

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, 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 SMOKEDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs/
Respondents

and

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS IN 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, 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 ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC

EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME - AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE AND INSTITUT DES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY) THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL- DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. - LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN, LES OBLATS DE MARIE IMMACULEE DU MANITOBA , THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE - ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE - THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE - FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants/
Appellants

(22 Catholic Entities as underlined and as in the Attached Appendix "A")

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

UPDATED FACTUM OF THE APPELLANTS, THE TWENTY-TWO CATHOLIC ENTITIES as listed in Appendix "A" attached hereto (with Reference to the Joint Compendium of Documents and Brief of Authorities)



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PART I - INTRODUCTION

1. This Factum is submitted on behalf the Twenty-Two (22) Catholic Entities as listed in **Appendix “A”** attached hereto (collectively, the **“22 Catholic Entities”** or the **“Appellants”**), who are all parties to the Indian Residential Schools Settlement Agreement signed May 8, 2006 (the **“IRSSA”**), appealing certain terms of the Reasons for Decision of the learned Judge, the Honourable Mr. Justice Perell, dated and released on August 6, 2014 (the **“Reasons for Decision”**), and entered February 10, 2015 (the **“Order”**) (the **“Appeal”**).

2. This Appeal is about maintaining the balance the parties agreed to in the IRSSA. In order to provide former residential schools students with a timely and efficacious claims process, the Independent Assessment Process (**“IAP”**) was designed to deny procedural fairness to alleged perpetrators (**“Alleged Perpetrators”**). However, the IRSSA also protected Alleged Perpetrators and religious organizations by ensuring that the process was closed to the public, and that the outcome of the process would remain confidential.

3. As submitted herein, the 22 Catholic Entities are gravely concerned that the accusations made against Alleged Perpetrators and religious organizations in connection with events that occurred decades ago, that are contained throughout the 37,000 IAP claims, could ultimately be made public through the terms of the Order. This proposed loss of confidentiality for Alleged Perpetrators and religious organizations is contrary to the plain reading of the terms of the IRSSA as the IRSSA does not provide for the unilateral and unconditional delivery of IAP records to any third party for archival,

historical or management purposes. Furthermore, this proposed loss of confidentiality is in direct contrast to the reasonable expectations of the organizations that negotiated the terms of the IRSSA, and the individuals who participated in the IAP, and to fundamental fairness.

PART II - OVERVIEW

A. Decision of the Chambers Judge

4. The Reasons for Decision consisted of a total of sixty-two (62) pages, which included, *inter alia*, an overview of the background to the IRSSA, a legal analysis on the contractual interpretation of the IRSSA, and the final disposition. A summary of the final disposition of Mr. Justice Perell in the Reasons for Decision can be found at paragraph 17, which reads as follows:

For the reasons that follow, I grant the Chief Adjudicator's request that the IAP Documents be destroyed. I make in rem - against the world - the following Order. It is ordered that: (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the Claimant, his or her IAP Application Form, hearing transcript, hearing audio recording, and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP Documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP Documents; (d) any other person or entity in possession of IAP Documents shall destroy them after the completion of the IAP hearings.

Reference: ~~Tab 10 at the Appeal Book and Compendium~~ Reasons for Decision of Perell J. dated August 6, 2014, **Joint Compendium of Documents, Vol 1, Tab 4 at 30.**

5. The 22 Catholic Entities appeal two (2) specific terms of the Reasons for Decision and the Order, namely, that: (a) With redaction of personal information about Alleged Perpetrators or other affected parties, and with the consent of the claimant (“**Claimant**”), IAP Redacted Documents (as defined therein) may be archived at the

National Centre for Truth and Reconciliation (the “NCTR”); and (b) That a notice program be undertaken in order to advise Claimants of their choice to transfer certain of their IAP Redacted Documents to the NCTR (the “**Notice Program**”). “IAP Redacted Documents” are defined within the Order to mean redacted “applications for compensation, hearing transcripts and audio recordings of the Claimant’s evidence, and adjudicators’ compensation decisions in respect of an IAP Claim.”

Reference: ~~Tab 9 at the Appeal Book and Compendium~~— Order of Perell J. dated August 6, 2014 and entered February 10, 2015, Joint Compendium of Documents, Vol 1, Tab 3 at 23.

6. The 22 Catholic Entities respectfully submit that the interpretation of the IRSSA given by Mr. Justice Perell in the Reasons for Decision, which significantly departed from the evidence before the Court, constitutes an error in law, by reason that:

(a) The transfer of the IAP Redacted Documents (excluding transcripts) to the NCTR without the consent of all ‘affected individuals’ is a breach of the express terms of the IRSSA, and constitutes a material amendment to the terms of the IRSSA. Such a proposed amendment to the IRSSA requires the consent of all signatories of the IRSSA, or compliance with section 5(d) of the Court Administration Protocol (as defined below);

and (b) The ordering of the Notice Program constitutes a material amendment to the terms of the IRSSA. Such a proposed amendment to the IRSSA requires the consent of all signatories of the IRSSA, or compliance with section 5(d) of the Court Administration Protocol (as defined below).

B. Jurisdiction and Standard of Review

7. The source of the Appellants’ right of appeal and the Court’s jurisdiction to entertain it is found section 6(1)(b) of the *Courts of Justice Act* (the “CJA”). The general powers of this Court to determine the Appeal are set forth in section 134 of the *CJA*.

Reference: *Courts of Justice Act*, RSO 1990, Chapter C. 43.

8. On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own.

Reference: ~~Tab 1 of Appellants' Book of Authorities~~ — *Housen v. Nikolaisen*, (2002), 211 D.L.R. (4th) 577, [2002] 2 S.C.R. 235 at paragraphs 8-37, **Joint Brief of Authorities, Vol 3, Tab 68.**

9. In 2014, the Manitoba Court of Appeal reviewed issues relating to the contractual interpretation of the IRSSA, in *Fontaine et al v. Canada (Attorney General)*. Relying on the most recent Supreme Court decision on this issue, *Sattva Capital Corp. v. Creston Moly Corp.*, the Manitoba Court of Appeal found that the issues they faced involved errors of law or extricable questions of law and were therefore reviewable on the standard of correctness. In this regard, the Manitoba Court of Appeal stated:

The interpretation of a contract in the context of the factual matrix is a question of mixed fact and law. However, the palpable and overriding error standard will not apply if a question of law can be extricated from the factual considerations involved. The question is then treated as one of law and the standard is correctness...

