Court File Nos: C59310, C59311, C59320

COURT OF APPEAL FOR ONTARIO

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, 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 Appeals)

- and -

[style of cause continued on next page]

UPDATED FACTUM OF THE PRIVACY COMMISSIONER OF CANADA
(with Reference to the Joint Compendium of Documents and Book of Authorities)

Date: October 12th, 2015

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA
Legal Services
30 Victoria Street, 1st floor
Gatineau, QC K1A 1H3
Tel: (819) 994-5878
Fax: (819) 994-5863
Email: kate.wilson@priv.gc.ca
regan.morris@priv.gc.ca

Kate Wilson (LSUC# 50564C)
Regan Morris (LSUC# 54636A)

Counsel for the Intervener, Privacy Commissioner of Canada

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 ATHABASCA, 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 SŒURS DE NOTRE-DAME-AUXILIATRICE, LES SŒURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SŒURS DU BON CONSEIL, LES SŒURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SŒURS DE JESUS-MARIE, LES SŒURS DE L'ASSOMPSION DE LA SAINTE VIERGE, LES SŒURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SŒURS DE LA CHARITÉ DE ST-HYACINTHE, LES ŒUVRES 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, SŒURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SŒURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, GREY NUNS OF MANITOBA INC. – LES SŒURS 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 IMMACULÉE 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 MONFORTAINS, 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 ARCHIÉPISCOPALE 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 EPISCOPAL CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

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

(Proceedings under the *Class Proceedings Act, 1992,* SO 1992, C6)

Counsel for the Appellant, Nine Catholic Entities
Pierre-L. Baribeau
Lavery, De Billy, LLP
1 Place Ville Marie, Suite 4000
Montreal, QC H3B 4M4
Tel: (514) 871-1522/Fax: (514) 871-8977

Counsel for the Appellant, Twenty-Two Catholic Entities
Michel G. Thibault, David M. Stack, Janine L. Harding
McKercher LLP
374 Third Avenue South
Saskatoon, SK S7K 1M5
Tel: (306) 653-2000/Fax: (306) 653-2669

Counsel for the Appellant, Sisters of St. Joseph of Sault Ste. Marie
Charles Gibson and Ian Houle
Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4
Tel: (613) 241-2701/Fax: (613) 241-2599

Counsel for the Cross-Appellant/ Respondent, Attorney General of Canada
Gary Penner, Diane Fernandes
Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West, Suite 3400, Box 36
Toronto, ON M5X 1K6
Tel: (416) 973-9268/Fax: (416) 973-2319

Counsel for the Cross-Appellant/ Respondent, Truth and Reconciliation Commission of Canada
Julian N. Falconer, Julian K. Roy, Meaghan T. Daniel
Falconers LLP
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9
Tel: (416) 964-0495/Fax: (416) 929-8179

Counsel for the Cross-Appellant/ Respondent, Independent Counsel
Peter Grant, Diane Doroka, and Sandra Staats
Peter Grant & Associates
900-777 Hornby Street
Vancouver, BC V6Z 1S4
Tel: (604) 685-1229/Fax: (604) 685-0244

Counsel for the Cross-Appellant/ Respondent, National Centre for Truth and Reconciliation
Joanna Birenbaum
Barrister & Solicitor
555 Richmond Street West, Suite 1200
Toronto, ON M5V 3B1
Tel: (647) 500-3005/Fax: (416) 968-0325

Counsel for the Respondent, Chief Adjudicator
Joseph Arvay, Q.C. and Catherine J. Boies Parker
Farris, Vaughan, Wills & Murphy LLP
PO Box 10026, Pacific Centre South
25th Floor, 700 W Georgia St.
Vancouver, BC V7Y 1B3
Tel: (604) 684-9151/Fax: (604) 661-9349

Counsel for the Respondent, Assembly of First Nations
Stuart Wuttke
Assembly of First Nations
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Tel: (613) 241-6789/Fax: (613) 241-5808

The Registrar of this Honourable Court, Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5
Tel: (416) 327-5020/Fax: (416) 327-5032

Parties/Individuals upon whom service is no longer required:

Court Counsel
Brian Gover
Stockwoods LLP Barristers
TD North Tower
77 King Street W., Suite 4130
P.O. Box 140
Toronto, ON M5K 1H1
Tel: (416) 593-2489/Fax: (416) 593-9345

Counsel for the National Consortium
Dan Carroll
Field Law
2000 - 10235 101 ST NW
Edmonton, AB T5J 3G1
Tel: (780) 423-7614/Fax: (780) 428-9329

CONTENTS

PART I – OVERVIEW

1. Privacy and confidentiality were central aspects of the Indian Residential Schools Settlement Agreement (IRSSA or Agreement) and are key issues in the appeals and cross-appeals before this Court. The IRSSA and, in particular, the Independent Assessment Process (IAP) under it, involve some of the most sensitive personal information imaginable — information so traumatic for the individuals affected that it may only ever have been shared in the context of the IAP.[1]

2. Among the issues before this Court is the possible application of the federal *Privacy Act* to records arising from the IAP (IAP Records). The IAP Records are held by the Indian Residential Schools Adjudication Secretariat (Secretariat), which administers the IAP under the direction of the Chief Adjudicator, who is an Officer of the Court. The Settlement Agreement Operations branch (SAO) of Aboriginal Affairs and Northern Development Canada (AANDC), which represents Canada as a respondent in IAP claims, also has a complete set of IAP Records.

3. While the parties do not dispute the central role privacy and confidentiality concerns played in the negotiation of the IRSSA and in particular the IAP, they differ in their understanding of the ways in which these concerns were addressed in the Agreement and on the potential application of federal privacy legislation to the IAP Records.

4. The question of the possible application of the *Privacy Act* to the IAP Records is significant in terms of protecting the privacy of the IAP Records; it also has implications for their eventual disposition. A finding that the IAP Records were under government

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[1] Factum of the National Centre for Truth and Reconciliation at para 23.

control would trigger not only the application of federal privacy and access legislation; it would also result in Library and Archives Canada (LAC) having authority over their eventual disposition or destruction.

5. The Privacy Commissioner's submissions focus on three areas:

   i. First, he will identify considerations relevant to assessing whether the *Privacy Act* applies.

   ii. Second, he will outline key implications of any finding that the Act does apply.

   iii. Third, should this Court determine that the IAP Records are subject to the Act, the Privacy Commissioner submits that the IRSSA provides important context for the Act's application to the IAP Records and should inform any exercise of discretion under it.

PART II – FACTS

The *sui generis* nature of the IRSSA

6. The historical, social and political context leading to the signing of the IRSSA is unique. The IRSSA "is much more than the settlement of a tort-based class action; it is a Political Agreement."[2] And, while it is not a treaty between Canada and its Aboriginal Peoples, "it is as important as a treaty."[3]

7. In approving the IRSSA and supervising its implementation, Courts have noted the Agreement's significance and its broader societal and political implications.[4] At times, they have found it challenging to engage in "contractual interpretation" of an agreement,

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[2] *Fontaine v Canada (Attorney General)*, 2006 YKSC 63 at para 8, [2006] YJ No 130, **Joint Book of Authorities, Vol 2, Tab 34**.
[3] *Fontaine v Canada (Attorney General)*, 2014 ONSC 4585 at para 88, [2014] OJ No 8638 [*Fontaine IAP Records*], **Joint Book of Authorities, Vol 2, Tab 47**.
[4] *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), 83 OR (3d) 481 (SC), per Winkler RSJ [*Baxter*], **Joint Book of Authorities, Vol 1, Tab 7**.

aspects of which "seek to structure relationships between Canada and Aboriginal people."[5]

