C. SETTLEMENT AGREEMENT REQUIRES DESTRUCTION OF IAP RECORDS

29. Canada, the TRC and the NCTR appeal the Motions Judge's finding that the Settlement Agreement contained an implied term that the IAP documents be destroyed upon the completion of the process. The cross-appellants argue that the express terms of the Settlement Agreement do not permit the destruction of IAP Documents.

30. Canada and the TRC assert a correct interpretation of the Settlement Agreement would involve the archiving of IAP Records in LAC and that any subsequent disclosure of the IAP records be made pursuant to federal Legislation. Canada asserts the parties agreed the IAP records would be archived. Thus, the finding of an express or implied term that the records would be destroyed was in error.

31. The AFN disagrees with Canada's assertion. The guarantee of confidentiality was a prerequisite requirement for the AFN and other parties to sign the Settlement Agreement.¹¹

¹¹ *Affidavit of Larry Philip Fontaine, Joint Compendium of Documents, Vol 4, Tab 41, pgs. 1585-1586, paras. 15- 17; Affidavit of Sister Bonnie MacLellan, Joint Compendium of Documents, Vol 5, Tab 49, p.*

32. The AFN submits the Motions Judge was correct in finding that a term of the Settlement Agreement was that the IAP records would be destroyed when they were no longer necessary for the IAP. The Motions Judge correctly found that the parties intended destruction to occur and it is a necessary term to give the Settlement Agreement operative effect:

After a careful review of the background to the IRSSA, it can be presumed that the parties intended that the IAP Documents would be destroyed after the completion of the IAP. That implied term arises as a matter of necessity and to give the Agreement operative efficiency because otherwise the IAP's objective of compensating the survivors would fail, and failure is the worst kind of inefficiency.

Near to absolute confidentiality was a necessary aspect of the IAP. Near to absolute confidentiality meant that the IAP Documents would be used for the IAP only subject to very limited exceptions that necessitated that the documents be retained so that criminals and child abusers or those incapable of caring for their children would not escape the administration of justice. After these uses were completed, the confidentiality would become absolute and the IAP Documents would be destroyed. This approach to confidentiality is necessary to make the IAP work and this treatment of the IAP Documents is also necessary to not re-victimize the Claimants and to promote healing and reconciliation between the Claimants and Canada.¹²

33. The Motions Judge correctly rejected Canada's proposition that claimants knew that the IAP records could be retained by Canada and Canada would have sole discretion to decide which documents would be destroyed and which documents would be archived at LAC.

1983, para 39; *Affidavit of Rev. Britton sworn May 2, 2014*, Joint Compendium of Documents, Vol 4, Tab 44, p. 1604, para 2.

¹² Decision at paras 325-326, Joint Compendium of Documents, Vol 1, Tab 4, p. 79. Also see para 353, p.84.

34. Canada and the TRC fail to demonstrate a palpable and overriding error to support a request to set aside the Motions Judge's findings regarding the destruction of IAP records. Rather, Canada and the TRC contest the Motion Judge's finding on the assertion that references to the federal legislation should be interpreted in a manner that an implied term of destruction is inconsistent with the Settlement Agreement.
35. The AFN respectfully submits that this proposition has no merit. The Motions Judge was correct that the parties bargained for strong privacy protections. The AFN submits that the interests of the parties during the execution of the Settlement Agreement was the destruction of IAP records upon completion of the IAP, or the archiving of the IAP records where an IAP Claimant elects/consents to do so.

D. IMPLIED UNDERTAKING

36. Canada and the TRC challenge the Motions Judge's finding that the implied undertaking applies to IAP documents. Canada argues the implied undertaking is a court-made rule that was intended to ensure privacy over documents produced in the context of litigation until such time as the documents are produced in open court.¹³ The TRC argues that the deemed undertaking rule only applies to prevent the use of documents in other unrelated proceedings and bars production of documents exchanged by the parties in the "discovery phase" of a proceeding.¹⁴

¹³ Factum of the AGC at para 94.

¹⁴ Factum of the TRC at Paras 80 and 81.

