

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

and

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND, (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF 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, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU

QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION 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. and MT. ANGEL ABBEY INC.

Defendants

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

FACTUM OF INDEPENDENT COUNSEL

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I. SUMMARY OF ARGUMENT

1. Due to the extreme sensitivity of much of the subject matter of Indian Residential Schools, all parties to the Indian Residential School Settlement Agreement (IRSSA") were concerned at the time of the negotiation of the IRSSA that individual privacy interests were to be respected and protected.

2. The Truth and Reconciliation Commission ("the TRC") seeks to obtain documents from Canada and various church entities pursuant to section 11 of Schedule N of the IRSSA. Independent Counsel does not oppose the transfer of such documents to the TRC providing that the privacy protections agreed to by all Parties to the Settlement Agreement and ordered by the nine Courts who approved the Settlement Agreement are made binding conditions of the transfer or release of any such documents.

3. The TRC proposes to archive these documents with the National Centre for Truth and Reconciliation ("the NCTR"). The legislation governing the NCTR does not preserve the confidentiality of these documents in accordance with the terms of the IRSSA and does not ensure that individual privacy interests will be protected. The only protection against the possibility of disclosure contrary to the terms of the IRSSA, including "proactive" disclosure, is by way of a Court Order.

II. THE FACTS

4. Independent Counsel are defined in the Indian Residential Schools Settlement Agreement ("IRSSA") as:

Independent Counsel" means Plaintiffs' Legal Counsel who have signed this Agreement, excluding Legal Counsel who have signed this Agreement in their capacity as counsel for the Assembly of First Nations or for the Inuit Representatives or Counsel who are members of the Merchant Law Group or members of any of the firms who are members of the National Consortium.

5. Independent Counsel have acted on claims for survivors across Canada and have undertaken since the beginning of the IAP process to comply with the terms of the IRSSA and the CBA Guidelines. Subsequently, after her decision in the Blott application in this proceeding in November 9, 2012, Independent Counsel have agreed to comply in all cases with Madam Justice Brown's decision.

A. Privacy Provisions in Schedule N of the Settlement Agreement

6. The goals of the TRC are set out at paragraph 1 of Schedule N. These include:

Identify sources and create as complete an historical record as possible of the "IRS system and legacy". The record shall be preserved and made accessible to the public for future study and use;
Settlement Agreement, Schedule N, para 1(e)

7. This provision and s. 11 of Schedule N in the IRSSA are the bases for the request being made by the TRC. However, all activities of the TRC are subject to strict conditions for maintaining the privacy of all individuals. The use of any information which might identify an individual cannot be used in any way without his or her consent. Section 2 of Schedule N provides that the Commissioners:

(f) [...] Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings;

(g) shall not, except as required by law, use or permit access to statements made by individuals during any Commission events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted;

(h) shall not name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual. Other information that could be used to identify individuals shall be anonymized to the extent possible;

(i) notwithstanding (e) shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the

person making the statement of some wrong doing, unless the person named or identified has been convicted for the alleged wrong doing. The Commissioners shall not record the names of persons so identified, unless the person named or identified has been convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible;

(j) shall not, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's consent.

IRSSA, Schedule N, ss. 2(f), (g), (h), (i), (j)

8. Paragraph 11 of Schedule N is entitled "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 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.

...

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.

IRSSA, Schedule N, para 11(emphasis added)

9. The TRC's request for the documents would include material which names individual students and, at times, alleged perpetrators, including alleged perpetrators of student-on-student abuse. Indeed the documents sought by the TRC include those very documents which were used to compile such materials as the Report on Claimant Attendance at School and the Report on the Alleged Perpetrator.

IRSSA, Schedule D, Appendix VIII

10. The mandate of the TRC includes the responsibility to establish a research centre to ensure the preservation of the TRC archives. As it has developed, the research centre is the NCTR.

IRSSA, Schedule N, para 3(d)

11. Further provisions concerning the NCTR are found at para. 12:

A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all material created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and **taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records**, all materials collected through this process should be accessible to the public.

IRSSA, Schedule N, para 12. (emphasis added)

B. The Arrangements with the University of Manitoba

12. The documents and material collected by the TRC are "settled property" in accordance with a trust deed signed between the TRC and the University of Manitoba. An administrative agreement was signed by the TRC and the University of Manitoba to set out the ways in which the information would be archived and managed.

