

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**LARRY PHILIP FONTAINE, *et al.***

Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA, *et al.***

Defendants/Respondents

**IN THE MATTER OF THE REQUEST FOR DIRECTIONS  
BY DR. EDMUND METATAWABIN  
AND BY IAP CLAIMANTS T-00185, S-20774 AND S-16753  
PERTAINING TO ST. ANNE'S INDIAN RESIDENTIAL SCHOOL**

Requestors/Appellants

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

**AMENDED APPELLANTS' FACTUM**

**APPEAL OF IRSSA DIRECTION  
OF HONOURABLE JUSTICE PERELL  
DATED JUNE 5, 2020**

July 24, 2020

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16753 on this Appeal

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## APPELLANTS' FACTUM

### PART I - OVERVIEW

1. The Appellants appeal the Direction (Order) of the Honourable Paul Perell, sitting as the Eastern Administrative IRSSA Supervising Judge under the Indian Residential Schools Settlement Agreement (IRSSA)<sup>1</sup>, dated June 5, 2020 ("Order Under Appeal"). In the Order Under Appeal, Justice Perell recused himself from hearing the Request for Directions (Metatawabin RFD #2). Justice Perell proceeds to transfer Metatawabin RFD #2, brought by the Appellants in the Ontario Superior Court of Justice (ONSC) to another court, the British Columbia Supreme Court (BCSC), rather than asking the Chief Justice of ONSC to appoint another ONSC judge.
2. The Appellants are all residents of Ontario and former residential school students who suffered sexual and physical abuse as children at St. Anne's Indian Residential School (St. Anne's), formerly operated in Fort Albany, Ontario. Dr. Metatawabin has devoted almost 30 years of his life seeking justice for survivors of St. Anne's. The six First Nations, from which children were sent to St. Anne's, are all located in Northern Ontario. There are no connections to British Columbia for the Appellants or for the subject matter of Metatawabin RFD #2.
3. The nature of the relief sought in Metatawabin RFD #2 is the enforcement of two ONSC Orders dated January 14, 2014 and June 23, 2015 (St. Anne's ONSC Orders) for IAP Claims concluded when Canada was in breach of its IAP disclosure/report obligations.
4. The ONSC Reasons on January 14, 2014<sup>2</sup> concluded Canada was in breach of the mandatory IRSSA disclosure/report obligations and stipulated remedial disclosure/reports required by the Attorney General of Canada ("Canada") for St. Anne's IAP claims, and that the revised disclosure placed "no new burden" on Canada for IAP claims. The ONSC Order retained

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<sup>1</sup> [\*Indian Residential Schools Settlement Agreement \(IRSSA\)\*](#), *Book of Authorities of Appellants (BoA) Tab 1*.

<sup>2</sup> [\*Fontaine v. Canada \(Attorney General\)\*](#), [\*2014 ONSC 283\*](#) (St. Anne's RFD #1), *BoA, Tab 3, para 208 - 232*

exclusive jurisdiction of the Court to reopen concluded IAP claims.

5. On June 30, 2014, Canada filed 12,300 additional documents containing allegations of child abuse, were produced *en masse* to the Secretariat. On June 23, 2015, Justice Perell further ordered the required form and substance of the revised narrative and Persons of Interest (POI) reports on this additional evidence for St. Anne's IAP claims, and that no redactions were permitted for public court documents<sup>3</sup>.

6. From 2015 until 2018, RFD's were brought by St. Anne's IAP claimants before Justice Perell in the ONSC, seeking to reopen concluded IAP claims<sup>4</sup>. The RFD's were never heard on the merits, because preliminary objections were always made by Canada. Canada never filed the original and revised reports/documents with the Court, to permit Justice Perell to exercise the Court's exclusive jurisdiction to reopen for new evidence. Justice Perell repeatedly accepted Canada's arguments that "exceptional circumstances" did not exist to provide judicial jurisdiction, that claimants did not have standing, or that RFD's to reopen for fresh evidence were premature until the claimant exhausted IAP reviews.

7. A major correction in Justice Perell's findings, which accepted Canada's preliminary objections, has come from the Supreme Court of Canada in *J.W. v Canada (Attorney General)* 2019 SCC 19<sup>5</sup>, which held that new, material evidence for an IAP claim comes within "exceptional circumstances", and IAP claimants can seek judicial intervention to determine whether to reopen for new evidence (para 26-32 and 142-146). Finality of an IAP claim is subject to compliance (para 34). The Courts have a duty to ensure that IAP claimants receive the benefits they bargained for in the IAP (para 30 and 190).

8. Six affiants in Metatawabin RFD #2 are former students of St. Anne's, and each IAP claim

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<sup>3</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2015 ONSC 4061](#) (St. Anne's RFD #2), BoA, Tab 4

<sup>4</sup> [\*IRSSA, Schedule D\*](#) ("IAP Model") BoA, Tab 2

<sup>5</sup> [\*J.W. v Canada \(Attorney General\)\* 2019 SCC 20](#), BoA, Tab 5

was concluded when Canada was in breach of his/her IAP hearing process. Canada has never filed and continues to refuse to file, the revised reports/documents with the Secretariat for them.

9. Recently, Canada admitted on **June 25, 2020**, that Canada has not filed revised reports and documents for each St. Anne's IAP claim concluded when Canada was in breach of disclosure/report mandatory obligations<sup>6</sup>. Canada has never sought directions from the Court on its self-serving interpretation of the ONSC Order of January 14, 2014, nor revealed this fact in previous St. Anne's RFD's and appeals. Canada seeks to Dismiss/Strike Metatawabin RFD #2 as being abuse of process. Effectively, with Canada's admission, the question for the ONSC is whether Canada is in contempt of the two St. Anne's ONSC Actions.

10. The Chief Adjudicator decided in two St. Anne's Re-review Decisions in 2017, that adjudicators have no power to compel Canada to comply with revised St. Anne's disclosure/reports, only the Courts do. The Chief Adjudicator has not brought this gap to the Supervising Courts to be filled. Instead, the Chief Adjudicator filed an RFD to end the IAP process, which "Sunset RFD" is being heard by Madam Justice Brown of the BCSC, the Western Administrative Judge of IRSSA. An Order of Madam Justice Brown dated May 29, 2020 will permit destruction of all IAP claim documents by Canada in the near future.

11. There is civil litigation in the ONSC, brought by St. Anne's IAP claimants, seeking damages from Canada for breach of the IRSSA, and damages for solicitor negligence of law firms who also had prior possession of the 12,300 additional documents, and who represented St. Anne's IAP claimants. This Honourable Court found in April 2020<sup>7</sup> that Canada and law firms are not released under the IRSSA release, for those separate causes of action.

12. The Order Under Appeal, which transfers Metatawabin RFD #2 to BCSC, will block

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<sup>6</sup> *Canada's RFD to Dismiss/Strike Metatawabin RFD #2 for abuse of process, paragraphs 23 and 34 – Appeal Book and Compendium (ABC), Tab 8, pages 0097 and 0100*

<sup>7</sup> [Claimant H-15019 v Wallbridge and Canada, 2020 ONCA 270](#) – BoA, Tab 6

enforcement of ONSC Orders, because a Judge of the BCSC has no jurisdiction to enforce non-monetary Orders of the ONSC for residents of Ontario.

## **PART II - THE FACTS:**

### **A) St. Anne's Indian Residential School**

13. St. Anne's was a Catholic church institution where generations of Indigenous children suffered unspeakable physical and sexual abuses, at the hands of those charged with their care<sup>8</sup>. Attendance was mandatory under Canada's then Indian Residential School Policy.

14. In 1992, Chief Edmund Metatawabin of Fort Albany First Nation (Dr. Metatawabin), led the "Keykaywin Conference" which began the process for survivors' stories of abuse. From 1992 to 1996, the Ontario Provincial Police (OPP) conducted a special investigation into child abuse at St. Anne's, in which the police collected over 700 Survivors' signed statements and seized church documents under court search warrants<sup>9</sup>. **(OPP Documents)**

15. Eight adult former supervisors were then criminally charged, tried and some were convicted in public court proceedings, based on testimonies from St. Anne's survivors, for sexual or physical abuse suffered when they were children at St. Anne's. **(Criminal Documents)**

16. Over 150 St. Anne's Survivors sought civil compensation in ONSC civil actions prior to the IRSSA. The 150+ plaintiffs, represented by Wallbridge Wallbridge (Wallbridge), served their ONSC pleadings and other civil documents on, and the plaintiffs' testimonies were tested in examinations for discovery, by Department of Justice lawyers (DOJ) representing Canada, and by Nelligan O'Brien Payne (Nelligan) representing the Catholic church entities<sup>10</sup>. **(Cochrane ONSC Documents)**

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<sup>8</sup> [St. Anne's RFD #1](#), para 105 – 118, BoA, Tab 3

<sup>9</sup> *Affidavit of Edmund Metatawabin, sworn May 11, 2020, (Metatawabin Affidavit) para 103 - 109, Appeal Book and Compendium (ABC), Tab10, Pages 0135 - 0136*

<sup>10</sup> St. Anne's revised Narrative confirms Notices Of Change of Solicitors for the Catholic church entities were filed in ONSC in February 2004, with Heenan Blaikie replacing Nelligan O'Brien Payne.

