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 ARME, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, MONDA BUFFALO, ERNESTINE CALBAIOSAI-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)

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UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE RESPONDENTS TO THE CROSS-APPEALS NINE CATHOLIC ENTITIES

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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 EPISCOPALE 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 Appeal and Cross-Appeals)

-and-

PRIVACY COMMISSIONER OF CANADA

Intervener

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

MONTREAL, October 14, 2015

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UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE RESPONDENTS TO THE CROSS-APPEALS

NINE CATHOLIC ENTITIES

Les Sœurs de Notre-Dame Auxiliatrice, Les Sœurs de Saint-François d'Assise, L'Institut des Sœurs du Bon-Conseil also known as Les Sœurs de Notre-Dame du Bon-Conseil de Chicoutimi, Les Sœurs de Saint-Joseph de Saint-Hyacinthe, Les Sœurs de Jésus-Marie, Les Sœurs de l'Assomption de la Sainte-Vierge, Les Sœurs de l'Assomption de la Sainte-Vierge de l'Alberta, Les Sœurs Missionnaires du Christ-Roi and Les Sœurs de la Charité de Saint-Hyacinthe.

PART I- INTRODUCTION AND OVERVIEW

1. This is an appeal from the Order of Justice Perell dated August 6, 2014, regarding the disposition of documents produced and prepared for the Independent Assessment Process (the "IAP") upon its completion.

2. Various parties to the Indian Residential School Settlement signed on May 8, 2006 (the "Settlement Agreement"), being the Nine Catholic Entities, the 22 Catholic Entities and the Sisters of St. Joseph of Sault Ste. Marie (the "Appellants" or the "Catholic Entities") have appealed the Order.

3. The Attorney General of Canada ("Canada"), the Truth and Reconciliation Commission (the "TRC"), the National Centre for Truth and Reconciliation (the "NCTR") and the Independent Counsel (the "Independent Counsel") have cross-appealed the Order.

4. This factum represents the submissions of the Nine Catholic Entities (the "Respondents") on the four cross-appeals.

5. In their response to these cross-appeals, the Respondents will address the following issues raised:

    a. Standard of review;

    b. Jurisdiction of the Court of Appeal;

    c. Whether Justice Perell had the authority to order the destruction of the IAP Documents, as defined in the Order, on the completion of the relevant IAP Claim, as defined in the Order, including the exhaustion of review, appeal rights or other legal proceeding in respect of the claim;

    d. Whether Justice Perell had the authority to order that the IAP Retained Documents, subject to redaction as provided by the Order (the "IAP Redacted Documents"), may be archived by the NCTR without the written consent of Persons of Interest ("POIs") or any other person who participated in the IAP;

    e. Whether Justice Perell had the authority to order the development of a notice program to inform Claimants, as defined in the Order, of their option to archive their IAP Redacted Documents at the NCTR.

6. In addition, the Respondents will address the failure of the cross-appellants to address relevant and applicable provisions of the law of Quebec to their members and former members, as citizens of Quebec.

PART II – STATEMENT OF FACTS

7. The Respondents accept as correct the facts as set out in the factum of the Independent Counsel (the "Independent Counsel factum").

8. The Respondents accept as correct the facts set out in paragraphs 11-12, 14-19, 24-28 and 29 of the factum of Canada (the "Canada factum"). The Respondents disagree with the balance of the facts as set out in the Canada factum.

9. The statements of fact including the "overview" in the factums of the TRC (the "TRC factum") and the NCTR (the "NCTR factum") are more in the nature of argument and as such the Respondents are generally unable to set out a position thereon as contemplated in the Rules. In particular, the promise of perpetual protection of the confidentiality of documents placed in the hands of the NCTR is argumentative or conclusory rather than factual or evidence-based.

Additional Facts Relied on by the Respondents

10. The Settlement Agreement was agreed upon by all Catholic Entities on the basis of two principal considerations: 1) a release from civil liability on behalf of the Government of Canada and its underwriting of the indemnification of Claimants; and 2) the protection of the personal information pertaining to the Catholic Entities' members or former members and all parties involved in the IAP.

