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

UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE CROSS-APPELLANT/RESPONDENT THE ATTORNEY GENERAL OF CANADA

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Plaintiffs

(Respondents in Appeal)

- 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, INSITUT 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 and Respondents in Appeal and Cross-Appeals)

UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE CROSS-APPELLANT/RESPONDENT,

ATTORNEY GENERAL OF CANADA

PART I - INTRODUCTION

1. Three appeals and four cross-appeals have been taken from an Order made by the Honourable Mr. Justice Perell dated August 6, 2014 regarding document retention and disposition in the context of the Court's supervisory jurisdiction over the administration of the Indian Residential Schools Settlement Agreement, ("the IRSSA"). The Appellants are the 22 Catholic entities, the 9 Catholic entities and the Sisters of St. Joseph. As one of the respondents to these three appeals, the Attorney General of Canada ("Canada") cross-appeals from the Order. Mr. Justice Perell released his reasons for decision on August 6, 2014 and issued his Order pursuant to those reasons on February 10, 2015.

2. A partial stay of Justice Perell's Order has been granted by the Ontario Court of Appeal on consent of the parties pending the outcome of these appeals and cross-appeals.

PART II - OVERVIEW

3. On July 14, 15 and 16, 2014, the Honourable Mr. Justice Perell heard arguments on two Requests for Direction ("RFDs"). The Chief Adjudicator ("the CA") of the Independent Assessment Process ("the IAP") and the Truth and Reconciliation Commission ("the TRC")

each brought an RFD seeking court direction regarding the retention or use of documents prepared for the IAP ("the IAP documents") pursuant to the IRSSA.

4. In its response to both RFDs, Canada sought to demonstrate that the Court's intervention over the fate of these government records was unnecessary, because a comprehensive framework for the potential retention, destruction and/or use of these records already exists in the IRSSA. The parties to the IRSSA negotiated, agreed to and set up a comprehensive framework to protect and balance the competing interests of affected individuals and entities, including the privacy of IAP claimants and alleged perpetrators, as well as individuals' ability to control their own personal information and the retention of historically and legally valuable information.

5. This framework necessarily included applicable federal legislation, including the *Privacy Act* and the *Access to Information Act*, quasi-constitutional legislation that Canada could not and did not contract out of, in addition to policy instruments that complement the statutory requirements. Together with the *Library and Archives Canada Act,* the IRSSA includes a legislative regime that contains all necessary checks and balances over the retention, use and disposition for records under the control of a government institution.

6. Notwithstanding Canada's position, in his reasons for decision, Justice Perell found that the IAP documents (as defined in Schedule "A" of his Order) were not "government records", but that even if they were government records, the Court had jurisdiction over Canada's possession of the IAP documents. Justice Perell went on to find more specifically that "the Court has the *in rem* (against the world) jurisdiction to direct how the IAP Documents may be retained, archived, or destroyed after the IAP is completed" and that "this jurisdiction exists regardless of whom has the custody or possession of the IAP documents."

7. It is Canada's position that Justice Perell's essential error was his finding that the documents in issue were not "government records" and that Canada's legislative scheme did not apply. This constituted a material amendment to the IRSSA, and as such constituted an error in law.

8. This error led Justice Perell to further err by ordering material amendments to the IRSSA as follows:

a. He ordered IAP documents (as defined in Schedule "A" of his Order) to be destroyed upon completion of an IAP claim after expiry of any review or appeal periods by all parties, subject to some minor exceptions and the limited retainer of certain documents as set out below;

b. He arbitrarily created a 15 year retention period following completion of each IAP process during which specified limited IAP documents would be retained only by the Chief Adjudicator;

c. Despite the fact that he found that the documents were not government records under the control of a government institution, Justice Perell nonetheless ordered that the *Privacy Act* and the *Access to Information Act* would apply to the IAP documents for limited defined purposes during this arbitrary retention period;

d. He ordered a court-approved notice plan led by the Chief Adjudicator with respect to these IAP retained documents to be put in place to permit claimants the option to consent to the transfer of the documents to the National Centre for Truth and Reconciliation, ("the NCTR") without which they would be destroyed at the end of the retention period;

e. His order arbitrarily expanded the Chief Adjudicator's mandate and required that Canada bear the costs of this expansion, the court-approved notice plan and other provisions for fifteen years;

f. He set his own limits to the use to which IAP documents can be put and circumscribed the period of time for which Canada may retain IAP documents;

g. He found the destruction of all IAP documents other than in accordance with the requirements of the *Library and Archives of Canada Act* to be an express or implied term of the IRSSA;

h. He declared null and void provisions of the Agreement for the Transfer of Archival Records signed August 7, 2012, its Appendix, and the *Records Disposition*

Authority (RDA) 2011/010 between Aboriginal Affairs and Northern Development Canada ("AANDC") and Library and Archives Canada ("LAC") to convey IAP Documents (those with historical and archival value) to the LAC notwithstanding that the Agreement was in accordance with Canada's legislative scheme for the management and maintenance of government documents, and in accordance with the terms of the IRSSA.

9. Justice Perell's errors were further compounded by significant differences between his Order of February 10, 2015, and his earlier reasons for decision released August 6, 2014. In paragraph 17 of his reasons, he ordered that Canada "retain all IAP documents for 15 years after the completion of the IAP hearings, that after this retention period, Canada shall destroy the documents, but that any other party or entity with IAP documents shall destroy the after completion of the IAP hearings". In his Order of February 10, 2015, he however, set out that the Chief Adjudicator, not Canada, retain certain limited IAP documents for 15 years and that all other parties, including Canada, immediately destroy the IAP documents on completion of the hearings, including any review periods.

10. It is Canada's position that Justice Perell erred and exceeded his jurisdiction in both his reasons and his Order. Canada asks the Order of Justice Perell be set aside and that an order issue from this Court that, in accordance with the terms of the IRSSA, the documents in issue are government records subject to Canada's legislative regime for the management of such documents.

PART III – THE FACTS

THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT (THE "IRSSA")

11. The IRSSA is the contractual agreement that governs the relationship of the parties to it, and includes the agreement of the parties with respect to the use, care and management of the documents generated in the context of the Independent Assessment Process (the "IAP").

12. The parties to the IRSSA designed the IAP as an out-of-court process, taking into account the goal of confidentiality and privacy for affected individuals, arriving at a unique process that was expressly intended to address anticipated concerns by claimants as well as alleged perpetrators regarding privacy and confidentiality.[1]

13. The IRSSA was also purposely structured with federal legislation in mind for the management of government records as the best and most reliable way to ensure the confidentiality of the IAP and the privacy of all individuals involved. This promise of confidentiality and privacy extended to all individuals regardless of their decisions to participate in the IAP process. Built-in mechanisms to ensure such confidentiality and privacy were key factors that induced the parties to enter into the IRSSA. The overriding concern of the parties was that any undue disclosure of the IAP Records would betray the reasonable expectations of confidentiality and privacy held by IAP claimants, church organizations, alleged perpetrators, and others.

14. The relevant portions of the IRSSA essential to the disposition of this appeal are as follows:

a. The Parties "agreed to settle the Class Actions upon the terms contained in this Agreement." [para. F, Preamble]

b. The Schedules to the Agreement "are incorporated into and form part of it by this reference as fully as if contained in the body of this Agreement." [para. 1.09]

c. All applications to the IAP "will be processed within the IAP as set out in Schedule "D" of this Agreement." [para. 6.01(3)][2]

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[1] Russell Affidavit, affirmed May 21, 2014, para. 32.; Joint Compendium of Documents, Tab 53 pp. 2294-2339

[2] Russell Affidavit, Exhibit "A" – Schedule "D" to the IRSSA; Joint Compendium of Documents, Tab 24 pp. 332-380

d. Schedule "D" of the IRSSA sets out the steps of the IAP, and the required documents, which are set out in the detailed Appendices to Schedule "D".

e. Appendix I of Schedule "D" sets out in general terms what will be asked of the claimant in applying to the IAP. One of the requirements is the claimant must provide authorizations "so that the defendants may produce their records as set out in Appendix VIII of Schedule "D."

f. Appendix VIII of Schedule "D" is titled "Government Document Disclosure." This Appendix establishes that the obligation is on the Government of Canada to "search for, collect and provide a report" regarding the dates the claimant attended a residential school, as well as about the persons named in the Application Form as having abused the claimant.

g. Appendix VIII provides that upon request the claimant or their lawyer will receive copies of the documents located by the government, "but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*."

