Court File No. 00-CV-192059

# *ONTARIO*
# SUPERIOR COURT OF JUSTICE

B E T W E E N:

LARRY PHILIP FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER, SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE MCCULLUM, CORNELIUS MCCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND, (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE

METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA

CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

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

## AFFIDAVIT OF DAVID H. FLAHERTY

I, DAVID H. FLAHERTY of the City of Victoria, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

### BACKGROUND

1. I am an Honours graduate of McGill University and have an M.A. and Ph.D. from Columbia University. I have taught history at Princeton University and the University of Virginia and was a Professor of History and Law at the University of Western Ontario. I was the Director of the Center for American Studies at the University of Western Ontario. I have held Fellowships and Scholarships at Oxford, Stanford and Georgetown Universities. I was also a Fellow of the Woodrow Wilson International Center for Scholars and a Canada –US Fulbright Scholar in Law. I was an Adjunct Professor in Political Science at the University of Victoria

from 1999 to 2006. I am currently a Professor Emeritus of History and Law at the University of Western Ontario. Attached hereto as **Exhibit "A"** is a copy of my *curriculum vitae*.

2. Since 1964, I have studied social structures that, from an historian's and social scientist's perspective, enhance or diminish privacy. My first publication dealing with privacy issues was a book published in 1972 called Privacy in Colonial New England. In 1974 I began comparative public policy work on privacy and data protection in Europe and North America. This work led to my writing and editing a series of books on various privacy issues, including Privacy and Government Data Banks: An International Perspective (1979), and Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada and the United States (1989).

3. In 1993, I was appointed as the first Information and Privacy Commissioner for the Province of British Columbia. During my six-year term, I wrote 320 orders under the Freedom of Information and Protection of Privacy Act.

4. During 2000, I served as a Special Advisor to the Deputy Minister of Industry Canada in support of Bill C-6, which became the federal *Personal Information Protection and Electronic Documents Act*. Since 2003 I have been a member of the External Advisory Committee to the Privacy Commissioner of Canada; currently, I am also a member of the External Advisory Committee to the Information and Privacy Commissioner of British Columbia. In 2013-14, I have been the privacy expert on the selection committee for the new Privacy Commissioner of Canada.

5. I am currently employed as a consultant. I provide services for my clients that include strategic advice on the management of privacy issues and of relationships with privacy

regulation authorities, privacy advocates, and the general public; conducting overall assessments of privacy compliance (privacy reviews, audits, and site visits); preparing privacy impact assessments; and developing privacy policies to comply with such legislation as the *Personal Information Protection and Electronic Documents Act.* My clients have included governments and public bodies across Canada, as well as a wide range of public and private sector companies in Canada, the Hong Kong Health Authority, and the governments of Singapore, Jamaica, Australia, and Bermuda. Attached and marked as **Exhibit "A"** is a copy of my *curriculum vitae.*

6. As an historian, my specialty has been U.S. and Canadian legal history, beginning with a book on the history of privacy in colonial New England (1972). I was the editor of the first and third publications of the Osgoode Society for Canadian Legal history: Essays in the History of Canadian Law (2 vols., 1981-1983). Earlier I had edited Essays in the History of Early American Law (1969). In 1980 I published an article on "Privacy and Confidentiality: The Responsibilities of Historians," *Reviews in American History*, vol. 9, no. 3 (Sept., 1980), 419-29. The theme was an expectation that historians would comply with emerging privacy and data protection standards, laws, and best practices.

7. As a privacy consultant, I have also had the privilege of advising the federal government, First Nations and Inuit, and First Nations groups about privacy principles, protection, and compliance. I have worked, for example, for the National Aboriginal Health Association (NAHO), the Inuit Tapirit Kanatami, the First Nations Regional Health Survey, Cape Breton First Nations, and the Northern Intertribal Health Authority Saskatchewan. In this connection, I

am aware of the First Nations' emphasis, with respect to protecting their personal information, on the OCAP principles: Ownership; Control; Access; and Possession.[1]

**EXPERT OPINION**

8. I have been retained by the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process to provide an opinion in this matter. I was asked to address the following questions:

1) What is the scope and sensitivity of the following categories of documents in the possession of the Independent Assessment Process ("IAP"):

   (a) The applications submitted by the claimants to initiate the process.

   (b) The witness statements submitted to the Secretariat;

   (c) The documentary evidence produced by the parties;

   (d) The transcripts and recordings of the hearings;

   (e) Expert and medical reports generated in relation to the claimants;

   (f) The mandatory documents obtained in relation to the claimants (as described in Appendix VII of Schedule "D" to the Indian Residential Schools Settlement Agreement); and

   (g) The decisions of Adjudicators and any appeals.

2) Please describe the privacy interest of claimants and third parties over the IAP records.

3) Ordinarily, are records of the types listed above archived?

4) As an historian, and in view of the other types of documents that are currently available to the Truth and Reconciliation Commission, is there a public interest in archiving and maintaining these materials?

5) In view of your answers to the above questions, please comment on the following options for the disposition of the IAP records:

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[1] See First Nations Information Governance Centre, "The First Nations Principles of OCAP," at http://fnigc.ca/ocap.html

(a) The destruction of the records.

(b) The sealing of the records for a specified number of years.

(c) Archiving the records without obtaining the consent of claimants;

(d) The obtaining of express consent of claimants and other participants for the archiving of the records.

(e) The total redaction of the records.

9. Attached and marked as **Exhibit "B"** is a copy of the letter of instruction. Attached hereto as **Exhibit "C"** is my Acknowledgment of Expert's Duty Form.

10. The balance of this affidavit is my expert opinion in response to the questions asked.

## I. SCOPE AND SENSITIVITY OF DOCUMENTS IN THE POSSESSION OF THE IAP

11. Schedule "D" of the Settlement Agreement refers to the following variety of IAP records containing personal information about claimants that is required to be produced, which is highly relevant to appreciating the scope of the dossiers being compiled for each one, and the extreme sensitivity of both individual items and the accumulated profiles of the claimants in particular:

(a) Points of claim for each alleged wrong;

(b) Summaries of new allegations;

(c) Narratives;

(d) Claimant applications;

(e) Testimony;

(f) Witness statements;

(g) Interview notes;

(h) Transcripts of hearings;

(i) Recordings of hearings;

(j) Submissions on lines of questioning;

(k) Decisions;[2]

(l) Psychological assessments;[3]

(m) Psychiatric assessments;[4]

(n) Vocational assessments;

(o) Actuarial assessments;

(p) Treatment reports;

(q) Expert reports;

(r) Medical evidence (present in approximately 69.1% of dossiers);[5]

(s) Treatment notes;

(t) Clinical records.

12. Schedule "D" further provides in Appendix VII for the *mandatory* production of documents by claimants once their completed application form has been accepted by the IAP. Claimants have no real choice but to agree with such coercion if they wish to pursue a claim. Almost all of this information comes from some type of government record. The need for each type of record is admittedly dependent upon the major levels of harm that the individual is claiming:

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[2] It is pro-privacy that the IAP process requires short decisions that are factually-oriented to key findings and do not "contemplate a narrative exposition of the evidence heard." (Ish Affidavit, Tab B, Settlement Agreement, Schedule B, the IAP process, pp. 141, 173.

[3] Only adjudicators can ask for such an assessment as part of the IAP hearings process. (Ish Affidavit, Tab B, Schedule B, IAP Process, Appendix VI, pp. 154-55).

[4] Only adjudicators can ask for such an assessment as part of the IAP hearings process. (Ish Affidavit, Tab B, Schedule B, IAP Process, Appendix VI, pp. 154-55).

[5] Trueman Affidavit, Exhibit B: the percentage of cases in SADRE, a case management system, with at least one of this document type. Each of these numbers will increase as the Adjudication Secretariat continues its work.

(a) Treatment records about the harms claimed, including clinical, hospital, medical or other treatment records; records from general practitioners, clinics, or community health centres may be deemed to be relevant;

(b) Workers' Compensation records (present in approximately 49.3% of dossiers);[6]

(c) Income tax records (present in approximately 68.4% of dossiers),[7] or Unemployment Insurance or Canada Pension Plan records;

(d) Secondary and post-secondary school records;

(e) Treatment plans for future care.

13. Rarely, if ever, in Canadian history has such a broad range of extremely sensitive records been demanded from so many claimants as part of a class action suit or a comparable compensation or reparations inquiry. As stated in bold type up front in the IAP Application Form, "People who suffered sexual abuse, serous physical abuse, or certain other wrongful acts which caused serious psychological consequences may receive money through the IAP."[8] (Ish Affidavit, Tab D, p. 3). As noted above, claimant records can include welfare, employment, health, income, educational, and criminal records of an administrative nature. It is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims. Having served their administrative purposes to settle claims, there is a strong

[6] Trueman Affidavit, Exhibit B: the percentage of cases in SADRE, a case management system, with at least one of this document type. Each of these numbers will increase as the Adjudication Secretariat continues its work.

[7] Trueman Affidavit, Exhibit B: the percentage of cases in SADRE, a case management system, with at least one of this document type. Each of these numbers will increase as the Adjudication Secretariat continues its work.

[8] Note that the Application form is titled the "Indian Residential Schools Independent Assessment Process" as is the accompanying Guide.

argument to **destroy** all of the claimant records to protect the current and historical reputations and privacy interests of the claimants and any third parties identified in the claims records.

14. Applicants in the IAP process do give their express informed consent for the collection, use, sharing, and disclosure of personal information about themselves when they sign the mandatory "Declaration." (Ish Affidavit, Tab C, p. 21, and Tab D, p. 24). Given the prospect of significant monetary compensation for establishing a specific claim, it is easy to question the meaningfulness of such consent; I also believe that most applicants will have little advance knowledge of the contents of the records that will be compiled for their dossiers. In the Declaration, claimants also have to "agree to respect the private nature of any hearing I may have in this process" and "not to disclose any witness statement I receive or anything said at the hearing by any participant, except what I say myself." The lawyers representing claimants also have to sign this Declaration.

15. The Guide to the IAP Application Form contains "Appendix B: Protection of your personal information." (2 pp.) (Ish Affidavit, Tab D, pp. 28-29). There is a promise of privacy and confidentiality for "sensitive and personal information" about the claimant and other third parties, with security rules in place. Appendix B further states that the IAP will act "in accordance with the *Access to Information Act*, the *Privacy Act*, and any other applicable law, <u>or we will ask your permission to share information.</u>" (Ish Affidavit, Tab D, p. 28; underlining added). Of course, IAP claimants will have little knowledge of the permissive aspects of such laws.

16. The Guide further stipulates in Appendix B that personal information on the application form and all documentation are being collected "*only* so we can (1) operate and administer the

Independent Assessment Process and (2) resolve your residential school claim." (Ish Affidavit, Tab D, p. 29; italics in original). Sharing of personal information with churches will be done "confidentially." Information can also be shared with Health Canada in response to a request for counselling and with "permission" of the claimant.