Extreme sensitivity of IAP Records

8. By its nature, much of the information related to IAP claims is extremely sensitive. While attendance at an Indian Residential School (IRS) qualified former students for the Common Experience Payment (CEP) under IRSSA,[6] the IAP was limited to claims of sexual abuse, serious physical abuse, or other wrongful acts resulting in serious psychological consequences.[7]

9. This inherent sensitivity is compounded in claims dealing with student-on-student abuse — a significant percentage of IAP claims.[8] Disclosure of personal information in these cases could lead to particularly grave harm, since the impact would be felt not only by the affected individuals but by whole communities.[9]

10. These privacy concerns are multi-generational in nature. The negative impacts associated with disclosure of personal information relating to such claims could affect future generations in small communities, long after the death of those directly involved.[10]

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[5] *Fontaine v Canada (Attorney General)*, 2013 ONSC 684 at para 56, 114 OR (3d) 263 per Goudge J., **Joint Book of Authorities, Vol 2, Tab 41**. This consideration led Justice Goudge to raise the possibility in *obiter* of viewing IRSSA "through the lens of public law as well as private law"; see however *Fontaine v Duboff Edwards Haight & Schachter*, 2012 ONCA 471, 111 OR (3d) 461 for confirmation that decisions of the Chief Adjudicator are not subject to judicial review in the public law sense, **Joint Book of Authorities, Vol 3, Tab 54**.

[6] Indian Residential Schools Settlement Agreement, Article 5 [IRSSA], **Joint Compendium of Documents, Vol 1, Tab 23 at 278**.

[7] Guide to the Independent Assessment Process Application, v3.2, April 4, 2013 at 3, online: < www.iap-pei.ca/information/publication/pdf/pub/iapg-v3.2-20130404-eng.pdf >, **Joint Compendium of Documents, Vol 1, Tab 26 at 395**.

[8] Factum of the Chief Adjudicator at para 29; *Fontaine IAP Records*, *supra* at para 137, **Joint Book of Authorities, Vol 2, Tab 47**.

[9] Factum of Independent Counsel at paras 20-22, 73; Factum of the Assembly of First Nations at para 65.

[10] Factum of Independent Counsel at para 22.

Privacy and confidentiality in the IAP

11. There are numerous references to privacy and confidentiality in the IRSSA, including several that pertain specifically to the IAP. Schedule D to the IRSSA, which deals with the IAP, sets out the many ways in which privacy and confidentiality were built into the IAP, from closed hearings to the provision of confidentiality undertakings by participants and the use of redacted decisions.[11]

12. However, the IRSSA contains few express references to the *Privacy Act*. Schedule N, dealing with the Truth and Reconciliation Commission (TRC), contains several references to privacy legislation, both federal and provincial.[12] These references must be understood in light of the fact that the TRC was expressly constituted as a separate government institution and is listed in the *Privacy Act*'s schedule of government institutions.[13] No party contests the Act's application to the TRC.

13. Schedule D contains a single reference to the *Privacy Act*.[14] Appendix VIII, concerning Government Document Disclosure, outlines Canada's obligation to disclose *existing* government records relevant to a particular IAP claim. It notes that in providing this information to a claimant or claimant's counsel, information about third parties, other than alleged perpetrators, "will be blacked out to protect each person's personal information, as

[11] IRSSA, Schedule D, "o. Privacy", at 15, **Joint Compendium of Documents, Vol 1, Tab 24 at 346**.
[12] IRSSA, Schedule N, "11. Access to Relevant Information", "13. Privacy" at 10, 11, **Joint Compendium of Documents, Vol 1, Tab 25 at 390-391.**
[13] *Privacy Act*, RSC 1985, c P-21.
[14] At first instance, the Court relied heavily on the Guide prepared by the IAP Working Group, which contains several references to the *Privacy Act*. The parties differ in terms of the status they accord the Guide. While it does not appear to be part of the IRSSA, it may provide useful context for the Agreement. **Joint Compendium of Documents, Vol 1, Tab 26 at 393.**

required by the *Privacy Act*."[15] However, this does not make clear the status of records *arising out of* the IAP process.[16]

Possession of the IAP Records

14. The full collection of IAP Records is held by the Secretariat, which implements and administers the IAP under the direction of the Chief Adjudicator. While the Secretariat is constituted as a branch of AANDC, it reports to the Chief Adjudicator, who is an Officer of the Court. "[S]ave for specific financial, funding, auditing and human resource matters", the Secretariat remains independent of AANDC.[17]

15. The SAO, which represents Canada in IAP claims, also has a complete set of IAP Records, due to Canada's role as respondent in IAP claims.[18]

PART III – ISSUE AND ARGUMENT

Contradictory determinations at first instance concerning the *Privacy Act*

16. The judge at first instance made seemingly contradictory findings concerning the application of the *Privacy Act* to the IAP Records. On the one hand, he found that the IAP Records are not "under the control of a government institution" within the meaning of the *Privacy Act*.[19] Instead, he concluded the documents are under the control of various supervisory bodies, including ultimately the Court under the IRSSA.[20]

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[15] IRSSA, *supra*, Schedule D, Appendix VIII: Government Document Disclosure, **Joint Compendium of Documents, Vol 1, Tab 24 at 361**.
[16] The Privacy Commissioner specifically rejects the submission of the Attorney General that the status of records that pre-date the creation of the IAP is determinative of the status of records created as a result of the IAP. Factum of the Attorney General of Canada at para 43 [AGC Factum].
[17] *Fontaine IAP Records*, *supra* at para 44, **Joint Book of Authorities, Vol 2, Tab 47**.
[18] *Fontaine IAP Records*, *supra* at para 47, **Joint Book of Authorities, Vol 2, Tab 47**.
[19] *Fontaine IAP Records*, *supra* at para 319, **Joint Book of Authorities, Vol 2, Tab 47**.
[20] *Fontaine IAP Records*, *supra* at para 319, **Joint Book of Authorities, Vol 2, Tab 47**.

17. On the other hand, he found that the contracting parties intended for the *Privacy Act* and *Access to Information Act* (ATIA)[21] to apply during a fifteen-year retention period prior to the destruction of the IAP Records, for limited purposes. The judge found that the purpose behind the application of these acts was to provide "a mechanism during the retention period for the disclosure of the documents for the limited purposes of the prosecution of criminal or child protection proceedings."[22]

18. The Privacy Commissioner submits that this combination of determinations is problematic and is not supported by the *Privacy Act* or by related jurisprudence.[23]

ISSUE 1: Considerations Relevant to Assessing Whether the *Privacy Act* Applies

Application of *Privacy Act* and nature of Privacy Commissioner's authority

19. The *Privacy Act* serves two related but different purposes: protecting the privacy of individuals with respect to their personal information held by government institutions; and providing individuals with a right of access to that information.[24]

20. The *Privacy Act* plays a fundamental role in Canada's legal system. Courts have recognized its quasi-constitutional status due to the importance of its objectives, in part due to its origins in human rights legislation and in recognition of the fact that privacy rights are protected and reflected in sections 7 and 8 of the Charter.[25] As a result, a

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[21] *Access to Information Act*, RSC, 1985, c A-1 [ATIA].
[22] *Fontaine IAP Records*, *supra* at para 318, **Joint Book of Authorities, Vol 2, Tab 47**.
[23] In this respect, the Privacy Commissioner agrees with the Attorney General of Canada and with the TRC. AGC Factum, *supra* at para 53; TRC Factum at paras 88–89.
[24] *Privacy Act*, *supra*, s 2; *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, at para 24, [2002] 2 SCR 773 [*Lavigne*], **Joint Book of Authorities, Vol 4, Tab 76**.
[25] *Lavigne*, *supra* at para 24 **Joint Book of Authorities, Vol 4, Tab 76**, citing LaForest J. in *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at paras 65–66, dissenting, but not on this point [*Dagg*], **Joint Book of Authorities, Vol 2, Tab 27**.

purposive approach to the interpretation of the Act is justified.[26]

21. Although the *Privacy Act* and the ATIA play different roles in the Canadian legal framework, the Supreme Court has recently reiterated that the statutes form a "seamless code" and should be interpreted with this in mind.[27] Although they serve different objectives, they employ similar concepts (including the threshold concept of "under the control of a government institution") and expressly reference one another. For example, the ATIA incorporates the *Privacy Act*'s definition of "personal information".[28]

22. The *Privacy Act* employs the phrase "under the control of a government institution"[29] in various contexts, including in regulating the use, disclosure, disposal of and access to personal information under the Act.[30] Whether information is "under the control of a government institution" is a "threshold question" — a pre-condition for the Act's application.[31] Absence of control precludes a finding that the *Privacy Act* applies.

