

Federal Court



Cour fédérale

Date: 20230106

Docket: T-370-17

Ottawa, Ontario, January 6, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

TODD ROSS, MARTINE ROY AND ALIDA SATALIC

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Defendant

And

THE LGBT PURGE FUND

Party

ORDER

(Motion for Settlement Approval)

UPON MOTION by the Party, the LGBT Purge Fund, made December 6, 2022, at the courthouse located at Thomas D'Arcy McGee Building, 90 Sparks Street, 5th floor, Ottawa, Ontario, K1A 0H9;

UPON READING the Notice of Motion, the Affidavit of Michelle Douglas, the Exhibits, and the Party's Written Representations;

UPON BEING INFORMED that the Representative Plaintiffs, His Majesty the King, and the LGBT Purge Fund consent to the relief being sought in this motion;

UPON HEARING the submissions of Counsel; and

BEING SATISFIED that the Fourth Supplementary Settlement Agreement is "fair and reasonable and in the best interests of the class as a whole" (*Manuge v Canada* 2013 FC 341).

THIS COURT ORDERS that

1. The Fourth Supplementary Settlement Agreement dated November 21, 2022, a copy of which is attached hereto as Schedule "A", between the Representative Plaintiffs, the LGBT Purge Fund, and His Majesty the King is hereby approved; and,
2. There shall be no order as to costs;

"Martine St-Louis"
Judge

SCHEDULE “A “

FOURTH SUPPLEMENTARY SETTLEMENT AGREEMENT
(Archival Records - Phase II Research Project)

WHEREAS Canada and the Plaintiffs entered into a Final Settlement Agreement (“FSA”) dated March 28, 2018, and a Supplementary Agreement (“SA”) dated June 15, 2018, which were both approved by the Federal Court on June 22, 2018, in full and final settlement of this proceeding;

AND WHEREAS Canada and the Plaintiffs entered into a Second Supplementary Agreement (“SSA”) dated January 31, 2019, which, inter alia, terminated the role of the Reconciliation and Memorialization Measures Panel and assigned its responsibilities to the LGBT Purge Fund, a non-profit corporation incorporated under the Canada Not for Profit Corporations Act, was approved by the Federal Court on March 5, 2019;

AND WHEREAS Canada, the Plaintiffs and the LGBT Purge Fund entered into a Third Supplementary Agreement (“TSA”), by which the Parties agreed to amend certain portions of the FSA and SSA to ensure that the LGBT Purge Fund can continue to meet its obligations under the agreements, which was approved by the Federal Court on January 7, 2022,

AND WHEREAS on January 7, 2022, following the completion of the individual claims process and the completion of various other aspects of the FSA, the Federal Court issued an Order which discharged the Claims Administrator, and the Assessor, and suspended the duties of Class Counsel and the Representative Plaintiffs, all in respect of the action and the FSA;

AND WHEREAS section 5.04 of the FSA provided that Canada would make non-personal historical policy records related to the LGBT Purge accessible and would, in accordance with the procedures in paragraph 1 of Schedule “L” of the FSA, and subject to applicable legislation and the provisions of the FSA, provide the results of a Research Project to the RMM Panel (now the LGBT Purge Fund);

AND WHEREAS, shortly after the delivery of the first batch of records under paragraph 1 of Schedule “L”, the LGBT Purge Fund raised concerns regarding both the completeness of the Research Project as well as Canada’s application of ATIP exemptions and exclusions;

AND WHEREAS a dispute then arose between the LGBT Purge Fund and Canada regarding the implementation of Schedule “L” resulting in the filing of a motion by the LGBT Purge Fund on September 29, 2021, which seeks an Order declaring that Canada was in breach of its obligations under paragraph 1 of Schedule “L” of the FSA;

AND WHEREAS despite this dispute, the Parties agree that the provision of historical records is a fundamental component to reconciliation, and preservation of the history of the LGBT Purge;

AND WHEREAS paragraph 3 of Schedule “L” contemplated that the Parties could continue their collaboration on this project and more specifically, paragraph 3(c) of Schedule “L” provided the RMM Panel (now the LGBT Purge Fund) with the discretion to authorize the retainer and payment to retain the services of a private or non-governmental entity or private individual to host the results of the Research Project and/or to conduct further research;

AND WHEREAS paragraph 3(e) of Schedule “L” also provided the RMM Panel (now the LGBT Purge Fund) with the discretion to authorize the retainer and payment to retain, through funding to be kept within the Government of Canada, for the services of Library and Archives Canada (“LAC”) to design and implement a project to create a dedicated unit of Access to Information and Privacy reviewers with a view to expediting the review of documentation relating to the LGBT Purge, which, subject to applicable legislation, could include the results of the Research Project. Such a retainer and payment would only be made upon acceptance of a proposal and costed work plan prepared by LAC and acceptable to both the RMM Panel (now the LGBT Purge Fund) and to LAC and would have a specified time frame and maximum output;

AND WHEREAS, in view of the above, the Parties have elected to resolve the dispute between

them fully and finally, without a determination of the issues raised in the motion brought by the LGBT Purge Fund on September 29, 2021;

AND WHEREAS, the Plaintiffs and the LGBT Purge Fund have expressly agreed that they are precluded from raising or litigating the issues raised in their motion or in relation to Canada's compliance with section 5.04 and Schedule "L" of the FSA in any future proceedings;

AND WHEREAS the Parties have agreed to take the steps set out in this Agreement in order to conduct additional historical research into Canada's archival records concerning the LGBT Purge for the purpose of creating a permanent archive;

NOW THEREFORE, in consideration of the mutual agreements, covenants and undertakings set out in this Agreement, the Parties agree with each other as follows:

SECTION THIRTY ONE

INTERPRETATION

31.01 Definitions

In this Fourth Supplementary Agreement ("Agreement" or "4SA"),

"Additional Records" or "Additional Non-Personal Historical Policy Records" means the records identified by the Research Company that are held by Library and Archives Canada originating from Government of Canada departments or their predecessors and the records provided identified by the departments and agencies identified in this Agreement as participants in the Phase II Research Project.

