

Court File No. C-59310
Court File No. C-59311
Court File No. C-59320

Courts of Justice Act

**UPDATED RESPONDING FACTUM WITH REFERENCE TO THE JOINT
COMPENDIUM OF DOCUMENTS AND BOOK OF AUTHORITIES OF THE
APPELLANT/RESPONDENT TO THE CROSS-APPEALS, THE SISTERS OF ST.
JOSEPH OF SAULT STE. MARIE**

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs/
Respondents

and

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

DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. - LES SŒURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF

PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES 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 MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC., MT. ANGEL ABBEY INC., ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, SISTERS OF CHARITY HALIFAX and THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE

Defendants/

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

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

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APPELLANT/RESPONDENT TO THE CROSS-APPEALS, THE SISTERS OF ST.
JOSEPH OF SAULT STE. MARIE**

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October 13, 2015

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PART I – OVERVIEW

1. The Appellant/Respondent by cross-appeal, the Sisters of St. Joseph of Sault Ste. Marie (the “SSJSSM”), appealed from the Order of the Honorable Justice Perell, dated August 6, 2014 in the Ontario Superior Court of Justice File No. 00-CV-192059.

2. Cross-appeals were thereafter brought.

3. The SSJSSM responds to some of the arguments raised by the Cross-Appellants. More particularly, the SSJSSM’s position is that:

- a. The IAP and the TRC process are separate processes and The Indian Residential Schools Settlement Agreement (the “Settlement Agreement”) must be interpreted from that perspective.

The former relates to the formal confidential and inquisitorial process put in place to adjudicate claims. The latter was put in place to allow Claimants to tell their story.

The SSJSSM do not wish that Claimants be prevented to tell their stories, as they are fully entitled to do, as is set out in Schedule N of the Settlement Agreement.

- b. The issue of the Claimants’ rights to receive certain records generated for use in the IAP is different from the issue of whether these records can thereafter be archived solely with the Claimants’ consent.

The SSJSSM do not propose that Claimants not receive records generated for use in the IAP which Claimants are entitled to receive pursuant to the Settlement Agreement.

4. The SSJSSM are however opposed that the records generated for use in the IAP be archived solely with the Claimants' consent, with the exception of the Claimant's own redacted transcript, if they so chose. The wording of the Settlement Agreement specifically contemplates that, with the exception of the Claimant's own redacted transcript, the archival of records generated for use in the IAP can only occur with the consent of all individuals affected.

5. In cases where allegations were made by a Claimant against the SSJSSM or one of its members, the SSJSSM and its members are individuals affected.

PART II – THE FACTS

6. The facts are as set out in the SSJSSM's factum on its appeal. As such, the SSJSSM are not repeating same herein, except where these relate to the arguments advanced herein.

(i) Schedule N

7. Schedule N of the Settlement Agreement is entitled "Mandate for the Truth and Reconciliation Commission". It is divided in 12 sections.

8. Although several sections address the gathering of statements and documents, subsection 10(c) specifically contemplates the gathering of individual

statements from Claimants who wish to have their stories memorialized. That subsection states as follows:

C. Individual Statement-Taking/Truth Sharing

The Commission shall coordinate the collection of individual statements by written, electronic or other appropriate means. Notwithstanding the five year mandate, anyone affected by the IRS legacy will be permitted to file a personal statement in the research centre with no time limitation.

The Commission shall provide a safe, supportive and sensitive environment for individual statement-taking/truth sharing.

The commission shall not use or permit access to an individual's statement made in any Commission processes, except with the express consent of the individual.

9. Subsection 10(c) gives Claimants the opportunity to give his/her statement should the Claimant wish to do so.

10. The next section to Schedule N, section 11, then addresses the "Access to Relevant Information" from Canada and the churches. Section 11 contemplates as follows:

11. Access to Relevant Information

In order to ensure the efficacy of the truth and reconciliation process, 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 the privacy interests of an individual as provided by applicable privacy legislation, and 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.

In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

Canada and the churches are not required to give up possession of their original documents to the Commission. They are not required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

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

11. The first 3 paragraphs of section 11 address the production in general by Canada and the Churches of records in their possession and control (subject to privacy interests) at the time that the Settlement Agreement was in place. The fourth paragraph of section 11 addresses specifically the production of information arising from the IAP process.