11. Importantly, under the IAP as set out in the Settlement Agreement, the Respondents and other religious entities and their members are severely limited in responding to allegations made against them. That is the agreed structure of the IAP: essentially to allow Claimants to pursue a claim without having to face those against whom allegations are made, without having to face cross-examination, and without being subject to a right of appeal of anyone against whom allegations were made, no matter how serious. But in return, the IAP clearly contemplates that such allegations will never be made public, at least not without the consent of those against whom they were made.

> ***Settlement Agreement,*** **Recital last para, Joint Compendium of Documents, Volume 1, Tab 23**
> ***Affidavit of Sister MacLellan, sworn May 12, 2014,*** **paras 12, 77-97, Joint Compendium of Documents, Volume 5, Tab 49**

12. The assurance of confidentiality of IAP Documents was a vital inducement to the acceptance of the Respondents to the Settlement Agreement.

> ***Affidavit of Sister MacLellan, sworn May 12, 2014,*** **paras 12, 77-97, Joint Compendium of Documents, Volume 5, Tab 49**
> ***Affidavit of Rev. Britton, sworn May 2, 2014,*** **para 2, Joint Compendium of Documents, Volume 4, Tab 44**

13. In each case where a citizen agreed as POI to participate in the IAP process, she did so while also relying upon the assurances of privacy and confidentiality she had received from the Superior General of her Congregation. In addition, such assurances of confidentiality were also expressed and implied in the Settlement Agreement and as such, the parties are inextricably bound by such undertakings.

14. The Respondents' members and former members were also provided with assurances of confidentiality at the hearings.

Settlement Agreement, Schedule "D", **para o.i., Joint Compendium of Documents, Volume 1, Tab 24**

PART III- ISSUES AND ARGUMENTS IN RESPONSE TO THE CROSS-APPELLANTS

A. Standard of Review

15. The Respondents agree with the cross-appellants that the standard of review generally applicable to the issues raised on this appeal is correctness.

16. Where Justice Perell was essentially engaged in the exercise of interpreting the Settlement Agreement, his conclusions in issue should be reviewable on a standard of correctness.

17. In *Sattva Capital Corp. v. Creston Moly Corp.*, the Supreme Court of Canada held that contractual interpretation generally involves issues of mixed fact and law.

Sattva Capital Corp. v. Creston Moly Corp.**, 2014 SCC 53, para 50, Joint Brief of Authorities, Volume 5, Tab 98**

18. However, the Supreme Court concluded that where it is possible to identify an extricable question of law from within what would generally constitute a question of mixed fact and law, the applicable standard of review will be one of correctness.

Sattva, ibid. **para 53**

19. The Supreme Court also held that the failure to consider a relevant factor may constitute an error of law.

Sattva, ibid.

20. The Respondents further rely on the decision of the Manitoba Court of Appeal in *Fontaine et al. v. Canada*. In this decision, the Court, citing the Supreme Court's decision in *Sattva,* held that the applicable standard of review to the interpretation of the Settlement Agreement was not that of palpable and overriding error, but rather the standard of correctness.

> ***Fontaine et al. v. Canada (Attorney General),* 2014 MBCA 93, Joint Brief of Authorities, Volume 2, Tab 43**

21. The Respondents respectfully submit that Justice Perell erred in failing to consider the legislative and quasi-constitutional privacy rights of their members and former members, and the incidence these rights should have on the interpretation of the Settlement Agreement. Because it is a pure question of law, the applicable standard of review will be one of correctness.

22. However, the Respondents agree with the Independent Counsel that Justice Perell's finding that it was an implied term of the Settlement Agreement that IAP Documents will be destroyed, is subject to review on the deferential standard of palpable and overriding error since it is a finding inferred from findings of facts without an error in any extricable legal principle.

B. Jurisdiction of the Court to hear this Appeal

23. The Respondents agree with three of the four cross-appellants, namely the TRC, the NCTR and the Independent Counsel, that this Court has jurisdiction to hear this appeal pursuant to s. 6 (1)(b) of the *Courts of Justice Act*.