13. The Administrative Agreement sets out a series of provisions in a section entitled "Access and Privacy", which appears to have been developed without regard to the restrictions on access set out in the Settlement Agreement:

31. Subject to the below, the University will make the Settled Property as accessible to the public as possible.

32. The Mandate requires that the archives be preserved and accessed “subject to and in compliance with applicable privacy and access to information legislation”. To the extent possible under applicable legislation, records among the Settled Property will be made available to the public in an un-redacted form.

33. It is intended that the Settled Property, once under the control of the University, will be subject to *The Freedom of Information and Protection of Privacy Act* (Manitoba) (“FIPPA”), which is substantially equivalent to the federal *Access to Information Act* and *Privacy Act*. The University and the TRC will take all reasonable steps to work with the Government of Manitoba to ensure the records among the Settled Property are subject to FIPPA, and to **achieve any new statutes or amendments to legislation or regulations necessary to ensure that the Settled Property is not less accessible than it would be if it were held at Library and Archives Canada.**

34. **The Settled Property has not been reviewed by the TRC for the purposes as assessing which records or information can be made publicly accessible under applicable legislation.** Upon receipt of the Settled Property, the University will begin the task of reviewing the Settled Property to determine what records and information can be made publicly accessible in both un-redacted and redacted form under applicable legislation as soon as possible, with priority to be given to statements given to the TRC.

35. Those portions of the Settled Property which cannot be made generally accessible to the public may be made available to researchers in accordance with applicable legislation, appropriate ethics and other approvals, and in accordance with the requirements of the University.

36. Certain portions of the Settled Property, including records related to the IAP process under the Settlement Agreement, may be subject to particular confidentiality provisions, imposed by a court of competent jurisdiction, or otherwise. The University will use **all reasonable efforts** to protect such records in accordance with the confidentiality requirements.

Centre for Truth and Reconciliation, Administrative Agreement, paras. 31-36 (emphasis added)

14. The Administrative Agreement also provides that the University and the TRC will work with the Government of Manitoba to ensure the records among the Settled Property are subject to Manitoba’s *Freedom of Information and Protection of Privacy Act*, (“FIPPA”), and “to achieve” any new statutes or amendments to legislation or regulations necessary to ensure that the Settled Property is not less accessible than it would be if it were held at Library and Archives Canada. Key provisions of this new statute are set out below.

Centre for Truth and Reconciliation, Administrative Agreement, para. 33

C. The National Centre for Truth and Reconciliation Act

15. The *National Centre for Truth and Reconciliation Act* (“NCTR Act”), which sets out the privacy legislation applicable to the records housed in the NCTR, was assented to on June 30, 2015 and came into force on July 13, 2015. Notably it was not drafted or in force at the time of this Court’s *in rem* decision made on July 14, 2014 relating to IAP documents.

National Centre for Truth and Reconciliation Act, S.M. 2015, c. 2

16. The *NCTR Act* purports to authorize the Director of the NCTR to enter into written agreements with other persons, governments and entities respecting the collection of records and information from them which may include restrictions on disclosure of records or of information contained therein. However the Director is prohibited from agreeing to restrict disclosures in any agreement concerning records or information received from the TRC or any party to the IRSSA.

NCTR Act, ss. 6(1), 6(2), 6(3)

17. In fact, The Director of the NCTR is mandated to make **proactive** disclosure, and to disclose any personal information, including personal health information, contained in the records to the extent that he considers necessary to fulfill the mandate to ensure the availability of the records.

NCTR Act, s. 7

18. The *NCTR Act* authorizes the disclosure of information normally protected under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and the *Personal Health Information Act* (“PHIA”).

NCTR Act, s. 7(2); Freedom of Information and Protection of Privacy Act, C.C.S.M. c. F175, s. 44(1)(e); Personal Health Information Act, C.C.S.M. c. P33.5, s. 22(2) (o)

19. The Director must restrict the proactive disclosure of records and information if the disclosure would be an unreasonable invasion of an individual's privacy or if a court prohibits disclosure.

NCTR Act, s. 8(1)

20. In determining whether a proactive disclosure would be an unreasonable invasion of an individual's privacy, the Director must consider all relevant circumstances including whether the public interest in the disclosure clearly outweighs any invasion of privacy that could result from the disclosure. There is no restriction on the Director's discretion in this decision.

