

CITATION: Fontaine v. Canada (Attorney General), 2021 ONSC 5795
COURT FILE NO.: 00-CV-192059
DATE: 20210830

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY

HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

PERELL, J.

ENDORSEMENT – APPROVAL OF ISA'S INTERIM REPORT #1

[1] This endorsement supplements my Reasons for Decision of April 20, 2021, cited as *Fontaine v. Canada (Attorney General)*, 2021 ONSC 2921 and the order that was attached as Schedule “B” to those reasons (the “Independent Review Order”). This endorsement provides the

parties and the public with information about the status and progress of the independent review, and this endorsement directs the delivery of further interim reports.

[2] In the Independent Review Order, I ordered the Honourable Ian Pitfield to continue in the role of Independent Special Advisor (“ISA”), and I gave him a mandate to conduct a review of certain Independent Assessment Process (“IAP”) claims by former students of St. Anne’s Indian Residential School in Fort Albany, Ontario. More precisely, paragraph 10 of the Independent Review Order provides as follows:

10. In the report, the ISA shall make an independent determination for each IAP Claimant whose IAP claim was resolved (whether by adjudication, settlement, negotiation, or withdrawal) before additional disclosure was made available pursuant to the orders made in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283 (“St. Anne’s #1”) and *Fontaine v. Canada (Attorney General)*, 2015 ONSC 4061 (“St. Anne’s #2”), and the ISA shall report to the court answers to the following questions:

1. Were the 2014/2015 disclosure documents available for the claim’s adjudication?
2. If not, could the 2014/2015 disclosure and use of the documents for the IAP have materially affected the amount of compensation paid on the claim? and,
3. If the disclosure and use of the documents could have materially affected the amount of the compensation, what additional compensation should have been paid in accordance with the IRSSA?

[3] In the Independent Review Order, I ordered Mr. Pitfield as ISA to report to the court with his findings, conclusions, and recommendations.¹

[4] The Independent Review Order also required the ISA to retain an Amicus (a former IAP adjudicator who had not adjudicated any St. Anne’s IAP claims) to represent and to be an advocate for all St. Anne’s IAP claimants whose claims are subject to the independent review.²

[5] In addition, the Independent Review Order provided that the ISA would have the assistance of counsel to seek direction from the court by way of Request for Direction (“RFD”) under the Court Administration Protocol³ and to move for confirmation of his report on notice to Canada and the Amicus.⁴

[6] The Amicus retained by the ISA is Rodger W. Linka, a former Deputy Chief Adjudicator with extensive experience in all aspects of the IAP, including IAP hearings, reviews and re-reviews.

[7] The ISA’s counsel is Louis Zivot. He has considerable expertise in the Indian Residential Schools Settlement Agreement (“IRSSA”) and the IAP, having previously served as the Monitor’s counsel and as counsel to Mr. Pitfield in his roles as ISA and Blott Transition Coordinator.

¹ Independent Review Order, para. 3.

² Independent Review Order paras. 6 and 7.

³ Independent Review Order, paras. 5 (ability to bring RFD generally), 12 (ability to bring RFD where ISA determines that further documentation is required to complete the review and Canada is unable or unwilling to produce the documents) and 14 (ability to bring RFD where ISA becomes aware of anything that is outside his mandate but which he believes requires further review). The Court Administration Protocol is attached as Schedule “A” to the Implementation Orders made on March 8, 2007 by each of the nine provincial and territorial superior courts that had earlier approved the IRSSA.

⁴ Independent Review Order para. 16.

[8] Each of Mr. Pitfield, Mr. Linka, and Mr. Zivot have extensive experience in dealing with information that is made confidential by Schedule D to the IRSSA, Item III(o) (IAP Privacy), as well as “IAP Documents” and “IAP Personal Information” as defined in and protected by this court’s *in rem* order.⁵

[9] In a Direction dated May 18, 2021 and cited as *Fontaine v. Canada (Attorney General)*, 2021 ONSC 3605, I approved the appointments of Mr. Linka and Mr. Zivot.

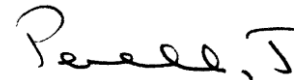
[10] Although not required to do so by the terms of the Independent Review Order, the ISA has submitted an interim report dated August 17, 2021. A copy of the report is appended as Schedule “A” to this Endorsement

[11] In the ISA’s Interim Report, Mr. Pitfield sets out his understanding of the Independent Review Order’s provisions concerning his mandate as requiring review of each of the 427 IAP claims made by former students of St. Anne’s.

[12] In the ISA’s Interim Report, Mr. Pitfield describes his methodology in conducting the independent review, which has entailed assigning each of those 427 IAP claims to one of four categories or priorities. He details how he, Mr. Linka, and Mr. Zivot have been able to access documents essential to the independent review

[13] In the ISA’s Interim Report, Mr. Pitfield reports on the progress of the independent review. Of note, the ISA has identified 81 IAP claims – those falling in the Priority 1 and Priority 2 categories – as requiring what he describes as a “significant review”.