24. The cross-appellant Canada did not address this jurisdictional issue.

25. Indeed, in light of the decision of this Court in *Parsons v. Ontario*, there is no doubt that Justice Perell's Order is final.

***Parsons v. Ontario*, 2015 ONCA 158, Joint Brief of Authorities, Volume 5, Tab 90**

26. The Order, by determining the disposition of the IAP Records, as defined in the Order, constitutes a final resolution on the matter in dispute between the parties.

27. The Respondents endorse the Independent Counsel's conclusion that "… there are no further questions to be answered or actions to be taken that would alter the decision of Justice Perell".

***Independent Counsel factum,* para 47**

C. Destruction Order of the IAP Documents

28. Three of the cross-appellants, namely the TRC, the NCTR and Canada, appeal Justice Perell's finding that it was an implied term of the Settlement Agreement that the IAP Documents be destroyed upon the completion of the relevant IAP claim. Essentially, these cross-appellants argue that the express terms of the Settlement Agreement do not permit the destruction of IAP Documents.

29. Contrary to what has been argued, the destruction of the IAP Documents is an "express or implied term" of the Settlement Agreement, as determined by Justice Perell in his reasons.

***Reasons for decision of Justice Perell,* para 353, Joint Compendium of Documents, Volume 1, Tab 4**

30. The assurances of privacy and confidentiality given to the Catholic Entities were an essential component of the Settlement Agreement.

> ***Affidavit of Sister MacLellan, sworn May 2, 2014,*** **para 39, Joint Compendium of Documents, Volume 5, Tab 49**
> ***Affidavit of Rev. Britton, sworn May 2, 2014,*** **para 2, Joint Compendium of Documents, Volume 4, Tab 44**

31. These assurances were *sine qua non* conditions to the agreement of the Catholic Entities to the terms of the Settlement Agreement.

32. The parties to the Settlement Agreement never signed and never granted access to any documents other than historical records of the Indian Residential School System.

> ***Affidavit of Sister MacLellan, sworn May 2, 2014,*** **para 47, Joint Compendium of Documents, Volume 5, Tab 49**

33. The Respondents therefore respectfully endorse the following findings of Justice Perell set out in the decision under appeal:

> 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 any 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.
>
> ***Reasons for decision of Justice Perell,*** **para 326, Joint Compendium of Documents, Volume 1, Tab 4**

34. In light of the above, the Respondents strongly disagree with the NTCR's argument that the Settlement Agreement does not provide for the destruction of records on completion of IAP Claims but only for confidentiality.

35. The Respondents' position is that the contractual expectation at the time the Settlement Agreement was concluded was the destruction of IAP records, after the completion of the IAP, subject to limited exceptions provided therein.

36. The TRC and the NCTR are not parties to the Settlement Agreement and were not involved in the negotiation of the rules of confidentiality to which all parties to the Settlement Agreement are bound.

37. The destruction of the IAP Records was the recommendation made by Dr. David Flaherty, mandated by the Chief Adjudicator to provide an expert opinion, based on the necessity "… to protect the current and historical reputations and privacy interests of the Claimants and any third parties identified in the claims records".

> ***Affidavit of David H. Flaherty, sworn May 2, 2014,*** **para 31, Joint Compendium of Documents, Volume 4, Tab 45**

38. The Respondents strongly disagree with the TRC's argument that the destruction of the IAP Documents is antithetical to the aim of reconciliation on the basis that it requires knowledge.

39. In this respect, the Respondents endorse the following position of Dr. Flaherty:

> ...there is absolutely no public interest in access to the private records of IAP Claimants, beyond their use for the stated purposes of adjudicating their claims …. scholars can write about the legacy of residential schools in Canada without access to more than 38,000 [claim] files.
>
> ***Ibid.*** **para 55**

40. With regard to the issue of the historical value of the IAP Documents raised by the TRC and Canada, the Respondents respectfully accept the view of Dr. Flaherty that individual claim files are not of enduring historical value.