NCTR Act, s. 8(2)

21. The *NCTR Act* further provides that the person providing information has a right of access to it and that family members of an individual have the right to receive a copy of the information if the individual consents or, if the individual is deceased, if the Director believes that disclosing the information would not unreasonably invade the privacy of the deceased individual or another individual referred to in the record. A restriction imposed under s. 8 does not affect a request made under this section of the Act.

NCTR Act, s. 11

22. The restrictions on proactive disclosure do not affect a right of access under Part 2 of *FIPPA* or Part 2 of *PHIA*.

NCTR Act, s. 12(3))

D. The Harms Resulting if Personal or Identifying Information is Made Publicly Accessible

23. This Court, in the context of discussing IAP documents, has already found that the disclosure of personal information, including the disclosure of information regarding student-on-student abuse, would perpetuate the harm caused to aboriginal individuals and communities. Other courts dealing with the IRSSA have also noted the ease with which individuals in small aboriginal communities can be identified.

Fontaine v. Canada (Attorney General) [2014] O.J. 3638, paras. 214-224; see also *Fontaine v. Canada (Attorney General)* (2013) BCSC 1955, para. 33 (*per* Brown, J.);

III. ARGUMENT

A. The Settlement Agreement Protects Individual Privacy Interests

24. Paragraph 11 of Schedule N deals with allowing the TRC access to the documents held by Canada and the churches. Where such documents are subject to individual privacy interests, researchers for the TRC may have access **only if privacy is protected**. There is **no** right of access to these documents for the general public. These conditions were agreed to by the parties to the Settlement Agreement and were ordered by the nine Courts without the presence of the TRC which was subsequently created. These conditions are binding on all parties to the *IRSSA*, the TRC which is a creature of the Settlement Agreement, and to any successor of the TRC.

Settlement Agreement, Schedule N, para 11

25. Section 13 also provides that the Commission shall respect privacy laws and the privacy concerns of participants.

Settlement Agreement, Schedule N, para 13

26. The issue of Canada's obligation to provide documents to the TRC was canvassed by Goudge, J. of this Court. In discussing the first two sub-paragraphs of paragraph 11 of Schedule N, he found:

Third, it is not an issue that any obligation of Canada to provide documents from LAC is subject to the privacy interests of individuals, solicitor-client privilege, and cabinet confidentiality.

Fontaine v. Canada (Attorney General) 2013 ONSC 684, para. 67

27. In determining the extent of Canada's obligation to disclose documents to the TRC, Justice Goudge pointed out:

As applied to LAC [Library and Archives Canada], Canada's obligation is to provide relevant documents which all agree means documents relevant to the TRC's mandate. As the change to the Ontario *Rules of Civil Procedure* made on

January 1, 2010 demonstrates, this is a less expansive and more targeted obligation than one requiring provision of documents “related to” or “possibly relevant to” the TRC’s mandate. Just because an archived document mentions an Indian Residential School, does not mean that it must be provided.

In my view, relevant documents are those that are reasonably required to assist the TRC to discharge its mandate. Viewing the obligation through the lens of reasonableness is important, as counsel for the TRC acknowledged in argument. It is akin to the modulating concept of proportionality that now applies to document production in civil actions in Ontario, which recognizes that exhaustive production is antithetical to just outcomes.

Fontaine v. Canada (Attorney General) 2013 ONSC 684, paras. 79-80

28. After reiterating the importance of the examination of the TRC’s mandate to determining Canada’s obligation to provide documents, Justice Goudge found:

However, there are several provisions of the Settlement Agreement that would appear to be relevant to fixing the extent of this obligation. For example, section 1(e) charges the TRC with the goals of creating “as complete an historical record as possible of the IRS system and legacy”. This may suggest that something short of perfection is the objective. A second example is section 2(h). **Its prohibition on the TRC making use of personal information may also affect the extent of Canada’s obligation.**

Fontaine v. Canada (Attorney General) 2013 ONSC 684, para. 82 (emphasis added)

29. As found by Goudge, J. at paras 67 and 82 cited above, the extent of Canada’s obligation to provide documents to the TRC may stop short of requiring Canada to provide documents which are subject to the privacy interests of individuals.

B. No One is Protecting Individual Privacy Interests

30. Hundreds of thousands of pages of documents have already been turned over by Canada (and the Churches) to the TRC. It is unclear to what extent, if any, Canada and the Churches have acted to protect the privacy interests of the individuals mentioned in those documents either by refusing to turn over documents which engage individual privacy interests, or by ensuring that the documents are redacted and anonymized.