Parties cannot contract into the Privacy Act

23. At first instance, having concluded that the IAP Records were not under government control, the judge nevertheless found that it was the "parties' intention" that the *Privacy Act* and ATIA apply to the IAP Records during a retention period,[32] thereby implying it is

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[26] *Lavigne*, *supra* at para 24, **Joint Book of Authorities, Vol 4, Tab 76**, citing Noël J. in *Canada (Privacy Commissioner) v Canada (Labour Relations Board)*, 1996 CanLII 4084 (FC), [1996] 3 FC 609 at p 652, **Joint Book of Authorities, Vol 1, Tab 21**.

[27] *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, at para 74, [2011] 2 SCR 306, [*Canada (IC) v Canada (MND)*], **Joint Book of Authorities, Vol 1, Tab 19** per Charron J., citing LaForest J. in *Dagg*, *supra*, **Joint Book of Authorities, Vol 2, Tab 27**.

[28] ATIA, *supra*, s 19.

[29] In French « *les renseignements personnels relevant d'une institution fédérale* ».

[30] *Privacy Act*, *supra*, ss.7, 8, 6(3), 12(1). The Act also employs the phrase "the government institution that has control of the personal information"; see e.g., *Privacy Act*, *supra*, ss 17(2)(*b*), (3)(*b*).

[31] *Canada (Privacy Commissioner) v Canada (Labour Relations Board)*, 2000 CanLII 15487 (FCA), [2000] FCJ No 617 at paras 4, 11, **Joint Book of Authorities, Vol 1, Tab 22**.

[32] *Fontaine IAP Records*, *supra* at paras 2–3, 362, **Joint Book of Authorities, Vol 2, Tab 47**.

possible to contract into the legislation.

24. Parties can agree to adhere to legislative standards, even where the statute does not formally apply. For example, parties to a contract could make it a contractual term to adhere to the fair information principles reflected in the *Privacy Act.*[33] However, while a party's violation of these standards might breach the contract, it would not give rise to a right to file a complaint under the Act. In other words, parties cannot, by contract, trigger the application of the Act if the jurisdictional pre-conditions are not otherwise met.

"Under the control of a government institution"

25. While the Privacy Commissioner does not take a position concerning whether the IAP Records are under government control, he offers the following submissions to assist the Court in its analysis of the presence or absence of control in this case.

26. There has been significant judicial consideration of the concept of "control", particularly under the ATIA. While the concept of "control" is undeniably broad, the Privacy Commissioner submits there are a number of factors that may be relevant to assessing whether information is under the control of a government institution for the purposes of the Act. These include possession, the nature and origin of the documents, as well as contractual or other restrictions affecting the information at issue.

27. The Supreme Court recently reviewed key principles from the jurisprudence on control:

- The concept of "control" is not defined in the Act. It should therefore be given its ordinary and popular meaning.[34]

[33] For example, parties might provide that personal information covered by a contract would not be used or disclosed without consent unless the conditions outlined in sections 7 or 8 of the Act were met.
[34] *Canada (IC) v Canada (MND), supra* at para 48, **Joint Book of Authorities, Vol 1, Tab 19**.

- In furtherance of the *Privacy Act*'s (and ATIA's) objectives, it should be given a broad and liberal interpretation, but should not be stretched beyond reason.[35]
- Parliament could have restricted the notion of control to the power to dispose of or get rid of the information, but it did not do so.[36]

28. The Supreme Court has concluded that physical possession plays a leading role, but is not determinative. Lack of physical possession does not necessarily prevent information from being under government control.[37]

29. Conversely, the Privacy Commissioner submits that mere physical possession may not always lead to a finding of control. Under provincial and municipal privacy and access legislation in Ontario, which employs similar undefined concepts of "custody and control",[38] courts have found that physical possession (e.g., the presence of emails on a government server) does not necessarily bring information under government control.[39]

30. In some circumstances, the Privacy Commissioner submits that it may be relevant to consider the nature of the relationship between the individual or entity having physical possession of the information and the government institution having potential control over it. Under provincial access and privacy legislation, courts have examined a variety of

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[35] *Canada (IC) v Canada (MND), supra* at para 48, **Joint Book of Authorities, Vol 1, Tab 19**.
[36] *Canada (IC) v Canada (MND), supra* at para 48, **Joint Book of Authorities, Vol 1, Tab 19**; see *Canada Post Corp v Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FCR 110 (FCA) at para 4 per Létourneau JA, for the majority, **Joint Book of Authorities, Vol 1, Tab 14**.
[37] *Canada (IC) v Canada (MND), supra* at para 54, **Joint Book of Authorities, Vol 1, Tab 19**.
[38] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, ss 10(1), 10.1, 24(1)(a), 25(1), 41(1), 42, 47(1), 48(1), 52(1), 52(4). The Divisional Court has held that the lack of statutory definition of the words "custody" or "control" "makes context and legislative intention even more important." *City of Ottawa v Ontario*, 2010 ONSC 6835, [2010] OJ No 5502 at para 22 [*City of Ottawa*], **Joint Book of Authorities, Vol 1, Tab 25**. The Privacy Commissioner notes that the use of both "custody and control" may make it harder for mere physical possession to trigger the application of FIPPA or MFIPPA.
[39] *City of Ottawa, supra*, **Joint Book of Authorities, Vol 1, Tab 25**. See also *David v Information and Privacy Commissioner Ontario*, 2006 CanLII 36618 (ON SCDC), [2006] OJ No 4351 [*David v OIPC*], **Joint Book of Authorities, Vol 2, Tab 28** where the documents of an independent investigator, although stored on a City computer, were not within its control.

factors in assessing whether records are under government control,[40] including the need for independence of the individual or entity in possession of the information at issue.[41]

31. This factor may be relevant in the case of the Secretariat, which, despite its status as a branch of AANDC (itself clearly a department listed in the Schedule to the Act),[42] must, in most respects, remain independent of the larger government department.[43]

32. In approving the IRSSA, the Court indicated its approval was conditional on the effective independence of the administration of the IAP from Canada's role as defendant.[44] The Privacy Commissioner submits this condition of independence is relevant to assessing whether the IAP Records held by the Secretariat are under AANDC's control.

