

Court File No. 00-CV-192059CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LARRY PHILIP FONTAINE et. al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et. al.

Defendants

**FACTUM OF THE APPLICANTS
PRELIMINARY ISSUES
RETURNABLE MARCH 24, 2017
FRESH AMENDED RFD OF METATAWABIN, CLAIMANT K-10106**

PART I - ISSUES:

1. On March 24, 2017, the Applicants, Canada, Wallbridge & Wallbridge (“Wallbridge”) and Nelligan O’Brien Payne (“Nelligans”) have been directed to address the following preliminary issues:

- a. Does Edmund Metatawabin have standing to bring this RFD?
- b. Does IAP Claimant K-10106 have standing to bring this RFD?
- c. Does the Court have jurisdiction to accept and implement any of the relief sought in the Fresh Amended RFD (paragraph 9)?

2. The evidence/facts filed in support of the Fresh Amended RFD are to be presumed to be true.

PART II - STANDING:¹

A. The Law

3. The Approval Orders of the IRSSA provide discretion to grant standing for the purpose of bringing an RFD to “such other person or entity as this Court may allow”. This recognizes the inherent jurisdiction of the Court to supervise and enforce the IRSSA². The test is as follows:

Specifically, the entity seeking standing must satisfy the court of the following:

- a) there is a serious issue to be tried;*
- b) the entity is directly affected or has a genuine interest in the issues raised;
and*
- c) there is no other reasonable and effective manner in which the issue can be brought before the court.*

4. Examples of non-parties to the IRSSA being granted standing for an RFD are:

- a. 60 IAP claimants from St. Anne’s IRS³
- b. Truth and Reconciliation Commission⁴
- c. Tsilhqot’in National Government⁵
- d. Lawyer representing a group of class members⁶

5. Canada relies on one decision in which a non-party was denied standing for an RFD.⁷ In that case, Justice Brown of the British Columbia Supreme Court confirmed that the Court does in fact have *jurisdiction* to allow non-parties to bring an RFD but simply

¹ Requested in Paragraph 9(xiii)(1) on page 8 Fresh Amended RFD; opposed by Canada

² *Approval Order* of Chief Justice Winkler heard December 15, 2006, filed March 15, 2007, paragraph 31, and *Implementation Order* of Chief Justice Winkler heard March 8, 2007 paragraph 23. Court *Administration Protocol*, paragraph 2. Also see *Fontaine v. Canada (Attorney General)*, 2015 BCSC 1386, para 28-29 and *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839, para 110-136 and *Fontaine v. Canada (Attorney General)*, 2014 BCSC 2531 at paras 16-20

³ *Fontaine v. Canada (AG)*, 2014 ONSC 283

⁴ *supra*

⁵ *Fontaine v. Canada (AG)*, 2014 BCSC 2531

⁶ *Fontaine v. Canada (AG)*, 2008 BCCA 329

⁷ *Fontaine v. Canada (Attorney General)*, 2015 BCSC 1386, para 28-29.

on the facts of that particular case, the test for doing so was not met. Specifically, Brown J. found that the Cachagee Entities did not raise a serious issue to be tried and their RFD was hypothetical. Those factual findings do not apply to St. Anne's IRS.

6. This Court has jurisdiction to grant standing to former St. Anne's students by virtue of their status as "class members". Only Indigenous Canadians were forced to attend Indian Residential Schools in Canada. Every Indigenous Canadian, who at any time prior to December 31, 1997, attended at an Indian Residential School, is automatically captured as a "class member" under the IRSSA and is bound by the terms therein. All legal rights of every class member, arising from attendance at an IRS and/or from the IRSSA/IAP are captured under the IRSSA and Implementation Orders and his/her rights will be extinguished when the IRSSA is completed.

7. Class members are entitled to access (through an RFD) the enforcement powers of the Court, to enforce the IRSSA against any alleged breaches. St. Anne's "class members" who were witnesses to the OPP, witnesses in criminal proceedings, plaintiffs in civil actions in the Ontario Superior Court of Justice, DR and IAP claimants are all captured as class members of the IRSSA.

8. The circumstances surrounding St. Anne's IRS constitute exceptional circumstances that warrant judicial recourse and action⁸. On June 30, 2014, Canada produced for the first time over 12,000 new documents into the IAP that had been in the possession of Department of Justice but withheld from AANDC⁹. Not until November 2105 did Canada produce a proper narrative and POI reports from all this previously withheld evidence from about 1000 Former Students of St. Anne's. This RFD pertains to Canada and the Catholic Church improperly withholding documents, even after January 14, 2014, from the IAP process, about widespread and horrific sexual and physical abuse of children at St. Anne's IRS. The non-disclosure has continued after June 30, 2014 by

⁸ *Fontaine v. Canada*, 2017 ONCA 26 at para 61 and 69; Justice Perell already recognized exceptional circumstances for judicial intervention by agreeing to exercise the power to re-open a concluded IAP claim if the prejudice from non-disclosure was more than theoretical: *Fontaine v. Canada*, 2014 ONSC 283, para 224 to 232.

⁹ *Fontaine v. Canada*, 2014 ONSC 283 at para 111 to 118

Canada in individual IAP claims. If dismissed at this preliminary stage, it could extinguish the rights of St. Anne's former students forever, to Court intervention.

9. As outlined below, it is submitted that for both Metatawabin and Claimant K-10106, the 3 part test for standing is clearly met. On a combined basis, plus with the evidence from the former students of St. Anne's IRS filed in support of this RFD, Metatawabin and Claimant K-10106 are entitled to challenge the defendants and intervenors herein.

B. The Facts presumed to be true for Metatawabin:

10. Metatawabin has filed evidence to establish:

- a. Metatawabin is a Class Member under the IRSSA¹⁰.
- b. Metatawabin attended St. Anne's IRS from 1956 to 1963.¹¹
- c. Metatawabin was the Chief of Fort Albany First Nation from 1988 to 1996 and was traditional Chief 1997 and 1998.
- d. Metatawabin co-chaired and helped organize and convene the Keykaywin Conference in 1992 in Fort Albany
- e. Metatawabin initiated the Ontario Provincial Police investigation, and supported/sponsored former students to overcome their fears and provide their stories of abuse to the OPP from 1992 to 1997.
- f. Metatawabin was consulted as a leader of St. Anne's survivors by Detective Constable Delguidice of the OPP and by Diana Fuller, Crown Attorney, who prosecuted the criminal charges against various former supervisors of St. Anne's IRS.
- g. Since 1997, Metatawabin was a founder and Executive Member of Peetabeck Keyway Keykaywin (PKKA) or St. Anne's Survivors Association, on authority from Mushkegowuk Council which authority continues to today¹².

¹⁰ Approval Order of Chief Justice Winkler, March 15, 2007, paragraph 1(f).

¹¹ Affidavit of Edmund Metatawabin, August 26, 2013, paragraph 3.

¹² Affidavit of Edmund Metatawabin, August 26, 2013, paragraph 20 and Exhibit C

- h. Metatawabin was Lead Negotiator in the Pilot ADR wherein 100+ former students were invited by the Federal Government, Catholic Churches and Ontario Government to participate for reconciliation and resolution of the complicated impact of this abuse on individuals, families and communities. From 2000 to 2004¹³, he negotiating with Department of Justice (DOJ) lawyers, AANDC officials, Catholic Church officials and Nelligans about sexual and physical abuse/crimes against them as children¹⁴. The defendants accepted his authority therein.
- i. Metatawabin has been a counsellor and elder in the many criminal and civil legal processes applied to the crimes/abuse against children at St. Anne's.
- j. He provided affidavit evidence relied upon by the Court for St. Anne's RFD's to date.
- k. He has appeared and been heard by the Administrative Judge of the IRSSA, on behalf of St. Anne's Survivors, numerous times since December 2013.
- l. Metatawabin was again appointed the authority of St. Anne's IRS survivors, when Mushkegowuk Council appointed him by resolution in October 2015, to represent it with an RFD on their behalf¹⁵. Metatawabin represented Mushkegowuk Council on the RFD appearance on May 11, 2016, in support of the RFD of Claimant H-15019. On July 5, 2016, the RFD of Claimant H-15019 was adjourned *sine die* with a cost endorsement of "costs in the cause", if Claimant H-15019 returned his RFD. The Court did not rule on the Mushkegowuk RFD, so Metatawabin and Deputy Grand Chief Friday wrote to the Court in August 2016 asking for the status of the Mushkegowuk RFD. When the Court agreed to consider the

¹³ Supplementary Affidavit of Edmund Metatawabin sworn April 26, 2016.

¹⁴ Affidavit of Edmund Metatawabin, August 26, 2013, paragraphs 22 and 23, and Supplementary Affidavit of Metatawabin sworn April 26, 2016 paragraphs 3 to 14

¹⁵ Affidavit of Deputy Grand Chief Rebecca Friday sworn February 24, 2016 and Mushkegowuk Council Resolution October 22, 2015.

Mushkegowuk RFD, Metatawabin retained legal counsel. In September 2016, in light of possible cost consequences, Mushkegowuk Council withdrew as the RFD Applicant. However, Mushkegowuk Council pledged their political support for Metatawabin proceeding with the RFD. Metatawabin has proceeded with the RFD in his own name and has sought/been granted cost immunity for the next step of this RFD.