15. The IAP Application Form itself is attached at the end of Schedule "D."[3]

a. The Application Form begins by referring to the Guide that accompanies the Application.

b. The Application Form asks for details about the Claimant, including details of the abuse experienced, the harms suffered, the treatment received, work history and the possibility of future care.

c. Section 7 of the Application requires the Claimant to sign a Declaration that includes the following:

> *I give permission to the Library and Archives Canada, Indian and Northern Affairs Canada, and any other federal, provincial or territorial government department having records relevant to my claim to share them with Indian Residential Schools Canada. This permission will allow the government to research my claim.*
>
> *I understand that my personal information, including the details of any claim of abuse, may be shared with the government, the decision-maker, any participating church organizations, person(s) I identify as having abused me, and witnesses. Information provided to the person(s) I*

[3] Russell Affidavit, Exhibit "C" – Application Form; Joint Compendium of Documents, Tab 27 pp. 437-458

identify as having abused me and witnesses will not include my contact details or other information not relevant to their role in the claim, unless I want it to be shared.[4]

d. Each page of the Application has a header that specifically notes the document is a "Protected B document when completed."

e. An explanation of what the government term of "Protected B" document means is then provided in Appendix "B" to the Guide.

16. The relevant portions of the Guide are as follows:

a. The Guide begins by explaining to the Claimant that the IAP is part of a larger agreement, the IRSSA.

b. The Guide then advises that the claimant must file the IAP Application Form.

c. Section 8 of the Guide advises the Claimant of the Declaration (set out above) that must be signed by the Claimant. The Guide then advises the Claimant that by signing the declaration, it means that the claimant is giving permission to certain groups to research the claimant's case, and confirming that the claimant understands "how people and organizations involved with this process will use your personal information (see Appendix B.)."

d. Appendix "B" of the Guide is titled "Protection of Your Personal Information":

The relevant subsections of the appendix are as follows:

LEVEL OF SECURITY

We will treat your Application Form with care and confidentiality. This means that security rules are in place to protect your Application Form. The Government of Canada uses the "Protected B" security level for sensitive and personal information. Once you submit it, we will treat your Application Form as a Protected B" document.

PRIVACY AND INFORMATION LAWS

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[4] Russell Affidavit, Exhibit "C" – Application Form; Joint Compendium of Documents, Tab 27 pp. 437-458

The Privacy Act is the federal law that controls the way the government collects, uses, shares and keeps your personal information. The Privacy Act also allows people to access personal information about themselves.

The Access to Information Act is the federal law that allows access to government information. However, it protects certain kinds of information, including personal information.

We will deal with personal information about you and other people you identify in your claim privately and confidentially. We will do so in accordance with the Access to Information Act, the Privacy Act, and any other applicable law, or we will ask your permission to share information.

In certain situations, the government may have to give personal information to certain authorities. For example, in a criminal case before the courts, the government may have to give information to the police if they have a search warrant. Another example is when the government has to give information to child welfare authorities or the police if the government finds out that a child needs protection. The government will also share personal information with people involved in resolving your claim, as we describe in the section "Sharing your personal information with others" on the next page.

You can find more information about these laws on the internet at: www.priv.gc.ca[5] and www.oic-ci.gc.ca[6].

KEEPING YOUR RECORDS

The Privacy Act requires the government to keep your personal information for at least two years. Currently, the government keeps this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.[7]

IRSSA AND THE COMMITMENT TO CONFIDENTIALITY/PRIVACY

17. As set out above, the IRSSA sets out the mechanisms that address the parties' mutual intention to respect and honour the confidentiality and privacy of the IAP participants and non-

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[5] Website of the *Office of the Privacy Commissioner of Canada*
[6] Website of the *Office of the Information Commissioner of Canada*
[7] Russell Affidavit, Exhibit "D" – Application Guide; Joint Compendium of Documents, Tab 26 pp. 393-436

participants alike. Further, individually, each claimant has accepted the terms of the IRSSA regarding privacy and confidentiality by their signing of the application form.

18. It is in the context of the existing mechanisms in place within the legislative framework of the federal government's management of its own records, that additional structural elements were then built into the agreement, and in particular into the IAP, to ensure the parties' goals were achieved, and how they were to be achieved:

a. The Secretariat will admit claims to the IAP as of right where the application is complete and . . . where the Claimant has signed the Declaration set out in the application form, including the confidentiality provisions in the Declaration.[8]

b. The following conditions apply to the provision of the application to the Government or a church entity:[9]

- The application will only be shared with those who need to see it to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage;

- If information from the application is to be shared with an alleged perpetrator, only relevant information about allegations of abuse by that person will be shared, and the individual will not be provided with the Claimant's address or the address of any witness named in the application form, nor with any information from the form concerning the effects of the alleged abuse on the Claimant, unless the Claimant asks that this be provided to the alleged perpetrator;

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

- Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that

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[8] *Ibid,* Exhibit "A" - Schedule D, Appendix II, (i), page 19; Joint Compendium of Documents, Tab 24 pp. 332-380
[9] *Ibid,* Exhibit "A" - Schedule D, Appendix II, (iv), page 19; Joint Compendium of Documents, Tab 24 pp. 332-380

others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations. (emphasis added)

c. The IAP hearings are closed to the public;[10]

d. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law.[11]

e. Claimants will receive a copy of the decision, redacted to remove identifying information about any alleged perpetrators, and are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.[12]

f. Proceedings will be recorded and will be transcribed for the purpose of producing a transcript, if required, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.[13]

19. It is readily apparent from the terms of the IRSSA, its attached schedules, the Application form and the Guide that expectations of confidentiality, privacy and the ability to consent to the use of their information are key factors for many in deciding whether or not to participate in the IAP, either as claimants or as alleged perpetrators. For that reason, continued respect for the confidentiality and privacy of all affected individuals remains a paramount objective in meeting Canada's obligations under the IRSSA in accordance with the law.

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[10]Russell Affidavit, Exhibit "A" Schedule D, III,(i), page 15; Joint Compendium of Documents, Tab 24 pp. 332-380
[11]*Ibid.*
[12]*Ibid.*
[13] *Ibid,* Schedule D, III, o(ii), page 15; Joint Compendium of Documents, Tab 24 pp. 332-380

CANADA'S LEGISLATIVE SCHEME FOR PROTECTING PRIVACY AND CONFIDENTIALITY OF GOVERNMENT RECORDS

20. As established under the *Library and Archives Canada Act*, the Library and Archives of Canada ("LAC"), is "the permanent repository of [...] government and ministerial records that are of historical or archival value."[14] LAC has unique and broadly-recognized expertise in the preservation of government records such as the IAP Records, subject to access restrictions and privacy considerations set out at law.[15]

21. Records transferred to LAC are registered into LAC's collection management system, where they are identified as Code 32, meaning that they are restricted by law, until a determination has been made otherwise.[16] Access restrictions on records at LAC may be re-evaluated a) upon an Access to Information and Privacy ("ATIP") request[17] or b) upon a request to Aboriginal Affairs and Northern Development Canada ("AANDC") as the originating institution of the documents to authorize LAC to grant Departmental Researcher Status to an individual.

22. A request for access to IAP records at LAC pursuant to an ATIP request would be very carefully reviewed in light of the nature of the records and the exemptions and exclusions of the *Access to Information Act* and the *Privacy Act*.[18]

23. AANDC retains the sole discretion to determine if an individual will be granted departmental researcher status to be able to consult records created by AANDC and its

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[14] *Library and Archives of Canada* Act, SC 2004, c 11 ("*LAC Act*") at s 7(c); Schedule "B"; Eryou Affidavit, affirmed May 5, 2014, paras. 42-46; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[15] Eryou Affidavit, paras. 42-46; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[16] *Ibid*, at para 43 and 47.
[17] *Ibid* at para. 23.
[18] *Ibid* at para.43.

predecessors held by LAC, and the terms and conditions of such potential grant. The considerations will include the personal and sensitive nature of the possible IAP records transferred, including the confidentiality undertakings and assurances that would have substantial impact.[19] If status were to be granted by AANDC, such individuals must provide their credentials and authorities to LAC in order to gain access to such restricted records.[20] While complete assurances of complete confidentiality cannot be given, AANDC, as the originating institution, will impose strict terms and conditions, if such a status grant is ever to be considered appropriate[21].

