Court of Appeal File Nos: 59310, 59311, 59320

UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE APPELLANTS NINE CATHOLIC ENTITIES

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs

-and-

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

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

Defendants
Appellants Nine Catholic Entities

UPDATED FACTUM OF THE APPELLANTS WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES

NINE CATHOLIC ENTITIES

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

MONTREAL, October 14, 2015

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TABLE OF CONTENTS

PART **Page**

Court of Appeal File Nos: 59310, 59311, 59320

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

LARRY PHILIP FONTAINE et al.

Plaintiff

-and-

THE ATTORNEY GENERAL OF CANADA et al.

Defendants
Appellants Nine Catholic Entities

PART I- INTRODUCTION

1. This is an appeal from the Order of the Honourable Mr. Justice Paul Perell dated August 6, 2014, made in the City of Toronto ("Order").

2. By this Order, IAP Documents and IAP Personal Information, as defined therein, are declared private and confidential and may not be used or disclosed by anyone for any other purpose other than resolving IAP Claims, as defined therein, and paying compensation, subject to limited exceptions.

3. The Order provides for the destruction of the IAP Documents, as defined therein, on the completion of the relevant IAP Claim, including the exhaustion of review, appeal rights or other legal proceeding in respect of the claim.

4. The Order also provides for the retention by the Chief Adjudicator, as defined therein, of IAP Retained Documents, as defined therein, for a 15-year Retention Period, as defined therein, during which a Claimant, as defined therein, may consent to spare

these documents from destruction and have them archived at the National Centre for Truth and Reconciliation (the "NCTR").

5. Pursuant to the Order, the Truth and Reconciliation Commission ("TRC") or the NCTR may give Claimants notice that with the Claimant's consent, his or her IAP Retained Documents may be archived at the NCTR, subject to redaction as provided by this Order ("Notice Program").

6. The Order provides that the terms of the Notice Program will be determined at another Request for Directions hearing brought by the TRC.

7. Pursuant to the Order, at the end of the 15-year Retention Period, the Chief Adjudicator shall destroy the IAP Retained Documents.

8. On receiving a Claimant's consent under Paragraph 4(a), the Chief Adjudicator shall identify the relevant IAP Retained Documents, determine if Personal Information about alleged perpetrators or other affected individuals in respect of an IAP Claim can be reasonably redacted from them and, if so, redact the IAP Retained Documents and transfer the resulting IAP Redacted Documents to the NCTR.

PART II – OVERVIEW

9. The Nine Catholic Entities (the "Appellants") are all parties to the Indian Residential School Settlement signed on May 8, 2006 (the "Settlement Agreement").

10. The Order under appeal was made in response to two Requests for Directions brought by the TRC and the Chief Adjudicator addressing the issue of the disposition of documents produced and prepared for the Independent Assessment Process (the "IAP"), namely the IAP Documents, upon its completion.

Request for Direction (re: IAP Records) of the Truth and Reconciliation Commission, **Joint Compendium of Documents, Volume 1, Tab 1**
Request for Directions of the Chief Adjudicator of the Indian Residential Schools Independent Assessment Program, **Joint Compendium of Documents, Volume 1, Tab 2**

11. The assurances of privacy and confidentiality regarding the documents contained in the IAP Records given to Claimants, as defined in the Order, Persons of Interest (the "POIs"), parties and witnesses involved in the IAP are to be found in the following: (a) provisions of the Settlement Agreement; (b) provisions of the Application Form and Guide to the Independent Assessment Process Application; (c) Confidentiality Agreements that Claimants, POIs, parties, witnesses and others in attendance at a hearing are required to sign; and (d) verbal assurances given by adjudicators at the outset of any hearing.

Affidavit of Daniel Ish, sworn September 27, 2013, **at para 58, Exhibits E and F, Joint Compendium of Documents, Volume 2, Tab 32**

12. More specifically, a transfer of any IAP Redacted Documents, as defined in the Order, would violate the Settlement Agreement, without the knowledge and the written consent of all members or former members of the Appellants, including POIs and any associated persons concerned by such documents, or of the Appellants themselves on their behalf.

13. The Appellants respectfully submit that such transfer would also breach the personal rights of Appellants' members and former members deriving from the *Civil Code of Quebec* and enshrined in the *Quebec Charter of Human Rights and Freedoms*, without their knowledge and written consent.

Civil Code of Quebec, **CQLR, C-1991;**
Quebec Charter of Human Rights and Freedoms, **CQLR, c. 12.**

14. As a result, the Appellants owe duties of confidentiality toward their members and former members as well as toward any associated persons that may claim these rights.

15. Finally, these Appellants respectfully submit that the Notice Program is inconsistent with the Settlement Agreement and does not fall within the administrative or supervisory jurisdiction of the Court.

PART III – STATEMENT OF FACTS

16. The Settlement Agreement was entered into on March 8, 2006, by the Appellants, the Claimants, Her Majesty the Queen in Right of Canada, the General Synod of the Anglican Church of Canada, the Presbyterian Church in Canada, the United Church of Canada and fifty other Catholic entities.