- m. Metatawabin did not file an IAP claim and he has not sought any personal financial compensation in this RFD, except if Canada is ordered by the Court to provide funding under Article 8.02 IRSSA, for local cultural support programs. Metatawabin might be paid some fee and/or disbursements for cultural support work in the context of these programs. Currently, Metatawabin is providing extensive cultural and community support work to St. Anne's survivors and their families, without pay.
- n. His entitlement to pay or not, has never interfered with Metatawabin's ability to represent St. Anne's survivors to properly their legal rights from the justice system, arising from the sexual and physical abuse they suffered as children, because persons in authority failed to fulfill their respective duties and legal obligations to them, as children.
- o. Metatawabin has arranged funding from First Nations, to facilitate attendance of St. Anne's survivors whose rights have been violated by Canada and the Catholic Church in the IAP process.
- p. Seeking justice for, restoring health and re-establishing cultural well-being of St. Anne's Survivors has been the motivation of Metatawabin for a quarter century.

C. The Facts presumed to be True for Claimant K-10106:

- 11. Claimant K-10106 has standing:
 - a. She is a Class Member under the IRSSA because she attended St.

Anne's IRS¹⁶.

- b. She is a claimant/party in the IAP process. Under St. Anne's RFD #1, the Court allows St. Anne's IAP claimants to access the Court, if the claimant can demonstrate prejudice from the non-disclosure by Canada.
- c. Claimant K-10106 was directed to Nelligans for claimant counsel services under an IRS Adjudication Secretariat pamphlet without any notice that Nelligans previously acted for the Catholic Church officials. She retained Nelligans for the entire IAP process and they were paid legal fees for their legal services.
- d. Claimant K-10106 testified in her IAP hearing in February, 2011. Her IAP claim was denied and no compensation was granted. She was not believed that she suffered severe sexual abuse at St. Anne's. The Claimant was devastated by the IAP hearing experience. The original adjudicator had incomplete disclosure (pre 2014) from Canada, including the false 2008 narrative that stated there was no documentation about sexual abuse at the school. The original adjudicator revealed he had been to Fort Albany and had participated in some social meeting with the nuns who operated St. Anne's.
- e. The IAP claim was overturned on Review, about one year later, finding SL5 level of sexual abuse and severe harms. However, K-10106 suffered mentally from the unfairness of the IAP hearing and the disbelief of the adjudicator that such sexual abuse had happened.
- f. Claimant K-10106 filed a complaint to the Chief Adjudicator, who did not disclose the non-disclosure¹⁷ by Canada. The Chief Adjudicator indicated Claimant K-10106 would not be advised of the outcome of a review of the conduct of her IAP hearing adjudicator.
- g. In March 2016, Claimant K-10106, was seeking assistance from PKKA for the IAP trauma. She was further traumatized to read 2003

¹⁶ Affidavit of K-10106 sworn March 31, 2016

¹⁷ *ibid*

Court evidence that Nelligans had previously been in solicitor and client relations with the Catholic Church entities, defending church officials in about 160 civil actions in Toronto and Cochrane. Nelligans denied on behalf of their church clients, any sexual and physical abuse of children at St. Anne's IRS. Claimant K-10106 became aware in 2016 that Nelligans conducted examinations for discovery of the Cochrane and Toronto plaintiffs. Nelligans was granted access and authority to copy the OPP investigation documents about sexual abuse at St. Anne's IRS, in unredacted form.

- h. Claimant K-10106 was never told of this professional and ethical conflict of interest at any time. Janice Payne¹⁸, a partner at Nelligans when the Catholic Church were represented in civil actions (1997 to 2004), was directly involved in the IAP claim of K-10106. No one at Nelligans revealed the conflict or obtaining informed consent for the firm to act as her claimant counsel¹⁹.
- i. Claimant K-10106 was also never informed by Nelligans that Canada had withheld this large body of evidence for the IAP hearing. To prove student on student abuse, IAP claimants must prove an adult employee knew or ought to have known abuse of the kind was occurring at the IRS at the time and failed to take reasonable steps²⁰.
- j. In the email between Claimant K-10106 and Nelligans on the day after the IAP hearing, the lawyer noted that the case "boils down to whether St. Anne's had an adequate system of supervision in place to prevent this type of [sexual] abuse."
- k. Nelligans never filed any of the evidence for Claimant K-10106 that Nelligans obtained during civil actions from 1997 until 2004, about sexual abuse and knowledge of church officials about the sexual abuse²¹.

¹⁸ Emails dated February 16, 2011, being Exhibit B to Affidavit of K-10106, Tab H, pages 2493, 2494

¹⁹ Affidavit of Claimant K-10106, Tab H, para 16, 17, 18, pages 2487 and 2488.

²⁰ IRSSA, Schedule D, IAP model, pages 33 and 34.

²¹ Affidavit of K-10106, para 16, 17 and 18

- l. The revised 2015 narrative for St. Anne's, and relevant source documents (previously generated or gathered by Nelligans while they were defending the Catholic Church), should have been available for the IAP adjudicator before he questioned Claimant K-10106²². The missing transcripts of examinations for discovery, conducted by Nelligan O'Brien Payne, are expected to contain more details about knowledge/lack of reasonable supervision at St. Anne's.
- m. Under Appendix VIII²³ of the IAP model, federal officials of Canada are contractually obligated to work with the Catholic Church, to make admissions about knowledge/lack of reasonable steps by persons in authority at St. Anne's, drawn from other former students' examinations for discovery. Nelligans conducted the St. Anne's discoveries as co-defence counsel with Department of Justice. No SOS admissions are made on the IAP data base, except from IAP decisions.
- n. Canada opposed the Review of IAP Claim K-10106.
- o. The defendant church official copied with the confidential IAP information for claimant K-10106, was a former client of Nelligans in the civil actions. The church also did not advise the Secretariat of the conflict.
- p. Nelligans did not file any Request for Directions for its St. Anne's IAP clients, to challenge the IAP disclosure by Canada.
- q. As of February 7, 2017, Canada now reveals that its legal position is that Canada is constrained by "settlement privilege" to not disclose transcripts. No one has revealed whether Nelligans is part of, or was part, of any communications that are causing Canada to claim it is bound by "settlement privilege".
- r. If Claimant K-10106 files a civil action against Nelligans, the IRSSA and Implementation Orders and IAP confidentiality restrictions may

²² *Fontaine v. Canada*, 2014 ONSC 283 at para 210 and 218; the Court found that this disclosure was not a new obligation on Canada and was owed from the outset of the IAP.

²³ IRSSA, Schedule D, Appendix VIII, last paragraph.

prohibit her from prosecuting a claim for negligence, breach of fiduciary duties and unjust enrichment, the Catholic Church or Canada may withhold consent to waive IAP confidentiality. Furthermore, a regular civil action would give rise to the risk of Claimant K-10106 losing her own rights to IAP confidentiality over her story. Judges in the regular court system are not in a position to adjudicate or fully understand breach of the IAP process, whereas the Administrative Judges of the IRSSA are concurrently Judges of the Superior Court.

12. The evidence of Claimant K-10106 is supported by two other IAP claimants from St. Anne's IRS, IAP Claimants H-00199 and E-10044. Both were also represented by Nelligan O'Brien Payne but were never told about the conflict. The documents were not requested of Canada nor filed by Nelligan O'Brien Payne.

D. Serious Issues to be tried and No other party will bring or is being permitted to bring an RFD

13. IAP proceedings pertain to sexual and physical abuse of aboriginal Canadians when they were children at an IRS. The issues are profound and personal to the IAP applicants. Each claimant has procedural rights against the defendants, prior to and during the IAP hearing. The defendants were to have filed their evidence for each school with the Secretariat, from which a narrative and POI reports were to be generated for IAP claims (that had to be filed by September 19, 2012)²⁴. IAP hearing adjudicators make findings of fact and credibility and are to review the IRS narrative and POI reports, and can access the document collection from the defendants, in advance of questioning a claimant. Adjudicators are expected to review the document collection from the defendants available for possible use²⁵. No new evidence is allowed for Review or Re-Review²⁶, so the defendants' disclosure obligations have to be met at the IAP hearing stage.

14. Failure of Canada to file required evidence has already been determined to be

²⁴ IRSSA, Schedule D, Appendix IV, Section (i) and Appendix VIII

²⁵ IRSSA, Schedule D, Appendix X, Section 3

²⁶ IRSSA, Schedule D, page

breach of procedural fairness, rendering original IAP hearing decisions null and ineffective²⁷. That finding applies whether the failure to file the evidence is advertent or inadvertent. Lack of procedural fairness applies as well when Canada fails to admit, in relation to student on student abuse, evidence in its possession for knowledge/lack of reasonable steps by supervisors aware of that kind of abuse.

15. From 1992 until 2005, prior to the IAP, about 1000 former students of St. Anne's gave their stories of horrific sexual and physical abuse they suffered as children, to the Ontario Provincial Police, in criminal proceedings and in civil actions in Cochrane and Toronto. The Ontario system of justice was operationalized, collecting evidence about widespread sexual and physical abuse of Canadian children, under due process to the defendants and/or those "persons of interest" for whom the defendants are vicariously liable.