31. In the same manner, the TRC has not implemented conditions for the protection of individual privacy interests in regard to the information it has received despite the very clear obligations to do so set out in section 2 of Schedule N of the IRSSA. Instead, the TRC has simply turned over its documents to the University of Manitoba for deposit in the NCTR.

32. The TRC confirmed in the Administrative Agreement that it has not reviewed these documents for the purpose of assessing which records or information can be made publicly accessible, instead leaving the University of Manitoba (which houses the NCTR) to do so. In the written discovery, the TRC advises that it has taken no steps to do so. This, in and of itself, violates section 2 of Schedule N of the IRSSA.

Centre for Truth and Reconciliation, Administrative Agreement, para. 34; IRSSA, Schedule N, s. 2 (supra, para. 7)

33. The Administrative Agreement provides that certain portions of the Settled Property may be subject to particular confidentiality provisions imposed by a court of competent jurisdiction or otherwise. Nonetheless, the University only undertakes to use “all reasonable efforts to protect such records in accordance with the confidentiality requirements” but does not guarantee compliance.

Centre for Truth and Reconciliation, Administrative Agreement, para. 36

34. In addition, as can be seen by paragraph 34 of the Administrative Agreement, the only obligation of the NCTR or the University of Manitoba to respect individual privacy interests is “under applicable legislation”. There is no obligation expressed that the NCTR would be required to redact, anonymize or restrict access to records in accordance with Schedule N of the IRSSA. The absence of such a condition demonstrates the risks involved in transferring documents to the TRC, the NCTR or the University of Manitoba without a Court Order that specifically binds the TRC, NCTR and the University or any party in possession of these documents to the specific provisions of Schedule N of the Settlement Agreement

35. Although the TRC relies heavily on the special archival arrangements including representation of aboriginal peoples in the governing structures, no committee, no matter how expert and how well-intentioned, can be a substitute for individual consent to the release of personal information. In short, any agreement between Canada, the Church entities, the TRC,

the NCTR and/or the University of Manitoba cannot and should not be allowed to over-ride the obligation in the IRSSA that no use may be made of any documents which engage individual privacy interests without the express consent of the individual whose privacy interests are engaged.

36. Whatever the University of Manitoba's internal processes may be, the NCTR itself is governed by the *NCTR Act*. Any claim that the *NCTR Act* will protect individual privacy interests is belied by the very terms of that legislation which clearly violate the terms of the IRSSA.

NCTR Act, supra s. 6, 7, 8, 11, 12;

37. If documents are to be kept completely confidential forever, there is no point in depositing them in any archive. It is therefore safe to assume that any documents deposited with the NCTR will be disclosed at some point even if the individual never consented to the disclosure. As the *NCTR Act* provides for no real protection of personal information engaging privacy interests other than by way of a court order, such an order is required to ensure that the terms of the IRSSA will be respected.

38. Independent Counsel is the only Party to the Settlement Agreement who, on this application, is speaking on behalf of the Claimants and the alleged perpetrators of student on student abuse. As a result, Independent Counsel are appearing on a *pro bono* basis and seek costs of this Application in any event of the result.

IV ORDER SOUGHT

1. The following conditions apply to all information in the possession of Canada and the Church Entities and that transferred from Canada or the Church Entities to the TRC, the NCTR or any other archive and to all information received by the TRC and the NCTR.

2. The use of all such information, for any purpose, is subject to the privacy interests of individuals. Where such privacy interests exist, researchers for the TRC or NCTR may have access to the documents, providing privacy is protected.
3. No one shall make any reference in any manner whatsoever to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings.
4. No one shall, except as required by law, use or permit access to statements made by individuals during any TRC or NCTR events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted.
5. No one shall name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual. Other information that could be used to identify individuals shall be anonymized to the extent possible.
6. In obtaining statements from individuals, the TRC and the NCTR shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the person making the statement of some wrong doing, unless the person named or identified has been convicted for the alleged wrong doing. The TRC and the NCTR shall not record the names of persons so identified, unless the person named or identified has been convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible.
7. No one shall, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's consent.

8. Costs of Independent Counsel for participation in this Request for Directions to be paid by the Applicants or by Canada as this Court may direct.

All of which is respectfully submitted,


Dated at Vancouver, British Columbia this 19th day of November, 2015.



Peter R. Grant,



Diane Soroka,



Sandra Staats
all on behalf of
Independent Counsel