"ATIP Reviewer" means the person named in this Agreement and appointed by Canada as a Legal Agent to fulfill the role and duties set out in section 37, namely the Hon. Marshall Rothstein, C.C., K.C.

“Dedicated Unit” or “Dedicated LAC ATIP Review Unit” means the unit created by Canada and assigned to conduct an ATIP review of the Selected Records set out in section 33.

“Listed Departments” means the departments listed in section 32.05 only.

“Mediator” means the person named in this Agreement and appointed by the Court pursuant to section 36, namely the Hon. Gloria Epstein, K.C.

“Paragraph 1, Schedule “L” Records” means the records released by LAC to the LGBT Purge Fund pursuant to paragraph 1 of Schedule “L” of the FSA.

“Phase II Research Project Progress Committee” means the committee assigned to fulfill the role and duties set out in section 35.

“Phase II Research Project” means the project identified in section 32.

“Publicly Available Court Documents” means documents that have been filed with a court in Canada, which, if they still existed in a court registry, would otherwise be available to the public from that registry, for a fee or otherwise, and which are not subject to a confidentiality order.

“Research Company” means the company engaged by Canada pursuant to section 32.02.

“Selected Records” means the records identified as part of the Phase II Research Project that have been selected by the Research Company to be reviewed by the Dedicated LAC ATIP Review Unit and/or ATIP reviewers in other Departments pursuant to section 32.08 and released to the LGBT Purge Fund.

SECTION THIRTY TWO

PHASE II RESEARCH PROJECT

32.01 General

Canada agrees to engage a professional research company who will conduct research (“Phase II Research Project”) to locate Additional Records and specifically, Additional Non-Personal Historical Policy Records related to the LGBT Purge to assist the LGBT Purge Fund in memorializing the history of the LGBT Purge and creating a permanent archive. The research will be limited by scope and a fixed budget, as outlined below.

From the Additional Records, Canada agrees that the Selected Records will be released to the LGBT Purge Fund subject to the provisions of any applicable legislation, including, but not limited to, the application of the exemptions or exclusions under the Privacy Act (“PA”) and the Access to Information Act (“ATIA”).

Canada agrees to make reasonable efforts to implement this Agreement in a timely manner. Delays caused by, inter alia, further public health restrictions or labour market shortages are not unreasonable for the purposes of this provision.

32.02 Research Company

Canada agrees to engage Canadian Development Consultants International Inc. (“CDCI”) or another research company approved by the Parties to conduct the Phase II Research Project research (the “Research Company”).

Canada will make reasonable efforts to retain the Research Company no later than 60 days from the date of the approval of this Agreement by the Court.

Canada agrees to pay all costs relating to the research to be completed by the Research Company as defined in Schedule “A”, and as further refined by the Research Company, and agreed to by Canada and the LGBT Purge Fund, up to a maximum amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00, inclusive of HST).

The Research Company shall complete the research outlined in section 32.04 and its selection of records pursuant to section 32.08 no later than September 30, 2023. This date may be adjusted with the written consent of Canada and the LGBT Purge Fund.

32.03 Departmental Researcher Status

Each of the Listed Departments will provide Departmental Researcher Status to those persons employed or engaged by the Research Company, provided those individuals otherwise meet security and any other usual and necessary requirements for such status. With respect to access to view documents designated as Top Secret, the Listed Departments will provide Departmental Researcher Status to Mr. Artur Wilczynski, upon confirmation that he has been formally engaged or employed by CDCI to work on this project, and confirmation that he holds that level of security clearance.

In the event that Mr. Wilczynski is unable or unwilling to complete the project, CDCI shall propose engaging another individual with Top Secret security clearance, and shall seek the agreement of the Parties. Should one or more of the Listed Departments decline to grant Departmental Researcher status to the individual proposed by CDCI, the department shall complete the research with internal resources.

32.04 LAC Archival Research - Scope and Process

The Parties agree that the Phase II Research Project shall focus primarily on archival records held at the Library and Archives Canada, with the exception of the additional research specifically described in sections 32.05, 32.06 and 32.07 below.

The Research Company will be asked to review the LAC holdings of the following departments and agencies and/or their predecessor departments:

(a) the Department of Public Safety Canada and Emergency Preparedness (not including the Canadian Security Intelligence Service (“CSIS”));

- (b) the Royal Canadian Mounted Police (“RCMP”);
- (c) the Department of National Defence (including the Canadian Armed Forces);
- (d) the Treasury Board of Canada Secretariat;
- (e) the Communications Security Establishment; and
- (f) the Privy Council Office.

For the purposes of this section, the departments and agencies shall include any predecessor department or agency and, where necessary, any succeeding department or agency.