***Ibid*. para 64**

41. This is clearly the position set out in the existing arrangements between the department of Aboriginal Affairs, which holds the IAP Documents, and Library and Archives Canada (LAC). It is clear that the documents particularly in issue in this appeal, namely the applications, hearing transcripts, and audio recordings, may be destroyed at the end of the IAP process. This is the express and only documented position of the National Librarian and Archivist contained in the record. It cannot be considered as countermanded by a hearsay reference that unnamed subordinates of LAC may be "re-appraising" this position.

***Affidavit of Tim Eryou, affirmed May 5, 2014*, paras 26-34, Joint Compendium of Documents, Volume 4, Tab 46**

42. This means that even if the IAP Documents are "government records", there is no legal impediment under the *Library and Archives Act*, S.C. 2004, c.11, or otherwise to a court-ordered destruction of IAP Documents.

43. Nor should a standalone concern as to the potential "historical value" of documents mitigate to the point of non-existence the privacy interests of individuals concerned, be they the rights of the Claimants or others.

44. The assertions of the NCTR at paragraph 9 of its factum that, "IAP records can be preserved...at the same time as obligations of confidentiality to...others respected" are just

that : assertions that are not established in the record and on which Justice Perell made no findings.

45. Such assertions are belied by regular and notorious leaks and hacking of confidential information from large and sophisticated organizations, of which the Court may take judicial notice. Recent prominent examples include the leak to Wikileaks of an enormous amount of highly classified and supposedly highly-safeguarded US State Department communications (including documents revealing the identities of foreign sources); the hacking of personnel records of virtually every US government employee held by the US Office of Personnel Management; and the hacking of sensitive personal information of clients held by large businesses such as JP Morgan and, as this factum is written, by a prominent international dating service based in Canada.

> **Privacy Commissioner of Canada, *Report of an Investigation into the Security, Collection and Retention of Personal Information: TJX Companies Inc. /Winners Merchant International L.P.,* PIPEDA Report of Findings #2007-389**

46. These prominent releases of seemingly highly protected information thus belie the "strict privacy controls" supposedly available at the University of Manitoba, referred to at paragraph 48 of the NCTR factum.

47. Any release of the information at issue would be highly prejudicial to organizations, their members and/or the surviving family of those members, and indeed, as pointed out in the evidence of Mr Fontaine set out in the Justice Perell's reasons, to former IRS students against whom student-on-student abuse allegations are made.

> ***Reasons for decision of Justice Perell,* para 215, Joint Compendium of Documents, Volume 1, Tab 4**

48. With respect, it is completely contradictory to suggest on the one hand that information should be preserved while at the same time suggesting on the other hand that the confidentiality of the information will be maintained in perpetuity. If the information is to remain confidential, there is simply no reason to keep it.

D. Archiving of IAP Documents by the NCTR

49. Two of the four cross-appellants, namely the TRC and the NCTR, argue that Claimants have the right to their own information and to tell their story. The Respondents respectfully submit that this does not necessitate the unilateral placement of IAP Documents in the NCTR, which in any event is not provided for in the Settlement Agreement.

50. This submission involves the interpretation of Schedule "D", paragraphs (o) (i) and (ii) of the Settlement Agreement.

51. Essentially, the TRC and the NCTR argue that these provisions mean that Claimants have the right to preserve their transcripts in an un-redacted form, along with redacted copies of their adjudicated decisions. Claimants would also be entitled to keep un-redacted copies of their applications. Should the Claimants decide to archive these documents in the NCTR, they argue, Schedule "N", paragraph 11 would not operate to negate such right by making it contingent on the consent of any other party or individual.

52. The relevant portion of Schedule "N" reads as follows:

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

53. The Respondents respectfully submit that the position of TRC and NTCR essentially to ignore this provision is incorrect, in that it disregards the clear intention of the parties to the Settlement Agreement.

54. The intention of the parties to the Settlement Agreement is clear given that the term employed in its Schedule "N" is "individual affected" and not "Claimant" as employed in Schedule "D" with respect to the archiving of a transcript.

