

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 IAP CLAIMANT H-15019
PERTAINING TO ST. ANNE'S INDIAN RESIDENTIAL SCHOOL**

Requestor/Appellant

**IN THE MATTER OF THE REQUEST FOR DIRECTIONS
BY EDMUND METATAWABIN
AND BY IAP CLAIMANT K-10106
PERTAINING TO ST. ANNE'S INDIAN RESIDENTIAL SCHOOL**

Requestors/Appellants

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

APPELLANTS' FACTUM

September 1, 2017

**WADDELL PHILLIPS
PROFESSIONAL CORPORATION**
36 Toronto Street
Suite 1120
Toronto, Ontario M5C 2C5

Margaret L. Waddell LSUC #29860U
John Kingman Phillips LSUC # 46206E
T: (416) 477-6979
F: (416) 477-1657
E: marg@waddellphillips.ca
Counsel to Fay K. Brunning, Lawyer for the
Appellants

and

Fay K. Brunning LSUC # 29200B
Practicing in Assoc. Williams Litigation
Lawyers LLP
169 Gilmour Avenue, Ottawa K2P 0N8
T: (613) 237-0520
F: (613) 237-3163
E: fbrunning@williamslitigation.ca

Lawyer for the Appellants

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

Bryan 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) 790-435

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: 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: 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 (Intervenors at the RFP before Perell J.)

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 (Intervenors at the RFP before Perell J.)

Courtesy Copy of this Factum:

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

Independent Claimant Counsel

TABLE OF CONTENTS

PART I - INTRODUCTION 1

PART II - OVERVIEW 2

PART III - FACTS 7

THE IRSSA HAS A COMPLETE CODE FOR IAP HEARINGS 7

CANADA BREACHED THE IRSSA BY FAILING TO PRODUCE THE COCHRANE DOCUMENTS AND BY FAILING TO PREPARE MEANINGFUL AND TRUTHFUL NARRATIVE AND POI REPORTS FOR ST. ANNE’S IRS 9

THE CONSEQUENCES OF CANADA’S BREACH ARE IMMEASURABLE 12

THE RFDS SEEK PRODUCTION OF THE WITHHELD TRANSCRIPTS AND A REMEDY FOR ALL ST. ANNE’S CLAIMANTS 14

THE SUPERVISING JUDGE’S REASONS FOR DECISION 20

PART IV - ISSUES AND THE LAW 21

ISSUE #1 – THE COCHRANE TRANSCRIPTS ARE NOT SETTLEMENT PRIVILEGED NOR SUBJECT TO THE DEEMED UNDERTAKING RULE 22

ISSUE #2 - EDMUND METATAWABIN, PKKA AND CLAIMANT 10106 HAVE STANDING 25

ISSUE #3 – THE COURT SHOULD ORDER A REVIEW AND REHEARING OF THE IAPS 27

PART V - ORDER SOUGHT 30

APPELLANTS' FACTUM

PART I - INTRODUCTION

1. The Appellants appeal from the order of the Honourable Paul Perell, sitting as the Eastern Administrative Supervising Judge under the Indian Residential Schools Settlement Agreement (IRSSA), dated April 24, 2017, in which he dismissed their Requests for Direction (RFD).

2. The Supervising Judge found that:

(a) **(Settlement Privilege and Deemed Undertaking)** The transcripts of the examinations for discovery of 154 Survivors of St. Anne's Indian Residential School from 62 civil actions settled before the IRSSA (the Cochrane Transcripts) are subject to the deemed undertaking rule and settlement privilege, and need not be produced by Canada;¹

(b) **(Standing)** the relief sought by Claimant K-10106, Edmund Metatawabin and Peetabeck Keway Keykaywin Association (PKKA) (together, the Requestors) is "outside the purview of the IRSSA and the IAP,"² therefore they did not have standing to bring their RFD in which they sought, among other things, to engage the Court's inherent supervisory powers and paragraphs 13, 31 and 36 of the IRSSA Approval Order³ to order a remedial process (i.e. a review and rehearing process) for all St. Anne's IAP Claimants whose hearings were conducted in the absence of

¹ *Fontaine v. Canada (Attorney General)*, 2017 ONSC 2487 (Reasons for Decision), para. 116-130, Appeal Book (AB) Vol. 1 Tab 4, and Book of Authorities (BoA) Tab 1.

² Reasons for Decision, para. 151, BoA Tab 1.

³ IRSSA Approval Order of the Honourable W. Winkler RSJ, dated December 15, 2006, BoA Tab 2.

approximately 12,300 “Cochrane documents”⁴ and under false Narratives and Person of Interest reports (POI reports)⁵ as a result of Canada’s breaches of the IRSSA,⁶ and,

(c) **(Jurisdiction)** for the relief sought by the Requestors where the court may have jurisdiction, tautologically, there was “no good reason” to exercise its jurisdiction in light of his conclusion on standing,⁷ and, with respect to Claimant K-10106, “there is no reason to believe the outcome of the IAP process was unjust or that the extraordinary circumstances for court intervention exist.”⁸ Taking on the mantle of the adjudicator and basing his decision on his view of the quantum of her IAP award, the Supervising Judge held that “there is no basis to believe that the absence of the Cochrane documents affected the outcome of the IAP process.”⁹

PART II - OVERVIEW

3. St. Anne’s Indian Residential School (IRS) was a veritable house of horrors where, for generations, indigenous children suffered unspeakable physical and sexual abuses at the hands of those charged with their care. From 1992 - 1996 extensive OPP investigations took place, in which the police collected over 700 Survivors’ signed statements. Over 250 Survivors sought civil

⁴ The Cochrane documents are approximately 12,300 documents that were produced by Canada on June 30, 2014, following the Supervising Judge’s decision in *Fontaine v Canada (Attorney General)* 2014 ONSC 283 (*St. Anne’s RFD-1*), BoA Tab 3, which had been in the possession of Canada from the outset of the IRSSA. See: Reasons for Decision, para. 70, 71, 77.

⁵ *Fontaine v Canada (Attorney General)*, 2015 ONSC 4061 (*St. Anne’s RFD-2*), para. 73, BoA Tab 4; Reasons for Decision, para. 84-85, BoA Tab 1; *Fontaine v Canada (Attorney General)*, 2015 ONSC 3611, para. 4, BoA Tab 5.

⁶ In *St. Anne’s RFD-1*, at para. 213-219, BoA Tab 3, the Supervising Judge found that Canada was in breach of the IRSSA for failing to produce documents already in its possession respecting OPP investigations, criminal convictions, and civil proceedings regarding St. Anne’s (the Cochrane documents) [para. 36, 110-118, 124, 125, 126-134].

In *St. Anne’s RFD-2*, para. 7, BoA Tab 4, the Supervising Judge found that the Narratives for St. Anne’s IRS and the POI reports do not comply with the IRSSA.

⁷ Reasons for Decision, para. 190, BoA Tab 1.

⁸ Reasons for Decision, para. 194, BoA Tab 1.

⁹ Reasons for Decision, para. 194, BoA Tab 1.

compensation in ADR and civil actions prior to the IRSSA. Canada had these documents from the outset of the Independent Assessment Process (IAP).

4. Every IRS Survivor became a class member when the IRSSA was approved. Over 500 St. Anne's Survivors filed IAP claims. Those Claimants were entitled to receive a fair hearing in which Canada fulfilled all its document production and admission obligations under the IRSSA before the hearings began.

5. Under the IAP, Canada is the creator of the evidentiary foundation for every claim. Under Appendices IV and VIII of the IAP Model, Canada accepted the duty and obligation to make full advance disclosure of all the documents in its possession or control about abuse at each Indian Residential School (IRS). Those documents, in turn, form the factual foundation for the Narrative for each IRS, and each POI report that Canada agreed to, and was obliged to create. Both the Narratives and the POI reports must be meaningful reports identifying all the allegations or incidents of physical or sexual abuse at the IRS. Production of the documents and creation of the Narratives and POI reports was a commitment that Canada made as part of the negotiated resolution of the class proceedings. This responsibility was not to be undertaken by Canada in its role of adversary to the Claimants, but rather as part of its commitment to truth and reconciliation.

6. The purpose of the document production, the Narratives and the POI reports was to ease the evidentiary burden for claimants in an inquisitorial setting, who can rely upon these documents as providing corroborating and similar fact evidence. They also make the adjudicative function easier. With the benefit of full documentary production, as well as the Narrative and POI reports, the Adjudicator can fulfill his or her inquisitorial function and make individual findings of fact and credibility relying on those documents. The adjudicator and the claimants are intended to reasonably assume that Canada has fulfilled its obligations under the IRSSA and Appendix VIII,

and that it has prepared truthful Narrative and POI reports, and produced all its documents containing allegations of physical or sexual abuse about each IRS. Findings of credibility are weighed against the fact record created by Canada, which is assumed to be an accurate reflection of all its available information.