17. Appendix B of the Guide closes with a section on "Keeping your records," which reads in full as follows:

> The Privacy Act requires the government to keep your personal information for at least two years. Currently, the government keeps this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.[9]

It is not at all clear what a claimant, or counsel, would make of such a mixed and misleading message. Does this apply to IAP records held by the Adjudication Secretariat? What personal information about the claimant will be kept for only two years - or beyond two years? Most of the personal information collected by the federal government itself is in fact itself routinely destroyed and never reaches Library and Archives Canada, unless archivists have determined that some personal information is of enduring historical value.[10]

18. Appendix F of the Guide informs IAP claimants of the documents they must provide to support their claims of harm. (Ish Affidavit, Tab D, pp. 38-39). These can include treatment records about the harms claimed and loss of opportunity, including clinical, hospital, medical, or other treatment records from general practitioners, clinics or community health centres. Loss of

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[9] Ish Affidavit, Tab D, p. 29

[10] The major ongoing example of such storage is historic data from the censuses of population and even that is controversial. See Terry Cook and Bill Waiser, "The Laurier Promise: Securing Public Access to Historic Census Materials in Canada," in Cheryl Avery and Mona Holmlund, Better Off Forgetting? Essays on Archives, Public Policy, and Collective Memory (University of Toronto Press, Toronto, 2013), pp. 71-110.

opportunity claims can also be supported by workers' compensation records, employment insurance and Canada Pension Plan records, and school records. "Other" relevant documents can include drug and alcohol treatment, statements to the police, personal diaries, and statements made to religious officials or medical or counselling professionals.

19. The IAP process includes a confidentiality agreement with respect to actual hearings. (Ish Affidavit, Tab E). The claimant has to agree:

> that I will keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within the IAP or otherwise by law. I understand that I may discuss the outcome of the hearing, including the amount of any compensation awarded to me.

Everyone in attendance at a hearing sign the same agreement (except for the last sentence above). Having made such an agreement, claimants might be quite surprised to learn about potential archiving of their entire claimant record.

20. Appendix II of Schedule "D" contains various additional measures to achieve confidentiality for a complainant's application:

(a) As noted above, the claimant has to agree to the "confidentiality provisions" in the Declaration set out in the IAP application form.

(b) Strict provisions are in place with respect to sharing of applications with the federal government or with a church entity:

(i) "*The application will only be shared with those who need to see it* to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage."

(ii) "Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application."

(iii) "Copies will be made only where absolutely necessary, and *all copies other than those held by the government will be destroyed on the conclusion of the matter*, unless the Claimants asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations." (emphasis added)

21. The IAP process anticipates the stressfulness of the hearings process by making it possible for support persons to "attend hearings to help ensure the health and safety of the Claimant during a stressful event." (Ish Affidavit, Tab B, Schedule D, IAP Process, Appendix IV, p. 23). The IAP also encourages claimants to get counselling support as they proceed through the application process, including the availability of an IRS crisis phone line and Aboriginal crisis counsellors.[11]

22. One of the main functions of the Secretariat is to compile the records filed by the claimant and the defendants into evidentiary packages for distribution to the parties and the adjudicator when cases are hearing-ready. They are maintained on a "secure" server and typically contain sensitive information, including:

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[11] The IAP Application Guide starts with "getting help and support." It says: "If you feel anxious or unwell when you think about your residential school experience, or while you are filling out this Application, you may want to have someone with you or nearby for support, such as a family member, counsellor, traditional healer, Elder or someone else from your community." (Ish Affidavit, Tab C, the IAP Process, p. 2).

(a) The application form;

(b) Mandatory documents submitted by the claimant, including medical, income, education, corrections, and workers compensation records;

(c) Any other records submitted by the claimant;

(d) Claimant attendance report submitted by Canada; and

(e) Person of interest report(s) submitted by Canada. (Trueman Affidavit, paras. 52 and 53).

23. Canada also produces school narratives and documents about each school that have been redacted to remove personal information. (Trueman affidavit, para. 21) These documents are exchanged electronically, by CD-ROM and a courier, and by print for the small number of self-represented claimants (8 %). The Secretariat intends to "permanently" retain these evidentiary packages and school narratives. (Trueman Affidavit, paras. 54-55). These are good examples of very sensitive and identifiable personal information held in the IAP claims process, which is expected to continue into 2018.

24. The IAP Secretariat[12] has created audio recordings of transcripts for all hearings since the ADR process began in 2003; where transcripts were produced, it also has electronic copies of them since mid-2011; previously, the transcripts were on paper only. (Trueman Affidavit, paras. 57-58). Currently, transcripts are only created on request, which is about 40 percent of cases. Under the privacy provisions of the IAP, there is a statement that "Claimants will also be given

[12] While the formal name is the "Indian Residential Schools Adjudication Secretariat," I am referring to it for ease of reference as the IAP Secretariat.

the option of having the transcript deposited in an archive developed for the purpose." (Ish Affidavit, Tab B, Schedule D, IAP Process, section "O," p. 15).

25. Claimants may obtain transcripts of IAP hearings, although such requests are few. Those transcripts are redacted to remove the names of alleged perpetrators (which appear in almost every case in response to questioning by adjudicators). (Trueman Affidavit, para. 69)

26. Schedule "D" also provides in Appendix VIII for the government to disclose documents about alleged sexual and physical abusers of claimants to them and/or their lawyers. They are known as "Persons of Interest."[13] The important qualification for present purposes is that "information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the Privacy Act."[14]

27. I take note of the fact that the Secretariat makes accessible to counsel and adjudicators a master list of admissions of general staff knowledge of student-upon-student abuse prepared by Canada. It is a component of the IAP Decision Database. Everyone given authorized access has to agree to maintaining confidentiality. The Trueman affidavit states that there is no personally-identifiable information in this database (no specific names are listed). (Trueman Affidavit, paras. 38-41, and Exhibits E and F).

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[13] See Ronald Niezen, Truth & Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools (University of Toronto Press, 2013), pp. 45-46.

[14] In conducting site visits and privacy audits for clients, I have found allegedly-redacted records where the names of female patients receiving a very sensitive medical procedure were still visible on the machine-readable copies of paper records. The redaction was clearly inadequate.

28. Canada also has its own records of all IAP claimant files.[15] (Trueman Affidavit, para. 71)

29. Churches that choose to participate in a claim receive full IAP documentation for that claim, which will have to be destroyed, subject to certain qualifications. (Trueman Affidavit, para. 73) According to the IAP process requirements, "Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application." (Ish Affidavit, Tab B, Schedule B, IAP Process, Appendix II, p. 147). From a data protection perspective, this last requirement, as stated, is rather weak.

30. One of the additional ironies and sensitivities of the IAP claimant files is that no individual could ever know in advance about the scope of the personal information about them in these life-long linked files, unless he or she had an amazingly retentive memory. Anyone, for example, who looks at their personal health records held by a family physician for a lengthy period will be astonished at the number of matters, sometimes of great sensitivity, that have left their memory. IAP claimants are also unlikely to see, or have seen, their linked dossiers; only their lawyers, opposing lawyers, adjudicators, and other third parties are in that situation. This makes it especially problematic to ask them for consent to archive their records when they will have only the foggiest notion of what is in them. One can simply pose the question as how many of us have any real memories of the kinds of records that were maintained about each of us during elementary and secondary schooling? It would also be very surprising if residential school students had any idea of the contents of the records that churches, for example, kept about

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[15] See http://www.tbs-sct.gc.ca/atip-aiprp/tools/priv-prp-eng.asp

them, since the whole experience of being removed from their homes was so bewildering to them, to say the very least.

31. The sensitivity of the contents of the IAP claimant files is so great that it would be completely inappropriate to collect, use, disclose, or retain them for archival purposes, or for any other administrative purposes affecting specific individuals, beyond the specific IAP process of determining results in individual cases.

32. All of the documentation surrounding the creation of the TRC itself indicates that its use of records has to be "in accordance with access and privacy legislation…."[16]

(a) S. 11 of Schedule "N," the Mandate of the TRC, provides with respect to "access to relevant information" that Canada and the churches will provide all relevant documents for the use of the TRC, "*subject to the privacy interests of an individual* as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation…." (emphasis added)

(b) Furthermore, "in cases where privacy interests of an individual exist, and subject to and in compliance with application privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected." Note that this activity appears to be separate from the Independent Assessment Process, yet the emphasis on

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[16] Schedule "N," Mandate for the TRC, 2(a).

protecting the privacy interests of individuals is very clear. (S. 11, Schedule "N.")

(c) S. 13 of Schedule "N," under the rubric of "Privacy," simply states that "the Commission shall respect privacy laws, and the confidentiality concerns of participants."

33. The Adjudication Secretariat follows confidentiality rules and best practices in its work. The provisions for "Privacy" in section 'o' of Schedule "D" stipulate that hearings are closed to the public and that all parties (including alleged perpetrators and other witnesses) are required to keep confidential information disclosed at a hearing (except for their own evidence). The copy of a decision that a claimant receives is also "redacted to remove identifying information about any alleged perpetrators...."[17]

34. The provisions for privacy in Schedule "D" for the Adjudication Secretariat further establish that transcripts of hearings will be recorded and transcribed for use by the adjudicator and by a claimant who requests a copy (which is unusual to date). Furthermore, "claimants will also be given the option of having the transcript deposited in an archive developed for the purpose." It is important to recognize that the contents of such transcripts contain very sensitive personal information, the product of intimate questioning by the adjudicator about the details of what happened to the survivor at the residential school.

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[17] The same confidentiality requirements are in the Ish Affidavit, Tab B, Settlement Agreement, Schedule D, the IAP Process, section "o."

**Other Copies of the Materials**

35. It is problematic that numerous copies already exist of the documents at issue, in different locations, of various parts of the claims records of individuals, including Canada, churches, and law firms. There are serious risks of privacy breaches occurring from the mere existence of these records in multiple locations, creating not only legal liability from future class action suits, but also significant harms to the reputations and even safety of the survivors, real or alleged perpetrators, and other third parties.[18]

36. It is possible that the court will determine that IAP records are part of a federal department for purposes of the federal Privacy Act, which regulates collection, use, disclosure, and retention of personal information. In principle, they should be managed in compliance with the requirements of the Privacy Act and the Treasury Board policies and best practices.[19] But Aboriginal Affairs and Northern Development Canada would have to gain access to the IAP records of claimants held by the IAP Secretariat and then determine to transfer them to Library and Archives Canada, or a new archive such as the one the TRC has agreed to with the University of Manitoba (and other partners), for purposes of controlled access over time for legitimate purposes. In my view, pending judicial guidance, the IAP Secretariat should not give any third parties access to its claimant records for any purposes, because of the extreme sensitivity of the personal information it has collected – much of the time on a mandatory basis once a claim has been accepted. To substantiate an accepted claim, a survivor has had to allow the federal government and the churches to produce copies of all of the multiple types of records that the IAP required and then "consent" to their use in the claims adjudication process.