24. After significant appraisal and analysis, LAC and AANDC first entered into an Agreement to Transfer Archival Records, dated July 26, 2012 and signed August 7, 2012 ("the Archival Agreement") with a detailed Appendix ("the Archival Agreement Appendix") covering a number of the IAP records relating to the resolution of claims relating to the IRS system.[22] LAC then issued the current Records Disposition Authority (*"RDA 2011/010"*)[23]. Of the IAP Records, it is important to note that the Archival Agreement Appendix currently specifies that only the electronic copies of the Notice of Decision for each case are to be transferred to LAC.[24] The Archival Agreement Appendix also requires the transfer of certain other records that do not qualify as IAP records, including settlement packages from the

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[19] Eryou Affidavit, para 44; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[20] *Ibid* at para 45.
[21] *Ibid* at para. 44.
[22] Eryou Affidavit, para. 28, Exhibit "E" – Agreement for the Transfer of Archival Records between AANDC and LAC pertaining to *RDA 2011/010;* Joint Compendium of Documents, Tab 46 pp. 1648-1742.
[23] *Ibid,* para. 26 and at "Exhibit "C – *RDA 2011/010* and at Exhibit "F" – Appendix to Archival Agreement - "Terms and Conditions for the Transfer of Information Resources of the Residential Schools Resolution Program Activity of AANDC"; Joint Compendium of Documents, Tab 46 pp. 1648-1742.
[24] *Ibid,* para. 34 and Exhibit "F" at subsection C.4.2; Joint Compendium of Documents, Tab 46 pp. 1648-1742.

Negotiated Settlement Process (the "NSP"), strategic documents relating to the IAP, and Alternative Dispute Resolution pilot project case files.

25. The Archival Agreement Appendix further specifies certain documents are not to be transferred to LAC, including IAP paper case files, other electronic case documentation related to the IAP, working files related to the IAP, Persons of Interest files (relating to alleged perpetrators) and tombstone information contained in the *SADRE*[25] database. Such documents would be destroyed by AANDC in accordance with the *RDA 2011/010* after the expiry of applicable retention periods.[26]

26. Any IAP Records transferred to LAC under the terms and conditions of *RDA 2011/010* will remain restricted and will be identified as "Code 32 documents".[27]

27. For any other disclosure, or transfer of their personal records and information to the TRC or the NCTR, AANDC would require the claimants and others to provide their consent. Canada voluntarily offered to facilitate a simple notice plan to let claimants know of this potential option, but was not required to do so, as part of the IRSSA.

THE KEY FINDINGS OF MR. JUSTICE PERELL

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[25] SADRE "Single Access to Dispute Resolution Enterprise" is an electronic database created in 2003 that is used by the IRSAS (the Secretariat) RIAS (the Resolution and Individual Affairs Sector) and by the SAO (Settlement Agreement Operations) Branch in order to hold the IAP records in electronic form and to carry out the day to day functioning of the IAP from preparation of packages to providing decisions of the Adjudicators.
[26] Eryou Affidavit, para. 34; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[27] *ibid*, paras. 26-34; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742. These documents will be flagged by AANDC on transfer as requiring further review should any requests for access be made.

28. In considering the commitment to confidentiality and privacy found in the IRSSA, the following are, in Canada's view, the non-controversial findings of Justice Perell necessary to the determination of the issue before the Court:

a. The IAP documents are governed by the IRSSA and the *Class Proceedings Act, 1992*. [para. 19]

b. AANDC is a department of the federal government, and as such, is subject to the *Library and Archives of Canada Act*. [para. 46]

c. The Indian Residential Schools Adjudication Secretariat ("IRSAS") that administers the IAP is part of AANDC. [para. 310]

d. LAC is a branch of the federal public administration presided over by a Minister and under the direction of the Librarian and Archivist. Under the *Library and Archives Canada Act*, "government records" may only be destroyed with the written consent of the Librarian and Archivist. Government records with historical or archival value as determined by the Librarian and Archivist must be transferred to LAC. [para. 49]

e. Canada possesses a complete set of the IAP documents. [para. 13]

f. Every page of the Application Form and Guide states "Protected B document when completed." Under the *Privacy Act*, and the *Access to Information Act*, this designation identifies the document as having information that if compromised "could result in grave injury, such as loss of reputation." [para. 177]

29. Notwithstanding the findings above, the terms of the IRSSA, its Appendices, the IAP Application and the Guide for claimants, Justice Perell went on to find as follows:

a. IAP documents are neither court records nor government records. [para. 19]

b. Although acknowledging that the IRSSA explicitly provides for the application of the *Privacy Act*, Justice Perell found that the *Privacy Act* does not provide the high degree of confidentiality that the parties bargained for. [para. 317]

c. In any event, the *Privacy Act* and the *Access to Information Act* do not apply because the IAP documents are not under the control of a government institution; rather they are under the control of various supervisory bodies, including ultimately the court under the IRSSA. [para. 319]

d. Notwithstanding the above, the *Privacy Act* and the *Access to Information Act* are to apply on a limited basis during a 15 year retention period post-hearing to certain IAP documents to be held by the Chief Adjudicator. [para.320]

e. The Court's jurisdiction extends over Canada's possession of the IAP documents even if they are government records. [para. 19]

f. That is because the IAP documents are confidential and private documents, both as a matter of contract and as a matter of the common law and equity. [para. 19]

g. Thus, the Court has the *in rem* (against the world) jurisdiction to direct how the IAP documents may be retained, archived, or destroyed after the IAP is completed. This jurisdiction exists regardless of whom has the custody or possession of the IAP documents. [para. 19]

h. The court's jurisdiction extends to government records if that is what the IAP documents also happen to be. [par. 65]

APPLICATION OF THE IMPLIED UNDERTAKING

i. Justice Perell found further support for his conclusions regarding the limitations of Canada's legislative scheme by finding that IAP documents are subject to the implied undertaking. As such, the court can enforce that undertaking and order the destruction of documents. [paras. 210 and 292]

THE COURT'S IN REM JURISDICTION

j. Justice Perell also held that the court can order the destruction of the documents because destruction is what the parties agreed, and the court can enforce *in rem* the parties' bargain. [para. 292]

BREACH OF CONFIDENCE

k. The court can also order the destruction of the documents because the IAP documents are subject to the law governing a breach of confidence. [para. 292]

l. Having found that Canada's legislative regime did not apply to the IAP, Justice Perell was then able to find that anything less than the complete destruction of all IAP documents after a 15-year retention period of his own creation constituted a breach of confidence. [para. 326]

PART IV - ISSUES and LEGAL ARGUMENT

30. The issues arising in respect of this Cross-Appeal are as follows:

ISSUE 1

31. Justice Perell erred by finding that the IAP Documents (as set out in Schedule "A" to his Order) were not "government records" under the control of a Government Institution and that *the Privacy Act,* the *Access to Information Act* and the *Library and Archives Canada Act* did not fully apply. Justice Perell further erred by misapprehending how the federal legislative scheme works in conjunction with the IRSSA to protect the confidentiality of the claimants and others.

ISSUE 2

32. Justice Perell erred and exceeded his jurisdiction by ordering material amendments to the class action settlement reached by the parties in the IRSSA.

STANDARD OF REVIEW

33. The general trend in Canada, confirmed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*, is that contractual interpretation involves issues of mixed fact and law. Consequently, questions of contractual interpretation generally attract a deferential standard of review.[28] However, *Sattva* also held that in the appropriate context it is also possible "to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law."[29] In that context, the standard of correctness would apply.