The above approach to contractual interpretation was most recently affirmed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII) at paras. 42-55. In that case, Rothstein J., writing for a unanimous court, stated that, while most cases of contractual interpretation involve the application of mixed fact and law, extricable questions of law can be identified in such circumstances as are identified in *King*.

[Emphasis Added]

Reference: ~~Tab 2 of Appellants' Book of Authorities~~ — *Fontaine et al v. Canada (Attorney General)*, 2014 MBCA 93, **Joint Brief of Authorities, Vol 2, Tab 43.**

~~Tab 3 of Appellants' Book of Authorities~~ — *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, **Joint Brief of Authorities, Vol 3, Tab 98.**

10. Very recently, the Alberta Court of Appeal in *Roderick Alexis v. The Attorney General Of Canada* cited with approval the Manitoba Court of Appeal's decision in *Fontaine et al v. Canada (Attorney General)* with respect to the appropriate standard of review when interpreting the IRSSA. In that case, the Alberta Court of Appeal stated as follows:

This Court has also concluded that correctness remains the appropriate standard of review when interpreting standard form contracts since the results would be expected to have an impact beyond the parties to a particular dispute and be of precedential value.... The case under appeal does not involve a standard form contract, nor have the parties identified any extricable errors of law. As a result, the appropriate standard of review in interpreting Article 12.01(2)(b) is reasonableness.

[Emphasis Added]

Reference: Tab 4 of Appellants' Book of Authorities - *Roderick Alexis v. The Attorney General of Canada*, 2015 ABCA 132 at para 18.

11. As outlined in the Notice of Appeal filed by the 22 Catholic Entities, the Appellants raise various grounds of appeal that concern the appropriate interpretation of the IRSSA. The 22 Catholic Entities submit that Mr. Justice Perell failed to consider certain relevant factors in his interpretation of the terms of the IRSSA, as outlined throughout this Factum. In addition, the 22 Catholic Parties submit that this Appeal has great legal precedential value and will affect thousands of individuals, including Claimants, individual Alleged Perpetrators and large religious institutions ("**Church Entities**"), across the country. It is submitted that these are extricable legal issues that should be reviewed on a standard of correctness, in accordance with *Sattva* and *Fontaine et al v. Canada (Attorney General)*, such that this Court is free to replace the findings of law of the trial judge with its own.

Reference: ~~Tab 1 of Appellants' Book of Authorities~~ *Housen v. Nikolaisen*, (2002), 211 D.L.R. (4th) 577, [2002] 2 S.C.R. 235, **Joint Brief of Authorities, Vol 3, Tab 68.**

PART III – STATEMENT OF FACTS

12. Some but not all of the facts to be relied upon by the 22 Catholic Entities in support of the Appeal are set forth in: (a) The Affidavit of Daniel Ish, sworn September 26, 2013 (the “**Ish Affidavit**”); (b) The Affidavit of Tom McMahon, sworn November 12, 2013 (the “**McMahon Affidavit**”); (c) The Affidavit of Rev. Mr. Robert Britton, sworn May 2, 2014 (the “**Britton Affidavit**”); (d) The Affidavit of F. Mark Rowan, sworn May 11, 2014 (the “**Rowan Affidavit**”); and (e) The Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014 (the “**MacLellan Affidavit**”).

A. Background to IRSSA and Procedural Background to the Within Appeals

13. The within appeals include three (3) separate appeals together with four (4) cross-appeals filed (collectively, the “**3 Appeals**”) seeking different forms of relief in connection with the Reasons for Decision and the Order.

14. The 3 Appeals originate from issues involving the interpretation and implementation of the IRSSA. The IRSSA is a product of extensive negotiations aimed at resolving individual and class actions related to Indian Residential Schools. The IRSSA was executed by all parties to those class actions in May, 2006, and was approved by the Court in nine (9) provinces, with the purpose of providing a fair, comprehensive, and lasting resolution to the legacy of Indian Residential Schools. The courts issued orders on March 8, 2007, which incorporated the terms of the IRSSA and otherwise addressed its implementation and administration (the “**Implementation Orders**”). The Court Administration Protocol, appended as Schedule “A” to the Implementation Orders,

provides for the courts' ongoing supervision of the IRSSA (the "**Court Administration Protocol**").

Reference: Tab 12 of Appellants' Book of Authorities – Court Administration Protocol.

15. The particular component of the IRSSA that is at issue in the 3 Appeals is the procedural and substantive nature of the IAP. Pursuant to Article 6.01 of the IRSSA, the parties to the IRSSA agreed to establish the IAP. The IAP is a claimant-centered, non-adversarial out of court process for the resolution of claims of sexual abuse, serious physical abuse, and other wrongful acts suffered at Indian Residential Schools. Former students or residents of Residential Schools may apply to the IAP in order to demonstrate that they experienced certain enumerated forms of abuse and to be compensated for those abuses.

Reference: ~~Tab 15 at the Appeal Book and Compendium~~— Affidavit of Daniel Ish, sworn September 27, 2013 at para. 7 (~~Tab 3 of the Exhibit Book~~), Joint Compendium of Documents, Vol 2, Tab 32 at 485 and 486.

16. The IAP was not designed to provide a fair process to all interested parties and it was not designed to provide outcomes that would meet the standards of a court or public inquiry. It was designed to provide an outcome for the Claimants.

17. The original proceedings that precipitated the 3 Appeals involved two (2) Request for Directions brought by the Chief Adjudicator of the IAP (the "**Chief Adjudicator**"), and the Truth and Reconciliation Commission (the "**TRC**") (the "**Commission RFD**"). With respect to the Commission RFD, part of the TRC's document collection mandate was to provide opportunities to residential school survivors to provide statements to the TRC reflecting their experiences at residential schools. As of November 6, 2013, the TRC has held six national events, and is planning its seventh and

final event in addition to a closing ceremony. The TRC has held 77 community hearings, two regional events and has provided funding to, or participated in, over 300 community-based residential school events (collectively, the “**TRC Events**”). The TRC has gathered approximately 6,200 oral statements from its hearings and statement gathering as of November 6, 2013.

Reference: ~~Tab 33 at Appeal Book and Compendium—~~Affidavit of Tom McMahon, sworn November 12, 2013 at para. 36 (~~Tab 21 of the Exhibit Book~~), **Joint Compendium of Documents, Vol 2, Tab 33 at 534.**

B. Involvement of 22 Catholic Entities with IRSSA and IAP

18. The privacy and confidentiality contractual terms of the IRSSA were of primary and vital importance to the 22 Catholic Entities when entering into the IRSSA. The parties bargained and agreed that the IAP process would be a private and confidential process for Claimants and that the process would follow a non open-adjudication principle to allow Claimants to give evidence on a confidential basis. In consideration of entering into the IRSSA, the 22 Catholic Entities and its members surrendered a number of their fundamental procedural rights which would typically be used to test the veracity of abuse claims in a court of law. These fundamental procedural rights include their rights to face their accuser, challenge the allegation, appeal and generally defend the individual’s reputation and their organization’s historical reputation.