16. In 2003, the Ontario Superior Court of Justice granted court access to the OPP investigation documents to the lawyers for Canada (DOJ), for the Catholic Church entities (Nelligans) and the plaintiffs in the Cochrane civil actions (Wallbridge). Justice Trainor declined, in his Order, to determine the rights of "non-plaintiffs" to the OPP investigation documents²⁸. "Non-plaintiffs" would include all IAP claimants to come.

17. Even though national class actions were already certified and were being defended, the federal government and the Catholic Church separately defended these 156 civil actions in Cochrane. Examinations for discovery were conducted of those former students and all the civil actions settled by 2005. DOJ lawyer Hanyia Sheikh swore in June 2003 that the testimony in examinations for discovery was often more serious than allegations of abuse in the pleadings. Canada has never revealed what Justice Trainor was asked by the defendants to decide about "non-plaintiffs" having access to the OPP investigation documents.

18. The IRSSA was signed in 2006. Notwithstanding the terms, the DOJ officials and the Catholic Church withheld from disclosure to the IAP, over 12,000 documents in their

²⁷ Re-Review Decision Q-10233, Review Decision M-18881 and Re-Review Decision H-15019.

²⁸ 2003 Motion Record of Canada dated June 25, 2003 including affidavit of Hanyia Sheikh DOJ sworn June 2, 2003, being Exhibit D to Affidavit of Claimant H-15019 sworn December 4, 2015, Volume 2, Amended RFD Record Claimant H-15019 dated February 11, 2016 at pages 212 to 193; and ONSC Order of Mr. Justice Trainor dated August 1, 2003, being Exhibit E to Affidavit of Claimant H-15019 sworn December 4, 2015, Volume 3, Amended RFD Record Claimant H-15019 dated February 11, 2016 at pages 194 to 198

possession about sexual and physical abuse of children at St. Anne's. DOJ withheld these documents from their own clients in AANDC. AANDC generated the narrative and POI reports for the IAP²⁹.

19. None of that evidence was filed for the IAP process until June 30, 2014. A complete narrative and POI reports were not available until November 2015, after St. Anne's RFD #2, when most IAP claims for St. Anne's had been completed.

20. IAP Adjudicators and claimant counsel had, previous to June 30, 2014, been given a false narrative that stated there were no documents about sexual abuse at St. Anne's and the POI reports were incomplete or false. The OPP had obtained disclosure from the Catholic Church under search warrants in the 1990's, so the revised evidence from the OPP coming into the IAP, significantly revised the POI reports.

21. Even after January 14, 2014, there is evidence that Canada did not file any revised evidence for St. Anne's IAP hearings³⁰. Wallbridge, which had been plaintiff counsel in the Cochrane civil actions so had all this evidence as well, went on to act as claimant counsel in the IAP process for St. Anne's students. In IAP Claim H-15019, the Chief Adjudicator has found that Wallbridge but did not require Canada to file the revised evidence for final submissions or the review, both conducted after January 14, 2014³¹. The IAP hearing adjudicator, Chief Adjudicator and Review Adjudicator all failed to implement the Order of January 14, 2014 to require the revised disclosure from Canada and only upon Claimant H-15019 bringing a Request for Directions did Canada finally offer to file revised evidence, but asked the Court to require Claimant H-15019 to seek a Re-Review.

22. Canada is still not producing the transcripts of examinations for discovery for the IAP, despite paragraph 6(b) of the Order of January 14, 2014. Simultaneously, Canada is filing written submissions, opposing IAP claims, claiming that the civil pleadings in the source documents for St. Anne's are "untested"³².

23. Canada has not made any admissions on the SOS admissions data base, from evidence obtained in completed examinations for discovery or from the signed witness

²⁹ *Fontaine v. Canada*, 2014 ONSC 283, para 111 to 118

³⁰ IAP Claim H-15019 and IAP Claim K-14876

³¹ Amended Re-Review Decision H-15019 dated January 30, 2017, para 20 to 26

³² IAP Claim H-15019

statements taken by the OPP, about supervisors having knowledge of abuse and failing to take reasonable steps at St. Anne's³³.

24. Counsel for Canada orally advised the Court on February 7, 2017 that regarding the re-hearing for Claimant H-15019, Canada is constrained from providing disclosure of the transcripts of the examinations for discovery in the civil actions, allegedly due to “**settlement privilege**” or the deemed undertaking. Canada never sought directions on this alleged legal constraint at any time with the Court, including in its RFD filed in 2013. Canada did not appeal the Order of January 14, 2014. It is not known who are the parties to the “settlement privilege”, and to whom/from whom Canada is constrained. That ‘settlement privilege’ would supposedly apply to all St. Anne’s claimants.

25. Department of Justice are prohibited from representing the Catholic Church or any other parties under the IRSSA. Canada has not provided any evidence as to whom or with whom the alleged “settlement privilege” supposedly attaches to St. Anne’s abuse documents from legal proceedings prior to the IRSSA. These documents were to be produced to the IAP, under Appendix IV and Appendix VIII of the IRSSA. The IRSSA, Schedule O-3, Section 2.7 provides:

The Government, the Corporation and each Catholic Entity agree that instructions given to their respective counsel will be consistent with the terms and intent of this Agreement, and further accept and acknowledge that their respective representatives and counsel are instructed by, act for, and represent only their principal.

26. The release³⁴ signed by one Cochrane plaintiff in 2005 and filed before the Court, confirms that the release would not apply to what became the IRSSA “common experience payment”. DOJ were simultaneously involved in defending Canada in the national class actions and defending Canada in the Cochrane civil actions. The signed release signed by that plaintiff does not contain any reference to “settlement privilege” over OPP investigation documents, transcripts of criminal trials and/or transcripts of examinations for discovery. Canada and the Catholic Church has not produced any evidence related to “settlement privilege”.

27. Canada itself has not brought forward any IAP claims from St. Anne’s for possible miscarriage of justice.

³³ RFD of Claimant C-14114 dated November 10, 2016

³⁴ Cochrane civil action form of release, Tab OO, Volume 9, Amended RFD Record of Claimant H-15019 dated February 11, 2016 at pages 2299 to 2301

28. If Metatawabin and/or K-10106 are not granted standing, it is not likely another party will bring or be permitted to bring these issues to the Court under an RFD;

a. **IAP Claimant H-15019 has standing but his RFD was adjourned.**

Claimant H-15019 filed an RFD in November 2015, and an Amended RFD on February 11, 2016, on these same or similar legal issues³⁵. Claimant H-15019's RFD has been adjourned *sine die*, to be brought back to the Court, "if necessary". It is not known whether Wallbridge was constrained in IAP Claim H-15019 and all St. Anne's IAP claims, under "settlement privilege", from using any of the similar fact evidence or evidence about knowledge/lack of reasonable steps by church and school officials about the sexual abuse going on at St. Anne's. Claimant H-15019 was never informed of such any constraint on Wallbridge, in representing him in the IAP process³⁶. Wallbridge never brought an RFD for any of the St. Anne's former students represented in the IAP process.

b. **IAP Claimant C-14114 has standing but her RFD is adjourned;**

this St. Anne's former student's IAP claim was also denied. Canada and the Catholic Church have not made any admissions under Appendix VIII from the transcripts of the examinations for discovery and/or witness interviews, about officials at the school knowing about sexual abuse and/or failing to take reasonable steps to stop the sexual abuse.

c. **Mushkegowuk Council** withdrew as Applicant, due to possible cost consequences. Canada was intending to contest standing of Mushkegowuk Council to bring an RFD.

d. **Claimant K-14876;** Review decision IAP Claim K-14876 confirmed denial of compensation for sexual abuse at St. Anne's based upon lack

³⁵ Amended RFD Claimant H-15019 dated February 11, 2016; Volumes 1 to 10 including Affidavit of Claimant H-15109 sworn December 4, 2015.

³⁶ Supported by evidence filed by IAP Claimant S-11733, former client of Wallbridge

of supporting evidence, for which new corroborating evidence is now available. Claimant K-14876 is an example of a St. Anne's former student who is not being advised by Canada or the Secretariat about the new evidence. The Review adjudicator does not reference any new source documents from Canada. Wallbridge were also claimant counsel for Claimant K-14876, but there is no RFD filed.

- e. **Wallbridge and Nelligans have never brought an RFD for any of their IAP clients from St. Anne's.** Wallbridge and Nelligans could have brought St. Anne's RFD #1 at the outset of the IAP, but did not, even though both firms knew Canada and the Catholic church entities had all this evidence about sexual and physical abuse of children prior to the IAP. It is not known if Wallbridge and Nelligans are within the group with whom or to whom Canada claims "settlement privilege" or when that privilege was attached.
- f. **The Chief Adjudicator and/or Court Monitor** are not participating in the RFD. The Chief Adjudicator has not ordered the Secretariat to conduct any review of St. Anne's IAP claims, following receipt of revised disclosure by Canada in June 2014.
 - i. IAP Claimants from St. Anne's, not the Chief Adjudicator, returned the St. Anne's RFD to court in 2015, to obtain a Court order³⁷ to force Canada to provide summaries and organization of 12,300 new documents about abuse into a new narrative and POI reports, and to reduce the redactions. The new narrative and POI reports were not filed by Canada for St. Anne's IAP claims until starting in November 2015³⁸.