> ***Settlement Agreement,*** **Joint Compendium of Documents, Volume 1, Tab 23**

17. Neither the Chief Adjudicator, nor the TRC or the NCTR were parties to the Settlement Agreement.

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

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

19. The Settlement Agreement was designed as a compromise in order to settle all proceedings pending with respect to the Indian Residential Schools.

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

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

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

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

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

23. Confidentiality measures that extend to the Claimants, more particularly in their Application, constitute an additional protection to the personal information of the POIs.

> ***Ibid, Appendix II,*** **at para iv., Joint Compendium of Documents, Volume 1, Tab 24**

24. Decisions rendered in connection with the IAP, as defined in the Order, are redacted prior to being provided to the Claimants and POIs.

> ***Ibid*****, at para o.i., Joint Compendium of Documents, Volume 1, Tab 24**

25. Furthermore, pursuant to the Settlement Agreement, documents provided by the Appellants to the TRC, in accordance with its initial mandate, are subject to applicable privacy and access to information legislation.

> ***Settlement Agreement, Schedule "N",* at para 11, Joint Compendium of Documents, Volume 1, Tab 25**

PART IV- ISSUES AND ARGUMENT

26. The Appellants respectfully submit that this appeal raises the following issues:

a. Did the Honourable Mr. Justice Perell err in law in concluding that the IAP Retained Documents, subject to redaction as provided by the Order (the "IAP Redacted Documents"), may be archived by the NCTR without the written consent of POIs who participated in the IAP on the condition of being afforded strict assurances of confidentiality by the adjudicators and as consented to in writing by each and every individual involved in any hearing?

b. Did the Honourable Mr. Justice Perell err in law in concluding that the development of the Notice Program to inform Claimants of their option to archive their IAP Redacted Documents at the NCTR is consistent with the Settlement Agreement and by finding that the order falls within the administrative or supervisory jurisdiction of the Court?

c. Did the Honourable Mr. Justice Perell err in law in refusing to consider the other grounds submitted by the Appellants in support of both their opposition to the 15-Year Retention Period and to the development of a notice program, including but not limited to the violation or potential violation of the fundamental rights of

privacy and other personality rights of their members, former members, including POIs, and associated persons guaranteed by the *Civil Code of Quebec* and the *Quebec Charter of Human Rights and Freedoms,* which may result from the disclosure and archival of IAP Redacted Documents without their knowledge and written consent?

27. The Appellants respectfully submit that the above-mentioned questions should be answered in the affirmative and that the Order should be set aside.

A. Standard of Review

28. The Appellants respectfully submit that while the Honourable Mr. Justice Perell was essentially engaged in the exercise of interpreting the Settlement Agreement, his conclusions should be reviewable on a standard of correctness.

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

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

30. Since the Supreme Court's decision in *Housen v. Nikolaisen*, it has been established law that questions of mixed fact and law attract significant judicial deference from appellate courts, being subject to review on a standard of palpable and overriding error.

> ***Housen v. Nikolaisen,* 2002 SCC 33 at para 37, <u>Joint Brief of Authorities, Volume 3, Tab 68</u>**

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

> ***Sattva,* supra at para 53.**

32. The Supreme Court also held that the failure to consider a relevant factor may constitute such an extricable question of law justifying a less deferential standard of review.

Sattva, ibid.

33. The Appellants respectfully submit that the Honourable Mr. Justice Perell failed to consider the impact of their arguments regarding the legislative and quasi-constitutional privacy rights of its members and former members, and the incidence these rights should have on the interpretation of the Settlement Agreement.

34. As a result, a review on the standard of correctness is appropriate in the present case.

35. In addition, the appropriate standard of review to be applied to the interpretation of the Settlement Agreement was considered by the Manitoba Court of Appeal in *Fontaine et al v. Canada (Attorney General)*.

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

36. In this decision, the Manitoba Court of Appeal, citing the Supreme Court's decision in *Sattva*, supra, held that the applicable standard of review was not that of palpable and overriding error, but rather the standard of correctness.

37. While recognizing the rarity of extricable questions of law that will be reviewable on the standard of correctness, the Manitoba Court of Appeal concluded as follows:

> [39] 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*.

> [40] The parties agree, as do I, that both issues involve errors of law or extricable questions of law and are reviewable on the standard of correctness. As was stated by Rothstein J. in *Sattva*, one of the purposes of drawing a distinction between questions of law and those of mixed fact and law "is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute" (at para. 51). In this case, the Agreement has applicability to thousands of claimants across the country and as such, the manner in which it is interpreted has great precedential value, and brings certainty to others involved in similar disputes. See *Sattva* at paras. 51-53.
>
> [*Emphasis Ours*]

38. The Appellants respectfully submit that the comments of the Manitoba Court of Appeal are wholly applicable to the present appeal and the proper standard of review is that of correctness.