Reference: ~~Tab 32 at Appeal Book and Compendium—~~Affidavit of Rev. Mr. Robert J. Britton, sworn May 2, 2014 at paragraph 2 (~~Tab 20 of Exhibit Book~~), **Joint Compendium of Documents, Vol 4, Tab 44 at 1604.**

19. Over the course of the IAP process, many adjudicative hearings have occurred where an Alleged Perpetrator or persons of interest cannot be located, has passed away or is unable to defend themselves due to advanced age or physical or mental

infirmity. In such a situation, and as explained in Appendix III of the Schedule “D” of the IRSSA, the IAP hearing still occurs, notwithstanding the fact that the Alleged Perpetrator is unable to give evidence in defence of the allegations of the Claimant and in defence of their reputation.

Reference: ~~Tab 10 at Appeal Book and Compendium~~ Reasons for Decision of Perell, J. dated August 6, 2014, at paragraph 139, citing the Affidavit of Sister MacLellan, Joint Compendium of Documents, Vol 1, Tab 4 at 49.

PART IV - ISSUES AND THE LAW

20. The Appellants respectfully submit that this Appeal raises the following issues for determination by this Honourable Court, namely:

- (a) Whether Mr. Justice Perell erred in law by concluding that the transfer of IAP Redacted Documents to the NCTR, with the exception of Redacted Transcripts, with only the consent of the Claimant, is not contrary to the express and implied terms of the IRSSA establishing confidentiality?
- (b) Whether Mr. Justice Perell erred in law by concluding that the ordering of the Notice Program does not constitute a material amendment to the terms of the IRSSA?

A. Whether Mr. Justice Perell erred in law by concluding that the transfer of IAP Redacted Documents to the NCTR, with the exception of Redacted Transcripts, with only the consent of a claimant, is not contrary to the express and implied terms of the IRSSA establishing confidentiality?

21. As a starting point, the TRC and the NCTR are not parties to the IRSSA but rather are entities created by the IRSSA. Therefore, the proposed transfer of the IAP

Redacted Documents to the NCTR, or for that matter any third party, can only legally occur if it is provided for through the terms of the IRSSA.

22. The interpretation of the IRSSA given by Mr. Justice Perell in the Reasons for Decision, which significantly departed from the evidence before the Court, constitutes an error of law such that this Court is free to replace the findings of law of the trial judge with its own. The legal basis for the Appellants' position is contained in Article III(o)(ii) of Schedule "D" of the IRSSA, and Article 11 of Schedule "N" of the IRSSA:

Article III(o)(ii) of Schedule "D"

Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

[Emphasis Added]

Article 11 of Schedule "N"

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

[Emphasis Added]

Reference: ~~Tab 17 at Appeal Book and Compendium—~~ Schedule D of Settlement Agreement, Joint Compendium of Documents, Vol 1, Tab 24 at 346.

~~Tab 27 at Appeal Book and Compendium—~~ Schedule N of Settlement Agreement, Joint Compendium of Documents, Vol 1, Tab 25 at 391.

23. These two provisions of the IRSSA establish that the treatment of IAP records under the terms of the IRSSA fall into two components. The first component is a

Claimant's right to access and obtain certain of his or her IAP records. The second component is a Claimant's right to archive certain IAP records.

24. Firstly, the IAP has always provided that claimants are able to access certain of their own IAP records. These rights to access and obtain documents are contained in the terms of the IRSSA, namely:

- (a) In Schedule D, III(0)(ii) on page 15, a claimant is able to access and obtain their own memorialized (redacted) transcripts, and to do with as they wish (the "**Redacted Transcripts**");
- (b) In Schedule D, III(o)(i) on page 15, a claimant is able access and obtain their redacted compensation decision and legal fee decision; and
- (c) In Appendix II of Schedule D, a claimant is able to obtain their own documents produced to the Secretariat.

Reference: ~~Tab 17 at Appeal Book and Compendium~~ Schedule D of Settlement Agreement, Joint Compendium of Documents, Vol 1, Tab 24 at 346 and 350.

25. The mechanics and scope of the notice provided to Claimants in connection with these access rights was not one of the issues either the TRC, or the Chief Adjudicator requested the lower Court to adjudicate on. Therefore, this particular issue was not before Mr. Justice Perell in the Chief Adjudicator's Request for Directions nor the TRC's Request for Directions, collectively heard from July 14 – 16, 2014 (the "**July Hearing**"), nor is it an issue under review in the within Appeal.

Reference: ~~Tab 17 at Appeal Book and Compendium~~ Schedule D of Settlement Agreement, Joint Compendium of Documents, Vol 1, Tab 24 at 346 and 350.

~~Tab 11 at Appeal Book and Compendium~~ Request for Direction by TRC, dated August 14, 2013 (generally), **Joint Compendium of Documents, Vol 1, Tab 1.**

~~Tab 12 at Appeal Book and Compendium~~ Request for Direction by Chief Adjudicator, dated October 11, 2013 (generally), **Joint Compendium of Documents, Vol 1, Tab 2.**

26. Secondly, the express terms of the IRSSA contemplates that only one type of IAP record may be archived, and that is the Redacted Transcripts (Article III(o)(ii) of the Schedule “D” of the IRSSA). In such a situation, the Redacted Transcripts may only be transferred to the TRC for research and archiving purposes, with the consent of all ‘individuals affected’ (Article 11 of Schedule “N”). For the purposes of this particular provision, the 22 Catholic Entities submit that ‘individuals affected’ would include Defendants, witnesses, Alleged Perpetrators, the Church Entities, the 22 Catholic Entities, non-religious local and caregiving staff, other students, and all other identifiable individuals in each IAP hearing.

27. Notwithstanding the above, Mr. Justice Perell went beyond the express provisions of the IRSSA and ordered that in addition to Redacted Transcripts, other types of IAP records, including redacted applications for compensation, redacted audio recordings of the Claimant’s evidence, and redacted adjudicators’ compensation decision in respect of an IAP claim (collectively referred to above as the “Redacted IAP Documents”), may be transferred and archived at the NCTR with only the consent of the Claimant.