33. Save for specific financial, funding, auditing, and human resource matters, the Secretariat is under the direction of the Chief Adjudicator, who in turn reports to the Court; in all but these respects, it is independent of AANDC. The Secretariat participates directly in the IAP's implementation, including determining if applications qualify for the process.[45]

34. This functional carving out of financial, funding, auditing, and human resource matters from matters related to the IAP itself, as well as the related distinction between matters

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[40] See e.g., *City of Ottawa, supra* at paras 30–31, **Joint Book of Authorities, Vol 1, Tab 25**.
[41] In *David v OIPC, supra*, **Joint Book of Authorities, Vol 2, Tab 28,** the Divisional Court concluded that documents in the possession of an independent investigator appointed by the City of Toronto were not under the City's control. Although a central factor in that case was the fact that the investigator was not a City employee, officer or agent, the Court also noted he was required to conduct his inquiry arms-length from the City. This need for independence was relevant to the court's conclusion that the investigator's documents were therefore not under the City's control. See also *Walmsley v Ontario (Attorney General)*, 1997 CanLII 3017(ON CA), [1997] OJ No 2485, **Joint Book of Authorities, Vol 5, Tab 105,** in which documents held by members of a Judicial Appointments Advisory Committee were found to not be under the control of the Ministry of the Attorney General. The Committee's need for independence was a relevant factor in that case.
[42] *Privacy Act*, *supra*, Schedule (Section 3) "Departments and Ministries of State."
[43] *Privacy Act*, *supra*, Schedule (Section 3).
[44] *Baxter*, *supra* at para 38, **Joint Book of Authorities, Vol 1, Tab 7**. The Court's primary concern was separating Canada's role as defendant from its role as administrator of the Agreement.
[45] IRSSA, *supra*, Schedule D, "t. Secretariat", **Joint Compendium of Documents, Vol 1, Tab 24 at 348.**

under the Minister's direction and those under the direction of the Chief Adjudicator, raises the question of whether IAP Records are under AANDC's control and therefore subject to the *Privacy Act*.

35. There may also be situations in which government possession of information is constrained and restricted by law in a manner which prevents the information from being considered under government control. The implied undertaking[46] may be an example of such a restriction.

36. In *Andersen Consulting v. Canada*,[47] the Federal Court considered the impact of the implied undertaking on the Department of Justice's retention obligations under the precursor to the *Library and Archives of Canada Act*.[48] The Court held that information subject to the implied undertaking could not be considered under the government institution's control and that the usual obligation to return or destroy information at the conclusion of litigation applied.[49]

37. The Court distinguished previous jurisprudence holding that confidentiality obligations imposed by a party entering into a (commercial) contractual relationship with government do not prevent information from coming under government control, noting that in the case before it, the law (as opposed to the parties to a contract) had imposed a condition on government relating to the receipt of the information.[50]

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[46] In Ontario, the implied undertaking is codified as the "deemed undertaking" in Rule 30.1.01 of the *Rules of Civil Procedure*.
[47] *Andersen Consulting v Canada*, 2001 CanLII 22032 (FC), [2001] FCJ No 57 [*Andersen Consulting*], **Joint Book of Authorities, Vol 1, Tab 4**.
[48] *Library and Archives of Canada Act*, SC 2004, c 11 [LACA].
[49] *Andersen Consulting, supra* at para 22, **Joint Book of Authorities, Vol 1, Tab 4**.
[50] *Andersen Consulting, supra* at paras 6, 14, **Joint Book of Authorities, Vol 1, Tab 4**.

38. In *obiter*, the Court suggested the same result would likely occur under the ATIA,[51] since a government institution's possession of information subject to the implied undertaking is by necessity constrained and restricted by law.[52]

39. As noted above, the SAO also has possession of a complete set of IAP Records due to Canada's role as a respondent to IAP claims. The IAP, while an out-of-court process, has been held to be a continuation of the litigation settled as a result of the IRSSA. Therefore, disclosure of information from these settled proceedings for use as evidence under the IAP does not violate the implied undertaking.[53]

40. To the extent that the implied undertaking also applies to the IAP, the Privacy Commissioner submits that this is relevant to assessing whether the SAO's set of IAP Records is under AANDC's control for purposes of the Act.

ISSUE 2: Key Implications of a Finding the *Privacy Act* Applies

41. While the *Privacy Act* establishes a regime for the protection of personal information under the control of government institutions, there are limits to this protection, some of which may be particularly relevant in the context of the IRSSA.

42. Should this Court find that the *Privacy Act* applies to the IAP Records, these would be retained by AANDC for a period of time, prior to destruction or archiving.[54] The following aspects of the legislation might impact the level of protection afforded to IAP

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[51] This would presumably also be the case under the *Privacy Act*, since the two statutes employ the concept of "control" in similar ways.
[52] *Andersen Consulting*, *supra* at para 17, **Joint Book of Authorities, Vol 1, Tab 4**.
[53] *Fontaine v Canada (Attorney General)*, 2014 ONSC 283 at paras 181ff, [2014] OJ No 195, **Joint Book of Authorities, Vol 2, Tab 45**.
[54] While the *Privacy Regulations* provide that personal information must be retained for at least two years following its last use for an administrative purpose, they do not impose a maximum retention period for personal information. *Privacy Regulations*, *supra*, s 4. The AGC has suggested that triage of IAP Records, for destruction or transfer to LAC, would occur following the completion of the IAP in approximately 2020. AGC Factum, *supra* at para 36 "g".

Records, while held by either AANDC or LAC.

Protection ceases 20 years after death

43. Although the Act's definition of personal information is broad ("information about an identifiable individual that is recorded in any form"), it does not include "information about an individual who has been dead for more than twenty years".[55] A government institution does not require the consent of the deceased individual's estate to use or disclose personal information more than 20 years after an individual's death.[56]

44. In 2006, in approving the IRSSA, the Superior Court noted that many class members were elderly and were dying at a rate of approximately 1000 per year.[57] Given the age of the affected individuals and the period of time during which the schools operated, the Privacy Commissioner submits that this exclusion from the definition of personal information would already prevent some IAP Records from being eligible for protection under the Act and would pose an increasingly significant barrier to protection over time.

45. As a result, such records would become vulnerable to disclosure in response to access requests under the ATIA, since they would lose the benefit of the "personal information" exemption.[58] The risk of harm resulting from disclosure would be particularly high in cases where the alleged perpetrator and claimant came from the same community.

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[55] *Privacy Act*, *supra*, s 3(*m*).
[56] See also discussion below (paras 53–57) concerning potential disclosure of personal information held by Library and Archives Canada for research and statistical purposes once 110 years have elapsed since the birth of affected individuals. *Privacy Regulations*, *supra* s 6.
[57] *Baxter*, *supra* at para 46, **Joint Book of Authorities,Vol 1, Tab 7**.
[58] Section 19(1) of the ATIA provides that "Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*." ATIA, *supra*, s 19(1).

46. This aspect of the Act therefore limits its ability to provide multi-generational,[59] let alone permanent, protection of the highly sensitive information contained in the IAP Records.

Discretionary disclosures without consent

47. While the Attorney General of Canada has indicated that continued respect for the confidentiality and privacy of all affected individuals remains a paramount objective in meeting Canada's obligations under the IRSSA,[60] his submissions do not close off the possibility of the discretionary disclosure of IAP Records while under government control. It is therefore relevant to examine some of the ways in which the Act could allow for disclosure of these records.

48. As a general rule, the *Privacy Act* requires consent for the use or disclosure of personal information.[61] However, the statutory regime includes a number of exceptions to this requirement, all of which are subject to any other Act of Parliament.[62]

1) Disclosure for research or statistical purposes (s.8(2)(j))

49. A government institution may disclose personal information to any person or body for research or statistical purposes, subject to the following two conditions:

- the head of the government institution must be *satisfied* the purpose for which disclosure occurs cannot be accomplished without disclosure of the information in identifiable form; and
- the government institution must obtain a written undertaking that the person or body will make no subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates.