17. DOJ lawyers brought a motion on consent and obtained an ONSC Order dated August 1, 2003 from Justice Trainor<sup>11</sup>, which granted all the lawyers full access to the OPP Documents, and to copy any document that pertained to 150+ plaintiffs and/or 180 named alleged perpetrators. The affidavit in support of the motion from a DOJ lawyer<sup>12</sup>, confirmed the nature of Cochrane ONSC Actions was seeking damages for sexual and physical abuse at St. Anne's while they were children.

18. From 2000 to 2004, another 100+ St. Anne's Survivors led by Dr. Metatawabin, negotiated for civil compensation with DOJ and Nelligan in a pilot ADR project, without any settlements.

19. DOJ lawyers therefore had the Criminal Document, ONSC Civil Documents, and access to all the OPP Documents containing details about child abuse, prior to the IRSSA being signed.

20. None of the civil actions went to trial. Some plaintiffs settled, and some proceeded to Canada's voluntary ADR process and/or the IAP process, which began in early 2007. Canada advised in St. Anne's RFD #1 that about 500 St. Anne's survivors applied for IAP compensation.

21. These documents containing details about child abuse and about the alleged perpetrators were withheld by DOJ<sup>13</sup> and not filed with the IRSSA Secretariat until June 30, 2014.

### **B) Use of Canada's Reports and Documents in IAP Claims**

22. Dr. Metatawabin was appointed to the working committee that hired IAP adjudicators. His understanding was that all the documents about child abuse gathered/generated through the Ontario justice system, outlined above, were to be disclosed into the IAP process. He did not apply for IAP compensation so he could maintain a neutral leadership role for survivors<sup>14</sup>.

23. In exchange for forfeiting the right to sue in the Superior Courts for child abuse, the

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<sup>11</sup> ONSC Order of Justice Trainor dated August 1, 2003 which is Exhibit D, Metatawabin Affidavit, ABC, Tab 10 - D, page 0148

<sup>12</sup> Affidavit of Hanya Shiehk sworn June 26, 2003 which is Exhibit E, Metatawabin Affidavit, ABC, Tab 10 - E, pages 0197 - 0222

<sup>13</sup> [St. Anne's RFD #1](#), BoA, Tab 3, para 117 and 118

<sup>14</sup> Metatawabin Affidavit - ABC, Tab 10, para 112, page 0137

Supreme Court of Canada has confirmed that each IAP claimant is entitled to compliance with the IAP hearing process, and the Court have a duty to enforce the IRSSA<sup>15</sup>.

24. IAP Claimants are entitled to receive a fair hearing, in which Canada and IAP claimant must fulfill their mandatory report/document production obligations. The Secretariat maintains the confidential data base, through which the parties exchange documents and the hearing adjudicator receives the documents/reports. The Secretariat and Canada have access to every IAP claim, whereas each IAP claimant has access only to his/her own IAP claim. Claimant counsel have access only to their own clients' IAP claims. Claimants can self-represent.

25. Canada creates the evidentiary foundation for every IAP claim. Under Appendices IV and VIII<sup>16</sup>, IAP Model, Canada accepted the obligation to make advance disclosure of relevant documents in its possession to the Secretariat, and in particular, all documents that contain "allegations of abuse". The full collection of documents for each Indian Residential School (IRS) form the factual foundation for the "Narrative" for that IRS. Each document that pertain to an alleged abuser, called the Person of Interest (POI), is to be collected and summarized into a POI report. Canada is obliged to file with the Secretariat, the narrative and the POI reports for every POI named by that IAP claimant plus the documents<sup>17</sup>. Narratives and POI reports was a hard-bargained-for obligation that Canada agreed to undertake<sup>18</sup>.

26. The hearing adjudicator is obligated to receive and review the Narrative and applicable POI reports prior to questioning the claimant in each IAP hearing process. Adjudicators, claimants/claimant counsel are entitled to rely upon Canada's document collections as providing *modus operandi* evidence by a particular POI, or to corroborate the credibility/reliability of

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<sup>15</sup> [J.W. v Canada \(Attorney General\)](#), *supra* note 5 BoA, Tab 5, para 30, 32, 35 and 162

<sup>16</sup> [IAP Model](#), BoA, Tab 2, Appendix IV at page 23 and Appendix VIII at page 30

<sup>17</sup> [IAP Model](#), BoA, Tab 2, Appendix X, Section 3 pages 40 - 41

<sup>18</sup> [St. Anne's RFD #2](#), BoA, Tab 4, para 66 - 68



claimant testimony such as confirming the dates, positions, name, nickname, of POIs, etc. Adjudicators are entitled to make findings of fact and credibility based on Canada's reports and documents, even if Canada contests a document<sup>19</sup>.

27. The adjudicator and the claimant/claimant counsel were entitled, in each IAP hearing process, to reasonably assume that Canada had fulfilled its disclosure obligations under the IRSSA, and that each POI report was an accurate summary of all the relevant documents about that POI.

### **C) Breach of IRSSA by Canada for St. Anne's IAP claims**

28. Starting in 2013, Edmund Metatawabin and 60 St. Anne's IAP claimants brought an RFD in the ONSC, and successfully challenged Canada for not disclosing evidence about child abuse (St. Anne's RFD #1)<sup>20</sup>. Until then, Canada's Narrative reported to adjudicators and claimant counsel that there were no documents about sexual abuse and no documents about student on student abuse at St. Anne's.

29. Justice Perell found Canada had misinterpreted its disclosure obligations and ordered revised disclosure/reports, that imposed "no new burden" on Canada. The ONSC Order of January 14, 2014 maintains exclusive jurisdiction to the Court to reopen concluded St. Anne's IAP claims. By June 30, 2014, Canada was to file criminal transcripts, OPP documents and ONSC civil documents with the Secretariat, and by August 1, 2014, Canada was to file revised narrative and POI reports for the IAP<sup>21</sup>. St. Anne's RFD #1 was not appealed.

30. In St. Anne's RFD #1, the evidence established that officials in DOJ<sup>22</sup> had possession of these documents but did not give them to officials in AADNC, the latter of whom did the filings and reports for the IAP. Justice Perell found that the Court did not have to determine whether

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<sup>19</sup> [IAP Model](#), BoA, Tab 2, Appendix X, Section 3 at pages 40-41

<sup>20</sup> [St. Anne's RFD #1](#), BoA, Tab 3

<sup>21</sup> ONSC Order January 14, 2014, ABC, Tab 5, para. 6, 7 and 8, page 0056

<sup>22</sup> [St. Anne's RFD #1](#), BoA, Tab 3, para. 117 and 118,

there was bad faith on the part of Canada:

*[213] Canada has too narrowly interpreted its disclosure obligations. I do not need to decide whether Canada did this in bad faith, and I rather assume that its officials mistakenly misconstrued their obligations and misread the scope of their obligations. That said, in my opinion, there has been non-compliance, and Canada can and must do more in producing documents about the events at St. Anne's.*

31. With respect to concluded IAP claims about child abuse at St. Anne's, when Canada was in breach of the IRSSA, Justice Perell communicated the following to Canada:

**5. May the Court Direct the Re-opening of Settled IAP Claims on the Grounds of Canada's Breach of its Disclosure Obligations?**

*[224] The above orders should resolve any problems associated with Canada's failure to comply with its disclosure obligations concerning the Narratives and POI Reports for St. Anne's, but the Applicants' RFD raises the question of whether the court may direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations.*

*[225] In my opinion, the answer to this question is yes. The court does have the jurisdiction to re-open settled claims but that jurisdiction must be exercised on a case-by-case basis.*

*[226] If truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's request for forgiveness for failing our Aboriginal peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRSSA provides both procedural and substantive access to justice...*

32. Following that decision, on June 30, 2014, Canada made a disorganized dump of 12,300 documents (40,000 pages) about sexual and physical abuse of St. Anne's children.<sup>23</sup>

33. The 12,300 documents were the OPP Documents, Criminal Documents and Cochrane ONSC Documents, outlined above. The revised document disclosure provided details of widespread sexual and physical abuse of children, by multiple pedophiles and physical abusers at St. Anne's, over many decades. The additional documents also first revealed church documents, seized by the OPP under search warrants, that provided proof of dates, positions, names,

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<sup>23</sup>[St. Anne's RFD #2](#), BoA, Tab 4, para. 27, pages 0065 - 0074

nicknames, etc of many adult POI's at St. Anne's.