37. The TRC further argues that the implied undertaking rule cannot operate as against the TRC in respect of documents exchanged between the parties as the undertaking does not preclude the use of evidence obtained in a proceeding being used in that same proceeding.¹⁵ In this respect the TRC relies on the decision in *St. Anne's*.¹⁶ The AFN submits that *St. Anne's #1* is distinguishable on the basis that the records in that case related to criminal investigations and trials, which would have been subject to the open court principle. The IAP documents are produced for a specific purpose in a private adjudicative process. Thus, the implied undertaking continues to protect IAP records from being used for any other purpose.

38. The AFN submits that both Canada and the TRC minimize the role of the implied undertaking. The Ontario Court of Appeal in *Goodman v. Rossi*¹⁷ applied Mathews and Malek's discovery:

The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them.¹⁸

¹⁵ Factum of TRC at para 80.

¹⁶ *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, at paras 183-85, Joint Book of Authorities, Vol 2, Tab 45.

¹⁷ *Goodman v. Rossi*, 1995 CanLii 1888 (ON CA), Joint Book of Authorities, Vol 3, Tab 59.

¹⁸ *Ibid*, at page 369, Joint Book of Authorities, Vol 3, Tab 59.

39. The implied undertaking prohibits much more than the actual use of the documents or transcripts themselves. It also protects against the use of any information derived from the discovered documents.
40. The Chief Adjudicator argues the common law implied undertaking principle and the court's jurisdiction to prevent collateral use of material produced for its processes, applies to situations beyond conventional civil litigation, including criminal proceedings, class proceedings, and judicial meditation. The AFN agrees with the Chief Adjudicator's submissions on these points.
41. The IAP, for many students, is the commencement of litigation for abuses they suffered as children while attending an Indian Residential School. The details of their experiences and the impact it had on their lives, as well as effects of intergeneration transmission, is very sensitive personal information. The private adjudication provided by the IAP is a benefit to former students of Indian Residential Schools and Persons of Interest, some of whom were students themselves.
42. The Motions Judge's ruling on the applicability of the implied undertaking rule to IAP Records was based in principle and law. The implied undertaking's application extends beyond discovery material and this is a necessary and correct finding. It is obligation owed to the court for the benefit of those individuals disclosing personal information to support litigation. The implied undertaking rule is within the control of

the court to enforce,¹⁹ as the Ontario Court of Appeal, quoting Prudential Insurance, in *Goodman v. Rossi* stated:

...the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz. contempt of court) and can be relieved or modified by an order of the court.²⁰

43. The TRC argues that the implied undertaking does not support record destruction.²¹

The AFN submits that there is judicial precedent allowing for the destruction of documents to enforce the implied undertaking.²² In *Anderson Consulting*²³ the Federal Court held:

There is thus a real threat that the confidentiality of the information obtained on discovery will be lost. It is also by no means clear that the defendant here has any property rights in the documents: the copies were made by the plaintiff and certainly belonged at one time to it. Mr. Lester argues that I should infer from the fact that the settlement payment included a sum for costs that property in the documents thereupon passed to the Crown. I can draw no such inference; on the contrary, it seems to me to be far more likely that it was an implied term of the settlement agreement that the documents would be destroyed or returned in accordance with the wishes of the party who had produced them in the first place.²⁴

44. The destruction of the IAP records was recommended by Dr. David Flaherty. Dr.

Flaherty expressed his opinion that destruction of information is a key component of

¹⁹ *Juman v. Doucette*, 2008 SCC 8, at para 29, Joint Book of Authorities, Vol 4, Tab 70.

²⁰ *Supra*, note 17 at p. 370, Joint Book of Authorities, Vol 3, Tab 59.

²¹ TRC Factum at Para 82.

²² *Robinson v. Medtronic Inc.*, 2011 ONSC 3663, at para 28(8), Joint Book of Authorities, Vol 5, Tab 96.

²³ *Andersen Consulting v Canada* [2001], 2 FCR 324 (TD), Joint Book of Authorities, Vol 1, Tab 4.

