Court of Appeal No. C-59310
C-59311
C-59320

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-

[style of cause continued on next page]

UPDATED FACTUM OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA

WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND JOINT BRIEF OF AUTHORITIES

Date: ~~July 17~~ October 15, 2015

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

- and –

PRIVACY COMMISSIONER OF CANADA

Intervener

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

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The Registrar of this Honourable Court

Contents

I. OVERVIEW

> *I have tried to keep memory alive... I have tried to fight those who would forget. Because if we forget, we are guilty, we are accomplices.*[1]
>
> *Rather than denying or diminishing the harm done, we must agree that this damage requires serious, immediate and ongoing repair. We must endeavour instead to become a society that champions human rights, truth and tolerance, not by avoiding a dark history but rather by confronting it.*[2]

1. This appeal regards the fate of documents created pursuant to the Independent Assessment Process (IAP). The issue before this court is whether the documents that describe the very worst of the Indian Residential School abuse, more than 37,000 survivor stories, ought to be preserved or destroyed.

2. Justice Perell ordered the destruction of the IAP documents, some immediately after the completion of the relevant IAP claim, and the rest after the elapse of a 15 year retention period. During the retention period, a survivor would be given the option to "spare some of their documents from destruction and instead have the documents with redactions to protect the personal information of others transferred to the National Centre for Truth and Reconciliation (NCTR)".[3]

3. With respect, the destruction Order was based on a perceived threat of involuntary public disclosure and a misapprehension of the goals and the terms of the Indian Residential Schools Settlement Agreement (Settlement Agreement). Justice Perell held:

> Destroying the IAP Documents is more likely to foster reconciliation, one of the goals of the IRSSA, but more to the point, destruction of the IAP Documents is what the parties

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[1] Elie Wiesel, Nobel Peace Prize Acceptance Speech, (10 December 1986) online: <http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-acceptance_en.html>.
[2] Justice Murray Sinclair, Chair of the Truth and Reconciliation Commission, in Gloria Gallaway and Bill Curry "Landmark Report Urges Education on Cultural Genocide of Aboriginals" *The Globe and Mail* (2 June 2015) online: Globe and Mail <http://www.theglobeandmail.com>.
[3] *Fontaine v Canada (Attorney General)*, 2014 ONSC 4585 at ¶ 2 [Reasons for Decision]. Joint Book of Authorities. Tab 47

contracted for under the IRSSA, and destruction of the IAP Documents is what the common law and equity requires.[4]

4. The goals of the Settlement Agreement, as set out in the preamble, are "the promotion of healing, education, truth and reconciliation and commemoration".[5] Taken together, the aim of the Settlement Agreement was knowledge. To learn what happened in the Indian Residential School system and why, and to make this information known to all Canadians. To use this information to begin the process of healing its legacy, and to preserve this history for future generations. It was born of a desire for a national reckoning with the profound consequences of the IRS system on the former students, and on all Indigenous families and communities. And it is only by continuing to share this history that Canadians can ensure that the burden of the IRS story will no longer be carried by the former students alone.

5. Reconciliation requires knowledge. Destruction of the IAP documents, and the narratives about what happened at the Indian Residential Schools is antithetical, and not supportive of, to the aim of reconciliation.

6. Further, the submission that assurances of confidentiality with regard to IAP documents were a vital inducement to the Catholic churches' acceptance of the Settlement Agreement, and in fact "what the parties contracted for under the IRSSA", is contradicted by the fact that the Settlement Agreement developed a parallel process whereby the very information shared in the course of making an IAP claim could be made publicly accessible in the NCTR. Survivors did not offer assurances of confidentiality, but rather, demanded that truth sharing be a process supported by all parties so that healing, education and ultimately reconciliation could occur.

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[4] *Ibid* at ¶ ~~6.~~ 19 p.6

[5] Indian Residential Schools Settlement Agreement at p. 6 [Settlement Agreement]. Joint Compendium of Documents, Tab 23 p.241

7. The Settlement Agreement contains no term for destruction and one cannot be implied in this case. Rather, it is explicitly contemplated that these documents are government records, under the control and possession of Canada, and that federal legislation applies. This legislation will operate to preserve those documents of historical value.

8. This appeal is about exposing false dichotomies. Destruction is not the only means of protecting confidentiality. Preservation does not have to result in public disclosure. It was explicitly contemplated in the Settlement Agreement that the survivors would be provided respectful support and the opportunity to choose between public release or personal privacy. The survivors did not bargain away control over their personal information and by extension, their documents. They have the right to keep copies, release copies, make statements to the Truth and Reconciliation Commission (Commission), in essence, to tell their story to any person in any format. It is their story to tell, and ours to preserve and remember.

II. STATEMENT OF FACTS

A. Indian Residential Schools

9. Between the 1860s and 1990s more than 150,000 First Nations, Inuit and Métis children were required to attend Indian Residential Schools, institutions largely operated by religious organizations under the funding of the federal government.

10. Numerous allegations of sexual and physical abuse led to thousands of former students taking legal action in the mid-1990s. The former students sought compensation for injuries and for loss of language and culture. Several large class action suits were brought forward in the hopes

of seeking redress for the former students and judicial recognition for the harms they suffered. These class actions culminated in the historic Settlement Agreement on May 8, 2006.

B. The Settlement Agreement

11. The Settlement Agreement was intended to be a fair and lasting resolution to the legacy of the Indian Residential School system. It contains five key components:

i) the Common Experience Payment (CEP): subject to verification, each eligible former student who applied received $10,000 for the first school year or portion thereof and $3,000 for each subsequent year;

ii) the Independent Assessment Process (IAP): a process by which to assist former students to settle individual claims of abuse for compensation in addition to that provided by the CEP;

iii) funding for Commemoration: the Settlement Agreement provides for $20 million in funding to facilitate commemoration initiatives that address the legacy of Indian Residential Schools;

iv) funding for Healing: the Settlement Agreement provides for $125 million in funding to the Aboriginal Healing Foundation, in addition to a further $100 million in cash and services from the Church entities involved; and

v) the Truth and Reconciliation Commission.

12. There are thus two means of providing financial compensation to individual residential school survivors with distinct purposes. The CEP fund provides a fixed amount to all residential school survivors. The supplemental compensation from the IAP is reserved for those who have suffered the most egregious harms, including: "sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual."[6]

[6] IAP Guide, at p. 2. Joint Compendium of Documents, Tab 26, p.395

C. The Independent Assessment Process

13. The IAP is a distinct, non-adversarial, out of court process that provides financial compensation to individuals who can establish specific abuses at residential schools above and beyond those covered by the CEP.

14. As provided in Schedule D of the Settlement Agreement, the IAP "uses a uniform inquisitorial process for all claims to assess credibility, to determine which allegations are proven and result in compensation, to set compensation according to the Compensation Rules, and to determine actual income loss claims".[7]

15. In the Settlement Agreement at Schedule D, Appendix I, there is an application form which is used to begin the process of making an IAP claim. The application thus formed part of the agreement between the parties, and was approved by the courts. This application form notes on the second page that it is to be accompanied by an IAP Guide, intended to assist counsel and claimants in completing the Application form. Both of these documents were completed by the IAP working group in the spring and early summer of 2006, during the completion of the Settlement Agreement, and prior to its implementation on September 19, 2007.[8] The IAP working group, responsible for the drafting of the application form and the IAP Guide, consisted of representatives from the parties, including Doug Ewart, Kathleen Mahoney, Leonard Marchand, David Patterson, Alexander Pettingill, Michael Troy and James Ward.[9]

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[7] Schedule D, section (e)(i), Settlement Agreement. Joint Compendium of Documents, Tab 24, p.340
[8] Correspondence dated July 21, 2006, from Doug Ewart, member of the IAP working group, attaching the draft IAP Application Guide, intended as a final draft.
[9] Schedule U, Settlement Agreement.