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[28] *Sattva Capital Corp. v. Creston Moly Corp.,* [2014] 2 S.C.R. 633 at para. 52; Joint Brief of Authorities, Vol. 5, Tab 98

[29] *Sattva* at para. 53; Joint Brief of Authorities, Vol. 5, Tab 98

34. Canada respectfully submits that correctness is the appropriate standard of review in this case. That would be consistent with what the Manitoba Court of Appeal held in another matter involving the interpretation of the IRSSA.

> 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 [the IRSSA] 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.[30]

35. However, even if a more deferential standard is applied to the decision of Justice Perell, his findings that the IAP documents were not government records and Canada's legislative regime for the management of IAP documents was not intended to apply to IAP documents, are unsupportable on the facts that were before him. As such, these findings constitute overriding and palpable errors.

KEY FACTS, PRINCIPLES AND LEGAL OBLIGATIONS

36. Canada states that the following facts, principles, and legal obligations must be taken into consideration with respect to this appeal:

a. The IAP documents defined in Schedule "A" of Justice Perell's Order are in Canada's possession and it submits, under its control, because AANDC has copies of the entire corpus of all the IAP Records currently in existence through the Indian Residential Schools Adjudication Secretariat (the "IRSAS") and through Resolution and Individual Affairs Section (the "RIAS"), both of which are housed within AANDC and whose roles are related to AANDC's programs and activities.[31]

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[30] *Fontaine v. Canada (Attorney General)*, 2014 MBCA 93 at para. 40; Joint Brief of Authorities, Vol. 2, Tab 43.
[31] Russell Affidavit, paras. 22 and 24; Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.

b. The *Privacy Act* and the *Access to Information Act* both apply to AANDC as a listed "government institution." As such, Canada's legislative framework for the care and management of government records applies to all documents under the control of AANDC, including the entire corpus of IAP records held by AANDC.

c. Consequently, the retention and disposition of the IAP documents, as government records containing the personal information of IAP claimants, alleged perpetrators and others, is governed by the *Privacy Act* and the *Library and Archives Canada Act*. Consequently, the disposition of the IAP documents must be consented to by Library and Archives Canada.

d. The IAP documents contain highly sensitive personal information that may only be used for the administration of the IAP or consistent purposes, subject to limited exceptions and exemptions in subsections 8(2) and 8(3) of the *Privacy Act*. The confidentiality of the IAP documents is ensured under the IRSSA and the *Privacy Act*, and individuals involved in the IAP receive numerous additional assurances of confidentiality and privacy. While under government control, the records must be protected from undue disclosure, and treated in a manner that respects the privacy and confidentiality of both IAP claimants and alleged perpetrators in accordance with the law.[32]

e. AANDC must retain the records generated by the IAP for a minimum two year retention period after their last administrative use, as required under s. 6(1) of the *Privacy Act* and s. 4(1) of the *Privacy Regulations*, unless individuals whose personal information is contained within those Records consent to its earlier disposal;

f. Prior to transfer to LAC, any requests for access to IAP records at AANDC under the *Access to Information Act* would take into account the confidentiality undertakings where discretionary exemptions are applicable. Similarly, as set out above, even after the transfer to LAC of certain of the records identified as having archival and historical importance, the confidentiality undertaking would inform the discretion of the Archivist in response to any request for disclosure.

g. Following the completion of the IAP in approximately 2020, AANDC must transfer those records identified as having "historical or archival value" to LAC and will destroy any other Records but only with the written consent of the Librarian and Archivist, which has already been obtained. LAC is the final repository for government records, with extensive expertise in the management of records containing personal information.[33]

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[32] *Ibid,* para.32; Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.
[33] Eryou Affidavit, para. 42; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.

h. As set out above, AANDC and LAC have entered into an Archival Agreement signed August 7, 2012, which includes the transfer of IAP records considered to have historical and archival value. The Archival Agreement Appendix sets the terms and conditions of the transfer. *Records Disposition Authority 2011/010* has been issued as a result of this Agreement. The IAP records are specifically the notices of decision at this time and subject to strict terms and conditions of the Archival Agreement. The Negotiated Settlement Process packages are also covered by the Agreement, although they are not specifically IAP Records. No documents have yet been transferred. As per the Archival Agreement, all other IAP records (as set out in Schedule "A") will be destroyed.[34]

i. Certain IAP records, such as the IAP notices of decision, contain valuable information of historic value about the IRS system, its legacy, and the legal responses thereto, some of which must be retained for future generations. The information powerfully memorializes experiences at IRS institutions across Canada.[35]

j. Acknowledgement of the importance of the IAP records furthers the goal of reconciliation contemplated under the IRSSA. The IAP documents also contain information about the extinguishment of certain legal entitlements and obligations of class members, non-class members, and other parties to the IRSSA.

k. The operation of the IRSSA is predicated on the consent or willingness of participants, including in the IAP and in relation to the TRC. Schedule "N" requires that individuals affected by the IAP must consent before their personal information is disclosed in ways not contemplated by the IAP. Furthermore, the *Privacy Act* permits individuals to consent to the disclosure of their personal information for other purposes.

ISSUE 1

37. Records that are under the control of a Government institution are subject to the *Privacy Act*[36], the *Access to Information Act*[37] and the *Library and Archives Canada Act.*[38] The Government institution cannot contract out of their application to records under its control.[39]

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[34] *Ibid*, para. 26-34; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[35] *Ibid*, para.34; Joint Compendium of Documents, Vol. 4, Tab 46 pp. 1648-1742.
[36] *Privacy Act* R.S.C. 1985, c.P-21; Schedule "B".
[37] *Access to Information Act* R.S.C. 1985, c.A-1; Schedule "B".
[38] *Library and Archives Canada Act* S.C. 2004, c.11; Schedule "B".
[39] *Canadian Broadcasting Corp. v. National Capital Commission* (1998), 147 F.T.R. 264 at para. 31 (F.C.T.D.); Joint Brief of Authorities, Vol. 1, Tab 15; *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)* 2003 FCT 254 at paras. 16-17 (F.C.T.D.), aff'd 2004

38. The Courts have interpreted the concept of "control" of documents for the purposes of the *Privacy Act* and the *Access to Information Act* in a very broad fashion. Generally, it is sufficient for the government institution to have physical possession or legal control of a record.[40]

39. The legal test for "control" under the *Access to Information Act* was most recently articulated by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence).*[41] It is noted that "control" is not a defined term and it should be given its "ordinary and popular meaning". Control is to be given a broad and liberal interpretation.

THE IAP RECORDS ARE GOVERNMENT RECORDS IN CANADA'S POSSESSION AND CONTROL

40. It is incontrovertible that Canada, through AANDC, has within its possession copies of the entire corpus of the IAP records currently in existence. It is similarly incontrovertible that the entire corpus of IAP records that will be generated or created in the future will also be within Canada's possession. Further, that entire corpus consists and will continue to consist to some significant degree of documents that were pre-existing government records produced by AANDC in response to the filing of a claim, as per Appendix VIII of Schedule "D" of the IRSSA. Appendix VIII obligates "Government Document Disclosure" regarding the dates the claimant attended a residential school, as well as any information about persons named in the

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FCA 214 (F.C.A.); Joint Brief of Authorities, Vol. 1, Tab 13; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* [2003] I F.C. 219 (C.A.) at paras. 2, 11; Joint Brief of Authorities, Vol. 1, Tab 20.

[40] *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)* 2007 FCA 272; Joint Brief of Authorities, Vol. 1, Tab 16.

[41] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 at para. 48; Joint Brief of Authorities, Vol. 1, Tab 19.

Application Form as having abused the claimant. This applies equally to electronic versions as well as any physical copies of files held by AANDC through IRSAS and RIAS with respect to individual IAP claims.[42]

41. To the same effect, IAP records that are in the possession of RIAS and IRSAS, entities residing within AANDC, are also documents within Canada's possession. Justice Perell found as a matter of fact that RIAS and IRSAS are part of AANDC, and their roles relate to AANDC's programs and activities; in any event that fact is apparent based on existing reporting mechanisms and evidence of government structure.