7. However, in the case of St. Anne's IRS, Canada failed the St. Anne's Survivors and misled the adjudicators. It failed them because it suppressed 12,300 documents that set out in brutal detail the abuses that transpired at St. Anne's for decades. It failed the Survivors and misled the adjudicators because the Narrative and POI reports it produced denied the truth of St. Anne's. Even after the fact of the suppressed documents was finally discovered and Canada was ordered to produce the documents, it failed to produce meaningful revised Narratives and POI reports for the IRS, until specifically ordered to do so. Canada continues to fail in the duties it owes to the St. Anne's Survivors, the adjudicators, and the administration of justice by refusing to produce transcripts from examinations from discovery that are part of the factual narrative of St. Anne's IRS, raising without a factual foundation the argument that the transcripts are settlement privileged. Canada's failures are a failure of due process for all St. Anne's IAP Claimants. It is a failure of exceptional circumstances¹⁰ that this Court can, and ought to remedy.

8. Settlement privilege only attaches to communications made in furtherance of negotiations towards settlement. It does not apply to sworn testimony and the factual evidence in transcripts from examinations for discovery. The deemed undertaking rule does not apply to documents produced within the same proceeding, and it is overtaken by the terms of the IRSSA in any event.

¹⁰ *Fontaine v Attorney General*, 2017 ONCA 26, para. 61, 69, BoA Tab 6.

9. Upon the approval of the IRSSA, all the civil proceedings by St. Anne's Survivors were swept into the class action and became part of the same proceeding.¹¹ Article 18.06 confirms that the IRSSA constitutes the entire agreement between the Parties. "There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement."¹² Appendix VIII of the IAP Model impose on Canada a positive obligation to produce the discovery transcripts (properly redacted), and for it to include the information from those transcripts in its Narratives and POI reports.

10. This appeal addresses the dismissal of two RFDs brought before the Eastern Supervising Judge arising from Canada's breach of its document production and report making obligations under the IRSSA. The Appellants seek important consequential relief for all St. Anne's Claimants arising from Canada's material suppression of evidence up to and including its present refusal to produce the Cochrane transcripts, in breach of the IRSSA. The relief falls squarely within this Court's inherent, statutory and contractual jurisdiction to control its own process, and to supervise and enforce the IRSSA.¹³

11. Most particularly, the Appellants seek an order from the Court that all St. Anne's IAP claims that were adjudicated while Canada was suppressing material evidence should be reviewed

¹¹ Even plaintiffs whose civil claims had settled were brought into the IRSSA. While they could not claim under the IAP, they received other benefits, such as the common experience payment, mental health funding, the right to the TRC, and the apology from the Prime Minister.

Fontaine v Canada (Attorney General) 2016 ONCA 241, para. 18, 240-241, BoA Tab 7;
St. Anne's RFD-1, para. 40-44, BoA Tab 3.

¹² Article 18.06, IRSSA, BoA Tab 2.

¹³ IRSSA Approval Order, para. 31, BoA Tab 2;
 IRSSA Implementation Order, dated March 8, 2007, para. 20, 23, BoA Tab 8;
Fontaine v Attorney General, 2017 ONCA 26, para. 201-203, BoA Tab 6;
 Reasons for Decision, para. 44-46;
 s. 12 *Class Proceedings Act*, 1992, SO 1992, c.C-6;
Fontaine v Canada (Attorney General), 2016 ONCA 241, para. 27, BoA Tab 7.

and reassessed, and, at the Claimant's option, a rehearing should be held by an adjudicator of original jurisdiction, all at Canada's expense.

12. The onus of seeking, and the expense of undertaking a rehearing should not be shouldered by the individual victims of Canada's breaches, as the Supervising Judge suggested in *St. Anne's RFD-1*.¹⁴ The IRSSA has been breached. The breaches are overwhelming and material for all of the 500+ St. Anne's Claimants. The law is clear that when, as here, there has been material non-disclosure of evidence, the entire judgment is tainted by this fraud on the court, and the whole judgment fails. The Court must protect the integrity of its process, including the IAP process ordered under the IRSSA.¹⁵ Once material non-disclosure is established, the onus is not on the victim of the deception to demonstrate "prejudice from non-disclosure" before the rehearing is ordered.¹⁶ The court is not "to speculate on the possibilities of success" at the new hearing.¹⁷

13. When the adjudicative process has been materially compromised because evidence relating to the foundation of the claim has been hidden from the court, the victim of the deception is entitled to have the case retried. The suppression of material evidence is the "prejudice" to both the deceived person and to the court, and gives rise to the right of a rehearing. It is not the job of the referring court to prejudge the outcome of that rehearing, and only open the gate for cases it thinks will succeed.

14. Accordingly, this Court should uphold and protect its own process by ordering a reassessment of all St. Anne's IAP decisions rendered before November 2015, including providing each Claimant with properly resourced independent legal advice and health care resources, and the

¹⁴ *St. Anne's RFD-1*, at para. 224-232, BoA Tab 3;
Implementation Order, para. 23 BoA Tab 8;
Approval Order, para. 31 and 36, BoA Tab 2.

¹⁵ *100 Main Street East Ltd v Sakas* (1975), 8 OR (2d) 385 (ONCA), pp. 6-9, BoA Tab 9.

¹⁶ *St. Anne's RFD-1*, para. 228, BoA Tab 3.

¹⁷ *100 Main Street East Ltd v Sakas* (1975), 8 OR (2d) 385 (ONCA), pp. 13, 15-16, BoA Tab 9.

right to a rehearing, all at Canada's expense. There has been a manifest failure of Canada's obligations under the IAP, and the St. Anne's Survivors have been revictimized as a result. Upholding the integrity of the courts and the IAP calls for this Court to hold Canada to its bargain, and for Canada to bear the consequences of its deception.

PART III - FACTS

THE IRSSA HAS A COMPLETE CODE FOR IAP HEARINGS

15. The history of the IRSSA, the purpose of the IAP, and the Court's supervisory role have been amply explained.¹⁸ Broadly speaking, the IRSSA is a court-approved national settlement of class actions and other civil proceedings brought against Canada and others. It encompasses the entire agreement between the parties, and is characterized as a "complete code". The Court maintains jurisdiction to supervise the implementation of the settlement. Judicial recourse in respect of an IAP decision, however, is limited to situations where the decision "reflects a patent disregard for the IAP Model's compensation rules" or was "so exceptionally wrong to amount to a failure to apply the IAP Model."¹⁹

16. This appeal is not about challenging the IAP decisions of the St. Anne's Claimants for errors by the Adjudicators. Rather, this appeal is about an overarching breakdown in the IAP process. It is about a failure of Canada to comply with the "complete code." As a result of Canada's breaches of the IRSSA, the adjudicative process under the IAP Model failed for some

¹⁸ Reasons for Decision, para. 54-61, 71-84, BoA Tab 1, AB Vol. 1, Tab 1.

Fontaine v Canada (Attorney General), 2017 ONCA 26, para. 1, 14, 15, 49-51, 53, 54, BoA Tab 6;
Fontaine v Canada (Attorney General), 2016 ONCA 241, para. 1-3, 5-8, 15-31, 46, 76, 201-203, 206,
BoA Tab 7;

Fontaine v Canada (Attorney General), 2012 BCSC 839, para. 29-30, BoA Tab 10.

¹⁹ *Fontaine v Canada (Attorney General)*, 2017 ONCA 26, para. 53, 54, BoA Tab 6.

500+ Survivors of St. Anne's IRS who did not receive the hearing to which they were entitled.²⁰

The Appellants ask the Court to put this wrong to right.

17. The IAP is an important aspect of the IRSSA. It establishes a specialized, *confidential*, and non-adversarial process through which IRS Survivors can claim compensation for the injuries they suffered. The IAP is intended to be respectful of the traumas suffered by the claimants.²¹

18. A core element of the IAP, IRSSA Schedule D, Appendices IV and VIII is Canada's undertaking and commitment to create the factual foundation for the IAP hearings in the form of Narratives, POI reports, and supporting documentation with respect to each IRS.²² The Foundational Facts inform the adjudicator about the known abuses and abusers (persons of interest or POI) at each IRS, and are used or her to assess the credibility of the claimant.

19. Similarly, each claimant can rely upon the foundational facts to as provide corroborating and similar fact evidence. It was intended that both the adjudicator and the claimants could reasonably rely on Canada to fulfil this solemn obligation – to prepare truthful Narratives and POI reports, and produce all its documents containing allegations of physical or sexual abuse about each IRS.