The Parties acknowledge that Schedule “A” – Provisional Scope of Research was originally drafted by the LGBT Purge Fund in consultation with the Fund’s Project Consultant and the Research Company.

The Parties agree that the first task of the Research Company shall be to review and refine the scope of the project as set out in Schedule “A” – Provisional Scope of Research. The purpose of requesting that the Research Company conduct a review and refine Schedule “A” is to ensure that the scope of the project best meets the objectives of memorializing the historical events surrounding the LGBT Purge through the creation of a permanent archive. To that end, the Research Company shall consult with representatives of LAC and the LGBT Purge Fund prior to its refinement of Schedule “A”.

No research shall commence until Canada and the LGBT Purge Fund confirm their agreement in writing to the refined version of Schedule “A” proposed by the Research Company. In the event of a dispute, the Parties agree to seek the assistance of the Mediator.

Once the scope of Schedule “A” is finalized and agreed upon, the research can begin. The scope of the research at LAC, within the Listed Departments and within CSIS and the Department of Foreign Affairs, Trade and Development (“DFATD”) will be limited to the topics identified in Schedule “A” to this Agreement, as refined by the Research Company, and as agreed to by Canada and the LGBT Purge Fund.

If the mediation is unsuccessful, CDCI's research shall cover the topics identified in Schedule A – Provisional Scope of Research.

32.05 Departmental Research - Scope and Process

Canada agrees to make reasonable efforts to identify records of historical or archival value that fall within the scope set out in Schedule "A", as refined by the Research Company, and agreed to by Canada and the LGBT Purge Fund, and which may not yet have been transferred to LAC by the following departments or agencies ("Listed Departments"):

- (a) the Department of Public Safety Canada and Emergency Preparedness (not including CSIS);
- (b) the RCMP;
- (c) the Department of National Defence (including the Canadian Armed Forces);
- (d) the Treasury Board of Canada Secretariat;
- (e) the Communications Security Establishment; and
- (f) the Privy Council Office.

For the purposes of this section, the departments and agencies shall include any predecessor department or agency and, where necessary, any succeeding department or agency.

For the purpose of this section, "reasonable efforts" means that Canada will search available electronic record indexes and will review electronic or hard copy records which are relevant to the topics identified in the refined version of Schedule "A".

Once identified, each of the Listed Departments shall provide a summary of the records identified, together with related page counts, in order for the Research Company to make a determination as to which records will be included as the Selected Records.

Where the Research Company has confirmed that any records should be included as part of the Selected Records, they shall be provided to the Research Company following review by the respective ATIP Units' review pursuant to any applicable legislation, including the application

of exemptions and exclusions under the ATIA and PA.

The Listed Departments shall complete their review and application of exemptions and exclusions under the ATIA and PA to the Selected Records no later than June 30, 2025. This date may be adjusted with the written consent of Canada and the LGBT Purge Fund.

32.06 CSIS and DFATD Records – Scope and Process

CSIS and DFATD will conduct their own research of the records held internally or at LAC, falling within the scope of Schedule “A”, as refined by the Research Company, and agreed to by Canada and the LGBT Purge Fund.

Once identified, CSIS and DFATD shall provide a summary of the records identified, together with corresponding page counts, in order for the Research Company to make a determination of the Selected Records. Where the Research Company has confirmed that any CSIS and DFATD records should be included as part of the Selected Records, they shall be provided to the Research Company following the application of ATIA and PA exemptions and exclusions by the Dedicated LAC ATIP Review Unit or the CSIS or DFATD ATIP Units.

CSIS and DFATD shall complete their review and application of exemptions and exclusions under the ATIA and PA to the Selected Records to the Selected Records no later than June 30, 2025. This date may be adjusted with the written consent of Canada and the LGBT Purge Fund.

For greater certainty, DFATD records shall include records from the Department of External Affairs, the Department of Foreign Affairs, and any other iterations of the departmental name.

32.07 Department of Justice Records – Scope and Process

Canada agrees to make reasonable efforts to identify and release the publicly available court documents which continue to be in the possession or control of the Department of Justice relating to legal proceedings involving the following litigants:

- (a) Michelle Douglas;
- (b) Derrick Dwyer;
- (c) Michele Poirier;
- (d) Sylvain Bordeleau;
- (e) James Stiles;
- (f) Simon Thwaites;
- (g) Graham Haig and Joshua Birch; and
- (h) Shawn Wayne Morash.

For the purpose of this section, “reasonable efforts” means that Canada will search available electronic record indexes at Library and Archives Canada and within Department of Justice holdings to identify any existing Publicly Available Court Documents within the files held there.

Once identified, Justice shall provide a summary of the documents identified, together with corresponding page counts, in order for the Research Company to make a determination whether to include these in the Selected Records.

Records held by the Department of Justice or in its holdings at LAC will not otherwise be searched and do not form part of the Phase II Research Project.

Justice shall complete its review and application of exemptions and exclusions under the ATIA and PA to the Selected Records no later than June 30, 2025. This date may be adjusted with the written consent of Canada and the LGBT Purge Fund.

32.08 Selection of Records by the Research Company

The Research Company will be asked to select up to a total of 15,000 pages of Selected Records out of the Additional Records (the “Selected Records”). The Parties recognize that the Research Company has expertise in historical research. Prior to commencing its research, the Research Company shall consult with representatives of the LGBT Purge Fund to assist it in determining

priorities with respect to the selection of the Selected Records. Should the Research Company require further direction after the research has begun, they may request a further consultation through the Progress Committee.