42. Just as it is incontrovertible that Canada, through AANDC, has or will have within its possession the entire corpus of the IAP records, it is submitted that it is similarly incontrovertible that Canada has had and continues to have within its possession "and control" all of those documents that were pre-existing government records produced by AANDC in response to the filing of a claim, in accordance with Appendix VIII of Schedule "D" of the IRSSA.

43. If it accepted that all pre-existing government records that form a significant part of the IAP records are documents in Canada's possession "and control", it follows that all additional documents created as a result of the IAP will be documents in Canada's possession "and control". Such a conclusion is entirely consistent with the test for control over records in the possession of the government departments as established by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence):*

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[42] Russell Affidavit, paras. 16-22; Joint Compendium of Documents, Tab 53 pp. 2294-2339.

> ..."control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis or a "*de facto*" basis.[43]

44. A finding that Canada does not or should not have possession or control of the IAP records runs contrary to the view of the Supreme Court of Canada as well as the IRSSA, which in Schedule "D" requires that Canada continue to hold its IAP records notwithstanding the qualified obligations upon other participants in the IAP to destroy their copies at the conclusion of a claim. Justice Perell's finding to the contrary constitutes an error in law.

THE *PRIVACY ACT*, THE *ACCESS TO INFORMATION ACT* AND THE *LIBRARY AND ARCHIVES CANADA ACT* APPLY

45. The IAP records are records under the control of a government institution, which is necessary for the proper administration, and implementation of the *IRSSA*. From paragraphs 58 to 64 of his reasons, Justice Perell discusses Canada's various roles under the *IRSSA*. He accurately points out at paragraph 60:

> It was a fact of life of the negotiations and of their outcome, the IRSSA, that Canada, which was providing billions of dollars of funding for the settlement, would have a role in administering the settlement funds and providing the infrastructure for the CEP and the IAP while at the same time having the right to challenge entitlements.[44]

46. Because of Canada's administrative and other roles, the documents had to be and were intended to be under the control of the government institution responsible for the IRSSA, which is now AANDC. Because of AANDC's control over the documents, it is a matter of law that the

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[43] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* ibid, at para.48; Joint Brief of Authorities, Vol. 1, Tab 19.
[44] Reasons for decision of Mr. Justice Perell, para. 60, Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

federal legislation of the *Privacy Act, the Access to Information Act* and the *Library and Archives Canada Act* be applicable to them.

47. The Supreme Court of Canada has characterized the *Privacy Act* and the *Access to Information Act* as "quasi-constitutional."[45] Accordingly, diligence and great care must be exercised in protecting personal information from improper disclosure, and the discretion of a government institution must be exercised in consideration of all relevant facts. This need is particularly pressing where, as here, the personal information is of the highest sensitivity and the risk of harm resulting from disclosure is great.

48. Both the *Privacy Act* and the *Access to Information Act* form part of the framework governing the use of the IAP Records, and are specifically referenced in the IAP application guide, which provisions are set out above at paragraph 16. The *Privacy Act* specifically allows for individuals to consent to the use or disclosure of their personal information[46], which the IRSSA acknowledges in its provisions regarding the possibility of use of transcripts for memorialization purposes.

49. At paragraph 177 of his decision, Justice Perell acknowledges that

> Every page of the Application Form and Guide in its header states: "Protected B document when completed." Under the *Privacy Act, supra* and the *Access to Information Act, supra*, this designation identifies the document as having information that if compromised "could result in grave injury, such as a loss of reputation.[47]

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[45] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; Joint Brief of Authorities, Vol. 4, Tab 76.
[46] *Privacy Act,* s.8 (1); Schedule "B".
[47] Reasons for Decision of Mr. Justice Perell, para.177; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

50. The *Access to Information Act* aims to ensure that records under the control of a government department are accessible to the public upon request, subject to exclusions and exemptions. The stated purpose of the *Access to Information Act* is:

> [...] to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public and that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.[48]

51. The dual objectives of the *Privacy Act* are to:

> Protect the privacy of individuals with respect to personal information about themselves held by a government institution and [to] provide individuals with a right of access to that information.[49]

On receipt of an access to information request, the *Privacy Act* operates to ensure that each individual's personal information held by a government institution remains private and accessible only to that person, subject to legislated exceptions. These Acts operate together to ensure the claimant will be able to access his or her own IAP documents while protecting the confidentiality of other individuals.

52. Justice Perell erred in finding that there could be limited application of the *Privacy Act* and the *Access to Information Act* during the 15-year retention period for IAP documents that he himself created. It was his view that a 15-year retention period was necessary in the event disclosure was required for criminal prosecution or child welfare proceedings.

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[48] *Access to Information Act,* R.S.C., 1985, c.A-1, s 2(1); Schedule "B"
[49] *PA*, *supra* at s 2; Schedule "B".

53. Canada submits it is not possible to find a partial application of these Acts to the documents; the legislation does not lend itself to such an interpretation. The documents are either under the control of a government institution requiring the Acts to apply in their entirety, or they are not, in which case these Acts have no application. Further, the basis for Justice Perell's finding is inconsistent with his conclusion at paragraph 320 of his decision:

> It was the contracting parties' intention that these Acts apply during the retention period.[50]

54. With respect, it cannot have been the parties' intention that these Acts apply during a retention period that was entirely the *post-facto* creation of Justice Perell himself, and therefore not a retention period that could have been within the parties' contemplation. To the contrary, it is evident by the terms of the IRSSA that it was the contracting parties' intention that these Acts apply to their fullest extent.

55. Justice Perell agreed with Canada at paragraph 360 of his decision that the "parties and participants contracted out of absolute confidentiality and privacy."[51] Canada was unable to agree to such absolute guarantees because it could not contract out of the obligations of not only the *Privacy Act* and the *Access to Information Act* but also the *Library and Archives Act.* Canada submits Justice Perell was incorrect when he continued on to say that the exceptions to absolute privacy and confidentiality did not include the imperatives of the *Library and Archives Canada Act.*

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[50] Reasons for Decision of Mr. Justice Perell, para. 320; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

[51] Reasons for Decision of Mr. Justice Perell, para.360; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

56. Justice Perell further erred when he found that the August 7, 2012 Agreement for the Transfer of Archival Records between AANDC and LAC, its Appendix and the *RDA 2011/010* to be a breach of confidence.[52] The fundamental point that Justice Perell failed to appreciate is that AANDC's negotiation of this Agreement and *RDA* with LAC, and the *RDA* itself is a public demonstration of how seriously and carefully Canada, operating within its legislated mandate, takes its responsibilities in the face of the difficult task, to protect the confidentiality of the IAP while at the same time, preserving the historical legacy.

57. Further, the enduring value of the IAP notices of decision has both legal and historical components, both of which militate against their destruction. Legally, the IAP decisions form a record of Canada's fulfillment of obligations under the IRSSA. Since IAP claimants agree to release Canada fully and forever from further liability in relation to abuse allegations advanced through the IAP, the IAP decisions are important for the purposes of estopping related claims that may be brought against Canada.

58. This is not a speculative concern on Canada's part. There have been claims brought by non-resident Indian students[53] or students who also attended Indian day schools in addition to an Indian Residential School that have been compensated through the IAP. Some of these claimants have commenced litigation relating to experiences that could be considered to be overlapping with their residential school experiences. The destruction of all IAP Records would erase the legal record of compensation awarded, the rationale or reasons for the

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[52] Reasons for Decision of Mr. Justice Perell, para. 360; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

[53] For example, in some instances, Indian children attended an IRS on a daily basis but stayed at home or elsewhere at night. Non-residents participated in the IAP on the signing of a Schedule "P" release.

compensation, if any, and the releases given by IAP claimants, exposing parties including Canada to the possibility of double liability and overpayments.

59. Thus, Justice Perell erred at paragraph 237, when he stated that Canada was "simply wrong that it needs the IAP decisions to protect itself from re-litigation of released claims."[54] His reasoning was that the Releases that Canada receives whenever a claimant enters into the IAP process were sufficient for Canada to protect itself. He failed, however, to appreciate that the claimants do not provide actual releases but are deemed to have released Canada and other parties from further liability by commencing an IAP claim by the terms of the IRSSA. Although Justice Perell specifically exempted Schedule "P" releases from his destruction order, it is a very limited subset of non-class members who signed these releases.