B. The Archiving of IAP Redacted Documents

39. The Appellants respectfully submit that the Honourable Mr. Justice Perell erred in law in concluding that the potential archiving of IAP Redacted Documents at the NCTR is consistent with the Settlement Agreement.

40. The Superior Court of Ontario has already held in *Fontaine* v. *Canada* that the Settlement Agreement "is a contract and that its interpretation is subject to the norms of the law of contract interpretation".

> ***Fontaine v Canada (Attorney General),*** **2014 ONSC 283 at para. 51, Joint Brief of Authorities, Volume 2, Tab 45**

41. Therefore, the Appellants do refer this Honourable Court to the interpretative rule of contracts that the Court of Appeal for Ontario has expressed in the following manner:

> The cardinal interpretative rule of contracts […] is that the Court should give effect to the intention of the parties as expressed in their written agreement. Where that intention is plainly expressed in the language of the agreement, the Court should not stray beyond the four corners of the agreement.
>
> [*Emphasis Ours*]

> ***KPMG Inc. v Canadian Imperial Bank of Commerce,*** **[1998] O.J. No. 4746 (ONCA), at para 5, Joint Brief of Authorities, Volume 4, Tab 72**

42. In this regard, the Appellants refer this Honourable Court to one of the principles of construction and interpretation of the Settlement Agreement which provides as follows:

> **18.06 Entire Agreement**
> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.
>
> ***Settlement Agreement,* at para 18.06, Joint Compendium of Documents, Volume 1, Tab 23**

43. Such principle of construction and interpretation of the Settlement Agreement requires the following analysis of some of its provisions.

44. The Settlement Agreement expressly contemplates the archiving of one kind of record of the IAP with the Claimant's sole consent, namely the redacted transcript of his or her testimony at his or her hearing.

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

45. Any additional IAP records, which include the IAP Retained Documents, with the exception of the redacted transcript of a Claimant, may only be transferred to the NCTR with the consent of all parties to the Settlement Agreement and all individuals affected including the Claimants, the Persons of Interest and/or Alleged Perpetrators and the Church Entities.

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

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

47. In light of the above, the Appellants respectfully submit that the potential archiving of IAP Redacted Documents which includes information relating to a Claimant with only his or her consent, disregards the clear intention of the parties to the Settlement Agreement and is tantamount to an amendment of the Settlement Agreement.

48. Furthermore, the Appellants respectfully submit that the potential archiving of IAP Redacted Documents constitutes a breach of the privacy rights of its members and former members.

49. The members and former members of the Appellants have a fundamental right to privacy and to the protection of their personal information. The right to privacy is a fundamental value in Canadian criminal and civil law. It is even recognized in Canada as worthy of constitutional protection.

> ***Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act, 1982*, 1982 c. 11 (U.K.) in RSC 1985 App. II no. 44, ss. 7 and 8;**
> **Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada*, Volume I, Carswell, 2000-, at pp. 2-4 to 2-16, Appellants' Book of Authorities, Tab 21**
> ***Dagg v. Canada (Min. of Finance)*, [1997] 2 S.C.R. 403, at paras. 65 and 66, Joint Brief of Authorities, Volume 2, Tab 27**
> ***H.J. Heinz Co. of Canada v. Canada (A.G.)*, [2006] 1 S.C.R. 441, at para. 28, Joint Brief of Authorities, Volume 3, Tab 66**

50. In Québec, the right to privacy is clearly recognized by specific sections of the *Civil Code of Québec* as well as section 5 of the Québec *Charter of Human Rights and Freedoms.*

> ***Charter of Human Rights and Freedoms*, CQLR c. C-12, at s. 5;**
> ***Civil Code of Québec*, CQLR, C-1991 c. 64, at ss. 3, and 35 to 41.**
> **Barbara McIsaac, Rick Shields et Kris Klein, *The Law of Privacy in Canada*, supra, at pp. 2-58.75, 2-58.78 and 2-58.79, Appellants' Book of Authorities, Tab 21**

51. For example, the use of the correspondence, manuscripts or other personal documents of a person is considered as an invasion of that person's privacy.

52. It is also important to note that the members or former members of the Appellants also enjoy the protection of the safeguard of their dignity, honour and reputation.

> ***Charter of Human Rights and Freedoms*, CQLR c. C-12, at s. 4;**
> ***Civil Code of Québec*, CQLR, C-1991, at s. 35**

53. The Appellants respectfully submit that the Honourable Mr. Justice Perell erred by failing to correctly apply the substantial safeguards which have been put in place to protect the privacy interests of Québec residents, including the Appellants' members and former members. Indeed, Québec courts have consistently held that the protection of one's privacy is a fundamental right afforded to all members of Québec society, even those who have been accused or found guilty of committing criminal acts.