The Parties agree that the total number of pages of Selected Records from all sources to be reviewed by the Dedicated LAC ATIP Review Unit and the departments identified in sections 32.05, 32.06 and 32.07, shall not exceed 15,000 pages.

Canada will pay the full costs of the ATIP review for up to 15,000 pages of Selected Records which will either be completed by the Dedicated LAC ATIP Review Unit or the departmental ATIP Units.

32.09 Responsible Authority for Review and Application of Exemptions and Exclusions

Once identified as the Selected Records, the records will be reviewed and, ultimately released, subject to the application of exemptions and exclusions pursuant to the ATIA and PA by the head of the institution or their delegate. The total Selected Records from all sources shall not exceed 15,000 pages.

32.10 Limitations

Canada does not warrant that the Phase II Research Project will identify, provide access to and/or make available all of Canada's records or documents relating to the LGBT Purge.

Beyond the obligations set out in this Agreement, Canada does not assume any further obligation to conduct research relating to the LGBT Purge.

Notwithstanding any provision of this Agreement and the FSA as a whole, any and all releases of the results of the Phase II Research Project and other records under the control of Canada are subject to the provisions of any applicable legislation, including, but not limited to, the provisions of the PA and the ATIA. Recourse in respect of exemptions and exclusions claimed

is limited to that set out in section 38.

The LGBT Purge Fund shall not be permitted to bring further proceedings relating to Canada's compliance with the terms of Schedule "L" of the FSA, but only under this Agreement. However, nothing in this Agreement is intended to preclude the LGBT Purge Fund's ability to otherwise challenge Canada's compliance with this Agreement in the Federal Court.

This section is not intended to preclude the Plaintiffs or members of the Class from exercising any rights that they may have under the PA or the ATIA.

SECTION THIRTY THREE

DEDICATED LAC ATIP REVIEW UNIT

33.01 Purpose

Canada agrees to establish a dedicated unit of reviewers to complete the ATIP review of the records selected pursuant to section 32.04 (the "Dedicated LAC ATIP Review Unit"). ATIP review of records selected from those identified under sections 32.05, 32.06, and 32.07 will be completed by each department's ATIP unit, with the exception of records identified from their holdings at LAC, which would be reviewed by the Dedicated LAC ATIP Review Unit.

33.02 Role

The Dedicated LAC ATIP Review Unit will be responsible for reviewing the portion of the Selected Records identified from LAC's holdings, and applying the exemptions and exclusions in accordance with the provisions of the PA and the ATIA, and any other applicable legislation, to that subset of the Selected Records. The Dedicated LAC ATIP Review Unit shall complete its review of records no later than June 30, 2025. This date may be adjusted with the written consent of Canada and the LGBT Purge Fund.

SECTION THIRTY FOUR

DISPUTE RESOLUTION

34.01 General

The Parties wish to establish effective methods for the resolution of disputes concerning the implementation of the Phase II Research Project to avoid further litigation.

Prior to commencing any further court proceedings, the Parties agree to first engage in the processes and Dispute Resolution methods set out in sections 35, 36 and 37.

SECTION THIRTY FIVE

PHASE II RESEARCH PROJECT PROGRESS COMMITTEE

35.01 Purpose

The Parties desire to establish a forum to address matters that arise in the implementation of the Phase II Research Project in a manner that is consistent with its underlying purpose of identifying key archival records in order to memorialize the history of the LGBT Purge.

35.02 Composition

The Parties agree that there shall be a Progress Committee consisting of six members: two Representatives of the LGBT Purge Fund, namely its Executive Director (Michelle Douglas) and one other Director (Diane Pitre); two representatives of the Government of Canada; one member of Counsel for the LGBT Purge Fund, and one member of Canada's legal team.

The Progress Committee will be chaired by a representative of the Government of Canada.

A representative of the Research Company shall be an ex officio member of the Progress Committee and may attend meetings at the invitation of the Chair. Any member of the Committee may request that the Chair extend an invitation to a representative of the Research Company, and such invitation shall not be withheld without a reasonable basis.

35.03 Role

The role of the Progress Committee is to operate as a forum for the sharing of information on the status and progress of the Phase II Research Project on an ongoing basis and to facilitate agreement on a consensus basis. The Progress Committee does not have decision-making powers. In the event that consensus is not reached, the Progress Committee shall refer disputes to the Mediator.

SECTION THIRTY SIX

DISPUTE RESOLUTION – MEDIATION

36.01 General

Where a dispute other than a dispute relating to the application of ATIA or PA exemptions or exclusions arises that is not resolved after discussion at the Progress Committee, the Parties agree to participate in mediation to attempt to resolve the dispute.

36.02 Appointment

The Parties agree to seek the appointment by the Federal Court of the Honorable Gloria Epstein K.C., who shall act as an independent Mediator to assist the Parties to resolve disputes that may arise in the implementation of the terms of this Agreement, other than disputes relating to the application of the ATIA and PA exemptions or exclusions, and as further set out in the Terms and Conditions of Appointment, attached as Schedule “B”.