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[59] Factum of Independent Counsel at paras 22, 73, citing Affidavit of L.P. Fontaine at paras 15–17, 25–26; *Fontaine IAP Records*, *supra* at paras 137, 215, **Joint Book of Authorities, Vol 2, Tab 47**.
[60] AGC Factum, *supra* at para 19.
[61] *Privacy Act*, *supra*, ss 7–8.
[62] *Privacy Act*, *supra*, s 8(2).

50. The first condition imposes a test of necessity: if the same research could be undertaken without disclosing identifying information, then the information should not be disclosed.

51. The second condition requires an objective risk assessment. For the written undertaking to be valid, the research party providing it, and the government institution receiving it, must both possess a clear understanding of the effectiveness of the proposed means for de-identification of the personal information in question.

2) Disclosure to Library and Archives Canada (s.8(3))

52. This provision, which deals with disclosures to LAC, is particularly relevant to the IAP Records since one of the central issues before the Court is their eventual disposition. A government institution cannot dispose of records under its control without the approval of the National Archivist.[63] It may however disclose personal information under its control to LAC for archival purposes.[64]

53. Once under the custody or control of LAC, information that has been transferred there by a government institution may be disclosed to any person or body for research or statistical purposes, subject to the conditions set out in the *Privacy Regulations*.[65]

54. Personal information held by LAC can be disclosed for research or statistical purposes if any one of the following conditions is met:

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[63] *LACA, supra,* s 12.
[64] *Privacy Act, supra*, s 8(2)(*i*).
[65] *Privacy Act, supra*, s 8(3). At first instance, the judge expressed concern about possible disclosure by Library and Archives Canada for research or statistical purposes, but did not mention the risk of IAP Records being disclosed for these purposes even prior to their transfer to LAC under s 8(2)(*j*). *Fontaine IAP Records, supra* at para 317, **Joint Book of Authorities, Vol 2, Tab 47**. However, the language adopted in the Order would appear to prevent disclosure for research or statistical purposes under either provision. *Fontaine IAP Records*, Order entered February 10, 2015 at para 1, **Joint Compendium of Documents, Vol 1, Tab 3 at 17**.

i. the information is of such a nature that disclosure would not constitute an unwarranted invasion of the privacy of the individual to whom it relates;

ii. disclosure is in accordance with paragraph 8(2)(*j*) (research or statistical purposes) or 8(2)(*k*) (Native claims research); [66] or

iii. 110 years have elapsed following the birth of the individual to whom the information relates.

55. The first condition requires consideration of the sensitivity of the information involved. Given the nature of much of the information contained in the IAP Records, it seems unlikely that such highly sensitive personal information would ever meet this condition.

56. The second condition allows for disclosure according to the requirements set by two other discretionary exemptions, including under s.8(2)(*j)*, discussed above.

57. And, over time, <u>all</u> personal information in IAP Records that had been transferred to LAC would be eligible for disclosure by virtue of 110 years having elapsed since the birth of the affected individuals.[67]

3) Disclosure in the public interest (s.8(2)(m)(i))

58. This broad grant of discretion[68] allows disclosure for any purpose where, in the opinion of the head of the institution, the public interest in disclosure <u>*clearly*</u> outweighs any invasion of privacy that could result from the disclosure.

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[66] Section 8(2)(*k*) allows for disclosure "to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada."

[67] The impact of this condition is similar to that of the "20 years after death" exclusion from the definition of personal information discussed above (paras 43–46). If the information is already excluded from the definition of personal information, no reference need be made to the conditions set out for disclosure in the *Regulations*.

[68] *Dagg*, *supra* at para 109 per LaForest J., dissenting, but not on this point, **<u>Joint Book of Authorities, Vol 2, Tab 27</u>**.

59. This provision is exceptional in nature,[69] as reflected by the fact that discretion is exercised by the head of the institution and on a case-by-case basis. The Act also requires the institution to notify the Privacy Commissioner of any anticipated disclosure (or, in extenuating circumstances, forthwith upon disclosure). The Privacy Commissioner has authority to notify the affected individual(s) of the pending disclosure if he deems it appropriate, but he cannot prevent disclosure from occurring.[70]

Balancing interests in granting access to personal information

60. As indicated above, one of the purposes of the *Privacy Act* is to provide individuals with a right of access to their personal information.[71] In granting access, a government institution must not disclose personal information belonging to any individual other than the requester if the disclosure is prohibited under section 8.[72]

61. In some situations however, personal information may belong to more than one individual. The Federal Court of Appeal has previously considered facts involving an investigation into allegations of workplace harassment. The individual under investigation sought access to the names of employees who were interviewed as part of the investigation.

62. The Court found that the names of the employees interviewed, connected with their evidence, were the personal information of the individual under investigation. However, each interviewee's name was also considered his or her personal information.[73]

63. Faced with conflicting rights to personal information, the Court concluded a balancing of

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[69] *Sutherland v Canada (Minister of Indian and Northern Affairs)*, 1994 CanLII 3493 (FC), [1994] 3 FC 527 at para 37, **Joint Book of Authorities, Vol 5, Tab 100**.
[70] *Privacy Act*, *supra*, s 8(5).
[71] *Privacy Act*, *supra*, s 12.
[72] *Privacy Act*, *supra*, s 26.
[73] *Privacy Act*, *supra*, paragraphs (*g*) and (*i)* of s 3.

interests was required, taking into account the private interests of the individuals concerned and the public interest(s) in the information's disclosure or non-disclosure.[74]

64. In that case, the Court concluded that the private interest of the individual subject to the allegations was paramount: in the interests of procedural fairness, he should be given access to the names of the interviewees, despite their lack of consent to disclosure, to allow him to respond to the allegations made against him.[75]

65. While such situations may occur infrequently, they underline the complexity of responding to access requests under the *Privacy Act* and the risk that requests could lead to disclosure of personal information belonging to an individual other than the requester.

ISSUE 3: Applying the *Privacy Act* in Light of the IRSSA

66. Despite the Attorney General's assertion that the federal legislative regime provides "the best and most reliable way to ensure the confidentiality of the IAP and the privacy of all individuals involved,"[76] there are limits to the level of privacy protection afforded by the *Privacy Act*. Within the specific context of the IRSSA, the level of protection offered by the *Privacy Act* may not, on its own, match the level of privacy and confidentiality contemplated in the Agreement.

67. Nevertheless, should this Court conclude that the *Privacy Act* applies to the IAP Records, the Privacy Commissioner submits that, given the unique historical, social, and political context of the IRSSA, its terms should, at a minimum, inform the Act's application to the

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[74] *Canada (Information Commissioner) v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270 at para 29, [2003] 1 FCR 219, [*Canada (IC) v Canada (MCI)*], **Joint Book of Authorities, Vol 1, Tab 20**.
[75] *Canada (IC) v Canada (MCI)*, *supra* at paras 14–15, 33–34, **Joint Book of Authorities, Vol 1, Tab 20**.
[76] AGC Factum, *supra* at para 13.

IAP Records, particularly as regards the exercise of discretion by government institutions under s.8(2).[77]

68. In his Order, the judge at first instance appeared to close off the possibility of disclosure of IAP Records for research or statistical purposes, presumably reflecting concern over such potential disclosures.[78] However, should this Court find that the Minister retains the discretion to disclose IAP Records for these purposes, the Privacy Commissioner submits that any undertaking provided by a researcher (and relied upon by a government institution in support of disclosure) would need to adequately reflect the particular nature of the IAP Records.