16. The application is made to the Indian Residential Schools Adjudication Secretariat (Secretariat). The Secretariat provides administrative support to the work of the IAP Chief Adjudicator. The Secretariat receives claims; assesses claims for eligibility; works with claimants/lawyers to prepare claims for hearing; and provides all other necessary administrative support to the IAP.[10] The Secretariat is autonomous of Canada, but also a branch of Canada, within Aboriginal Affairs and Northern Development Canada (AANDC).[11]

17. The deadline to submit an IAP application was September 19, 2012. The Secretariat received 37,716 applications and had held 16,700 hearings as of March 31, 2013.[12]

D. The IAP Documents and their Historical Value

18. Documents in the possession of the Secretariat fall into seven categories: (1) applications submitted by the Claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert and medical reports; and (7) decisions of the adjudicators and any appeals.[13]

19. In order to initiate a hearing before an IAP adjudicator, a claimant must submit an application form to the Secretariat. Once the completed application form has been accepted by the IAP, claimants are required to produce the following documentary evidence to the Secretariat: (i) treatment records relevant to the harms claimed (including clinical, hospital, medical or other treatment records); (ii) workers' compensation records; (iii) corrections records (insofar as they

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[10] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 16. Joint Compendium of Documents, Tab 32, p.488
[11] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 18. Joint Compendium of Documents, Tab 32, p.489
[12] Affidavit of Tom McMahon sworn November 12, 2013 at ¶ 69. Joint Compendium of Documents, Tab 33, p.542
[13] Reasons for Decision at ¶ 205. Joint Book of Authorities, Tab 47 p. 38

relate to injuries or harms); (iv) income tax records; (v) secondary and post-secondary school records; and (vi) treatment plans for future care. These documents are referred to as "claimant mandatory documents" or "mandatory documents".[14]

20. At the hearing before Justice Perell, a dispute arose with regard to the historical value of the IAP documents. Library and Archives Canada (LAC), the institution tasked with serving as the memory of the government of Canada, performed a preliminary assessment and found some of the documents to be of enduring historical value (including IAP material relating to strategy, policy, and adjudication, the overall management of the IAP and ADR processes, recordings and transcripts of the IAP hearings, and copies of each decision for the IAP and ADR). In spite of this, certain church parties continued to submit that the IAP documents had no historical value. Specifically, the 24 (now 22) Catholic Entities, and the Sisters of Saint Joseph of Saulte Ste Marie (SSJSSM) both made submissions with regard to the reliability of the documents, submitting that false or misleading allegations were made by survivors in order to receive any or increased payments.

21. The debate over the historical value of the IAP documents is difficult to reconcile with the fact that all other documents relevant to the Indian Residential School system are of mutually recognized value. All survivor statements given to the Commission are considered to have important historical value, despite the fact that they too could be believed to be 'one sided' allegations, with issues of reliability, completeness, bias, and accuracy. All relevant documents in the possession or control of the defendants were considered to have important historical value, despite the fact that these documents suffer issues of reliability, completeness, bias, and accuracy.

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[14] Reasons for Decision at ¶ 175. Joint Book of Authorities, Tab 47 p. 31

22. IAP documents do not lose historical value by virtue of being created in the course of an IAP claim. Source criticism can be leveled against any of the documents, whether survivor or defendant created, but this beside the point. Any record of relevance has value to our understanding of the Indian Residential School system and its legacy.

23. Finally, existence of the Commission does not render the IAP documents superfluous or valueless. Truth telling was to be achieved through the Commission, but not solely through this process. Rather, a survivor was to be provided the opportunity to preserve his or her narrative with either public access or personal privacy either by a direct statement to the Commission or by having his or her IAP transcript deposited into an archive. Once with the Commission, these narratives would not automatically become part of the public record, but rather, assurances of confidentiality and privacy remained. According to section 10(c) of Schedule N of the Settlement Agreement, regarding the Commission's mandate on Individual Statement-Taking / Truth Sharing, "[t]he Commission shall not use or permit access to an individual's statement made in any Commission process, except with the express consent of the individual."[15]

E. Canada's Possession of the Records

24. Canada has possession of the IAP documents in both its capacity as defendant (i.e. continuing litigant) in the IAP, and as administrator of the IAP aspect of the Settlement Agreement through the Secretariat.

25. The Settlement Agreement Operations branch (SAO) is the entity within AANDC that has possession of a complete set of the IAP documents on behalf of Canada as defendant. SAO maintains copies of the following IAP documents: (i) IAP applications; (ii) witness statements;

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[15] Schedule N, section 10(c) at p. 10. Joint Compendium of Documents, Tab 25, p. 390

(iii) documentary evidence produced by the parties (including mandatory documents); (iv) audio recordings and transcripts of IAP hearings; (v) expert medical reports; (vi) adjudicators' decisions.[16] The SAO branch of AANDC is "responsible for representing Canada at IAP hearings, performing and providing Canada's document disclosure obligations in respect to individual IAP claims, and paying out compensation for settlements reached under the IAP".[17] Digital and hard copies of these documents are maintained by SAO in respect of each IAP claim admitted by the Secretariat.[18]

26. The Secretariat was constituted as an autonomous branch of AANDC and operates as the administrator of the IAP. The Secretariat maintains its own digital and hard copies of the IAP documents in a variety of databases, and also has possession and control of a complete set of the IAP documents.

27. Thus, both the Secretariat and the SAO are branches of AANDC, which is a department of Canada. During the time that AANDC is using the documents, these documents stay within the department. AANDC, as a federal department of Canada, is subject to a statutory regime regarding government records, and must act in accordance with the *Privacy Act*[19], the *Access to Information Act*[20], and the *Library and Archives Canada Act*[21].

28. As noted above, and as is outlined in Justice Perell's decision, it is the *Library and Archives Canada Act* which governs the disposition of government records:

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[16] Affidavit of David Russell sworn May 5, 2014 at ¶ 16. Joint Compendium of Documents, Tab 47, p. 1747
[17] *Ibid.* at ¶ 54. Joint Compendium of Documents, Tab 47, p. 1755
[18] *Ibid.* at ¶ 17. Joint Compendium of Documents, Tab 47, p. 1748
[19] *Privacy Act*, RSC 1985 c. P-21 .
[20] *Access to Information Act*, RSC 1985 c. A-1.
[21] *Library and Archives Canada*, SC 2004 c. 11.

> Pursuant to s. 12 of the *Library and Archives of Canada Act*, *supra* disposition of any records held by AANDC may occur only with the written consent of the Librarian and Archivist. LAC has the authority to destroy government records…
>
> With regards to IAP records, LAC issued a *Records Disposition Authority No. 2011/010*, dated February 26, 2013. A Record Disposition Authority ("RDA") is the official instrument used to direct the disposition of government records.
>
> *RDA No. 2011/010* stated:
>
> > The Deputy Head and Librarian and Archivist of Canada, pursuant to subsections 12(1) and 13(1) of the *Library and Archives of Canada Act*, is of the opinion that records described in the attached Agreement are of historic or archival importance. The Librarian and Archivist, therefore, requires their transfer to the care and control of Library and Archives Canada in accordance with the Terms and Conditions set out in the Appendix to the Agreement, and consents to the disposal of all other records, when the Aboriginal Affairs and Northern Development Canada decides that it is no longer necessary to preserve these information resources to satisfy operational or legal requirements.
>
> Under a RDA, records identified as having historical or archival value by the Librarian and Archivist are transferred to LAC after the expiry of the retention period in accordance with a transfer agreement between LAC and AANDC. After transfer, the transferred records fall under the care and control of LAC. The non-transferred documents remain under the custody and control of their custodian, in this case AANDC.
>
> On August 7, 2012, AANDC and LAC signed an Agreement for the Transfer of Archival Records. A substantive appendix to the AANDC-LAC Agreement provides that "[all] electronic copies of the Notice of Decision document and Settlement Package for each IAP and ADR case" must be transferred to LAC when they are no longer required by AANDC.
>
> Under the Agreement for the Transfer of Archival Records, the balance of the IAP Documents could be disposed of by AANDC at its discretion and in accordance with law.[22]

29. The nature of the IAP documents as government records cannot change to correct the concern that naturally arises given Canada's conflict of interest as both defendant in the IAP claim, and administrator of the IAP. This concern was raised and answered by Justice Winkler at the time that multiple courts approved the Settlement Agreement. It was then decided that with requisite separation, "a clear line of demarcation" between these roles, Canada's conflict of interest could

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[22] Reasons for Decision at ¶ 259-264. Joint Book of Authorities, Tab 47, p.45

be managed, and it was approved to be both defendant and administrator.[23] With respect, this aspect of the Settlement Agreement approval, and thus, of the Settlement Agreement itself is not now open to revision by subsequent decisions.