³⁷ Fontaine v. Canada, 2015 ONSC 4061

³⁸ Canada and the Adjudicators did not adjourn the St. Anne's claims pending compliance by Canada, as found Fontaine v. Canada, 2016 ONSC 4328, para 34

- ii. The Chief Adjudicator failed to follow the IRSSA, the Implementation Orders of the Court (including Order of January 14, 2014) by finding and operationalizing that adjudicators do not have the power to enforce the Order of January 14/14 against Canada in individual IAP hearings. The Chief Adjudicator has never returned any RFD to either establish the powers of adjudicators to enforce the January 14/14 Order and/or to notify the Court that Canada continues to not file revised evidence to comply with that Order. While the Court has retained the power to re-open a concluded case, the Order of January 14, 2014 is authority for adjudicators to control Canada's disclosure in individual hearings for St. Anne's claimants.
- iii. The Chief Adjudicator³⁹ also did not rule on admissibility or use of the new evidence (OPP statements and civil pleadings), despite having Canada's objections to admissibility and use of specific civil pleadings/briefing notes and OPP signed statements filed by Claimant H-15019 on Re-Review⁴⁰. Admissibility is a legal issue of first instance, for every St. Anne's IAP claim.
- iv. The goal to conclude the IAP process does not justify the means, if there are miscarriages of justice for St. Anne's IAP claims, caused by non-disclosure by Canada.

29. On the basis of these facts, it is submitted that it is clear that Metatawabin and Claimant K-10106 have standing before this court to bring this RFD.

³⁹ The Chief Adjudicator can provide advice to adjudicators on compliance with the IAP, is responsible to ensure consistency among decisions of adjudicators, and must ensure application of IAP model, IRSSA, Schedule D, pages 16 and 17.

⁴⁰ Amended Re-Review Decision H-15019 of Chief Adjudicator Shapiro dated January 30, 2017, Exhibit NNN Volume 4, RFD Record of Claimant H-15019 dated October 26, 2016.

30. By law, this Court has the legal duty and responsibility to enforce the IRSSA, and enforcement must be done prior to the completion of the IAP. Aboriginal Canadians are class members entitled to rely on the Court to enforce the IRSSA against the Government of Canada, the Catholic Church entities, and any claimant counsel who signed the IRSSA.

PART III - REMEDIES/RECOMMENDATIONS SOUGHT IN METATAWABIN RFD

31. The Metatawabin RFD requests all or some of the following:

- a. Paragraph 9(i): **Court investigation**⁴¹ of conduct of counsel for possible breach of IRSSA; alternatively allow Applicants' to investigate through RFD process
- b. Paragraph 9(ii): **Determine rights of non-plaintiffs in relation to Order of Justice Trainor August 1, 2003**, and the current legal rights to and status of those parties/counsel currently in possession of those unredacted documents⁴²
- c. Paragraph 9(iii): **finding of violation of Order of January 14/14 by Canada, for failing to produce transcripts of examinations for discovery in IAP and to TRC and enforcement thereof**⁴³;
- d. Paragraph 9(iv): **adjudication of Canada's objections**⁴⁴ **against admissibility of civil and criminal transcripts and OPP signed witness statements in IAP hearings, as legal issue of first instance**

⁴¹ *Fontaine v. Canada*, 2012 BCSC 839 (Blott RFD). *Fontaine v. Canada*, 2015 BCSC 717 (Bronstein RFD) and *Fontaine v. Canada*, 2016 ONSC 5359 (Keshen RFD)

⁴² The ONSC Order of August 1, 2003 adjourned the relief sought by the defendants regarding the rights of "non-plaintiffs" to the OPP investigation documents; what counsel for the defendants requested about non-plaintiffs has not been disclosed. That Order was issued at a time when every aboriginal former student of an IRS was already a class member under certified national class actions.

⁴³ Rules 60.11 and 30.08 Ontario Rules of Civil Procedure.

⁴⁴ Tab CCC, Volume 4, RFD record of Claimant H-15019 dated October 26, 2016; starting at para 20, non-lawyers in AANDC filed the Submissions of Canada for IAP Claim H-15019, taking the position that the

- e. Paragraph 9(v): **Extend the IAP deadline date** for former students who gave the OPP a signed statement about sexual abuse or compensable physical abuse, and for whom no compensation has been paid. Compensation to PKKA to help locate OPP witnesses or estates if witness died after May 2005
- f. Paragraph 9(vi): **Judicial officer to be appointed⁴⁵ to review IAP claims** of St. Anne's former students, for possible miscarriages of justice and payment of increased legal fees to be incurred by claimants, with payment not contingent upon outcome
- g. Paragraph 9(vii): **SOS admissions⁴⁶** from Canada from evidence given in examinations for discovery and OPP witness statements, overseen by Chief Adjudicator
- h. Paragraph 9(viii) and (ix): Directions from the Court for **possible conflict of interest of Wallbridge & Wallbridge and/or by Nelligan O'Brien Payne to IAP claimants**, and directions for process to seek damages
- i. Paragraph 9(x): **Enforcement of Article 8.02 IRSSA** and extension of time for funding mental health and cultural support in Mushkegowuk region
- j. Paragraph 9(xi): Advance **costs**, substantial indemnity costs and costs for St. Anne's survivors to attend public Court proceedings
- k. Paragraph 9(xii) (1): **Cost immunity**

civil pleadings and OPP witness statement are "untested". Canada takes the legal position that every plaintiff and/or former student who gave an OPP signed statement, must be called to testify in the IAP before the adjudicator can accept similar fact evidence. This will bring the administration of justice under the IAP into disrepute, if that student's credibility was established in criminal proceedings or if Canada has already tested that former student in the civil actions, DR or IAP process and paid the student a settlement. Canada should not be permitted to re-victimize former students by forcing them to testify again in the IAP, to provide supporting evidence in civil pleadings, transcripts or signed OPP statements.

⁴⁵ *Fontaine v. Canada 2012 BCSC 839*, appointment of retired Justice Pittfield.

⁴⁶ IRSSA, Schedule D, Appendix VIII, last paragraph.

- l. Paragraph 9(xiii)(1): **Standing**
- m. Paragraph 9(xiii)(2): **Direction that Chief Adjudicator participate**
in this St. Anne's RFD
- n. Paragraph 9(xiii) (3): **Canada to file in public record** the evidence of
1000 former students, subject to privacy rights.

PART IV - COURT POWERS UNDER IRSSA AND INHERENT JURISDICTION

E. Sources of Powers of the Court

32. The IRSSA was passed into law across Canada under Court Orders of Superior Courts in 9 provinces. Superior Courts in Canada thereby assumed responsibility to enforce the IRSSA, under the Approval Order and Court Implementation Orders⁴⁷. The Court also has powers to enforce the IRSSA under s. 12 and 35 *Class Proceedings Act*⁴⁸.

33. The IAP is not a federal government program⁴⁹. The IRSSA is not legislation. Canada was a defendant in the class action and Canada is a defendant in every IAP claim. The Court is the arm of democracy to enforce the rights of vulnerable IRS abuse victims against federal officials and others. Federal officials are not immune from the law and the past systemic failures⁵⁰ of federal officials to fulfill legal obligations to aboriginal Canadians should not be repeated today.

34. The Superior Court possesses inherent jurisdiction and nothing is intended to be out of the jurisdiction of a Superior Court, unless a legislature divests from the universal

⁴⁷ *Approval Order* of Chief Justice Winkler heard December 15, 2006, filed March 15, 2007, paragraph 31, and *Implementation Order* of Chief Justice Winkler heard March 8, 2007 paragraph 23.

⁴⁸ *Class Proceedings Act, 1992, S.O. 1992, c. 6 s. 12; Fontaine v. Canada, 2015 BCSC 1386.*

⁴⁹ *Fontaine v. Canada, 2016 ONCA 241* at paragraph 168

⁵⁰ Failure to protect IRS children from widespread sexual and physical abuse at St. Anne's.

jurisdiction, in unequivocal terms⁵¹. This residual source of powers can be used to serve four functions:

- a. Ensure convenience and fairness in legal proceedings
- b. Thwart action that could render judicial proceedings ineffective
- c. Prevent abuse of process
- d. To act in aid or control of inferior courts and tribunals

35. The broad, discretionary jurisdiction of the Court for supervision, interpretation and/or enforcement of the IRSSA is well established. If the IRSSA is silent about a matter, the Administrative Judge is entitled to remedy “the gap”, in accordance with the principles embodied in the IRSSA, its factual matrix and the evidence before him⁵². As this Court has held:

“Schedule D to the IRSSA is not a complete code of procedural rights under the IRSSA, and Schedule D must also fit with the Court’s administrative jurisdiction, its jurisdiction under the approval order and the implementation order, and its general jurisdiction to enforce contracts and its own orders”⁵³.

36. The Court’s inherent powers, powers under the provincial *Class Proceedings Act*, plus the powers under the IRSSA, allow the Court to appoint its agents to investigate and report to the Court, particularly for instances of breach of the IRSSA by legal counsel.