36.03 Costs of the Mediator

The Parties further agree that the costs of the Mediator, and any other costs associated with in-person mediations, shall be borne equally (50/50), and the total costs associated with the mediation of disputes are not to exceed One Hundred Thousand Dollars (\$100,000), inclusive of HST.

SECTION THIRTY SEVEN

DISPUTE RESOLUTION – ATIA AND PA EXEMPTIONS AND EXCLUSIONS

37.01 General

The Parties wish to establish an informal method for the review of ATIA and PA exemptions and exclusions claimed on the records identified and previously released by Canada pursuant to paragraph 1 of Schedule “L”, and on the Selected Records.

37.02 ATIP Reviewer

Canada agrees to appoint the Honourable Marshall Rothstein, C.C., K.C., as a Legal Agent to act as the ATIP Reviewer. The Parties acknowledge that the purpose of appointing Mr. Rothstein as a Legal Agent is in order facilitate the ATIP Reviewer’s review of records otherwise protected by solicitor-client privilege and other privileges, exemptions, and exclusions without risk of a waiver of privilege.

37.03 Security Clearance

The intention of the Parties is for the ATIP Reviewer to have the requisite level of security clearance to review all records in dispute. The ATIP Reviewer will seek the requisite security clearance(s) from all Departments from which records are collected under this Agreement as required. Canada agrees to make reasonable efforts to assist the ATIP Reviewer, in making such application(s), subject to applicable legislation.

In the event the ATIP Reviewer is unable to secure the requisite security clearance(s) from the appropriate Departments, the Parties will attempt to agree on an alternative ATIP Reviewer who is able to secure the requisite security clearance.

37.04 Scope of the review of records by the ATIP Reviewer

The role of the ATIP Reviewer is to review the records identified by the LGBT Purge Fund for review, and to provide his opinion as to whether the information that was exempted or excluded in or on those records, on the basis of a provision of the ATIA or the PA or other legislation, was properly claimed. For greater clarity, determinations as to whether information was properly exempted or excluded on the basis of solicitor-client privilege and litigation privilege shall be based on the common law. Determinations as to whether information that is exempted or excluded on the basis of other provisions of the ATIA or the PA or other legislation, shall be based on jurisprudence concerning the interpretation of those provisions.

The Parties will agree on a written memorandum of law to be delivered to the ATIP Reviewer. This memorandum will provide an overview of the law applicable to the various ATIP exemptions. In the event the Parties cannot agree on the language to include in the memorandum, the Parties may each provide their own memorandum to the ATIP Reviewer.

For greater certainty, the ATIP Reviewer shall not make any determinations relating to whether or not a record that properly falls within an exemption ought to be disclosed in the public interest.

37.05 Process for requesting a review by the ATIP Reviewer.

Within 60 days of the approval of this Agreement by the Court, the LGBT Purge Fund shall identify the pages of the records already produced pursuant to paragraph 1 of Schedule "L" in respect of which it seeks review by the ATIP Reviewer.

Within 90 days of the receipt of a release package of Selected Records, the LGBT Purge Fund shall identify the pages in respect of which it seeks review by the ATIP Reviewer.

All requests under this section shall be made in writing and directed to the ATIP Reviewer and to the Progress Committee with sufficient details to identify the documents.

37.06 Process for the review of records by the ATIP Reviewer

Upon receiving a copy of a request for review of records, Canada shall provide the ATIP Reviewer with copies of the unredacted versions of the records identified by the LGBT Purge Fund, save for any information for which the ATIP Reviewer does not have the appropriate security clearance.

The ATIP Reviewer may consult with the Parties as needed for the performance of his duties. More specifically, the ATIP Reviewer shall have the authority to request written representations from the Parties in respect of particular record(s) or on particular issues as he deems appropriate.

Upon receipt of a package of records, the ATIP Reviewer shall review them to determine whether, in his view, the information was properly exempted or excluded on the basis that it is subject to solicitor client privilege or litigation privilege, or on the basis of another provision of the ATIA or PA, or other legislation.

The opinion and recommendation shall describe the record at issue in such a way as to permit the Parties to understand the recommendation, without disclosing any information over which an exemption or exclusion has been claimed.

Where the ATIP Reviewer believes that that the information exempted did not fall within the applicable exemption or exclusion, he shall make a non-binding recommendation to the designated Assistant Deputy Minister of Justice of Canada, indicating the basis for his opinion and recommendation, and where a recommendation to release additional information is made, a copy of the record indicating the information at issue. The ATIP Reviewer shall provide a

copy of his opinion and recommendation to the LGBT Purge Fund, but shall not provide a copy of the record(s).

37.07 Review of a recommendation by Canada

Where Canada accepts the recommendation of the ATIP Reviewer, a revised copy of the pages will be released to the LGBT Purge Fund within 90 days of Canada's decision or as otherwise agreed to by the Parties, depending on the volume of records concerned.

Where Canada does not accept the recommendation of the ATIP Reviewer, it shall indicate the Canada's position to the LGBT Purge Fund within 90 days of Canada's receipt of the ATIP Reviewer's opinion and recommendation or as otherwise agreed to by the Parties, depending on the volume of records concerned.

37.08 Recourse in the event an exemption or exclusion is maintained

The LGBT Purge Fund retains the right to submit a formal ATIA request for the impugned records. Upon receipt of a formal request, LAC or the affected department will process the request pursuant to the relevant provisions of the ATIA, after which a formal complaint to the Information Commissioner of Canada may be made by the LGBT Purge Fund, and thereafter the matter may be reviewed by way of an application to Federal Court pursuant to section 41 of the ATIA.