> ***Fabrikant c. Adolph*, [1998] R.R.A. 585 (QCCS), at pp. 6 and 7, <u>Joint Brief of Authorities, Volume 2, Tab 32</u>**

54. Although the invasion of privacy concept in Canadian common law used to be an inceptive, if not ephemeral, legal concept, the Ontario Court of Appeal now also clearly recognizes the common law tort of invasion of privacy.

> **Barbara McIsaac, Rick Shields et Kris Klein, *The Law of Privacy in Canada*, supra, at pp. 2-58.63 to 2-58.74, Appellants' Book of Authorities at Tab 21,**
> ***Jones v. Tsige*, 2012 ONCA 32, at paras. 17, 18, 21 and 66, <u>Joint Brief of Authorities, Volume 3, Tab 69</u>**

55. In *Jones v. Tsige*, this Court recognized the existence of the tort of intrusion upon seclusion. More specifically, this Court explained the rationale for such a tort in the following terms:

> [66] The case law, while certainly far from conclusive, supports the existence of such a cause of action. <u>Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion</u>. Many legal scholars and writers who have considered the issue support recognition of a right of action for breach of privacy: see, e.g., P. Winfield, "Privacy" (1931), 47 Law

> Q. Rev. 23; D. Gibson, "Common Law Protection of Privacy: What to do Until the Legislators Arrive" in Lewis Klar, ed., Studies in Canadian Tort Law (Toronto: Butterworths, 1977) 343; Robyn M. Ryan Bell, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Todd Archibald and Michael Cochrane, eds., Annual Review of Civil Litigation (Toronto: Carswell, 2005) 225; Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1; John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 52 McGill L.J. 355.
>
> [*Emphasis Ours*]

***Jones v. Tsige*, 2012 ONCA 32, at para. 66, Joint Brief of Authorities, Volume 3, Tab 69**

56. In *Jones*, supra, this Court cited with approbation Prosser's "four-tort catalogue" as it pertains to privacy interests:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

***Jones v. Tsige*, supra, at para. 18**

57. The right to privacy encompasses the right to the protection of personal information or "informational privacy". Informational privacy equates to secrecy and confidentiality, and includes the related but wider notions of control over, access to and use of information. Of particular importance in the context of this case is also the understanding of privacy as anonymity.

Barbara McIsaac, Rick Shields et Kris Klein, *The Law of Privacy in Canada*, supra, at pp. 2-32 to 2-37, Appellants' Book of Authorities, Tab 21
***Dagg v. Canada (Min. of Finance)*, [1997] 2 S.C.R. 403, at para. 67, Joint Brief of Authorities, Volume 2, Tab 27**
***R. v. Spencer*, 2014 CSC 43, at paras. 34, 35, and 38 to 44, Joint Brief of Authorities, Volume 5, Tab 95**

58. Whether there is a reasonable expectation of privacy is assessed by considering and weighing the totality of the circumstances. In the case at bar, the context, the highly sensitive nature of the information at issue, the contractual and statutory frameworks,

and the subjective intentions of the persons involved are interrelated factors that support the existence of a reasonable expectation of privacy.

> **Barbara McIsaac, Rick Shields et Kris Klein, *The Law of Privacy in Canada*, supra, at pp. 2-17 to 2-19, Appellants' Book of Authorities, Tab 21**
> ***R. v. Spencer*, supra, at paras. 17 and 18, Joint Brief of Authorities, Tab 95**
> ***Srivastava c. The Hindu Mission of Canada (Québec) inc.*, 2001 CanLII 27966 (QC CA), at para. 68, Joint Brief of Authorities, Volume 5, Tab 99**

59. Indeed, it is the Appellants' submission that the parties to the Settlement Agreement specifically turned their minds to such considerations and provided for the confidentiality of all IAP Documents during the negotiations of the Settlement Agreement, in the Settlement Agreement itself and in the confidentiality agreements signed in connection with the IAP as well as the verbal assurances given by the Adjudicator at the outset of the hearing.

> ***Settlement Agreement, Schedule "D",* at page o.i.; Joint Compendium of Documents, Volume 1, Tab 24**
> ***Confidentiality Agreement (Claimant); Confidentiality Agreement (Witness);* Joint Compendium of Documents, Tab 28**

60. The Honourable Mr. Justice Perell, in his reasons for decision, held that the *Access to Information Act* and the *Privacy Act* apply to the IAP Documents during their retention period in accordance with the contracting parties' intention. (para 320)

> ***Fontaine v Canada (Attorney General),* 2014 ONSC 4585, Reasons for Decision, Joint Compendium of Documents, Volume 1, Tab 4, Joint Brief of Authorities, Volume 2, Tab 47**
> ***Access to Information Act,* RSC 1985 cA-1;**
> ***Privacy Act,* RSC 1985 c. P-21.**

61. It is an underlying principle of Canadian privacy law that there must be consent to the disclosure of personal information. Indeed, the importance of consent is explicitly set out at sections 7 and 8 of the *Privacy Act.*

> ***Privacy Act,* supra, at ss. 7 and 8.**

62. While the Honourable Mr. Justice Perell's Order states that the Claimants must provide consent to the transfer and archiving of IAP Redacted Documents, the Order does not require the consent of the Appellants' members and former members.