37. In the context of the IRSSA, it has been already been established that if the conduct of legal counsel could undermine the integrity of the IRSSA, the Court can direct an investigation⁵⁴. Upon a finding of breach of the IRSSA by legal counsel, the remedies that the Court can order are wide, perhaps beyond what is requested.

⁵¹ *Parsons v. Ontario*, 2015 ONCA 158, paragraphs 55, 70-74, and 150. Also see *McCombie v. Cadotte* (2001), 53 O.R. (3d) 704, [2001] O.J. No. 1286 (CA), paragraphs 29-30.

⁵² *Fontaine v. Canada*, 2016 ONCA 241 at paragraphs 201 to 205

⁵³ *Fontaine v. Canada*, 2014 ONSC 283 at para. 204.

⁵⁴ *Fontaine v. Canada*, 2012 BCSC 839 (Blott RFD). *Fontaine v. Canada*, 2015 BCSC 717 (Bronstein RFD) and *Fontaine v. Canada*, 2016 ONSC 5359 (Keshen RFD)

38. In the context of the IRSSA, there is precedent for the Appointment of a judicial officer by the Court under the IRSSA, to investigate for alleged misconduct by legal counsel, and to review IAP claims for potential prejudice. Retired Justice Pittfield was appointed by the Court to review the IAP claims of Mr. Blott's former clients⁵⁵.

39. Breach of the IRSSA by Canada has not been extensively addressed to date, except in the context of non-disclosure for St. Anne's IRS. The evidence for St. Anne's was not "newly discovered" by Canada. The Court already confirmed it would use its extraordinary powers to re-open concluded cases, if the prejudice from the non-disclosure is more than hypothetical⁵⁶. The Ontario Court of Appeal declined to decide whether newly discovered evidence would amount to an exceptional circumstance to allow for judicial intervention, so the matter is left open⁵⁷. This RFD is not an appeal to the Court of an individual IAP decision⁵⁸, but is a request for judicial intervention to determine whether to appoint an officer of the Court to find concluded St. Anne's cases that should be re-opened and to extend the deadline date for filing of IAP claims for OPP witnesses.

40. The Court under the IRSSA can resort to the Rules of Civil Procedure, to the extent that the Rules do not override the IRSSA, or otherwise expand or diminish IAP procedures.

41. *Rule 30.08* of the Ontario Rules of Civil Procedure, provides that where a party fails to produce a document, the court may revoke or suspend a party's right, strike out the statement of defence if the party is a defendant, and "*make such order as is just*"⁵⁹. The Court must consider the seriousness of any breach, the prejudice that the breach may cause to the innocent party's right to a fair hearing, and whether the litigant has shown a cavalier disregard for his obligations⁶⁰.

⁵⁵ *Fontaine v. Canada*, 2012 BCSC 839 (Blott decision)

⁵⁶ *Fontaine v. Canada (AG)*, 2014 ONSC 283 at paragraphs 200 – 207;

⁵⁷ *Fontaine V. Canada*, 2017 ONCA 26, para 61 and 69.

⁵⁸ Distinguished from *Fontaine v. Canada*, 2016 BCSC 2218 and distinguished from *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 471.

⁵⁹ Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

⁶⁰ *Glass v. 618717 Ontario Inc.* 2011 ONSC 2810, [2011] O.J. No. 2086.

42. *Rule 60* outlines the powers of the Court for enforcement of a civil order, including the procedures for civil contempt, and powers of the Court upon finding contempt of a Court Order⁶¹.

43. Failure by Canada to produce the transcripts of civil proceedings about sexual and physical abuse at St. Anne's under paragraph 6(b) of the January 14, 2014 Order, and failure to file the same transcripts with the Truth and Reconciliation Commission under paragraph 5, is *prima facie* violation of the Court Order. The National Centre for Truth and Reconciliation confirmed on November 18, 2016⁶², that they also do not have any civil transcripts. Canada never appealed the Order of January 14, 2014. There were never any civil trials, according to Canada's evidence in St. Anne's RFD #1. The civil actions all settled by 2005, so the only "civil transcripts" were from examinations for discovery, fully discussed in the Reasons of January 14, 2014. The 2003 ONSC motion record and the DOJ affidavit sworn June 24, 2003, confirms that 111 examinations for discovery were already completed by June 2003. Canada never sought directions from the Court nor revealed in Canada's own RFD in 2013, that Canada had agreed to or is somehow bound by "settlement privilege" in relation to the transcripts.

44. The Chief Adjudicator has his own powers to bring an RFD to the Court. He is an Agent of the Court, not Canada⁶³. The Chief Adjudicator is obligated to administer the IAP in accordance with the IRSSA, Implementation Orders and Orders made thereunder by the Administrative Judges and Appeal courts. If Canada is not filing the St. Anne's revised reports and source documents for IAP hearings, then adjudicators cannot be found to have reviewed that documentation in advance of questioning the claimant.

⁶¹ Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

⁶² Letter from NCTR November 18, 2016; Exhibit XX, Volume 4, RFD Record of Claimant H-15019 dated October 26, 2016.

⁶³ *Fontaine v. Canada*, 2016 ONCA 241 at para 166 to 180

F. Remedies Available from the Court for Breach of Contract and/or Breach of Fiduciary Duty

45. The Court has power to remedy for breach of contract. There is alleged breach of the IRSSA by Canada and the Catholic Church entities that operated St. Anne's. There are breaches of retainer contracts between IAP claimants and Nelligans or Wallbridge.

46. The general principle is that contract damages should place the plaintiff in the same economic position that he/she would have been in, had the defendant performed the contract⁶⁴. An IAP re-hearing that follows the IAP model and considers the new disclosure, should put the claimant into the same monetary position as if the disclosure had been properly made by Canada at the outset of the IAP, except the increased legal costs caused by the defendants' non-disclosure.

47. Moreover, an independent actionable wrong can be established within a contractual relationship. Breach of contractual duty of good faith, breach of a distinct contractual provision and/or breach of other duty such as a fiduciary duty⁶⁵ can constitute independent actionable wrongs.

48. Punitive damages can be awarded by the Court, upon finding an independent actionable wrong, in a contractual relationship. Retribution, denunciation and deterrence are recognized as justification for punitive damages. The factors to be analyzed for punitive damages in a contractual relationship are:

- a. Level of blameworthiness of the defendant's conduct
- b. Vulnerability of the plaintiff
- c. Potential harm directed at the specific plaintiff
- d. The need for deterrence
- e. Proportionality when considering other penalties that are likely to be imposed on defendant

⁶⁴ *IBM Canada Limited v. Waterman*, [2013] S.C.J. No. 70, 2013 SCC 70 at paras. 34-37 (S.C.C.)

⁶⁵ *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, confirmed in *Honda Canada v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362

- f. Proportionality to the advantage gained by the defendant for the misconduct⁶⁶.

49. Aggravated damages can also be awarded by the Court for breach of contract, where one object of the contract was to secure a psychological benefit⁶⁷. Mental suffering caused by the breach can be compensated, separately from the economic position that the innocent party would have been in, had the party in breach performed the contract.

50. Restitutional damages are within the power of the Court, which focus on the advantage gained by the defendant as a result of breach of contract or breach of fiduciary duty⁶⁸. The Court has the power to provide a remedy of restitutionary damages in the form of an “accounting for profits” in situations such as breach of fiduciary duty⁶⁹. Honour of the Crown, principles of fiduciary duty, restitution damages are discussed in *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, [2014] Nu.J. No. 13: para 62-89.

51. Canada should not be permitted to rely upon the IRSSA to limit its exposure, if current federal officials breached the IRSSA and Orders made thereunder, causing more harms and damages to IAP claimants. For instance, Canada should not be limited to paying 15% of an award as a contribution towards legal fees when it has acted in breach of the IRSSA.

52. Lawyers acting for IAP claimants owe parallel fiduciary and contractual duties⁷⁰. The remedies that can flow are not confined to contractual remedies. Lawyers must sign and agree to abide by the IRSSA, as a pre-condition to acting as claimant counsel. Lawyers acting for IAP claimants have special professional duties under Law Society guidelines.

⁶⁶ *supra*, paragraphs 111 to 125

⁶⁷ *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3

⁶⁸ *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] SCJ No. 44

⁶⁹ Halsbury's (HAD-36). Account for Profits. Also see *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 [2011] A.J. No. 120 at para. 522, (Alta. Q.B.):

⁷⁰ *Hodgkinson v Simms*, 1994 CanLii 70 (SCC). Also see *Special Guidelines of LSUC* for IAP process.

H. Argument

53. The heads of relief sought by the Applicants are within the power of the Court, upon finding breach of the IRSSA. The Court of Appeal has not eliminated or limited power of the Court to address breach of the IRSSA. It is not known until an investigation is conducted, as to the exact remedies should flow from the breach of IRSSA and further possible findings of independent actionable wrongs. The Court will not be constrained, at the end of an investigation, by the RFD pleadings of the Applicants.

54. The Court has a pro-active role as enforcer of the IRSSA, upon receipt of evidence to establish a *prima facie* case calling for an investigation for breach by Canada and perhaps by others. The Court, under the IRSSA, is not acting as a trial judge adjudicating a dispute between private parties in private litigation.

