

2007 01T4955 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER

Plaintiffs
(Moving Parties)

AND:

THE ATTORNEY GENERAL OF CANADA

Defendant
(Respondent)

AND AS BETWEEN THE FOLLOWING 4 ACTIONS:

TOBY OBED, WILLIAM ADAMS and MARTHA BLAKE - and - THE ATTORNEY GENERAL OF CANADA	2007 01T5423 CP
ROSINA HOLWELL and REX HOLWELL - and - THE ATTORNEY GENERAL OF CANADA	2008 01T0844 CP
SARAH ASIVAK and JAMES ASIVAK - and - THE ATTORNEY GENERAL OF CANADA	2008 01T0845 CP
EMILY DICKMAN and DOMINIC DICKMAN - and - THE ATTORNEY GENERAL OF CANADA	2008 01T0846 CP

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

BEFORE THE HONOURABLE JUSTICE BUTLER,
CASE MANAGEMENT JUDGE

PLAINTIFFS' MEMORANDUM OF FACT AND LAW
(APPLICATION TO SEVER OR STAY THE THIRD PARTY CLAIM)
(Application returnable Monday May 27 and Tuesday May 28, 2013)

TO: THE REGISTRAR
AND TO: DEPARTMENT OF JUSTICE
CANADA
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3
Jonathan D. N. Tarlton
Melissa Grant
Mark Freeman
Tel: 902-426-5959/Fax: 902-426-8796

AND TO: Lawyers for the Defendant
GOVERNMENT OF
NEWFOUNDLAND AND
LABRADOR
DEPARTMENT OF JUSTICE
4th Flr – East Block Confederation
Building, P.O. Box 8700
St. John's NL A1B 4J6
Rolf Pritchard, Q.C.
Tel: 709-729-2864/Fax: 709-729-2129
Gerry Quigley
Tel: 709-729-3970/Fax: 709-729-2129
Lawyers for the Third Party,
Her Majesty in Right of Newfoundland
and Labrador

TABLE OF CONTENTS

PART I - NATURE OF THE APPLICATION.....	1
PART II - FACTS SURROUNDING THE APPLICATION	2
A. NATURE OF THE PLAINTIFFS' CERTIFIED CLASS ACTIONS.....	2
B. CANADA'S THIRD PARTY CLAIM AGAINST THE PROVINCE.....	4
C. THIRD PARTY CLAIMS ARE NOT INTERWOVEN WITH THE MAIN ACTIONS.....	6
D. PREJUDICE TO THE PLAINTIFFS IF THIRD PARTY CLAIM IS NOT SEVERED OR STAYED FROM THE MAIN ACTIONS.....	7
E. ON BALANCE, THE EQUITIES, EFFICIENCIES AND ECONOMIES WEIGH HEAVILY IN FAVOUR OF SEGREGATING THE THIRD PARTY CLAIM FROM THE MAIN ACTIONS	9
PART III - ISSUES AND THE LAW	10
A. THE APPLICABLE TEST TO STAY OR SEVER.....	10
B. THE ISSUES TO BE DETERMINED AT TRIAL ARE NOT INTERWOVEN AS BETWEEN THE MAIN ACTIONS AND THE THIRD PARTY ACTION.....	12
(i) At Issue In the Main Actions.....	12
(ii) At Issue in the Third Party Action	17
(iii) The <i>Class Actions Act</i> Contemplates This Type of Bifurcation At The Common Issues Trial.....	19
C. STAYING OR SEVERING THE THIRD PARTY ACTION WOULD SIMPLIFY THE TRIAL OF THE COMMON ISSUES IN THE MAIN ACTIONS	20
D. PREJUDICIAL TO THE PLAINTIFFS TO TRY THE MAIN AND THIRD PARTY ACTION TOGETHER.....	24
(i) The Present Litigation Timetable – Inevitable Delay As Third Party Action Cannot 'Catch Up'	24
(ii) Evidence of Prejudice to Plaintiffs As A Result of Delay	27
(iii) No Evidence Of Prejudice to Defendant If Third Party Claim is Struck or Severed.....	29
PART IV - ORDER REQUESTED	30
SCHEDULE "A" LIST OF AUTHORITIES	31
SCHEDULE "B" RELEVANT STATUTES	32

PART I - NATURE OF THE APPLICATION

1. The five (5) main actions are close to the ‘eve’ of a common issues trial in late 2013. Having been commenced in 2007, the Plaintiffs’ claims are ready and ripe for judicial determination on their merits against Canada.
2. Late in 2012, Canada issued a Third Party Claim against Her Majesty in Right of the Province of Newfoundland and Labrador (the “Province”) seeking contribution for any damages it is ordered to pay the Plaintiffs at the common issues trial.
3. The Plaintiffs seek a stay or severance of the Third Party Claim from the main actions:
 - (a) having framed their claims for relief upon the several liability of Canada alone, the basis for the Third Party Claim for contribution is untenable at law;
 - (b) the matters at issue as between the Plaintiffs and Canada have no bearing to any *lis* between Canada and the Province, making the legal issues for determination entirely unconnected;
 - (c) hearing the Third Party Claim with the main actions would inevitably delay the common issues trial to a distant time in the future, thereby visiting gross prejudice upon the Plaintiffs; and
 - (d) it would uneconomical and inefficient to try these actions together.

PART II - FACTS SURROUNDING THE APPLICATION

A. NATURE OF THE PLAINTIFFS' CERTIFIED CLASS ACTIONS

4. These five (5) companion proceedings were certified by this court as class actions in 2010 pursuant to the *Class Actions Act* (the "Act"). The Court of Appeal upheld the certification order in 2011. In each of these proceedings, the Plaintiffs assert certain breaches of duties committed by the Defendant following Newfoundland's entry into Confederation in April 1949. The certified common issues turn entirely upon the scope and content of federal duties.

Class Actions Act, S.N.L. 2001, c. C.-18.1, Plaintiffs' Factum, Schedule B, Tab 3.

Order of Justice Fowler, dated June 7, 2010, Application Record, Tab 2D.

5. Specifically, the Plaintiffs allege that Canada alone possessed a singular and non-delegable duty over Indians and Eskimos in Newfoundland as a matter of constitutional law. By limiting their claims to Canada's several liability only, the Third Party Claim against the Province is therefore not only unnecessary, but untenable.

Amended Statement of Claim, dated April 18, 2012, Application Record, Tab 2A.

6. As noted by both the certification judge and the Court of Appeal, the nature of the claims asserted on behalf of the class are unique to the Defendant. This is compounded by the fact that the claim only seeks to have Canada pay for the damages it caused, as opposed to what other parties may (or may not) have caused:

(a) "...the critical issue here, according to the Plaintiffs, is that Canada, having a constitutional duty of care in relation to all aboriginal peoples of this country, systematically failed in that duty of care and were specifically negligence in failing to exercise that duty owed to aboriginal people of coastal Labrador";

(b) "the Plaintiffs take the position that even if Canada did not directly manage or operate these residential schools it was still in breach of its fiduciary duty to those

aboriginal students by failing to ensure that these schools were properly run to avoid the resulting abuse";

(c) "It was therefore the duty of the Crown to recognize and protect the rights of aboriginal peoples as soon as these aboriginal people were subsumed into the Canadian constitutional mosaic";

(d) "it is safe to say that Canada was aware at the time of Confederation that any union with Newfoundland would have an aboriginal component associated with it. ... The argument that the Plaintiffs will present at trial is that Canada constitutionally inherited jurisdiction over Indians and their land including Inuit aboriginal people of Labrador at the moment of Confederation";

(e) "the Respondents [Plaintiffs] submit that at Confederation Canada reaffirmed its exclusive responsibility for the affairs of aboriginal peoples insofar as its responsibility related to native peoples of Labrador (and northern Newfoundland). These duties would not have been related to solely to educational funding contributions to Newfoundland which is separately alleged to be woefully inadequate....It is alleged that Canada knew or ought to have known that they would be at risk of physical, verbal, mental and sexual abuse in an environment of involuntary cultural assimilation in the European tradition";

(f) "the Respondents argue that on a broad view of Canada's fiduciary duty the health, welfare and education of aboriginal peoples cannot be said to have resided solely in the Crown in right of Newfoundland after Confederation in 1949".