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[18] Aboriginal peoples in the IAP include First Nations, Inuit and Métis persons.
[19] See http://www.tbs-sct.gc.ca/pubs_pol/gospubs/tbm_128/siglist-eng.asp

## II. IDENTIFYING THE PRIVACY INTERESTS OF INDEPENDENT ASSESSMENT PROCESS (IAP) CLAIMANTS WITH RESPECT TO THE PROTECTION OF THEIR PERSONAL INFORMATION

37. It is notoriously difficult to find one commonly-agreed definition for the complex and essential value called privacy. Some scholars argue that there is no common denominator.[20] However, my mentor, Professor Alan F. Westin, late of Columbia University, helpfully defined "privacy" as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[21] In revisiting this definition fifty years later, Westin refined it to read: "... privacy is the individual's claim to determine what information about himself or herself should be known to others."[22] I believe this working definition is helpful in the present case.

38. In the course of my own comparative research on the development of privacy legislation in the 1970s and 1980s, I further developed a table of "privacy interests of individuals in information about themselves" to try to put some meat on the bones of the concept of privacy and to illuminate what individuals want when they seek to protect their privacy interests. I have reproduced this table below for the purposes of helping to understand why IAP claimants are, and should be, concerned about multiple aspects of their privacy and what they should be claiming as ethical, constitutional, and legal rights in the present proceedings:[23]

- The right to individual autonomy;

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[20] See Daniel J. Solove, Understanding Privacy (Harvard University Press, Cambridge, MA, 2008).

[21] Alan F. Westin, Privacy and Freedom (New York, 1967), p. 7. I began my own work on privacy as a research assistant to Alan Westin at Columbia University in September, 1964.

[22] Westin, "*Privacy and Freedom* Revisited – 50 Years Later," in a re-publication of Privacy and Freedom in 2014 by the International Association of Privacy Professionals (Portsmouth, New Hampshire), p. xxxi.

[23] See David H. Flaherty, Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States (Chapel Hill, NC, University of North Carolina Press, 1989), p. 8. Only the last two item in the table are new additions.

- The right to be left alone;
- The right to a private life;
- The right to control information about themselves;
- The right to limit accessibility;
- The right of exclusive control of access to private realms;
- The right to minimize intrusiveness;
- The right to expect confidentiality;
- The right to enjoy solitude;
- The right to enjoy anonymity;
- The right to enjoy reserve;
- The right to secrecy;
- The right to human dignity.
- The right to informational self-determination.

39. In my further judgment, the privacy protection principles and practices for the management of personal information are as follows:[24]

(a) The principles of publicity and transparency (openness) concerning personal information (no secret data banks).

(b) The principles of necessity and relevance governing the collection and storage of personal information.

(c) The principle of reducing the collection, use, and storage of personal information to the maximum extent possible.[25]

(d) The principle of finality (the purpose and ultimate administrative uses for personal information need to be established in advance).

(e) The principle of establishing and requiring responsible keepers for personal information.

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[24] See Flaherty, Protecting Privacy in Surveillance Societies, p. 380. I developed this list in the 1980s as global principles for the control of surveillance reflecting best practices in the English-speaking world and Western Europe.

[25] My commentary in the text about this principle was as follows: "One might also emphasize the fundamental importance of principle three [here 'c'], which places the highest significance on reducing data collection to the fullest extent possible in the first instance and then retaining personal data in identifiable form only as long as necessary." (Flaherty, Protecting Privacy in Surveillance Societies, p. 380).

(f) The principle of controlling linkages, transfers, and interconnections involving personal information.

(g) The principle of requiring informed consent for the collection of personal information.

(h) The principle of requiring accuracy and completeness for personal information.

(i) The principle of data trespass, including civil and criminal penalties for unlawful abuses of personal information.

(j) The requirement of special rules for protecting sensitive personal information.

(k) The right of access to, and correction of, personal information.

(l) The right to be forgotten, including the ultimate anonymization or destruction of almost all personal information.

**States of Privacy Threatened**

40. Westin described four states of privacy, three of which are threatened with respect to IAP claimants.[26]

(a) The first is *intimacy* which reflects the fact that we normally try to control the use and disclosure of our most personal information among a close circle of family and friends. In the present case, claimants who were asked/required to disclose some of their most intimate experiences now risk exposure to third parties who are, and will be, unknown to them, i.e. custodians and users of a potential archive.

(b) The second such state of privacy is *anonymity*, which reflects the fact that most of us want to proceed through life being known, or making ourselves known, to a relatively small group of people, including family, friends and work mates. In the

[26] Westin, Privacy and Freedom (1967 edition), pp. 31-32. Westin re-visited his "four states of privacy" in the 2014 edition, pp. xxxiii-xxxiv. I have omitted discussion of the fourth state, solitude, since it is not relevant to the present discussion.

present case, claimants have already been forced to expose their records to government researchers, Church entities, the IAP secretariat, counsel, clerical staff, adjudicators, transcribers, claims managers, insurance companies, and other third parties. With the prospect of outsiders having access to their identifiable personal information in an archive, the intimate details of the lives of specific juvenile (now adult) claimants could in principle be exposed to the entire world.

(c) Finally, a sense of *reserve* is a third state of privacy at risk in the present scenario. Most of us rarely discuss the intimate details of our sexual and psychological experiences with other people in the way that the IAP claimants have been required to do in order to gain compensation for their victimization in residential schools. They have been asked, and essentially required, to reveal their innermost secrets – to engage in the unbarring of their lives.[27]

41. In his last professional writing, Westin made the following relevant and telling observation about these psychological conditions or states of privacy:

> Such changing personal needs and choices about self-revelation are what make privacy such a complex condition, and such an important matter of personal choice. The importance of that right to choose, both to the individual's self-development and to the exercise of responsible citizenship, makes the claim to privacy a fundamental part of civil liberty in a democratic society. Without the power to decide when to remain private and when to 'go public,' we cannot exercise many other basic freedoms. If we are 'switched on' without our knowledge or consent, we

[27] For graphic details of the experiences of residential school survivors and the related trauma of the TRC and IAP processes, see Niezen, Truth & Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools, pp. 48-9, 6—61, 62, 68, and 79.

> have, in very concrete terms, lost our fundamental constitutional rights to decide when and with whom we speak, publish, worship and associate.[28]

42. The principle of informational self-determination, originally developed by the German Federal Constitutional Court in 1983, is another fundamental principle when dealing with an individual's right to privacy. Informational self-determination is premised on the core belief and expectation that individuals have the right to exercise as much control as possible, subject to their structured goals and objectives, about the collection, use, disclosure and retention of their own personal information. This principle forms the basis for information privacy and data protection laws around the world.[29]

43. The legal concept of the "droit d'oubli," or the right to be forgotten, is another concept in international privacy law and practice also worthy of articulation in the present context. There is a particular provision in Article 28 of the French data protection law that essentially says personal information cannot be stored indefinitely and must be destroyed on a fixed schedule. This has led to significant destruction of data, even by the police and the military. As I wrote in 1989, the "articulation of the right to be forgotten is of inestimable importance for data protection in every country."[30] The right to be forgotten has been the subject of heated debate in Europe for two years, because of the proposed language of Article 17(1) of the European Draft Regulation on the Protection of Individuals, which reads:

> The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further

[28] Westin, Privacy and Freedom, (2014 edition), p. xxxiv. See also ibid., pp. xxxv-xxxvii for US polling verification of the relative importance of these states of privacy.
[29] See Colin J. Bennett, Regulating Privacy: Data Protection and Public Policy in Europe and the United States (Cornell University Press, Ithaca, NY, 1992).
[30] Flaherty, Protecting Privacy in Surveillance Societies, pp. 210, 180, and 219.

> dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child....[31]

44. In a decision that I made as Information and Privacy Commissioner for British Columbia in 1995, I determined that:

> In my opinion, the passage of time has restored the witnesses' personal privacy in respect of their statements. While some of the statements may have been considered in open court in 1978 and 1979, the door of privacy has closed on these records because they contain sensitive personal and law enforcement information. The witnesses' "right to be forgotten" shifts these formerly-available records under the protection of sections 22(1) and 22(3)(b) of the Act. If they were to be disclosed today, there is a presumption that an unreasonable invasion of the witnesses' personal privacy would occur.[32]

45. Finally, the notion of archiving all IAP claimant records contradicts at least five of the ten **privacy commandments/fair information practices** enshrined in Canadian federal, provincial, and territorial legislation during the past fifty years:[33]

(a) The obligation to "Identify the Purposes" for information use at the time of collection. IAP claimants were told that their information would be used solely to process their claims. Subject to my observations below at para. 70, archiving was not a fully-stated purpose, at least without express consent. Any intentions of archiving should have been made explicit in such a formal process. As recently as January 2011, the chair of the IAP Oversight Committee made clear to the TRC the need to explain to claimants how the TRC would use their information

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[31] European Union (EU). Proposal for a Regulation of the European Union and the Council on the *Protection of Individuals with respect to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*. Published January 25, 2012. http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf . A version has been passed by the European Parliament but has yet to be reconciled with the Council of Ministers' draft.

[32] Order No. 58 (1995), available at: http://www.oipc.bc.ca/rulings/orders.aspx

[33] See the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), schedule 1. They are also known as "fair information practices."

and what would happen if they did not consent to sharing it with the TRC. (Trueman Affidavit, para. 103, and Exhibit U).

(b) The standard obligation to obtain "Consent" means that IAP claimants had to have knowledge and give consent to the collection, use, or disclosure of their personal information. In the IAP process to date, I do not believe there has been knowledge of, or consent to, archiving by individual claimants (although the IAP developed such plans in 2011-2012). (Trueman Affidavit, 86-126).

(c) The obligation of "Limiting Use, Disclosure and Retention" means that "Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes." This principle reiterates the centrality of consent as well as the anticipation of destruction for routine administrative records in the normal course of records management. The normal life cycle of most administrative records of personal information ends with their destruction.

(d) The obligation to maintain "Security Safeguards" requires personal information to be protected with security safeguards appropriate to the sensitivity of the personal information. In my view, IAP claimant records should be protected at the highest level of sensitivity for identifiable personal information.[34] It is arguable that no public or private archive in Canada has the resources and technology to protect

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[34] The training of adjudicators emphasized best security practices, such as the expansive use of encryption to protect identifiable personal information.

such sensitive material over time, not least because of ongoing federal and provincial government cutbacks for all public archives. The proposed archive at the University of Manitoba would be exposed to all of these risks.[35] Manitoba does not even have a "Privacy Commissioner" with that title.

(e) The ability of "Challenging Compliance" means that an individual claimant should be able to make a complaint to a privacy oversight body if the mandated privacy principles are not being complied with. Given the vulnerable nature of the body of IAP claimants, it is hard to envisage a scenario whereby they could ever become aware of non-compliance with legal and ethical obligations to protect their privacy interests over time. It is also highly unlikely that the Office of the Privacy Commissioner of Canada, or the Manitoba Ombudsman, would have the resources to conduct pro-active audits.

## III. ORDINARY TREATMENT OF SIMILAR RECORDS

46. It is important to remember that most of the administrative records produced about IAP claimants on a mandatory basis would normally be destroyed by the original custodians - and not archived by them - because such routine records are not "of enduring value."[36] This would be true for individual health records, welfare records, social work records, unemployment records, and income tax records. Criminal and correctional records would likely be stored in a manner

[35] Section 18 of the Trust Deed between the TRC and the University of Manitoba provides for termination of the trust, no earlier than ten years from the date of this deed, should "the University become unwilling or unable to continue to host the Centre…." The start date was June 21, 2013.