63. It is with the utmost reserve that a court will consider the right of an individual to consent to a violation of a fundamental right. By its very nature, the waiver of any fundamental right such as the right to privacy must be voluntary, freely expressed and with a clear understanding of the true consequences and effects of so doing if it is to be valid – such a waiver is not present in the case at bar.

> ***Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paras. 96 to 102, Joint Brief of Authorities, Volume 5, Tab 101**
> ***G Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 72, Joint Brief of Authorities, Volume 3, Tab 58**
> ***R. c. Richard*, [1996] 3 S.C.R. 525, at para. 22, Joint Brief of Authorities, Volume 5, Tab 93**

64. On the other hand, the Order requires the redaction of personal information pertaining to the alleged perpetrators or affected parties. However, the Order provides for only "reasonable" redaction.

65. Consequently, under the Honourable Mr. Justice Perell's Order, it is possible that information of a highly personal nature pertaining to the Appellants' members or former members, that could not be reasonably redacted, will be transferred and archived without their consent.

66. The Appellants respectfully submit that minimally, and only to the extent where this Honourable Court does not require such consent of Appellants' members or former members as previously argued, the notion of "reasonable redaction" must be clarified in order to prevent such a transfer.

67. In this regard, the Appellants respectfully submit that the notion of "reasonable redaction" must be understood as allowing the redaction of an IAP Retained Document, and its subsequent transfer, only where the redacted document retains meaning. Otherwise, the documents or parts thereof should remain entirely confidential.

> ***Merck Frosst Canada Ltd v. Canada (Health),*** **[2012] 1 S.C.R. 23, at paras 237-238, Joint Brief of Authorities, Volume 4, Tab 82**

68. It should be noted that the *Privacy Act* does allow for exceptions to the principle that consent must be obtained for the use of personal information. One of the more extensively used exceptions to this principle is for a use or a communication that is consistent with the initial purpose for which the information was obtained in the first place.

> ***Privacy Act,*** **supra, at ss. 7(a) and s.8(2)(a).**

69. The Appellants respectfully submit that this exception does not apply in the present situation. Indeed, the transfer and archiving of IAP Redacted Documents and the information contained therein does not constitute a use or a communication that is consistent with the purpose of the initial disclosure of said information.

70. For a use to be consistent with the purpose for which the information was obtained or compiled, there must be a sufficiently direct connection between the purpose and the proposed use, such that the person concerned would reasonably expect that the information could be used or communicated in the manner proposed.

> ***Bernard v. Canada (A.G.),*** **[2014] 1 S.C.C. 227, at paras 31 and 32, Joint Brief of Authorities, Volume 1, Tab 9**

71. The fact that the Appellants' members or former members may have disclosed information in order to cooperate in the settlement process and the development of the Settlement Agreement does not imply that they have consented to have such

information transferred to the NCTR and archived in perpetuity. To the contrary, the Appellants' members or former members were led to believe that the information provided would be held in the utmost confidence.

72. The Appellants respectfully submit that the transfer and archiving of IAP Redacted Documents is therefore not a consistent use of such information in the meaning of the *Privacy Act*.

73. In addition, while it is true that the Act sets out other exceptions, any of the exceptions which might apply in this case, which is not admitted but specifically denied, are discretionary. Consequently, any contractual or other analogous impediments continue to bind the Defendants and prevent the proposed disclosure.

74. In light of the above, the Appellants respectfully submit that the transfer and archiving of IAP Redacted Documents pursuant to the Order made by the Honourable Mr. Justice Perell would breach the privacy rights of the Appellants' members and former members.

C. The Development of a Notice Program

75. The Appellants respectfully submit that the Honourable Mr. Justice Perell lacked the jurisdiction to create the Notice Program for the potential archiving of IAP Redacted Documents by the NCTR.

76. The Honourable Mr. Justice Perell concluded that the Court's authority to order the creation of the Notice Program was derived from its administrative or supervisory jurisdiction over the class action proceedings.

> ***Fontaine v Canada (Attorney General),*** **2014 ONSC 4585, Reasons for Decision, at para 369, Joint Compendium of Documents, Volume 1, Tab 4, Joint Brief of Authorities, Volume 2, Tab 47**

77. Section 12 of the *Class Proceedings Act, 1992* does provide the court overseeing a class action with a great deal of authority:

> **12.** The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> [*Emphasis Ours*]
>
> ***Class Proceedings Act*, S.O. 1992, c.6**

78. However, the case law has consistently confirmed that the court's supervisory jurisdiction under the *Class Proceedings Act, 1992*, while large, does not extend to permitting the court to alter or modify a settlement agreement which has been reached by the parties.

79. In *Fantl v. Transmerica Life Canada*, this Honourable Court confirmed that the supervisory jurisdiction of the court in class proceedings continues throughout the stages of the proceeding, including the implementation of the administration of a settlement.