28. This conclusion arrived at by Mr. Justice Perell essentially replaces and disregards the agreement made between the private parties to the IRSSA that only certain IAP records were to be used for archival purpose, on obtaining the required consent of all

affected individuals. Simply put, this conclusion is in direct contrast to the express and implied terms of the IRSSA such that if allowed to stand, constitutes an amendment to the terms of the IRSSA. The 22 Catholic Entities therefore respectfully submit that Mr. Justice Perell erred in arriving at this conclusion, by failing to properly consider and weigh a number of relevant factors that were before him. These factors will be discussed below.

(i) **Breach of Express and Implied Terms of IRSSA**

29. Firstly, the ordering of the proposed transfer of IAP Redacted Documents to the NCTR, including Redacted Transcripts, with only the consent of the Claimant, is contrary to the express terms of the IRSSA. Therefore, any addition or modification of the express terms of the IRSSA represents a material amendment to the IRSSA, which is contrary to the express terms of the IRSSA by reason of section 18.06 of the IRSSA, which states that, “This Agreement constitutes the entire agreement between the parties ...” (the “**Entire Agreement Clause**”).

Reference: ~~Tab 16 at the Appeal Book and Compendium— Settlement Agreement,~~ **Joint Compendium of Documents, Vol 1, Tab 23 at 318.**

30. The 22 Catholic Entities submit that the general rules of construction that apply to any written agreement also apply to exclusionary clauses, such as the Entire Agreement Clause referenced above. The Entire Agreement Clause is clear and unambiguous: it leaves no room for additions or amendments to the IRSSA.

Reference: ~~Tab 5 of Appellants’ Book of Authorities— Dryburgh v. Oak Lake Marina (1992) Ltd., 2001 FCT 671,~~ **Joint Brief of Authorities, Vol 1, Tab 29.**

31. A regime that grants the ability of Claimants to archive documents that were never intended to be archived, and which requires only the consent of the Claimant and

not the consent of the Alleged Perpetrators and other affected individuals, to such an archive process, is inconsistent and incompatible with the express provisions of the IRSSA. Their creation by Mr. Justice Perell represent more than the mere 'administration' of the IRSSA; they constitute entirely new components of the IRSSA, ones not agreed to by the parties and in fact inconsistent with the express terms agreed to by the parties and put to writing.

32. In addition, and most importantly, a regime that grants such an ability is not only inconsistent with the terms of the IRSSA as a whole, but also with the underlining guarantees of confidentiality it provides. When interpreting contracts, Courts may consider the surrounding circumstances, factual background, and purpose of a contract. In outlining the history of the IRSSA, Justice Perell correctly outlined and identified the factual nexus applicable to the interpretation of the IRSSA:

[136] In achieving the goal of compensation, a problem for Plaintiffs and Representative Plaintiffs was that the claims were intensely private and difficult for the Claimants to describe in public. Further, unfortunately some claimants had been victimized by other students at the Indian Residential Schools. Moreover, some claimants were both victims and perpetrators of child abuse in the toxic environment of the Indian Residential Schools. Thus, privacy and confidentiality concerns were an extremely important part of the factual nexus of the negotiations.

[138] Privacy and confidentiality was also extremely important to the Defendants. If true, the allegations against the Church Entities that had managed the Indian Residential Schools for Canada would show their members and employees to be criminals, sinners, and moral degenerates, and if untrue, the allegations were grave slanders.

[139] Further, privacy and confidentiality were essential to the Defendants negotiating the IRSSA, because they were being asked to give up the right to test the allegations made against them in Court.

[Emphasis Added]

Reference: ~~Tab 10 at Appeal Book and Compendium~~ Reasons for Decision of Perell, J. dated August 6, 2014, at paras. 136, 138, and 139, **Joint Compendium of Documents, Vol 1, Tab 4, at 48 and 49.**

33. The transfer of the IAP Redacted Documents to the NCTR, which is a subset of all of the IAP records, contain arguably the most confidential and private information of the ‘affected individuals’ involved in the IAP process. Most notably, contained in the applications, decisions, and hearing transcripts are the statements made by the Claimants against Alleged Perpetrators recounting their experiences at residential schools and identifying other parties involved, such as witnesses, Alleged Perpetrators, non-religious local and caregiving staff, and other students. Together, these three (3) sources of information create and shape the core of the Claimant’s claim. This is precisely the circumstances, information and documents that require protection.

34. The 22 Catholic Entities submit that the Claimants, parties, the witnesses involved in the IAP process and the parties that negotiated the IRSSA, were provided with assurances of privacy and confidentiality regarding the documents in the possession of the Secretariat. These privacy considerations took the following forms: (a) In the IRSSA itself; (b) In the Application Form and Guide to the Independent Assessment Process Application; (c) In the Confidentiality Agreement the Claimants, parties, witnesses and others in attendance at hearing were required to sign; (d) Notice of Allegations provided to Alleged Perpetrators; and (e) Orally by the adjudicators presiding over the hearings.

35. With respect to the IRSSA itself, assurances of privacy and confidentiality were provided for in the following provisions:

(a) In the negotiations leading to the formation of the IRSSA, as described in the

Rowan Affidavit and the MacLellan Affidavit;

(b) In Schedule “D” of the Settlement Agreement:

(i) at page 15, wherein it states:

“Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law”;

(ii) at page 19, wherein it states:

“Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application”;

(iii) at page 30, wherein it states:

“Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person’s personal information, as required by the Privacy Act”;

Reference: ~~Tab 17 at Appeal Book and Compendium—Exhibit “B”:~~
Schedule D of the Settlement Agreement at pages 15, 19 and 26
(~~Tab 5 of Exhibit Book~~), **Joint Compendium of Documents,**
Vol 1, Tab 24 at 346, 350 and 361.

(c) In Schedule “O-3” of the Settlement Agreement:

(i) at page 9, wherein it states:

“Where a Catholic Entity receives from the IAP Secretariat a copy of Claimant’s IAP application or receives from the Government a copy of an application to the DRM, the Catholic Entity agrees to be bound by trust conditions imposed on it with respect to confidentiality or, if it does not so agree in one or more instances, to return the document(s) without copying, reading or making use of it in any way”;

(ii) at page 60-61, wherein it states:

“Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities

will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application.”; and

Reference: ~~Tab 26 at Appeal Book and Compendium – Exhibit D~~: Schedule “O-3” to the Settlement Agreement at pages 9, 60 and 61 (~~Tab 14 of Exhibit Book~~), Joint Compendium of Documents, Vol 5, Tab 49 at 2077, 2078 and 2079.