F. The Confidentiality of the Documents

30. IAP claimants were given various promises of confidentiality respecting the documents they submitted and the IAP proceedings themselves. These promises are contained in the Settlement Agreement, in various documents provided by the Secretariat to claimants during the hearing process the hearing process, and verbal assurances given by IAP adjudicators.

i) Confidentiality provisions in the Settlement Agreement

31. The parties to the Settlement Agreement provided for certain protections for confidentiality within the IAP.

32. The confidentiality provisions are present in two schedules to the Settlement Agreement: Schedule D, setting out the IAP; and, Schedule N, which establishes the mandate of the Commission.

33. Appendix II to Schedule D to the Settlement Agreement specifically addresses the retention of IAP applications. It provides that "all copies [of the IAP applications] other than those held by the Government will be destroyed on conclusion of the matter, unless the claimant asks that others retain a copy…".[24] This provision specifically contemplates that IAP materials are to be preserved by Canada and remain under the control of the survivor.

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[23] *Baxter v Canada Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ONSC), 83 O.R. (3d) 481 (S.C.J.), at ¶ 37 and 38 Joint Book of Authorities, Tab 7

[24] Appendix II s. (iv), Schedule D, Settlement Agreement. Joint Compendium of Documents, Tab 24, p.350

34. This is the only reference to the destruction of IAP documents in the Settlement Agreement.

35. The application form for the IAP process is prescribed in Schedule D, and the standard form is contained at Appendix I. Each page of the application form has a header that states that the document is a "Protected B document when completed."

36. The prescribed application form refers to a "Guide to the Independent Assessment Process". The IAP Guide was prepared by representatives of the parties to the IRSSA, and was finalized prior to the implementation date of September 19, 2007.[25]

37. The IAP Guide provides explicit reference to the question of how the Secretariat will deal with confidential information. The IAP Guide includes a Declaration for the claimants to sign.[26] The Declaration is indicated to be a legal document that the claimant must sign in order to:

i) give your permission to certain groups to research your case;
ii) confirm that you understand how your personal information will be used (see Appendix B);
iii) agree to respect the confidentiality of the process;
iv) confirm that all information you give in the application is true.[27]

38. Appendix B states that the application form will be treated as at a security level "Protected B", as it is sensitive personal information. It also briefly outlines the federal legislation that applies, including the *Privacy Act*, RSC 1985, c P-21 and the *Access to Information Act*, RSC 1985, c. A-1, and includes hyperlinks to these Acts. Finally, as a conclusion to Appendix B, under

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[25] See schedule U of the IRSSA, and correspondence dated July 21, 2006 from Doug Ewart, member of the IAP working group, attaching the IAP Guide, intended to be the final version.
[26] IAP Guide, at p. 17. Joint Compendium of Documents, Tab 26, p.416
[27] IAP Guide, at p. 17. Joint Compendium of Documents, Tab 26, p.416

the heading "**Keeping your records**" it is noted that "[o]nly the National Archivist can destroy government records,"[28] specifically averting to s. 12 (2) of the *Library and Archives Act.*[29]

39. The IAP Guide thus sets out unequivocally that the documents generated in the IAP are not subject to an absolute guarantee of confidentiality. It states that, at minimum, Canada can be expected to retain the documents for a period of at least 30 years, and that the documents can only be destroyed at the behest of the National Archivist.

40. Schedule D further imposes an obligation on the Secretariat to provide all IAP claimants the option of having the transcript of their respective hearings deposited in an archive developed for the purpose (with no mention of redactions to the transcript).[30] In practice, no IAP claimants have actually been given the option of having the transcripts of their hearings archived.

41. In section (o) of Schedule D, it is noted that claimants are to be given 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.

42. While the IAP hearings are closed to the public, even there, exceptions were made to the promise of confidentiality. Schedule D to the Settlement Agreement provides that parties, alleged perpetrators and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, apart from their own evidence, or as required within that process or

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[28] IAP Guide, at p. 24 Joint Compendium of Documents, Tab 26, p.421

[29] ~~*priva*~~ *Library and Archives of Canada Act*, SC 2004, c. 11 at s. 12. (1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

[30] Schedule D, section (θ) (o), Settlement Agreement. Joint Compendium of Documents, Tab 24, p.346

otherwise by law.[31] Further, a declaration in the application form alerts IAP claimants to the private nature of the IAP proceedings, but recognizes their control over their own story:

> 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.[32]

43. The declaration also includes the following statement related to the disclosure of the claimant's personal information to others:

> I understand that my personal information, including details of any claim of abuse, may be shared with others, including the government, the adjudicator, participating church organizations, those who I identify as having abused me, and witnesses.

44. The phrase "otherwise by law" appears in two places – on the confidentiality agreement, and at section (o) of Schedule D of the Settlement Agreement. In both, similar language is used, where at section (o) it states:

> 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.[33]

In both instances, the phrase, "otherwise by law" operates as a qualification on the assurances of confidentiality that the parties bargain for, and drafted into the Settlement Agreement.

45. Notably, the Settlement Agreement is silent on the final disposition of the IAP documents outside of the application form. Though, the application form does not address whether the IAP documents will be archived, Schedule N to the Settlement Agreement addresses that potential. Section 11 of Schedule N provides that "[i]nsofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP),

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[31] Schedule D, section (o), Settlement Agreement. Joint Compendium of Documents, Tab 24, p.346
[32] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 34. Joint Compendium of Documents, Tab 32, p.493
[33] Schedule D, section (o), Settlement Agreement. Joint Compendium of Documents, Tab 24, p.346

existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes".[34]

ii) Written confidentiality provisions outside of the Settlement Agreement

46. Each IAP claimant was also required to sign a confidentiality agreement as is mentioned in Schedule D.[35] The confidentiality agreement requires that IAP claimants "keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in [the IAP hearing], except [the IAP claimant's] own evidence or as required within the IAP or otherwise by law". The confidentiality agreement does not inform claimants of their entitlement to archive a transcript of their evidence or any other IAP document.

47. The one-page confidentiality agreement only addresses the obligations of the IAP claimants. It does not address the obligations of the Secretariat in respect of IAP documents.

48. A second confidentiality agreement is signed by all other attendees at the IAP hearing, including the alleged perpetrators and witnesses. Signatories (including Canada) agree that:

> [they] will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within IAP or otherwise by law.[36]

iii) Verbal Assurances

49. Until April 2012, some IAP adjudicators made broad verbal assurances to some IAP claimants and alleged perpetrators about the confidentiality of their evidence. The assurances were given for the purposes of facilitating the full participation of claimants at their hearings. The

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[34] Schedule N, section 11, Settlement Agreement. Joint Compendium of Documents, Tab 24, p.391
[35] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 58. Joint Compendium of Documents, Tab 32, p.498
[36] *Ibid.*

difficulty with this approach, however, is that these assurances departed from the terms of the Settlement Agreement, the IAP Guide and legal requirements.