Anderson v. Canada (Attorney General), [2010] N.J. No. 195 (Nfld. T.D.) at paras. 10, 68, 75, Application Record, Tab 2C

Anderson v. Canada (Attorney General), [2011] N.J. No. 445 (Nfld. C.A.) at para. 58, 61, Application Record, Tab 2E

7. The causes of action to be determined at trial stem entirely from duties assumed and owed by Canada at the time of Newfoundland and Labrador's entry into Confederation. The claim provides significant detail concerning the constitutional root of liability and that Canada is exclusively liable to the class. The certified common issues are centred on Canada's conduct and duties, not others.

8. Even putting the Defendant's arguments at their highest and even assuming all of its tendered evidence is accepted, given the claims asserted against Canada in this action, there are no grounds upon which the Defendant can seek contribution from the Province on the basis of

contribution or indemnity. Therefore, its Third Party Claim against the Province is entirely superfluous to the determination of the common issues at trial and ought to be stayed or severed.

9. The very essence of the Plaintiffs' claim is that: "[a]ny attempt by Canada to delegate its duties, responsibilities or obligations to the Class to the Province of Newfoundland is unlawful and in breach of its exclusive and non-delegable fiduciary duties owed to the class". If this claim is successful, then no claim for contribution and indemnity can arise.

Amended Statement of Claim, dated April 18, 2012, at para. 55, Application Record, Tab 2A.

10. Moreover, the insistence at pursuing its Third Party Claim against the Province would further "require Canada to modify its position on liability since shared responsibility is the underlying concept of such notices". However, Canada has not modified its position and maintains an absolute defence.

Reasons of Butler J., dated October 17, 2012 at para. 94, Application Record, Tab 2J.

11. Given the Third Party Claim's already tenuous basis in this respect, it would be unfair and uneconomic to force its disposition along with the main actions, thereby delaying adjudication of the Plaintiffs' claims.

B. CANADA'S THIRD PARTY CLAIM AGAINST THE PROVINCE

12. On November 21, 2012, Canada issued a Third Party Claim against the Province, alleging that the schools were created and run by the Province, the International Grenfell Association ("IGA"), the Moravian Church (the "Moravians"), and the School Boards. Canada seeks contribution and indemnity from the Province to the extent that Canada is found liable to pay damages to the Plaintiffs.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 20, Application Record, Tab 2.

Third Party Claim, dated November 21, 2012, Exhibit K to the O'Donnell Affidavit, Application Record, Tab 2K.

13. In January 2013, the Province defended the Third Party Claim and on February 1, 2013, filed additional third party claims against the Moravians and the IGA. Amended Third Party Claims by the Province were issued by the court on April 15, 2013.

Affidavit of G. Quigley, sworn April 24, 2013 at para.11, Province's Responding Application Record, Tab 1.

14. On February 7, 2013, at a case management conference before Justice Butler, the Plaintiffs placed the parties and the court on notice of their intention to bring this application and a timetable was set down for return of this application with the agreement of both Canada and the Province.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 20, Application Record, Tab 2.

CMC Minutes, February 7, 2013, Exhibit 27 to the P. Kennedy Affidavit, Responding Application Record, Tab 27 (pg.14).

15. As noted above, and judicially acknowledged, the Plaintiffs consciously chose to focus on specific common issues related to Canada alone. The Plaintiffs do not seek redress against the Province. The Plaintiffs rely on the assertion that the duty owed to class members was Canada's alone. Accordingly, any involvement of the Third Party in the common issues trial is not only unnecessary but would unduly complicate and protract those proceedings, as well as the commencement date for trial.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 23, Application Record, Tab 2.

C. THIRD PARTY CLAIMS ARE NOT INTERWOVEN WITH THE MAIN ACTIONS

16. The certified common issues relate to Canada's non-delegable constitutional fiduciary duty and duty of care to aboriginal persons in Newfoundland: the constitutional issues that are at play in the main action do not turn on the conduct or knowledge of any third parties.

17. Any relationship between Canada and the Province (or other third parties) is unconnected to any common issues as certified. The common issues do not put any third party interest at issue, as the Plaintiffs have alleged that only Canada owed the alleged duties to the Plaintiffs and class members. In fact, the Plaintiffs' claim, as advanced, is for Canada's several liability only.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 25, Application Record, Tab 2.

18. The basis of Canada's Third Party Claim against the Province is for contribution and indemnity only, which does not involve determination of the same issues as between the Plaintiffs and Canada in the main action. There is no need to dispose of those issues at the same time as the main action as they are not inextricably connected to the main action. In fact, as set out above, they are not connected at all.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 26, Application Record, Tab 2.

19. The issues raised in Canada's Third Party Claim against the Province (and the Province's corollary Third Party Claims against the IGA and the Moravians) will turn on facts that are not relevant to the certified common issues in the main action. For example, the nature of agency relationships between the Province and proposed other third parties will be of no moment when the court is determining the legal duties owed by Canada to the class.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 27, Application Record, Tab 2.

D. PREJUDICE TO THE PLAINTIFFS IF THIRD PARTY CLAIM IS NOT SEVERED OR STAYED FROM THE MAIN ACTIONS

20. The claims advanced by the Plaintiffs relate to events that took place over 60 years ago, when Newfoundland entered Confederation in 1949. The class members are at an advanced age and survivors of these residential schools, and their family members who are part of the family class, are dying every day.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 28, Application Record, Tab 2.

21. The Third Party Claim will divert the focus of the Plaintiffs' inquiry into whether Canada owed a duty of care and fiduciary duty to the Plaintiffs and class members and whether those duties were breached by Canada. If the third party proceedings are allowed to progress and be tried with the main action, the costs of the litigation will increase exponentially as will the time required to adjudicate upon the common issues trial.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 29, Application Record, Tab 2.

22. Canada's Third Party Claim against the Province is also at a very preliminary stage. Only pleadings have been exchanged. The Province is not required to produce any documents in the third party proceeding until April 30, 2013. The Province may or may not retain experts, who will have to be examined for discovery, in addition to a representative of the Province. There are also sure to be applications arising from those discoveries or other preliminary applications and any attendant appeals all of these matters will delay the main action.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 32, Application Record, Tab 2.

23. The Province has also recently advised that it has made requests for document retrieval from various governmental departments to comply with its production obligations but as of

today's date, "none of the departments have been able to complete their search. Despite best efforts, it appears that the Province will be unable to have its List of Documents ready by April 30, 2013."

Affidavit of G. Quigley, sworn April 24, 2013, at para. 12, Province's Responding Record, Tab 1.