55. Vulnerable and powerless aboriginal survivors of St. Anne's IRS are seeking Court action. St. Anne's survivors are not statistics within the IAP. If the defendants have knowingly, and without prior judicial authority, violated the contractual rights of individual St. Anne's survivors, each one may have independent actionable wrongs and be entitled to damages. Late disclosure by Canada, when the IAP is attempting to shut down operations, is causing concern about this administrative goal to conclude the IRSSA. That end does not justify the means, if Canada and perhaps others are in breach of the IRSSA.

56. Canada should pay the additional costs and damages, if federal officials have caused a St. Anne's survivor to suffer a miscarriage of justice. Once the IRSSA is found to be concluded, all rights of every St. Anne's survivor arising from IRS operations and the IRSSA will be extinguished. The defendants are not yet entitled to that release, until these issues are investigated and determined.

57. To date, there are no pleadings from the defendants or intervenors, and no evidence filed that might establish additional grounds for the Court to fulfill its legal responsibilities to enforce. To whom/ with whom and when has Canada extended

“settlement privilege” over documents pertaining to sexual and physical abuse of children at St. Anne’s?

58. The sexual abuse was so severe and widespread at St. Anne’s that taken alone, one claim may sound improbable. The new 1200 page narrative negates DOJ submissions that other staff would intervene to protect a child from sexual abuse. It has been vital to the legal interests of IAP claimants from St. Anne’s, throughout the IAP process, that similar fact evidence, evidence about modus operandi of supervisors sexually abusing the children, and evidence about knowledge of abuse/lack of reasonable steps by persons in authority at St. Anne’s, be available to IAP adjudicators before questioning claimants in re-hearings, to determine issues of credibility of claimants.

59. Civil pleadings prepared by Wallbridge, include details of horrific sexual abuse such as sodomy and vaginal intercourse by religious or school officials⁷¹, other supervisors “trolling” for children who would be sexually abused by others⁷², confinement/punishment of children who complained to persons in authority⁷³ and other IAP supporting evidence. Department of Justice lawyer, Hanyia Sheikh swore in June 2003, that many plaintiffs gave testimony about abuse during examinations for discovery that was more serious than the pleadings.

60. Disclosure of relevant documents, even if adverse in interest is a fundamental component of civil litigation in Canada. Federal and church officials failed the St. Anne’s students, who suffered widespread sexual and physical abuse as children. Redacted OPP documents confirm the highest church official for St. Anne’s was told about the sexual abuse by a group of 10 boys in 1967, but he failed to do anything. When

⁷¹ See for instance FTA 040256, FTA 040115, FTA 041019, FTA 040121, FTA 041204, FTA 041456, FTA 041016, FTA 041448, FTA 041013 and many more. Also see OPP signed statements: OPP 002076-0002, OPP-114006, OPP-002088-0002, OPP-000236.

⁷² OPP-002076-0002, OPP-001304-0001, FTA-040256, FTA-041019, FTA-041014, OPP-000072-002

⁷³ FTA 040225

they told the church official there was sexual abuse by a Priest, he told the boys “it is the fatherly way”⁷⁴.

61. The Assistant Administrator of St. Anne’s, after the OPP investigation, was subsequently charged and tried for sexual abuse of St. Anne’s boy. Justice Perell found:

For yet another example of a transcript available since 2003, IAP Claimants who identify J.C. as a perpetrator were given a POI report that made no reference to any allegations of sexual abuse against J.C., although he was subject to a preliminary hearing and trial on allegations of sexual abuse of a student at St. Anne’s. J.C. was acquitted, but the transcripts available to Canada include “allegations” of abuse and the trial judge’s reasons indicate that the acquittal was based on the prosecution’s failure to meet the criminal standard of proof⁷⁵.

62. No one would believe the children that religious people were doing these criminal acts to them as children at St. Anne’s. Starting in 1992, it took over 700 former students to give their stories to the OPP before charges were laid in 1997. The former students had to overcome their distrust and fear of persons in authority. Sexual and physical abuse of children causes harms and consequences to the person as recognized by the IAP.

63. St. Anne’s former students have shown respect for and trust in the legal system, and they properly operationalized the various arms of the law to address the sexual and physical abuse they suffered as children, starting with Metatawabin going to the OPP in 1992. The IRSSA signed in 2006 was the 6th legal system applied to the acts of sexual abuse against these children at St. Anne’s (OPP investigation, criminal charges and trials, Pilot ADR, civil actions, DR process). The IRSSA came with a promise that the Court would enforce the agreement and that the Secretariat would act as an Agent of the Court, not Canada. Even after bringing St. Anne’s RFD #1, to rightfully compel all this evidence to be produced to the IAP and to the TRC, adjudicators are not requiring Canada to file the evidence and obviously not reviewing the evidence prior to testing the credibility of each IAP claimant.

⁷⁴ OPP document 114337, Tab R, Volume 3, RFD Record of Claimant H-15109 dated October 26, 2016.

⁷⁵ *Fontaine v. Canada*, 2014 ONSC 283, para 133.

64. Defendants in civil actions do not have the right to remain silent. Defendants in regular litigation must file pleadings and produce evidence or else findings will be made against them. The IRSSA started as class action litigation. The IRSSA is the settlement, and it empowers the Court to investigate, even on its own initiative. Procedural fairness to IAP claimants includes during in IAP court proceedings. To test the credibility of the defendants and to determine if independent actionable wrongs have occurred, the defendants (and intervenors if involved in “settlement privilege” being placed over the evidence of 1000 Former students) must disclose their evidence so the Court can determine the Truth.

65. The integrity of the IAP process for St. Anne’s survivors is being seriously challenged by Edmund Metatawabin, Claimant K-10106, Mushkegowuk Council and many individual St. Anne’s students, on solid evidence. IAP claimants both individually and standing collectively, are asking the Court for investigation as to why federal officials in the Department of Justice and others violated their rights, without prior directions. St. Anne’s IAP claimants have a right to an investigation of possible misconduct by legal counsel, to know who, what, where, when and why federal officials in the Department of Justice violated legal disclosure rights of St. Anne’s survivors, while simultaneously challenging credibility of IAP claimants in private and confidential hearings. Under what legal mechanisms the violations been accomplished to date. The evidence from the defendants about non-disclosure and breach of the IRSSA falls outside IAP confidentiality, and requires public access to the evidence and proceedings. By what means have the rights of the vulnerable been violated in the IAP.

66. Part of the reconciliation owed under the IRSSA, is whether St. Anne’s survivors can trust federal officials and whether they can trust the justice system to investigate systemic failures by government officials to enforce rights of aboriginal Canadians. IRS federal officials failed in their fiduciary duty to protect these children from widespread horrific abuse. The Attorney General of Canada has a duty to ensure the Government of Canada complies with the law. Aboriginal Canadians who were sexually and physically abused as children at St. Anne’s IRS remain vulnerable and must have faith that if current

officials are not abiding by the law, that the Court can be counted upon to investigate and enforce the law.

67. Reconciliation will only come to St. Anne's survivors if:

- a. persons with authority over aboriginal rights know that they could be held accountable, if they fail to abide by the law
- b. Department of Justice lawyers, acting under the *Department of Justice Act*, can be held accountable, if DOJ attempt to bind the Crown to settlements agreements that prejudice the rights of aboriginals as national class members, or if DOJ fail to seek judicial interpretation of their legal theories, which could be erroneous and are likely to be opposed by claimant counsel⁷⁶, etc.
- c. the Courts can be counted upon to enforce the rights of aboriginals Canadians, even against the State.

68. Mushkegowuk Council passed a resolution that called for an investigation, or alternatively asked for a class action against DOJ lawyers. Cost of litigation and possible cost sanctions against survivors and aboriginal organizations block access to the Court for possible investigation of conduct of federal officials. The Court has its own powers to investigate and to fund an agent of the Court, with costs flowing to the Government of Canada, at least initially. All Canadians have an interest in Truth and Reconciliation and enforcement of the IRSSA by the Court.

⁷⁶ *Fontaine v. Canada*, 2014 ONSC 283; DOJ in the RFD filed for Canada in September 2013 falsely claimed that St. Anne's applicants were trying to force Canada to investigate for documents from third parties, whereas in 2003, Canada had already been given the OPP documents. The 2003 motion record and Order of Justice Trainor were only disclosed in November 2013 because Canada had to file evidence. Also see recent "administrative split" announcements for IAP claimant counsel. Legal theories from DOJ were erroneous but Canada and the Chief Adjudicator did not bring an RFD for IRSSA interpretation by the Court. Claimant counsel were sent a notice in 2017 and claimant counsel are allegedly now responsible to find claimants prejudiced by these erroneous legal theories from DOJ, within a 30 day time limit.

69. The longstanding relationship between the Court and DOJ must not cloud the Court's responsibilities to investigate for breach of the IRSSA by any federal officials of Canada, including DOJ officials, in the IAP process⁷⁷.

