

*Courts of Justice Act*

**UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF  
DOCUMENTS AND BOOK OF AUTHORITIES OF THE APPELLANT,  
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE**

**COURT OF APPEAL FOR ONTARIO**

**BETWEEN:**

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

Plaintiffs/

Respondents

and

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

MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-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 SŒURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT STE. 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

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KAMLOOPS CORPORATION SOLE

Defendants/

Appellant (The Sisters of St. Joseph of Sault Ste. Marie)

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

**UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF  
DOCUMENTS AND BOOK OF AUTHORITIES OF THE APPELLANT,  
THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE**

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## **PART I – DECISION BEING APPEALED**

1. The Appellant, the Sisters of St. Joseph of Sault Ste. Marie (the “SSJSSM”), appeals from the Order of the Honorable Justice Perell, dated August 6, 2014 in the Ontario Superior Court of Justice File No. 00-CV-192059.
2. By written reasons dated August 6, 2014, Justice Perell ordered, on terms, the destructions and/or archiving of certain documents collected and created in and for the Independent Assessment Process (“IAP”).

*Order of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 3, Pages 16-25*

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Pages 26-92*

## **PART II – OVERVIEW**

3. This matter involves The Indian Residential Schools Settlement Agreement (the “Settlement Agreement”).
4. More particularly, the Truth and Reconciliation Commission (“TRC”) and the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process (the “Chief Adjudicator”) each brought a Request for Direction regarding the disposition and/or archiving of the documents collected and created in and for the IAP.
5. The Settlement Agreement dictates and determines the manner in which the documents collected and created in and for the IAP (the “IAP Documents”) are to be handled.



6. The main issue is one of contractual interpretation and promises of confidentiality; whether the IAP Documents may be archived at the National Research Center for Truth and Reconciliation (the "NRCTR") without the consent of all individuals affected.

7. It is respectfully submitted that the motion judge erred when ordering that the IAP Documents may be archived at the NRCTR solely with the consent of Claimants.

8. As set out in the Settlement Agreement, the IAP Documents should only be archived at the NRCTR with the consent of all individuals affected, which includes Persons of Interest ("POI") and members of the SSJSSM.

9. The Settlement Agreement is clear that the IAP Documents are to be kept confidential. It was always the intention of the parties to the Settlement Agreement that the IAP Documents would be kept confidential, unless agreed to otherwise by all individuals affected, and that they be destroyed upon the completion of the IAP.

10. The SSJSSM have decided not to move forward with the appeal on the issue of standing.

### **PART III – THE FACTS**

#### **A. The Sisters of St. Joseph of Sault Ste. Marie**

11. The SSJSSM, as a congregation, was formed in 1936. From 1937 to September 1968, the SSJSSM owned and operated St. Joseph's Boarding

School at Fort William, Ontario. For a period of time, St. Joseph's Boarding School operated as an Indian Residential School ("IRS").

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1979 and 1982 at para 19, 30, 32 and 33*

## **B. The Indian Residential Schools Settlement Agreement**

12. In the late 1990s, thousands of claims were brought by students who lived at or attended one or more Canadian IRSs against Canada and various religious orders who operated IRSs. In or about May 1999, the SSJSSM was advised of approximately 110 potential plaintiffs with respect to alleged psychological, physical and sexual abuse emanating from their attendance at St. Joseph's Boarding School, Fort William.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1982 at para 34 and 35*

13. On May 8, 2006, the SSJSSM entered into the Settlement Agreement with former IRS students (the "Claimants"), Her Majesty in Right of Canada, the General Synod of the Anglican Church of Canada, the Presbyterian Church in Canada, the United Church of Canada and 50 other Catholic entities (jointly referred to as the "Parties").

*Settlement Agreement, Joint Compendium of Documents, Volume 1, Tab 23, Pages 236-331*

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1996 at para 91*

***(i) The Independent Assessment Process***

14. The Settlement Agreement contemplated the creation and administration of the IAP, an adjudicative process whereby Claimants could seek compensation for alleged abuse and harms suffered while at IRS. It is created through Article Six and Schedule "D" of the Settlement Agreement.