²⁰ *St. Anne's RFD-1*, para. 227, BoA Tab 3;

St. Anne's RFD-2, para. 65-75, BoA Tab 4.

Affidavit of Deputy Grand Chief Rebecca Friday, sworn February 24, 2016 (Friday Affidavit), para. 29-31, and Ex. A, AB Vol. 12, Tab 10(III), p. 3660;

Affidavit of Edmund Metatawabin declared February 29, 2016 (Metatawabin Affidavit #2), para. 6, 11-13, 17-23, 26: "Every IAP claimant whose rights have been violated should have justice." AB Vol. 12, Tab 10(II)

²¹ Schedule D to IRSSA, IAP Model, Procedure, pp. 9-10, 12-13, Appendix IV (vii) – (ix), Appendix VIII, Appendix X, (IAP Model), BoA Tab 11;

Fontaine v Canada (Attorney General), 2016 ONCA 241, para. 8, 46-48, 209-215, 223, BoA Tab 7.

²² *Fontaine v Canada (Attorney General)*, 2017 ONCA 26, para. 32, BoA Tab 6;

IAP Model, Appendices IV (i), (iv), Appendix VIII, and Appendix X, BoA Tab 11, "Adjudicators will be provided with Canada's, and potentially a church's, document collection on each school for which they are holding hearings. This material will also be available to Claimants and their counsel. ... Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility.... it is expected that adjudicators will be familiar with it before starting a hearing to which it is relevant...."

CANADA BREACHED THE IRSSA BY FAILING TO PRODUCE THE COCHRANE DOCUMENTS AND BY FAILING TO PREPARE MEANINGFUL AND TRUTHFUL NARRATIVE AND POI REPORTS FOR ST. ANNE’S IRS

20. There is an enormous volume of documents and evidence regarding the abuse at St. Anne’s IRS. Hundreds of St. Anne’s Survivors gave signed witness statements to the Ontario Provincial Police (OPP). Testimony in criminal proceedings, in civil actions, and the ADR process was given.²³ Many more documents, such as the pleadings in the Cochrane Actions mention the sexual and physical abuse. Edmund Metatawabin knew that a substantial documentary record of the abuse existed. He was instrumental in much of its creation.²⁴

21. However, in 2013 a shocking truth came to light. Thousands of documents in Canada’s possession, the factual foundation for involving St. Anne’s IRS, had been excluded.²⁵

22. The 2008 Narrative for St. Anne’s did not include the transcripts of criminal proceedings of St. Anne’s employees. That Narrative referenced only 4 incidents of physical abuse as “all known identifiable complaints and/or allegations received by government officials and all available information regarding follow-up and outcome. The 2008 Narrative, falsely stated that “there were no known incidents found in documents regarding sexual abuse.” The POI reports were similarly deficient, excluding reference to the OPP documents and transcripts of criminal and civil proceedings.²⁶

²³ Affidavit of Edmund Metatawabin declared August 26, 2013 (Metatawabin Affidavit #1), para. 1-25, AB Vol. 10, Tab 10(I).

St. Anne’s RFD-1, para. 109-110, BoA Tab 3.

²⁴ *St. Anne’s RFD-1*, para. 105-110, BoA Tab 3;

Affidavit of Edmund Metatawabin sworn February 29, 2016 (Metatawabin Affidavit #2) AB Vol. 12, Tab 10(II);

Affidavit of Edmund Metatawabin sworn April 26, 2016 (Metatawabin Affidavit #3) AB Vol. 12, Tab 10(IV).

²⁵ Metatawabin Affidavit #1, para. 28, 31, 32, 37, 38, AB Vol. 12, Tab 10(I).

²⁶ *St. Anne’s RFD-1*, para. 123-134, BoA Tab 3.

23. Hundreds of St. Anne’s Survivors AIP claims have been adjudicated on that false factual foundation, stunning scope and breadth. Canada’s staggering failure to meet the disclosure obligations entrusted to it under the IRSSA are comprehensively set out in the Supervising Judge’s decisions in *St. Anne’s RFD-1* and *St. Anne’s RFD-2*.²⁷

24. Despite the plain language of Appendix VIII, in *St. Anne’s RFD-1*, Canada opposed the production of the Cochrane documents. The Supervising Judge found Canada’s narrow interpretation of the IAP Model untenable. He concluded that Canada had breached the IRSSA, and ordered Canada to produce the documents in *St. Anne’s RFD-1*.²⁸

25. In the context of the *St. Anne’s RFD-1*, the 2003 motion record of the Attorney General of Canada (AGC) came to light. The AGC had sought production of the 1992 – 1996 OPP investigation documents in the context of 62 civil actions (the Cochrane Actions), about sexual and physical abuse of 156 St. Anne’s Survivors. The AGC listed 180 alleged perpetrators who were mentioned in the pleadings²⁹. Ironically, given its position in *St. Anne’s RFD-1* and *RFD-2*, and on this appeal, the AGC argued “The records in the possession of the non-party the [OPP] are relevant and necessary to these claims and cannot be obtained by any other means. It would be

²⁷ *St. Anne’s RFD-1*, para. 105-118, BoA Tab 3;

St. Anne’s RFD-2, para. 73., BoA Tab 4.

²⁸ *St. Anne’s RFD-1*, para. 210-219, BoA Tab 3. At para. 217 Perell J. found: “That narrow interpretation makes little sense and is contrary to the reading of the letter and spirit of the IAP provisions of the IRSSA read all together. In particular, it is inconsistent with the provisions of Appendix VIII that states that the Adjudicator will be given “any documents mentioning sexual abuse at the residential school in question.”” (emphasis added)

²⁹ Under IAP Model, Appendix VIII, BoA Tab 11, Canada is required to give to the adjudicator, among other things, “documents about the person(s) named abusers, ... and any sexual or physical abuse allegations concerning them”, and “any documents mentioning sexual abuse at the [IRS] in question.” (emphasis added) The language is important, as it emphasizes that the production obligations are not limited to documents.

unfair to require the defendants to proceed to trial without production of these documents”, and it argued that the documents were required to assess the plaintiff’s claims.³⁰

26. In the Cochrane Actions, the plaintiffs were all represented by the law firm, Wallbridge & Wallbridge. The St. Anne’s church entities were represented by Nelligan O’Brien Payne LLP. Their clients were parties to Canada’s production motion.³¹

27. The 2003 Order gave the lawyers in the Cochrane Civil Actions access to, and the right to copy the OPP documents, every document that pertained to the 156 plaintiffs and/or to the 180 alleged perpetrators.³² Hence both Wallbridge & Wallbridge and Nelligan O’Brien Payne LLP were well aware that Canada had the Cochrane documents when those firms subsequently represented St. Anne’s Survivors in their IAP hearings, yet the documents remained buried at the Department of Justice until the decision in *St. Anne’s RFD-1*.

28. 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 that had been in Canada’s possession since the Cochrane Actions.³³

29. In addition to the document dump, Canada’s lawyers sent a letter stating that it would not produce discovery or ADR transcripts on the grounds of settlement privilege and/or undertakings of confidentiality given to the plaintiffs in the context of pre-IRSSA settlements.³⁴ Canada did not bring its own RFD or otherwise seek directions from the court with respect to its asserted right to withhold the Cochrane transcripts. It adduced no evidence to support its position.

³⁰ AGC Notice of Motion, and Affidavit of Hanyia Shiekh, para. 1 – 30, Ex. D to the Affidavit of Claimant H-15019 sworn December 4, 2015 (H-15019 Affidavit), AB Vol. 2, Tab 8(II)2D .

³¹ AGC Notice of Motion, and Affidavit of Hanyia Shiekh, para. 4, 9, Ex. D to H-15019 Affidavit, AB Vol. 2, Tab 8(II)2D, pp. 277, 314, 315.

³² Order of Justice Trainor dated August 1, 2003, H-15019 Affidavit, Ex. E, AB Vol. 2 Tab 8(II)E.

³³ Reasons for Decision, para. 77, BoA Tab 1;
St. Anne’s RFD-2, para. 37, 38, BoA Tab 4.

³⁴ This letter is not in evidence, but is quoted in the Reasons for Decision, para. 79, BoA Tab 1.

30. In *St. Anne's RFD-2*, Canada was ordered to produce a better and meaningful Narrative and meaningful POI reports, and it was ordered to make fewer redactions.³⁵ For example, the new, but inadequate POI report for Father Lavoie did not mention any allegations of physical or sexual abuse, but had a 36 page appendix listing source documents 2,472 pages long. The Supervising Judge concluded that "A review of the source documents indicates that Father Lavoie was a serial sexual abuser of children at St. Anne's IRS."³⁶

31. The Foundational Facts for St. Anne's now includes a 1200 page narrative,³⁷ with details of widespread sexual and physical abuse to the children of St. Anne's. The October 2015 POI report for Father Lavoie is now 96 pages long³⁸ and Canada admits that from 1938 until 1976 when the IRS closed, Father Lavoie had access to the children. The pre-2014 and compliant POI reports for other supervisors are similarly drastically different³⁹ and previous gaps in dates for their presence at the school are eliminated.