60. It is instructive to observe how Justice Harrington of the Federal Court recently addressed this very issue in British Columbia. The context was a class-action certification motion with respect to day students who attended Indian residential schools. The facts before Harrington J. were that some of the proposed class members had already participated in the IAP and consequently, had signed releases[55].

> In order to interpret the wording of a Release, one must look at the intention of the parties and context in which the Release was prepared. See *Taske Technology Inc. v. Prairiefyre Software Inc.* [2004] O.J. No. 6019 (QL), 3 BLR (4th) 244; *Arcand v. Abiwyn Co-Operative Inc.* 2010 F.C. 529.[56]

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[54] Reasons for Decision of Mr. Justice Perell, para. 327; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.
[55] *Gottfriedson et al v. Her Majesty the Queen in right of Canada* 2015 FC 706, paras. 71-73; Joint Brief of Authorities, Vol. 3, Tab 60.
[56] *Gottfriedson supra* at para. 78; Joint Brief of Authorities, Vol. 3, Tab 60.

61. Justice Perell's order would leave Canada with possibly no record of releases, and no ability to consider context, compensation or reasons for decision, thereby potentially leading to injustice and double or inadequate recovery for claimants.

ISSUE 2

62. By his Order, Justice Perell made material amendments to the IRSSA. He erred and exceeded his jurisdiction by so doing.

63. At paragraph 353 of his reasons, Justice Perell found that destruction of the IAP Records was an "express or implied term of the IRSSA,"[57] a conclusion that fails to meet the test of correctness in the face of the express and explicit terms of the IRSSA.

64. By effectively amending the terms of the IRSSA to bring it in line with his own ideas of what would constitute effective document management, Justice Perell fell into jurisdictional error.

65. The Ontario Superior Court of Justice has already approved the terms of the IRSSA as being fair, reasonable and in the best interests of the class. As with all settlement agreements, the IRSSA constitutes a binding contract enforceable under the general law of contract whose terms must be respected by the parties and enforced by the courts. The applicable class proceeding statutes explicitly provide that the IRSSA is binding.[58]

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[57] Reasons for Decision of Mr. Justice Perell, para. 353; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.
[58] *Class Proceedings Act*, 1992, SO 1992, c 6, s 29; Schedule "B".

66. When considered in its proper context, it is well settled law that when settlement has been reached and the agreement has been approved by the court, no provision of such an agreement should be varied unless invalid or amended by the parties.[59]

67. Further, ongoing supervisory jurisdiction cannot be appealed to as a mechanism for amending a settlement agreement to impose additional burdens on a defendant.[60]

THE PROPER ROLE OF A SUPERVISORY JUDGE

68. In interpreting the IRSSA, the Court is bound by certain well-known principles of construction and interpretation. The aim of interpretation is to objectively determine the parties' contractual intentions by reference to the words in the agreement, according to their plain and ordinary meaning.[61] Subjective intentions alone do not form a proper part of contractual interpretation.[62]

69. It is to be presumed that the parties to the IRSSA, having reduced their agreement to writing, have intended what they say and have included all necessary terms.[63] This principle is reiterated internally within the IRSSA at Article 18.06.[64] Further, the words of any contractual

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[59] *Gray v Great-West Lifeco Inc*, 2011 MBQB 13 at para 42; Joint Brief of Authorities, Vol. 3, Tab 62; *Bodnar* v *The Cash Store Inc*, 2011 BCCA 384; Joint Brief of Authorities, Vol. 1, Tab 11

[60] *Lavier v MyTravel Canada Holidays Inc*, 2011 ONSC 3149 (CanLII), ("*Lavier*") at paras 31 – 33; Joint Brief of Authorities, Vol. 4, Tab 75.

[61] *Gilchrist v Western Star Trucks Inc*, 2000 BCCA 70 at paras 17 & 18; Joint Brief of Authorities, Vol. 3, Tab 56.

[62] *Eli Lilly & Co* v *Novopharm Ltd*, [1998] 2 SCR 129 at paras 54, 56; Joint Brief of Authorities, Vol. 2, Tab 30.

[63] *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316 at 341; Joint Brief of Authorities, Vol. 5, Tab 103; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 at para 26; Joint Brief of Authorities, Vol. 4, Tab 88.

[64] IRSSA at Article 18.06; Joint Compendium of Documents, Vol. 1, Tab 23 pp. 236-331.

provision within the IRSSA must be read in the context of the entire Agreement and its purposes.[65]

70. The IRSSA must also be interpreted in such a way as to avoid absurd results.[66] It is an absurd result to find that the *Privacy Act* and the *Access to Information Act* apply on a partial and limited basis only to a retention period arbitrarily created by Justice Perell. Further, this contradicts the legislation.

71. It is acknowledged that "[i]n some instances ... the court's administrative jurisdiction may allow adjustments to be made to the scheme of the settlement, and at first blush, these variations might resemble a variation of the settlement agreement."[67] Thus, it lies with the court to determine in respect of each requested modification the line between a mere adjustment to the scheme of settlement and an amendment in contravention of the parties' intentions. In making that determination, the clear terms of settlement and the potential to materially increase the burden to the defendant are central concerns.

72. It is submitted that the effect of Justice Perell's Order, to increase the scope of the CA mandate, to create an extensive and long-term notice plan and to require Canada to pay for it does materially increase the burden on Canada as a defendant.

73. The inherent jurisdiction of the Ontario Superior Court of Justice provides a limited domain for the enforcement of the terms of the IRSSA. As Madam Justice Brown has directed

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[65] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 64; Joint Brief of Authorities, Vol. 5, Tab 102.
[66] *Guarantee Co of North America v Gordon Capital Corp* (1999), 178 DLR (4th) 1 at para 61; Joint Brief of Authorities, Vol. 3, Tab 63.
[67] *Lavier* at para 34; Joint Brief of Authorities, Vol. 4, Tab 75.

in relation to her role as administrative judge for the IRSSA in the Province of British Columbia, the "primary role of inherent jurisdiction is to prevent abuses of the Court's process which would frustrate the Court's ability to function as a court of law and administer justice... [it] is an 'extraordinary power', should be exercised sparingly and only in the clearest cases."[68]

74. In *Parsons v The Canadian Red Cross Society*,[69] it was found that the court's supervisory jurisdiction did not permit it to add, delete, or modify the terms of a class action settlement agreement in the context of a proposed late-filed claims protocol relating to individuals infected with Hepatitis C virus.[70]

75. Justice Perell himself acknowledges that the Court must respect the settlement reached by the parties. In *Fontaine v. Canada (Attorney-General),* he denies an applicant's request to create a "witness-matching program." He states at paragraph 89 of that decision:

> The proposed program would fundamentally alter the responsibilities and function of the Secretariat, and amounts to a request to vary or amend substantive terms of the IRSSA, something that cannot occur without the agreement of all parties. See: *Fontaine v. Canada (Attorney General)* 2014 ONSC 283 at paras. 159-160 and 246; *Fontaine v. Canada (Attorney General)* 2014 ONSC 4024 at paras. 29-31; and *Fontaine v. Canada (Attorney General),* 2014, ONSC 4585 at para. 35.[71]

76. Canada states that neither the TRC nor the CA were parties to the IRSSA, but are bound by the objective intentions of the settling parties. Justice Perell erred by ordering Canada to

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[68] *Fontaine v Canada*, Direction of November 20, 2013 (Court File No. L051875 Vancouver Registry) at para 54 (currently under appeal); Joint Brief of Authorities, Vol. 2, Tab 41, referencing *Fontaine v Canada*, 2012 BCSC 839 at para 11; Joint Brief of Authorities, Vol. 2, Tab 41 and *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd*, [1971] MJ No 38 (CA) at para 15;. Joint Brief of Authorities, Vol. 4, Tab 84.

[69] *Parsons v The Canadian Red Cross Society,* 2013 ONSC 7788; Joint Brief of Authorities, Vol. 5, Tab 89.