*Settlement Agreement, Schedule D, Joint Compendium of Documents, Volume 1, Tab 24, Pages 332-380*

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1984, 1986 and 1987 at para 43, 56 and 58, respectively*

15. The IAP was established to create a uniform inquisitorial process (as opposed to investigative) for the determination of claims of sexual assaults, physical assaults and other acts of wrongdoing submitted by Claimants.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1987 at para 58*

***(a) The Independent Assessment Process Generally***

16. The IAP is a claimant-centered process both in its definition and in its application.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1987 at para 60*

17. To be admitted to the IAP Process, a Claimant must first complete an IAP Application. Once admitted, the IAP Application is then shared with the Defendant Parties which always include Canada and may include the religious

order(s) which operated the IRS(s) that the Claimant attended. The SSJSSM elected to receive all IAP Claims involving Claimants who attended St. Joseph's.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1987 at para 61, 62 and 63*

18. The Claimant is then required to collect and produce a number of documents which the IAP considers mandatory supporting documentation. Similarly, Canada has the obligation to conduct a search of its records to confirm if and when the Claimant attended the IRS(s) in question. If the religious order(s) which operated the IRS(s) choose(s) to participate in the Claim, the religious order(s) also has the contractual obligation to produce all documents in its possession relating to the Claimant. These are all historical records which already exist outside of the IAP and to which the TRC already has access.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1987-1988 at para 64, 65 and 66*

19. The IAP Claim then is brought to a hearing, which is attended by:

- a. The Adjudicator presiding over the hearing;
- b. The Claimant;
- c. The Claimant's lawyer, if any;
- d. A health-support person, if requested by the Claimant;
- e. Canada's representative;

- f. A representative for the religious order which operated the Indian Residential School, if they choose to participate;
- g. Counsel for any POI named in an IAP Application is not permitted to be present at the Claimant's hearing.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1988 at para 67*

20. Following the hearing, one or more witness hearings may also be held if the Parties wish to present witnesses related to the IAP Claim. Once the hearings are completed, the IAP Claim proceeds to final submissions where the Parties' representatives or counsel, excluding the POI's counsel, make submissions.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1988 at para 68 and 69*

21. After final submissions, the Adjudicator prepares and produces a decision in which the allegations and the evidence are considered, a finding is made regarding the veracity of the claim, and compensation is awarded to the Claimant or the IAP Claim is dismissed. Following the issuance of the decision, there are two levels of possible review. An unsatisfied Party may request a review of the Adjudicator's decision by making written submissions. The other Parties to the Claim may also respond in writing. Following a request for review, a review decision is prepared and produced. If unsatisfied with the review decision, a Party may request a re-review which follows the same process as the request for review.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1988-1989 at para 70, 71, 72 and 73*

***(b) The documents collected and created for and within the IAP***

22. The SSJSSM has no objection that, as specifically contemplated in the Settlement Agreement, historical records which already exist outside of the IAP be produced and made available to the TRC.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1978, 1984 and 1987 at para 16, 47 and 65, respectively*

23. The SSJSSM objects that the IAP Documents, as defined in the decision of Justice Perell (the "IAP Documents"), be archived and made available to the public if all affected individuals have not provided their consents thereto. The SSJSSM's position is that affected individuals clearly include POIs, members of the SSJSSM and other catholic parties.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1989 at para 76 and 77*

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Page 29 at para 6*

***(c) The negotiation of the IAP and the Settlement Agreement***

24. The IAP was created on the understanding that it, and the information resulting there from, would remain confidential unless otherwise agreed to by all parties affected.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1987 at para 59*

*Settlement Agreement, Schedule D, Joint Compendium of Documents, Volume 1, Tab 24, Page 346 at para o.i.*

25. During the negotiations of the Settlement Agreement, one of the main concerns of the SSJSSM was the protection and preservation of the reputation of the SSJSSM and of its members.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1975-2118 at para 78*

26. The SSJSSM and other religious orders expressed concern about the fairness of the IAP being included as part of the Settlement Agreement.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1993 at para 79*

27. The SSJSSM noted the lack of procedural safeguards included in the IAP:

- a. The SSJSSM and other religious orders would not be permitted to defend IAP Claims as they would if matters were before the courts. The SSJSSM and other religious orders agreed to forfeit many rights, including their right to scrutinize and challenge a Claimant's credibility and evidence.
- b. The SSJSSM had concerns Adjudicators would not be impartial in the process. Indeed, in one instance, the SSJSSM were required to challenge the bias of an Adjudicator who took the position that neither the General Superior nor her counsel could be present at the Claimant's hearing because the Claimant did not want them at the hearing.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1993 at para 80*