69. The extreme sensitivity of the information and the fact that many affected individuals, claimants or alleged perpetrators, come from "small, closely knit communities,"[79] would significantly increase the level of diligence required to avoid inadvertent re-identification of individuals as a result of subsequent disclosure of supposedly de-identified information. As the Federal Court has found, even seemingly innocuous information, when combined with information from sources otherwise available, can lead to the (re-)identification of individuals and to potential invasions of privacy.[80]

70. The terms of the IRSSA are also relevant to determining what might constitute disclosure in the public interest under s.8(2)(*m*)(i). The IAP's strong emphasis on privacy and

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[77] The Attorney General of Canada, while emphasizing the fact that discretion would rest solely with AANDC, acknowledges that the IRSSA and the undertakings of confidentiality and privacy relating to the IAP would inform the exercise of discretion under the Act. AGC Factum, *supra* at paras 23, 36.
[78] *Fontaine IAP Records*, Order entered February 10, 2015 at para 1, **Joint Compendium of Documents, Vol 1, Tab 3 at 17**.
[79] Factum of the 22 Catholic Entities at para 52; Factum of Independent Counsel at paras 20, 73.
[80] *Gordon v Canada (Health)*, 2008 FC 258 at paras 32–33, *(sub nom Gordon v Canada (Ministry of Health))*, [2008] FCJ No 331, **Joint Book of Authorities, Vol 3, Tab 61**; see also Affidavit of Dr. David Flaherty at para 74, **Joint Compendium of Documents, Vol 4, Tab 45 at 1642-1643**.

confidentiality, as expressed in the IRSSA, might make it difficult for the public interest in disclosure to "clearly" outweigh the resulting invasion of privacy for affected individuals. Despite the provision's broad grant of discretion, any disclosure that was not informed by the terms of the IRSSA would risk constituting an abuse of discretion.[81]

71. Lastly, the Privacy Commissioner notes that the exceptions to the consent requirement under s.8(2) afford government institutions varying levels of discretion.[82] In truly discretionary provisions, such as those reviewed above, discretion is exercised in light of all relevant considerations.[83] The Privacy Commissioner submits that the terms of the IRSSA, particularly those relating to the IAP, should play a central role in informing any exercise of discretion relating to the IAP Records.

PART IV – CONCLUSION AND RELIEF SOUGHT

72. Whether or not this Court concludes that the IAP Records are subject to the *Privacy Act*, it is clear that the parties to the IRSSA recognized the extreme sensitivity of the information involved in the IAP and intended that records arising from it receive the highest level of protection. It also appears that the parties intended to provide survivors with a degree of control over their personal stories, as shared under the IAP.

73. As these proceedings demonstrate however, the parties differ considerably in their interpretation of how the IRSSA provided for the protection of the IAP Records and for the maintenance of survivor control over their stories. The Privacy Commissioner urges

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[81] *Dagg*, *supra* at paras 11, 115 per LaForest J. dissenting, but not on this point, **Joint Book of Authorities, Vol 2, Tab 27**.

[82] Under some provisions, the discretion suggested by use of the word "may" in the opening words of s.8(2) may be illusory, as when an institution is presented with a valid warrant or court order; Ruth Sullivan, *Sullivan on the Construction of Statutes*, Third Edition, Lexis Nexis, 2008 at 71.

[83] AGC Factum, *supra* at para 47.

this Court to provide the parties with clear guidance in order to assist them in translating a shared recognition of the extreme sensitivity of the IAP Records and of the serious harm that could result from their unauthorized disclosure into directions concerning their treatment during and after the conclusion of the IAP.

74. As provided in Chief Justice Strathy's Order issued April 27th, 2015, the Privacy Commissioner takes no position on the disposition of these appeals and cross-appeals.

75. As further provided, the Commissioner does not seek costs and respectfully requests that he not be liable to pay the costs of any party.

Dated at Gatineau, Quebec, this 12th day of October, 2015.

Kate Wilson (LSUC #50564C)
Regan Morris (LSUC #54636A)
Counsel for the Privacy Commissioner of Canada

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 et al.

Plaintiffs
(Respondents in Appeals)

- and -

THE ATTORNEY GENERAL OF CANADA et al.

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

CERTIFICATE

I, Kate Wilson, lawyer for the Intervener, Privacy Commissioner of Canada, certify that:

1. No order under subrule 61.09(2) (original record and exhibits) is required.
2. I estimate requiring ⅓ hour (20 minutes) for oral argument, exclusive of reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Monday, October 12th, 2015

Kate Wilson (LSUC #50564C)
Office of the Privacy Commissioner of Canada, Legal Services
Counsel for the Intervener, Privacy Commissioner of Canada

SCHEDULE A – List of Authorities

A.	**Jurisprudence**
1.	*Fontaine v Canada (Attorney General)*, 2006 YKSC 63, [2006] YJ No 130.
2.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 4585, [2014] OJ No 8638 [*Fontaine IAP Records*].
3.	*Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), 83 OR (3d) 481 (SC) [*Baxter*].
4.	*Fontaine v Canada (Attorney General)*, 2013 ONSC 684, 114 OR (3d) 263.
5.	*Fontaine v Duboff Edwards Haight & Schachter*, 2012 ONCA 471, 111 OR (3d) 461.
6.	*Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773 [*Lavigne*].
7.	*Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 [*Dagg*].
8.	*Canada (Privacy Commissioner) v Canada (Labour Relations Board)*, 1996 CanLII 4084 (FC), [1996] 3 FC 609.
9.	*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 [*Canada (IC) v Canada (MND)*].
10.	*Canada (Privacy Commissioner) v Canada (Labour Relations Board)*, 2000 CanLII 15487 (FCA), [2000] FCJ No 617.
11.	*Canada Post Corp v Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FCR 110 (FCA).
12.	*City of Ottawa v Ontario*, 2010 ONSC 6835, [2010] OJ No 5502 [*City of Ottawa*].
13.	*David v Information and Privacy Commissioner Ontario*, 2006 CanLII 36618 (ON SCDC), [2006] OJ No 4351 [*David v OIPC*].
14.	*Walmsley v Ontario (Attorney General)*, 1997 CanLII 3017 (ON CA), [1997] OJ No 2485.
15.	*Andersen Consulting v Canada*, 2001 CanLII 22032 (FC), [2001] 2 FC 324 [*Anderson Consulting*].
16.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 283, [2014] OJ No 195.
17.	*Sutherland v Canada (Minister of Indian and Northern Affairs)*, 1994 CanLII 3493 (FC), [1994] 3 FC 527.
18.	*Canada (Information Commissioner) v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270, [2003] 1 FCR 219 [*Canada (IC) v Canada (MCI)*].

19.	*Gordon v Canada (Health)*, 2008 FC 258, (*sub nom Gordon v Canada (Ministry of Health))* [2008] FCJ No 331.

B.	**Doctrine**
1.	Sullivan, Ruth, *Sullivan on the Construction of Statutes,* 5th ed, (Markham : Butterworths, 2008).

C.	**Legislation**
1.	*Privacy Act*, RSC, 1985, c P-21, ss 2, 3, 7, 8, 12, 17, 26, 41 and Schedule (Section 3).
2.	*Access to Information Act*, RSC, 1985, c A-1, s 19 [ATIA].
3.	*Library and Archives of Canada Act,* SC 2004, c 11, s 12 [LACA].
4.	*Privacy Regulations,* SOR/83-508, ss 4, 6.
5.	*Freedom of Information and Protection of Privacy Act,* RSO, 1990, c F-31, ss 10, 24-25, 41-42, 47-48, 52.
6.	*Rules of Civil Procedure*, RRO 1990, Reg 194, rule 30.1.01.