[36] Library and Archives Canada does not automatically accept deposits suggested by federal departments, etc. Its accession specialists first have to determine if the records in question are "of enduring value." The population census, the papers of leading politicians, and the major policy work of a department are examples of material that would be preserved.

comparable to court records. Juvenile court records might be preserved but are not normally available to researchers except under very strict controls.[37] Even hospitals generally destroy health records ten years after the last treatment of an adult patient; and they do not normally archive patient records. Would patients ever consult a psychologist or psychiatrist if they were told that records of their treatments would be archived?

47. It is my understanding that plaintiffs or defendants in court proceedings can apply for a sealing order in certain circumstances, including the protection of very sensitive personal information from any form of third party access. In the present case, IAP records could be sealed in perpetuity (if they are not destroyed), or sealed for a period of perhaps one hundred years after the documented death of a claimant. Since the average age of claimants today is fifty-five years, most such records would be sealed till the next century.

**Treatment of Similar Records in Other Contexts**

48. The history of truth and reconciliation commissions is that very few of them have processed reparation claims themselves and may thus have faced issues of archiving comparable to the present matter.[38]

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[37] Professor Jon Swainger of the University of Northern British Columbia, and an historian of crime in the Peace River District, informed me that the only time he has accessed juvenile court records was for the Peace River history of crime research. The request had to be reviewed by a judge to see if he was doing so for sound reasons and that he was taking appropriate steps to protect identities and such.

[38] Professor Matt James, Dept. of Political Science, University of Victoria, informed me that the three examples are Morocco, Peru, and Ghana. The TRC in Ghana recommended monetary reparations to about 3,000 victims of political repression (http://www.usip.org/publications/truth-commission-ghana). The Truth Commission in Morocco recommended reparations for almost 10,000 victims of political repression. As many as 16,000 persons had received monetary compensation by the end of 2007 (http://www.usip.org/publications/truth-commission-morocco). The Peruvian Truth Commission only recommended reparations to victims of political repression; a separate body was then asked to follow up on the matter (http://www.usip.org/publications/truth-commission-peru-01).

***Records of the Stasi in East Germany***

49. One leading Western example of the perils of allowing access to sensitive personal information is the history of the various forms of harm that happened, in the 1990s and thereafter, when the massive dossiers maintained by the Stasi in East Germany were opened to members of the public for whom records had been compiled from multiple sources over time.[39] The principle being followed in Germany was the constitutional right of informational self-determination, including complete access to one's own records. Applicants were in some instances astonished and shocked by what they learned about the surveillance activities of families, friends, and other loved ones under the *ancien regime.*

***Project Metropolitan in Sweden***

50. I followed the development of this research project in person in the 1970s and 1980s and have written about it in my privacy books.[40] I worked with Prof. Carl Gunnar Janson, a sociologist at the University of Stockholm, for this purpose. The project collected and linked an incredible variety of very sensitive personal information about all of those born in the Stockholm area in 1953 (about 15,000 persons). The existence of the unique Personal Identification Number and the publicity principle (open records) in Sweden made it possible to do remarkable data linkages for each person, including people arrested, for example, displaying evidence of drug use such as needle marks on their arms. Unfortunately, most of those born in 1953 did not know all of this was happening. The project became an international cause celebre in February 1986. This led the privacy authority in Sweden, the Data Inspection Board, to order the permanent

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[39] See Timothy Garton Ash, The File: A Personal History (1997). There were more than 110 miles of Stasi files.
[40] Flaherty, Protecting Privacy in Surveillance Societies, pp. 153-55.

anonymization of these records. The leading data protection specialist said that the data subjects were being "treated like rats in a cage." I think there are analogies here to the need for destruction of IAP claimant records.

***Project GAMIN in France***

51. GAMIN is a slang word for a young child. This automated government data bank, initiated in 1970 by a part of the Ministry of Health, managed health screening of all newborns through compulsory physical examinations.[41] The stated claim was the need to address children at risk and involved several million health certificates each year. Project GAMIN then suffered from a generalized French resistance to automated data banks in the mid-1970s. After its creation in 1978, the French data protection commission, the National Commission on Informatics and Freedoms (CNIL), issued a principled decision requiring, among other things, the anonymization of the data bank of health certificates so that they could only be used for statistical purposes. In a subsequent decision in this complex story, the CNIL determined that all identifiable data had to be destroyed when a child reached the age of six.

52. The general point that needs to be made is that "data destruction" is always a key component of privacy and data protection compliance. German data protectors have been leaders in ensuring that sensitive personal records, such as those of the police and security forces, are destroyed when they are no longer required.[42]

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[41] Flaherty, Protecting Privacy in Surveillance Societies, pp. 221-26.
[42] Flaherty, Protecting Privacy in Surveillance Societies, pp. 67, 72, 75.

***The McDonald Commission of Inquiry Concerning Certain Activities of the RCMP (1977-81)***

53. This Commission documented the fact that the Security Services of the RCMP were maintaining files on almost a million Canadians, including homosexuals and tourists to the Soviet Union. Early in 1983 the Liberal government announced plans for the eventual destruction of many of these files under the supervision of the Privacy Commissioner of Canada and the Security Intelligence Review Committee.[43]

## IV. PUBLIC INTEREST IN ARCHIVING THE RECORDS

### Historical Value of the Records

54. As an historian, I am extremely reluctant to encourage the destruction of important records of any sort, but I am prepared to make the argument in the present case. I do so in the context of a situation where those shaping the various governing Agreements seemingly had so much on their plates that worrying about the ultimate disposition of IAP claimant records was not a pressing matter.

### Public Interest in Access to Sensitive Private Records

55. An important point to contemplate is that there is absolutely no public interest in access to the private records of IAP claimants, beyond their use for the stated purposes of adjudicating their claims.[44] Journalists, historians, political scientists, and other scholars can write about the legacy of residential schools in Canada without access to more than 38,000 claims files. Some

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[43] Flaherty, Protecting Privacy in Surveillance Societies, pp. 291-92

[44] I am grateful to Professor Colin J. Bennett, political scientist and privacy expert at the University of Victoria, for discussion of this point.

such files may even see the light of day in future if claimants were to choose to keep a copy of their claim file in their personal papers, and/or consent to having it archived locally or nationally.

56. Plus qualified parties can use the numerous survivor statements that the TRC itself has already obtained from survivors. It is noteworthy that some former residential school students are making their experiences known in TRC Sharing Panels, in private statement gathering sessions, and in public statements at TRC events.[45] Survivors have already given 7,000 statements to the TRC; it is noteworthy that 40 percent have chosen to remain anonymous. (Juliano Affidavit, paras. 19 and 80).

57. It is admittedly possible to make the argument that legitimate scholars can be trusted to use IAP claimant records in a sensitive manner, because of their track record in a country like Canada. Until considerable time had passed, historians, for example, are unlikely to identify survivors of residential school abuse (unless they have made public statements, especially in the established processes of the TRC).[46] I have more concerns about how genealogists and journalists might use such information. Even more importantly, surviving band members of a particular First Nation might have appropriate and inappropriate purposes in mind in accessing the records of individual claimants. To use Library and Archives Canada, for example, one only has to apply on line for a User Card.[47] Explaining the general purposes of the proposed research is not even a mandatory requirement. If a decision were made to archive IAP claims records, a

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[45] See the story of one survivor as narrated in Brent Wittmeier, "Residential School Stories to be Preserved at National Research Centre, Edmonton event told," Edmonton Journal, March 28, 2014, http://www.edmontonjournal.com/Residential+school+stories+preserved+National+Research+Centre+Edmonton+event+told/9674196/story.html. Niezen, Truth + Indignation, pp. 8, 58-62, and 106 describes survivor statements and their circumstances.

[46] I acknowledge that in my own research work on the history of serious crime in 18th century Massachusetts I have had full access to the surviving court records and have identified names of horse thieves, counterfeiters, and adulterers in my published and unpublished materials.

[47] See http://www.collectionscanada.gc.ca/the-public/005-4060-e.php

very high standard of pre-clearance must be established for access to such sensitive personal information.

58. Early in 2011 Library and Archives Canada assessed the holdings of the Adjudication Secretariat to identify "information resources of enduring value" that should be retained and not destroyed. (Trueman Affidavit, paras. 77-85 and Exhibits I to K). Although the proposed agreement was not signed by the Adjudication Secretariat, pending a decision by this Court, the determinations of Library and Archives Canada are very informative for present purposes: it essentially determined that most of the records of the five activities of the Secretariat were not "of enduring value," including 1) admissions; 2) case management; 3) and hearings management. Under the rubric of client services, Library and Archives Canada only wanted single copies of guides/flyers and a skimming of the website.

59. Under the rubric of "adjudication," Library and Archives Canada wanted only material related to strategy, policy and decision-making guidance for adjudication and overall management of the IAP and ADR processes. It also asked for "copies of each decision for the IAP and ADR." (Trueman Affidavit, para. 81.) Most importantly, "all other information resources related to adjudication are not to be transferred." I interpret this to mean that Library and Archives Canada did not want to keep the voluminous materials about the claims of individual applicants.

60. In 2014, Library and Archives Canada informed the Adjudication Secretariat that it now considered hearing audio records and transcripts to be of enduring historical value. (Trueman Affidavit, paras. 84-85).

61. I have no privacy objections whatsoever to the TRC itself delivering its general records to a National Research Centre at the University of Winnipeg, including the statements of claimant survivors who have gone public; I oppose any attempts to do so for the entire range of identifiable claimant records from the IAP process.[48] In my view, future historians of the TRC do not need individual claimant records to write their histories of residential schools. There is, after all, not much doubt that residential schools harmed many or most of their students; invading the privacy of such disadvantaged persons for research purposes cannot be justified in these particular circumstances, unless the assembled records were sealed for something like 100 years after the documented death of each claimant. Even then, the individual records would have to be carefully reviewed, and likely redacted, to protect against multiple risks and harms. It is also highly relevant to the issue at hand that the TRC itself has already received 7,000 witness statements from survivors and that thousands of them have been videotaped.[49]

## V. DISPOSITION OF THE RECORDS

### a) Destruction of Records: My Primary Recommendation

62. From my perspective as a professional historian and as an expert in privacy protection, the threshold question is whether the entire range of IAP claimant records should be ever archived or should simply be destroyed because of the extraordinary sensitivity of their contents for more than 38,000 victims, or alleged victims, of residential schools. The accumulation of so

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[48] Schedule "N," the Mandate of the TRC, section (4), in discussing the TRC's exercise of its duties, specifically treats the "Independent Assessment Process" as a separate stream from the work of the TRC that the latter is not to duplicate in whole or in part. Thus the IAP claimant records should not be treated as an automatic component of what the TRC seeks to archive.

[49] Colin Perkel, "First Nations. Residential schools commission hearings come to a close," The Globe and Mail, March 31, 2014, p. A3.

much sensitive information on a stigmatized population is truly extraordinary. My primary recommendation is destruction.