12. Section 11 is the only section in Schedule N which specifically addresses the archiving of records generated for use in the IAP. There is no ambiguity in the fourth paragraph of section 11. Information from the IAP may be transferred to the Truth and Reconciliation Commission insofar as agreed to by the individuals affected.

(ii) Schedule D

13. The Settlement Agreement contemplated the creation and administration of the IAP, an adjudicative process whereby Claimants could seek compensation for alleged abuse and harms suffered while at IRS.

14. It is created through Article Six and Schedule D of the Settlement Agreement.

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

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

15. Schedule D contains various sections dealing with how certain documents are to be handled, are to be kept confidential and are to be provided to Claimants. These include but are not limited to:

a. The Application Form : I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, except what I say myself.

b. K. Decision

(i) : The adjudicator will produce a decision in a stand format outlining key factual findings and providing a rationale for finding or not finding compensability within the IAP and for the compensation accessed, if any.

c. o. Privacy

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

(ii) Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for those purposes, as well as if a Claimant requests a copy of their own evidence for

memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

d. Appendix II : Acceptance of Application :

(i) The Secretariat will admit claims to the IAP as of right where the application is complete and sets out allegations which if proven would constitute one or more continuing claims, and where the Claimant has signed the Declaration set out in the application form, including the confidentiality provisions of the Declaration.

(iv) The following conditions apply to the provision of the application to the Government or a church entity:

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

(iii) *The Order of Justice Perell*

16. The Order under appeal allows that IAP Redacted Documents be achieved with the consent of a Claimant. IAP Redacted Documents are described in the Order as follows:

IAP Redacted Documents means IAP Retained Documents from which Personal Information about any alleged perpetrator or other affected individual in respect of an IAP Claim can reasonably be redacted and has been redacted.

IAP Retained Documents means applications for compensation, hearing transcripts and audio recordings of the Claimant's evidence, and adjudicators' compensation decisions in respect of an IAP Claim.

PART IV – ISSUES AND LEGAL ARGUMENTS

A. What does the Settlement Agreement allow regarding records specifically generated for use in the IAP process?

17. All sections and Schedules to the Settlement Agreement are consistent that none of the confidentiality provisions applicable to the IAP will interfere with a Claimant's right to tell his/her story.

18. Further, Schedule D to the Settlement Agreement specifically contemplates that Claimants are entitled to receive certain records generated for use in the IAP process.

19. The issue is therefore not whether or not a Claimant can obtain certain records generated for use in the IAP process or tell his/her story, including through the process set out in Schedule N. The issue is: Whether the Settlement Agreement allows a Claimant to use those records generated for use in the IAP process to tell his/her story, including by consenting that they be archived?

20. When one reads the various sections of Schedule D (including those above), one cannot argue that confidentiality does not apply generally to all records specifically generated for use in the IAP.

21. This is consistent with the motion judge's finding that confidentiality was paramount to the parties to the Settlement Agreement.

Decision of Perell J. dated August 6, 2014, Joint Compendium of Documents, Volume 1, Tab 4, Pages 49-50, 64, 78 and 79 at para 138-142, 145, 212-214, 315, 316, 317 and 322, respectively

22. As such and given that the subject records were generated for use in the IAP, it is submitted that one must commence with the premise that the parties intended that all records specifically generated for use in the IAP are to be kept strictly confidential.

23. Then one turns to whether exceptions were contemplated in the Settlement Agreement which would allow the archiving of which records specifically generated for use in the IAP and with who's consent(s).

24. The Settlement Agreement, including its Schedules, provides for specific exceptions. These exceptions are:

- a. that a certain party to the Settlement Agreement may receive an IPA record for his/her ; and/or
- b. that certain IAP records may be archived only with the consent of Claimants.

25. Exception 24(a) above applies to the redacted hearing transcripts and the redacted decision. Exception 24(b) above applies only to redacted transcripts. The parties to the Settlement Agreement specifically put their minds to those exceptions and decided not to allow other ones unless all individuals affected consented.