34. Canada was ordered to produce revised narrative and POI reports by August 1, 2014 for the IAP. However, a second ONSC Order was sought and issued on June 23, 2015 stipulating the required form and contents of the revised narrative and POPI reports for St. Anne's, and reducing redactions (St. Anne's RFD #2)<sup>24</sup>. Due to redactions and volume, the only way for adjudicators and claimant counsel to find the documents for an POI, is Canada's revised POI reports.

35. Canada's Narrative for St. Anne's went from 12 pages in 2013 and which stated there were no documents about sexual abuse, to over 1000 pages in 2015 and which organized the documents about abuse by each child, correlating the OPP Documents, Criminal Documents and ONSC pleadings. Note that OSNC pleadings were first produced by Canada until June 30, 2014.

36. The POI reports drastically changed after St. Anne's RFD #2, in unresolved claims being handled by Appellant counsel, Brunning. For example, Canada finally compiled the documents, and provided a 50 page summary about an electric chair that supervisors built and used to torture children. In 2018 and 2019, IAP claimants represented by Brunning, were ultimately awarded compensation by adjudicators for being put into the electric chair by supervisors. After revised disclosure, adjudicators began to compensate claimants represented by Brunning, who were forced to eat their own vomit by a nun. That nun had been criminally convicted for that child abuse, but the criminal trial transcripts and the medical expert evidence accepted by the jury to convict the nun, had been withheld by DOJ until St. Anne's RFD #1. Some POI's, whom AADNC officials claimed were unknown before St. Anne's RFD #1, were thereafter confirmed in revised POI reports, to have been present at St. Anne's.

37. However, the Chief Adjudicator had directed in February 2014, that adjudicators would not permit adjournments as of right to St. Anne's IAP claimants, to await revised disclosure to

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<sup>24</sup> [St. Anne's RFD #2](#), BoA, Tab 4 and ONSC Order dated June 23, 2015 ABC, Tab 6, page 0061 - 0063

adjudicators and claimants. Claimant counsel could reserve the right of each St. Anne's claimant to still receive revised disclosure/reports owed by Canada if the claim did not conclude immediately. If the claimant was believed by the adjudicator, and if Canada agreed to pay the IAP claimant for the worst incident of abuse and for the highest level of harm, and if the IAP claimant decided to conclude without revised disclosure from Canada, that decision of the IAP claimant was finalized. Many awaited revised disclosure.

#### **D) RFD's to Reopen Concluded St. Anne's IAP Claims**

38. From November 2015 until January 2018, Appellant counsel filed several RFD's to reopen concluded IAP claims. Those St. Anne's claimants filed sworn affidavits for Justice Perell, to prove Canada had not filed revised reports/disclosure with the Secretariat for his/her IAP claim.

39. At no time, (until June 25, 2020) did Canada admit it interpreted the Order of January 14 2014 to exclude revised reports/documents for concluded IAP claims. Instead, Canada raised preliminary objections to every RFD, and Justice Perell never heard any St. Anne's RFD to reopen on its merits. Justice Perell never received the original and revised reports/documents from Canada for the IAP claim that was the subject of the RFD. Justice Perell never exercised the Court's exclusive jurisdiction to determine whether to reopen for fresh evidence.

40. Justice Perell first received the RFD of St. Anne's **Claimant H-15019** in November 2015, whose claim had been denied in 2014 in the absence of Canada's revised evidence. Canada made a preliminary objection, asserting that H-15019 had to first exhaust re-review, and Canada promised to file the revised reports/documents for consideration by the re-review adjudicator<sup>25</sup>. Justice Perell accepted Canada's legal position. That Order actually constituted an amendment to the IAP, because "new evidence" is prohibited for review and re-review under the IAP Model<sup>26</sup>,

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<sup>25</sup> [\*Claimant H-15019 and Fontaine v. Canada \(Attorney General\)\*, 2016 ONSC 4328](#), para 59-64. (*Claimant H-15019 RFD*), BoA, Tab 7

<sup>26</sup> [\*IAP Model\*](#), BoA, Tab 2, page 14, para 1 (v)

plus the Court had exclusive jurisdiction to reopen. The SCC has since confirmed that the remedy for new material evidence is a rehearing by an adjudicator, given there is no new evidence on reviews<sup>27</sup>. Claimant H-15019 sought re-review. Canada opposed reopening and opposed the admissibility of all new evidence. Canada objected as “untested” the ONSC pleadings relied upon by H-15019, that supported his previous testimony. Canada argued those plaintiffs had to testify before an IAP adjudicator before those pleadings could be accepted as true. The Chief Adjudicator granted re-review, ordered a rehearing on the revised POI report alone, but did not rule on Canada’s objections. The Chief Adjudicator found that adjudicators do not have the power to compel mandatory disclosure from Canada, only the Courts do<sup>28</sup>.

41. Justice Perell received an RFD in March 2016 from Mushkegowuk Council, Dr. Metatawabin, St. Anne’s IAP claimant K-10106 and others with concluded claims (**Metatawabin RFD #1**). Due to professional misconduct allegations therein, on consent, Justice Perell granted intervenor status to Wallbridge and Nelligan<sup>29</sup> on December 14, 2014. Justice Perell also ordered he would hear Canada’s preliminary objections on March 24, 2017. Canada asserted the Requestors had “no standing” to bring an RFD<sup>30</sup>, and/or there was no jurisdiction because new evidence did not come within “exceptional circumstances. Canada’s preliminary objections were accepted, without Canada being required to first provide disclosure to the Court of the original and revised reports/documents for the concluded IAP claims before the Court. The merits of Metatawabin RFD #1 were never heard by Justice Perell, and Canada never revealed during Metatawabin RFD #1 that Canada had in fact, not filed the revised reports/documents for all

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<sup>27</sup> [\*J.W. v Canada \(Attorney General\)\*](#) *supra* note 5, BoA, Tab 5, para 27, pages 0139 - 0145

<sup>28</sup> *Metatawabin Affidavit, Exhibit F, Re-review Decision H-15019, para 37 and footnote 10, ABC, Tab 10 – F, page 0237*

<sup>29</sup> *Affidavit of Claimant K-10106, ABC, Tab 14, pages 0413 - 0419 and Supplementary Affidavit of Claimant K-10106, ABC, Tab 15, pages 0420 - 0427*

<sup>30</sup> [\*Metatawabin, Claimant K-10106 and Fontaine v Canada \(Attorney General\) 2017 ONSC 2487\*](#) (*Metatawabin RFD #1*), BoA, Tab 8

concluded IAP claims.

42. Justice Perell also received an RFD to obtain the revised reports/documents and to reopen from St. Anne's **Claimant C-14114** in November 2016, but he declined to exercise the Court's jurisdiction, based on his previous finding that claimants must first exhaust review and re-review. However, Canada refused to file the revised POI reports and documents during review. The review adjudicator reopened on the basis of procedural fairness (because the original adjudicator did not adjourn to await possible future admissions by Canada). Canada sought re-review in 2017. The Chief Adjudicator reopened in August 2017, but only for student on student abuse admissions by Canada since 2013. Again the Chief Adjudicator found that adjudicators have no power to compel mandatory disclosure from Canada, only the courts do<sup>31</sup>.