28. The SSJSSM and other religious orders gave up certain fundamental legal rights by executing the Settlement Agreement. These rights included, but were not limited to:

- a. The right to face their accuser;
- b. The right to cross-examine their accuser and/or witnesses to test the evidence and credibility of the former resident and/or witnesses;
- c. The right to avail themselves of the checks and balances normally available in the civil litigation and criminal processes; and,
- d. The right to appeal or review decisions on traditional grounds.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1993-1994 at para 79, 80, 81 and 82*

29. Through the loss of these many fundamental legal rights and with inherent bias in favour of the Claimant, the evidence heard and recorded at hearings is one-sided and may remain legally untested for all intents and purposes. The records, as now found in the IAP Documents, would be, in large part, interpreted to be biased against the SSJSSM and other religious orders.

30. As such, and in order to protect and maintain the reputations of the SSJSSM and its members, it was paramount to the SSJSSM and other religious orders when entering into the Settlement Agreement that the terms relating to the IAP ensure the confidentiality of all information created or resulting from the IAP hearings.



*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1994 at para 83*

31. During the negotiation for the Settlement Agreement the issue of confidentiality was discussed at great length among the members of the SSJSSM and other religious orders. Due to the fact that many of the persons who worked at the IRSs were deceased, elderly and/or sick, it would not be easy or possible for them to defend themselves within the IAP. For this reason, the SSJSSM and other religious orders were steadfast in ensuring that the terms of the Settlement Agreement which related to the IAP provided for the confidentiality of all information created or resulting from the IAP Claims.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1994 at para 84*

32. One of the principal reasons the SSJSSM agreed to sign the Settlement Agreement was that assurances were made, and reduced in writing within the Settlement Agreement and within the IAP itself, that the IAP would remain strictly confidential. These assurances are reflected in the terms of the Settlement Agreement.

*Settlement Agreement, Schedule D, Joint Compendium of Documents, Volume 1, Tab 24, Page 346 at para o.i.*

*Settlement Agreement, Schedule D, Appendix II, Joint Compendium of Documents, Volume 1, Tab 24, Page 350 at para iv*

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1995-1996 at para 85, 90 and 91*

*Affidavit of Rev. Britton, sworn May 2, 2014, Joint Compendium of Documents, Volume 4, Tab 44, Page 1604 at para 2*

33. In consideration for the loss of said fundamental rights, the Settlement Agreement contemplated that the IAP and the IAP Documents would remain

confidential, which confidentiality would only be breached with the consent of all interested parties/persons.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1994-1995 at para 83, 84 and 85*

*Settlement Agreement, Schedule N, Joint Compendium of Documents, Volume 1, Tab 25, Pages 390-391 at section 11*

34. As contemplated in the Preamble of the Settlement Agreement, the consideration received by the SSJSSM in exchange for the obligations it agreed to and the undertakings which it gave to the Parties, are the covenants set out in the Settlement Agreement. These include the confidentiality terms set out therein.

*Settlement Agreement, Preamble, Joint Compendium of Documents, Volume 1, Tab 23, Pages 241-243*

35. Section 11 of Schedule N to the Settlement Agreement specifically states that:

**"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."**

*Settlement Agreement, Schedule N, Joint Compendium of Documents, Volume 1, Tab 25, Pages 390-391 at section 11*

***(d) The subsequent assurance of confidentiality***

36. The SSJSSM have been actively involved in IAP Claims since the beginning of the IAP.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1996 at para 92*

37. In each of the IAP hearings in which the SSJSSM participated, all parties were required to sign an agreement which committed all persons in attendance to keep all information disclosed at a hearing confidential. The terms relating to the IAP are clear that IAP Applications and the information collected throughout the IAP are to be kept confidential. In participating in the IAP, the SSJSSM and their legal counsel are prohibited from discussing or disclosing any information divulged during the IAP.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Pages 1996-1997 at para 93 and 96*

*Confidentiality Agreement, Joint Compendium of Documents, Volume 2, Tab 28, Pages 459-460*

38. In addition, The Secretariat's Website also provides assurances of privacy and confidentiality at hearings. The Website states:

The hearing is held in private. The public and the media are not allowed to attend. Each person who attends the hearing must sign a confidentiality agreement. This means that what is said at the hearing stays private.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1997 at para 97*

39. The IAP Guide, which was produced by the Secretariat, also contains assurances of privacy and confidentiality. Specifically, Appendix B of the IAP Guide states that IAP Applications are to be treated as "Protected B" documents.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1997 at para 98*