THE CONSEQUENCES OF CANADA'S BREACH ARE IMMEASURABLE

32. The consequences of Canada's non-disclosure of the Cochrane documents and criminal transcripts is significant. While the sheer volume of the documents, alone, speaks to the materiality of the breach, one example clearly demonstrates the point.

³⁵ *St. Anne's RFD-2*, para. 68-73, BoA Tab 4.

³⁶ *St. Anne's RFD-2*, para. 55-57 BoA Tab 4.

³⁷ 2015 Narrative for St. Anne's IRS, Exhibits HH and II to the Affidavit of Jennifer Gabriel sworn December 14, 2015 in the RFD Record of Claimant H-15109 (4 volumes comprising 894 pages of the narrative are not being produced; examples pages are attached in the compendium namely pp. 172, 438, 446, 694-699 AB Vol. 5, Tab 8(V)3HH, AB Vol. 6, Tab 8(VI)3II, AB Vol 7, Tab 8(VII)3II, Tab 8(VIII)3II.

³⁸ POI Report for Father Lavoie updated October 13, 2015 which is Exhibit H to the Affidavit of Jennifer Gabriel sworn December 14, 2015. AB Vol. 3, Tab 8(III)3H (pages 78-80 as examples).

³⁹ See POI reports for some other serial sexual abusers: Exhibits R, S, U, V, W, X to the Affidavit of Jennifer Gabriel sworn December 14, 2015 (not included in compendium).

33. In 2003, Canada obtained the transcripts from the 1999 criminal trial of Anna Wesley, a former St. Anne's nun who was convicted on 3 counts of "administering a noxious substance". Wesley had beaten sick children to force them to eat their own vomit. In some instances, she put out the bowl of vomit for several days at every meal if the child had not eaten it. At her trial, the Crown called expert evidence to establish the long-term psychological harm and physical harm from such severe child abuse. Because these trial transcripts had been excluded from the IAP record, IAP decisions had not yet granted compensation based on this abuse. The new criminal evidence and convictions established the "but for" causation link to establish this abuse as a "wrongful act" under the IAP process.⁴⁰

34. The Reasons for Decision on the Re-review of Claimant H-15019 also make the point. The issue of whether the perpetrator was at the school at the same time as the Claimant moved from a live issue to a proven fact.⁴¹ The Re-review adjudicator properly applied the test for a rehearing, and concluded that the original hearing was made without disclosure of material facts that could have (and indeed did⁴²) affect the outcome, and ordered a new hearing.

35. Claimant H-15019 is a First Nation member of a remote community in Mushkegowuk Council region, who was represented in his IAP by the Wallbridge firm.⁴³ At his original hearing, Claimant H-15019 told his story about experiencing SL5 sexual abuse over a prolonged period of

⁴⁰ "Other Wrongful Acts" are compensable abuse under the IAP if the psychological harm of a wrongful act is proven to be below parenting standards and causation is proven on the "but for" burden of proof in civil actions. Schedule D, IAP, p. 2.

⁴¹ Reasons for Decision on Re-review, para. 41, 42, 46-54, Ex. NNN Affidavit of Sydney Williams sworn February 2, 2017, AB Vol. 11, Tab 9(IV)3NNN, pp. 3543-3547.

⁴² In August 2017, Claimant H-15019's rehearing was successful, and the adjudicator found that he had suffered sexual abuse. He accepted H4 level of harm caused by childhood sexual abuse. IAP Re-hearing Decision dated August 2017; BoA Tab

⁴³ Affidavit of Claimant H-15019 sworn December 4, 2015, para 6-11. AB Vol. 2 Tab 8(II)2

time.⁴⁴ Claimant H-15019 was questioned repeatedly⁴⁵ by the IAP hearing adjudicator on the 2-page pre-2014 POI report, which falsely stated there were gaps in the years the POI was overlapping with the Claimant.⁴⁶

36. Unknown to Claimant H-15019,⁴⁷ on January 14, 2014 the decision in *St. Anne's RFD-1* was released. Claimant H-15019 was not told about the production Order, and there had been no adjournment of his hearing pending the receipt of the revised disclosure. Sadly, while the Wallbridge firm knew Canada had the documents from the Cochrane Action, and it did not require Canada to file documentation with similar fact evidence, or that would have confirmed that the POI was present at the school during the relevant time period. Canada's counsel raised arguments during final submissions about credibility and reliability of the Claimant, and argued it was improbable that such serious abuse would have happened and not be known to other supervisors.⁴⁸ The adjudicator denied H-15019's claim in September 2014,⁴⁹ adopting Canada's arguments. H-15019's review also took place in the absence of the revised disclosure from Canada. Claimant H-15019 was so distraught from not being believed he became suicidal.⁵⁰

THE RFDS SEEK PRODUCTION OF THE WITHHELD TRANSCRIPTS AND A REMEDY FOR ALL ST. ANNE'S CLAIMANTS

⁴⁴ Transcripts of IAP hearing Claimant H-15019 dated May 13, 2013, which is Exhibit F to the Affidavit of Jennifer Gabriel sworn December 14, 2015, AB Vol. 2, Tab 8(II)3F.

⁴⁵ Transcripts of IAP hearing Claimant H-15019 dated May 13, 2013, which is Exhibit F to the Affidavit of Jennifer Gabriel sworn December 14, 2015 at page 104-107, AB Vol. 2, Tab 8(II)3F.

⁴⁶ POI report after June 30, 2014 revised disclosure from Canada admits that POI had access to children at St. Anne's from 1938 until St. Anne's IRS closed in 1976. *St. Anne's RFD-2*, para. 55-57, 65-72.

⁴⁷ Affidavit of Claimant H-15019 sworn December 4, 2015, para 24, 25, 28, 36, AB Vol. 2, Tab 8(II)2

⁴⁸ Transcripts of final submissions dated July 15, 2014, which is Exhibit N to the Affidavit of Jennifer Gabriel sworn December 15, 2014, AB Vol. 3, Tab 8(III)3N.

⁴⁹ IAP hearing Adjudicator Decision dated September 2, 2014 which is Exhibit J to the Affidavit of Jennifer Gabriel, sworn December 14, 2015, AB Vol. 3, Tab 8(III)3J.

⁵⁰ *Fontaine v Attorney General*, 2016 ONSC 4328, para 39-40, BoA Tab 12.

37. Claimant H-15019 was vulnerable and still fragile withstanding several years of legal processes that had resulted in him not being believed. He sought the support of Mushkegowuk Council, which passed a Resolution 2015-10-22, dated October 22, 2015.⁵¹ The Resolution supported that a Request for Directions be brought to the Court by former Chief Edmund Metatawabin on behalf of former students of St. Anne's, concurrent with the RFD for Claimant H-15019 for a re-hearing.

38. Without a review of each IAP decision made on the deficient evidentiary record, it is impossible to say how many St. Anne's Claimants were disbelieved, or if all or parts of their claim were determined to be unfounded. Regardless, each Claimant suffered procedural and evidentiary unfairness, contrary, not just to the spirit and intent of the IRSSA, but also its terms and the Court Orders approving and implementing it.

39. The St. Anne's Claimants lack the resources to seek individual recourse for Canada's breaches, assuming that the findings of the Court *in St. Anne's RFD-1* and *RFD-2* reached them, and their rights were competently explained to them. Because the IAP is a confidential process, for the most part the affected Claimants are not identifiable. Their leaders, and particularly Edmund Metatawabin and PKKA are entrusted to bring the issue to the Court on their behalf.⁵²

40. In November 2015, Claimant H-15019 filed his Request for Directions for a rehearing. Canada would not consent.⁵³ An amended RFD was filed on February 11, 2016. This RFD was

⁵¹ Resolution 2015-10-22 of Mushkegowuk Council dated October 22, 2015 which is Exhibit Q to the Affidavit of Jennifer Gabriel dated December 14, 2015, AB Vol. 3 Tab 8(III)3Q.

⁵² Resolutions of Mushkegowuk Council attached as Exhibit C to Metatawabin Affidavit #1 and Resolution 2015-10-22 of Mushkegowuk Council dated October 22, 2015 which is Exhibit Q to the Affidavit of Jennifer Gabriel dated December 14, 2015 AB Vol. 12, Tab 10(I)C and AB Vol. 3, Tab 8(III)3Q.