43. Because during re-review of IAP Claim H-15019, Canada had claimed the ONSC pleadings were "untested" or that each plaintiff had to testify again in the IAP, before the ONSC pleadings could be found to be true, Brunning challenged Canada's position to Justice Perell. In a case conference on February 7, 2017, DOJ then admitted to Justice Perell that DOJ were in possession of transcripts of examinations for discovery for the ONSC civil pleadings listed as supporting evidence by Claimant H-15019. DOJ then claimed that the testimonies of St. Anne's plaintiffs could not be released because the plaintiffs, church and Canada had agreements for "settlement privilege" over those testimonies. Claimant H-15019, not Canada, was given the burden of proving that "transcripts of civil proceedings", in the Order of January 14, 2014, included transcripts of examinations for discovery<sup>32</sup>. Justice Perell accepted Canada's responding arguments without any evidence, and Wallbridge was served but did not context Canada's position about "settlement privilege". In his decision of April 24, 2017, Justice Perell accepted Canada's

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<sup>31</sup> *Metatawabin Affidavit, Exhibit G, Re-review Decision C-14114, para 143-146, ABC, Tab 10 – G, page 0274 - 0275*

<sup>32</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2017 ONSC 1149](#), BoA Tab 9

assertion and also found the deemed undertaking applied to all portions of those transcripts.

44. Claimant H-15019 was compelled to proceed to his re-hearing, despite his appeal. Some of the Cochrane ONSC plaintiffs agreed to testify, and each confirmed he/she had been tested and had been paid a settlement by Canada. Only after the plaintiffs agreed to testify did Canada agree to pay compensation. At the re-hearing, H-15019 was permitted to adopt his former testimony by the adjudicator, who had reviewed the revised reports/documents. H-15019 was found to have suffered SL5 abuse, H4 level of harm, and he was granted compensation of \$183,000.

45. Canada subsequently withdrew its settlement privilege position in the ONCA, during oral argument in March 2018. However, in July 2017 Justice Perell and Canada had received the **RFD of Angela Shisheesh**, a lead plaintiff in the Cochrane ONSC Actions. Between July 2017 and February 2018, five St. Anne's plaintiffs who had been represented by Wallbridge, each filed affidavits denying he/she had given control over their testimony to the Government and church during settlements<sup>33</sup>. The ONCA found<sup>34</sup> that the deemed undertaking applied to the transcripts of examinations for discovery, that Claimant K-10106 did have standing and that Dr. Metatawabin likely had standing, but the ONSC declined to grant the request to reopen all St. Anne's IAP claims. Canada had never responded to the merits of Metatawabin RFD #1.

46. Unknown to Dr. Metatawabin and Appellant counsel, an **RFD of St. Anne's Claimant T-00178** was sent to British Columbia in 2017. Claimant T-00178 was represented on March 22, 2017 by Wallbridge in BCSC, while at the same time in ONSC, Wallbridge was responding to professional conflict allegations from H-15019 and Dr. Metatawabin. In the BCSC, Canada asserted to Justice Brown<sup>35</sup>, that the new evidence for St. Anne's was "progressive disclosure"

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<sup>33</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2018 ONSC 103](#) (BoA Tab 10) and [\*Fontaine v. Canada \(Attorney General\)\*, 2018 ONSC 3957](#) ("Shisheesh RFD") (BoA Tab 11)

<sup>34</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2018 ONCA 421](#) (BoA Tab 12).

<sup>35</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2017 BCSC 946](#), para 76-82 (BoA Tab 13)

(whereas it was breach of the IRSSA by Canada). Justice Brown had no involvement in St. Anne's RFD #1 or #2 and Canada's position was not disputed by Wallbridge. Justice Brown accepted it was "progressive disclosure" for St. Anne's which meant there were inconsistent decisions in ONSC and BCSC for St. Anne's. Moreover, Canada asserted that Wallbridge itself authored the 2001 pleading raised as new evidence for T-00178. Justice Brown agreed that Claimant T-00178 could not claim it was new evidence if Wallbridge had that evidence at the time of the IAP hearing<sup>36</sup>. Brunning was retained by Claimant T-00178 in late July 2017, when he became aware of Metatawabin RFD #1, and Claimant T-00178 brought a motion for extension of time to appeal which was denied, in part because Canada relied on Justice Brown's finding of "progressive disclosure". Canada never produced for Justice Brown the original and revised reports/documents for IAP claim T-00178, and Canada did not make similar objections to standing/jurisdiction in the BCSC on March 22, 2017 that Canada made in the ONSC on March 24, 2017.

47. Canada further relied on Justice Brown's inconsistent finding of "progressive disclosure" for St. Anne's in **Canada's RFD on Procedural Fairness** heard in the BCSC on December 1, 2017. Therein, Canada challenged the Chief Adjudicator's Re-review Decisions that reopened St. Anne's IAP claims H-15019 and C-14114. Canada challenged other re-review decisions beyond St. Anne's. Brunning filed evidence, written and made oral arguments on December 1, 2017, to prove Canada was in breach of the IRSSA for St. Anne's claims and to correct that inconsistent findings. Brunning advised Justice Brown that Canada was also in contempt of the two ONSC Orders by failing to file revised reports/evidence for Claimant C-14114, and she asked Justice Brown to grant the Chief Adjudicator the power to compel Canada to file mandatory reports/documents<sup>37</sup>. Justice Brown accepted Canada's arguments, and found "progressive

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<sup>36</sup>*Fontaine v. Canada (Attorney General)*, 2017 BCSC 946, BoA Tab 13, para 79

<sup>37</sup>*Affidavit of Suzanne Desrosiers*, sworn June 3, 2020 (*Desrosiers Affidavit*), ABC, Tab 18 – S, pages 0513 - 0529



disclosure” by Canada, including for these St. Anne’s IAP claims<sup>38</sup>.

48. That inconsistent “progressive disclosure” finding in the BCSC was finally corrected by the British Columbia Court of Appeal (BCCA) in July 2019<sup>39</sup>. The BCCA confirmed that Canada was in breach of the IRSSA for St. Anne’s IAP claims H-15019 and C-14114, and it was not after acquired evidence by Canada.

49. In the ONSC, Brunning had asked for return of RFD of C-14114 to seek revised reports/documents, for the court to provide power to the Chief Adjudicator and for the Court to exercise its exclusive jurisdiction to reopen. Brunning also had brought the RFD of Shisheesh, in which Shisheesh and other former plaintiffs disputed “settlement privilege” asserted by Canada in March 2017, without their knowledge. Canada again raised preliminary objections to standing of C-14114 and Shisheesh to bring RFD’s and objections that the court had no jurisdiction. On December 13, 2017, Brunning retained Margaret Waddell to appear with Brunning before Justice Perell. In oral argument<sup>40</sup>, Ms. Waddell and Brunning both addressed the importance of Canada filing the revised POI reports/documents for Claim C-14114 for the upcoming rehearing (which was ordered by the Chief Adjudicator but only for admissions made since 2013 by Canada for student on student abuse). DOJ, as confirmed in the transcripts, asked Justice Perell to address the “outrageous allegations” of Brunning that Canada was in contempt of the two St. Anne’s ONSC Orders, but he responded that he would need to do a forensic review, and could only do so if he agreed the RFD could proceed.

50. Justice Perell then dismissed the RFD of C-14114, and found it was “premature”<sup>41</sup>. Justice Perell did not exercise the Court’s exclusive jurisdiction to reopen and even though he did not seek

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<sup>38</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2018 BCSC 63](#), BoA, Tab 14, para 104

<sup>39</sup> [\*Independent Counsel and Fontaine v. Canada \(Attorney General\)\*, 2019 BCCA 269](#), BoA 15, para 42-44 and 55

<sup>40</sup> *Desrosiers Affidavit, Transcript of the ONSC Hearing December 13, 2017, ABC, Tab 18 – T, pages 0550 - 0622*

<sup>41</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2018 ONSC 103](#), BoA, Tab 10, para. 70 and 190

evidence from Canada to determine if there was contempt of the two St. Anne's ONSC Orders, he found the allegations were not true. Justice Perell also found that Shisheesh had standing to seek some but not all the relief in the RFD of Shisheesh.

51. In the Reasons of January 4, 2018, Justice Perell did not rule on whether Canada had to file revised POI reports/documents for the re-hearing scheduled for January 19, 2018. Brunning engaged in further communications to attempt to have the two ONSC Orders enforced against Canada for the rehearing<sup>42</sup>. Claimant C-14114, Shisheesh, Metatawabin and other Indigenous people held a national press conference in Ottawa on January 15, 2018, calling upon Minister Bennett to compel her officials to abide by the Orders.