50. The verbal assurances were that only those in the IAP hearing room would be privy to the testimony of a claimant or an alleged perpetrator.[37] In other cases, it had been practice to reassure claimants "that their testimony and records would remain confidential within [IAP] processes".[38]

51. On April 5, 2012, Daniel Ish, the Chief Adjudicator of the IAP, sent a direction to all IAP adjudicators advising them that verbal assurances of confidentiality to IAP claimants must be revised. The direction stated:

> I think the best that can be done is rely on Paragraph III, o, I (at page 15) of the IAP [Schedule D to the Settlement Agreement] which essentially says that information will be kept confidential except "as required within this process or otherwise by law" … In short, I ask adjudicators not to give iron-clad assurances about confidentiality but to advise claimants and other participants that the information is protected by law, will be handled securely and seen by those who have a legitimate need to see it.[39]

G. Justice Perell Orders Destruction

52. Justice Perell released his reasons for decision on August 6, 2014. Holding that the parties to the Settlement Agreement did not intend for the IAP documents to become accessible to the public, in his decision, the qualified promises of the confidentiality in the Settlement Agreement became an irreversible Order of destruction.

53. The form of the Order to be issued in accordance with Justice Perell's reasons for decision was not settled until February 10, 2015. Several items of significance in the eventual Order were inconsistent with the reasons for decision. First, in the reasons, it was provided that all IAP

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[37] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 59. . Joint Compendium of Documents, Tab 32, p. 499
[38] Affidavit of Daniel Shapiro sworn September 26, 2013 at ¶ 5. . Joint Compendium of Documents, Tab 31, p. 471
[39] Affidavit of Daniel Ish sworn September 27, 2013 at ¶ 59. . Joint Compendium of Documents, Tab 32, p. 499

Documents shall be retained by Canada "for 15 years after the completion of the IAP hearings", following which destruction would be effected should the survivor not exercise the option to save them. The Order revised this such that all IAP documents except for the application, hearing transcripts and/or recordings and decisions be destroyed immediately. These last three types of documents became an IAP retained documents subclass, and the Chief Adjudicator (instead of Canada) was required to retain these documents for 15 years.

54. The change to an immediate destruction of a portion of the IAP documents, will pre-empt the possibility of a survivor seeking to transfer any documents beyond the application, transcript and decision: in essence, it pre-empts survivor choice in this respect.

55. The change from Canada as a repository of documents during the retention period, to the Chief Adjudicator as the exclusive repository creates confusion with regard to the source of Chief Adjudicator's ongoing authority. The Order provides the Chief Adjudicator with a "mandate" with respect to the disposition of *inter alia* "IAP retained documents" and the authority to "implement" that mandate. The Chief Adjudicator is entitled to contract persons or organizations to implement its mandate, or to engage other arrangements with the Secretariat or Canada. Canada is ordered to bear the costs of the Chief Adjudicator's administration of the Order, and to assist the Chief Adjudicator by retaining consultants/contractors and/or providing "any required services or facilities". The reasons do not speak to the Chief Adjudicator's continuing role in administering the order, or specifically empower any other body with such a mandate. If anything, the reasons imply that Canada has responsibility to administer the Order (given that it was directed to retain the IAP documents).

56. The Order was settled following the circulation of a draft Order by counsel to the Chief Adjudicator. The parties were given the opportunity, and did make, submissions with respect to the Order. Both the Commission and Canada opposed language in the Draft Order which removed Canada as the repository of documents during the retention period. The Order was issued on February 10, 2015, some six months after the issuance of the reasons.

III. LAW AND ANALYSIS

57. The Commission respectfully requests that this appeal raises the following issues:

A. Does the Court of Appeal have jurisdiction to determine the appeal herein?

B. What is the applicable standard of review on this appeal?

C. Did Perell J. err in law in holding that destruction was a term and/or an implied term of the Settlement Agreement?

D. Did Perell J. err in applying the deemed undertaking rule?

E. Did Perell J. err in finding that a breach of confidence has occurred?

F. Did Perell J. err in finding that the IAP documents are not government records?

G. Is the Notice Program within the court's supervisory jurisdiction?

H. Was the costs award against the Commission unreasonable?

A. The Court of Appeal has Jurisdiction to Determine the Appeal

58. The Commission respectfully submits that this Honourable Court has jurisdiction to determine the appeal herein. In particular, the Commission submits that the decision below is a final order of the Superior Court of Justice, and as such, the Court of Appeal has jurisdiction by virtue of section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

59. Where, as in this case, the *Class Proceedings Act* does not specifically address rights and avenues of appeal, section 6(1)(b) of the *Courts of Justice Act* governs appeals to the Court of Appeal in class proceedings[40]. Section 6(1)(b) of the *Courts of Justice Act,* provides:

> 6(1) An appeal lies to the Court of Appeal from,
> (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

60. The distinction between a final and an interlocutory order is set out in this Honourable Court's decision in *Hendrickson v. Kallio*:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties – the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.[41]

61. In *Parsons v. Ontario*[42], the distinction between a final and interlocutory order was explained in the context of class action proceedings. The majority in *Parsons* found that, because the subject matter of the litigation (in that case, a class action regarding tainted blood) had been resolved by the settlement agreement, a modified approach to determining the issue of final or interlocutory orders was necessary to address appeal from motions for directions.

62. Justice LaForme reasoned that the request for directions in *Parsons* (as it pertained to the implementation and enforcement of a settlement agreement) was akin to an application under s. 14.05(3)(d) of the *Rules of Civil Procedure*.[43] The order was final in the same way that an order

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[40] *Locking v Armtec Infrastructure Inc.*, 2012 ONCA 774 at ¶ 8. . Joint Book of Authorities, Tab 78, p. 4
[41] *Hendrickson v Kallio*, [1932] OR 675 (CA) at p. 678. Joint Book of Authorities, Tab 65
[42] *Parsons v Ontario*, 2015 ONCA 158. Joint Book of Authorities, Tab 90
[43] Section 14.05(3)(d) provides:

> 14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
> ...

on a rule 14 application is final. LaForme J. held that the determination as to whether an order is final or interlocutory is context specific within the discrete context of post-settlement litigation in class proceedings.

63. In the herein appeal, directions were sought from the court below regarding the disposition of the IAP records, a matter tied to the proper administration of the Settlement Agreement. This required the interpretation of Settlement Agreement, legislation and the common law with regard to contract interpretation, the deemed undertaking rule and breach of confidence.

64. The RFD in this appeal, like the one in *Parsons*, is akin to a standalone rule 14.05 application regarding the implementation and enforcement of the Settlement Agreement. The merits of the case were determined before Perell J., and the result was a destruction Order, with some of the records being destroyed immediately after the completion of the IAP and the others after a 15-year retention period. As such, the Order was a final determination of the question or real matter in dispute between the parties.

B. The Standard of Review is correctness

65. The Commission respectfully submits that the applicable standard of review in this appeal is correctness.

66. In *Sattva Capital Corp. v. Creston Moly Corp.*, the Supreme Court of Canada held that contractual interpretation generally involves determinations of mixed fact and law.[44] However,

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(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

[44] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at 53. Joint Book of Authorities, Tab 98

the Court also held that where it is possible to identify an extricable question (or questions) of law from within a question of mixed fact and law, the applicable standard of review is correctness.[45]

67. The analysis as to whether an appeal involves an issue of law that is extricable from an issue of mixed fact and law is contextual. The purpose of limiting the correctness standard to errors of law and extricable errors of law is to ensure that appellate intervention is restricted to cases in which the results will have significant precedential value and broad application. The policy rationale for applying the correctness standard was relied on by the Manitoba Court of Appeal in hearing an appeal involving the Settlement Agreement:

> The parties agree, as do I, that both issues involve errors of law or extricable questions of law and are reviewable on the standard of correctness. As was stated by Rothstein J. in *Sattva*, one of the purposes of drawing a distinction between questions of law and those of mixed fact and law "is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute" (at para. 51). In this case, the Agreement has applicability to thousands of claimants across the country and as such, the manner in which it is interpreted has great precedential value, and brings certainty to others involved in similar disputes.[46]

68. As is submitted below, Perell J.'s interpretation of the Settlement Agreement involved extricable errors of law. In view of the reality that this Honourable Court's decision will determine the fate of documents submitted in respect of over 37,000 claimants, the policy rational underlying the application of the correctness standard is directly implicated.