[70] *Ibid* at para 91, adopted in *Endean v The Canadian Red Cross*, 2014 BCSC 621 at para 12; Joint Brief of Authorities, Vol. 2, Tab 31 and in *Honhon c. Canada*, 2014 QCCS 2032 at para 16; Joint Brief of Authorities, Vol. 3, Tab 67.

[71] *Fontaine v. Canada (Attorney General)* 2015 ONSC 3611, at para. 89; Joint Brief of Authorities, Vol. 3, Tab 52.

step outside the boundaries of the IRSSA. The IRSSA, Schedule "D", and Schedule "N", which incorporate by reference applicable laws, including the *Privacy Act*, the *Access to Information Act*, and the *Library and Archives Canada Act*, provide the complete set of obligations facing Canada in its handling of the IAP Records.

PROPOSED NOTICE PLAN

77. Nothing in the IRSSA requires Canada to disclose personal information contained in its IAP records to any other body.

78. Canada's disclosure obligations under the IRSSA relate exclusively to the historical and archival information within its control, including for use in the adjudication of IAP claims pursuant to Schedule "D", and for use by the TRC in pursuit of its mandate under Schedule "N".

79. Thus, Canada must disclose to the TRC certain records relating to the IRS system, in accordance with Schedule "N":

> Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.[72]

80. Where Canada's records contain personal information, Canada's general disclosure obligations to the TRC are limited.[73] As noted by Justice Goudge:

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[72] Russell Affidavit at Exhibit "L" at s 11 (at p.10); Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.
[73] *Fontaine v Canada (Attorney General)*, 2013 ONSC 684 at paras 79-80; Joint Brief of Authorities, Vol. 2, Tab 41.

> However, there are several provisions in the Settlement Agreement that would appear to be relevant to fixing the extent of this obligation. A second example is section 2(h). Its prohibition on the TRC making use of personal information may also affect the extent of Canada's obligation.

81. Schedule "N" deals with the IAP records separately, stipulating that Canada "may" disclose to the TRC information relating to the IAP, subject to the condition precedent of having obtained consent from all "individuals affected." There is no requirement that Canada exercise this discretion, or seek to fulfill the conditions precedent subject to which it may exercise its discretion.

82. To the contrary, the TRC's mandate does not include Canada's response to IRS-related claims, thereby limiting the need for disclosure of the IAP records. In *Fontaine v Canada*, Goudge J held:

> In short, in my view, the legacy mandate of the TRC does not extend to Canada's responses to the IRS experience or an evaluation of their adequacy. Thus, Canada's obligation to provide documents to the TRC relevant to its legacy mandate does not extend this far either.[74]

83. Before Justice Perell, Canada took the position that it would be prepared to implement a simple notice plan to permit claimants and others to consent to their documents being transferred to the TRC and/or the NCTR.

84. Canada was prepared to do this because voluntariness emerges as a key theme reiterated throughout the IRSSA. The necessity of consent for the disclosure of claimants' personal information is also manifest in various provisions. It is clear that a claimant may consent to the disclosure or external use of his or her own personal information as contained

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[74] *Fontaine v Canada (Attorney General)*, 2013 ONSC 684 at para 99; Joint Brief of Authorities, Vol. 2, Tab 41.

within IAP records, and this concept is referred to in Schedule "D", Schedule "N", documents submitted in the IAP, the *Privacy Act*, and the *Access to Information Act.*[75]

85. Furthermore, the Supreme Court of Canada has held:

> As a rule, personal information may never be disclosed to third parties except with the consent of the individual to whom it relates (s 8(1)) and subject to the exceptions set out in the *Privacy Act* (s 8(2)).[76]

86. As such, Canada's exclusive authority to determine the retention and disposition of IAP records in accordance with the legislative framework may be informed by an IAP claimant's consent for the disclosure of such information. For example, claimants' consent is required for Canada to deposit an IAP hearing transcript into an archive developed for the purpose of containing such transcripts, and for other parties to be entitled not to destroy IAP application forms in their possession at the conclusion of an IAP claim. Similarly, under Schedule "N", the TRC is granted the ability to interview and gather statements from willing participants, including IAP claimants. The TRC does not have the authority to compel any particular individual to provide personal information of any kind.

87. Therefore, any IAP records that are disclosed to the TRC must arrive there only with the specific consent of affected individuals. Under Schedule "N", Canada's discretion to transfer information from the IAP to the TRC requires agreement from "individuals affected" by the IAP.

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[75] *ATIA*, s 19(2)(a); Schedule "B"; *H.J. Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at para 53; Joint Brief of Authorities, Vol. 3, Tab 66.
[76] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 27; Joint Brief of Authorities, Vol. 4, Tab 76.

88. Evidence showed the prospect of an IAP claimant consenting to the disclosure of their personal information to the TRC was not merely speculative. A sample of former clients of Merchant Law Group highlighted that there was a rate of positive responses amongst IAP claimants to the prospect of disclosing their personal information contained within IAP records to the TRC, even though there was a high rate of non-response, and the bulk of given responses were negative.[77]

89. For these reasons, Canada indicated before Justice Perell that it would be prepared to undertake a voluntary and a simple notice plan to notify former IAP claimants of their potential options, should they wish to consent.

90. Justice Perell's order that an extensive and long-term notice plan be created, implemented by the CA and paid for by Canada, constituted a material and unnecessary amendment to the IRSSA.

REDACTION OF THE PERSONAL INFORMATION OF ALLEGED PERPETRATORS

91. The issue of the personal information of alleged perpetrators, and potentially other individuals, must also be considered.[78] Canada has continued to take the position that the appropriate way to address concerns about the disclosure of personal information of alleged perpetrators and others is to redact such information from any IAP records that might ultimately need to be transferred to the TRC as a result of a notice plan.

92. The IAP frequently engages personal information about alleged perpetrators, and the

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[77] Gordon Affidavit, at paras 2 – 5; Joint Compendium of Documents, Vol. 6, Tab 50 pp. 2119-2192.
[78] Russell Affidavit, paras. 37-38; Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.

IAP records contain that information. Furthermore, under section 8 of the *Privacy Act*, an individual may only consent to the disclosure of their own personal information, and not of others' personal information. Because of the subject matter of the IAP, it is impractical to suggest that consent from many alleged perpetrators for the disclosure of their personal information contained within IAP records would be forthcoming. The redaction of personal information is consistent with the approach currently taken where an IAP claimant requests a copy of their decision.[79]

93. The parties to the IRSSA did not agree to institute any mechanism by which alleged perpetrators or other affected parties could consent to the release of information about themselves. The IRSSA specifically limited the ability of alleged perpetrators to retain or use the documents that are made available to them in the IAP.[80]

THE IMPLIED UNDERTAKING

94. Justice Perell's application of the implied undertaking rule as a basis for finding that he had jurisdiction to decide on the management scheme that should apply to IAP documents is entirely misplaced. The implied undertaking is a court-made rule that was intended to ensure privacy over documents produced in the context of litigation until such time as the documents are produced in open court. It is a rule that not only protects privacy, it promotes settlement.

95. There is no need or application for such a court-made rule in the context of the IRSSA, because it is a comprehensive settlement agreement in which the parties have already agreed

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[79] Russell Affidavit, at Exhibit "A" at III (o)(i) (at 15); Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.
[80] Russell Affidavit, para. 45; Joint Compendium of Documents, Vol. 6, Tab 53 pp. 2294-2339.

on how to deal with the privacy concerns and document management of the IAP records. At article 18.06 of the IRSSA, it is specifically noted that there are no implied terms:

> 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.[81]

THE COURT'S IN REM JURISDICTION

96. Justice Perell similarly erred when he found that the court could order the destruction of the documents because the parties had agreed on destruction and the court can enforce *in rem* the parties' bargain. With respect, such a finding is incorrect and inconsistent with the understanding and intention of the parties reflected in the IRSSA and inconsistent with federal legislation. It thereby constitutes reversible error.