*Guide to the Independent Assessment Process Application, Joint Compendium of Documents, Volume 1, Tab 26, Pages 393-436*

40. The IAP Application itself states on the top of each page that it is a “Protected B” document once completed.

*Affidavit of Sister Bonnie MacLellan, sworn May 12, 2014, Joint Compendium of Documents, Volume 5, Tab 49, Page 1997 at para 99*

*IAP Application, Joint Compendium of Documents, Volume 2, Tab 27, Pages 437-458*

## **PART IV – ISSUES AND LEGAL ARGUMENTS**

### **A. Standard of Review**

41. The Supreme Court of Canada has established the standards of review on appeal from a trial court as follows: for a question of law the standard of review is one of correctness; the standard of review for findings of fact is the “palpable and overriding error” meaning that the error must be readily or plainly seen; and the standard of review for mixed questions of fact and law can vary depending on the circumstances. An incorrect application of the legal standard can expose the mixed question of fact and law to a correctness standard of review.

*Housen v Nikolaisen, [2002] SCR 235 (SCC), Joint Brief of Authorities, Volume 3, Tab 68, Pages at para 8, 10, 28 and 35,*

42. In this case, the Appellant respectfully submits that the conclusions reached by the motion judge should be reviewable on a standard of correctness.

43. Although contractual interpretation generally involves issues of mixed fact and law, which attracts more deference, the standard of correctness will apply where it is possible to identify an extricable question of law from within what would generally constitute a question of mixed fact and law.

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

44. The failure to consider a relevant factor may constitute such an extricable question of law justifying the application of the standard of correctness.

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

*King v Operating Engineers Training*, 2011 MBCA 80, Joint Brief of Authorities, Volume 4, Tab 71 at para 21

45. In this case, it is submitted that the motion judge failed to consider a relevant factor, namely the specific words of the Settlement Agreement which state that “individuals affected” must agree to the archiving.

46. Further, the Appellant relies on the Manitoba Court of Appeal decision, wherein it was decided that the standard of correctness applied with regard to the interpretation of the Settlement Agreement.

*Fontaine v Canada (Attorney General)*, 2014 MBCA 93, Joint Brief of Authorities, Volume 2, Tab 43 at para 40

**B. Does the Settlement Agreement provide that the IAP Documents be archived with the consent of all individuals affected, which individuals include POI and members of the SSJSSM**

47. The motion judge erred in law when he failed to consider the specific wording of section 11 of Schedule N to the Settlement Agreement which specifically states that:

“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]

*Settlement Agreement, Schedule N*, Joint Compendium of Documents, Volume 1, Tab 25, Page 391 at section 11

48. More specifically, the motion judge erred when:

- a. he ordered and concluded in his decision that the Order should provide that, with the consent of the Claimant only and with redaction of personal information about alleged perpetrators or affected individuals, the Claimant's IAP Documents may be archived with the NRCTR;
- b. the motion judge did not provide for the consent of the other affected individuals, such as a POI or the SSJSSM;
- c. he ordered that the Chief Adjudicator would have the sole discretion to identify and redact information concerning alleged POI or affected individuals; and
- d. the motion judge did not provide that the redaction by the Chief Adjudicator was subject to the agreement of the POI or affected individuals.

*Order of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 3, Pages 18-19 at para 4*

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Pages 74, 84 and 86 at para 291, 353 and 370, respectively*

49. The motion judge correctly sets out that judges cannot amend the IRSSA in the guise of administering it.

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Pages 38-40 at para 68 to 78*

50. Similarly, the motion judge correctly sets out the following principles of contractual interpretation applicable to the Settlement Agreement:

- a. The primary goal of contract interpretation is to give effect to the intention of the parties at the time the contract was made [para 68];
- b. In searching for the intent of the parties at the time when they negotiated their contract, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms [para 69];
- c. Generally, words should be given their ordinary meaning [para 70];
- d. In interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purposes of the contract. After a careful review of the background to the contract, a court will imply terms to a contract based on the presumed intention of the parties and to give the contract business efficacy [para 71];
- e. A term may be implied as a matter of presumed intention because it is necessary to give business efficacy to a contract [para 75]; and
- f. If there is evidence of a contrary intention in the actual contract on the part of either party, an implied term may not be found [para 78].