⁵³ Letter of Fay Brunning dated January 7, 2016 and Letter from Catherine Coughlan dated January 14, 2016 which are exhibits JJ and LL to the Supplementary Affidavit of Jennifer Gabriel dated February 11, 2016, Volume 9 AB Vol. 8, Tab 8(IX)1JJ and Tab 8(IX)1LL.

heard on May 11, 2016 and adjourned on July 5, 2016 based on the position of Canada that the Re-review hearing should be exhausted first, and on Canada's promise to file revised disclosure⁵⁴.

Among the relief Claimant H-15019 sought was that Canada produce the Cochrane Actions transcripts (properly redacted), and that the Court to determine a fair and expeditious process for the review of the St. Anne's Claimants decisions rendered on the deficient evidentiary record.⁵⁵

41. Edmund Metatawabin filed an RFD on behalf of Mushkegowuk Council March 2, 2016, asking the Court to grant funding for mental health support programs, and for the court to order a review of the St. Anne's IAP claims for potential miscarriages of justice, along with other relief.

42. The RFD was supported by evidence from Edmund Metatawabin and from Deputy Grand Chief Rebecca Friday (DGC Friday) of Mushkegowuk Council. DGC Friday, who had been the cultural and mental health support worker for the previous 10 years in Kashechewan, outlined the mental health issues in the James Bay region, the lack of resources, lack of notice about the IAP process and difficulty in obtaining counselling⁵⁶. Her evidence is that the majority of people in the First Nations of Mushkegowuk Council over age 48 are IRS survivors. She stated:

“We are trying to stop the suicides, but also to bring back pride in our elders.”

43. After Canada threatened to seek costs against Mushkegowuk Council if its RFD was not successful, it withdrew its RFD. Mr. Metatawabin and PKKA filed their own RFD in its stead.⁵⁷

⁵⁴ *Fontaine v Attorney General*, 2016 ONSC 4328, para 59-64, BoA Tab 12.

⁵⁵ Amended Request for Directions and Notice of Application for Rehearing of Claimant H-15019 dated February 11, 2016, AB Vol. 1 Tab 6.

⁵⁶ Affidavit of Deputy Grand Chief Friday, sworn February 24, 2016, para 4-34 AB Vol. 12, Tab 10(III), pp. 3655 - 3660.

⁵⁷ Fresh Amended RFD of Metatawabin and Claimant K-10106 dated November 16, 2016, AB Vol. 1, Tab 6B; Reasons for Decision, para. 90, BoA Tab 1.

44. Edmund Metatawabin is a former Chief of Fort Albany First Nation, and an executive member of PKKA. He and the PKKA are the chosen representative of the St. Anne's Survivors and the Mushkegowuk Council for the purpose of pursuing the St. Anne's Survivors' rights in the Courts. He is a class member who attended St. Anne's IRRSA from 1956 – 1963 and has actively been advocating for Survivors' rights and to promote healing for 25 years. Quite reasonably he "thought that the evidence proven to that point about the abuse at St. Anne's would be known to the adjudicators and available to individuals in their private hearings."⁵⁸

45. It therefore came as a shock and an affront to Mr. Metatawabin to learn in 2013 that none of the earlier documentation created by the justice system had been included in the IAP. Each claimant was being isolated in their IAP hearing, with a false Factual Foundation, giving an unfair advantage to Canada, and contrary to the spirit of reconciliation in which the IRSSA was negotiated and agreed upon.⁵⁹

46. Claimant K-10106 joined Mr. Metatawabin's RFD in November 2016. Her IAP claim had been denied in 2011 on the false Factual Foundation. Claimant K-10106 had been represented in the IAP process by Nelligan O'Brien Payne LLP, the lawyers who had acted for church entities in the Cochrane Actions.⁶⁰ Like Claimant H-15019, the Cochrane documents were not put forward on her behalf for the IAP hearing, nor did Nelligan challenge Canada on its non-disclosure.

⁵⁸ Metatawabin Affidavit #1, para. 1, 3-25, AB Vol. 12, Tab 10(I);
Supplementary Affidavit of Edmund Metatawabin declared April 26, 2016 (Metatawabin Affidavit #3),
AB Vol. 12 Tab 10(IV);

Friday Affidavit, para. 2, 5, 31 and Ex. A, AB Vol. 12 Tab 10(III).

⁵⁹ Metatawabin Affidavit #1, para. 26-33, AB Vol. 10, Tab 10(I).
Metatawabin Affidavit #3, para. 15, AB Vol. 12, Tab 10(IV).

⁶⁰ Affidavit of IAP Claimant K-10106, sworn March 31, 2016, which was filed in Volume 10 of the RFD record for IAP Claimant H-15019, AB Vol. 8, Tab 8(X) 2.

47. On November 10, 2016, St. Anne's IAP Claimant C-14114 filed an RFD asking for re-opening of her IAP claim, denied under the false Factual Foundation.⁶¹ Claimant C-14114 believed she had suffered SL3 student on student sexual abuse at St. Anne's as a child, but her IAP Claim was denied, because she did not have evidence to meet the test for compensable student-on-student abuse⁶². Canada would not agree to re-open her IAP claim and would not agree to make admissions on the Cochrane transcripts.

48. Other Claimants have filed affidavits in support of the Requestors' RFD. They express their dismay on learning of Canada's breach of the IRSSA and assert that the documents were not produced at their IAP hearings by their own lawyers. They feel they have been treated unfairly and seek rehearings.⁶³

49. Until the Cochrane documents were produced in 2014, all the IAPs for St. Anne's Claimants were made while Canada was in material breach of the IRSSA. The first Narrative for St. Anne's was only 12 pages. It stated that there were: (1) "no known incidents found in the documents regarding sexual abuse"; and (2) no known incidents of student on student abuse.⁶⁴ This was a false Narrative.

50. Until after the decision of the Supervising Judge in *St. Anne's RFD-2*, the Narrative and POI reports for St. Anne's were untrue. The corrected Narrative was not delivered until November

⁶¹ RFD for Claimant C-14114 dated November 10, 2016 and Affidavit of Claimant C-14114, sworn November 10, 2016, AB Vol. 12, Tab 10(IX).

⁶² On August 8, 2017, the Chief Adjudicator issued Re-Review Decision C-14114 rejecting Canada's legal position that breach of procedural fairness is not a ground for re-opening a concluded case [Re-Review Decision C-14114 of Chief Adjudicator dated August 8, 2017, BoA Tab 13]. The issue of Canada's failure to make admissions on completed examinations for discovery is still before the IRSSA Administrative Judge.

⁶³ Affidavits of IAP Claimant K-10106, sworn March 31, 2016,; IAP Claimant H-00199, sworn November 16, 2016; IAP Claimant S-11733, sworn November 16, 2016; and IAP Claimant E-10044, sworn November 16, 2016, AB Vol. 12, Tabs 10(V), 10(VI), 10(VII), 10(VIII).

⁶⁴ 2008 narrative for St. Anne's IRS, which is Exhibit GG to Affidavit of Jennifer Gabriel sworn December 14, 2015, page 10, AB Vol. 4, Tab 3GG.

2015.⁶⁵ The Chief Adjudicator maintains that neither the Secretariat nor adjudicators have the authority to compel Canada to produce documents, so outside an RFD Canada cannot be compelled to comply with its IAP fact building duties.⁶⁶

51. Approximately 8 years after the St. Anne's IAPs commenced, after hundreds of St. Anne's IAP Claimants hearings had been conducted, well after the deadline for filing an IAP claim, and only under compulsion of court orders, Canada finally corrected the Factual Foundation for St. Anne's IRS.

52. Except, Canada still will not produce transcripts from the Cochrane Actions' examinations for discovery, and it has excluded the relevant facts and allegations in those transcripts from the St. Anne's Narratives. Although the Supervising Judge had already determined that documents from the Cochrane Actions form part of the IRSSA proceedings⁶⁷, Canada asserts the transcripts are caught by the deemed undertaking rule. It also argues that the transcripts are subject to settlement privilege.⁶⁸ The Supervising Judge agreed.⁶⁹

53. In *St. Anne's RFD #1*, Canada's affiant deposed that none of the Cochrane Actions proceeded to trial, and they settled by 2005.⁷⁰ Under the release signed by the plaintiffs in the Cochrane Actions, only the fact of and quantum of the settlement is confidential.⁷¹ There is no evidence to support the argument of settlement privilege over the Cochrane transcripts.

⁶⁵ The additional narrative dated October 31, 2015 is contained in Volumes 6 and 7 of AB.

⁶⁶ H-15019 Re-Review Decision, footnote 10, AB, Ex. NNN Affidavit of Sydney Williams sworn February 2, 2017, AB Vol. 11, Tab 9(IV)3NNN, pp.3542

⁶⁷ *St. Anne's RFD-1*, para. 36, BoA Tab 3.