69. Alternatively, the Commission submits that Perell J. committed palpable and overriding errors in interpreting the Settlement Agreement, and relies on its submissions below in this regard.

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[45] *Ibid.* at 53.

[46] *Fontaine et al v. Canada (Attorney General)*, 2014 MBCA 93 at ¶ 40. The Manitoba Court of Appeal's approach is consistent with that of the Alberta Court of Appeal's in *Canada (Attorney General) v. Alexis*, another appeal involving the IRSSA. In *Alexis*, the court applied the "palpable and overriding error" standard in circumstances in which no error of law or extricable error of law was alleged. *Alexis* involved an appeal of a determination as to whether two particular schools were included in the settlement agreement. . Joint Book of Authorities, Tab 43

C. Perell J. erred in law in holding that destruction (whether immediate or delayed) was a term and/or an implied term of the Settlement Agreement

i) Perell J. erred in finding a term of destruction in the Settlement Agreement

70. Perell J. found that there is an express term in the Settlement Agreement that the IAP documents would be destroyed following the completion of the claims process (and a retention period). His finding is based on his interpretation of the IAP Guide, which is referred to in the Schedule D of the Settlement Agreement:

> What the parties bargained for was that the IAP Documents would be treated as highly confidential but subject to the very limited prospect of disclosure during a retention period and then the documents, including Canada's copies, would be destroyed. That's more or less what Canada told the IAP Claimants in the Guide to the IAP Application, omitting the point that eventually the documents would be destroyed. In interpreting the IRSSA, the court can now give the Claimants the assurance that the IAP Documents will eventually be destroyed and in the interim the documents will be kept confidential subject to very limited exceptions.[47]

Respectfully, the IAP Guide states the opposite of what Perell J. found. The IAP Guide is replete with references to federal legislation, and explicitly advises claimants that "[o]nly the National Archivist can destroy government records" under the bold faced heading "Keeping your records"[48].

71. Aside from these explicit references to preservation under federal legislation, the Settlement Agreement does not contain a term providing for the wholesale destruction of the IAP records. The only specific mention of destruction is with regard to the destruction of all copies of the application form, other than those copies held by the government of Canada. The exemption of Canada from the obligation to destroy its copies of the Application is consistent with the

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[47] Reasons for Decision at ¶ 322. . Joint Book of Authorities, Tab 47
[48] IAP Guide, at p. 24. . Joint Compendium of Documents, Tab 26, p. 416

provisions of the IAP Guide. Even this destruction term is subject to the exception that the claimant may ask that others retain a copy.[49]

72. Rather than terms outlining destruction, the Settlement Agreement has terms outlining the preservation of certain IAP documents. For instance, there is an explicit reference to the memorialization and archiving of transcripts in Schedule D. Also in Schedule D is an explicit reference to the provision of decisions to claimants, once they are redacted to remove identifying information about any alleged perpetrators, and including the fact that claimants are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.

ii) Perell J. erred in finding an implied term of destruction in the Settlement Agreement

73. Perell J. found, if he was wrong about the presence of an explicit term of destruction in the Settlement Agreement, that there is an implied term of destruction in the Settlement Agreement. The Commission respectfully submits that Perell J. erred in law in finding an implied term.

74. Perell J.'s finding of an implied term must be considered in the context of the protracted negotiations leading up the Settlement Agreement and the court approval process. The Settlement Agreement was the most intensively negotiated settlement agreement in Canadian history, negotiated by some 60 legal counsel, and was subject to a rigorous approval process before nine provincial courts. In this context, the burden of establishing that an unexpressed term was necessarily intended to be part of the agreement is a high one. The Settlement Agreement itself states that there are not implied terms.

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[49] Appendix II s. (iv), Schedule D, Settlement Agreement. Joint Compendium of Documents, Tab 24, p.350

75. In determining whether the parties would have intended that an unexpressed term be a part of their contract, the court must be careful not to substitute its own view as to what reasonable parties would or ought to have intended to give their contract business efficiency:

> A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
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> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.[50]

76. In the process of determining whether to imply a term to a contract, the court is involved in a process of interpreting the contract that the parties actually signed, as opposed to determining the presumed intent of what either party acting reasonably ought to have intended when he or she signed the contract. If there is evidence of a contrary intention in the actual contract on the part of either party, an implied term may not be found.

77. As submitted above, the Settlement Agreement contains no specific provisions indicating an intention of the parties that the IAP documents would be subject to wholesale destruction. The only reference in the Settlement Agreement to destruction of IAP documents (limited to the Application), specifically exempts the "government" (i.e. Canada) from its terms. The IAP Guide, as submitted above, refers specifically to the application of federal privacy and access legislation, the preservation of the documents by Canada, and the exclusive authority of the National Archivist

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[50] *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at ¶ 29. Joint Book of Authorities, Tab 83 p.635

to destroy documents. In view of these specific references in the Settlement Agreement, the Commission submits that the finding that an implied term of destruction was not available.

78. Further, Perell J. erred in finding that an implied term was necessary, within the meaning of the governing jurisprudence.[51] As submitted above, an implied term of mandatory, wholesale destruction is not necessary to ensure that the confidentiality bargained for by the claimants was protected. In view of the fact that the IAP Guide, with its references to federal legislation and preservation of the IAP documents by Canada, had been in play throughout the life of the IAP, there is no evidence whatsoever that "operative efficiency" necessitated the destruction of the documents.

D. Perell J. erred in law in applying the deemed undertaking rule

79. The Commission respectfully submits that Perell J. erred in finding that the deemed undertaking rule applied to IAP applications, hearings transcripts/recordings, and decisions. Based on the terms of the Settlement Agreement described above, the application of the deemed undertaking is ousted. The Commission submits that the deemed undertaking rule has no application to the IAP documents for three additional reasons.

80. First, the Commission submits that, as Perell J. had previously determined in *Fontaine v. Canada (Attorney General)*, the deemed undertaking rule cannot operate as against the Commission in respect of documents exchanged between the parties in other aspects of this class action proceeding.[52] The deemed undertaking rule only applies to prevent the use of documents for proceedings other than the proceeding in which they were produced. The work of the Commission is part of the same proceeding in which the IAP documents were exchanged.

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[51] *Canadian Pacific Hotels Ltd. v Bank of Montreal*, [1987] 1 S.C.R. 711 at ¶ 51-53; *Rio Algom Limited v The Attorney General of Canada*, 2012 ONSC 550 (CanLII) at ¶ 35-41. Joint Book of Authorities, Tab 23

[52] *Fontaine v Canada (Attorney General)*, 2014 ONSC 283. Joint Book of Authorities, Tab 45

> The Commission argues that by its express language, the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. It argues that the undertaking does not preclude the use of evidence obtained in a proceeding being used in that same proceeding. Then, relying on Article 11.01 of the IRSSA, the Commission submits that the proceedings that culminated in the IRSSA include or are the same as the 156 proceedings associated with Justice Trainor's order, and, therefore, the Commission argues that the production of the OPP documents to the Commission is not precluded by the deemed undertaking.
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> I agree with the Commission's argument. Unless they opted out of the class action, of which there is no evidence, and which is unlikely, the purposes of the plaintiffs in the 156 actions in which the OPP documents were obtained, were overtaken by the purposes of their participating in the IRSSA as IAP Claimants.
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> Those purposes of participating in the IAP include the IAP being the means to provide access to justice and compensation and those purposes include facilitating the project of the Truth and Reconciliation Commission, which provides a different but equally important route to access to justice. From the perspective of the 156 individual plaintiffs, the documents obtained for the 156 actions are being used for what does appear to be the same proceeding or a transformation of it. [53]

81. Second, even if the deemed undertaking has some application in this matter (by analogy), it would only serve to bar production of documents exchanged by the parties in the "discovery phase" of a proceeding. It has no application whatsoever to pleadings, to documents filed in the hearing phase of the proceeding, or to the written decision rendered by an adjudicator. The Commission did not seek preservation of the mandatory documents exchanged by the parties prior to the hearing phase. It sought only to preserve the applications, the transcripts and/or recordings (including the documents provided by the defendants as part of the hearing process), and the decisions. As such, the deemed undertaking rule could have no application even by analogy to the IAP documents sought to be preserved by the Commission.