(iii) at page 11, paragraph, 11 wherein it states:

“Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.”

[Emphasis Added]

Reference: ~~Tab 27 at Appeal Book and Compendium – Exhibit “E”~~: Schedule N: Mandate for the Truth and Reconciliation Commission at page 10 (~~Tab 15 of Exhibit Book~~), Joint Compendium of Documents, Vol 1, Tab 25 at 391.

36. For these reasons, the 22 Catholic Entities submit the disclosure of the IAP Redacted Documents to the TRC and the NCTR without the consent of all ‘affected individuals’ is a clear breach of the express terms of the IRSSA, and the privacy obligations to which the parties are strictly bound to observe pursuant to the IRSSA. Moreover, the assurances of privacy which were provided ought to be honoured in order to protect the privacy and confidentiality of the information contained in the IAP Redacted Documents and the integrity of the IAP process and IRSSA as a whole.

(ii) Official Mandate of TRC

37. Secondly, the 22 Catholic Entities submit that the specific information contained in the IAP Redacted Documents (except for the Redacted Transcripts) clearly falls outside the TRC Mandate such that the TRC and NCTR do not have the legal rights to collect such documents.

38. The official Mandate of the Commission is found in Schedule “N” of the IRSSA which includes principles that are to guide the TRC in its work (the “**TRC Mandate**”). The TRC Mandate explicitly requires that the TRC to, “create as complete an historical record as possible of the IRS system and legacy”. The 22 Catholic Entities submit that the IAP Redacted Documents, as a collection, are anything but complete.

Reference: ~~Tab 27 at Appeal Book and Compendium — Exhibit “E”;~~
Schedule N: Mandate for the Truth and Reconciliation
Commission at paragraph 1(a) to (G) (~~Tab 15 of Exhibit Book~~);
Joint Compendium of Documents, Vol 1, Tab 25 at 381 and
382.

39. The incompleteness of the IAP Redacted Documents originates from article 6.01 of the IRSSA which establishes that the IAP is governed by Schedule “D” of the IRSSA. There are a number of procedural inequalities that were built into Schedule “D”, namely:

- (a) at page 12, it states that an alleged perpetrator “does not have a role as a party” and has “no right of confrontation”; and

Reference: ~~Tab 28 at Appeal Book and Compendium — Exhibit “F”;~~
Schedule D: Independent Assessment Process at page 12 (~~Tab~~
~~16 of Exhibit Book~~);, **Joint Compendium of Documents, Vol**
1, Tab 24 at 343.

- (b) at page 21 of Appendix III, it states that “If the alleged perpetrator is dead, cannot be located, or declines to attend, the hearing may still occur.”

Reference: ~~Ibid at page 21, Appendix III.~~, **Joint Compendium of**
Documents, Vol 1, Tab 24 at 352.

40. Over the course of the IAP process, many adjudicative hearings have occurred where an Alleged Perpetrator or person of interest cannot be located, has passed away or is unable to defend themselves due to advanced age or physical or mental infirmity. In such a situation, the hearing still occurs, notwithstanding the fact that the

Alleged Perpetrator is unable to give evidence in defence of the allegations of the Claimant and in defence of their reputation.

Reference: ~~Tab 13 at Appeal Book and Compendium—~~ Affidavit of F. Mark Rowan, sworn May 1, 2014 at paragraphs 3(c) and (d) (~~Tab 1 of Exhibit Book~~), **Joint Compendium of Documents, Vol 4, Tab 42, at 1591.**

41. In situations where an Alleged Perpetrator is located, a number of other procedural disadvantages occur. This situation was described in the Ish Affidavit as follows:

“If located, alleged perpetrators may give evidence “as of right,” though they cannot be compelled to attend. They are, in essence, non-compellable witnesses with specific rights outlined in the Settlement Agreement.

The alleged perpetrator may be accompanied by counsel during his or her evidence, but cannot attend or be represented during the evidence of the claimant without the advance consent of the parties. Conversely, the claimant is entitled to attend the hearing for the evidence of the alleged perpetrator since the claimant is a party.”

Reference: ~~Tab 15 at Appeal Book and Compendium—~~ Affidavit of Daniel Ish, sworn September 27, 2013 at paragraphs 27 - 28 (~~Tab 3 of the Exhibit Book~~), **Joint Compendium of Documents, Vol 2, Tab 32, at 491.**

42. Furthermore, if an Alleged Perpetrator provides a sworn statement to the Adjudication Secretariat, but is unable to attend the hearing, the statement is not produced to the adjudicator for consideration at the hearing. In fact, this process is expressly provided for in each letter that an Alleged Perpetrator receives from AANDC when first being made known that particular allegations have been made against them.

Reference: ~~Tab 14 at Appeal Book and Compendium—~~ Exhibit “A”: Copy of Redacted Allegation Letter (~~Tab 2 of the Exhibit Book~~), **Joint Compendium of Documents, Vol 2, Tab 29, at 462.**

43. On this issue, the 22 Catholic Entities have grave concerns with false accusations against Alleged Perpetrators, being named on the basis of generally available

lists of individuals who worked at the residential schools. In some circumstances, claims have been made against Alleged Perpetrators that were not even working or present at the residential school at the time in question when the Claimant alleges that the alleged abuse occurred. Given the procedural nature of the IAP Process, evidence in defense of the Alleged Perpetrators is never part of the adjudicative hearing when an accused person testifies and even in those cases, they are not permitted to participate in the hearings in which they are accused.

44. The 22 Catholic Entities submit that fundamental aspects of procedural fairness which would allow Alleged Perpetrators to dispute the accuracy of the allegations and defend themselves and their reputation are entirely absent from the IAP Process. In light of this, it cannot be maintained that the outcome of the IAP process should be treated as anything other than a confidential claims process. Nor can it be said that the IAP Redacted Documents contain a complete historical record as set out in the goals of Schedule “N”.

45. In addition, section 4 of Schedule “N” prohibits the TRC from making recommendations on matters covered in the IRSSA. Schedule “N” expressly states that the “Commission is not to act as a public inquiry or to conduct a formal legal process...”, or to make findings of liability. In *Fontaine v. Canada (Attorney General)*, Justice Goudge delineated the areas that were relevant to the Commission Mandate, and he noted that section 4 of Schedule N prohibits the TRC from making recommendations on matters covered in the IRSSA and that “the parties agreed in section 2(b) of Schedule “N” that the TRC was not to act as a public inquiry...”