²⁴ *Ibid*, at para 19, Joint Book of Authorities, Vol 1, Tab 4.

privacy protection.²⁵ With respect to the IAP documents, Dr. Flaherty is of the view that destruction of the records is necessary to “protect the current and historical reputations and privacy interests of the Claimants and any third parties identified in the claims records”.²⁶

45. The AFN submits that once IAP records have served their purposes to settle claims of abuse and other wrongful acts, the records should be destroyed to protect the privacy interests of claimants and third parties identified in the records. The IAP records, however, may be achieved with the express consent of IAP claimants, who choose to add his/her experience to the historical record.

E. BREACH OF CONFIDENCE

46. Canada argues that the Motions Judge erred when he concluded that the court could order the destruction of the documents because the IAP Documents are subject to the law governing a breach of confidence.

47. Canada further asserts that there is no basis in fact or in law for Motions Judge’s finding that AANDC's Agreement for the Transfer of Archival Records with LAC was a breach of confidence. The AFN respectfully disagrees with Canada’s position.

²⁵ Affidavit of David H. Flaherty sworn May 2, 2014, Joint Compendium of Documents, Vol 4, Tab 45, p. 1634, para 52.

²⁶ Affidavit of David H. Flaherty sworn May 2, 2014, Joint Compendium of Documents, Vol 1, Tab 45, p. 1621, para 31.

48. The AFN submits that confidentiality and protection of the privacy interests of individuals is essential to the implementation and proper functioning of the IAP. Without the strict assurances of confidentiality, both Claimants and Persons of Interest would not feel comfortable enough to divulge the traumatic events for which they are to be compensated.²⁷

49. Confidentiality is also important to address those cases which involve allegations of abuse of students by other students. Should the identity of those individuals ever be disclosed, there would be severe consequences in First Nations communities, where individuals are easily identified. Not only would it affect the individuals involved in the IAP, but also their children, grandchildren and other community members.

50. The AFN respectfully endorses the following findings of Motions Judge set out in the decision under appeal:

The Destruction Order that I shall make does not require an amendment to the IRSSA and indeed is an express or implied term of the IRSSA. Conversely, the archival of the IAP Documents at LAC or at NCTR without the consent of the Claimants would require an amendment to the IRSSA. Further, without the consent of the Claimants, the archiving would be a breach of the implied undertaking and a breach of confidence.²⁸

51. In these circumstances, the AFN submits that the appropriate remedy to prevent a breach of confidence is the destruction of IAP documents.

²⁷ Decision, at paras. 226-227, Joint Compendium of Documents, Vol 1, Tab 4, p. 66.

²⁸ Decision, at para 353, Joint Compendium of Documents, Vol 1, Tab 4, p.84.

F. COURT HAS JURISDICTION OVER RECORDS

52. Canada asserts that the Motions Judge erred when he found that the court could order the destruction of the documents because the parties had agreed on destruction and the court can enforce *in rem* the parties' bargain.

53. The AFN submits that the Motions Judge was correct in finding that, despite IAP documents being the possession of Canada, nothing turns on that conclusion because having possession of IAP documents is not determinative.²⁹

54. The AFN respectfully endorse the following findings of Motions Judge relating to its *in rem* jurisdiction:

The IAP Documents are a product of an alternative dispute resolution mechanism, and one of the attractions of adjudication outside of the court is that the adjudication is private and the open court principle does not apply. Under an arbitration agreement, the parties can obtain privacy, something not available from the court system, which is public and invasive of privacy. The IAP is an alternative dispute resolution system, and the parties bargained for privacy and confidentiality.³⁰

55. The AFN is of the view that certain IAP records, such as the IAP notices of decision, contain valuable information that may be of historic value about the Indian Residential School system and its legacy. However, the AFN submits that Canada

²⁹ Decision, at para 331, Joint Compendium of Documents, Vol 1, Tab 4, p. 80.

³⁰ Decision, at para 335, Joint Compendium of Documents, Vol 1, Tab 4, p. 80.

cannot have the sole discretion to determine which records may be achieved. To allow Canada sole discretion would risk the colouring of the historical record. For instance, Canada could destroy the most egregious and horrible accounts contained in the IAP records, while keeping those records that contain cases of mild abuses for future generations.

56. The AFN submits that First Nations themselves are the proper authority to protect the historical record relating to Indian Residential Schools.