⁶⁸ *Fontaine v Canada (Attorney General)*, 2017 ONSC 1149, para. 12, BoA Tab 14.

⁶⁹ Reasons for Decision, para. 18, 19, BoA Tab 1.

⁷⁰ Affidavit of Graham MacDonald, sworn November 1, 2013 which is Exhibit PP to the Supplementary Affidavit of Jennifer Gabriel, sworn February 11, 2016, para 9, AB Vol. 8, Tab 8(IX)1PP; *St. Anne's RFD-1*, paragraphs 117-118, BoA Tab 3.

⁷¹ Final legal release Exhibit OO to the Affidavit of Jennifer Gabriel sworn February 11, 2016, RFD Record of H-15019, pp. 2463-2465, AB Vol. 8, Tab 8(IX) 100.

THE SUPERVISING JUDGE'S REASONS FOR DECISION

54. The Supervising Judge concluded, relying solely on the bald allegations in a letter from Canada's lawyer,⁷² that the discovery transcripts from the Cochrane Actions were subject to settlement privilege, and he dismissed the RFD of Claimant H-15019.

55. Troublingly, the Supervising Judge sought to bolster his decision that the transcripts are privileged by making two unsupported assumptions that the information in the transcripts would be of no value.

56. First, he surmised, without evidence, that the information in the transcripts is more or less available from the Cochrane documents already produced.⁷³

57. Then the Supervising Judge made the remarkable assertion that the delayed production of the Cochrane Documents had not had an adverse effect on IAP claims, based upon his own post-hearing "inquiries".⁷⁴ The results of these "inquiries" do not include information regarding whether the quantum of damages awarded to St. Anne's Claimants was comparable to that received by other claimants who had suffered comparable abuse.⁷⁵ He did not disclose the number of St. Anne's Claimants whose stories were disbelieved in whole or part based upon a lack of corroborating or similar fact evidence, nor did he consider the psychological impact upon the Claimants because they were disbelieved. The extent to which these "inquiries" influenced the Supervising Judge's decision is immeasurable, and it is an error in principle.⁷⁶ His assumptions stand in stark contrast to the evidence of Claimant H-15019 and Claimant E-10106.

⁷²Reasons for Decision, para. 16, 18, 19, 78, 79, BoA Tab 1.

⁷³Reasons for Decision, para. 19, BoA Tab 1.

⁷⁴Reasons for Decision, para. 20, BoA Tab 1.

⁷⁵According to the IAP website, the average compensation awarded is \$91,708; but based upon the information that the Supervising Judge disclosed, the average award for St. Anne's Claimants is \$63,294 – approximately 30% lower, BoA, Tab 15.

⁷⁶Reasons for Decision, para. 65, 68 BoA Tab 1.

58. The Supervising Judge also determined that the Requestors did not have standing, and for that reason, he dismissed their RFD. In obiter, he also declined to address Relief the court could grant because he had denied standing.⁷⁷

PART IV - ISSUES AND THE LAW

59. This appeal raises three important questions of law:

(a) Does settlement privilege or the deemed undertaking rule apply to the relevant facts contained in the discovery transcripts from the Cochrane Actions, such that those facts and the redacted transcripts need not be disclosed by the Crown in St. Anne's IAPs? Answer – No.

(b) Do the Requestors have standing to bring the Metatawabin RFD? Answer – Yes.

(c) Does the Court have the jurisdiction to grant the relief sought in the Requestors' RFD Request for Relief paragraphs (iii) – production of the Cochrane Action discovery transcripts; (vi) – determination of a process for remediation of the miscarriage of justice for all St. Anne's Survivors whose IAPs were carried out in the absence of the Cochrane Documents (i.e. a direction for reassessment and/or rehearings, including identification of and notice to affected class members or their estates, and an order requiring Canada to pay the reasonable legal fees of independent legal counsel for all affected class members, and the costs of the necessary ancillary social supports); (viii) – directions as to the manner to resolve possible conflicts of interest identified in the evidence; (x) – direction to Canada with respect to its continuing obligation to provide mental health and emotional support services to class members who are entitled to a reassessment or rehearing of their IAP; and (xi) – an order granting Metatawabin and Claimant K-

Fontaine v Canada (Attorney General), 2014 ONSC 283 at para. 36, 122, 123, 187, 194 - 195 [where the Supervising Judge improperly assumes that the absence of the Cochrane documents did not affect the outcome of Claimant K-10106's IAP process], BoA Tab 3.

⁷⁷ Reasons for Decision, para. 133 , BoA Tab 1.

10106 substantial indemnity costs of this RFD, and if it does have the jurisdiction, should it do so, without remitting the matter back to the Supervising Judge?⁷⁸ Answer – yes.

60. The Court has an ongoing obligation to oversee the implementation of the IRSSA, and to ensure that the interests of the highly vulnerable class members are protected. It is charged with ensuring that the settlement delivers the promised benefits to the class.⁷⁹

ISSUE #1 – THE COCHRANE TRANSCRIPTS ARE NOT SETTLEMENT PRIVILEGED NOR SUBJECT TO THE DEEMED UNDERTAKING RULE

61. In *St. Anne's RFD-1*, the Supervising Judge made no distinction between transcripts from civil trials and transcripts from examinations for discovery.⁸⁰ His Order compelled Canada to produce “all transcripts of civil proceedings about abuse at St. Anne’s”.⁸¹ Canada had not argued that settlement privilege or the deemed undertaking applied to the discovery transcripts. The issue was only raised in respect of the OPP documents it obtained under the 2003 order.⁸²

62. Hence, Canada’s subsequent position that the Supervising Judge’s Order of January 14, 2014 “contemplated” that Canada would not produce the discovery transcripts because they were subject to settlement privilege is disingenuous. The order plainly requires the production of all transcripts of civil proceedings, without qualification. The order should be given its plain meaning. A “proceeding” is defined by Rule 1.03 as “an action or an application”.⁸³ Indeed, the Supervising

⁷⁸ On this written record, this Court is in as good a position as the Supervising Judge to make the necessary findings of fact and law, and in the interests of justice, it is appropriate for the court to exercise its discretion to do so to avoid the delay and expense of a further hearing on the same record. See for example: *Pearson v Inco Ltd.*, 2005 CanLII 42474 (ON CA), BoA Tab 16.

⁷⁹ *St. Annes' RFD-1* at para. 156-158, 162-164, BoA Tab 3; and quoting with approval: *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), para. 12, BoA Tab 17; Implementation Order, para. 23, BoA Tab 8.

⁸⁰ *St. Anne's RFD-1*, para. 130, 131, 199, 210, 211, 218, 223, BoA Tab 3. At para. 223, he stated: “To be clear, the order of the court is to produce documents, including transcripts, already in the possession of Canada, and to continue to produce other documents in the same manner as it has in the past.”

⁸¹ Order of Perell J. dated January 14, 2014, BoA Tab 18.

⁸² *St. Anne's RFD-1*, para. 36, BoA Tab 3.

⁸³ Rule 1.03, *Rules of Civil Procedure*, RRO 1990, Reg. 194.

Judge applied the same meaning to the term earlier in his Reasons for Decision when he set out the factual background “In 2000, 154 former students hired Wallbridge, to commence 62 civil proceedings.”⁸⁴ A proceeding is not a trial.

63. Claimant H-15019 did not acknowledge that the deemed undertaking rule applied, but should be lifted in the interests of justice.⁸⁵ Rather, he relies upon the Court’s decision in *St. Anne’s RFD-1* in which the Supervising Judge held the opposite – there is no deemed undertaking with respect to documents from the Cochrane civil proceedings because it is the same proceeding as the IRSSA.⁸⁶

64. There is an irreconcilable difference between the Supervising Judge’s finding that H-15019 is a non-party to the Cochrane civil litigation with “a heavy burden to demonstrate the deemed undertaking should be lifted” and his earlier finding in *St. Anne’s RFD-1*. If the OPP documents obtained by Canada are not covered by the deemed undertaking rule, then neither are the Cochrane transcripts. The same rationale applies to both.

65. In reaching his decision, the Supervising Judge interpreted the IAP Model narrowly, finding that the obligation to produce examination for discovery transcripts is imposed only upon IAP Claimants (and not Canada).⁸⁷ This was an error in law. The IRSSA Approval Order, including the IAP Model supersedes and overrides the deemed undertaking rule, assuming it applied to the Cochrane transcripts. Appendix VIII imposes broad and comprehensive disclosure obligations upon Canada. There is no limiting language in Appendix VIII to exclude transcripts from prior civil proceedings from Canada’s disclosure obligations. To the contrary, the production

⁸⁴ *St. Anne’s RFD-1*, para. 27, BoA Tab 3

⁸⁵ Reasons for Decision, para. 115, BoA Tab 1.