> ***Fantl v. Transamerica Life Canada,* 2009 ONCA 377, at para 39, Joint Brief of Authorities, Volume 2, Tab 33**

80. This Court in *Fantl,* supra*,* also endorsed a middle of the road approach to the level of intervention to be expected from a court pursuant to its supervisory jurisdiction:

> [41] While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.
>
> [*Emphasis Ours*]
>
> ***Fantl* v. *Transamerica Life Canada, supra, at para 41,* Joint Brief of Authorities, Volume 2, Tab 33**

81. In *Lavier v. My Travel Holidays Canada Inc*., the motions judge clearly delineated the supervisory jurisdiction of the court in the context of class action proceedings. More specifically, he held that the court's jurisdiction does not include the power to vary a settlement which has been legitimately reached between the parties.

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

82. The Appellants respectfully submit that with the creation of the Notice Program, the permission to archive IAP Redacted Documents and the setting of a retention period that is in no way rooted in the Settlement Agreement, the Honourable Mr. Justice Perell exceeded his supervisory jurisdiction and effectively altered the settlement agreement reached by the parties.

83. With the Order that is the subject of this appeal, the Honourable Mr. Justice Perell not only added to the Settlement Agreement but also varied its terms by derogating from the explicit confidentiality protections included in this agreement.

84. The Appellants further submit that the Order that is the subject of this appeal cannot be justified as an exercise of the Superior Court's inherent jurisdiction.

85. In *Myers v. Canada (Attorney General)*, another class proceeding commenced in British Columbia in connection with the residential school system and the abuses that occurred therein, the Court of Appeal of that province endorsed the motions judge's conclusion that resort to the inherent jurisdiction should be used sparingly and that the jurisdiction does not go so far as to allow the Court to create or ignore substantive legal rights or obligations.

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

86. The Appellants respectfully submit that the Honourable Mr. Justice Perell's Order falls outside the Court's inherent jurisdiction insofar as it both creates legal rights and obligations that did not exist in the Settlement Agreement (the creation of a notice program, the retention of IAP Retained Documents by the Chief Adjudicator, the possible archiving of those documents by the NCTR once redacted, etc.) and ignores the substantive privacy rights of the Appellants' members and former members.

D. The Retention Period of IAP Retained Documents

87. The Honourable Mr. Justice Perell held that although IAP Documents are in the possession of Canada, they are not under the control of a government institution, but rather under the control of various supervisory bodies, including ultimately the Court under the Settlement Agreement.

> ***Fontaine v Canada (Attorney General),* 2014 ONSC 4585, Reasons for Decision, at paras. 319 and 331, Joint Compendium of Documents, Volume 1, Tab 4, Joint Brief of Authorities, Volume 2, Tab 47**

88. Furthermore, while the IAP Documents are not subject to the *Privacy Act,* and to the *Access to Information Act,* the Honourable Mr. Justice Perell held that this legislation applies to the IAP Documents in accordance with the contracting parties' intention.

> ***Ibid*, at para. 320.**

89. It is also the opinion of the Honourable Mr. Justice Perell that the IAP Documents are not court records subject to the Ontario *Court of Justice Act*, RSO 1990 c. C-43, but rather, that they are documents that the Court has jurisdiction to control *in rem*.

> ***Ibid*, at paras. 333 and 334.**

90. Having determined that the Court has the jurisdiction to order that the IAP Documents be destroyed after a retention period, the Honourable Mr. Justice Perell held that, in accordance with the ultimate limitation period pursuant to the *Ontario Limitations Act,*

2002, SO 2002 c. 24 Sch. B, a reasonable retention period for the IAP Documents would be 15 years.

***Ibid*, at paras. 362.**

91. However, in his Order, the Honourable Mr. Justice Perell ordered that the Chief Adjudicator shall destroy IAP Documents at the completion of a relevant IAP Claim, therefore submitting only the IAP Retained Documents to a 15-Year Retention Period.

Justice Perell's Order, at paras. 4 and 6, Joint Compendium of Documents, Volume 1, Tab 3

92. According to the Office of the Privacy Commissioner of Canada, the following points should be considered in assessing what is an appropriate retention period and when it is timely to dispose of personal information :

> Reviewing the purpose for having collected the personal information in the first place is generally helpful in assessing how long certain personal information should be retained.
>
> If personal information was used to make a decision about an individual, it should be retained for the legally required period of time thereafter – or other reasonable amount of time in the absence of legislative requirements – to allow the individual to access that information in order to understand, and possibly challenge, the basis for the decision.
>
> If retaining personal information any longer would result in a prejudice for the concerned individual, or increase the risk and exposure of potential data breaches, the organization should consider safely disposing of it.
>
> [*Emphasis Ours*]

Office of the Privacy Commissioner of Canada, *Personal Information Retention and Disposal: Principles and Best Practices*, 2014, at p. 2, Appellants' Book of Authorities, Tab 22

93. Keeping in mind the underlying principle that personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous, the Appellants submit that the destruction of all IAP Documents should occur immediately after completion of the IAP, subject only to the specific exceptions provided in the Settlement Agreement.