37.09 No Other Review by the Federal Court

The Parties agree that the Federal Court has no role or jurisdiction over the review of the exemptions and exclusions claimed on the Schedule "L" Documents or with respect to exemptions and exclusions claimed on any of the Selected Records that may be released pursuant to this Agreement, save and except as referred to in section 37.08.

37.10 Costs of the ATIP Reviewer

The Parties further agree to share the costs of the ATIP Reviewer equally (50/50), but the costs of the ATIP Reviewer are not to exceed \$300,000, inclusive of HST, unless Canada and the LGBT Purge Fund agree in writing to an increase in this amount.

For greater clarity, the Parties agree that the LGBT Purge Fund shall be entitled to seek the review of up to 20% of the total number of pages of the Schedule “L” Records and the Selected Records released.

37.11 Limitations

For greater certainty, Canada is under no obligation to provide the ATIP Reviewer with any record for which the ATIP Reviewer does not possess the requisite security clearances. The ATIP Reviewer must not reveal the content of the unredacted material to any unauthorized party.

SECTION THIRTY EIGHT

GENERAL

38.01 Court Approval and Release

The Parties agree that they will seek the Court’s approval of this Agreement on December 6, 2022, or such other date as the Court may allow, in full and final settlement of all claims, as negotiated in this Fourth Supplementary Agreement.

For greater certainty, the Parties and the LGBT Purge Fund agree that all current and future legal proceedings, actions and claims past and present relating to any of the issues raised in the motion brought by the LGBT Purge Fund in relation to Schedule “L” of the FSA, or otherwise relating to Canada’s compliance with Section 5.04 and Schedule “L” of the FSA, are barred and

further that all Class Members will be bound by a deemed release to be set out in the approval order.

For greater certainty, this does not preclude the Plaintiffs or the LGBT Purge Fund from raising or litigating issues concerning Canada's compliance with its obligations under this Agreement, subject to the limitations that are set out herein.

38.02 General Provisions Continue to Apply

The Parties confirm that the provisions set out in the FSA continue to apply, including, but not limited to sections 1, 2, 10, and 14-17, subject to the limitations that are set out herein

As set out in section 17.03 of the FSA, the Parties confirm that references to the FSA executed on March 28, 2018, shall include the SA, the SSA, the TSA and this 4th SA, and together they form the entire agreement between the Parties.

38.03 Agreement May be Signed in Counterparts

This Agreement may be executed in one or more counterparts, together forming a single, executed whole.

IN WITNESS WHEREOF the Parties have executed this Fourth Supplementary Agreement.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the Attorney General of Canada.

Signed at Toronto, Ontario this
22nd day of November, 2022.

BY: _____

BY: _____

ATTORNEY GENERAL OF CANADA

For the Defendant

Signed at Halifax, Nova Scotia, this 22nd day of November, 2022.

ATTORNEY GENERAL OF CANADA
For the Defendant

BY: _____
KOSKIE MINSKY LLP

BY: _____
CAMBRIDGE LLP
For the Plaintiffs

BY: _____
IMK LLP
For the Plaintiffs

For the Plaintiffs

Signed at Toronto, Ontario this day of November, 2022.

THE LGBT Purge Fund, as represented by their Counsel:

Signed at Elliot Lake, Ontario this 22nd day of November, 2022.

BY: _____
CAMBRIDGE LLP
For the LGBT Purge Fund

THE PLAINTIFFS, as represented by Class Counsel

Signed at Elliot Lake, Ontario this 22nd day of November, 2022.

Signed at Montréal, Quebec this day of November, 2022

THE LGBT Purge Fund, as represented by their Counsel:
Signed at Elliot Lake, Ontario this 21st day of November, 2022.

BY: _____

CAMBRIDGE LLP
For the LGBT Purge Fund

THE PLAINTIFFS, as represented by Class Counsel

Signed at Toronto, Ontario this day of November, 2022.

BY: _____

KOSKIE MINSKY LLP
For the Plaintiffs

Signed at Elliot Lake, Ontario this 21st day of November, 2022.

BY: _____

CAMBRIDGE LLP
For the Plaintiffs

Signed at Montréal, Quebec this 22nd day of November, 2022.

BY: _____

IMK LLP
For the Plaintiffs

Signed at Halifax, Nova Scotia this day of November, 2022.

BY: _____

MCKIGGAN HEBERT LLP
For the Plaintiffs

SCHEDULE "A"

PROVISIONAL SCOPE OF RESEARCH

The scope of the research for the Phase II Research Project shall include the following topics, regardless of security clearance level, and shall be focused on the time period between January 1, 1950 and June 30, 1996.

For the purposes of the schedule "record" means any documentary material other than a publication, regardless of medium or form

A. Cabinet Records

Records of Cabinet and Cabinet Committees, including in particular those relating to:

- Planning, preparation and implementation of the 1963 Cabinet Directive 35 on Security;
 - Cabinet Committee on Security and Intelligence from 1963 onwards;
 - 1969-70 amendments to the Criminal Code on homosexuality;
 - Amendments to the Canadian Human Rights Act to include "sexual orientation" from 1970 to 1993;
 - Security Panel from the late 1940s until it ended;
 - Debates on changes to the Department of National Defence Policy from 1986 to 1992;
- and
- Response to the Equality Rights Report.