⁸⁶ *Fontaine v Canada (Attorney General)*, 2014 ONSC 283, para. 36, 183-187, BoA Tab 3.

⁸⁷ Reasons for Decision, para. 118, BoA Tab 1.

and report writing obligations imposed on Canada are framed in the broadest of language. The language is clear, and unlimited in scope.⁸⁸

66. Even if the deemed undertaking did apply, this would be an appropriate case to relieve against the rule, since the underlying privacy concern is not engaged in the Confidential IAP forum. There is a greater public interest in disclosure for the benefit of the just resolution of serious cases of child abuse. The discovery evidence is not being used against the deposed person for a collateral purpose, and their privacy rights will be preserved through the redaction of personal information as required under Appendix VIII. As Binnie J. noted in *Juman v. Doucette*, “where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent”.⁸⁹

67. Nor are the Cochrane transcripts subject to any form of settlement privilege. The Supervising Judge mistakenly conflated the facts of a case with communications with respect to settlement. The latter is subject to settlement privilege, but the former is not.⁹⁰

68. Settlement privilege is a rule of evidence that protects *communications* [not facts or evidence] exchanged by parties as they attempt to settle a dispute, and it is subject to exceptions.⁹¹ “The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.”⁹² The purpose of settlement privilege is to encourage and promote settlement. The underlying rationale for settlement privilege is that what parties say in the course of negotiations “will be more open,

⁸⁸ Appendix VIII, IAP Model

⁸⁹ *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157, para 35, BoA Tab 19;

Beazley v Suzuki Motor Corp, 2008 BCSC 850, aff’d [2009] BCJ No 524 (CA), BoA Tab 20.

⁹⁰ *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35, para 37, BoA Tab 21;

Sable Offshore Energy v Ameron International Corp, 2013 SCC 37, para 13, BoA Tab 22.

⁹¹ *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35, para 1, 31, BoA Tab 21;

Sable Offshore Energy v Ameron International Corp, 2013 SCC 37, para 19, BoA Tab 22.

⁹² *Sable Offshore Energy v Ameron International Corp*, 2013 SCC 37, para 1, 2, 12, 13, BoA Tab 22.

and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.”⁹³ “If there is no risk that the use of the information will cause prejudice or risk to the party whose information it is, then the rationale for the privilege tends to disappear.”⁹⁴

69. The Supervising Judge failed to weigh the competing public policy benefit to the IAP process and the Claimants of having the evidence disclosed in the confidential IAP process about institutional child abuse, versus any public policy interest in conferring settlement privilege over discovery evidence, when only limited facts, relevant to the abuse at the IRS would be disclosed from the transcripts, and the identity of the witness would remain confidential and protected. Here, the countervailing interests in a fair IAP process, as reflected by the IAP Model and the IRSSA as a whole weighs against maintaining any settlement privilege, if it exists, in the transcript evidence. It was an error in law and principle for the Supervising Judge to ignore the countervailing public policy benefit of disclosure, which outweighs the policy behind settlement privilege in this case.⁹⁵

ISSUE #2 - EDMUND METATAWABIN, PKKA AND CLAIMANT 10106 HAVE STANDING

70. Paragraph 31 of the Approval Order sets out the right to bring an RFD. The court has the discretion to grant standing to “such other person or entity.”⁹⁶ In exercising this discretion, the court applies the established common law test for public interest standing. The person seeking standing must satisfy the court that: (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.⁹⁷

⁹³ *Sable Offshore Energy v Ameron International Corp*, 2013 SCC 37, para 12, BoA Tab 22.

⁹⁴ *R v Nestlé Canada Inc.*, 2015 ONSC 810, at para. 47, BoA Tab 23

⁹⁵ *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, para. 19, 30, BoA Tab 22.

⁹⁶ Approval Order, para. 31, BoA Tab 2.

⁹⁷ *Fontaine v Canada (Attorney General)*, 2014 BCSC 2531, para. 24, BoA Tab 24.

71. The issues raised by the Requestors are extremely serious and at immediate concern to the Requestors and the constituency they represent. Claimant K-10106 is directly affected, and has a right to seek a rehearing. Mr. Metatawabin and PKKA are the designated representatives of the St. Anne's Survivors. The Supervising Judge erred in principle by reframing all the issues raised by the Requestors as "personal complaints" about professional negligence "outside the purview of the IRSSA and the IAP",⁹⁸ when one item of the Relief related to prior solicitor-client relationships.

72. Rather, the predominate Relief requested is for the Court to issue directions and remedy the failure of the IAP hearings conducted on false Factual Foundation.

73. On the third part of the test for standing, the Supervising Judge again mischaracterized the relief sought as a personal claim for professional negligence, which was an error in principle. He failed to apply the test and consider the particularly vulnerable nature of these IAP claimants,⁹⁹ the fact that they cannot be readily identified to be directly advised of Canada's violations of the IRSSA, and the fact that Mr. Metatawabin and the PKKA are the Survivors' chosen representatives. There is no other reasonable and effective manner to bring their common concern to the court. Like the Tsilhqot'in National Government, granted standing by Justice Brown, the PKKA is in a unique position to assist to its members and the court.¹⁰⁰

74. Further, and contrary to his prior conclusion in *St. Anne's RFD-1*, the Supervising Judge rejected Claimant K-10106's RFD out of hand, disregarding to the actual relief she sought.¹⁰¹ This was a miscarriage of justice and an error of law, as explained below under Issue #3.

⁹⁸ Reasons for Decision, para. 151, 152, BoA Tab 1.

⁹⁹ *Fontaine v Canada (Attorney General)*, 2012 BCSC 839, at para. 120, BoA Tab 10.

¹⁰⁰ *Fontaine v Canada (Attorney General)*, 2008 BCCA 329, para. 16, BoA Tab 24;

Fontaine v Canada (Attorney General), 2014 BCSC 2531, at para. 21, 26, 27, 31, BoA Tab 23

¹⁰¹ Reasons for Decision, para. 15.

75. Mr. Metatawabin, on behalf of the PKKA, has already been granted standing in RFDs related to the same subject matter, including *St. Anne's RFD-1*.¹⁰² Once standing was granted, Mr. Metatawabin and the PKKA are not required to seek further orders in the same proceeding.

76. In May 2016, Canada became of full supporter of the *United Nations Declaration on the Rights of Indigenous Peoples*. The *Declaration* confirms the *Constitutional*¹⁰³ right of PKKA, as the chosen representatives of the St. Anne's Survivors, to bring its RFD. The *Declaration* confirms that Indigenous peoples have the right to determine the responsibilities of individuals in their communities and chose representatives to participate in decision-making in matters that would affect their rights in accordance with their own procedures.¹⁰⁴

77. The Supervising Judge wholly disregarded the *Declaration*, and the PKKA's status as the St. Anne's Claimants' representative, which was an error law and in principle.

78. In sum, the Administrative Judge erred in principle and in law by failing to properly apply the test for granting standing. It is in the interests of justice that the Requestors standing be recognized, and that the merits of their RFD be heard.

ISSUE #3 – THE COURT SHOULD ORDER A REVIEW AND REHEARING OF THE IAPS

79. The final issue is whether the Court has the jurisdiction to grant the Requestors' Relief. The Supervising Judge conceded that he might have jurisdiction on the issues raised in this appeal, but declined to address the issues in light of his standing decision. This too was an error in law.

¹⁰² *Fontaine v Canada (Attorney General)*, 2014 ONSC 4024, para. 20-22, 30. Perell J stated at para. 30: "As I explained to Mr. Metatawabin at the hearing of this RFD, the Courts across the country wish to hear from the parties and the Courts will do what they can to ensure that the IRSSA is properly administered so that the Claimants receive the benefits of the IRSSA." BoA Tab 25;

Reasons for Decision, para. 70, 155, BoA Tab 1

¹⁰³ S. 35, *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁰⁴ United Nations Declaration on the Rights of Indigenous Peoples, BoA Tab 25.