D.	**Additional Sources**
1.	Indian Residential Schools Settlement Agreement [IRSSA] Article 5, "Common Experience Payment" Schedule D – Independent Assessment Process (IAP) - Part III: Assessment Process Outline, Section "t. Secretariat", "o. Privacy" - Appendix IV: Information Collection: Setting Hearing Date o Section IX - Attendance and Participation at Hearings - Appendix VIII: Government Document Disclosure Schedule N – Mandate for the Truth and Reconciliation Commission - Term 11 (Access to Relevant Information) - Term 13 (Privacy)

SCHEDULE B - Relevant text of provisions of statutes, regulations and by-laws

Privacy Act **RSC, 1985, c P-21**	***Loi sur la protection des renseignements personnels*** **LRC (1985), ch P-21**
PURPOSE OF ACT 2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.	OBJET DE LA LOI 2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.
INTERPRETATION 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, […] (*g*) the views or opinions of another individual about the individual, […] (*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual, 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; […]	DÉFINITIONS 3. Les définitions qui suivent s'appliquent à la présente loi. « renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment : […] *g*) les idées ou opinions d'autrui sur lui; […] *i*) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet; toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant : […] *m*) un individu décédé depuis plus de vingt ans. […]

COLLECTION, RETENTION AND DISPOSAL OF PERSONAL INFORMATION 6. (3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.	COLLECTE, CONSERVATION ET RETRAIT DES RENSEIGNEMENTS PERSONNELS 6. (3) Une institution fédérale procède au retrait des renseignements personnels qui relèvent d'elle conformément aux règlements et aux instructions ou directives applicables du ministre désigné.
PROTECTION OF PERSONAL INFORMATION 7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or (*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).	PROTECTION DES RENSEIGNEMENTS PERSONNELS 7. À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci : *a*) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins; *b*) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).
PROTECTION OF PERSONAL INFORMATION 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; […] (*i*) 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	PROTECTION DES RENSEIGNEMENTS PERSONNELS 8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants *a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins; […] *i*) communication à Bibliothèque et Archives du Canada pour dépôt; *j*) communication à toute personne ou à tout

(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;	organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes : (i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent, (ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;
(*k*) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;	*k)* communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;
[…]	[…]
(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.	(3) Sous réserve des autres lois fédérales, les renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont été versés pour dépôt ou à des fins historiques par une institution fédérale peuvent être communiqués conformément aux règlements pour des travaux de recherche ou de statistique.
[…]	[…]
(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(*m*) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.	(5) Dans le cas prévu à l'alinéa (2)*m*), le responsable de l'institution fédérale concernée donne un préavis écrit de la communication des renseignements personnels au Commissaire à la protection de la vie privée si les circonstances le justifient; sinon, il en avise par écrit le Commissaire immédiatement après la communication. La décision de mettre au courant l'individu concerné est laissée à l'appréciation du Commissaire.

ACCESS TO PERSONAL INFORMATION 12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to (*a*) any personal information about the individual contained in a personal information bank; and (*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.	ACCÈS AUX RENSEIGNEMENTS PERSONNELS 12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande : *a*) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels; *b*) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.
ACCESS 17. (2) Where access to personal information is to be given under this Act and the individual to whom access is to be given requests that access be given in a particular one of the official languages of Canada, […] (*b*) where the personal information does not exist in that language, the head of the government institution that has control of the personal information shall cause it to be translated or interpreted for the individual if the head of the institution considers a translation or interpretation to be necessary to enable the individual to understand the information. (3) Where access to personal information is to be given under this Act and the individual to whom access is to be given has a sensory disability and requests that access be given in an alternative format, access shall be given in an alternative format if […] (*b*) the head of the government institution that has control of the personal information considers the	EXERCICE DE L'ACCÈS 17. (2) Un individu reçoit communication des renseignements personnels dans la langue officielle qu'il a précisée dans les cas suivants : […] *b*) il n'en existe pas de version dans cette langue mais le responsable de l'institution fédérale dont ils relèvent juge nécessaire de les faire traduire ou de fournir à l'individu les services d'un interprète afin qu'il puisse les comprendre. (3) Un individu ayant une déficience sensorielle qui a demandé que communication des renseignements personnels lui soit faite sur un support de substitution reçoit communication de ceux-ci sur un tel support dans les cas suivants : […] *b*) le responsable de l'institution fédérale dont relèvent les renseignements juge nécessaire de

giving of access in an alternative format to be necessary to enable the individual to exercise the individual's right of access under this Act and considers it reasonable to cause the personal information to be converted.	communiquer les renseignements sur un support de substitution afin que la personne puisse exercer ses droits en vertu de la présente loi et raisonnable de les transférer sur un tel support.
PERSONAL INFORMATION 26. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.	RENSEIGNEMENTS PERSONNELS 26. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.
REVIEW BY THE FEDERAL COURT 41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	RÉVISION PAR LA COUR FÉDÉRALE 41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

Access to Information Act **RSC, 1985, c A-1**	***Loi sur l'accès à l'information*** **LRC (1985), ch A-1**
PERSONAL INFORMATION 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	RENSEIGNEMENTS PERSONNELS 19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if (*a*) the individual to whom it relates consents to the disclosure; (*b*) the information is publicly available; or (*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où : *a*) l'individu qu'ils concernent y consent; *b*) le public y a accès; *c*) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

Privacy Regulations **SOR/83-508**	***Règlement sur la protection des renseignements personnels*** **DORS/83-508**
PERSONAL INFORMATION UNDER THE CONTROL OF THE ARCHIVES 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.	RENSEIGNEMENTS PERSONNELS RELEVANT DES ARCHIVES PUBLIQUES 6. Les renseignements personnels qui ont été placés sous le contrôle de la Bibliothèque et Archives du Canada par une institution fédérale, pour dépôt ou à des fins historiques, peuvent être communiqués à toute personne ou à tout organisme pour des travaux de recherche ou de statistique, si *a*) ces renseignements sont d'une nature telle que leur communication ne constituerait pas une intrusion injustifiée dans la vie privée de l'individu qu'ils concernent; *b*) leur communication est conforme aux alinéas 8(2)*j*) ou *k*) de la Loi; *c)* il s'est écoulé 110 ans depuis la naissance de l'individu qu'ils concernent; ou *d*) il s'agit de renseignements qui ont été obtenus au moyen d'une enquête ou d'un recensement tenu il y a au moins 92 ans.

Freedom of Information and Protection of Privacy Act **RSO 1990, CHAPTER F 31**	***Loi sur l'accès à l'information et la protection de la vie privée*** **LRO 1990, CHAPITRE F 31**
10. (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (*a*) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or (*b*) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. […] 10.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution. […]	10. (1) Sous réserve du paragraphe 69 (2), chacun a un droit d'accès à un document ou une partie de celui-ci dont une institution a la garde ou le contrôle, sauf dans l'un ou l'autre des cas suivants : *a*) le document ou la partie du document fait l'objet d'une exception aux termes des articles 12 à 22; *b*) la personne responsable est d'avis, fondé sur des motifs raisonnables, que la demande d'accès est frivole ou vexatoire. […] 10.1 La personne responsable d'une institution veille à ce que des mesures raisonnables concernant les documents dont l'institution a la garde ou le contrôle soient élaborées, documentées et appliquées pour préserver les documents conformément aux exigences, aux règles ou aux politiques en matière de tenue et de conservation de documents, établies par voie législative ou autre, qui s'appliquent à l'institution. […]
24. (1) A person seeking access to a record shall, (*a*) make a request in writing to the institution that the person believes has custody or control of the record; […]	24. (1) L'auteur de la demande d'accès à un document : *a*) s'adresse par écrit à l'institution qui, à son avis, a la garde ou le contrôle du document; […]
25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,	25. (1) La personne responsable de l'institution qui reçoit une demande d'accès à un document dont l'institution n'a ni la garde ni le contrôle, fait les recherches nécessaires afin de déterminer si une autre institution en a la garde ou le contrôle. Si la personne responsable détermine que tel est le cas, la personne responsable, dans les quinze jours de la réception de la demande :