B. Parliamentary Records

Records of the Parliamentary Sub-Committee on Equality Rights of the Justice and Legal Affairs Committee 1985

- records relating to the committee, including records of confidential testimony and records of key government departments preparing for the Committee hearings, including DND, RCMP, as well as records of meetings and documents prepared in response to the Report; and any records relating to the Government's response to key Parliamentary

Committee hearings on the Purge between 1980 and 1992.

C. Commission Records

Records relating to the following Commissions or Inquiries

- records relating to the 1969 Royal Commission on Security (MacKenzie Commission), including in particular records of interviews conducted by the Commissioners;
- records of the 1981 Royal Commission into Certain Activities of the RCMP (McDonald Commission) on the subject of homosexuality and security, as well as responses of the government on these subjects, and on the policy of destruction of files pertaining to homosexuality;
- records of the 1991 Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department (1991 Marin Commission), including in particular records pertaining the DND Special Investigation Unit (SIU) on the subject of homosexuality and security, including copies of Military Police Investigation documents (excluding any material that includes personal information).

D. RCMP Records

Records of the RCMP “A” Division on Character Weaknesses and homosexuality;
Records of RCMP International Division re collaboration with United States, UK and Australian agencies on the subject of homosexuality.

E. Military Records

Records of the Security Clearance Review Boards dealing with issues arising from CFAO 19-20 and predecessor orders;
Records of the 1986 DND Charter Task Force and follow-up to their recommendations;
Records of the 1989 Sexual Orientation Working Group within DND; and
Records of Military Chaplaincy on the subject of homosexuality.

F. Miscellaneous

Records relating to the Research Project undertaken by Dr. Robert Wake known colloquially as the “Fruit Machine”:

- all record relating to the project between 1959 until its termination in the late 1960s, including reports of Dr. Wake’s travel to the United States in 1960-1961 together with PCO Official Don Wall, and any follow-up documentation on the project from PCO, DND, RCMP or other sources

G. Schedule L Document Follow Ups

Records identified by name in the documents listed in Annex 1, which were previously released under Schedule L of the Final Settlement Agreement between the Plaintiffs and the Defendants. Additional records referenced in the documents listed in Annex 1, which were previously noted by the LGBT Purge Fund.

ANNEX 1

Batch 2 Batch 6 cont’d

AGC-205 AGC-1707

AGC-209 AGC-1708

AGC-326 AGC-1709

AGC-336 AGC-1710

AGC-363 AGC-1762

Batch 3 AGC-1789

AGC-390 AGC-1809

Batch 4 AGC-1810

AGC-576 AGC-1811

AGC-577 AGC-1836

Batch 6 AGC-1842

AGC-735 AGC-1843

AGC-769 AGC-1919

AGC-808 AGC-1920

AGC-817 AGC-1934

AGC-984 AGC-1953

AGC-1284 AGC-1988

AGC-1085 AGC-1998

AGC-1234 AGC-2002

AGC-1284 AGC-2021

AGC-1288 AGC-2078

AGC-1363 AGC-2085

AGC-1543 AGC-2095

AGC-1546 AGC-2171

AGC-1583 AGC-2263

AGC-1598 AGC-2303

AGC-1668 AGC-2349

AGC-1672 Batch 7

AGC-1759 AGC-2557

SCHEDULE "B"

TERMS OF APPOINTMENT OF THE MEDIATOR

DEFINITIONS

1. Terms defined in the FSA, the SSA, TSA and in this 4SA have the same meaning in these Terms of Appointment.

GENERAL

A. Enforcement

2. For greater certainty, the obligations set out in these Terms of Appointment are enforceable as a court order.

3. Any party to the 4SA or the Mediator may seek enforcement in the Federal Court of the obligations contained in these Terms of Appointment.

B. Language of Work

4. The Mediator may be required to review documents in both official languages in order to perform her duties.

C. Place of Work

5. The Mediator shall provide her own office space, technology, supplies and resources to carry out her roles and responsibilities under this agreement. The work will be carried out primarily from the Mediator's place of business in Toronto.

D. Terms of the Mediation

6. Either Canada or the LGBT Purge Fund may request mediation on reasonable notice to the other.

7. Upon commencing mediation, the Mediator and the Parties shall agree to the following terms:

(a) The Mediator is being retained for the sole purpose of facilitating settlement discussions and not for the purpose of giving legal advice. However, it is understood that the Parties seek to reach a consensual settlement of disputes relating to the implementation of this agreement. The Parties agree that, although the Mediator will act as a neutral facilitator, if requested by one of the parties, the Mediator may provide an evaluation concerning the issue(s) in dispute, to the party;

(b) The Mediator will not be liable for any act or omission in connection with the mediation and shall have the immunity of a judge of a Superior Court of Ontario. On an equal basis between them, Canada and the LGBT Purge Fund agree to indemnify the Mediator for any claims arising out of the mediation;

(c) The Mediator may contact counsel for any Party and/or respond to any request by counsel to obtain information or discuss matters that may be of assistance in the mediation. Any such communications should be treated in the same manner as caucuses of the Mediator with one side of the dispute and the Mediator shall not disclose the contents of any such communication to the other side without the permission of the counsel with whom the Mediator spoke. For clarity, the Mediator may, in her discretion, disclose that a conversation took place;