94. First, the Appellants are of the view that this is in keeping with the letter and the spirit of the Settlement Agreement.

95. With respect to the archiving of the IAP Records, the Appellants agree with the following statement made by the Chief Adjudicator in his initial Request for Directions:

> The record of the IAP may only be archived if there is authority for doing so under the Settlement Agreement. The only records that the Settlement Agreement contemplates archiving are the redacted transcript of the Claimants' testimony, provided the Claimant consents. Accordingly, there is no lawful authority for the archiving of any other of the records of the IAP.
>
> ***Factum of the Chief Adjudicator,* at para 104; Appellants' Appeal Book and Compendium, Tab 3.**

96. It should also be noted that some former Indian Residential Schools students opposed the potential archiving of documents containing personal information by the Commission or their storage in an archive established through the Commission or under the *Library and Archives of Canada Act*. In this subject, Fred Kelly stated the following:

> I am absolutely opposed to that and wish to exercise my free will respecting the retention or destruction of my personal information compiled in the IAP.
>
> ***Affidavit of Fred Kelly, affirmed May 21,* 2014 at para 6, <u>Joint Compendium of Documents, Volume 6, Tab 52</u>**

97. The Appellants also share the Chief Adjudicator's view that "[…] the Settlement Agreement would need to contain the very clearest language expressing that these records were to be archived in any way. No such language exists".

> ***Factum of the Chief Adjudicator,* at para 114; Appellants' Appeal Book and Compendium, Tab 3.**

98. Second, the Appellants' respectfully submit that the Honourable Mr. Justice Perell erred in law by requiring not only that the IAP Retained Documents be retained, but that they be retained for a period of 15 years following the end of the IAP process.

99. As underlined by the Court, the Settlement Agreement does not specify the duration of the retention period of the IAP Documents.

> ***Fontaine v Canada,* supra, Reasons for Decision, at para. 362, Joint Compendium of Documents, Volume 1, Tab 4, Joint Brief of Authorities, Volume 2, Tab 47**

100. The only reference to a retention period of IAP Documents is found in the Guide to the Independent Assessment Process Application, that states that the *Privacy Act* requires that the personal information of a Claimant recorded by any means with respect to his or her claim be kept for at least two years.

> ***Guide to the Independent Assessment Process Application,* at page 29, Joint Compendium of Documents, Volume 1, Tab 26**

101. Indeed, there is no legislated provincial standard regarding retention periods for documents similar to the IAP Documents. Similarly, the federal legislative scheme provides for a minimum two (2) year retention period, but only in regard to personal information used for administrative purposes.

> ***Privacy Act*, supra, c. P-21, s. 6**
> ***Privacy Regulations*, supra, ss. 4 and 7**

102. The Appellants respectfully submit that the limitation periods provided in the *Ontario Limitations Act*, 2002, are not akin to a retention schedule.

> ***Ontario Limitations Act,* 2002, supra, s.15(2)**

103. While the goal of mirroring the ultimate limitation period in a retention schedule may make sense in cases where there is a possibility of subsequent litigation and, as a result, there would be a desire to protect the rights of potential litigants or stakeholders, this is clearly not the case in the context of the present matter.

104. Indeed, the goal of the IAP and of the Settlement Agreement is to provide for an efficient and fair claims evaluation process in the context of a settlement agreed upon

between the parties. By definition, there is no potential for litigation arising out of the IAP Documents.

105. Consequently, the Appellants respectfully submit that the Honourable Mr. Justice Perell erred in law by using the Ontario ultimate limitation period as a point of reference for determining the retention schedule.

106. Furthermore, there is no basis in the Settlement Agreement for the establishment of the 15-Year Retention Period which would unduly that the disposition by destruction of the IAP Retained Documents.

107. The 15-Year Retention Period is arbitrary, unjustified and unreasonable given the spirit and the letter of the Settlement Agreement.

108. Furthermore, as was previously mentioned, the retention of documents containing personal information that is no longer required to fulfill its purpose substantially increases the risk of a disclosure or release of sensitive personal information as well as additional potential privacy breaches.

109. In addition, the Appellants respectfully submit that by imposing a moral burden on the Appellants' members or former members who are prevented to put an end to a painful and stressful part of their lives, the 15-Year Retention Period goes against the purpose of the Settlement Agreement.

110. More particularly, the 15-Year Retention Period is out of step with one of the goal of the Settlement Agreement namely the reconciliation between its parties.