63. I have explained that the normal life-cycle of most administrative records of personal information ends with destruction, and that it is not normal in Canada to collate, compile, and link records about such a large group of specific victims. Having served their administrative purposes to settle claims, these records should be destroyed to protect the current and historical reputations and privacy interests of claimants and third parties identified in the records.

64. I have also explained that, in my opinion, individual IAP claims files are not of enduring historical value in these circumstances.

65. Scholars and journalists can research and write about residential schools without access to IAP claims records. The TRC has already received and videotaped thousands of survivors' statements. The IAP Decision Database is a fully-anonymized collection of IAP decisions.

66. Schedule "D" dealing with the IAP process clearly establishes the IAP as separate and apart from the general mandate of the TRC. I am further struck by the extent to which various IAP processes already involve the *destruction* of personal information about claimants.

(a) Lawyers representing specific claimants may have access to the IAP Decision Database for research purposes after undertaking to destroy such research at the conclusion of each claim. (Trueman Affidavit, paras. 36, 70)

(b) Church copies of application forms for their residential schools have to be destroyed in compliance with the Settlement Agreement, Schedule D, appendix II, point iv. These restrictions provide that "copies will be made only where

absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy…." (Trueman Affidavit, para. 73)

(c) A subsequent memo for the IAP Oversight Committee emphasized certain first principles for the disposition of IAP records, among them, "The disposition of records where the claimant has not given consent. The only sure way to guarantee permanent privacy is through destruction of the records, which is opposed by the TRC and may be politically unpalatable to many." (Trueman Affidavit, para. 120, and Exhibit GG)

(d) A staff memorandum from John Trueman in the fall of 2011 about the disposition of IAP claimant transcripts stated that "[t]he sense of the OC [Oversight Committee], which has perhaps not been formally expressed, is that without consent the transcript should be kept confidential forever. Although there may be a number of ways to accomplish this objective, destruction of the record would normally be the safest and surest way to ensure confidentiality." (Trueman Affidavit, Exhibit HH).

**b) Archiving with Consent of the Claimants**

67. A second option for protecting privacy would be to obtain the informed consent of claimants for the archiving of all of their IAP records or classes of records such as hearing transcripts.

68. I have explained the centrality of individual consent to the collection, use, disclosure, and retention of personal information. I have also outlined confidentiality protections in place around IAP records.

69. Under this option, surviving claimants would be asked, perhaps through their counsel, for express consent for archiving. That was what the IAP Secretariat pursued diligently and creatively in 2011. (Trueman affidavit, paras. 86-126 and exhibits L to JJ.) Such a request for consent should include Frequently Asked Questions that fully explain the risks to a variety of interests, including privacy, involved in such an archiving process, especially for persons living out the rest of their lives in small, isolated reserve communities that have endured ongoing feuds, rivalries, and shifting factions in local politics. Claimants should be given a full sense of what the contents of actual claims records are. Survivors need expert guidance to appreciate how their disclosed information could conceivably be used to harm them. One can even anticipate the risks of harm to the heirs and descendants of individual claimants if sealed claimant records were opened up to qualified users one hundred years after their deaths. Victimized persons should not be re-victimized.

70. Schedule "N," the Mandate of the TRC, makes it very clear in section 11 that archiving the records of the Independent Assessment Process (IAP) is not mandatory but permissive and governed by a requirement for individual consent:

> *Insofar as agreed to by the individuals affected* and as permitted by process requirements, information from the Independent Assessment Process (IAP), … *may* be transferred to the commission for research and archiving purposes. (emphasis added)

This statement also articulates the fact that the IAP is a distinct component of the general work of the TRC with separate issues of records management.[50] Schedule D of the Settlement Agreement, which governs the IAP, provides at s. III(o)(ii), p. 15, that "Claimants will also be given the option of having *the transcript* developed into an archive developed for the purpose." (Trueman Affidavit, paras. 87-88, emphasis added) Thus, in my view, the IAP records should not be automatically bundled in with general TRC records for archival purposes.

**c) The sealing of the IAP records for a specified number of years.**

71. Another option for privacy protection is to seal the IAP claimant records for one hundred years after the established death of each claimant.

72. However, as I have explained, individual records would still have to be reviewed, and likely redacted, against multiple risks and harms. Risks of harms to heirs and descendants of individuals identified can be anticipated, even one hundred years after their deaths, given what is known about the contents of these records. From a privacy protection perspective, sealing of records is a much less palatable solution than destruction.

**d) Total Redaction of the Records**

73. The total redaction of the IAP claimant records to render them completely non-identifiable by reasonable means is yet another option to protect privacy rights. .

74. If the court approves of the archiving of IAP claimant records, all of the archived records could in theory be anonymized, by redaction, in order to protect the identity and identifiable

[50] Schedule "N" can be accessed at http://www.trc-cvr.ca/overview.html

details about claimants and third parties.[51] In practice, there is now a rich literature on how enormously difficult it is to try to anonymize personal information - and that the risks of re-identification are very high.[52]

75. Reversible anonymization of the identifiable IAP claimant records is another potential solution for this privacy problem. The code for re-identification could be stored with a trusted third party, such as a trust company, under the control of the courts.

76. My understanding is that the decisions of the IAP are already somewhat redacted when they are issued, which is a good precedent for doing the same with the totality of IAP records before archiving them (were this truly possible and practical with such a volume of primary material). Adjudicators will generally name the claimant and often include significant amounts of personally-identifying background information in the decisions. Two versions of the decision are released: a completely unredacted version to counsel, and a version that redacts alleged perpetrator information that is given to the claimant. If the decision is chosen to be placed in the decision database, it is redacted to remove personally identifying information about the claimant, alleged perpetrators and others. The solution would be that only such redacted records would be stored with Library and Archives Canada or any other approved Archive.

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[51] Schedule "N," the Mandate of the TRC, stipulates in s. 2(g) that names should not be made use of without express consent: "Other information that could be used to identify individuals shall be anonymized to the extent possible." Paragraph G in the preamble in the Trust Deed between the TRC and the University of Manitoba indicates that "the TRC and the University intend for the Centre [archive] to respect any conditions of confidentiality relating to IAP records that may be established by a court of competent jurisdiction…."

[52] The major proponent of this approach is Professor Latanya Sweeney of Harvard University; see http://dataprivacylab.org/people/sweeney/ Her Canadian counterpart is Khaled El Eman of the University of Ottawa: see http://www.privacyanalytics.ca/category/khaled-el-emam/

77. The critical point is that the IAP Secretariat already imposes a considerable amount of redaction on its paper and electronic records that are released, reflecting its commitment to the confidentiality of claimant and other third party personal information. The IAP Oversight Committee is also unanimously committed to maintaining the confidentiality of claimant information without the claimant's consent to do otherwise. (Trueman Affidavit, para. 102(b) and Exhibit U). The IAP Decision Database, for example, contains a selection of the ADR and IAP decisions kept in paper files in Regina. (Trueman affidavit, para. 28) As of Feb. 27, 2014, there were 2,161 redacted decisions in it, including 1,283 general decisions (out of 10,177 to March 16, 2014) and 527 review decisions. (Trueman affidavit, paras. 32, 33) Redaction in this Database means "to remove names and any information that could reasonably identify a claimant, alleged perpetrator, or other person." (Trueman affidavit, para. 30)

78. The latest version of the redaction instructions from the IAP Oversight Committee for decisions placed in the IAP Decision Database is in Exhibit D1 of the Trueman affidavit. In general, redactors are instructed to remove all proper names, staff positions, dates of birth or ages, origins and residences of claimants, education of the claimant or any witness, and any reference to employment of the claimant or any witness. The "overriding principle" is "that any information that will [reasonably] identify any individual should be redacted." In "deciding whether information is identifying, the redactor might ask whether or not the information is likely to be public knowledge within the claimant's community." Since I cannot discuss the totality of the detailed redaction rules here, let me simply say that they are the most severe I can remember encountering in terms of achieving anonymization.

### e) Archiving the Records without obtaining the consent of claimants

79. A final option for disposing of IAP records that I have been asked to comment on is archiving without obtaining the consent of claimants.

80. I oppose this option because, as I have explained, it contradicts a number of privacy principles in relation to an abnormal, large, and broad range of extremely sensitive records about very vulnerable individuals. This option contradicts privacy principles that include: the obligation to identify uses at the time of collection; the obligation to obtain individual consent to the archiving of personal information; the obligation to limit use, disclosure, or retention to the purposes of collection; information self-determination; and the right to be forgotten.

81. The IAP has required more than 38,000 claimants to be the subjects of "cradle to grave" dossiers about themselves, including the most sensitive personal information about their lives from adolescence to adulthood. Transferring all of these records to any archives for retention, use, and disclosure could be a privacy disaster in the making in terms of its ultimate impact on the privacy interests of a disadvantaged, victimized, and stigmatized population of survivors of residential schools, who now risk re-victimization. Even the University of Manitoba anticipates that "some of the most sensitive IAP records may never be made accessible in any form." (Juliano Affidavit, para. 87)

82. The conundrums of the issues addressed in this Affidavit are nicely set up in the "Truth and Reconciliation Principles" (Schedule "E" of the Agreement in Principle). One objective is: "As complete an historical record as possible will be compiled of the IRS system and legacy. It will be archived and made accessible for future use and study." But:

> The truth and reconciliation process is committed to the principle of voluntariness with respect to all participants. The preferred mechanism for obtaining information and documents from all sources is through voluntary cooperation. In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents to and for the use of the Truth and Reconciliation Commission, *subject only to overriding concerns about the privacy interests of an individual.* In such cases, researchers for the Commission shall have access to such documents provided privacy is respected.[53] (emphasis added)

83. IAP claimants were promised confidentiality at their hearings, well into 2012, which standard may no longer be upheld in practice. Thus they had reasonable expectations of privacy and confidentiality going forward, plus an expectation of not being further harmed in the claims process.[54] The multiple promises of confidentiality made to IAP claimants establish a high standard for their reasonable expectations of privacy and continued confidentiality over time. Claimants were also not informed that their extremely sensitive personal information would, or might, be placed in an archive for subsequent disclosure to third parties. The IAP Oversight Committee is also strongly committed to maintaining promises of confidentiality made to claimants. (Trueman affidavit, paras. 100-104, 119-120)

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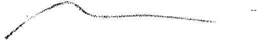
[53] Schedule "N," the Mandate for the Truth and Reconciliation Commission, articulated this goal as "Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use." In the exercise of its power, the TRC recognizes "that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation." (McMahon Affidavit, Exhibit 4. I read the latter statement as referring to the general work of the TRC and not to the Independent Assessment Process.

[54] One of the fundamental Principles in the Mandate for the TRC is "confidentiality (if required by the former student." Another is to "do no harm" and to be "just and fair." Schedule "N," Mandate for the Truth and Reconciliation Commission.