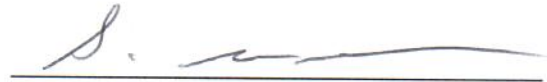
ORDER REQUESTED

The AFN seeks an Order setting aside the Order of August 6th, 2014 and that an Order be granted for the following:

- (a) IAP documents, Applications, hearing transcripts/audio recordings and adjudicated decisions not be destroyed immediately, but be held by the Chief Adjudicator for a period of 15 years;
- (b) IAP records are private and confidential documents, both as a matter of contract and a matter of common law and equity;
- (c) For greater certainty, IAP records are neither court records or government records;
- (d) IAP records are under the control of the Chief Adjudicator and the Court has the in rem jurisdiction to direct how the IAP Records are to be retained, archived or destroyed after the IAP is completed;

- (e) For greater certainty and to protect IAP Claimant's rights, the Chief Adjudicator shall preserve IAP records for a period of 15 years;
- (f) Confirming an enhanced Notice Plan is to be developed by the NCTR to inform Survivors of their rights to archive their IAP records; and
- (g) Claimants do not require the consent of POI and others to archive their IAP records.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 15th DAY OF OCTOBER,
2015



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COURT OF APPEAL FOR ONTARIO

BETWEEN

LARRY PHILIP FONTAINE et al.

Plaintiffs
(Respondents in Appeal)

-and-

THE ATTORNEY GENERAL OF CANADA et al.

Defendants
(Appellants and Respondents in Appeal and Cross-Appeals)

- and -

PRIVACY COMMISSIONER OF CANADA

Intervener

CERTIFICATE

I, Stuart Wutke, lawyer for the Respondent, the Assembly of First Nations certify that:

1. An order under subrule 61.09(2) is not required.
2. An estimate that 2.0 hours will be required for the Respondent's oral argument, not including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

~~Friday August 28th, 2015~~
October 15, 2015



Stuart Wutke
The Assembly of First Nations
Counsel for the Respondent

SCHEDULE A

LIST OF AUTHORITIES

Andersen Consulting v Canada [2001], 2 FCR 324 (TD).

Baxter v. Canada, (2006) CanLII 41673 (ON SC).

Fontaine v Canada (Attorney General), 2014 ONSC 283.

Goodman v. Rossi 1995 CanLII 1888 (ON CA).

Juman v. Doucette 2008 SCC 8, at para 29.

Ontario (Divisional Court) v. Ontario (Attorney General), 1997 CanLII 3017 (ON CA)

Robinson v. Medtronic Inc., 2011 ONSC 3663

SCHEDULE B
STATUTES AND REGULATIONS

Privacy Act, R.S.C. 1985, c. P-21, ss. 3, 8(2)(i), 8(2)(j), 8(3)

3. In this Act, ..

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing, ...

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(m) information about an individual who has been dead for more than twenty years;

8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed...

(j) to the Library and Archives of Canada for archival purposes;

(j) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.

Privacy Regulations, SOR/83-508, s. 6

6. Personal information that has been transferred to the control of the Library and Archives of Canada by a government institution for archival or historical purposes may be disclosed to any person or body for research or statistical purposes where

- (a) the information is of such a nature that disclosure would not constitute an unwarranted invasion of the privacy of the individual to whom the information relates;
- (b) the disclosure is in accordance with paragraph 8(2)(j) or (k) of the Act;
- (c) 110 years have elapsed following the birth of the individual to whom the information relates; or
- (d) in cases where the information was obtained through the taking of a census or survey, 92 years have elapsed following the census or survey containing the information.

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LARRY PHILIP FONTAINE et al.
Plaintiffs

-and- THE ATTORNEY GENERAL OF CANADA et al.

Defendants

Court of Appeal File No.: 59310

Court of Appeal File No.: 59311

Court of Appeal File No.: 59320

COURT OF APPEAL FOR ONTARIO

**UPDATED REPLY FACTUM WITH REFERENCE TO THE
JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF
AUTHORITIES OF THE RESPONDENT, ASSEMBLY OF
FIRST NATIONS TO CROSS-APPEALS**

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