70. The evidence of 1000 Former students and the 2015 narrative confirm widespread horrific sexual and physical abuse at St. Anne's. Lawyers for Canada and the church withheld all that evidence, and caused that non-disclosure to both the IAP and TRC. They would have succeeded, except for legal challenge brought by former students themselves in St. Anne's RFD #1. There were 200 objections raised by DOJ during cross examinations in 2013, that avoided answers from the Department of Justice on these issues. The Court knew on January 14, 2014 that it had the power to investigate further. The Court chose to not determine whether federal officials acted in bad faith and instead presumed that federal officials mistakenly misconstrued their legal obligations⁷⁸. Further evidence of continuing non-disclosure since January 14, 2014 is now before the Court, as well as the impact on individuals.

71. Claimant H-15019 testified to horrific sexual abuse in 2013. On July 25, 2014, only 25 days after Canada produced over 12,000 new documents to the Secretariat, DOJ counsel failed to file the revised evidence owed under the Order. The IAP hearing adjudicator, Chief Adjudicator and Review Adjudicator each failed to request revised disclosure from Canada. Wallbridge failed to request the new disclosure at any time, and then failed to bring an RFD in 2015, whereas Wallbridge had all this evidence in its possession as well. Claimant H-15019 then tried to take his life in 2015 over the denial of his IAP claim. Mental health support workers advise Claimant H-15019 to get new legal counsel. As an intervenor, the Court is entitled to know if Wallbridge was/is part of the "settlement privilege" being claimed by Canada over transcripts of examinations for discovery. Claimant H-15019 needed the same corroborating evidence from the OPP signed witness statements and from the Cochrane civil plaintiffs, to prove his testimony to be credible, given the horrific sexual abuse at St. Anne's and knowledge/lack of

⁷⁷ Fontaine v. Canada, 2017 ONSC 1149

⁷⁸ Fontaine v. Canada, 2014 ONSC 283 at para 213; Also see evidence in St. Anne's RFD #1: Affidavit of G. MacDonald of AANDC sworn November 1, 2013, the transcripts of cross examinations of Canada and the list of undertakings/refusals from Canada.

reasonable steps by church and school authorities. Claimant H-15019 and all IAP claimants from St. Anne's, should not have been represented in the IAP by Wallbridge, if there was some pre-existing constraint on Wallbridge to not force Canada to file this evidence in the IAP and/or not file it themselves.

72. Claimant K-10106 has provided her evidence of the heavy impact when her testimony about sexual abuse was found "not credible" by an IAP adjudicator. She filed a complaint to the Chief Adjudicator about her IAP hearing adjudicator and was not told that Canada had withheld thousands of pages of disclosure for her IAP hearing. That emotional impact is worsened by finding out that her IAP claimant counsel, Nelligans, had defended the Catholic Church from 1997 until 2004 in about 160 civil actions about sexual and physical abuse of children at St. Anne's. Claimant K-10106 should not have been represented in the IAP by Nelligans without full prior disclosure and informed consent. If there was some pre-existing constraint on Nelligans by the Catholic Church to not reveal this evidence and/or not force Canada to file this evidence in the IAP, the Court should seek that evidence.

73. Only on February 7, 2017, DOJ finally admitted in a public hearing in Court, that Canada has not been produced under a legal theory that only transcripts of public civil proceedings must be filed under the Order January 14, 2014, and that "settlement privilege" prevents Canada from filing the transcripts on its own for the IAP. Even though Canada's other legal theories were found to be "mistaken" and "misconstrued" in 2014, Canada claims "settlement privilege" attaches to these transcripts. Canada did not raise that legal issue in Canada's own RFD in 2013. Canada did not appeal the Order of January 14, 2014 and did not make disclosure of the evidence to establish "settlement privilege" during St. Anne's RFD #1 or #2.

74. Department of Justice have not disclosed the transcripts to its clients in AANDC⁷⁹ proven because on December 21, 2016, non-lawyers in AANDC refer to civil pleadings as “untested”.

75. “Settlement privilege” and perhaps other legal mechanisms have been placed over documents by DOJ, during the time of certified national class action proceedings, thereby preventing disclosure of these horrific stories to the IAP and TRC. Settlement privilege⁸⁰ does not attach to examinations for discovery. Testimonies taken under oath in discoveries, under the Ontario Rules of Civil Procedure, are not “made with the express or implied intention the testimony will not be disclosed in the event settlement fails⁸¹”. The opposite is true—transcripts will be revealed if settlement fails and the litigation proceeds to trial. Canada was already unsuccessful in arguing the deemed undertaking applies to transcripts of examinations for discovery. The Cochrane plaintiffs should be granted funding to be represented on their own legal rights. DOJ do not represent the former students on issues of privacy in the IAP, being used as another excuse by Canada, whereas redacted transcripts could be filed in any event.

76. Canada is taking the legal position that the civil pleadings are “untested” and that the pleadings cannot be accepted unless the plaintiff is to testify in the IAP⁸². The Cochrane plaintiffs should not be compelled to testify again in the IAP, in order for IAP adjudicators to accept the written documents as credible and true, if the defendants already tested the plaintiff and paid him/her a settlement. For Canada to require each plaintiff to be called to testify in the IAP constitutes abuse of process and re-victimizes survivors.

77. In IAP hearings subsequent to the Cochrane civil actions, adjudicators did not get full disclosure and proper reports from Canada until November 2015. One by one,

⁷⁹ Response Submissions of Canada on Re-Review, dated December 21, 2016, calling the civil pleadings “untested”; Tab CCC, Volume 4, RFD of Claimant H-15019 dated October 26, 2016; AANDC do not appear to have receipt or knowledge of the examinations for discovery.

⁸⁰ *Moore v. Bertuzzi*, 2012 ONSC 3248

⁸¹ *Moore v. Bertuzzi*, 2012 ONSC 3248

⁸² See Response Submissions of Canada dated December 21, 2016, being Exhibit CCC, RFD of Claimant H-15019 dated October 26, 2016 paragraphs 20-26

without corroborating evidence from other students, IAP claimants' testimony about horrific sexual abuse, such as from Claimant H-15019, Claimant K-10106, Claimant K-14876, were found "improbable" or "unsupported", and defeated by Canada. Credibility of the claimant, in essence, is the main issue in respect of any claim in the IAP⁸³.

78. If the sworn testimonies of Cochrane plaintiffs are not disclosed in redacted form and/or if IAP claims have been found not credible, the truth about horrific sexual abuse at St. Anne's in history will be distorted. St. Anne's survivors are aware that the Catholic Church has been trying to establish a veto over IAP testimony going to the TRC for historical purposes, in the *In Rem* confidentiality RFD's. It appears for St. Anne's survivors, that prior to the Courts denying the Catholic Church that veto in 2016⁸⁴, the Catholic Church has tried to establish a veto that by other means. By litigating 156 actions in Cochrane from 2000 to 2005 (but settlement not controlled under the Class Proceedings Act), and by attaching "settlement privilege" to the OPP documents, criminal transcripts, and sworn testimony of the plaintiffs, none of those stories of crimes against aboriginal children have gone to the TRC (including serial sexual abuse by a Priest⁸⁵, electrocuting children in an electric chair, beating sick children to force them to eat their own vomit). Then, by withholding the evidence of 1000 Former students from the IAP and trying to defeat horrific sexual and physical abuse IAP claims one by one, through procedural unfairness, the impact of testimony from defeated IAP claimants is also eliminated in the historical records. Federal officials in DOJ have participated/facilitated this non-disclosure for St. Anne's, without prior testing of legal theories/mechanisms created by DOJ. The TRC described St. Anne's IRS, during St. Anne's RFD #1 as the worst example of abuse of IRS children.

79. St. Anne's survivors do not know how many more potential injustices have happened from this distorted disclosure. Some survivors have likely died in the interim. IAP claimants from St. Anne's whose hearings are concluded, mostly live in remote parts of Canada, and have not been given any notice of all this new evidence. The defendants

⁸³ *Fontaine v. Canada (AG)*, 2012 BCSC 839, paragraph 131.

⁸⁴ Leave to appeal to SCC denied in 2016 to Catholic Church on this legal issue.

⁸⁵ *Fontaine v. Canada*, 2015 ONSC 4061

know which IAP cases may have resulted in different outcomes. The defendants know which OPP witnesses did not subsequently file DR or IAP proceedings.

80. The Court has the power and responsibility to investigate for the truth as to whether DOJ constrained Wallbridge from bringing forward any of the evidence in the Cochrane civil actions into the IAP. If so, why did Wallbridge then act for IAP claimants who were entitled to that evidence? How many IAP claimants were represented by Wallbridge beyond Claimants H-15019, K-14876 and S-11733? Did the former students who were plaintiffs agree to “settlement privilege” applying to the examinations for discovery for redacted production in the IAP and/or for filing with the TRC, or was that separately imposed on plaintiff legal counsel by the defendants? What were/are the rights of the Cochrane plaintiffs to elect to file their transcripts with the TRC?

81. Why did Nelligans act as claimant counsel in the IAP, after having defended the Catholic Church entities that operated St. Anne’s IRS, without the informed consent of each one? Why did the Secretariat not have disclosure of that conflict, so that IAP public information did not include Nelligans as possible IAP claimant counsel? Did anyone constrain Nelligans from bringing forward any of the evidence from the Cochrane civil actions into the IAP?