24. By contrast, the main action is significantly more advanced and is closing in on a trial of the common issues:

- (a) the parties have completed discoveries of all representative Plaintiffs and Canada's representative on the common issues;
- (b) the parties have brought and disposed of discovery applications;
- (c) the Plaintiffs have served expert reports;
- (d) Canada's expert reports are to be served by May 31, 2013;
- (e) discovery of experts commences on May 24, 2013 and shall be completed by July 2013; and
- (f) the common issues trial is expected to commence as early as November, 2013.

25. If the parties in the main action are required to wait for the Third Party Claim to catch up, it will be several years before a common issues trial commences, let alone disposed of, with all the attendant appeals arising. It would place the present litigation timetable in jeopardy and at "considerable risk".

Affidavit of S. O'Donnell, sworn March 25, 2013 at para. 33, Application Record, Tab 2.

Reasons of Butler J., dated March 19, 2013 at para. 69(iii), Application Record, Tab 2M.

26. If the third party proceedings are allowed to proceed along with the main action, it will be impossible for the third parties to argue any pleadings applications, produce documents, conduct discoveries of the Province, serve expert reports, conduct expert discoveries (and any

applications arising therefrom) and still meet a trial date in late 2013 or early 2014. This would be highly prejudicial to the Plaintiffs as it will leave any disposition of the actual merits of these proceedings to the far distant future.

Affidavit of S. O'Donnell, sworn March 25, 2013, at para. 34, Application Record, Tab 2.

E. ON BALANCE, THE EQUITIES, EFFICIENCIES AND ECONOMIES WEIGH HEAVILY IN FAVOUR OF SEGREGATING THE THIRD PARTY CLAIM FROM THE MAIN ACTIONS

27. Severing or staying the third party proceedings will:

- (a) allow the parties to focus on the issues at the heart of the main action, namely the fiduciary and non-delegable constitutional duties owed by Canada to the Plaintiffs;
- (b) ensure that all parties do not incur costs that are unnecessary, particularly if the Plaintiffs are not successful at the common issues trial (in which case the litigation will come to an end as between all parties); and
- (c) not result in inconsistent verdicts or duplicative litigation as Canada's Third Party Claim for contribution and indemnity against the Province is not an issue engaged by the main action.

28. Most importantly, a decision at the common issues trial that Canada owed non-delegable constitutional duties to Indians and Eskimos in Newfoundland will not be re-considered in the third party proceedings, as those derivative proceedings could only relate to contribution and indemnity. Hence, there is no possibility of an inconsistent verdict.

29. As a result, no prejudice would be visited upon Canada if the Third Party Claim is stayed as Canada can seek contribution and indemnity from the Province (if available and appropriate) after the conclusion of the common issues trial, if the Plaintiffs are successful in obtaining judgement. Conversely, if the Plaintiffs are unsuccessful at trial, any third party participation in this action would have been redundant, wasteful and time consuming.

30. On the other hand, it would be prejudicial to the Plaintiffs to delay by their claims because of the inevitable preliminary motions, attendant appeals and lack of litigation timetable in the third party actions.

31. These delays and additional expense associated with permitting the third party actions to proceed concurrently with the main actions would be severely prejudicial to the Plaintiff classes and will frustrate the pursuit of judicial economy and access to justice, express goals of the Act.

32. The Plaintiffs therefore respectfully submit that their application be granted.

PART III - ISSUES AND THE LAW

33. The only issue on this application is whether the Third Party Claim commenced against the Province ought to be stayed or severed, pursuant to section 97(1) of the *Judicature Act*, Rules 7.03(2) and 12.06/8 of the *Supreme Court Rules* and/or sections 13, and 14 of the *Class Actions Act*.

A. THE APPLICABLE TEST TO STAY OR SEVER

34. The question of how third party proceedings should be managed in the context of a certified class action requires “careful consideration”

Johnston et al. v. Sheila Morrison Schools et al., 2011 ONSC 3398 at para. 86, Plaintiffs’ Book of Authorities, Tab 1.

35. Various statutory provisions and Rules of Court provide this Court with broad discretion to make any order necessary in respect of the conduct of a proceeding to ensure that the main action is neither unnecessarily delayed or prejudiced:

Section 97(1) The Court may direct a stay of proceedings pending before it.

Judicature Act, R.S.N.L. 1990, c. J-4, section 97(1), Plaintiffs' Factum, Schedule B, Tab 1.

Rule 7.03(2) Where a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the Court may order the counterclaim or third party proceeding to be struck out or tried separately, or it may make such other order as is just.

Rule 12.06(1) Where a third party files a defence, the defendant serving the third party notice or the third party may, on notice to all the parties to the proceeding, apply to the Court for directions and the Court may, ...

- (e) make such other order as may appear to the Court proper for having the rights and liabilities of the parties conveniently determined and enforced.....

Rule 12.08 The Court may at any time stop the trial or hearing under a third party notice and have each proceeding tried or heard separately or as the Court may order.

Rules of the Supreme Court, 1986, SNL 1986, c. 42 Sch D., Rule 7.03, Plaintiffs' Factum, Schedule B, Tab 2.

Section 13 Notwithstanding section 12, the court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

Section 14 The court may stay an action related to the class action on terms the court considers appropriate.

Class Actions Act, SNL 2001, c. 18.1, sections 13, 14, Plaintiffs' Factum, Schedule B, Tab 3.

36. Section 13 of the Act provides the court with plenary authority to fashion rules and processes which would enhance the purposes and values of the class proceedings statute. In considering any application brought pursuant to the Act, the case management judge must keep in mind the policy objectives informing the class proceedings regime, namely, expeditious and timely access to justice and judicial efficiency or economy.

Peter v. Medtronic Inc., [2008] O.J. No. 4378 (S.C.J.) at para. 22, Plaintiffs' Book of Authorities, Tab 2.

37. On an application to stay or sever, the Court is to consider the extent to which the issues are not interwoven or overlapping, any savings in time or costs that would result and whether there would be serious prejudice visited upon either party by severance (or lack thereof).

Furlong Estate v. Newfoundland Light and Power Co., [2000] N.J. No. 241, Plaintiffs' Book of Authorities, Tab 3.

38. In determining whether to order a stay or severance, "the court should not be overly restrictive when faced with such applications. There may well be good reasons adduced to support severance. The reasons provided will necessarily vary from case to case."

Coady Boone et al. v. James F. King, 2004 N.L.S.C.T.D. 154, at para. 12, Plaintiffs' Book of Authorities, Tab 4.

39. There are strong reasons auguring in favor of severance or a stay in these actions and only the Plaintiffs have tendered evidence on the economies and prejudice that will arise if the application is not granted.

B. THE ISSUES TO BE DETERMINED AT TRIAL ARE NOT INTERWOVEN AS BETWEEN THE MAIN ACTIONS AND THE THIRD PARTY ACTION

(i) At Issue In the Main Actions

40. An examination of the declaratory relief sought by the Plaintiffs and the terms of the certified common issues for trial demonstrate that third party participation at trial is not only unnecessary, but would constitute a truly irrelevant and costly diversion from the matters to be determined between the Plaintiffs and Canada.

41. The Plaintiffs seek the following declaratory relief at trial:

- (a) a declaration that Canada owed an exclusive non-delegable fiduciary duty of care to the Plaintiffs in relation to the funding oversight, operation, supervision, control, maintenance and support of the schools;
- (b) a declaration that Canada was negligent in its duty aforesaid and breached the duty it owed; and
- (c) a declaration that Canada is liable to the Plaintiffs for the damages caused by its neglect and breach of duty.

Amended Statement of Claim, dated April 18, 2012, at para. 1, Application Record, Tab 2A.

Reasons of Butler J., dated October 17, 2012, para. 24, Application Record, Tab 2J.