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Pages 38-40 at para 68 to 78*

51. The Appellants agree with the following finding made by the motion judge:

- a. The parties to the IRSSA interested in confidentiality, most particularly the survivors of the IRS and the Church entities, intended the highest possible degree of confidentiality and privacy during the IAP and most particularly during IAP hearings, which would be recorded sessions.

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Page 78 at para 315*

- b. This high degree of confidentiality is what the plain meaning of the IAP promises.

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Page 78 at para 316*

- c. There is certainly no express language in the Settlement Agreement that told the Claimants and Defendants that in addition to necessary and predictable exceptions to confidentiality for criminal proceedings and current; i.e., imminent, child welfare proceeding, their IAP Documents would be archived. As the motion judge states, that is not the high degree of confidentiality that the parties bargained for.

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Page 78 at para 317*

- d. What the parties bargained for was that the IAP Documents would be treated as highly confidential but subject to the very limited



purposes of disclosure during a retention period and then the documents, including Canada's copies, would be destroyed.

*Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Page 79 at para 322*

52. However, the motion judge erred in law when reaching the decision and ordering that IAP Documents could be archived solely with the consent of the Claimant. This constitutes an error in law because:

- a. This constituted an amendment to section 11 of Schedule N to the Settlement Agreement; and
- b. There was evidence of a contrary intention to the term implied by the motion judge. The Settlement Agreement specifically provides that consent of all individuals affected is required before archiving can occur. As such, it was not open for the motion judge to infer that only the Claimant's consent was required.

53. The fact that there was an error of law by the motion judge is supported by the additional following considerations:

- a. The motion judges own findings, as listed in paragraph 51 above, that it is not solely the claimants but rather all the parties to the IRSSA who were interested in confidentiality (most particularly the survivors of the IRS and the Church entities) and intended the highest possible degree of confidentiality and privacy.

By narrowing who needed to provide consent for disclosure, the motion judge's conclusion goes contrary to his prior finding that confidentiality was promised to all parties.

- b. The Settlement agreement expressly contemplates in Schedule "D" the archiving of one kind of record of the IAP with solely the Claimant's consent, namely the redacted transcripts of his or her testimony at his or her hearing.

*Settlement Agreement, Schedule D, Joint Compendium of Documents, Volume 1, Tab 24, Page 346 at para o*

- c. The Settlement Agreement makes specific references to "claimants", as referenced in its Schedule D, versus the term "individuals affected", as referenced in its Schedule N.


*Settlement Agreement, Schedules D and N, Joint Compendium of Documents, Volume 1, Tabs 24 and 25, Pages 332-380 and 381-392, respectively*

**PART V – ORDER SOUGHT**

54. The Appellant respectfully asks that part of the order be set aside and that an order be granted as follows:

- a. An order that only with the consent of all individuals affected, including but not limited to the Claimants, alleged perpetrators and Church entities, may IAP Documents be archived at the NRCTR.
- b. An order that the redaction done by the Chief Adjudicator be agreed upon by the POI or affected individuals.
- c. Costs of the appeal and of the motion; and
- d. Such further and other relief as this Honourable Court may deem just and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8<sup>th</sup> 13<sup>th</sup> day of May  
October, 2015.



Charles M. Gibson  
Ian B. Houle  
Solicitors for the Appellant,  
The Sisters of St. Joseph  
of Sault Ste. Marie

**CERTIFICATE**

I, Charles M. Gibson, lawyer for the Appellant, The Sisters of St. Joseph of Sault Ste. Marie, certify that an Order under subrule 61.09(2) is not required and estimate that one (1) hour 50 minutes is required for my oral argument, ~~not~~ including reply.



Date: May 8, 2015

October 13, 2015

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**SCHEDULE "A"**

1. *Housen v Nikolaisen*, [2002] SCR 235 (SCC).
2. *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53.
3. *King v Operating Engineers Training*, 2011 MBCA 80.
4. *Fontaine v Canada (Attorney General)*, 2014 MBCA 93.

**SCHEDULE "B"**

N/A

**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 et al.

Plaintiffs/Respondents

- and -

THE ATTORNEY GENERAL OF  
CANADA, et al.

Defendants/Appellants  
(The Sisters of St. Joseph of  
Sault Ste. Marie)

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**Updated Factum with Reference to  
the Joint Compendium of Documents  
and Book of Authorities of the  
Appellant, The Sisters of St. Joseph  
of Sault Ste. Marie**

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