82. Third, even if the deemed undertaking rule applied, it is only concerned with the improper use of documents obtained through compelled production in the litigation process. It cannot be

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[53] *Ibid*, at ¶ 183 - 185. Joint Book of Authorities, Tab 45

used to justify the wholesale destruction of IAP applications, hearing transcripts/recordings or decisions. If it applies at all, the deemed undertaking rule could only serve to prevent the improper use or publication of this material. Federal privacy legislation, which governs Canada, the Commission and the NCTR (or equivalent legislation), will serve to bar the disclosure of personal information should the documents be preserved.

E. Perell J. erred in finding that there was a breach of confidence

83. The Commission submits that Perell J. erred in anticipating that a breach of confidence has occurred due to Agreement for the Transfer of Archival records between AANDC and LAC.[54]

84. A breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information.[55]

85. As is submitted above, the obligations of confidentiality in this case were qualified by express notification to the survivors that Canada would be retaining their records within the archives, as is provided for in federal legislation. Thus, the parties contracted out of absolute confidentiality, a key exception to this confidentiality being the application of federal legislation. Specifically, the IAP Guide stated, "the government keeps this information in the National Archives…".[56] Canada cannot be said to have taken on an obligation of confidentiality which would preclude the operation of federal legislation. Further, acting in accordance with legislation cannot be considered to be a misuse of the information in the IAP documents.

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[54] Reasons for Decision at ¶ 360. Joint Book of Authorities, Tab 47
[55] *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.). Joint Book of Authorities, Tab 73
[56] IAP Guide at p. 29. Joint Compendium of Documents, Tab 26, p.421

F. Perell J. erred in law in holding that the IAP documents are not government records

86. The *Privacy Act*, the *Access to Information Act*, and the *Library and Archives Canada Act*, govern records that are under the control of a government institution. "Control" for the purposes of this legislation has been interpreted broadly, such that physical possession or legal control is sufficient to render the record under the control of a government institution.[57] The Supreme Court has recognized that privacy legislation is quasi constitutional in nature.[58]

87. The Commission submits that Perell J. committed legal errors in his analysis as to how and whether federal privacy and access legislation governed the disposition of IAP documents.

88. Perell J. made inconsistent and untenable legal determinations as to whether federal legislation applied. He commenced his analysis with a finding that the IAP documents were not government records within the meaning of federal legislation.[59] Second, in the face of explicit references to federal legislation in the IAP Guide, he made the unprecedented finding that the legislation applied "in the interim[60]" during a retention period (to records that are not under the control of Government), after which the IAP documents cease to be governed by the legislation, and thereafter can be destroyed (not in compliance with the legislation). He also implied that the application of federal legislation was confined to certain purposes, namely criminal and child welfare proceedings.

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[57] *Canada (Information Commission) v Canada (Minister of National Defence)*, 2011 SCC ~~24~~ 25 at ¶ 48.; *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, 2007 FCA 272. Joint Book of Authorities, Tab 19

[58] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53. Joint Book of Authorities, Tab 76

[59] Reasons for Decision at ¶ 319. Joint Book of Authorities, Tab 47

[60] *Ibid.* at ¶ 311.

89. Respectfully, there is no authority, statutory or jurisprudential, for the proposition that records can become government records and then cease to be so. Nor is there any authority for the proposition that federal privacy, access and archival law can apply for certain limited purposes and not for others.

90. Perell J.'s reasons with respect to the temporary application of federal legislation become even more problematic in view of the terms of the Order that was ultimately issued. While his reasons provide that Canada is to be the repository of the IAP documents during the retention period, his Order removes them from Canada and substitutes the Chief Adjudicator as the repository. It is difficult to understand, in view of the Order that Canada immediately destroy its own collection of IAP records, how federal legislation could apply to documents that Canada no longer has possession of, much less control.

91. As is submitted above, a plain reading of the language of the Settlement Agreement provides that the IAP documents are government records subject to federal privacy and access law. The confidentiality bargained for by the claimants is provided through this suite of federal legislation, and not wholesale destruction.

92. This interpretation of the Settlement Agreement is consistent with Canada's role as administrator of the IAP. The Secretariat was intended by the parties (and was directed by the Approving Courts) to maintain independence from Canada in respect of its adjudicative function, to ensure that Canada was not in a position of conflict in respect of its dual roles as defendant and administrator of the settlement. However, the Approving Courts did not go so far as to require that the court become the *de facto* administrator of the settlement. The Courts assumed an

"executive oversight" role, whilst leaving Canada in place as administrator of the IAP aspect of the Settlement Agreement:

> [38] … [T]he administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.
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> * * *
>
> [51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the de facto administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

93. The Commission respectfully submits that the collection and management of documents to support the IAP is an administrative function that was left to Canada under the Settlement Agreement to perform in accordance with federal legislation. The collection and management of documents does not implicate the Approving Courts' concern about the potential conflict between Canada's role as continuing litigant and as neutral administrator of the Settlement Agreement.

94. Perell J. viewed Canada's dual role of defendant and administrator, and its implications for document preservation, as "problematic".[61] Whether or not it is "problematic", it is what the

[61] *Ibid.* at ¶ 148. Joint Book of Authorities, Tab 47

parties bargained for and the Courts approved. Perell J. was not entitled to amend the Settlement Agreement to attempt to repair what he viewed as a problem.

95. In the alternative, to the extent that the IAP documents are not government records, Perell J. erred in determining that they could be destroyed in the absence of the explicit consent of survivors. The Settlement Agreement, read as a whole, is dedicated to preserving history and to giving survivors a venue to tell their experiences for the benefit of all Canadians. In these circumstances, explicit language in the Settlement Agreement would be required to permit destruction of the most comprehensive and detailed record of survivors' experiences without their respective consent. As such, the Commission submits that Perell J. erred in creating a "default position" of destructions in respect of the IAP documents.

G. The Notice Program is within the Court's Supervisory Jurisdiction

i) Perell J. had jurisdiction to order a robust Notice Program as a means of implementing the Settlement Agreement

96. Perell J. directed that a Notice Program be implemented to permit survivors to decide whether to transfer certain of their IAP documents to the NCTR. The Commission submits that this was a proper exercise of the court's supervisory jurisdiction. The Notice Program directed by Perell J. does nothing more than ensure that survivors receive the full benefit of the agreement that they bargained for.

97. A class action judge's jurisdiction to supervise the implementation of a settlement agreement is both inherent and statutory. In the St. Anne's RFD decision, Justice Perell described the sources of the court's supervisory class action jurisdiction as follows:

> Although some sources of jurisdiction are perhaps more pertinent to the IAP process discussed in the next major section of these Reasons for Decision, the court has several

> sources of jurisdiction over the performance of the terms of the IRSSA, and this jurisdiction extends to the governance of Canada's disclosure obligations to the Truth and Reconciliation Commission. Indeed, the court has at least three sources of jurisdiction over the performance of the IRSSA. First, there is the court's jurisdiction over the administration of a class action settlement. Second, there is the court's plenary jurisdiction from s. 12 of the Class Proceedings Act, 1992; S.O. 1992, c. 6. Third, there is the court's jurisdiction derived from the IRSSA, which includes its jurisdiction to interpret and enforce contracts and its own orders, including its approval and implementation orders of the IRSSA.[62]

Therefore, whether the Court has jurisdiction depends on whether the order amounts to implementation of, as opposed to an amendment of, the Settlement Agreement.