42. The certified common issues for trial are the following:

- (a) by its operation or management of the respective school, did the Defendant breach a duty of care owed to the students of the school to protect them from actionable physical or mental harm?
- (b) by its purpose, operation or management of the respective school, did the Defendant breach a fiduciary duty owed to the students of the school to protect them from actionable physical or mental harm?
- (c) by its purpose, operation or management of the school, did the Defendant breach a fiduciary duty owed to the families and siblings of the students of the school?
- (d) if the answer to any of the above issues is “yes”, can the Court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?
- (e) if the answer to any of these common issues is “yes”, was the Defendant guilty of conduct that justifies an award of punitive damages, and if so, how much?

Order of Fowler J., dated June 7, 2010, Application Record, Tab 2D.

43. As further described by the Province in its Defence to Canada’s Third Party Claim, the main action is “not one which lends itself to a third party action by Canada against the Province as the liability alleged by the Plaintiffs is uniquely and solely Canada’s as a result of Canada’s duties, constitutional and otherwise”. The Province’s pleading goes on to state that the very

“basis of the Plaintiffs’ claim against Canada is the allegation that Canada breached a non-delegable fiduciary duty towards the Plaintiffs ... their cause of action stems from duties assumed by Canada at the time of Newfoundland and Labrador’s entry into Confederation”.

Defence of the Third Party (Her Majesty in Right of Newfoundland and Labrador), dated January 31, 2013, paras. 5 (i), 9 (iii), Application Record, Tab 2L.

44. This court has also already acknowledged that the nature of the Plaintiffs’ claims turns upon the following unique allegations and legal positions, amongst other things:

- (a) “They [the plaintiffs] also acknowledge Contribution Agreements between Canada and the Province respecting resources and programs to Indians and Eskimos in Labrador but allege that such a cost sharing was a breach of Canada’s duty”;
- (b) “The plaintiffs allege that Canada owed an exclusive, non-delegable fiduciary duty of care (arising from its constitutional jurisdiction) in relation to the operation of the schools and that Canada did, through its employees, agents or representatives, breached the duty of care owed” ;
- (c) “The plaintiffs assert that their claims are unique to the defendant, having a constitutional root of liability exclusive to Canada.”

Reasons of Butler J., dated October 17, 2012 at paras. 20, 21, 30, Application Record, Tab 2J.

45. Justice Butler put it most succinctly by recently noting that:

“Plaintiffs’ counsel has always maintained that a conscious decision was made to sue Canada only and that notwithstanding the Third Party claim made by Canada against her Majesty in Right of Newfoundland and Labrador, the Plaintiffs do not seek redress against the Province. They continue to rely on the sole assertion that the duty owed to both classes of the Plaintiffs was by Canada alone. They assert that the Defendant’s Third Party claim cannot delay the Plaintiffs’ pursuit of its claim against Canada”. [emphasis added]

Reasons of Butler J., dated March 19, 2013, at para. 67, Application Record Tab 2M.

46. The pleadings themselves are rife with particulars exemplifying the purely ‘several’ nature of the Plaintiffs’ claims and the exclusivity of Canada’s liability:

- (i) Canada was the party with the legal responsibility towards the individuals at the schools;
- (ii) to the extent that it permitted Delegates to assume that role, Canada wrongly forsaked its legal obligations and is responsible in law for the wrongs or omissions of those parties;
- (iii) to the extent that Canada provided the core funding and pursuant to its constitutional duties, it was obliged to supervise the administration of the schools, which it utterly failed to do;
- (iv) some of the material facts which bear out this relationship, include, but are not limited to:
 - (a) Canada required a report from the Committee to the Department of Natural Resources to supply information regarding Indian and Eskimo administration; education and welfare,¹ a report that never would have been requested by Canada if its involvement had been limited to the provision of funds;
 - (b) a 1952 memorandum from the Chief of the Northern Administration Division of the Federal Department of Resources and Development references a request from the Secretary of the Committee studying financial arrangements between Canada and the Province, including information regarding the annual operating costs of education for Eskimos which “would include the cost of operating our own schools and the grants we pay to Eskimo mission schools”,²
 - (c) in 1956, the Deputy Minister of Education from the Federal Secretary of the Treasury Board requested detailed information on the Nain school in particular, “for the information of my government, something of the facilities there at present and the size and nature of the population to be served ... I would like to know what the sociological policies are that underlie the choice of Nain for this development”,³
 - (d) in 1965, Canada requested information of the proposed school and dormitory at North West River, and expressed concern about the location of two small schools in the same area, resulting in approval for Canada’s representatives to travel to Northern Labrador to visit the schools;⁴
 - (e) in 1966, Canadian representatives reported on their visit to Northern Labrador and discussed the integration of Indian children with white and Eskimo children pursuant to the Canadian government’s general policy, including a Canadian

¹ Memorandum for the Interdepartmental Committee on Indians and Eskimos by P. Pelletier of the Privy Council Office, April 3, 1950

² Memorandum from the Chief, Northern Administration Division, of the Federal Department of Resources and Development dated June 23, 1952.

³ Correspondence to the Deputy Minister of Education from the Federal Secretary to the Treasury Board, May 28, 1956.

⁴ Minutes of the Second Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 30, 1965 – December 1, 1965) with capital expenditure attachments.

expression of concern on the ability to recruit and retain suitable teaching staff and a Canadian request for copies of plans and estimates;⁵

- (f) in 1966, Canadian representatives questioned the proposed location of a dormitory in North West River, pointing out that “the Federal government is careful in its application of principles concerning Indians and Eskimos so that the financial support to each is comparable to the rest of the country”;⁶
- (g) in 1967, the Province provided a detailed report on various aspects of Indian and Eskimo school services to the entire Federal-Provincial Committee,⁷ evidencing Canada’s interest, knowledge and involvements in such matters; and
- (h) Canada and the Province entered into agreements commencing in 1965 which was renewed every five years, and ultimately by 1981 entitled “Canada-Newfoundland Native Peoples of Labrador Agreement” which establishes a Coordinating Committee of both federal and provincial representative and charges it with “designated programs” including “education programs”.

Plaintiffs’ Supplementary Response to Demand for Particulars, August 15, 2012, pg. 2 – 5, Responding Application Record, Tab 14

47. By limiting their claims to the several liability of Canada only, the tenability of the Defendant’s Third Party Claim has been obviated: “the difference between a claim that the defendant is liable for all the damages suffered by the plaintiff and a claim that is limited to the part of the damages caused solely by the defendant, is ... critical”. There are no tenable third party claims at law where a plaintiff has limited itself to seeking damages that would be apportioned only to the defendant’s *relative* degree of fault

Taylor v. Canada (Minister of Health), [2009] O.J. No. 2490 (C.A.), paras. 9–12, Plaintiffs’ Book of Authorities, Tab 5.

⁵ Minutes of the Third Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (June 21, 1966) with capital expenditure attachments.

⁶ Minutes of the Fourth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (December 13 – 14, 1966), with capital expenditure attachments.

⁷ Minutes of the Sixth Meeting of the Federal-Provincial Committee on Financial Assistance for Indians and Eskimos in Northern Labrador (November 28, 1967), with capital expenditure attachments.

48. Accordingly, third party participation in the main common issues trial would not assist – let alone be necessary to – the court in adjudicating upon an appropriate judgment. The Province’s involvement in such a trial would be of no moment, one way or another, to the certified common issues in the main actions.