84. The language of various passages of Schedule "N" of the Settlement Agreement states that claimant records would not be archived without the express informed consent of the individual claimant.[55]

85. I swear this affidavit to assist the Court with the within Requests for Directions.

**SWORN BEFORE ME** at the City of Victoria, in the Province of British Columbia on May ..2.., 2014.



*Commissioner for Taking Affidavits (or as may be)*

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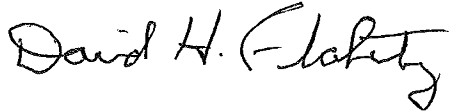

**DAVID H. FLAHERTY**

[55] Schedule "N," the Mandate for the TRC, stipulates in s. 2(g) that it "shall not, except as required by law, use or permit access to statements made by individuals during any of the Commission's events, activities or *processes, except with the express consent of the individual* and *only for the sole purpose and extent for which the consent is granted.*" (emphasis added) The standard in s. 2(h) of the Mandate for naming names is also the express consent of the individual. S. (10)(C) of Schedule "N" further states that "the Commission shall not use or permit access to an individual's statement *made in any Commission processes, except with the express consent of the individual.*" (emphasis added)

This is Exhibit "A" referred to in the Affidavit of David H. Flaherty
sworn May 2 , 2014

*Commissioner for Taking Affidavits (or as may be)*

Marcia McNeil
Sheen Arnold McNeil

DAVID H. FLAHERTY    Academic Vita

Privacy and Information Policy Consultant, 1999 to present

Information and Privacy Commissioner, Province of British Columbia, Canada, 1993-1999 (wrote 320 Orders under the B.C. *Freedom of Information and Protection of Privacy Act)*.

Professor Emeritus of History and Law, Faculty of Social Science and Faculty of Law; University of Western Ontario, London, Canada, N6A 5C2; Adjunct Professor, Dept. of Political Science, University of Victoria, 1999-2006.

Director, Maximus BC Health and Maximus BC Health Services, 2004 to present; President, Pacific Opera Victoria, 2010-.

**RESEARCH AND TEACHING FIELDS (to 1993)**

History of American Law; American Constitutional History; American Colonial and Revolutionary History; Canadian Legal History
Privacy and Data Protection in Modern Industrial Societies
Information Law and Policy

**TEACHING AND PROFESSIONAL EXPERIENCE (to 1999)**

Professor, University of Western Ontario, 1977- 1999
Associate Professor, University of Western Ontario, 1972-1977
Assistant Professor, University of Virginia, 1968-1972
Instructor, Princeton University, 1965-1968

Corresponding Fellow (elected), Massachusetts Historical Society, 1993-
Fellow, Woodrow Wilson International Center for Scholars, Washington, DC, 1992-1993
Canada-U.S. Fulbright Scholar (Law), 1992-1993
Visiting Scholar, Georgetown University Law Center, 1992-1993
Fellow, Kennedy Institute for Ethics, Georgetown University, 1992-1993
Deputy chairperson, Privacy International (World Privacy and Data Protection Network), 1991-93
Member, Review Committee on Aid to Learned Journals, Social Sciences and Humanities Research Council of Canada, 1991
Faculty of Social Science Research Professor, U.W.O., 1989-90
1st Director, Centre for American Studies, U.W.O, 1984-1989
Visiting Scholar, Stanford Law School, 1985-1986.
Resident Scholar, March 10-April 15, 1983, at the Rockefeller Foundation's Bellagio Study and Conference Center, Lake Como, Italy.
Visiting Fellow, Magdalen College, Oxford University, 1978-1979.
Fellow in Law and History (Liberal Arts Fellow), Harvard Law School, 1971-1972.
Fellow of the Charles Warren Center for Research in American History, Harvard University, 1971-1972.
Fellow of the American Council of Learned Societies, 1971-1972.

Member, Working Group 5, European Union's International Collaboration with Canada (Quebec) on Eurocards (smart cards) in the Health Field, 1994-95
Participant, George Washington University/National Science Foundation, Workshop on Policy Questions Related to Computer Networks, Amelia Island, Florida, January 25-28, 1993.
Chair, Workshop on Privacy Rights in Computerized Medical Information, Office of Technology Assessment, U.S. Congress, Washington, D.C., Dec. 7, 1992.

Fellow, Westminster Institute for Ethics and Human Values, 1991-.
Consultant, National Task Force on Health Information, National Health Information Council and Statistics Canada, 1991.
Member, Panel on Confidentiality and Data Access, sponsored jointly by the Committee on National Statistics, U.S. National Research Council, the National Academy of Sciences, and the Social Science Research Council, 1989-1992.
Participant, "Workshop on Confidentiality of and Access to Doctorate Records," Committee on National Statistics, National Research Council, Washington, D.C. Nov. 3-5, 1988
Member, Council of Ontario Universities' Committee on Freedom of Information and Protection of Individual Privacy, 1988-90.
Staff consultant, House of Commons, Standing Committee on Justice and Solicitor General, 1985-1987.

Principal Investigator, Project on Privacy and Data Protection in the Private Sector: A Comparative Perspective, 1992-95.
Principal Investigator, Project on Privacy and New Cable TV Services, University of Western Ontario, 1982-1983.
Principal Investigator, Project on Data Protection Compared: an international perspective, University of Western Ontario, 1981-1985.
Co-Principal Investigator, Project on Privacy and Access to Government Microdata for Social Science Research, University of Western Ontario 1974-1978.
Consultant, Ontario Commission on Freedom of Information and Individual Privacy, 1977-1978.
Expert witness and consultant, Alexandria, Virginia, waterfront litigation, 1974-1983.
Expert witness and consultant to the Attorney General of Virginia and the Atlantic Seaboard Attorneys General, Atlantic continental shelf litigation, U.S.A. v. Maine et al. No. 35, Orig., in the Supreme Court of The United States, 1970-1974.
President, David H. Flaherty Inc., Consultants, 1975 to present.
Director, Dorset Industrial Chemicals Ltd., Chateauguay, Quebec, 1962-86.

Testified before the Senate Banking Committee, Ottawa, April 24 and May 19, 1992 on privacy and confidentiality regulations for Canadian financial institutions; and consultant to the Committee (1992-93).
Testified, with the Privacy Commissioner of Canada, before the Special Joint Committee on a Renewed Canada, Ottawa, December 9, 1991, with respect to entrenching a constitutional right to privacy for Canadians.
Testified before the Standing Committee on the Legislative Assembly, Province of Ontario, Feb. 7, 1991 on its review of the Freedom of Information and Protection of Privacy Act, 1987.
Testified before the Legal and Constitutional Committee, Parliament of Victoria, Australia during its Inquiry into Privacy and Breach of Confidence, Melbourne, Feb. 16, 1990.
Lead witness in a Hearing on Data Protection, Computers, and Changing Information Practices before the U.S. House of Representatives, Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, Washington, D.C., May 16, 1990.
Written and oral testimony on Bill 34 on Freedom of Information and the Protection of Individual Privacy, to the Standing Committee on the Ontario Legislative Assembly, Toronto, June 4, 1986.
Invited testimony on the Privacy Act of 1974 in oversight hearings before the U.S. House of Representatives, Subcommittee on Government Information, Justice, and Agriculture, Washington, D.C., June 8, 1983.

Invited testimony on the privacy implications of computer-based crime before the Subcommittee on Computer Crime, Canadian House of Commons, May 3, 1983.
Written testimony on computer matching programs for hearings held in Washington, D.C., December 15-16, 1982 by the U.S. Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management.
Testimony on Research and Statistical Uses of Data before the U.S. Privacy Protection Study Commission, Washington, D.C., January 6, 1977.

Editorial Board, Canadian Review of American Studies, 1987-92
Member, Minister's Advisory Council on Tax Administration, Ministry of National Revenue, Canada, 1985-1988, 1988-90, 1990-1991.
Member, Committee on Canada-U.S. Relations, Canadian Chamber of Commerce, 1984-1986.
Member, Advisory Panel, Office of Technology Assessment, U.S. Congress, 1984-1985, "Implications of Federal Government Information Technology for Congressional Oversight and Civil Liberties."
Ontario Ministry of the Attorney General, History Project Advisory Committee, 1983-1985.
Founding Member, Advisory Board of the Canadian Register of Research and Researchers in the Social Sciences, 1981-.
Member, Social Science Federation of Canada's Committee on the federal Freedom of Information legislation, 1979-1981. Testified before the House of Commons Standing Committee on Justice and Legal Affairs, Dec. 13, 1979.
Director, American Society for Legal History, 1976-1981; chairman, Nominating Committee, 1977; member, Executive Committee, 1977-1978, 1980-1981.
Frederick Jackson Turner Award Committee, Organization of American Historians, 1973-1976.
Editorial Board, American Journal of Legal History, 1971-1976.

Director and lecturer, Seminar in Modern Legal History for Law Professors, University of Western Ontario, June 19-24, 1983; June 3-8, 1984; May 26-June 1, 1985; June 1-6, 1986; May 31-June 5, 1987.
Chairman and Organizer, International Conference on Privacy and Data Protection: "Nineteen Eighty-Four" and After, at the Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Lake Como, Italy, April 9-13, 1984.
Participant, Council of Europe's Conference on Problems relating to the Development and Application of Legislation on Data Protection, Rome, December 13-15, 1982.
Chairman, Advisory and Program Committee, International Conference on "The United States Bill of Rights: Implications for Canada," University of Western Ontario, March 10-12, 1982.

Participant, International seminars on the history of crime and criminal justice, held at the Maison des Sciences de l'Homme, Paris, January, 1979; October, 1979; May, 1980; June, 1981.
University of Western Ontario's Representative to the Social Science Federation of Canada's General Assembly, 1977-1981; 1981-1983.
Organizer and chairman, Conference on Canadian Legal History, Osgoode Hall, Toronto, May 31, 1980.
Organizer (with a committee), International Conference on the History of Crime and Criminal Justice, held at University of Maryland Conference Center, College Park, Md., September 4-7, 1980.
Chairman and Organizer, Conference on Privacy, Confidentiality, and the Use of Government Microdata for Research and Statistical Purposes, at the

Rockefeller Foundation's Bellagio Study and Conference Center, Bellagio, Lake Como, Italy, August 15-20, 1977.

**MAJOR RESEARCH GRANTS**

Social Sciences and Humanities Research Council of Canada, "Privacy and Data Protection in the Private Sector: A Comparative Perspective," (1992-95), $67,000.
Ford Foundation: "Data Protection Compared: an international perspective" for three years, 1981-1984, $75,000 U.S. funds.
Social Sciences and Humanities Research Council of Canada: "Data Protection Compared: an international perspective" for two years, 1981-1983, $62,940.
Academic Development Fund, University of Western Ontario: "Data Protection Compared: an international perspective" for three years, 1981-1984, $22,236.
Office of Technology Assessment, U.S. Congress: "Data Protection and Privacy: Comparative Policies" 1984, $10,271 U.S. funds.
Ford Foundation: "International Conference on Privacy and Data Protection: "Nineteen Eighty Four" and After," Bellagio Study and Conference Center, Lake Como, Italy, April 9-13, 1984, $8,950 U.S. funds.
Ontario Ministry of Transportation and Communications: "Privacy and New Cable TV Services," 1982-1983, $26,960.
Ford Foundation: Competition on the Common Problems of Advanced Industrial Societies, August 1974, $147,000. (With E.H. Hanis). Project on Privacy and Access to Government Microdata for Social Science Research, (1974-1978).
Canada Council: Research on Criminal Justice in Provincial Massachusetts, 1974, $6,453.