98. In *Lavier v. MyTravel Canada Holidays Inc.*, Justice Perell described the limits of the court's supervisory jurisdiction as follows:

> While a court has the jurisdiction to reject or approve a settlement, it does not have the jurisdiction to rewrite the settlement reached by the parties [citations omitted]... In particular, the court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume... [citations omitted].
>
> ... But after the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties.
>
> In some instances - and the case at bar is not one of them - the court's administrative jurisdiction may allow adjustments to be made to the scheme of the settlement, and at first blush, these variation might resemble a variation of the settlement agreement. For example, in my opinion, an extension of the deadline for making claims would be permissible administrative adjustment in a settlement in which the contribution of the defendant was fixed with any surplus being paid *cy pres*. In such a settlement, the defendant should be indifferent to how the settlement funds are allocated.
>
> In contrast, in a claims made, no-cap settlement, unless the settlement agreement provided for an extension of the deadline for making claims, an extension of time for making claims would vary the settlement and not be a permissible administrative adjustment because the defendant would not be indifferent to having to pay more claims.[63]

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[62] *Fontaine v Canada (Attorney General)*, 2014 ONSC 283; see also *Fantl v. Transamerica Life Canada* (2009), 95 OR (3d) 767; 249 OAC 58 (CA). Joint Book of Authorities, Tab 45

[63] *Lavier v. MyTravel Canada Holidays Inc.* 2011 ONSC 3149, see also *Bodnar v. Cash Store Inc.*, 2011 BCCA 384. Joint Book of Authorities, Tab 75

99. A class action court is not permitted to amend a settlement agreement, only to make orders that would, as a practical matter, serve to implement that agreement. The Order that an enhanced notice program be administered to canvass the consent of IAP claimants to transfer their IAP applications, transcripts and/or audio recordings of their hearings and decisions to the NCTR for archiving, is an Order to implement a term already agreed to within the Settlement Agreement.

100. There is no new burden here. Schedule D already imposed an obligation on the Secretariat and the Chief Adjudicator to provide all IAP claimants the option of having the transcript of their respective hearings deposited in an archive developed for the purpose (with no mention of redactions to the transcript).[64] In practice, no IAP claimants have actually been given the option of having the transcripts of their hearings archived.

101. The Secretariat took no steps whatsoever to address consent issue prior to June 2010, some three years into its mandate.[65] The Commission was of the view from the outset that IAP claimants should be advised as to the fate of the IAP documents if consent was not provided for archiving with the Commission and/or the NRC. From the Commission's perspective, "informed consent' required that IAP claimants be told whether the documents would be preserved by Canada in any event. The Commission has consistently articulated this perspective in its discussion with the Secretariat between 2010 and 2012[66].

102. The Commission attempted to obtain some clarity as to the position of the IAP numerous times. Notably, in correspondence dated October 25, 2010 to Dean Mayo Moran, the Chair of the IAP Oversight Committee, the Honourable Mr. Justice Murray Sinclair, Chair of the Commission

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[64] Schedule D, section (o), Settlement Agreement Joint Compendium of Documents, Tab 24, p.346
[65] Affidavit of John Trueman sworn April 8, 2014 at ¶ 89 – 90. Joint Compendium of Documents, Tab 34, p.930
[66] Affidavit of John Trueman sworn April 8, 2014, at ¶ 103. Joint Compendium of Documents, Tab 34, p.934

stressed the importance of the preservation of the IAP documents and asked the IAP Oversight Committee to clarify its position with respect to the fate of the IAP documents.[67]

103. In a response dated January 11, 2011, Dean Moran noted that the IAP Oversight Committee is reviewing the forms of consent used by the Commission and that it hopes to "jointly develop" a form that would be used to seek the informed consent of IAP claimants. Dean Moran also stated that the IAP Oversight Committee would make a "concerted effort" to reach IAP claimants who have already resolved their IAP and ADR claims. Dean Moran further stated that the Secretariat had not yet developed an information management plan (some four years into its mandate) for the wind-down of the IAP.[68]

104. It was not until June 2014 that the Chief Adjudicator finally took a formal position on the fate of the documents where consent to archiving with the Commission and/or NCTR was not provided. Consistent with this, the Chief Adjudicator took no further steps after June 2010 to implement a consent program. It is difficult to conceive how such a consent program could have been implemented without this threshold issue being resolved by the Chief Adjudicator. It is the inability to resolve this issue internally within the Secretariat which led to the failure to implement a consent program, not anything the Commission did or did not do.

105. The enhanced notice program only ensures that class members receive the information and option to archive to which they are entitled, and that the defendants provide what they already agreed to provide. The Commission submits that, regardless of the outcome of this appeal, this

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[67] Affidavit of John Trueman sworn April 8, 2014 at Exhibit "T". Joint Compendium of Documents, Tab 34, p.1130
[68] Affidavit of John Trueman sworn April 8, 2014 at Exhibit "U". Joint Compendium of Documents, Tab 34, p.1135

Honourable Court should confirm the direction that a Notice Program be implemented. The terms of such Notice Program should be left to a further RFD with appropriate evidence called.

ii) The Catholic church entities and Persons of Interest do not have a veto over the preservation of the survivors' experiences

106. Contrary to what is argued by the 9 Catholic entities, the 22 Catholic entities and the SSJSSM, the Settlement Agreement does not give the church entities or the Persons of Interest a veto power over the survivors' right to preserve records documenting their experiences. Nothing in the Settlement Agreement in any way limits survivors from disclosing, transferring, or archiving their own evidence. In fact, in accordance with the provisions below, survivors are specifically authorized to disclose their experiences:

- The application form requires a claimant to "respect the private nature of any hearing" held as a part of their IAP claim, but explicitly permits the disclosure of "what I say myself". The form does not limit a survivors' right to name names and give a full account of their experiences;

- The confidentiality agreement signed by the claimant does not limit a survivor's right to name names and give a full account of their experiences outside of the hearing setting;

- Limiting conditions which apply to use and review of the application form only apply to the responding parties, and not to the claimant;

- Section (o) of Schedule D sets out that the hearings are closed to the public, and places a requirement to keep information disclosed at the hearing confidential, but explicitly permits a claimant to disclose their own evidence;

- Section (o) of Schedule D sets out that the decision will be redacted, but states that claimants "are free to discuss the outcome of their hearing, including the amount of compensation awarded"; and

- Section (o) of Schedule D sets out that claimants can request a copy of their own evidence for memorialization – this transcript being provided without redaction.

107. The fact that survivors remain in control of their own stories is not qualified by Schedule N, section 11. In that section, it states:

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

It has been argued that this section gives persons other than the survivor a right of consent before the survivor's story is archived or otherwise shared. This section is confined to prescribe how records are transferred directly between the IAP and the Commission. It does not affect how survivors might transfer their own transcript, or to otherwise archive their own records. Otherwise, this section would operate to negate all of the provisions outlined above which repeatedly affirm survivor control.

H. Perell J.'s cost award against the Commission is unreasonable

108. Independent Counsel sought costs against Canada and the Commission following the ruling. Perell J. ordered costs against the Commission alone. The Commission respectfully submits that the hearing on costs was procedurally flawed and that the award was unreasonable.

i) The process engaged in by Perell J. in determining costs

109. Following his ruling on the merits of the RFD's before him, Perell J. directed that parties make costs submissions within 20 days of the release of the Reasons (i.e. by August 26, 2014), followed by a right of reply within a further 20 days (i.e. September 15, 2014).

110. On August 26, 2014, Independent Counsel served its costs submissions. In a supplementary submission made by way of email, Independent Counsel advised that it sought costs against both

Canada and the Commission. It is apparent that the supplementary submission did not come to the attention of Perell J.

111. Also on August 26, 2014, the Commission sought, and was granted, a three day extension for its main costs submissions from Court counsel. The Commission reserved its right to submit a reply in accordance with Perell's J.'s direction. Its submission did not substantively reply to Independent Counsel.

112. On September 4, 2014, Independent Counsel filed its reply to the Commission's submission, along with an amended Costs Outline.

113. On September 15, 2014, Perell J. issued his first Ruling on Costs (the "First Ruling"). He ordered costs exclusively against the Commission.[69]

114. Also on September 15, 2014, but apparently after Perell J.'s First Ruling was issued, Canada made reply submissions to those of Independent Counsel. Canada argued that no costs should be awarded against it in favour of Independent Counsel.