(ii) At Issue in the Third Party Action

49. Canada cannot argue that the Province needs to participate in the common issues trial as a result of its pleaded claims for contribution and indemnity. Given the character of the main actions’ claims, Canada has no basis in law for a claim over or a third party claim as it cannot be entitled to contribution or indemnity as matter of common law or the *Contributory Negligence Act*, by virtue of breach of non-delegable duties owed to the class solely by Canada.

50. For such breaches, there can be no joint responsibility or joint liability as required by the statute for the purposes of apportionment or contribution. One of the primary common issues to be decided in the main actions is whether or not Canada breached a fiduciary duty to the Plaintiffs: fiduciary duties are not, in law, subject to joint responsibility or contribution.

Contributory Negligence Act, R.S.N.L. 1990, c. C-33, Plaintiffs’ Factum, Schedule B, Tab 4.

Johnston v. Sheila Morrison Schools, [2012] O.J. No. 915 (Div.Ct.) at para. 16, Plaintiffs’ Book of Authorities, Tab 6.

51. The case management judge in the main consolidated proceedings has even expressly observed that the “pursuit of third party claims would require Canada to modify its position on liability since shared responsibility is the underlying concept of such notices”. [emphasis added]

Reasons of Butler J., dated October 17, 2012 at para. 94, Application Record, Tab 2J.

52. Moreover, there is no identity of interest between the certified common issues and the claims between Canada and the Province. Quite the contrary. In fact, on the joinder application, this Court determined that if the Province and religious entities were added to the main actions, it “would require a comprehensive amendment to the ‘common issues’ identified in the June 2010 Certification orders”. [emphasis added]

Reasons of Butler J., dated October 17, 2012 at para. 91, Application Record, Tab 2J.

53. Where third party involvement in the main action would serve no meaningful purpose, those third party proceedings ought to be stayed or severed.

Attis v. Canada (Minister of Health), [2005] O.J. No. 1337 (S.C.J.) at para. 14, Plaintiffs’ Book of Authorities, Tab 7.

54. In these actions, concurrent participation of the third parties serves no valid purpose. Reinforcing the lack of *lis* between the third parties and the Plaintiffs further is the position of the Province on discoveries: the Province has confirmed it does not even wish to examine either Canada or the Plaintiffs for discovery (even though it did not attend either of the parties’ discoveries as it had yet to become a third party).

CMC Minutes, March 20, 2013, pg.3/19, Exhibit 27 to the Affidavit of P. Kennedy, sworn April 16, 2013, Responding Application Record, Tab 27.

55. Even if the Plaintiffs are incorrect in advancing the position that there is no relief in law available to Canada from the third party, its participation would nevertheless serve no useful purpose. If Canada is found liable in the main actions, it will preserve its rights to claim as against the Province, the Province in turn maintaining its ability to claim against the religious entities, if necessary, in a later separate proceeding which would turn solely upon the degrees of respective fault or contribution. If any such proceedings proved necessary, they would be

exponentially more circumscribed and streamlined than the common issues trial of the main actions themselves.

56. Conversely, if the Plaintiffs are unsuccessful on liability at the common issues, the litigation will come to an end – a stay or severance would obviate the need for the third party to expend the time and resources, thereby protracting determination of the main actions, when the claims against it might turn out to be wholly academic.

(iii) The Class Actions Act Contemplates This Type of Bifurcation At The Common Issues Trial

57. The two-staged process of trial advanced by the Plaintiffs is specifically contemplated by the Act. The statute expressly provides that the certified common issues “shall be determined together” and that the trial judge can give common judgment respecting the common issues and separate judgments respecting “another issue” (ie. apportionment):

Section 12 (1) In a class action,

- (a) common issues for a class shall be determined together;
- (b) common issues for a subclass shall be determined together; and
- (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 27 and 28.

(2) The court may give a common judgment respecting the common issues and separate judgments respecting another issue. [emphasis added]

Class Actions Act, SNL 2001, c. 18.1, section 12, Plaintiffs’ Factum, Schedule B, Tab 3.

58. The Plaintiffs propose that the Third Party Claim be stayed until the final disposition of the common issues trial or that it be severed from the main actions to proceed along at its own pace. This is practical solution akin to the result in *Cooper v. British Columbia* or *Williamson v.*

Morrison: it would be of no benefit to any party for the third parties to remain involved in the main actions when the resolution of the common issues may render the claims in those matters moot or where they will turn solely on the apportionment of liability.

Johnston v. Sheila Morrison Schools, [2012] O.J. No. 915 (Div.Ct.) at paras. 100 - 101, Plaintiffs' Book of Authorities, Tab 6.

Cooper v. British Columbia (Registrar of Mortgage Brokers), [1999] B.C.J. No. 1360 (B.C.S.C.), at para. 55, Plaintiffs' Book of Authorities, Tab 8.

C. STAYING OR SEVERING THE THIRD PARTY ACTION WOULD SIMPLIFY THE TRIAL OF THE COMMON ISSUES IN THE MAIN ACTIONS

59. To deny the Plaintiffs' application to stay or sever would invariably have the effect of complicating and frustrating an expeditious determination of the common issues on their merits.

60. Courts have often found that staying a third party proceeding until after the disposition of a common issues trial is the most sensible, economical and efficient approach. For example, in *Campbell v. Flexwatt Corp.*, ("*Campbell*") the British Columbia Supreme Court stayed the third party proceedings and relying on *Campbell*, Justice Tysoe made a similar order in *Cooper v. British Columbia*, ("*Cooper*") finding that:

It is my opinion that the third party proceedings should be stayed until the conclusion of the trial of the common issues. If the common issues are decided in favour of the Defendants, the litigation will come to an end...[emphasis added]

Campbell v. Flexwatt Corp. (1996), 25 B.C.L.R. (3d) 329 (B.C.S.C.), add. reasons (1996), 3 C.P.C. (4th) 208 (B.C.S.C.), Plaintiffs' Book of Authorities, Tab 9.

Cooper v. British Columbia (Registrar of Mortgage Brokers), [1999] B.C.J. No. 1360 (B.C.S.C.), at para. 55, Plaintiffs' Book of Authorities, Tab 8.

61. By so ordering, the *Cooper* court rejected the defendant's submission that a significant portion of the trial of the common issues would revolve around an investigation into the third parties' activities as there was no identity of interest between the defendants and third parties in

that case. The third party in *Cooper* also supported the request for a stay, just as the Province does in these actions.

Cooper v. British Columbia (Registrar of Mortgage Brokers), [1999] B.C.J. No. 1360 (B.C.S.C.), at para. 57, Plaintiffs' Book of Authorities, Tab 8.

62. Similarly, in this case, there is nothing to be gained by insisting upon third party participation at the trial of the main actions because the Province has no connection (or even standing) to the duty of care issues, causation or damages. As such, the streamlined *serriatum* approach suggested by the Plaintiffs is the preferable manner by which to adjudicate upon these trials.

63. This is not a situation like the one confronting Justice Cullity in *Robertson v. Proquest Learning and Information LLC* ("*Robertson*") where his Honour refused to stay the third party claims. *Robertson* concerned allegations of copyright infringement asserted by authors against print publishers who either published the authors' works electronically or authorized others' electronic republications. The interconnected defences raised by both the defendants and third/fourth parties in that case turned entirely upon the same alleged express consents and/or oral or implied licenses given by the plaintiff authors:

"Once it is accepted that – unlike the position in *Thomson* – the terms of the licenses given by the authors, and the circumstances surrounding them, will be in issue, these will necessarily be relevant to, and involved in, any determination of liability as between the plaintiff and defendants, as well as between the defendants and the third and fourth parties. ... The existence of these claims should, in their submission, fairly be regarded as the natural and foreseeable consequence of the plaintiff's decision to extend the class members' claims against Proquest and Cedrom to encompass electronic republication of Works provided by more than 250 print publishers of whom only three were name as defendants." [emphasis added]

Robertson v. Proquest et al., [2009] O.J. No. 3261, pg. 6, 7, Plaintiffs' Book of Authorities, Tab 10.