52. On January 15, 2018, Claimant participated in a national press conference with Shisheesh, Metatawabin and other Indigenous leaders, calling upon Minister Bennett to compel her officials to file the revised reports and agree to reopen St. Anne's concluded claims. Later that same day, Justice Perell issued an ONSC Order, ordering Claimant C-14114 to proceed to her rehearing. The rehearing proceeded without Canada's revised St. Anne's reports/documents. Claimant C-14114 was then diagnosed with cancer. In March 2018, she was awarded some compensation, but she did not want to endure any more litigation and she and her family needed the money. Sadly, Claimant C-14114 died in March 2020.

53. Another counsel brought an RFD before for St. Anne's IAP claimant C-10290 seeking the fresh evidence about the electric chair, which was dismissed on Canada's argument that there were no exceptional circumstances<sup>43</sup>.

54. Also on January 15, 2018, without notice or any legal process, Justice Perell severely criticized Brunning, including for her facts and argument on December 1, 2017 before Justice

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<sup>42</sup> Brunning affidavit is contained in the Divisional Court Files 084/19, 110/19 and 111/19, in [Brunning and Fontaine v. AGC, 2020 ONSC 1003](#), BoA, Tab 16.

<sup>43</sup> [Fontaine v. Canada \(Attorney General\), 2018 ONSC 6893](#), BoA, Tab 17

Brown, and for her facta and argument on December 13, 2017 before Justice Perell<sup>44</sup>. Thereafter, Canada sought costs against Brunning personally. For two years, Brunning was represented by Lawrence Greenspon who brought forward motions, appeals and made written and oral arguments. Brunning and Metatawabin were completely immobilized/demoralized until the SCC decision in April 2019.

55. On February 11, 2020, in the hearing in Divisional Court, Lawrence Greenspon argued that proper Crown disclosure is a critical element of the justice system, and these St. Anne's matters pertain to child abuse. The panel queried whether, similar to Claimant C-14114, Canada had not filed revised reports/disclosure for other St. Anne's claimants. DOJ did not respond to that query and never revealed Canada's narrow interpretation of the Order of January 14, 2014.

56. Divisional Court found on February 13, 2020 that given Justice Perell's Order of January 15, 2018, *"a reasonable, right minded, fully informed person would conclude that this is one of the rare instances where the author of that direction should not be the one to determine a claim for costs sought personally against Ms. Brunning"*.<sup>45</sup>

#### **E) Supreme Court of Canada April 2019 and Metatawabin RFD #2**

57. The Supreme Court of Canada decision in April 2019 confirms that the IRSSA represents the negotiated settlement of thousands of individual and class action suits against the Government of Canada and other defendants, relating to the operations of Residential Schools. The SCC confirmed the existence of the IRSSA was contingent on judicial approval, and judicial approval was contingent on ongoing judicial supervision. On Canada's arguments for finality of IAP decisions, Justice Abella found:

*While finality and expediency are important goals, it is also crucial to recognize that claimants agreed to forfeit their litigation rights by not opting out of the Agreement. Given this trade-off, it is paramount that the agreed-upon terms of the IAP Model are applied and*

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<sup>44</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2018 ONSC 357, BoA, Tab 18](#)

<sup>45</sup> [\*Brunning and Fontaine v. Canada \(Attorney General\)\*, 2020 ONSC 1003, BoA, Tab 16](#)

implemented in a way that is consistent with the parties' intentions. The courts' supervisory power must permit intervention when it is necessary to ensure that the benefits promised are delivered.<sup>46</sup>

58. The SCC confirms that the Supervising Courts have a duty to ensure that the IAP benefits promised to the claimants are delivered in accordance with the terms of the IRSSA-- benefits for which they relinquished their litigation rights<sup>47</sup>.

59. The SCC found, in both the main and concurring reasons, that the inability of adjudicators to re-open concluded claims in circumstances of new, material evidence is an “exceptional circumstance”, being a gap that warrants judicial intervention (para 26 and 142 -147). The IAP model does not permit new evidence on review, so the Supervising Courts have a role of determining whether the IAP claim should be reopened in light of new evidence, by reviewing and perhaps remitting to the Chief Adjudicator (para 147). The remedy is a re-hearing because there is no new evidence permitted on review or re-review. The Justices questioned counsel for the Chief Adjudicator during oral submissions<sup>48</sup> whether there were any other gaps in the IAP, to which Mr. Arvay responded he was not aware. The Chief Adjudicator does not appear to have brought the inability of adjudicators to enforce the two St. Anne's Orders against Canada.

60. Dr. Metatawabin sent a letter on May 14, 2019 to Prime Minister Trudeau, Minister Bennett and Attorney General, copied to the Chief Adjudicator, asking for a review of St. Anne's concluded IAP claims, in light of the Supreme Court of Canada decision in April 2019<sup>49</sup>. There was no response. Dr. Metatawabin had hosted a land-based healing conference in Fort Albany in March 2019, during which he learned that more survivors whose IAP claims were decided before 2015, were still not being notified about or given the new evidence for St. Anne's IAP claims.

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<sup>46</sup> [J.W. v. Canada \(Attorney General\)](#), *supra* note 5, BoA, Tab 5, para 34

<sup>47</sup> *Ibid*, *supra* note 5, BoA, Tab 5, para 22, 30-35 and 162

<sup>48</sup> [Webcast of Hearing - J.W. and REO Law Corporation v. Attorney General of Canada, et al.](#)

<sup>49</sup> [J.W. v Canada \(Attorney General\)](#) *supra* note 5, BoA, Tab 5.

61. Brunning resumed communications with Chief Adjudicator, Oversight Committee Chair and Court Counsel, following the SCC decision in 2019, asking the Chief Adjudicator to bring forward the gap in the IAP process, namely adjudicators did not enforce St. Anne's ONSC Orders against Canada. Appellants T-00185<sup>50</sup>, S-20774<sup>51</sup>, S-16753<sup>52</sup>, found out through Metatawabin about fresh evidence, and they sought legal opinions as to possible impact of the revised reports/documents for his/her claim, each decided before 2014. Brunning sought revised reports/documents for each, but the Chief Adjudicator's office and Secretariat claimed no power to compel revised filings from Canada. Brunning asked DOJ to file the revised reports/documents, but DOJ either did not respond or merely referred to the Court Administrative Protocol.

62. No RFD has ever been filed by the Chief Adjudicator to seek powers to enforce St. Anne's ONSC Orders. Instead a Sunset RFD was filed by the Chief Adjudicator in February 2020, seeking to end the IAP and to destroy all the IAP documents. The Chief Adjudicator's affidavit does not reveal nor seek directions, about Canada's non-compliance with the two St. Anne's ONSC orders.

63. Dr. Metatawabin identifies hardships on St. Anne's survivors, in his affidavit:

[96] *"It is exhausting and demoralizing, after almost 30 years of St. Anne's survivors telling our stories to the justice system, and after winning two Court Orders in 2014 and 2015, that the burden [of enforcing the IRSSA] is still being placed on survivors. Vulnerable and aging survivors are expected to bring more legal proceedings to the Courts, without funding, simply to get the fresh evidence to each claimant who suffered breach of the IRSSA. St. Anne's Survivors have a right to make his/her own decision.*

[97] *I am 72 years of age. It costs me about \$2,000 every time I have to fly from Fort Albany to Toronto for these Court proceedings. St. Anne's Survivors generally do not have resources to bring onerous legal proceedings, to force the Government to abide by the law and to ask the Courts to address breach of the IRSSA. We want to appear in the courtrooms, to hear matters pertaining tot our rights and to be seen by the Judges and by the media/public, so the Government knows we are prepared to stand up for our rights.*

[98] *The Government breached the IRSSA, yet the Courts awarded us no additional funding, payable by the Government, to legally address the breach. Our Indigenous organizations and St. Anne's survivors have very limited resources, and the Government knows, when it brings preliminary objections, etc, that it is very difficult for us to attend*

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<sup>50</sup> Affidavit of T-00185, ABC, Tab 11, pages 0380 - 0390

<sup>51</sup> Affidavit of S-20774, ABC, Tab 12, pages 0391 - 0403

<sup>52</sup> Affidavit of S-16753, ABC, Tab 13, pages 0404 - 0411

*the public court hearings in Toronto. I have requested that the Court hearings on these RFD's be held in Timmins or Cochrane, so St. Anne's survivors and supporters have the best chance to attend.*"<sup>53</sup>

64. Appellants counsel served and filed Metatawabin RFD #2 in the ONSC on May 12, 2020, supported by affidavits from Dr. Metatawabin and six St. Anne's IAP claimants, whose IAP claims were heard when Canada was in breach of his/her IAP hearing process. Delay was encountered due to the pandemic and due to travel necessary to gather evidence in more remote parts of Ontario.