115. On September 22, 2014, Perell J. issued a second Ruling on Costs (the "Second Ruling"). In it, Perell J. determined that he had "no reason to change the costs award that I have already made",[70] whilst acknowledging the "oddities, improbabilities, and ironies"[71] that led to the issuance of his two costs rulings.

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[69] *Fontaine v Canada (Attorney General)*, 2014 ONSC 5292. Joint Book of Authorities, Tab 48
[70] *Fontaine v Canada (Attorney General)*, 2014 ONSC 5474 at ¶ 14. Joint Book of Authorities, Tab 49, p.4
[71] *Ibid.* at ¶ 2.

ii) The costs award was unreasonable

116. The Commission respectfully submits that Perell J.'s decision to award costs against it was unreasonable. In particular, Perell J. erred first in failing to appreciate that costs were sought against both Canada and the Commission, and thereafter failing to take account of this fact. This is significant because in his ruling on the merits, Perell J. held that "[u]ltimately, the Chief Adjudicator's dispute about the fate of the IAP documents is as much if not more of a dispute with Canada as it is a dispute with the TRC".[72] The Court further acknowledged that "both the TRC and the Chief Adjudicator raised very serious issues that ultimately would require the court's attention".[73]

117. In these circumstances, Perell J.'s costs award was unreasonable in singling out the Commission for costs, in circumstances in which costs were also sought against Canada, and in which he had previously ruled that Canada was the more significant party in the dispute before him. The fact that the Commission was obligated to bring the matter to Court as part of its mandate to "[i]dentify sources and create as complete an historical record as possible of the IRS system and legacy"[74] makes the decision to single out the Commission for costs all the more unreasonable.

118. The Commission submits that the Second Ruling does not rehabilitate Perell J.'s costs award. Rather than consider Canada's role in the proceedings, and the fairness of singling out the Commission, Perell J. held that there was no "intelligible justification for awarding costs against Canada".[75] This determination runs directly contrary to his finding that the proceedings were "as

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[72] Reasons for Decision at ¶ 302. Joint Book of Authorities, Tab 47
[73] *Ibid.* at ¶ 307.
[74] Schedule N, s. 1(e), Settlement Agreement. Joint Compendium of Documents, Tab 25, p.382
[75] *Fontaine v Canada (Attorney General)*, 2014 ONSC 5474 at ¶ 10. Joint Book of Authorities, Tab 49

much if not more of a dispute with Canada as it is a dispute with the TRC",[76] and as such, is unreasonable.

119. In addition, Perell J. acknowledged that success was divided and that the proceeding was necessary (i.e. the Commission did not cause meritless or unnecessary proceedings). He found that "in the absence of some other relevant factor, it would be appropriate in the circumstances of this case to make no order as to costs."[77] Despite this, he ordered costs against the Commission because Independent Counsel was acting as *amicus curiae* and because the Commission's reasonable expectation was that legal proceedings might be necessary as a part of its mandate. Respectfully, that Independent Counsel was acting as *amicus curiae* does not lead logically to a ruling that the Commission should fund that counsel. Nor does the Commission's expectation that it may be required to litigate create a reasonable expectation that it should fund *amicus curiae* whose client is not successful. Perell J.'s reliance on these factors was unreasonable.

120. Further, the Commission submits that it was deprived of procedural fairness in the hearing in writing it received from the Court. The Commission expressly reserved its right to make reply submissions. It received no contrary direction or indication from the Court or Court counsel that reply submissions would not be entertained. By issuing a ruling prior to the date fixed for reply, the Court was deprived of the benefit of both the Commission's and Canada's submissions.

121. In the circumstances, the Commission submits that Perell J.'s costs award should be quashed, and that no costs should be issued as against the Commission.

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[76] *Reasons for Decision* at ¶ 302. Joint Book of Authorities, Tab 47
[77] *Fontaine v Canada (Attorney General)*, 2014 ONSC 5292 at ¶14 Joint Book of Authorities, Tab 48

Conclusion

122. There is no dispute that the IAP documents are highly sensitive and deserve stringent protections to ensure their confidentiality. But by virtue of federal legislation, there are binding legal obligations to protect the confidentiality of the IAP documents that govern both the Secretariat and Canada (in its role as defendant). The purpose of privacy legislation is to ensure confidentiality protection for documents that will be maintained and/or archived by an institution.

123. There will come a time in the life of our nation when there will no longer be a living memory of residential schools. It will be then that the threat to truth and memory will become most acute. The IAP documents are a vital and necessary resource to ensure that such challenges to truth and memory can be met, and that the experiences of residential school survivors can never be denied or forgotten. They are irreplaceable. It is only by preserving this history that we can ensure that the tragedy of residential schools will never be repeated.

IV. ORDER REQUESTED

124. The Commission respectfully requests that this Honourable Court make the following Orders:

i) that the appeals of the 9 Catholic Entities, the 22 Catholic Entities and the SSJSSM be dismissed;

ii) that the cross appeals of the Commission and the NCTR be allowed;

iii) that the Independent Assessment Process application form, hearing transcript, hearing audio recording and adjudicator's decision may only be destroyed with the express consent of the IAP claimant to which the IAP Records relate;

iv) that the IAP documents are subject to the *Library and Archives of Canada Act*, the *Privacy Act*, and the *Access to Information Act*;

v) that leave to appeal on the issue of costs be granted, and that the appeal on costs be allowed; and

vi) such further and other Orders as counsel may request and this Honourable Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS ~~17TH~~ 15th DAY OF ~~JULY~~ OCTOBER, 2015.

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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, Julian Roy, lawyer for the Cross-Appellant/Respondent, the Truth and Reconciliation Commission of Canada certify that:

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

2. An estimate that 2.0 hours will be required for the Cross-Appellant/Respondent's oral argument, not including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

~~Thursday July 17, 2015~~
October 15, 2015

Julian K. Roy
Falconers LLP
Counsel for the Cross-Appellant/Respondent, the Truth and Reconciliation Commission of Canada

SCHEDULE "A"

1. *Fontaine v Canada (Attorney General)*, 2014 ONSC 4585
2. *Baxter v. Canada Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.)
3. *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA
4. *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.)
5. *Parsons v. Ontario*, 2015 ONCA 158
6. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633
7. *Fontaine et al v. Canada (Attorney General)*, 2014 MBCA 93
8. *Canada (Attorney General) v. Alexis*, 2015 ABCA 132 (CanLII)
9. *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619
10. *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711
11. *Rio Algom Limited v. The Attorney General of Canada*, 2012 ONSC 550 (CanLII)
12. *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283
13. *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574
14. *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.)
15. *Canada (Information Commission) v Canada (Minister of National Defence)*, 2011 SCC 24
16. *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, 2007 FCA 272
17. *Fantl v. Transamerica Life Canada* (2009), 95 OR (3d) 767; 249 OAC 58 (CA)
18. *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53.
19. *Lavier v. MyTravel Canada Holidays Inc.* 2011 ONSC 3149
20. *Bodnar v. Cash Store Inc.*, 2011 BCCA 384
21. *Fontaine v. Canada (Attorney General)* 2014 ONSC 5292

22. *Fontaine v Canada (Attorney General)*, 2014 ONSC 5474

SCHEDULE "B"

RELEVANT STATUTES

Library and Archives Canada Act

S.C. 2004, CHAPTER .11

GOVERNMENT AND MINISTERIAL RECORDS

Destruction and disposal

12. (1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

Courts of Justice Act

R.R.0. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE. O. Reg.259/14, s. 6 (1)

APPLICATIONS — BY NOTICE OF APPLICATION

Application under Rules

14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

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-Appeal)

Court File No: C59310, C59311, C59320

COURT OF APPEAL FOR ONTARIO

UPDATED FACTUM OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA

WITH REFERENCE TO THE JOINT COMPENDIUM OF DOCUMENTS AND JOINT BRIEF OF AUTHORITIES

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