64. The court in *Robertson* distinguished its facts from that in *Campbell* and found that: “*Campbell* did not concern claims against third parties whose transactions and relationship with the plaintiff and the class members were inextricably connected with the claims against the defendants.” Similarly, these actions do not involve third parties whose transactions are interwoven with the claims against Canada – *Campbell* ought to be preferred over *Robertson*.

Robertson v. Proquest et al., [2009] O.J. No. 3261, pg. 8, Plaintiffs’ Book of Authorities, Tab 10.

Campbell v. Flexwatt Corp. (1996), 25 B.C.L.R. (3d) 329 (B.C.S.C.), add. reasons (1996), 3 C.P.C. (4th) 208 (B.C.S.C.), Plaintiffs’ Book of Authorities, Tab 9.

65. Furthermore, as a matter of law, it is not open to Canada to assert that it requires third party participation at trial in order for the court to make causation or damages determinations. The Newfoundland Court of Appeal has expressly rejected such arguments, some of which the Defendant is sure to raise here:

- (i) the fact that another party, not named in the action, may have contributed to the plaintiff's injuries does not interfere with or prevent the court's assessment of the liability of the original defendant;
- (ii) the proposition that a causation determination may require all possible parties before the court does not take into account the fact that if the proposed parties have evidence that may be relevant to the assessment of the original defendant's liability, including causation, that evidence may be called without adding the proposed party; and
- (iii) the notion that damages and apportionment require that any and all potential parties’ participation fails to recognize that the original defendant's liability, whether whole, partial or not proven, can be determined without the inclusion of others.

Vardy v. Dufour, [2008] N.J. No. 122 (Nfld.C.A.) at paras. 27 – 31, Plaintiffs’ Brief of Authorities, Tab 11.

66. The issues framed between the parties to the main actions do not engage nor affect the legal rights of any of the third parties. By relying on non-delegable fiduciary duties and

constitutional legal responsibilities, the Plaintiffs have focussed their claims solely on the several obligations assumed by Canada at the time of Confederation. As a result, it cannot be established that the third parties are in any way "necessary" to the court's assessment of the original Defendant, Canada's, liability at trial.

67. This is not a situation where the issues of fact and law are so interconnected or interwoven that it would be prejudicial to a defendant to sever the matters. Nor can Canada rely upon the *Spellacy* jurisprudence to oppose this application – it is only where the “cause of action is identical against all three defendants” that there is no reason to depart from the general rule of trying matters together.

Confederation Trust Co. v. Collingwood, 2000 CarswellNfld 331 (S.C.T.D.) at para. 16, Plaintiffs' Book of Authorities, Tab 12.

68. Moreover, to have a separate (later) trial for issues between Canada and the Province (if necessary) would not be duplicative. The common issues trial in the main actions will turn on:

- (a) pure questions of law as between Canada and aboriginal persons;
- (b) historical documentation authored and produced by Canada with respect to its own knowledge or belief about its legal obligations;
- (c) expert evidence the standard of care at the relevant times; and
- (d) expert evidence regarding the propriety of making an aggregate award of damages.

69. None of these issues pertains in any fashion to the role of the Province. In this way, trials held *serriatum*, if needed, would not be overlapping in either questions of law, credibility or witness participation. Severance or a stay is therefore the most appropriate manner of proceeding to have these actions determined on their merits.

70. Lastly, only the Plaintiffs have filed evidence on the comparative costs and relative conveniences of staying or severing the third party actions versus having all actions tried together. There is no conflicting evidence that has been tendered on this application by any other party. As such, their evidence ought to be preferred and the application granted.

D. PREJUDICIAL TO THE PLAINTIFFS TO TRY THE MAIN AND THIRD PARTY ACTION TOGETHER

(i) The Present Litigation Timetable – Inevitable Delay As Third Party Action Cannot ‘Catch Up’

71. This court established a litigation timetable in March 2012 which contemplated a return date for trial in September 2013. That timetable, made on consent of the Plaintiffs and Defendant, contemplated an expedited schedule to the common issues trial, largely as a result of the long delays already occasioned by the reserves of judicial determinations⁸ and the ageing class members.

72. To date, that timetable has been complied with: (a) all documentary productions have been made, (b) all examinations for discovery have been completed, (c) all refusals applications have been heard and disposed of, (d) the Plaintiffs have delivered expert reports, (e) Canada will deliver same in May 2013 and (f) expert discoveries are commencing on May 24, 2013.

73. For all intents and purposes, the main actions are at the eve of trial. As stated by the case management judge in March 2013, “at our last case management meeting [on February 8, 2013]

⁸ The following reserves in the release of decisions in these matters occasioned great delay on disposition of these actions:

a.	Scheduling Certification/Preliminary Applications:	heard May 2008, released October 2008
b.	Certification as Class Actions Applications:	heard June 2009, released June 2010
c.	Appeal of Certification as Class Actions:	heard November 2010, released December 2011

it was agreed that if all pre-trial matters were addressed by August 31, 2013, trial dates currently anticipated for September-October 2013 may be found between November 2013 and January 2014”.

Reasons of Butler J., dated March 19, 2013, at para. 62, Application Record, Tab 2M

74. At the present time, the parties and court are working towards a commencement of trial in November 2013 or January 2014. In contrast, the Province just defended the Third Party Claim in January 2013 and has yet to deliver its List of Documents. The Province has recently confirmed it will not be able to produce these documents for some time.

Affidavit of G. Quigley, sworn April 24, 2013, at para. 12, Province’s Responding Record, Tab 1.

75. Canada has also recently confirmed that it intends to discover a representative of the Province, dates for which cannot be scheduled until delivery of the Province’s documentary productions for which there no fixed date for completion. There are also a number of preliminary applications which the Province (or Canada) may intend to bring, not to mention inevitable applications arising from productions or discoveries, and the retention of experts, including their respective examinations for discovery. The Third Party action is clearly years away from being ready for trial.

Letter from J. Tarlton to R. Pritchard, dated April 8, 2013, Exhibit 8 to P. Kennedy Affidavit, Responding Application Record, Tab 8.

76. If the Third Party action (and consequent actions commenced by the Third Party itself) is not stayed or severed pending the resolution of the common issues, the Plaintiffs’ claims will not be determined on their merits in the foreseeable future. The procedural complexities alone associated with the inclusion of the Province to the main actions – without regard to even the

further likely delays associated with the Third Party's (or any other's) participation in additional productions, examinations, preliminary applications – do not augur well for timely determination of the Plaintiffs' claims. This will be, on its own, inherently prejudicial to the Plaintiffs and the classes.

77. This court has previously determined, in these very proceedings, that the addition of extra parties to this litigation would occasion “considerable delay in setting down the hearing [and] the adjudication of the existing claims would take a very different form, which would lengthen the trial. Each of these facts would be both inconvenient and prejudicial to the plaintiffs”. [emphasis added]

Reasons of Butler J., dated October 17, 2012, at para. 86, Application Record Tab 2J.