65. Dr. Metatawabin specifically requested the following for venue in Ontario:

*[121] I request that continuing non-disclosure of the revised POI reports/documents by Government officials for St. Anne's IAP claims, heard without that evidence, be addressed by the Court in Ontario. The courts in other provinces should not be given jurisdiction over St. Anne's matters. It will also make it impossible for us to attend. I have located a letter that I sent to Justice Perell on September 19, 2017 after we were told that the IAP decisions for H-15019 and C-14114 would be challenged in British Columbia by the Government. I asked for St. Anne's matters to be heard in Ontario, and I also asked that the RFD's for St. Anne's survivors be heard in Timmins, so that St. Anne's survivors could attend and hear the public court hearings that pertain to us.*<sup>54</sup>

66. Court counsel scheduled a case conference for May 21, 2020. Appellant counsel identified venue, Canada filing responding evidence, cross examinations, participation of the Chief Adjudicator, and cost immunity to the Appellants, as preliminary issues to be discussed. DOJ was asked to provide Canada's legal position to relief sought by the Appellants. Independent Counsel and Assembly of First Nations came forward to support Metatawabin RFD #2.

67. At the case conference on May 21, DOJ advised Appellant counsel to presume that Canada would oppose everything in Metatawabin RFD #2. Court Counsel advised that a separate RFD would have to be filed, if the Appellants sought participation by the Chief Adjudicator, who had been served but declined to participate. Tentative dates of June 22 or June 26 were identified for the preliminary hearing by video conference.

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<sup>53</sup> Metatawabin Affidavit, ABC, Tab 10, page 0134

<sup>54</sup> Metatawabin Affidavit, ABC, Tab 10, para 121, page 0139

68. Appellant Counsel were provided with a copy of the Chief Adjudicator's Sunset RFD, and told to attend before Madam Justice Brown of BCSC on May 29, 2020. Appellant counsel requested that St. Anne's IAP claims documents be exempted from the proposed Order, which directs destruction by the Chief Adjudicator and Canada by March 31, 2021. That request was denied by Justice Brown, who approved the draft Order proposed by the Chief Adjudicator<sup>55</sup>.

69. Dr. Metatawabin and Mushkegowuk Council decided that due to the pandemic, any travel outside the First Nations to southern towns/cities would put Indigenous members at risk, and there are very limited hospital services in Northern Ontario. To date, no one has the virus. Therefore on May 29, 2020, Appellant counsel communicated that the hearing could proceed in Toronto, provided there was video broadcasting into the northern Ontario communities. The Appellants declined responsibility to compel the Chief Adjudicator to participate in the RFD<sup>56</sup>.

70. On Saturday, May 30, 2020, Court Counsel unilaterally announced that preliminary issues would be heard by Madam Justice Brown in BCSC on June 26, 2020<sup>57</sup>. There had been no prior notice nor submissions by counsel. Appellant counsel sent a letter seeking the Direction by which jurisdiction was being transferred to BCSC, and outlining reasons why that should not occur.

71. On June 3, Appellant Counsel with the assistance of David Schulze, simplified the relief sought in Metatawabin RFD #2, which was served on counsel and filed with Court counsel<sup>58</sup>.

## **F) THE SUPERVISING JUDGE'S ORDER UNDER APPEAL**

72. On June 5, 2020, Court Counsel provided a Direction of Justice Perell in ONSC and a Direction of Justice Brown in BCSC styled as "Joint Direction".

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<sup>55</sup>BCSC Order dated May 29, 2020 of Justice Brown regarding Sunset of the Independent Assessment Process (not yet issued but approved by all counsel), ABC, Tab 9, pages 0102 - 0106

<sup>56</sup>Email of Ms. Brunning to Mr. Gover, dated May 29, 2020, ABC, Tab 19, page 0623

<sup>57</sup>Email of Mr. Gover dated Saturday, May 30, 2020, ABC, Tab 20, page 0624

<sup>58</sup> Amended Request for Directions of Dr. Metatawabin and St. Anne's Claimants, T-00185, S-20774, S-16753, amended on June 3, 2020, ABC, Tab 7, pages 0064 - 0083

73. Justice Perell recused himself on his own motion. His reasons relate to the Appellants being represented by Brunning in Metatawabin RFD #2, and the details are summarized above.

74. In the Order Under Appeal, on his own motion, Justice Perell recused himself from hearing Metatawabin RFD #2:

[24] “While Justice Perell appreciates that Ms. Brunning has taken the position that he need not recuse himself from all matters in which she is involved, Justice Perell considers it in the best interests of the administration of justice that he do so in this case, given the Divisional Court’s findings and Ms. Brunning’s role in bringing forward the Requestors’ concerns”.<sup>59</sup>

75. Justice Perell found that his choice was to either assign Metatawabin RFD #2 to another judge of ONSC or to another Supervising Judge. He quoted Sections 5 (a), (b), (c) and (f) of the Court Administration Protocol (para 25-26). Justice Perell found, having recused himself, that:

On the basis of “achieving judicial economy and efficiency”, interests would not be served to assign this RFD to someone who has not previously been involved in IRSSA (para 27) Because the IRSSA has been brought to the final stage, when the machinery of the IRSSA is being dismantled and plans are underway for the closure of the Secretariat, there is urgency in getting on with the merits of this RFD, before the IAP is dismantled (para 28).

76. Justice Brown issued essentially a parallel Order on June 5, 2020 in the BCSC to assume jurisdiction of Metatawabin RFD #2.

77. In the ONSC Implementation Order of Chief Justice Winkler dated March 8, 2007, the Court Administration Protocol (“the Protocol”) therein stipulates that when an RFD concerns an individual class member or particular class, the IRSSA Administrative Judges are obliged to submit the matter to the court with jurisdiction over the individual:

5. *Should a hearing be required, the Administrative Judges will make such direction and determine the jurisdiction in which the hearing should be held. In making this determination the Administrative Judges will be guided by the*

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<sup>59</sup> [\*Fontaine v. Canada \(Attorney General\)\*, 2020 ONSC 3497](#), Perell J. (no Order issued), ABC, Tab 2, pages 0016 - 0027



*following principles:*

- (a) Where the issue(s) involve relief for a particular class member or particular class, the hearing will be directed to the supervising court with jurisdiction over the class member or class pursuant to the terms of the Agreement and the Approval Orders.*
- (b) Where the issue(s) affect more than one jurisdiction, but not all, the hearing will be directed to a supervising court in one of the affected jurisdictions.*
- (c) Where the issue(s) will affect all jurisdictions, the hearing may be directed to any court supervising the Agreement.*
- (d) On purely procedural matters, the Administrative Judges may direct that any hearing shall be in writing only. On substantive matters, the court to which the hearing is directed, shall in its discretion, determine the manner in which the matter will be heard, whether in writing or by appearance, or both.*
- (f) In applying these principles, the Administrative Judges may also be guided by any other consideration that he or she deems to be appropriate in the circumstances<sup>60</sup>.*  
(emphasis added)

78. Under the IRSSA, paragraph 1.01, the superior court with jurisdiction over an individual class member is the court of the province or territory where he or she resided on the date of the last Approval Order (which was January 15, 2007):

*“**Appropriate Court**” means the court of the province or territory where the Class Member resided on the Approval Date save and except:*

- a) that residents of the provinces of Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island will be deemed to be subject to the Approval Order of the Superior Court of Justice for Ontario;*
- b) International Residents will be deemed to be subject to the Approval Order of the Superior Court of Justice for Ontario;*

*“**Approval Date**” means the date the last Court issues its Approval Order<sup>61</sup>;*

79. Justice Perell and Justice Brown relied on the general provisions of the Protocol, to direct Metatawabin RFD #2 to the BCSC. Mr. Schulze requested that because the same substantive issue is pending before the Quebec Court of Appeal in the G.S RFD, Justice Perell and Justice Brown await the Quebec judgment on jurisdiction under Section 5(a) of the Protocol<sup>62</sup>. That request was

<sup>60</sup> *Implementation Order of ONSC, dated March 8, 2007, ABC, Tab 4, pages 0051 - 0052*

<sup>61</sup> *IRSSA, Para 1.01, BoA, Tab 1*

<sup>62</sup> *Letter from Mr. Schulze to Mr. Gover dated June 8, 2020, ABC, Tab 23, page 0635 - 0637*

declined by Justice Brown on June 9, 2020.