(i) The hearing transcripts and audio recording

26. Schedule D, section III, (o)(i) explicitly states that the hearings are confidential. Parties, alleged perpetrators and other witnesses must sign agreements to keep information disclosed at a hearing confidential.

Settlement Agreement, Schedule D, section III, Joint Compendium of Documents, Volume 1, Tab 24, Pages 346 at para (o)(i)

27. The same section contemplates that parties, perpetrators and other witnesses' own evidence is not captured by this confidentiality obligation. In other words, the purposes of the confidentiality provisions found in Schedule D are not meant to "muzzle" anyone from telling their own story.

28. In order to assist adjudicators to facilitate report writing and for review purposes, Schedule D, section III, (o)(ii), contemplates that all hearings are to be recorded. The subject section specifically states that hearings are recorded and transcribed for these specific purposes.

29. It logically follows that if the hearings are confidential, then so are the transcripts of said hearings, including its audio recordings.

30. The only specific exception in the Settlement Agreement which allows a Claimant to request and obtain for archival purposes a record generated for use in an IAP is the redacted transcript of his/her own evidence.

31. This exception respect the spirit and the letter of the agreement because:

- a. As set out in Schedule D, section III, (o) the intent is not to prevent a Claimant from telling her story; and
- b. As set out in Schedule N, subsection 10(C), a Claimant has the opportunity to tell his/her story to the TRC.

32. As submitted at paragraph 53(b) of its factum, the SSJSSM have no objections to the archiving of redacted transcripts, as is specifically contemplated (as an exception), in Schedule D to the Settlement Agreement, if a Claimant so chooses.

33. The Settlement Agreement does not however set out a similar exception for audio recordings or any other record specifically generated for use in the IAP process.

(ii) The adjudicators' compensation decisions

34. The IAP process was as result of negotiations whereby parties gave away substantial procedural rights. The IAP process is a claimant-centered process both in its definition and in its application. Section III, e. entitled "Procedure – General" sets out this process.

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

Settlement Agreement, Schedule D, section III, Joint Compendium of Documents, Volume 1, Tab 24, Pages 340-341 at para e

Settlement Agreement, Schedule D, Appendix XII, Joint Compendium of Documents, Tab 24, Pages 376-377

35. Section III, e.(i) sets out that a decision rendered by an adjudicator must outline key factual findings and provide rational for finding or not finding compensability.

Settlement Agreement, Schedule D, section III, Joint Compendium of Documents, Volume 1, Tab 24, Pages 340-341 at para e

36. By rendering formal decisions containing findings, the claimant-centered process is and the conclusions reached therein are given or would be given more credibility should they latter be made accessible to the public.

37. Schedule D, section III, (o)(i) provides that Claimants will receive a copy of the decision (redacted) and that they are free to discuss the outcome of their hearing.

38. This section does not allow Claimants to distribute, disseminate or archive said decisions itself. To the opposite, that same section speaks of confidentiality.

39. It is submitted that, like for transcripts, the purposes of the confidentiality provisions found in Schedule D are not meant to "muzzle" anyone to discuss the findings made at their hearing. Rather, a balance was struck between a Claimants' rights to have a copy of the decision rendered in his complaint and to discuss the outcome of his hearing versus the recognition that the decisions be

confidential in order to take into account that the decision arises from a claimant-centered process.

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

40. A distinction was made in the Settlement Agreement and should be recognized between: (i) the right to use and archive records generated for use in the IAP; and (ii) the right of Claimants to, on their own, tell their story should they wish to do so outside of the IAP. The records generated for use in the IAP are not required by Claimants to tell their story.


41. All records generated for use in the IAP process, with the exception of a Claimant's own redacted transcript, are captured by the specific wording of Schedule N which requires the consent of all individuals affected.

PART V – ORDER SOUGHT

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th 13th day of August October, 2015.



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

SCHEDULE "A"

N/A

SCHEDULE "B"

N/A

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BETWEEN:

LARRY PHILIP FONTAINE in his
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Mary Fontaine, deceased et al.

Plaintiffs/Respondents

- and -

THE ATTORNEY GENERAL OF
CANADA, et al.

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

**Updated Responding Factum with
Reference to the Joint Compendium
of Documents and Book of
Authorities of the
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