> ***Settlement Agreement, Schedule "D",*** **para o, Joint Compendium of Documents, Volume 1, Tab 24**

55. IAP records may only be transferred to the NCTR with the consent of all parties to the Settlement Agreement and all individuals affected including the Claimants, Persons of Interest and/or Alleged Perpetrators and the Church Entities.

> ***Settlement Agreement, Schedule "N",*** **p. 10, Joint Compendium of Documents, Volume 1, Tab 25**

56. It is true that one sentence in Schedule D of the Settlement Agreement appears to contemplate the archiving of a transcript of a Claimant's testimony at the "option" of a Claimant; however, due to the express provisions of Schedule N referred to above, it is clear that such a transcript could not be archived unless at the very least it were redacted to remove any references to any persons affected who had not consented. But Dr Flaherty's uncontradicted expert evidence is that a "rich literature" indicates that as a practical matter,

it is "enormously difficult" to redact identifying information from material of this nature: the risks of identifying individuals "are very high".

> ***Affidavit of David H. Flaherty, sworn May 2, 2014*, para 74, Joint Compendium of Documents, Volume 4, Tab 45**

57. The TRC and NCTR factums appear to infer that the privacy rights of Claimants should receive greater protection than others. However, all individuals stand equal under privacy legislation and under applicable principles of civil and common law concerning privacy.

58. Thus it is the position of the Respondents, which was perhaps not expressed as clearly as it should have been in their appeal factum, that there can be no archiving of transcripts without the consent of all "individuals affected".

E. Development of a notice program

59. The TRC, the NCTR and the Independent Counsel agree that the development of a notice program falls within the jurisdiction of the Court.

60. As for Canada, its position is that an extensive and long-term notice program, to be implemented by the Chief Adjudicator and paid by Canada, constitutes a material and unnecessary amendment to the Settlement Agreement.

61. The Respondents disagree with the TRC that the order of a notice program amounts to an implementation measure of the Settlement Agreement and does not constitute an amendment of such agreement.

***Lavier v. My Travel Holidays Canada Inc.,* 2011 ONSC 3149, leave to appeal denied 2011 ONSC 5559, Joint Brief of Authorities, Volume 4, Tab 75**

62. With the creation of a notice program, the permission to archive IAP Redacted Documents, and the setting of a retention period that is in no way rooted in the Settlement Agreement, Justice Perell exceeded his supervisory jurisdiction and in doing so impermissibly altered the Settlement Agreement reached by the parties.

63. The Respondents further submit that the Superior Court's inherent jurisdiction does not allow the Court to create or ignore substantial legal rights or obligations.

***Myers v. Canada (Attorney General),* 2015 BCCA 95, para 19, Joint Brief of Authorities, Volume 4, Tab 85**

64. The Respondents respectfully submit that Justice Perell's Order impermissibly created legal rights and obligations not provided for in the Settlement Agreement.

65. The Respondents also submit that pursuant to Justice Perell's Order, the transfer and archiving of IAP Redacted Documents would impermissibly breach the privacy rights of the Respondents' members and former members.

66. As noted above, the Respondents consider that the setting of a retention period is not rooted in the Settlement Agreement and would constitute an amendment. However, should this Court determine otherwise, the Respondents endorse the Independent Counsel's position that a 15-year retention period is far too long and that there is nothing in the Settlement Agreement that allows for such a long time period, which constitutes an amendment to the Settlement Agreement and is contrary to the intention of the parties.

F. ADR Documents should be considered as IAP Documents

67. The Respondents agree with the Independent Counsel that all documents related to the ADR process should also be considered as IAP Documents.

68. The Respondents respectfully submit that their members or former members involved in the ADR process are entitled to the same protections provided for the IAP in the Settlement Agreement.

69. In this regard, the Respondents endorse the Independent Counsel's position that the information generated in the ADR process should have been treated in the same way as the information from the IAP by Justice Perell.

G. Failure of cross-appellants to address privacy rights of others

70. The Respondents respectfully submit that the potential archiving of IAP Documents would constitute a breach of the privacy of their members and former members.

71. The right to privacy is a fundamental value in federal law and Quebec civil law, to which the Supreme Court of Canada has given a constitutional protection.