Reference: ~~Tab 27 at Appeal Book and Compendium — Exhibit “E”;~~
Schedule N: Mandate for the Truth and Reconciliation

Commission at paragraph 4 (~~Tab 15 of Exhibit Book~~), **Joint Compendium of Documents, Vol 1, Tab 25 at 385.**

~~Tab 6 of Appellants Book of Authorities~~— *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, 114 O.R. (3d) 263 at paragraphs 97 – 98, **Joint Brief of Authorities, Vol 2, Tab 41.**

46. The 22 Catholic Entities submit that the terms of the Order providing for access and use of the IAP Redacted Documents is therefore beyond the TRC's mandate and that if the TRC and the NCTR were to take over these records from this confidential complaint resolution and compensation process, it would be crossing the line into a public inquiry. Publishing these records will have the practical impact of the TRC and the NCTR reporting findings akin to liability against the Catholic Entities who ran the schools and staff. This would involve the TRC and the NCTR publicly making findings of misconduct against the Alleged Perpetrators when that is precisely what the IRSSA was intended to avoid.

47. Finally, the collecting of and use of the IAP Redacted Documents by the TRC and the NCTR cannot be within the TRC Mandate as neither the TRC nor the IAP Redacted Documents were in existence until the IRSSA was ratified by the Courts. Accordingly, the possible disclosure of the IAP Redacted Documents could not conceivably have been negotiated by the parties at the time of signing the IRSSA.

48. The TRC Mandate can be, and ought to be fulfilled through the assembly of records and sources of information other than the IAP Redacted Documents, which the TRC has current access to. Tom McMahon, who is General Counsel to the TRC, illustrated a number of alternative sources of information in his Affidavit (collectively, the "**Commission Database**").

Reference: ~~Tab 33 at Appeal Book and Compendium~~— Affidavit of Tom McMahon, sworn November 12, 2013 at paragraphs 39 and 40 (~~Tab 21 of Exhibit Book~~), **Joint Compendium of Documents, Vol 2, Tab 33 at 535.**

49. The parties to the IRSSA have made commitments to make available their archives or copies of archive material and cooperate with Canada and the TRC. Those are the documents along with the voluntary stories told at the TRC Events, and the documents contained in the Commission Database, that were the documents envisioned at the time of the agreement that the TRC would have and have access to.

(iii) Removal of Personal identifiers from the IAP Redacted Documents Insufficient

50. Thirdly, the 22 Catholic Entities submit that even if fully redacted, the information contained in the IAP Redacted Documents, when taken as a whole, could still identify Alleged Perpetrators, which would constitute a breach of the confidentiality commitments contained in the IRSSA. If severed documents do release sufficient information such that an individual is identifiable, it can be found that the documents have released what constitutes "personal information".

51. The Court in *Gordon v. Canada (Minster of Health)* had occasion to review and comment on this issue when it stated as follows:

In *Canada (Information Commissioner) v. Canadian Transportation Accident Investigation & Safety Board*, Madame Justice Desjardins, for the Court, wrote at paragraph [43]:

These two words, "about" and "concernant" [the French language equivalent of "about" in section 3 of the *Privacy Act*], shed little light on the precise nature of the information which relates to the individual, except to say that information recorded in any form is relevant if it is "about" an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an "identifiable" individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available....

[citations omitted, emphasis added]

Thus, information recorded in any form is information "about" a particular individual if it "permits" or "leads" to the possible

identification of the individual, whether alone or when combined with information from sources "otherwise available" including sources *publicly* available.

Reference: ~~Tab 7 of Appellants' Book of Authorities~~ – *Gordon v. Canada (Minster of Health)*, [2008] F.C.J. No. 331 at paragraphs 32 and 33, **Joint Brief of Authorities, Vol 2, Tab 61.**

52. In the instant case, where many Alleged Perpetrators come from small, closely knit communities, identifiable markers such as the years they worked at the school, their birth place and year, combined with information from sources otherwise available could invariably lead to the identification of the Alleged Perpetrator by the general public. Therefore, the 22 Catholic Entities submit that no degree of diligence and care can be exercised in redacting or severing the IAP Redacted Documents to protect the confidential information of the 'affected individuals', particularly where, as here, the personal information is of the highest sensitivity and the risk of harm resulting from inappropriate disclosure is considerable.

(iv) Cannot Imply Terms to IRSSA to Make it More "Fair"

53. Fourthly, the Entire Agreement clause also specifically contemplated and precluded the possibility of a Court finding an implied term on interpretation of the IRSSA. Notwithstanding this, the only logical conclusion that can be drawn when measuring Mr. Justice Perell's conclusions contained in the Reasons for Decision in connection with the proposed transfer of IAP Redacted Documents to the NCTR without consent of all 'affected individuals', against the express terms of the IRSSA, is that he implied terms into the IRSSA.

54. As a basic point of law, terms may not be implied into a contract if such terms conflict with the express terms contained within the contract. The Alberta Court of

Appeal in *Catre Industries Ltd. v. Alberta* had occasion to review and comment on this basic point of law. In that case, the Court of Appeal stated:

The most important limitation of all is to be found in the rule that no term will be implied that is inconsistent with or contrary to, or so as to vary, the express terms of the contract. This legal principle has been settled since at least 1877 and has been consistently applied in our common law as a basic tenant of contractual interpretation.

[Emphasis Added.]

Reference: ~~Tab 8 of Appellants' Book of Authorities~~— *Catre Industries Ltd. v. Alberta*, 1989 ABCA 243 at para 28, citing “Hudson’s Building and Engineering Contracts (10th Edition)”, **Joint Brief of Authorities, Vol 1, Tab 24.**

55. Indeed, this principle was identified by Mr. Justice Perell when he cited with approval the following excerpt of law from *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, at paragraph 29:

A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis.

Reference: ~~Tab 10 at Appeal Book and Compendium~~— Reasons for Decision of Perell, J. dated August 6, 2014, at paragraph 77, citing *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1991] 1 SCR 619 at paragraph 29, **Joint Compendium of Documents, Vol 1, Tab 4 at 40.**

56. This principle holds true even where the Court sees an opportunity to alter an agreement so as to make it more fair or reasonable in the Court’s eyes. In *Attorney General of Belize & Ors. v. Belize Telecom Ltd. & Anor*, the Court stated that a Court:

... The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means...