80. On June 16, 2020, a Notice of Appeal and Certificate of Evidence was served by the Appellants that was issued by Court of Appeal on June 19, 2020<sup>63</sup>. Canada would not consent to a Stay Pending Appeal.

81. On June 23, 2020, Madam Justice Brown, after hearing from counsel, directed that the parties could make submissions on June 26 regarding an adjournment or stay of her Order in the BCSC. For the first time, DOJ stated Canada's intention to file an RFD, to strike Metatawabin RFD #2 for abuse of process.

82. On June 25, 2020 Justice Canada emailed an RFD in the BCSC, without evidence, seeking to dismiss/strike Metatawabin RFD #2 ("Canada's RFD to Dismiss/Strike") as abuse of process.

83. In Canada's RFD to Dismiss/Strike, Canada admits that its officials have not filed the revised reports/documents for the St. Anne's IAP claims concluded before Canada complied with St. Anne's RFD #1 and #2.<sup>64</sup> DOJ have interpreted the two ONSC Orders to not include a requirement to file revised reports/documents for concluded IAP claims. [Sworn evidence from Canada was just received on July 20, 2020].

84. On June 26, 2020, Justice Brown heard argument for an adjournment or stay. Appellant Counsel were then directed to file a motion for a stay and to seek an expedited hearing date, which was completed by July 2, 2020.

85. On July 10, 2020, ONCA Justice Simmons granted a Stay Pending Appeal and delivered reasons outlining her findings and conclusions. Justice Simmons asked Canada, during argument on the motion, whether or not there were any other RFD's under the IRSSA in which all the Requestors resided in one province but the RFD was heard by a Judge in another province. Canada

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<sup>63</sup> Notice of Appeal, ABC, Tab 1, pages 0001 - 0015

<sup>64</sup> Canada's RFD for Summary Dismissal/Strike of Metatawabin RFD #2, para 23 and 34, ABC, Tab 8, pages 0097 and 0100

stated it is not aware of any such examples.

86. Dr. Metatawabin is opposed to these matters being heard outside the Ontario. He outlines extensively in his affidavit, 30 years of engaging the Ontario justice system to address the widespread sexual and physical abuse of Indigenous children at St. Anne's. He and the other affiants provide evidence about the emotional and financial hardship to bring forward these many legal proceedings against Canada to enforce the IRSSA, which is the duty of the Courts and its Agents. If Canada is found to be in contempt of the two St. Anne's ONSC Orders, and St. Anne's IAP claimants finally are given notice of, and access to, revised reports/documents for that IAP claim, any RFD's to reopen will be to the ONSC.

*"The Courts have a duty, so are responsible to use their powers to enforce Superior Court Orders, particularly when IRSSA Orders are still being violated by the Government. Under the IRSSA, the Courts appointed their own agents. Some effective penalty against Government officials, for violation of Court orders, should be ordered by the Courts or Chief Adjudicator. IAP adjudicators should not conduct re-hearings for St. Anne's claims, until there is full disclosure by the Government of revised POI reports/documents and the 2015 narrative so adjudicators can make their findings of fact and credibility, including on the correct reports/documents, as per the IAP terms. Stella Chapman [St. Anne's IAP Claimant C-14114, now deceased] told me that she was very angry that her re-hearing proceeded on January 19, 2018, without the Government officials being forced to file all the evidence owed under the St. Anne's IRSSA Court orders. The Courts should fulfill their responsibilities to us, and we should not be blocked from bringing these violations back to the Court, so the public can hear and understand how the justice systems are failing us."*<sup>65</sup>

### **PART III--ISSUES AND THE LAW**

87. This Appeal raises the following questions of law:

- (a) Jurisdiction of ONCA: Is the Order Under Appeal a final or interlocutory?
- (b) Order Under Appeal
  - (i) Excess of Jurisdiction
  - (ii) Failure to Exercise Actual Jurisdiction

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<sup>65</sup> Metatawabin Affidavit, para 82, ABC, Tab 10, pages 0130 - 0131

### **ISSUE #1 – FINAL OR INTERLOCUTORY ORDER**

88. The Order Under Appeal finally determines the forum for the dispute and is therefore a final order for the purposes of appeal. An order of the court below that mistakenly declines jurisdiction is a final order, within the meaning of s. 6(1)(b) of the Courts of Justice Act, RSO 1990, c. C.34 (“CJA”)<sup>66</sup>.

89. Justice Simmons, in granting a Stay Pending Appeal, at paragraphs 16 and 17, found as follows:

*[16] In my view, however, the effect of the Order goes beyond simple procedural rights and finally determines a substantive matter – the appellants’ entitlement to have the RFD heard in the forum they say is prescribed by the CAP.*

*[17] In Fontaine v. Canada (Attorney General), 2018 ONCA 832, on a stay motion, Sharpe J.A. said, at para. 7:*

(a) *An order that finally determines the forum for the dispute is a final order for the purposes of appeal, even though the substantive issues remain to be determined by the court or tribunal held to have jurisdiction*<sup>67</sup>.

### **ISSUE #2A: ORDER UNDER APPEAL IS IN EXCESS OF JURISDICTION**

90. Justice Perell erred in law by relying on the general discretionary powers in sub-para 5(f) of the Court Administrative Protocol (CAP), to direct that the BCSC should hear Metatawabin RFD #2, whereas he was obligated at law to apply the specific mandatory provision of sub-para 5(a) of the Protocol, which requires that the RFD be heard in Ontario<sup>68</sup>.

91. It is respectfully submitted that Justice Perell exceeded his jurisdiction by applying sub-para 5(f), a general clause, rather than the specific mandatory terms of sub-para 5(a). The ONSC has jurisdiction over the Appellants, who are all Ontario IRSSA class members.

92. Under accepted principles of contract interpretation, general terms in a contract will be seen to be qualified by specific terms. The parties will be assumed to have intended the scope of

<sup>66</sup> [\*Denison Mines Ltd. v Ontario Hydro\*, \(2001\) 56 O.R. \(3d\) 181 \(ONCA\)](#), BoA, Tab 19, para 4

<sup>67</sup> *Fontaine v. Canada (Attorney General)*, Docket M51618 (C68407), Simmons J.A., July 10, 2020, BoA, Tab 20

<sup>68</sup> *Implementation Order of ONSC*, dated March 8, 2007, ABC, Tab 4, pages 0051 - 0052

the general term to not extend to the subject matter of the specific term<sup>69</sup>.

93. The Protocol is part of the Implementation Order, issued by the ONSC. When a Court judicially interprets a court order, accepted principles of statutory and contract interpretation will be used<sup>70</sup>.

94. Sub-para 5(a) of the Protocol is specific and recognizes the public importance that Ontario residents have a right to litigate in Ontario courts for events that happened in Ontario.

95. The two IRSSA Administrative Judges cannot insert their own processes into the Protocol and cannot make unilateral declarations impacting on the operations of the IAP<sup>71</sup>.

## **ISSUE 2B: ORDER UNDER APPEAL FAILS TO EXERCISE JURISDICTION**

96. Section 16 of *CJA*, provides that a proceeding in the Superior Court of Justice shall be heard and determined by one judge of the Superior Court of Justice.

97. The Appellants, Metatawabin RFD #2, seek enforcement of two ONSC Orders that do not involve payment of money, so *ONSC Rule* 60.11 (1) applies:

*60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.*

98. The Appellants properly brought their RFD to Justice Perell, the judge in the RFD proceedings in which these Orders were made in 2014 and 2015, but Justice Perell recused himself.

99. In settled class actions proceedings, that are national in scope, the nature of the relief in the RFD must be reviewed, to determine which Superior Court has jurisdiction.<sup>72</sup>

100. In the ONSC Order of January 14, 2014 (para 8), the ONSC maintained exclusive

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<sup>69</sup> *BG Checo International Ltd. v. BC Hydro & Power Authority*, [1993] 1 SCR 10, BoA, Tab 21, para 9

<sup>70</sup> *L'Homme v. Pliskevicius Estate*, 2011 ONSC 6012, BoA, Tab 22, para 22.

<sup>71</sup> *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023, BoA, Tab 23, para 34 and 40

<sup>72</sup> *Parsons v Ontario*, 2015 ONCA 158, BoA, Tab 25

jurisdiction to reopen concluded St. Anne's IAP claims. However, in each St. Anne's RFD, Justice Perell failed to compel Canada to file the original and revised disclosure and failed to exercise the Court's exclusive jurisdiction to determine whether to reopen that IAP claim. He had evidence before him in many St. Anne's RFD's to prove that Canada had not filed the revised reports/disclosure for concluded IAP claims: H-15019, C-14114, S-11733, K-10106, T-00185, S-20774, S-16753. Despite evidence from St. Anne's survivors, and written/oral submissions, Justice Perell failed to confirm that Canada had not done so.