(*a*) forward the request to the other institution; and (*b*) give written notice to the person who made the request that it has been forwarded to the other institution. […]	*a*) d'une part, renvoie celle-ci à l'institution concernée; *b*) d'autre part, avise par écrit l'auteur de la demande du renvoi à une autre institution. […]
41. (1) An institution shall not use personal information in its custody or under its control except, (*a*) where the person to whom the information relates has identified that information in particular and consented to its use; (*b*) for the purpose for which it was obtained or compiled or for a consistent purpose; (*c*) for a purpose for which the information may be disclosed to the institution under section 42 or under section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*; or (*d*) subject to subsection (2), an educational institution may use personal information in its alumni records and a hospital may use personal information in its records for the purpose of its own fundraising activities, if the personal information is reasonably necessary for the fundraising activities. […]	41. (1) Une institution ne doit pas utiliser les renseignements personnels dont elle a la garde ou le contrôle, sauf, selon le cas : *a*) si la personne concernée par ces renseignements les a identifiés spécifiquement et a consenti à leur utilisation; *b*) aux fins pour lesquelles ils ont été obtenus ou recueillis ou à des fins compatibles; *c*) à des fins qui justifient leur divulgation à l'institution en vertu de l'article 42 ou de l'article 32 de la *Loi sur l'accès à l'information municipale et la protection de la vie privée*; *d*) sous réserve du paragraphe (2), qu'un hôpital et un établissement d'enseignement peuvent, dans le cadre de leurs activités de financement, utiliser des renseignements personnels qu'ils consignent dans leurs documents, notamment des documents sur d'anciens étudiants, si ces renseignements sont raisonnablement nécessaires aux activités de financement. […]
42. (1) An institution shall not disclose personal information in its custody or under its control except, (*a*) in accordance with Part II; (*b*) where the person to whom the information relates has identified that information in particular and consented to its disclosure; (*c*) for the purpose for which it was obtained or compiled or for a consistent purpose;	42. (1) Une institution ne doit pas divulguer les renseignements personnels dont elle a la garde ou le contrôle, sauf : *a*) conformément à la partie II; *b*) si la personne concernée par ces renseignements les a identifiés spécifiquement et a consenti à leur divulgation; *c*) aux fins pour lesquelles ils ont été obtenus ou recueillis ou à des fins compatibles;

[…]	[…]
47. (1) Every individual has a right of access to, (*a*) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and (*b*) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution. […]	47. (1) Tout particulier a un droit d'accès : *a*) aux renseignements personnels qui le concernent qui sont mis en mémoire dans une banque de renseignements personnels dont une institution a la garde ou le contrôle; *b*) aux autres renseignements personnels qui le concernent dont une institution a la garde ou le contrôle et que le particulier indique avec suffisamment de précision pour permettre à l'institution de les récupérer sans trop de difficulté. […]
48. (1) An individual seeking access to personal information about the individual shall, (*a*) make a request in writing to the institution that the individual believes has custody or control of the personal information; (*b*) identify the personal information bank or otherwise identify the location of the personal information; and (*c*) at the time of making the request, pay the fee prescribed by the regulations for that purpose. […]	48. (1) Le particulier qui sollicite l'accès aux renseignements personnels qui le concernent : *a*) en fait la demande par écrit à l'institution qui, à son avis, a la garde ou le contrôle de ces renseignements; *b*) identifie la banque de renseignements personnels ou identifie d'une autre façon l'endroit où sont consignés ces renseignements; *c*) au moment de présenter la demande, verse les droits prescrits par les règlements à cette fin. […]
52. (1) The Commissioner may conduct an inquiry to review the head's decision if, (*a*) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or (*b*) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected. […] (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine	52. (1) Le commissaire peut mener une enquête afin de réexaminer la décision de la personne responsable dans l'un ou l'autre des cas suivants: *a*) il n'a pas autorisé un médiateur à mener l'enquête visée à l'article 51; *b*) il a autorisé un médiateur à mener l'enquête visée à l'article 51, mais aucun règlement n'est intervenu. […] (4) Malgré les parties II et III de la présente loi, et toute autre loi ou privilège, le commissaire peut, dans

any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. […]	le cadre d'une enquête, exiger que lui soit communiqué un document dont une institution a la garde ou le contrôle et en faire l'examen. Il peut de même aux fins de l'enquête pénétrer dans les locaux d'une institution et en faire l'inspection. […]

Library and Archives of Canada Act, SC 2004, c 11	***Loi sur la bibliothèque et les archives du Canada, LC 2004, c 11***
12. (1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.	12. (1) L'élimination ou l'aliénation des documents fédéraux ou ministériels, qu'il s'agisse ou non de biens de surplus, est subordonnée à l'autorisation écrite de l'administrateur général ou de la personne à qui il a délégué, par écrit, ce pouvoir.
(2) Despite anything in any other Act of Parliament, the Librarian and Archivist has a right of access to any record to whose disposition he or she has been asked to consent.	(2) Par dérogation aux autres lois fédérales, l'administrateur général a accès aux documents visés par la demande d'autorisation.
(3) For the purposes of this section, the Librarian and Archivist may have access to a record to which subsection 69(1) of the *Access to Information Act* applies, only with the consent of the Clerk of the Privy Council and to a government record that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II to that Act, only with the consent of the head of the government institution in question.	(3) L'accès est toutefois subordonné à l'autorisation du greffier du Conseil privé dans le cas des documents du Conseil privé de la Reine pour le Canada visés au paragraphe 69(1) de la *Loi sur l'accès à l'information*, et à celle du responsable de l'institution en cause dans le cas des documents fédéraux qui contiennent des renseignements dont la communication est restreinte au titre d'une disposition figurant à l'annexe II de cette loi.
(4) Despite anything in any other Act of Parliament, any officer or employee of a government institution may grant to the Librarian and Archivist access to any record to whose disposition the Librarian and Archivist has been asked to consent.	(4) Par dérogation aux autres lois fédérales, les personnels des institutions fédérales sont habilités à permettre à l'administrateur général d'avoir accès aux documents visés par la demande d'autorisation.
(5) The Librarian and Archivist and every person acting on behalf or under the direction of the Librarian and Archivist shall, with respect to access to records, satisfy any security requirements	(5) L'administrateur général et les personnes agissant en son nom ou sur son ordre sont tenus, quant à l'accès aux documents visés par la demande, de satisfaire aux normes de sécurité applicables et de

applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to those records.	prêter les serments imposés à leurs usagers habituels.

LARRY PHILIP FONTAINE et al.
Plaintiffs
(Respondents in Appeals)

and

THE ATTORNEY GENERAL OF CANADA et al.
Defendants
(Appellants and Respondents in Appeals/Cross-Appeals)

Court of Appeal File Nos: C59310, C59311, C59320

COURT OF APPEAL FOR ONTARIO

UPDATED FACTUM OF THE PRIVACY COMMISSIONER OF CANADA

Office of the Privacy Commissioner of Canada
Legal Services
30 Victoria Street, 1st floor
Gatineau, Quebec K1A 1H3

Kate Wilson (LSUC #50564C)
Email: kate.wilson@priv.gc.ca
Tel: (819) 994-5878

Regan Morris (LSUC #54636A)
Email: regan.morris@priv.gc.ca
Tel: (819) 994-5905

Counsel for the Intervener, Privacy Commissioner of Canada