[Emphasis Added]

Reference: ~~Tab 9 of Appellants' Book of Authorities—~~ *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)* [2009] UKPC 10 at paragraph 16 (BAILII), **Joint Brief of Authorities, Vol 1, Tab 6.**

57. In addition, the British Columbia Court of Appeal in *Bower v. JM Schneider Inc. (1986)* stated:

I do not think that it is open to the court to imply a term on the ground of the court's notion of fairness.... That is not to say that the operation of the 'business efficacy' or 'practical efficacy' test is incapable of incorporating a 'fairness' clause into a contract. But that incorporation must be done to fill a gap, through the application of the 'practical efficacy' test, and not in order to impose the court's notions of fairness on the contracting parties... And there is no gap to be filled where the term sought to be implied contradicts a term incorporated expressly in the contract.

[Emphasis Added.]

Reference: ~~Tab 10 of Appellants' Book of Authorities—~~ *Bower v. JM Schneider Inc. (1986)*, 34 DLR (4th) 77, 1986 CarswellBC 397 at paragraphs 69-70, **Joint Brief of Authorities, Vol 1, Tab 12.**

58. The 22 Catholic Entities respectfully submit that Mr. Justice Perell essentially redrafted the IRSSA, and then interpreted it in a manner contrary to the relevant evidence before him. It is respectfully submitted that it was apparent, on the evidence before Mr. Justice Perell, that there was a clear meeting of the minds as between the signatory parties of the IRSSA as to which IAP records could be deposited into an archive, and under what consent provisions. The Court cannot step in and make the bargain for the parties more fair or more reasonable, particularly in light of the significant privacy rights involved in that bargain.

Reference: ~~Tab 9 of Appellants' Book of Authorities—~~ *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)* [2009] UKPC 10, **Joint Brief of Authorities, Vol 1, Tab 6.**

(v) **Requirements to Amend IRSSA**

59. Finally, any addition or modification of the express terms of the IRSSA constitutes a material amendment to the IRSSA, such that compliance with section 5(d) of the Court Administration Protocol is required, or alternatively, consent to such amendment is required by all signatories to the IRSSA. In this regard, section 5(d) of the Court Administration Protocol provides as follows:

5(d) ... A supervising court that has received a copy of the full record may choose to adopt the reasons of any other supervising court hearing the matter without holding a formal hearing of its own, but no order amending the Agreement or the Approval Orders shall be effective unless it is approved by all 9 (nine) supervising courts.

Reference: Tab 12 of Appellants' Book of Authorities – Court Administration Protocol.

60. In light of this, if an amendment is contemplated to be made to the terms of the IRSSA, then such an amendment must be approved by way of Court order, which in turn, only becomes effective until approved by all nine (9) supervising courts, pursuant to the Court Administration Protocol. In the case at bar, the terms of the Order clearly constitute amendments to the IRSSA such that the Order does not become effective until approved by all nine (9) supervising courts.

B. Whether the ordering of the Notice Program constitutes a material amendment to the terms of the IRSSA?

61. Simply put, the Notice Program is not provided for in the IRSSA.

62. Indeed, the court procedure undertaken preceding the July Hearing did not allow for any evidence to be put before Mr. Justice Perell in connection with the Notice Program, as such issues were not raised until after affidavit materials were served on the parties and filed with the Court. More particularly, the concept of undertaking a Notice

Program was only put before the Court during the course of the July Hearing when the Government of Canada (“**Canada**”), by way of its Factum dated June 30, 2014, proposed the implementation of the Notice Program. In this regard, Canada stated this:

On the basis of the real possibility that certain IAP claimants will consent to the disclosure of their personal information to the TRC, Canada proposes the implementation of a Notice Plan whereby former IAP claimants would be contacted by letter and asked for permission to disclose their personal information in IAP applications, transcripts, or decisions to the TRC. For future claimants, letters would be included in settlement packages.

Reference: Tab 34 at Appeal Book and Compendium – Factum of the Attorney General of Canada, dated June 30, 2014, at page 33.

63. This proposal was supported by the Mr. Justice Perell when he stated the following at para. 16 and 19 of the Reasons for Decision:

Canada supports the idea that a notice program be developed to inform Claimants that their IAP Documents may be archived at the NCTR if the Claimant consents. To facilitate obtaining consents, Canada is prepared to undertake a court approved program. However, Canada says that the court has no jurisdiction to order a Notice Program. Canada's undertaking is entirely gratuitous.

...

By way of overview, my conclusions are as follows:

- Further, the court should order that a notice program be developed to notify Claimants that provided that the personal information about alleged perpetrators or affected parties is redacted, the Claimant's IAP Documents may be archived at the NCTR.

...

- The notice plan to encourage voluntary delivery by Claimants of IAP Documents to the TRC and the NCTR with redactions to protect the personal information of others is an **excellent idea**, but involuntary disclosure of the IAP Documents would be a grievous betrayal of trust, a breach of the IRSSA, and it would foster enmity and new harms, not reconciliation.

Reference: ~~Tab 10 at Appeal Book and Compendium~~ — Reasons for Decision of Perell, J. dated August 6, 2014, at paragraphs 16 and 19, **Joint Compendium of Documents, Vol 1, Tab 4 at 30.**

64. Clearly, the words used by Mr. Justice Perell in describing the Notice Program as an “excellent idea” supports the position of the 22 Catholic Entities that the Notice Program was not a negotiated term of the IRSSA, but rather an after-thought offered by Canada.

65. Indeed, a reading of the Reasons for Decision demonstrates that Mr. Justice Perell was attempting to make the IRSSA ‘more fair’ or ‘reasonable’ by ordering the Notice Program. As outlined above, doing so is not within the Court’s authority and is contrary to the settled rules of contractual interpretation. Moreover, the IRSSA was court approved by each of nine different Courts across the country as being fair, reasonable, and in the best interests of the Claimants (specifically, at that time, the Class Members).

Reference: ~~Tab 10 at Appeal Book and Compendium~~ — Reasons for Decision of Perell J. dated August 6, 2014, at paragraph 156, **Joint Compendium of Documents, Vol 1, Tab 4 at 52.**

66. The ordering of the Notice Program (and its subsequent implementation) is not necessary to give effect to the IRSSA. The purpose of the IRSSA was not to create an archive of IAP Redacted Documents, but to resolve a National complex legal issue in a highly confidential manner. Indeed, no evidence was put before Mr. Justice Perell that the availability of Claimants to request and receive a memorialized transcript of their evidence pursuant to Schedule D, III(o)(ii) on page 15, was inadequate to fulfil the terms of the IRSSA.