> ***Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act, 1982*, 1982 c. 11 (U.K.) in RSC 1985 App. II no. 44, ss. 7 and 8;**
> **Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada*, Volume I, Carswell, (looseleaf), pp. 2-4 to 2-16;**
> ***Dagg v. Canada (Min. of Finance)*, [1997] 2 S.C.R. 403, paras 65 and 66, Joint Brief of Authorities Joint Brief of Authorities, Volume 2, Tab 27**
> ***H.J. Heinz Co. of Canada v. Canada (A.G.)*, [2006] 1 S.C.R. 441, para 28, Joint Brief of Authorities, Volume 3, Tab 66**

72. As previously argued at first instance, as well as in the Respondents' primary appeal, the Respondents' members and former members have a fundamental right to privacy as well as other personality rights guaranteed by the *Civil Code of Québec* and the *Québec Charter of Human Rights and Freedoms*.

> ***Québec Charter of Human Rights and Freedoms*, CQLR c. C-12, ss. 4, 5, 9;**
> ***Civil Code of Québec*, CQLR, C-1991 c. 64, ss. 3, and 35 to 41;**
> **Barbara McIsaac, Rick Shields et Kris Klein, *The Law of Privacy in Canada, supra*, pp. 2-58.75, 2-58.78 and 2-58.79**

73. The Respondents also have the obligation to protect these rights belonging to their members and former members as well as any associated persons that may claim them.

74. In his reasons for decision, Justice Perell mentioned the Respondents' submission about the duties of confidentiality owed by the Respondents toward their members and former members in accordance with the *Civil Code of Québec* and the *Québec Charter of Human Rights and Freedoms*, but failed to protect those duties in the resulting Order.

> ***Reasons for decision of Justice Perell,* paras 229, 230 and 231, Joint Compendium of Documents, Volume 1, Tab 4**

75. Justice Perell seems to have at least recognized the Respondents' privacy concerns in stating the following:

> … The parties to the IRSSA interested in confidentiality, most particularly the survivors of the Indian Residential Schools and the Church entities obliged by law to protect the privacy of their members and interested in protecting their own reputations, intended the highest possible degree of confidentiality and privacy during the IAP and most particularly during IAP hearings, which would be recorded sessions.
> [emphasis added]

> ***Reasons for decision of Justice Perell,* para 315, Joint Compendium of Documents, Volume 1, Tab 4**

76. However, the Respondents respectfully submit that Justice Perell did not take into account the fundamental right of privacy of their members or former members in ordering the potential archiving of IAP Documents without their written consent, or the consent of the Respondents on their behalf.

77. None of the cross-appellants discussed any of the Respondents' propositions in this regard in their appeal factums, thereby ignoring the Canadian legal duality.

78. In light of the above, the Respondents respectfully reiterate and refer to their submissions on point contained in paragraphs 48 to 63 of their appeal factum.

79. The Respondents respectfully submit that the right of privacy of persons other than the Claimants is an unavoidable element of this appeal.

PART IV- ORDER SOUGHT

80. The Respondents respectfully seek an Order:

a. That their appeal be allowed, with costs;

b. That the cross-appeals, to the extent that the relief sought therein is inconsistent with the relief requested by the Respondents, be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of October 2015.

Per: _____

Pierre-L. Baribeau
Lawyer for the Respondents to the Cross-Appeals
Nine Catholic Entities

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

LARRY PHILIP FONTAINE et al.

Plaintiffs
(Respondents in Appeal)

-and-

THE ATTORNEY GENERAL OF CANADA et al.