78. As such, if this application to stay or sever the Defendant's Third Party claim is dismissed, there is no reasonable possibility whatsoever that the trial will commence as scheduled in the winter of 2013 (or early 2014). The right of the Plaintiffs to proceed on the scheduled trial date has been deemed to be a ‘substantive right’, the denial of which will amount to an injustice: such a right will not, and ought not, be lightly interfered with.

Tarrant v. Manufacturer's Life Insurance Co., [1993] N.J. No. 323 (T.D.) at paras. 9 – 10, Plaintiffs' Book of Authorities, Tab 13.

Odeco Drilling of Canada Ltd. et al. v. Hickey's Estate and Hickey, (1985), 55 Nfld. & P.E.I.R. 17 at pg. 20, Plaintiffs' Book of Authorities, Tab 14.

79. The joinder of third party actions to a main action has been denied by this court in cases where the litigation is already at such an advanced stage that it “could mean as much as another year of pleadings and discoveries, together with applications, by these parties. The trial itself

would, in all probability, take three to four times as long to complete. This is unfair to the plaintiffs.”

Bow Valley Huskey v. St. John Shipbuilding, [1991] N.J. No. 227 (Nfld. S.C.T.D.) at pg. 5, Plaintiff’s Book of Authorities, Tab 15.

(ii) Evidence of Prejudice to Plaintiffs As A Result of Delay

80. In the context of a class proceeding, courts have recognized that the potential for prejudice and delay to a plaintiff, through the initiation of third party proceedings is more pronounced than in a ‘regular’ individual action.

Attis v. Canada, [2005] O.J. No. 1337 (S.C.J.) at paras. 11 – 12, Plaintiffs’ Book of Authorities, Tab 7.

81. In this particular case, class members are dying every day. Given the advanced average age of the vast majority of class members, the evidence before the courts during the national settlement hearings during the fall of 2006 showed that approximately five (5) class members, or survivors of residential schools, perish daily in Canada. Justice Winkler (as he then was) determined in the *Baxter* proceeding (the Ontario class proceeding commenced on behalf of all residential school survivors in Canada) that delay is *inherently* prejudicial to elderly class members:

“The class period spans a period of over 75 years. At this point, a reasonable inference can be drawn that there are elderly potential class members for whom further delay represents significant prejudice. Those members of the potential class are entitled to have a determination of whether this proceeding is certifiable as a class action in a timely manner.” [emphasis added]

Baxter v. Canada, [2005] O.J. No. 2165 (S.C.J.) at para. 13, Plaintiffs’ Book of Authorities, Tab 16.

82. In Ontario, Justice Cumming dealt with a similar issue in *Wilson v. Servier*, dismissing a defendant’s motion to issue third party proceedings on the virtual eve of trial, holding that:

“Our society's concept of justice dictates that fairness is inherently fundamental to our court processes. Timeliness in the determination of claims on their merits is critical to achieving fairness to the parties. Justice must be done and must be seen to and done in a timely way and manner. It is prejudicial to plaintiffs to deny them fairness through further substantial delays by granting Servier's motion. To grant Servier's motion would inevitably have the result of delaying and frustrating a determination of the common issues on their merits. A basic objective of the judicial system is access to justice. Access to justice means access to timely justice. A fair judicial process requires much more than simply an endless war of attrition waged by defendants with considerably greater resources than an individual representative plaintiff and the plaintiff class.”
[emphasis added]

Wilson v. Servier Canada Inc., [2001] O.J. No. 4717 (S.C.J.), at paras. 22 - 23, Plaintiffs' Book of Authorities, Tab 17.

83. As such, one of the very purposes of proceeding as a class action - timely access to justice - in these actions would be subverted by the involvement of the additional Third Party, particularly when, as a matter of law, there is no likely basis for any contribution claims given the legal nature of the Plaintiffs' claims and relief sought. Maintaining the Third Party action on the same trial track as the main actions would mean an adjournment of the common issues trial, leaving the Plaintiffs' main actions to languish in abeyance while the Third Party action readied itself for trial. Such a result would be highly prejudicial to the Plaintiffs.

84. It is well-settled that the death of witnesses or class members amounts to non-compensable prejudice. The prejudice which could be visited upon an elderly and ageing class was found to constitute non-compensable prejudice in *Baxter*, leading Justice Winkler (as he then was) to stay the third party claims and their proposed motions until after certification.

Kings Gate Developments Inc. v. Colangelo et al., (1994), 17 O.R. (3d) 841 at p. 4 (QL) (C.A.), Plaintiffs' Book of Authorities, Tab 18.

Baxter v. Canada, [2005] O.J. No. 2165 (S.C.J.) Plaintiffs' Book of Authorities, Tab 16.

85. Given the historical nature of the class period in the main actions, any further delays to trial would, in these circumstances, amount to non-compensable prejudice to the Plaintiffs.

(iii) No Evidence Of Prejudice to Defendant If Third Party Claim is Struck or Severed

86. An important part of the test to determine whether stay or severance ought to be granted is an examination of the equities: which party would suffer prejudice if the order were (or were not) granted? In this case, the only evidence of prejudice to any party before the court is that of the Plaintiffs.

Affidavit of S. O'Donnell, sworn March 25, 2013, paras. 28-40, Application Record, Tab 2.

87. The Defendant has tendered no evidence whatsoever with respect to how prejudice might be visited upon it if the application were granted. In fact, the Defendant has filed no evidence concerning the issue of delay, procedural complexities or why it must have the Third Party at the common issues trial as a matter of fairness to Canada. The Province supports the relief sought on this application.

88. Accordingly, there is no balancing for this court to do nor any weighing of prejudice or equities on this application: the Plaintiffs' evidence has neither been challenged upon cross-examination nor rebutted in the Defendant's own evidentiary record.

PART IV - ORDER REQUESTED

89. The Plaintiffs respectfully request that the court make an order:
- (a) staying the third party proceeding until the final disposition of the main actions;
 - (b) alternatively, severing the third party claim from the main actions, to be prosecuted and determined in a separate proceeding from the main consolidated proceedings; or
 - (c) in the further alternative, denying the Third Party any entitlement to defend the main action or participate in the common issues trial of the consolidated proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April 2013

April 29th, 2013



Koskie Minsky LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert
Tel: 416-595-2117/Fax: 416-204-2889

Celeste Poltak
Tel: 416-595-2701/Fax: 416-204-2909

Chesley F. Crosbie, Q.C.
169 Water Street
St. John's, NL A1C 1B1
Tel: 709-579-4000/Fax: 709-579-9671

Ahlstrom Wright Oliver & Cooper LLP
200, 80 Chippewa Road
Sherwood Park, AB T8A 4W6