**LEAVE FELLOWSHIPS**

Social Sciences and Humanities Research Council of Canada, 1985-1986, 1978-1979.

**EDUCATION**

Elementary and secondary education in Montreal and Toronto, 1945-1958.
University of Alberta, Edmonton, 1958-1960
McGill University, B.A. Honours (History), 1962; Gold Medal in History.
Columbia University, M.A., 1963, Ph.D. (History), 1967

**ADMINISTRATIVE EXPERIENCE:** University of Western Ontario, etc.

Advisory Committee, BC Information and Privacy Commissioner, 2010 to present.
Advisory Committee, Privacy Commissioner of Canada, 2004 to present;
Chief Privacy Advisor, Canadian Institute for Health Information, 2000 to present.
Computer Security Group, Department of Family Medicine, 1991-92
Executive Committee, Faculty Association, 1988-90; chair, Pension Committee, 1988-89.
Director, University Club of London, 1988-89.
President's Task Force on Smoking in the Workplace, 1987-88.
Ad Hoc Advisory Committee on Research, 1986-87.
Board of Directors, Centre for the Study of International Economic Relations, University of Western Ontario, 1981-.

Joint Board of Governors/Senate Committee to Review the University of Western Ontario Act, 1980-1981.
Faculty of Social Science: Selection Committee for Chairman of the Department of Anthropology (1988-1989).
History Department: Advisory Committee (1988-89); graduate committee (1986-89); and curriculum committee (1986-87).
Appointments, Promotion and Tenure Committees: School of Library and Information Science, 1987-89; School of Journalism, 1989-; Faculty of Kinesiology, 1990-.
University Research Board, 1990-91.

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BOOKS: PRIVACY AND INFORMATION POLICY

Stephanie Perrin, Heather Black, David H. Flaherty, and T. Murray Rankin, The Personal Information Protection and Electronic Documents Act: An Annotated Guide (Irwin Law, Toronto, January, 2001).
Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States (University of North Carolina Press, Chapel Hill and London, 1989, 483pp.); paperback edition, 1992.
Protecting Privacy in Two-Way Electronic Services (Knowledge Industry Publications, Inc. White Plains, NY, [G.K. Hall, Boston] and Mansell [Cassell], London, UK, 1985, 172 pp.)
Edited with an introduction, Privacy and Data Protection: An International Bibliography (Mansell [Cassell], London, UK, and Knowledge Industry Publications, Inc. White Plains, NY 1984, xxvi, 276 pp.)
Privacy and Government Data Banks. An International Perspective (Mansell [Cassell], London, UK, 1979, 350 pp.
(With Hanis, E.H. and Mitchell, S.P. compilers) Privacy and Access to Government Data for Research. An International Bibliography (Mansell [Cassell], London, England, 1979, 197 pp.)

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(with Miyo Yamashita), Guidelines for Managing Privacy, Data Protection and Security for Ontario Hospitals (A Report prepared by the Ontario Hospital eHealth Council's Privacy and Security Working Group - July 2003). www.oha.com
Telecommunications Privacy: A Report to the Canadian Radio-television and Telecommunications Commission (May 1, 1992, 140 pp.)
Data Protection, Data Dissemination, and the Survey of Labour and Income Dynamics (SLID). A Report to the Household Surveys Division, Statistics Canada (Statistics Canada, Ottawa, February, 1992)

Entrenching A Constitutional Right to Privacy for Canadians: A Background Paper. A submission to the Special Joint Committee on a Renewed Canada (Office of the Privacy Commissioner of Canada, Ottawa, December, 1991, 38 pp.)
Implications of Privacy and Confidentiality Concerns on the Use of Health Information for Research and Statistics, Report of the Project Team to the National Task Force on Health Information (Statistics Canada, Ottawa, May 3, 1991, 50 pp.)
[Co-Author] Open and Shut: Enhancing the Right to Know and the Right to Privacy. Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act (House of Commons, Ottawa, 1987, 130 pp.).
Data Protection and Privacy: Comparative Policies (A Report to the Government Information Technology Project, Office of Technology Assessment, U.S. Congress, January, 1985, 90 pp. National Technical Information Service, PB86-205689/LL, 1986.
Protecting Privacy: Data Protection in Two-Way Cable Television Services (A Report to the Ontario Ministry of Transportation and Communications, April, 1983, 225 pp.)
The Origins and Development of Social Insurance Numbers in Canada (Privacy Commissioner and Department of Justice, Ottawa, 1981, 210 pp.). Also published in a French edition.
Research and Statistical Uses of Ontario Government Personal Data (Ontario Commission on Freedom of Information and Individual Privacy, Research Publication 5, Toronto, 1979, 188 pp.)
Privacy, Confidentiality and Security in a Canadian Electronic Funds Transfer System (Ontario Electronic Funds Transfer Study Project, Working Paper No. 5, Ministry of the Attorney General, Toronto, 1978, 117 pp.)

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"Reflections on Reform of the *Privacy Act*." (2008; http://www.privcom.gc.ca/information/pub/pa_ref_df_e.asp); and 21 Canadian Journal of Administrative Law and Practice (2008), 271-321.

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"Controlling Surveillance: Can Privacy Protection Be Made Effective?" in Philip E. Agre and Marc Rotenberg, eds., Technology and Privacy: The New Landscape (MIT Press, Cambridge, MA, and London, UK, 1997), pp. 167-92.

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"Privacy, Confidentiality, and the Use of Canadian Health Information for Research and Statistics," Canadian Public Administration, XXXV, No. 1 (1992), 75-93.

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"Data Protection and National Information Policy," in Peter Seipel, ed., From Data Protection to Knowledge Machines: The Study of Law and Informatics (Kluwer: Deventer, The Netherlands and Boston: Computer/ Law Series 5, 1990), 29-48.
"The Emergence of Surveillance Societies in the Western World: Toward the Year 2000," Government Information Quarterly, V (1988), 377-87. [English version of the next item]
"Vers l'an 2000: L'émergence des sociétés de surveillance dans le monde occidental," in CREIS (Centre de coordination pour la recherche et l'enseignement en informatique et société), Bulletin de liaison, V (June, 1988), 3-13 [Paris]; also in Terminal. Informatique. Culture. Societe, No. 42 (Jan/.Feb., 1989), 16-20. [French version of the previous item]
"The Canadian Privacy Commissioner: An Agent for the Control of Technology," in Ren, Laperriere et al., eds., Une Démocratie Technologique? Actes d'un colloque multidisciplinaire tenus sous l'egide de l'ACFAS a Ottawa en mai 1987 (ACFAS-GRID, Montréal, 1988), 447-63.
"The Human Rights Context of Technological Innovation," in Marc LeBlanc, et al., eds., New Technologies and Penal Justice (Les Cahiers de Recherches Criminologiques, Cahier No. 9, Montreal, 1988), pp. 532-54.
"Protecting Privacy in an Information Society," Transactions of the Royal Society of Canada, Series IV, XXIII (1985), 23-32.
"Schutz der Personlichkeitssphare bei Ruckkanaldiensten," in Der Berliner Datenschutzbeauftragte, Datenschutz und Neue Medien, Internationale Workshop, Sept. 5, 1985 (Materialien zum Datenschutz, VII, Berlin, 1986), 36-42.
"Data Protection and the Statistical Community," in Statistical Office of the European Economic Communities, Protection of Privacy, Automatic Data Processing, and Progress in Statistical Documentation (Luxembourg, Eurostat News, Special Edition, 1986), 239-258. (Also published in a French edition).
"Protecting Privacy in Police Information Systems: Data Protection in the Canadian Police Information Centre (CPIC)," University of Toronto Law Journal, XXVI (1986), 116-148.
"Limiting Governmental Surveillance and Promoting Bureaucratic Accountability: The Roles of Data Protection Agencies in Western Societies," Science, Technology and Human Values, XI, no. 1 (1986), 7-18.
"Final Report of the Bellagio Conference on Current and Future Problems of Data Protection: Nineteen Eight-Four and After." (Privacy Project, University of Western Ontario, London, Canada, May 15, 1984); printed in Government Information Quarterly, I, Number 4 (November, 1984), 431-42.
"The Need for an American Privacy Protection Commission," Government Information Quarterly, I (1984), 235-258.
(with Neil Vidmar), "Concern for Personal Privacy in an Electronic Age," Journal of Communication, XXV (1985), 91-103.
"Observations sur le volet 'protection des renseignements personnels' de la loi Quebecoise," in Pierre Trudel, ed., Accss a l'Information et Protection des Renseignments Personnels. Experience Occidentale et Perspective Québécoise (Les Presses de L'Université de Montréal, Montréal, 1984), 157-167.
"Data Protection in Health Care Records in Canada," Proceedings of a Two Day Symposium on the Impact of Computer Networks in Health Care Delivery: Issues of Security, Confidentiality, Integrity and Cost (Canadian Organization for the

Advancement of Computers in Health, University of Victoria, Victoria, B.C., 1984), pp. 7-42.
"Canadian Privacy Legislation in Comparative Perspective," in Rudy Wall, ed., Conference on Privacy: Initiatives for 1984. Proceedings (Ontario Provincial Secretariat for Resources Development, Toronto, 1984), pp. 67-72.
"Statement" and "Prepared Statement" in Oversight of the Privacy Act of 1974, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, June 7-8, 1983 (Washington, DC, U.S. Govt. Printing Office, 1983), pp. 179-222.
"Testimony on the Privacy Implications of Computer-based Crime," in Minutes of Proceedings and Evidence of the Sub-Committee on Computer Crime of the Standing Committee on Justice and Legal Affairs, House of Commons, May 3, 1983, Issue No. 5, pp. 5:18-5:37, 5:A1-5A:25.
"Testimony on Computer Matching Programs," in Oversight of Computer Matching to Detect Fraud and Mismanagement in Government Programs, Hearings before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate. December 15-16, 1982 (Washington, D.C., U.S. Government Printing Office, 1983), pp. 472-489.
"The Canadian Human Rights Act, Part IV. Comment", in John D. McCamus, ed., Freedom of Information: Canadian Perspectives (Butterworths, Toronto, 1981), pp. 260-265.
"Privacy and Confidentiality: the Responsibilities of Historians," Reviews in American History, VIII (1980), 419-429.
"Country Report Canada", in E. Mochmann and Paul J. Muller, eds., Data Protection and Social Science Research. Perspectives from Ten Countries (Campus Verlag, Frankfurt/New York, 1979), 80-102.
Final Report of the Bellagio Conference on "Privacy, Confidentiality, and the Use of Government Microdata for Research and Statistical Purposes," U.S. Statistical Reporter, Number 78-8 (May 1978), 274-279; Social Sciences in Canada, VI, No. 1 (1978) 9-10; Journal of the Royal Statistical Society, Series A, Vol. 141, Part 3 (1978), 401-405; and others.
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"Balancing Risks and Benefits in Personal Identification Systems," 15th International Conference of Data Protection and Privacy Commissioners, Manchester, UK, 27-30 September, 1993.
"The Future of Privacy: Towards the Year 2000," TRW's Consumer Advisory Council, Dallas, Texas, June 24, 1993.
"Data Protection in the U.S. Private Sector," Groupe de Recherche Informatique et Droit, Colloque sur la protection des renseignements personnels: bilan et enjeux, Montreal, April 16, 1993; Government Affairs Conference, Direct Marketing Association, Washington, DC, May 10-12, 1993.