BREACH OF CONFIDENCE

97. Finally, Justice Perell also erred when he concluded that the court could order the destruction of the documents because "the IAP Documents are subject to the law governing a breach of confidence and in the circumstances of the IAP Documents, the appropriate remedy to prevent a breach of confidence is to destroy the documents."[82]

98. Justice Perell's finding on this point is based primarily on his interpretation of Appendix B of the Guide titled "Protection of Your Personal Information." This is where the Claimant is advised of the legislative mechanisms of the *Privacy Act* and the *Access to Information Act*, as

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[81] IRSSA, Article 18.06; Joint Compendium of Documents, Vol. 1, Tab 23 pp. 236-331; Reasons for Decision of Mr. Justice Perell, para. 81; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.
[82] Reasons for Decision of Mr. Justice Perell, para. 292; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.

well as the organizational protocols that enable the Government of Canada to protect the sensitive and personal information revealed by the claimant. In particular, the Claimant is advised of Canada's use of the "Protected B" security level.

99. Despite finding that the parties and participants to the IRSSA had contracted out of absolute confidentiality, he nonetheless found the promises of privacy and confidentiality were such that after a necessary retention period of 15-years "confidentiality would become absolute and the IAP Documents would be destroyed."[83] It was on this basis that Justice Perell held the August 7, 2012 Agreement for the Transfer of Archival Records between AANDC and LAC to be a breach of confidence.[84]

100. In Appendix B of the Guide, the promises of privacy and confidentiality were explicitly made with reference to Canada's legislative regime:

> We will deal with personal information about you and other people you identify in your claim privately and confidentially. We will do so in accordance with the *Access to Information Act*, the *Privacy Act*, and any other applicable law, or we will ask your permission to share information.[85]

101. Based on the above, there is no basis in fact or in law for Justice Perell's finding that AANDC's Agreement for the Transfer of Archival Records with LAC was a breach of confidence. To the contrary, the Agreement provides an excellent example of AANDC doing what the Government of Canada promised to do in the IRSSA, which was to manage the

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[83] Reasons for Decision of Mr. Justice Perell, para. 326; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.
[84] Reasons for Decision of Mr. Justice Perell, para. 360; Joint Compendium of Documents, Vol. 1, Tab 4 pp. 26-92.
[85] Russell Affidavit, Exhibit "D" - Appendix B, The Guide, page 28; Joint Compendium of Documents, Vol. 1, Tab 26 pp. 393-436.

privacy concerns of claimants and perpetrators rigorously and respectfully. Justice Perell's interpretation of the IRSSA to the contrary was incorrect and should be overturned.

SUMMARY

102. Canada submits that Justice Perell in his Order has made material amendments to the IRSSA which were beyond his jurisdiction and beyond the supervisory role of the Courts.

103. At paragraph 95 of his reasons for decision in another IRSSA RFD, Justice Perell's own observation about this settlement bears repeating (in the context of allaying that applicant's fears regarding achievement of truth and justice):

> This concern, however, is not made out if one gives the parties that negotiated the IRSSA, whose company include competent, brave and resilient representatives of the survivors, credit for designing a system that generally speaking, facilitates and assists legitimate claimants in making claims before unbiased and competent independent adjudicators and if one recalls that the IRSSA is a settlement and settlements are inherently less than perfect justice.
>
> It is the Court's responsibility to hold the parties to their negotiated bargain, no more, no less.[86]

104. The IRSSA and the federal legislation work together to achieve the necessary balance of protecting privacy and confidentiality and memorialization of the legacy of Indian Residential schools, as contracted for by the parties.

PART V- RELIEF REQUESTED

105. Canada respectfully requests this Honourable Court set aside Mr. Justice Perell's Order and substitute an Order that the IAP documents are government records, under the control of

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[86] *Fontaine v. Canada (Attorney General)* 2015 ONSC 3611, paras. 95 and 96; Joint Brief of Authorities, Vol. 3, Tab 52.

the government institution of AANDC and subject to the applicable federal legislation of the *Privacy Act*, the *Access to Information Act* and the *Library and Archives Canada Act*, as contracted for by the parties to the IRSSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 15th day of ~~July~~ October, 2015.

Per: S. Warwick
for Gary Penner, General Counsel

Diane Fernandes, Counsel

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Schedule "A"
List of Authorities

Bodnar v *The Cash Store Inc*, 2011 BCCA 384

Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services) 2003 FCT 254 (F.C.T.D.), aff'd 2004 FCA 214 (F.C.A.)

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration) [2003] I F.C. 219 (C.A.)

Canada (Information Commissioner) v. Canada (Minister of National Defence) 2011 SCC 25

Canadian Broadcasting Corp. v. National Capital Commission (1998), 147 F.T.R. 264 (F.C.T.D.)

Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission) 2007 FCA 272

Eli Lilly & Co v *Novopharm Ltd*, [1998] 2 SCR 129

Endean v The Canadian Red Cross, 2014 BCSC 621

Fontaine v Canada (Attorney General) 2012 BCSC 839

Fontaine v Canada (Attorney General), 2013 ONSC 684

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

Fontaine v. Canada (Attorney General) 2015 ONSC 3611

Gilchrist v Western Star Trucks Inc, 2000 BCCA 70

Gottfriedson et al v. Her Majesty the Queen in right of Canada 2015 FC 706

Gray v Great-West Lifeco Inc, 2011 MBQB 13

Guarantee Co of North America v Gordon Capital Corp (1999), 178 DLR (4th) 1

H.J. Heinz Co of Canada Ltd v Canada (Attorney General), 2006 SCC 13

Honhon c. Canada, 2014 QCCS 2032

Lavier v MyTravel Canada Holidays Inc, 2011 ONSC 3149

Lavigne v Canada (Office of the Commissioner of Official Languages), 2002 SCC 53

Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd, [1971] MJ No 38 (CA)

Paddon-Hughes Development Co. v. Pancontinental Oil Ltd., 1998 ABCA 333

Parsons v The Canadian Red Cross Society, 2013 ONSC 7788.

Sattva Capital Corp. v. Creston Moly Corp., [2014] 2 S.C.R. 633

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), 2010 SCC 4

United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd, [1993] 2 SCR 316

Additional Sources

Access to Information Act, R.S.C., 1985, c.A-1

Library and Archives Canada Act S.C. 2004, c.11

Privacy Act R.S.C. 1985, c.P-21

Indian Residential Schools Settlement Agreement ("IRSSA")

Schedule "D" - Independent Assessment Process

Schedule "N" - Mandate for Truth and Reconciliation Commission

Schedule "B"
Statutes and Regulations

Access to Information Act, R.S.C., 1985, c.A-1, s.2(1)

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Privacy Act, R.S.C. 1985, c.P-21, s.2

2. The purpose of this Act is to extend the present laws of Canada that protect privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

Class Proceedings Act, 1992, SO 1992, c.6, s.29

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

IRSSA at Article 18.06

18.06 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.

Privacy Act, R.S.C. 1985, c.P-21, s.8(1)

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.

Access to Information Act, R.S.C., 1985, c.A-1, s.19(2)(a)

19. (2)(a) The head of a government institution may disclose any record requested under this Act that contains personal information if (a) the individual to whom it relates consents to the disclosure;.

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LARRY PHILIP FONTAINE et al.

Plaintiffs
(Respondents in Appeal)

-and-

THE ATTORNEY GENERAL OF CANADA et al.

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

CERTIFICATE

I, Gary Penner, lawyer for the Cross-Appellant/Respondent Attorney General of Canada certify that:

1. An order under subrule 61.09(2) is not required.
2. An estimate that ~~2.0 hours~~ 50 minutes will be required for the Cross-Appellant/Respondent's oral argument, ~~not~~ including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

~~Thursday July 16, 2015~~
October 15, 2015

S. Warnica

for Gary Penner
Department of Justice
Counsel for the
Cross-Appellant/Respondent
Attorney General of Canada

Appeal File Nos.: 59310, 59311, 59320

LARRY PHILIP FONTAINE ET AL. AND THE ATTORNEY GENERAL OF CANADA ET AL.

Plaintiffs (Respondents in Appeal)

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

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

UPDATED FACTUM WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE CROSS-APPELLANT/RESPONDENT ATTORNEY GENERAL OF CANADA DATED ~~JULY 15, 2015~~ OCTOBER 15, 2015

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