82. Negative mental impact on IAP claimants of discovering his/her former claimant counsel was constrained in putting forward his/her best case on required/known documents from Canada, should be presumed by the Court, but is also in evidence. There must be a presumption of independent actionable wrongs on the evidence produced to date.

83. What was the role of the Catholic Church? Denials of abuse in the past were the norm. Filing disclosure on a honour system with the Secretariat⁸⁶ for the IAP has not been successful for St. Anne’s IRS. A shell game of separating the officials with the documents from the officials preparing reports/attending IAP hearings, does not relieve the Attorney General of Canada. She has a legal obligation to ensure the officials in the

⁸⁶ Appendix IV, Section (i)

Government of Canada abide by the law, particularly in private and confidential IAP hearings.

84. Credibility of the defendants is being questioned for St. Anne's IRS and if there was bad faith, the Court can deny the defendants their contractual right to challenge re-hearings, and/or to draw presumptions against the defendants on the civil pleadings/OPP signed statements. The penalty for non-disclosure should not merely be to further traumatize the claimant by making him/her re-testify and/or for Canada to assign non-lawyers to challenge the claimant in the confidential hearing process. The Attorney General should be required to be represented by legal counsel on non-disclosure for St. Anne's claimants, and to take legal positions that abide by the law, based upon prior legal opinions to that effect.

85. Canada and the Catholic Church are contractually obligated to instruct their respective lawyers to act in accordance with the IRSSA⁸⁷. Even if a non-lawyer acts for Canada, the non-lawyer must act on the same basis as counsel⁸⁸. Once DOJ were found to have mistakenly misconstrued Canada's disclosure obligations for St. Anne's on January 14, 2014, the Attorney General of Canada should have ensured there are no miscarriages of justice and that only those legal arguments, based upon external legal opinions, are being advanced to oppose/defeat IAP claims by DOJ or AANDC officials. The lawyers who withheld the documents should not be providing the legal opinions regarding use of the evidence in private and confidential IAP hearings.

86. IAP adjudicators are not specialized in admissibility of evidence, as compared to the Court. The Chief Adjudicator could have ruled on these legal objections by Canada in Re-Review Decision H-15019, to provide advice to adjudicators and claimant counsel, and to ensure consistency among re-hearing decisions of adjudicators, but did not do so. The Chief Adjudicator is an Agent of the Court. Legal issues of first instance for all this new St. Anne's evidence could be determined by the Court, as a consequence of prolonged non-disclosure and to prevent more unfairness to St. Anne's IAP claimants and

⁸⁷ See IRSSA, Schedule O-3, section 2.7

⁸⁸ IRSSA, Schedule D, Section III (a)(ii) page 7

years of appeals. Canada and claimant counsel could make legal arguments to the Court about admissibility of transcripts of completed examinations for discovery and of signed statements collected by the OPP, for the purpose of the IAP, to be applied thereafter by adjudicators. Relevance of admissible evidence would still be determined by the IAP adjudicators. The Court can also rule about unredacted copies of OPP signed statements going to claimant counsel for the purpose of locating potential witnesses, and/or to the adjudicator to determine if that witness was compensated under the DR or IAP process.

87. In terms of legal costs, the financial and professional burden of addressing this non-disclosure by the defendants has fallen to claimant counsel. Claimant counsel agreed under the IRSSA to take IAP claims on a contingency basis, dependent upon compliance by the defendants with the IRSSA. The contingency agreement of claimant counsel is also dependent upon the defendants giving instructions to legal counsel consistent with the terms and intent of the IRSSA. The IRSSA, Schedule O-3, Section 2.7 provides:

The Government, the Corporation and each Catholic Entity agree that instructions given to their respective counsel will be consistent with the terms and intent of this Agreement, and further accept and acknowledge that their respective representatives and counsel are instructed by, act for, and represent only their principal.

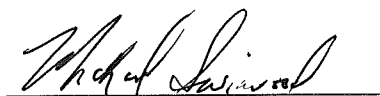
88. Access to the Court for breach of the IRSSA requires legal representation. Requesting enforcement of the IRSSA by the Court, unless pursued by the Court or Chief Adjudicator directly, requires IAP claimants to retain legal counsel. There is a gap in the IRSSA about payment of legal costs for bringing forward legal proceedings to the Court to enforce the IRSSA against the defendants. The financial costs to claimant counsel are enormous. The Court cannot enforce the IRSSA unless bona fide legal matters are brought to the Court or initiated by the Court and/or its agents. Threats of costs against St. Anne's IAP claimants caught in the procedural unfairness caused by Canada's non-disclosure are not supported in any terms of the IRSSA.

89. Some claimant counsel such as Wallbridge and Nelligans, have never brought any RFD's for St. Anne's IAP claimants on this non-disclosure. (Wallbridge also represented MF from Spanish Boys school but never brought an RFD on his behalf to address a

miscarriage of justice.) Wallbridge did not bring an RFD on behalf of Claimants H-15019 or K-14876 or any other St. Anne's claimants.

90. How many IAP claims were filed for St. Anne's survivors in which Canada did not produce this disclosure (before and after January 14, 2014), and how many of those claimants were represented by Wallbridge and/or Nelligans?
91. In summary, the Applicants have standing. The issues are very serious to St. Anne's survivors. The Court has the responsibility to enforce the IRSSA. The relief sought are each within the inherent powers of the Court, and/or the powers under the IRSSA and Implementation Orders, the Class Proceedings Act and Rules of Civil Procedure.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st day of February, 2017



Michael Swinwood

237 Argyle Avenue, Ottawa K2P1B8

Tel: 613-563-7474

Fax: 613-563-9179

Fay K. Brunning

Practicing in Assoc. Williams Litigation Lawyers
LLP

169 Gilmour Avenue, Ottawa. K2P0N8

Tel: 613-237-0520

Fax: 613-237-3163

Co-Counsel for Edmund Metatawabin
And Claimant K-10106 on this RFD

- TO: STOCKWOODS LLP**
 TD North Tower
 77 King Street West, Suite 4130, P.O. Box 140
 Toronto-Dominion Centre
 Toronto, Ontario M5K 1H1
 Tel: 416-593-7200
 Fax: 416-593-9345
Brian Gover
 Lawyer for the Administrative Judge on the IRS Settlement Agreement
- AND TO: CHIEF ADJUDICATOR, DAN SHAPIRO**
 Indian Residential Schools Adjudication Secretariat
 2010 - 12th AVE, 9th floor
 Regina, SK S4P 0M3
 Tel: 306-502-3528
 Fax: 306-790-4635
- AND TO: GOWLINGS**
 2600-160 Elgin Street
 Ottawa, Ontario K1P 1C3
 Tel: 613-233-1781
 Fax: 613-563-9869
Pierre Champagne
 Lawyers for Les Soeurs de la Charité d'Ottawa, a Catholic entity that operated St. Anne's IRS
- AND TO: DEPARTMENT OF JUSTICE**
 Prairie Region
 300 EPCOR Tower, 10423 -101 Street
 Edmonton, Alberta T5H 0E7
 Tel: 780-495-2975
 Fax: 780-495-2964
Catherine A. Coughlan and Brent Thompson
 Lawyers for the Attorney General of Canada
- AND TO: CAZA SAIKELEY**
 350-220 Laurier Avenue, West
 Ottawa, ON, K2C 3T2
 Tel: 613-565-2292
 Fax: 613-565-2087
Ronald Caza
 Lawyers for Diocese of Moosonee and Les Oeuvres Oblates de L'Ontario, two Catholic entities that operated St. Anne's IRS

AND TO: Wardle Daley Bernstein Bieber
 410 Bay Street, Suite 2104
 Toronto ON M5H 2Y4
 Tel: 416-351-2771
 Fax: 416-351-9196
Peter C .Wardle
 Lawyer for Nelligan O'Brien Payne LLP
 Former Lawyers for IAP Claimant K-10106, IAP Claimant H-00199, IAP
 Claimant E-10044 and former lawyers for three Catholic entities that
 operated St. Anne's IRS

AND TO: Adair Barristers LLP
 Commerce Court North
 25 King Street West, Suite 1101
 Toronto ON M5L 1E2
 Tel: 416-499-9940
 Fax: 416-689-2059
Geoffry Adair, Q.C.
 Lawyer for Wallbridge & Wallbridge LLP
 Former Lawyers for IAP Claimant H-15019, IAP Claimant S-11733, IAP
 Claimant K-14876

AND TO: Ursel Phillips Fellows Hopkinson LLP
 555 Richmond St. W., Suite 1200
 Tel: 647-500-3005
 Fax: 416-968-0325
Joanna Birenbaum
 Counsel for National Centre for Truth and Reconciliation

Copy of this Factum will be also copied

TO: ASSEMBLY OF FIRST NATIONS
 55 Metcalfe Street, Suite 1600
 Ottawa, Ontario K1P 6L5
 Tel: 613-241-6789
 Fax: 613-241-5808
Stuart Wuttke
 Lawyers for the Assembly of First Nations

AND TO: PETER GRANT & ASSOCIATES
 900-777 Hornby Street
 Vancouver, British Columbia V6Z 1S4
 Tel: 604-685-1229
 Fax: 604-685-0244
Peter Grant
 Chair – National Administration Committee