(d) The Parties and their counsel grant the Mediator the absolute right, to be exercised in the Mediator's sole and unfettered discretion, to meet privately with clients or counsel, at any time, and in any combination whatsoever, provided reasonable notice is given to the other Party;

(e) In advance of a mediation session, the Mediator may request mediation briefs from each Party. The parties shall arrange for a conference call with the Mediator to set a schedule for the delivery of mediation briefs and other steps relevant to the mediation. Mediation briefs shall be submitted in both an electronic version and a hard copy version, and shall be provided to the Mediator sufficiently in advance of the mediation to allow the Mediator adequate preparation time. The mediation briefs shall generally outline the key issues, the parties' differences with respect to those issues, and the submitting party's particular interests in connection with the resolution of the dispute; and

(f) where feasible, the parties will send representatives to the mediation with authority to settle and understand that the mediation may result in a settlement agreement that contains legally binding obligations that are enforceable in a court of law. The parties acknowledge that, depending on the issue, and the number of government departments affected by the issue, Canada may not be in a position send a representative to the mediation with authority to settle or bind the government at the mediation;

(g) The parties are responsible for drafting any Minutes of Settlement; and

(h) Such further terms as the Mediator requests, and the Parties may agree to in writing.

PROFESSIONAL FEES

A. Fee Structure

8. The LGBT Purge Fund and Canada shall, on an equal basis (50/50), pay the Mediator for professional services personally rendered by her in accordance with these terms, or any further terms as may be agreed by the Parties in writing, at the rate of Seven Thousand Five Hundred Dollars (\$7,500.00, exclusive of HST) for the first full day (10:00 a.m. to 5:00 p.m.), and on an hourly basis of Seven Hundred and Fifty Dollars (\$750.00, exclusive of HST) per hour, thereafter.

9. As set out in section 36.03, the Mediator must not perform any work that would result in professional fees exceeding One Hundred Thousand Dollars (\$100,000.00, inclusive of HST), over the course of the appointment, except with the express written authorization of counsel for Canada and LGBT Purge Fund.

10. The Mediator shall notify the Parties when the cost of professional services rendered reaches 80% of One Hundred Thousand Dollars (\$100,000.00, inclusive of HST).

11. Where travel is required for the Mediator to perform her duties, reasonable travel expenses shall be billed to Canada and the LGBT Purge Fund on an equal basis (50/50) as part of the professional services, on the basis of rates established in the Government of Canada National Joint Council Travel Directive. If the rates for accommodation set out therein are not sufficient to secure reasonable accommodation, with the prior consent of Canada and the LGBT Purge Fund, those rates may be exceeded by a reasonable amount.

12. Canada and the LGBT Purge Fund will reimburse the Mediator for reasonable costs incurred in connection with the mediations, including administrative costs, where prior approval is obtained in writing from both Canada and the LGBT Purge Fund.

13. Should the parties cancel or reschedule the mediation fewer than 45 days prior to the scheduled date(s), 50% of the total per diem rate as referred to in paragraph 8, above (multiplied by the number of days booked) shall be paid as a cancellation fee in addition to the hourly rate for time the Mediator has devoted to the preparation of the mediation. If the parties cancel or reschedule the mediation with fewer than 20 days' notice, the entire per diem fee for each scheduled day shall be paid in addition to the hourly rate for time devoted to the matter. At the request of counsel, the mediation can be rescheduled at no charge with up to 15 days' notice. Cancellation fees shall be shared equally by the parties to be immediately payable by their lawyers unless the parties otherwise agree. The parties shall equally share all fees charged, including cancellation fees, unless otherwise agreed by the parties. Charges are to the account of the parties and their lawyers.

B. Invoicing and Payment Schedule

14. Canada and the LGBT Purge Fund shall pay the Mediator's professional fees covered by the invoice where:

(a) An accurate and complete invoice and any other documents required by the 4SA have been submitted in accordance with invoicing instructions to be provided by Canada and the LGBT Purge Fund, and;

(b) All documents have been verified by Canada and the LGBT Purge Fund.

15. Professional fees covers all compensation for professional services rendered; no additional compensation for annual leave, statutory holidays, sick leave, overhead, or any other expense shall be payable.

16. The Mediator is not an employee, servant, officer, agent or other emanation of His Majesty the King in Right of Canada.

CONFIDENTIALITY

17. All statements made and documents produced during the mediation shall not be subject to disclosure through discovery or any other process and shall be confidential. Such statements and documents shall not be admissible into evidence for any purpose, including impeaching credibility or to establish the meaning and/or validity of any settlement or alleged settlement arising from the mediation;

18. The Mediator's notes, records, and recollections shall be confidential and protected from disclosure for all purposes, including for the purposes of enforcement of the terms of the agreement, as an exception to settlement privilege;

19. The Mediator shall execute a non-disclosure agreement in a form satisfactory to the

Parties, upon request.

20. The Mediator shall ensure that all sensitive material is stored in a secure location and that only authorized persons who have signed the non-disclosure agreement are permitted to access the information. Printed material will be stored in a locked container in an area that is subject to continuous monitoring by the Mediator.

21. The Mediator shall promptly notify the Parties of any incident or concern that confidential information has been disclosed to or otherwise obtained by unauthorized persons.

22. Information relating to the Mediator's appointment shall be returned or destroyed no later than June 30, 2027, or as may otherwise be directed by the Court.