> ***Settlement Agreement*, Recital C., <u>Joint Compendium of Documents, Volume 1, Tab 23</u>**

PART V- ORDER SOUGHT

111. Wherefore the Appellants seek that the Order be set aside and that an order be granted for the following:

112. That Claimants' IAP Redacted Documents not be transferred to the NCTR without the written consent of all members or former members of the Appellants, including Persons of Interest, and any associated persons concerned by such IAP Redacted Documents, or the Appellants themselves on their behalf;

113. That the Notice Program to advise Claimants of their option to transfer the IAP Redacted Documents at the NCTR is declared inconsistent with the Settlement Agreement, and does not fall within the administrative or supervisory jurisdiction of the Court;

114. That the act of providing IAP Redacted Documents to the NCTR constitutes a violation of confidentiality statutory obligations lying upon the Appellants under the *Civil Code of Quebec* and the *Quebec Charter of Human Rights and Freedoms*;

115. That the destruction of all IAP Documents occur immediately after completion of the IAP, subject to limited exceptions provided in the Settlement Agreement.

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

Per: Michelle Tamarche

for Pierre-L. Baribeau
Lawyer for the Appellants
Nine Catholic Entities

Court of Appeal File Nos: 59310, 59311, 59320

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

LARRY PHILIP FONTAINE et al.

Plaintiff

-and-

THE ATTORNEY GENERAL OF CANADA et al.

Defendants
Appellants Nine Catholic Entities

CERTIFICATE

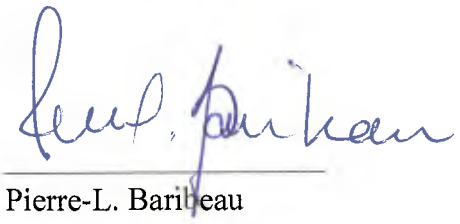
I, Pierre-L. Baribeau, lawyer for the Appellants certify that:

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

2. An estimate that ~~1.5 hours~~ 50 minutes will be required for the Appellants' oral argument, ~~not~~ including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montreal, October 14th, 2015



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

SCHEDULE "A" – LIST OF AUTHORITIES

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

Housen v. *Nikolaisen,* 2002 SCC 33

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

Fontaine v Canada (Attorney General), 2014 ONSC 283

KPMG Inc. v *Canadian Imperial Bank of Commerce,* [1998] O.J. No. 4746 (Ont CA)

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

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

Fabrikant c. *Adolph,* [1998] R.R.A. 585 (QCCS),

Jones v. *Tsige*, 2012 ONCA 32

R. v. *Spencer*, 2014 CSC 43

Srivastava c. *The Hindu Mission of Canada (Québec) inc.*, 2001 CanLII 27966

Syndicat Northcrest v. *Amselem*, [2004] 2 S.C.R. 551

Godbout v. *Longueuil (City)*, [1997] 3 S.C.R. 844

R. c. *Richard*, [1996] 3 S.C.R. 525

Merck Frosst Canada Ltd v. *Canada (Health),* [2012] 1 S.C.R. 23

Bernard v. *Canada (A.G.)*, [2014] 1 S.C.C. 227

Fontaine v *Canada (Attorney General),* 2014 ONSC 4585

Fantl v. *Transamerica Life Canada,* 2009 ONCA 377

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

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

Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada.* (Toronto: Carswell, 2000)

Office of the Privacy Commissioner of Canada*, Personal Information Retention and Disposal: Principles and Best Practices*, 2014

SCHEDULE "B" – STATUTES

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

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

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

***Quebec Charter of Human Rights and Freedom*, CQLR, c. 12, ss 4, 5, 9, 36.**

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

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

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

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

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

36. Every accused person has a right to be assisted free of charge by an interpreter if he does not understand the language used at the hearing or if he is deaf.

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

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

These rights are inalienable.

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

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

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

[…]

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

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

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

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

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

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

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

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

***Privacy Act, RSC 1985 c. P-21,* s. 6, 7, 8**

6. (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.

(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

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

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

***Class Proceedings Act, S.O. 1992, c.6,* s 12**

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate

***Privacy Regulations, SOR/83-508,* s. 4, 7**

4. (1) Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution

(*a*) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and

(*b*) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act.

(2) Notwithstanding subsection (1) where personal information is under the control of a government institution at a post abroad, the head of the post or the senior officer in charge thereof may order the destruction of the information in an emergency in order to prevent the removal of the information from the control of the institution.

7. The head of a government institution shall retain for a period of at least two years following the date on which a request for access to personal information is received by the institution under paragraph 8(2)(*e*) of the Act

(*a*) a copy of every request received; and

(*b*) a record of any information disclosed pursuant to such a request

***Ontario Limitations Act, 2002, SO 2002, c 24, sch B,* s. 15.(2)**

15.(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

LARRY FONTAINE et al.
Plaintiffs

v.

THE ATTORNEY GENERAL OF CANADA et al.
Defendants – Appellants
Nine Catholic Entities

Court of Appeal File Nos: 59310, 59311, 59320

COURT OF APPEAL OF ONTARIO

Proceeding commenced at TORONTO

UDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE APPELLANTS (NINE CATHOLIC ENTITIES)

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