[14] I approve the ISA’s Interim Report, and I direct that a further Interim Report be submitted by yearend.



PERELL J.

Released: August 30, 2021

⁵ See *Fontaine v. Canada (Attorney General)*, 2014 ONSC 4585; var’d 2016 ONCA 241; aff’d 2017 SCC 47.

Schedule “A”

St. Anne's Claim Review Interim Report August 17, 2021

I write to update you [Court Counsel] and the Court on the present status of the St. Anne's Claim Review ordered by the Ontario Superior Court of Justice.

The review requires answers to three questions:

1. Were the 2014/2015 disclosure documents available for the claim's adjudication?
2. If not, could the 2014/2015 disclosure and use of the documents for the IAP have materially affected the amount of compensation paid on the claim? and,
3. If the disclosure and use of the documents could have materially affected the amount of the compensation, what additional compensation should have been paid in accordance with the IRSSA?

I construed the Order to require a review of each of the 427 Independent Assessment Procedure claims identified by Canada, in relation to St Anne's, notwithstanding that it was unlikely that many of the claims would have been affected by undisclosed OPP investigation documentation. Absent a review of all of the claims, it was not possible, in my judgment, to know whether the OPP documentation would have affected the outcome of any particular claim.

I engaged the assistance of Mr. Rodger Linka, formerly a deputy chief adjudicator in the IAP process, to assist me in understanding the workings of the IAP adjudication process and the intricacies of the IRSSA. I also engaged Mr. Lou Zivot, Barrister and Solicitor, to assist with legal analysis as I anticipated that kind of analysis would be required.

From the outset, Canada has been forthcoming with respect to the production of documentation. Canada compiled a spreadsheet providing details with respect to the 427 claims associated with St. Anne's. Canada divided the claims into 4 categories or priorities as follows:

Priority 1: claims where allegations related to St. Anne's IRS were put forward and:

- Where there was no award based on credibility or reliability concerns, where there were capacity concerns or where the claim was dismissed on its merits;
- Where the highest-level allegation in the application form was dismissed.

Priority 2: Include claims where allegations were made related to St. Anne's IRS and:

- The highest-level allegation in the application form was withdrawn or awarded at a lower level (downgraded).

Priority 3: Include claims where allegations were made related to St. Anne's IRS and:

- The claim was awarded at the highest level claimed in the application form.

Priority 4: Include claims where allegations were made related to St. Anne's IRS and:

- Were withdrawn pre-hearing;
- The claim was awarded above the top level of allegation claimed in the application form;
- The claim was dismissed through the IFR process;
- The claim was dismissed because it was previously settled through litigation, the ADR or another process;
- The court considered and rejected compensation through an RFD;
- The claim was dismissed as the abuse was found to have happened outside the operating years of the IRS; and
- Claims which did not contain allegations related to St. Anne's IRS, although the claimant indicated in their application form that they resided at St. Anne's IRS for a period.

Canada used its secure file transfer software to upload all of the documentation it had accumulated in relation to each claim. Each of us involved in the review process was granted access to all of the documentation. We were also granted access to all of the documentation accumulated by the OPP in the course of its investigation, and all documentation in Canada's possession accumulated in relation to criminal and civil proceedings connected with issues arising at St. Anne's. The documentation is voluminous, but search and access aspects of the software make it possible to identify and focus on specific documents of concern.

As I previously advised Court Counsel, I concluded it was not possible to compile a report that would withstand scrutiny without ensuring that any judgments made by Canada in relation to the merits of any claim were reasonable in the context of the review Order. In my judgment, it was necessary to review each and every claim in order to answer the first two questions as framed by the Court.

Canada classified 316 claims as Priority 3 claims. I divided the batch into three parts, and each of us engaged in the review process undertook a review of one third of those claims. We proceeded by reviewing the IAP application and, in particular, the nature of the allegations raised therein, and then reviewing the reasons for decision in each case with a view to determining whether any of the "production" documentation may have affected the outcome. We have substantially completed that part of the review and have recorded our initial conclusions and observations in relation to those claims. Our conclusions will appear in my final report.

We have now turned our focus to the 30 Priority 4 claims and that part of the review is progressing on the same basis I have outlined in relation to the Priority 3 claims.

The claims that will require significant review are those in Priorities 1 and 2 which number 81 in total. I am unable to offer any timeframe within which the review of all files will be completed. Suffice to say, we are working diligently having regard for other commitments with a view to ensuring a timely final report.

Please let me know if you have questions or concerns with respect to any aspect of the review.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "M. J. [unclear]". The signature is written in a cursive style with a large initial letter.

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COURT FILE NO.: 00-CV-192059
DATE: 20210830

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

ENDORSEMENT

Perell, J.

Released: August 30, 2021