67. Similarly, Courts should not assume that the parties did not understand the reluctance of Claimants and Alleged Perpetrators to share their stories or make their IAP

records publically available or archived. That reluctance was clearly contemplated and a guiding concern throughout the settlement process. To conclude now that a Notice Program is necessary to give effect to the parties' intention would be to assume that the parties did not understand or foresee that those affected by the IAP process would not want to share confidential and sensitive information. Had the parties wanted a notice program to be developed, they would have done so expressly in the IRSSA. As the Courts have noted, the IRSSA was the product of negotiations which:

...evolved over a number of years. It is not a commercial agreement that arose after a short sharp negotiating session between two corporate entities. Its context should not be arbitrarily limited as if it were.

Reference: ~~Tab 6 of Appellants' Book of Authorities~~— *Fontaine v. AG Canada*, 2013 ONSC 684 at paragraph 34, as cited in *Fontaine v. AG Canada*, 2014 BCSC 941 at paragraph 40, **Joint Book of Authorities, Vol 2, Tab 41.**

68. To that end, Courts have found that when interpreting contracts, the absence of words may be considered. Here, the absence of a notice program in the IRSSA is indicative of the parties intentions and should be given deference as such.

Reference: ~~Tab 11 of Appellants' Book of Authorities~~—*Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, **Joint Book of Authorities, Vol 2, Tab 55.**

69. In light of the facts and matters described above, the 22 Catholic Entities respectfully submit that the Notice Program was improperly read in to the IRSSA by Mr. Justice Perell. Since a Court does not have the authority to unilaterally make a material amendment to a contract against the parties wishes, it appears that Mr. Justice Perell intended to read in the Notice Program as an implied term. However, doing so was not available to him in law as the Notice Program conflicts with the express terms of the IRSSA itself. Even if this conclusion is incorrect, the Notice Program cannot be read in

because of the overall purpose and factual context of the negotiations, and ultimately the IRSSA, which were premised on the importance of confidentiality for all affected parties.

PART V - ORDER REQUESTED

70. Therefore, the 22 Catholic Entities respectfully request that the Order be varied on the following basis:

(a) Paragraph 4 be varied so as to read:

4. AND THIS COURT ORDERS the Chief Adjudicator shall retain IAP Retained Documents held by the Chief Adjudicator and the Secretariat for a 15 year Retention Period under the following conditions:

(a) Before the end of the Retention Period, a Claimant and all individuals affected, including all members or former members of the Church Entities, Persons of Interest and/or Alleged Perpetrators, non-religious staff, other students and witnesses, or any associated persons concerned in the IAP claim, may consent to Redacted Transcripts ~~any of the IAP Redacted Documents~~ in respect of his or her claim being archived at the NCTR.

(b) Paragraph 4(b) to 4(f) be varied so as to reflect the terms of varied paragraph 4(a) above; and

(c) Paragraph 5 be set aside in its entirety.

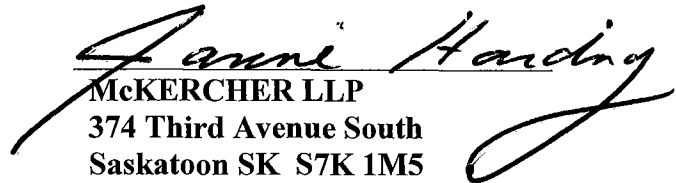
PART VI – CERTIFICATE

71. The Appellants certify that:

- (a) an order under subrule 61.09(2) is not required; and
- (b) the estimated time for oral argument by Appellants' counsel, not including a reply, is one hour.

ALL OF WHICH IS RESPECTFULL SUBMITTED

DATED at Saskatoon, Saskatchewan, this 15th day of October, 2015.


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Catholic Entities**

JANINE L. HARDING

▲ Barrister & Solicitor

APPENDIX “A”

1. Les Oeuvres Oblates de l’Ontario
2. Les Residences Oblates du Quebec
3. Soeurs Grises de Montreal/Grey Nuns of Montreal
4. Sisters of Charity (Grey Nuns) of Alberta
5. Les Soeurs de La Charité des T.N.O.
6. Hotel-Dieu de Nicolet
7. The Grey Nuns of Manitoba Inc. – Les Soeurs Grises du Manitoba Inc.
8. The Sisters of Saint Ann
9. Sisters of Instruction of the Child Jesus
10. The Sisters of Charity of Providence of Western Canada
11. Immaculate Heart Community of Los Angeles CA
12. Missionary Oblates – Grandin Province
13. Les Oblates de Marie Immaculee du Manitoba
14. Oblates of Mary Immaculate- St. Peter’s Province
15. Order of the Oblates of Mary Immaculate in the Province of British Columbia
16. La Corporation Episcopale Catholique Romaine de Grouard
17. The Catholic Episcopale Corporation of Mackenzie
18. Roman Catholic Episcopal Corporation of Prince Rupert
19. Sisters of Charity Halifax
20. The Roman Catholic Bishop of Kamloops Corporation Sole
21. Sisters of the Presentation
22. Roman Catholic Archiepiscopal Corporation of Winnipeg

PART VII SCHEDULE “A” - LIST OF AUTHORITIES

Tab

- 1 *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577, [2002] 2 S.C.R. 235.
- 2 *Fontaine et al v. Canada (Attorney General)*, 2014 MBCA 93.
- 3 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.
- 4 *Roderick Alexis v. The Attorney General of Canada*, 2015 ABCA 132.
- 5 *Dryburgh v. Oak Lake Marina (1992) Ltd.*, 2001 FCT 671.
- 6 *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, 114 O.R. (3d) 263.
- 7 *Gordon v. Canada (Minster of Health)*, [2008] F.C.J. No. 331.
- 8 *Catre Industries Ltd. v. Alberta*, 1989 ABCA 243.
- 9 *Attorney General of Belize & Ors v. Belize Telecom Ltd. & Anor (Belize)*, [2009] UKPC 10.
- 10 *Bower v. JM Schneider Inc.* (1986), 34 DLR (4th) 77, 1986 CarswellBC 397.
- 11 *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71.
- 12 Court Administration Protocol, appended as Schedule “A” to the Implementation Orders – IRSSA.

PART VIII SCHEDULE “B” – STATUTES, REGULATIONS AND BY-LAWS

1. *Courts of Justice Act*, RSO 1990, Chapter C. 43.

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;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.

...

134. (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

LARRY PHILIP FONTAINE et al-and- THE ATTORNEY GENERAL OF CANADA et al

Plaintiffs (Respondents)

Defendants (Appellants)

Court of Appeal File No.: 59320

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**UPDATED FACTUM OF THE APPELLANTS,
THE TWENTY-TWO CATHOLIC ENTITIES (with
Reference to the Joint Compendium of Documents and Brief
of Authorities)**

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