80. The Supervising Judge erred by failing to apply the correct test in the case of material non-disclosure in *St. Anne's RFD-1*,¹⁰⁵ or to apply the test at all in the present case. The law is firmly established that where a judgment has been obtained by a fraud on the court through the suppression of material evidence, the entire judgment must be set aside, and there shall be a rehearing. Once material non-disclosure is established, the right is made out. The motion judge is not to speculate on the possible success of the victim on the rehearing, as the Supervising Judge did with Claimant K-10106. The right and duty of the Court to protect its process is paramount:

Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials.¹⁰⁶

81. Furthermore, pushing the onus onto the Claimants to seek a rehearing was tantamount to denying them a remedy. It ignored the fundamental problem of Notice. The IAP hearings are confidential. The identity of the Claimants is, for the most part, unknown. There is no means by which anyone, other than the Chief Adjudicator, can ensure that the Claimants are informed of Canada's breaches and the Claimants' rights arising from the breaches. The Chief Adjudicator has not taken on that responsibility, and the onus cannot rest on the victims to inform themselves of Canada's breaches.¹⁰⁷

82. Canada is the wrongdoer, and it is before the Court. The Court has ample jurisdiction under the IRSSA, the *Class Proceedings Act, 1992* and under its inherent jurisdiction¹⁰⁸ to direct an independent review of each claim based upon the full evidentiary record, with the option of

¹⁰⁵ *St. Anne's RFD-1*, para. 228, BoA, Tab 3.

¹⁰⁶ *100 Main St. East Limited v Sakas* (1975), 8 OR (2d) 385 (ONCA), at pp. 5-9, 13, 15-16, BoA Tab 9

¹⁰⁷ Metatawabin Affidavit #1, para. 26, 35-39, AB Vol. 12, Tab 10(I);

Metatawabin Affidavit #2, para. 17-23, 27, 28, AB Vol. 12, Tab 10(II).

¹⁰⁸ *Fontaine v Canada (Attorney General)*, 2016 ONCA 241, para. 236-239, BoA Tab 7.

each Claimant to elect a full rehearing should they so choose, and ordering Canada to pay the costs of independent legal advice and health support services for each Claimant who has been revictimized by Canada's egregious disregard of the Court's Orders and the promises it made in the IRSSA. It is a fair remedy in light of the exceptional circumstances of Canada's repeated breaches of the IRSSA, which compromised the hearings of hundreds of St. Anne's Survivors, and consistent with the Court's right and duty to protect its process.

83. In the context of over the St. Anne's Survivors' IAPs, the special considerations for determining credibility, and the opportunity to have their claims adjudicated in a non-confrontational process was materially compromised by Canada's complete abrogation of its responsibility to prepare a true Factual Foundation. Every Claimant's hearing was equally prejudiced. Every Claimant is entitled to the Relief sought by the Requestors, and the interests of justice call for the issue to be resolved in this one RFD.

84. In *Fontaine*, 2017 BCSC 946¹⁰⁹, Supervising Judge Brown denied Claimant T-00178's RFD, a St. Anne's Claimant, represented by the Wallbridge firm. Justice Brown found no exceptional circumstances or patent disregard of the IAP Model to warrant judicial intervention. At the RFD, the lawyer for T-00187 argued that the Updated Narrative for St. Anne's was "new evidence" and that if it had been available to the adjudicator "he would have come to a different conclusion."¹¹⁰ The Supervising Judge characterized the Updated Narrative as "progressive disclosure" as required by Appendix VIII, and held that new evidence adduced subsequent to the determination of an IAP claim was not grounds for a new hearing, and was contrary to the intent that an IAP determination is to be final.¹¹¹

¹⁰⁹ *Fontaine v. Canada (Attorney General)*, 2017 BCSC 946, BoA Tab 26

¹¹⁰ *Fontaine v. Canada (Attorney General)*, 2017 BCSC 946 (CanLII), para. 32 – 34, BoA Tab 26

¹¹¹ *Ibid*, para. 77 – 79

85. The Cochrane documents and the new Narratives and POI reports are not “new evidence”. They are evidence that Canada had in its possession and which it kept from the Adjudicator.¹¹² As this Court explained in *100 Main St.*, “the rules pertaining to new evidence as a ground for a new trial do not apply where the Court has been misled by one of the parties.”¹¹³ The parties to T-00178’s RFD did not argue the law relating to suppression of evidence, and it is apparent that the Western Supervising Judge expressly chose not to address this argument in reaching her decision.¹¹⁴ The decision is not binding on this Court, and should not be accepted as persuasive.

86. Once the suppression of material evidence is established, it is the function and responsibility of the Supervising Judge to protect its processes, to ensure that litigants do not profit from their improper conduct.¹¹⁵ The St. Anne’s Claimants are entitled to a fair hearing on a full evidentiary record, which they seek on this RFD

PART V - ORDER SOUGHT

87. The Appellants request an order setting aside the Order of the Honourable Paul Perell dated April 24, 2017, and substituting an order of this Court requiring Canada to produce the Cochrane discovery transcripts and to comply with Appendix VIII in respect thereto, and for the additional Relief of the Requestors, as addressed above, and substantial indemnity costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September, 2017.



Margaret L. Waddell and John K. Phillips
Waddell Phillips Professional Corporation
Counsel to **Fay K. Brunning**,
Lawyer for the Appellants

¹¹² RFD-1, para. 210, 211 “It already has the documents and transcripts that the Applicants are seeking.”

¹¹³ *100 Main St.*, p. 9

¹¹⁴ *F v. C*, 2017 BCSC 946 (CanLII) para. 82

¹¹⁵ *100 Main Street East Ltd v Sakas* (1975), 8 OR (2d) 385, at pp. 8, 13, 15, BoA Tab 9.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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 IAP CLAIMANT H-15019
PERTAINING TO ST. ANNE'S INDIAN RESIDENTIAL SCHOOL**

Requestor/Appellant

**IN THE MATTER OF THE REQUEST FOR DIRECTIONS
BY EDMUND METATAWABIN
AND BY IAP CLAIMANT K-10106
PERTAINING TO ST. ANNE'S INDIAN RESIDENTIAL SCHOOL**

Requestors/Appellants

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

CERTIFICATE

I, Margaret L. Waddell, counsel to Fay K. Brunning, lawyer for the Appellants, certify that:

1. An Order under subrule 61.09(2) is not required.
2. An estimated four (4) hours will be required for the Appellants' oral argument, not including reply.

September 1, 2017



Margaret L. Waddell, Counsel to Fay K. Brunning,
Lawyer for the Appellants

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Fontaine v. Canada (Attorney General)*, 2017 ONSC 2487
2. IRSSA Approval Order of the Honourable W. Winkler RSJ, dated December 15, 2006, and Schedule D
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. *Fontaine v Canada (Attorney General)*, 2015 ONSC 3611
6. *Fontaine v Attorney General*, 2017 ONCA 26
7. *Fontaine v Canada (Attorney General)* 2016 ONCA 241
8. IRSSA Implementation Order, dated March 8, 2007
9. *100 Main Street East Ltd v Sakas* (1975), 8 OR (2d) 385 (ONCA)
10. *Fontaine v Canada (Attorney General)*, 2012 BCSC 839
11. Schedule D to IRSSA, IAP Model
12. *Fontaine v Attorney General*, 2016 ONSC 4328
13. *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (ON SC)
14. *Fontaine v Canada (Attorney General)*, 2015 BCSC 1386
15. *Pearson v Inco Ltd.*, 2005 CanLII 42474 (ON CA)
16. *Fontaine v Canada (Attorney General)*, 2017 ONSC 1149
17. *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157
18. *Beazley v Suzuki Motor Corp*, 2008 BCSC 850, aff’d [2009] BCJ No 524 (CA)
19. Order of Justice Perell, dated January 14 2014
20. IAP Website statistics screenshot

21. *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35
22. *Sable Offshore Energy v Ameron International Corp*, 2013 SCC 37
23. *R v Nestlé Canada Inc.*, 2015 ONSC 810
24. *Fontaine v Canada (Attorney General)*, 2014 BCSC 2531
25. *United Nations Declaration on the Rights of Indigenous Peoples*
26. *Fontaine v Attorney General*, 2017 BCSC 946
27. IAP Re-hearing Decision for Claimant H-15019, dated August 2017

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11***

S.35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

2. ***The Class Proceedings Act, 1992, SO 1992, c.C-6***

s. 12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12

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

1.03 (1) In these rules, unless the context requires otherwise, "proceeding" means an action or application; ("instance")

LARRY PHILIP FONTAINE et al
Plaintiffs

-and- **THE ATTORNEY GENERAL OF CANADA et al.**
Defendants/Respondents

Court of Appeal File No.: C63804

COURT OF APPEAL FOR ONTARIO

APPELLANTS' FACTUM

**WADDELL PHILLIPS
PROFESSIONAL CORPORATION**

36 Toronto Street
Suite 1120
Toronto, Ontario M5C 2C5

Margaret L. Waddell LSUC #29860U

T: (416) 477-6979

F: (416) 477-1657

E: marg@waddellphillips.ca

Counsel to Fay K. Brunning, Lawyer for the Appellants

Fay K. Brunning

Practicing in Assoc. Williams Litigation Lawyers LLP

169 Gilmour Avenue, Ottawa K2P 0N8

T: (613) 237-0520

F: (613) 237-3163

Lawyer for the Appellants