101. Justice Brown is not a Judge of the ONSC. She has no power to enforce ONSC Orders. The two St. Anne's ONSC Orders were not issued by any other Superior Courts.

102. Indigenous survivors of St. Anne's are entitled to enforcement of ONSC Court Orders, regardless how shocking and perhaps distasteful the truth may be. DOJ mistakenly misconstrued the disclosure obligations of Canada in 2014. Justice Perell declined to determine if there was bad faith. St. Anne's survivors have also filed evidence to confirm that four law firms (including DOJ as a law firm) had possession of the Criminal Documents, Cochrane ONSC Documents and OPP Documents before the IRSSA was signed. Those four law firms subsequently represented parties to the IRSSA and/or appeared in IAP hearings, without disclosing the documents.

103. The SCC confirmed that the Superior Courts have a duty to enforce the IRSSA, in exchange for claimants forfeiting his/her right to sue, and that finality is subject to compliance.

104. Justice Perell had Re-Review Decisions H-15019 and C-14114 from the Chief Adjudicator before him in 2017, which confirm the gap. Since adjudicators have no power to compel Canada to file mandatory reports/documents, and Canada was not fulfilling the terms of the two St. Anne's ONSC Orders, the Court has to fill the gap and deal with Canada's non-compliance.

105. Since 2019, Justice Perell has failed to revisit his earlier dismissals of St. Anne's RFD's. Justice Perell has failed to direct Canada to file the original and revised evidence for each of those

IAP claims, and never asked the Chief Adjudicator to report whether Canada had or had not filed the revised reports/documents with the Secretariat for concluded St. Anne's IAP claims.

106. Starting in 2017, Justice Brown has made decisions that it was “progressive disclosure” from Canada for St. Anne's, which were inconsistent with the ONSC finding that there was breach of the IRSSA by Canada for St. Anne's. Even though the BCCA corrected her mistakes in July 2019, Justice Brown declined on May 29, 2020 to exempt St. Anne's IAP documents from being destroyed by the Chief Adjudicator and Canada by March 2021. The affidavit of the Chief Adjudicator for the Sunset RFD reveals nothing about Canada not filed revised reports/documents for concluded St. Anne's IAP claims.

107. The ultimate decision whether bring an RFD, to ask the ONSC to reopen a concluded St. Anne's IAP Claims, belongs to each IAP claimant. The revised narrative, POI reports and documents must be available to the IAP claimant and his/her legal counsel to make a decision.

108. Canada, now admitting it has not filed those revised reports/documents, requires the ONSC to address this under Rule 60 for non-monetary orders. Because the SCC confirmed the duty on the Courts to enforce the IRSSA, an ONSC judge must address possible contempt by Canada.

109. One of the goals of class action proceedings is that wrongdoers modify their behaviour to take full account of the harm they are causing or might cause to the public<sup>73</sup>. This is especially true for the relationship between Indigenous people in Canada, and the Government of Canada, under a Settlement Agreement that includes promises truth and reconciliation by Canada.

110. The integrity of the administration of the IAP has been put into question since 2013 due to the conduct and/or omissions of Canada. St. Anne's survivors have abided by the law, they properly used various legal processes from 1992 to 2005 to seek justice for victims of child abuse, and they already were granted these two ONSC Orders in 2014 and 2015.

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<sup>73</sup> [\*Hollic v. Metropolitan Toronto \(Municipality\)\*, 2001 SCC 68](#), BoA, Tab 24, para 15

111. St. Anne's survivors seek to restore the integrity of the IAP process, by the ONSC enforcing its own orders against Canada, and by eliminating all threat of costs against St. Anne's IAP claimants and their counsel. Canada's position that St. Anne's survivors are engaging in abuse of process, is an attempt to divert the Court from addressing Canada's admission that could constitute contempt of court orders, and is a mockery of St. Anne's survivors' good faith efforts to ensure the justice also works for Indigenous citizens.


112. St. Anne's Survivors are not prepared to abandon their quest to ensure the truth about St. Anne's cannot be denied, including current day failures of Canada to abide by ONSC Court Orders and some lawyers failing to abide by professional Rules of Conduct.

### **PART III - ORDER SOUGHT**

113. The Appellants seek for this Honourable Court to refer Metatawabin RFD #2 and Canada's RFD to Dismiss/Strike, to the Chief Justice of ONSC, to appoint a different ONSC Judge to decide all the legal issues raised in Metatawabin RFD #2 and Canada's RFD to Dismiss/Strike. That new ONSC Judge could also hear possible RFD's from St. Anne's IAP claimants, who seek to re-open his/her IAP claim,

114. The Appellants seek substantial indemnity costs from Canada.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of July 2020

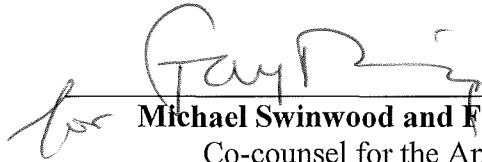
  
\_\_\_\_\_  
**Michael Swinwood and Fay Brunning**  
Co-counsel for the Appellants



**APPELLANTS' CERTIFICATE**

1. The Appellants estimate that 75 minutes will be required for their oral argument.

July 24, 2020

  
for **Michael Swinwood and Fay Brunning**  
Co-counsel for the Appellants

### SCHEDULE “A” LIST OF AUTHORITIES

1. Indian Residential Schools Settlement Agreement (IRSSA)
2. IRSSA, Schedule D (“IAP Model”)
3. Fontaine v. Canada (Attorney General), 2014 ONSC 283 (St. Anne’s RFD #1)
4. Fontaine v. Canada (Attorney General), 2015 ONSC 4061 (St. Anne’s RFD #2)
5. J.W. v Canada (Attorney General) 2019 SCC 20
6. Claimant H-15019 v Wallbridge and Canada, 2020 ONCA 270
7. Claimant H-15019 and Fontaine v. Canada (Attorney General), 2016 ONSC 4328
8. Metatawabin, Claimant K-10106 and Fontaine v Canada (Attorney General) 2017 ONSC 2487 (Metatawabin RFD #1)
9. Fontaine v. Canada (Attorney General), 2017 ONSC 1149
10. Fontaine v. Canada (Attorney General), 2018 ONSC 103
11. Fontaine v. Canada (Attorney General), 2018 ONSC 3957 (“Shisheesh RFD”)
12. Fontaine v. Canada (Attorney General), 2018 ONCA 421
13. Fontaine v. Canada (Attorney General), 2017 BCSC 946
14. Fontaine v. Canada (Attorney General), 2018 BCSC 63
15. Fontaine v. Canada (Attorney General), 2019 BCCA 269
16. Brunning and Fontaine v. Canada (Attorney General), 2020 ONSC 1003
17. Fontaine v. Canada (Attorney General), 2018 ONSC 6893
18. Fontaine v. Canada (Attorney General), 2018 ONSC 357
19. Denison Mines Ltd. v Ontario Hydro, (2001) 56 O.R. (3d) 181 (ONCA)
20. Fontaine v. Canada (Attorney General), 2020 Docket M51618 (C68407), Simmons J.A.,  
July 10, 2020

21. BC Checo International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 SCR 12
22. L’Homme v. Pliskevicius Estate, 2011 ONSC 6012
23. Fontaine v. Canada (Attorney General), 2018 ONCA 1023
24. Hollic v. Metropolitan Toronto (Municipality), 2001 SCC 68
25. Parsons v Ontario, 2015 ONCA 158

**SCHEDULE “B”****TEXT OF STATUTES, REGULATIONS & BY - LAWS****1. Courts of Justice Act, RSO 1990, c. C.34**

**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;

**16** A proceeding in the Superior Court of Justice shall be heard and determined by one judge of the Superior Court of Justice.

**2. Rules of Civil Procedure, RRO 1990, Reg. 194**

**60.11 (1)** A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

**METATAWABIN and LARRY  
, T-00185, S- PHILIP  
20774, S-16753 FONTAINE et  
al.**

and

**THE ATTORNEY GENERAL OF  
CANADA et al.**

Court File No: C68407

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at [Toronto](#)

**AMENDED APPELLANTS' FACTUM**

**July 24, 2020**

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