"Computers and Privacy: Whether to Regulate the Private Sector," Montreal International Conference on Computers and Law, September 30-October 3, 1992; Conference on Privacy Regulation: International developments, Australian implications, Faculty of Law, Human Rights Centre, University of New South Wales, Australia, October 30, 1992; Association of American Law Schools, San Francisco, January 7, 1993.
"Ensuring Privacy and Data Protection in Health and Medical Care," U.S. Department of Health and Human Services, Conference on "Health Records: Social Needs and Personal Privacy," Washington, D.C., Feb. 11-12, 1993; National Committee on Vital and Health Statistics, Washington, D.C., March 9, 1993; Kennedy Institute of Ethics, Georgetown University, April 13, 1993; U.S. Privacy Council, Washington, D.C., Dec. 14, 1993.
"Communication Privacy Challenges," Internet Society, International Networking Conference, Kobe, Japan, June 15-18, 1992.®LB this was published in H. Ishida, ed., Proceedings of Inet'92, pp. 179-86.
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"Entrenching a Constitutional Right to Privacy for Canadians. A Background Paper." Prepared for the Privacy Commissioner of Canada for presentation to the Special Joint Committee on a Renewed Canada of the Senate and House of Commons of Canada (Ottawa, 1991, 38 pp.)
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"Data Protection in Longitudinal Studies: A Commentary," European Science Foundation, Network on Longitudinal Studies, Workshop on Ethical and Legal Issues in Longitudinal Research, Copenhagen, June 7-9, 1990.
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"Protecting Privacy in Surveillance Societies," First Amendment Congress Seminar on Privacy, Access and Accountability, Washington, DC, Oct. 26-27, 1989; Symposium on "The Protection of Personal Information," Winnipeg, Jan. 12, 1990; Symposium organized by the Privacy Committee of New South Wales, Sydney, Australia, Feb. 8, 1990; Centre for Socio-Legal Studies, Latrobe University, Melbourne, Australia, Feb. 16, 1990; Faculty of Law, University of Auckland, New Zealand, Feb. 19, 1990; Institute of Policy Studies, Victoria University of Wellington, New Zealand, Feb. 22, 1990; World Computing Services Industry Congress VII, and ADAPSO 72nd Management Conference, Washington, DC, June 4, 1990; National Conference of State Legislatures, Chicago, November 8-10, 1990.
"Some Perspectives on Information Technology and Privacy," American Society of Access Professionals' international workshop/training session on Access to Information Laws, Ottawa, Canada, April 13-14, 1989.

"The Emergence of Surveillance Societies," Conference on Major Issues concerning Freedom of Information and Protection of Privacy in Ontario, organized by the Management Board of Cabinet, Toronto, Nov. 22-23, 1988.
"Emergence de sociétés de surveillance?" Forum on "Droits et libertés dans les ann,es '90," organized by la Ligue des Droits et Libertés, Montréal, Nov. 14, 1988.
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"Towards the year 2000: The Emergence of Surveillance Societies in the Western World," the keynote address to the opening session of the International Data Protections Commissioners' Annual Meeting, Quebec, Quebec, September 22, 1987.
"On The Utility of Constitutional Rights to Privacy and Data Protection," Conference on "Canadian Reflections on the American Constitution," University of Calgary, September 24-26, 1987.
"The Human Rights Context of Technological Innovation," International Course in Criminology, Université de Montreal, August 28, 1987
"Data Protection, Statistical Activities, and the Public Interest," International Conference on "Future Access to Data for Official Statistics - Cooperation or Distrust?," Stockholm, June 24-26, 1987.
"Improving Canada's Access to Information and Privacy Legislation," Canadian Law and Society Association annual meeting, Hamilton, June 4, 1987; Canadian Association for Information Science annual meeting, London, Ontario, May 6, 1987; and Institute of Internal Auditors, Ottawa, April 16, 1987.
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"Data Protection and the Statistical Community," Statistical Office of the European Economic Communities Conference on "Protection of privacy, automatic data processing and progress in statistical documentation," Luxembourg, December 11-13, 1984.
"Limiting Governmental Surveillance and Promoting Bureaucratic Accountability: The Role of Data Protection Agencies in Western Societies," Annual Meeting, American Political Science Association, Washington, D.C., Aug. 31, 1984; and Workshop on Confidentiality, Privacy and Data Protection, European Consortium for Political Research, Barcelona, March 25-30, 1985.
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"Freedom of Information," Panel Discussion, Association of Canadian Archivists, Quebec City, June 1, 1976.
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SELECTED PAPERS AND PRESENTATIONS: HISTORY, AMERICAN STUDIES, AND CANADIAN STUDIES [excluding those prior to 1985 that were subsequently published as articles.]

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"Trial By Jury in Provincial Massachusetts (1690-1780)," International Colloquium on "LES DESTINEES DU JURY CRIMINEL," organized by the Groupe de Recherche d'Histoire Judiciare, Université de Lille II, and the Société d'Histoire du Droit, Lille, France, May 25-27, 1989; and Legal History Seminar, Faculty of Law, University of Toronto, Jan. 25, 1990.

"Criminalization and Decriminalization in Early America," International conference on "Criminalization and Decriminalization in the Western World since the late Middle Ages," held at the Maison des Sciences de l'Homme in Paris, October 20-22, 1988.

"The Revolution and the Reform of American Criminal Justice," School of Law, Boston University, January 22, 1988.

"Historical Preconditions for Judicial Review under the Canadian Charter of Rights and Freedoms," Roundtable discussion at the Association for Canadian Studies in the United States, Montreal, October 16, 1987.

"Reform and the American Revolution: Criminal Justice as a Case Study: Massachusetts," Organization of American Historians, Philadelphia, April 5, 1987.

"The Enlightenment and the Reform of American Criminal Law," International Conference on the 'Leopoldine Code:' The Reform of Criminality and Criminal Justice in the 18th century Europe, University of Siena, Italy, December 3-6, 1986.

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"Problems Encountered in Teaching Legal History," Panel discussion, American Society for Legal History, Washington, D.C., November 2, 1973.

"Criminal Justice in Provincial Massachusetts," Conference on Atlantic Society, 1600-1800, University of Edinburgh, Scotland, June 30, 1973.

"Teaching and Writing Legal History: What Lawyers and Historians Can Learn from Each Other," American Historical Association, New Orleans, December 20, 1972.

"On the Teaching of Legal History," Conference on American Legal History, Harvard Law School, May 1, 1971.

"Puritanism and Change in New England Society," American Historical Association, Washington, D.C., December 29, 1969.

"Privacy Within the Colonial Family: The New England Experience," Conference on Social History, State University of New York, Stonybrook, October 24, 1969.

This is Exhibit "B" referred to in the Affidavit of David H. Flaherty sworn May 2 , 2014

*Commissioner for Taking Affidavits (or as may be)*

Marcia McNeil
Sheen Arnold McNeil

Lenczner Slaght

130 Adelaide St W
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April 23, 2014

William C. McDowell
Direct line: 416-865-2949
Direct fax: 416-865-2850
Email: wmcdowell@litigate.com

David H. Flaherty Inc.
1939 Mayfair Drive
Victoria, BC V8P 1R1

Dear Professor Flaherty:

**RE: Indian Residential Schools Request for Directions**
**Expert Opinion**
**Our File No.: 43747**

Thank you for agreeing to provide an expert opinion in the above-noted matter.

I would be grateful if your affidavit could state your professional background, and addressing your expertise as an historian, a privacy expert and specifically privacy issues in Aboriginal communities.

In addition, I would be grateful if you could address the following questions:

1) What is the scope and sensitivity of the following categories of documents in the possession of the Independent Assessment Process ("IAP"):

   (a) The applications submitted by the claimants to initiate the process.

   (b) The witness statements submitted to the Secretariat;

   (c) The documentary evidence produced by the parties;

   (d) The transcripts and recordings of the hearings;

   (e) Expert and medical reports generated in relation to the claimants;

   (f) The mandatory documents obtained in relation to the claimants (as described in Appendix VII of Schedule "D" to the Indian Residential Schools Settlement Agreement); and

   (g) The decisions of Adjudicators and any appeals.

2) Please describe the privacy interest of claimants and third parties over the IAP records.

3) Ordinarily, are records of the types listed above archived?

4) As an historian, and in view of the other types of documents that are currently available to the Truth and Reconciliation Commission, is there a public interest in archiving and maintaining these materials?

5) In view of your answers to the above questions, please comment on the following options for the disposition of the IAP records:

   (a) The destruction of the records.

   (b) The sealing of the records for a specified number of years.

   (c) Archiving the records without obtaining the consent of claimants;

   (d) The obtaining of express consent of claimants and other participants for the archiving of the records.

   (e) The total redaction of the records.

For the purposes of your report, we have provided you with the affidavits of Dan Ish, Dan Shapiro and John Trueman. We are also providing you with copies of the affidavits of Tom McMahon and Gregory Juliano, served by the Truth and Reconciliation Commission.

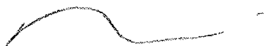
Yours very truly,

William C. McDowell

JL/cb
Enclosures

cc: Jon Laxer

This is Exhibit "C" referred to in the Affidavit of David H. Flaherty sworn May 2 , 2014



*Commissioner for Taking Affidavits (or as may be)*

Marcia McNeil
Sheen Arnold McNeil

Court File No. 00-CV-192059

# *ONTARIO*
# SUPERIOR COURT OF JUSTICE

B E T W E E N:

LARRY PHILIP FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER, SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE MCCULLUM, CORNELIUS MCCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND, (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA,

THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUSMARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON - THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES - GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES

OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER - THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIEFORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

Proceedings under the *Class Proceedings Act*, 1991, S.O. 1992. C.6

## ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is David H. Flaherty. I live at 1939 MAYFAIR DR, in the CITY of VICTORIA, BRITISH COLUMBIA.

2. I have been engaged by or on behalf of the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date May 2, 2014

David H. Flaherty
*Signature*

**NOTE**: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

LARRY PHILIP FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased et al.
Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA et al.
Defendants

Court File No. 00-CV-192059

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

PROCEEDING COMMENCED AT TORONTO

**ACKNOWLEDGMENT OF EXPERT'S DUTY**


**LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Barristers
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Lawyers for the
Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada)

LARRY PHILIP FONTAINE, in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased et al.
Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA et al.
Defendant

Court File No. 00-CV-192059

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

PROCEEDING COMMENCED AT TORONTO

**AFFIDAVIT OF DAVID H. FLAHERTY**


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