Defendants
(Appellants and Respondents to the Appeal and Cross-Appeals)

-and-

PRIVACY COMMISSIONER OF CANADA

Intervener

CERTIFICATE

I, Pierre-L. Baribeau, lawyer for the Respondents to the Cross-Appeals certify:

1. An order under subrule 61.09(2) is not required.

2. An estimate that ~~1.5 hours~~ 50 minutes will be required for the Appellants/Respondents to the Cross-Appeals' oral argument, ~~not~~ including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montreal, October 14, 2015

Pierre-L. Baribeau
L.S.U.C. Occasional Practice Permit
2015
LAVERY, de BILLY L.L.P.
Lawyer for the Respondents to the
Cross-Appeals,
Nine Catholic Entities

SCHEDULE "A" – LIST OF AUTHORITIES

Sattva Capital Corp. v. *Creston Moly Corp*., 2014 SCC 53

Fontaine et al v. *Canada (Attorney General),* 2014 MBCA 93

Parsons v. Ontario, 2015 ONCA 158

Privacy Commissioner of Canada, *Report of an Investigation into the Security, Collection and Retention of Personal Information: TJX Companies Inc. /Winners Merchant International L.P.,* PIPEDA Report of Findings #2007-389

Lavier v. *My Travel Holidays Canada Inc*., 2011 ONSC 3149

Myers v. *Canada (Attorney General),* 2015 BCCA 95

Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada.* (Toronto: Carswell, looseleaf)

Dagg v. *Canada (Min. of Finance)*, [1997] 2 S.C.R. 403

H.J. Heinz Co. of Canada v. *Canada (A.G.)*, [2006] 1 S.C.R. 441

SCHEDULE "B" – STATUTES

***Courts of Justice Act*, R.S.O. 1990, CHAPTER C.43**

Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

***Canadian Charter of Rights and Freedoms,* Schedule B to the *Canada Act, 1982*, c. 11, ss. 7-8**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

8. Everyone has the right to be secure against unreasonable search or seizure

***Quebec Charter of Human Rights and Freedom*, CQLR, c. 12, ss. 4, 5, 9.**

4. Every person has a right to the safeguard of his dignity, honour and reputation.

5. Every person has a right to respect for his private life.

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

***Civil Code of Québec,* CQLR, C-1991, art. 3, 35, 36, 37, 38, 39, 40, 41**

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

35. Every person has a right to the respect of his reputation and privacy.

36. No one may invade the privacy of a person without the consent of the person unless authorized by law.

The following acts, in particular, may be considered as invasions of the privacy of a person:

[…]

(6) using his correspondence, manuscripts or other personal documents.

37. Every person who establishes a file on another person shall have a serious and legitimate reason for doing so. He may gather only information which is relevant to the stated objective of the file, and may not, without the consent of the person concerned or authorization by law, communicate such information to third persons or use it for purposes that are inconsistent with the purposes for which the file was established. In addition, he may not, when establishing or using the file, otherwise invade the privacy or injure the reputation of the person concerned.

38. Except as otherwise provided by law, any person may, free of charge, examine and cause the rectification of a file kept on him by another person with a view to making a decision in his regard or to informing a third person; he may also cause a copy of it to be made at reasonable cost. The information contained in the file shall be made accessible in an intelligible transcript.

39. A person keeping a file on a person may not deny him access to the information contained therein unless he has a serious and legitimate reason for doing so or unless the information may seriously injure a third person.

40. Every person may cause information which is contained in a file concerning him and which is inaccurate, incomplete or equivocal to be rectified; he may also cause obsolete information or information not justified by the purpose of the file to be deleted, or deposit his written comments in the file.

Notice of the rectification is given without delay to every person having received the information in the preceding six months and, where applicable, to the person who provided that information. The same rule applies to an application for rectification, if it is contested.

41. Where the law does not provide the conditions and manner of exercising the right of examination or rectification of a file, the court, upon application, determines them.

Similarly, if a difficulty arises in the exercise of those rights, the court settles it, upon application.

LARRY FONTAINE et al.
Plaintiffs (Respondents in Appeal)

v.

THE ATTORNEY GENERAL OF CANADA et al.
Defendants
(Appellants and Respondents to the Appeal and Cross-Appeals)

Court of Appeal File Nos: 59310, 59311, 59320

COURT OF APPEAL OF ONTARIO

Proceeding commenced at TORONTO

UPDATED FACTUM OF THE NINE CATHOLIC ENTITIES WITH REFERENCE TO THE JOINT COMPEDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES (RESPONDENTS TO THE CROSS-APPEALS)

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OUR FILE NO.: 001326-000192