Stephen L. Cooper
Tel: 780-464-7477 ext. 233/Fax: 780-467-6428

**Lawyers for the Plaintiffs/Moving Parties on the
Application**

SCHEDULE "A"
LIST OF AUTHORITIES

Case

1. *Johnston et al. v. Sheila Morrison Schools et al.*, 2011 ONSC 3398
2. *Peter v. Medtronic Inc.*, [2008] O.J. No. 4378 (S.C.J.)
3. *Furlong Estate v. Newfoundland Light and Power Co.*, [2000] N.J. No. 241
4. *Coady Boone et al. v. James F. King*, 2004 N.L.S.C.T.D. 154
5. *Taylor v. Canada (Minister of Health)*, [2009] O.J. No. 2490 (C.A.)
6. *Johnston v. Sheila Morrison Schools*, [2012] O.J. No. 915 (Div.Ct.)
7. *Attis v. Canada (Minister of Health)*, [2005] O.J. No. 1337 (S.C.J.)
8. *Cooper v. British Columbia (Registrar of Mortgage Brokers)*, [1999] B.C.J. No. 1360 (B.C.S.C.)
9. *Campbell v. Flexwatt Corp.* (1996), 25 B.C.L.R. (3d) 329 (B.C.S.C.), add. reasons (1996), 3 C.P.C. (4th) 208 (B.C.S.C.)
10. *Robertson v. Proquest et al.*, [2009] O.J. No. 3261
11. *Vardy v. Dufour*, [2008] N.J. No. 122 (Nfld.C.A.)
12. *Confederation Trust Co. v. Collingwood*, 2000 CarswellNfld 331 (S.C.T.D.)
13. *Tarrant v. Manufacturer's Life Insurance Co.*, [1993] N.J. No. 323 (T.D.)
14. *Odeco Drilling of Canada Ltd. et al. v. Hickey's Estate and Hickey*, (1985), 55 Nfld. & P.E.I.R. 17
15. *Bow Valley Huskey v. St. John Shipbuilding*, [1991] N.J. No. 227 (Nfld. S.C.T.D.)
16. *Baxter v. Canada*, [2005] O.J. No. 2165 (S.C.J.)
17. *Wilson v. Servier Canada Inc.*, [2001] O.J. No. 4717 (S.C.J.)
18. *Kings Gate Developments Inc. v. Colangelo et al.*, (1994), 17 O.R. (3d) 841 (QL) (C.A.)

SCHEDULE "B"
RELEVANT STATUTES

Judicature Act, RSNL 1990, c J-4

Stay of proceedings

97.(1) The court may direct a stay of proceedings pending before it.

(2) A person, whether or not that person is a party to the proceeding

(a) who would have been entitled, if *The Newfoundland Judicature Act, 1889* had not been enacted, to apply to the court to restrain the prosecution of the proceeding; or

(b) who may be entitled to enforce an order, contrary to which proceedings may have been taken,

may apply in a summary way for a stay of the proceedings either generally or where necessary for the purposes of justice, and the court shall make the order that may be just.

SCHEDULE "B"
RELEVANT STATUTES

Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D

Court may order separate trials, etc.

7.03. (1) Where a joinder of causes of actions or parties in a proceeding may embarrass or delay the trial or hearing of the proceeding or is otherwise inconvenient, the Court may order separate trials or hearings, or make such other order as is just.

(2) Where a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the Court may order the counterclaim or third party proceeding to be struck out or tried separately, or it may make such other order as is just.

...

Third party directions

12.06. (1) Where a third party files a defence, the defendant serving the third party notice or the third party may, on notice to all the parties to the proceeding, apply to the Court for directions and the Court may,

(a) where the liability of the third party to the defendant is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant;

(b) order the proceeding to be tried in such manner as the Court may direct;

(c) give the third party leave to defend the proceeding either alone or jointly with any other defendant or third party, upon such terms as may be just;

(d) give the third party liberty to appear on the trial or hearing of the proceeding and to take such part therein as may be just;

(e) make such other order as may appear to the Court proper for having the rights and liabilities of the parties conveniently determined and enforced, or for determining the extent to which the third party is to be bound by any order in the proceeding;

(f) dismiss or adjourn the application; or

(g) set aside the third party notice.

(2) Any order made under rule 12.06(1) may be varied or rescinded by the Court at any time.

Default of third party

12.07. Where a third party fails to defend or appear on the hearing under the third party notice, the defendant may,

(a) on filing an affidavit of service of the notice and of the failure of the third party to serve a defence or appear on the hearing under the notice, have the Registrar note in the cause book that the third party is in default, whereupon the third party shall not, without the leave of the Court, file and serve a defence or appear on the hearing under the notice;

(b) if judgment has been entered against the defendant, at any time after satisfaction of the same or with leave of the Court before satisfaction thereof, enter judgment against the third party to the extent of the claim in the notice, but the Court may set aside or vary the judgment entered against the third party upon such terms as it thinks just; or

(c) at or after the trial or hearing of the proceeding or the approval of a settlement by the Court, apply to enter judgment against the third party and the Court may make such order as it thinks just, provided that execution shall not issue thereon without the leave of the Court until after the defendant satisfies the judgment entered against the defendant.

Third party proceeding set aside or heard separately

12.08. The Court may at any time stop the trial or hearing under a third party notice and have each proceeding tried or heard separately or as the Court may order.

SCHEDULE "B"
RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 6

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate. 1992, c. 6, s. 13.

Participation of class members

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding. 1992, c. 6, s. 14 (1).

SCHEDULE "B"
RELEVANT STATUTES

Contributory Negligence Act, R.S.N.L. 1990, c. C-33

Short title

1. This Act may be cited as the *Contributory Negligence Act*.

Apportionment of damage

2. (1) Where by the fault of 2 or more persons damage or loss is caused to 1 or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

(2) Notwithstanding subsection (1)

(a) where, having regard to the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(b) nothing in this section shall operate so as to make a person liable for damage or loss to which his or her fault has not contributed.

Degree of fault

3. Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each was at fault, and where 2 or more persons are found at fault they shall be jointly and individually liable to the person suffering damage or loss, but as between themselves, in the absence of a contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

Questions of fact

4. In an action the amount of damage or loss, the fault, and the degrees of fault shall be questions of fact.

Submission to jury

5. Where the trial is before a judge with a jury the judge shall not submit to the jury a question as to whether, notwithstanding the fault of 1 party, the other could have avoided the consequences, unless in his or her opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it.

Trial without a jury

6. Where the trial is before a judge without a jury, the judge shall not take into consideration a question as to whether, notwithstanding the fault of 1 party, the other could have avoided the consequences, unless the judge is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it.

Adding party defendant

7. Where it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, that person may be added as a party defendant or may be made a 3rd party to the action, upon the terms that are considered just.

Apportionment of liability for costs

8. Unless the judge otherwise directs, the liability for costs of the parties to an action shall be in the same proportion as their respective liability to make good the damage or loss, and where, as between 2 persons, 1 is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs, there shall be a set-off of the respective amounts and judgment shall be given accordingly.

CAROL ANDERSON et al

and

**THE ATTORNEY GENERAL OF
CANADA**
Defendant

Court File No: 2007 01T4955CP

Plaintiffs

**IN THE SUPREME COURT OF
NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**
Proceeding commenced at the City of St. John's
**BROUGHT UNDER THE CLASS ACTIONS ACT,
S.N.L. 2001, C. C-18.1, BEFORE THE
HONOURABLE JUSTICE BUTLER,
CASE MANAGEMENT JUDGE**

**PLAINTIFFS' MEMORANDUM OF FACT AND
LAW (APPLICATION TO SEVER OR STAY THE
THIRD PARTY CLAIM)
(APPLICATION RETURNABLE MAY 27 & 28, 2013)**

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert LSUC#: 309420
Tel: 416-595-2117/Fax: 416-204-2889

Celeste Poltak LSUC#: 46207A
Tel: 416-595-2701/Fax: 416-204-2909

AHLSTROM WRIGHT OLIVER & COOPER LLP
200, 80 Chippewa Road
Sherwood Park, AB T8A 4W6
Steve P. Cooper
Tel: 780-464-7477 ext. 233/Fax: 780-467-6428

CHES CROSBIE BARRISTERS
169 Water Street
St. John's, NL A1C 1B1
Chesley F. Crosbie, Q.C.
Tel: 709-579-4000/Fax: 709-579-9671

**Lawyers for the Plaintiffs (Applicants on the
Application)**