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

Citation: *Anderson v. Canada (Attorney General)*, 2013 NLTD(G) 154
Date: 20131119
Docket: 200701T4955CCP

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

Docket: 200701T5423CCP

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

Docket: 200801T0844CCP

BETWEEN:	**ROSINA HOLWELL AND REX HOLWELL**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY

AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

Docket: 200801T0845CCP

BETWEEN:	**SARAH ASIVAK AND JAMES ASIVAK**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR**	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)**	THIRD THIRD PARTY

Docket: 200801T0846CCP

BETWEEN:	**EDGAR LUCY AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR**	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)**	THIRD THIRD PARTY

Before: The Honourable Madam Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: May 27, 2013

Summary:

Application to strike or, alternatively, sever/stay Third Party Claims in a class action proceeding.

Appearances:

Kirk Baert, Celeste Poltak & Chesley F. Crosbie, Q.C.	Appearing for the Plaintiffs
Mark Freeman, Melissa Grant & Jonathan Tarlton	Appearing for The Attorney General of Canada
Rolf Pritchard, Q.C.	Appearing for Her Majesty in right of Newfoundland and Labrador
Stephen J. May & Leanne M. O'Leary	Appearing for The Moravian Church in Newfoundland and Labrador
Philip J. Buckingham & Jennifer E. Lundrigan	Appearing for The International Grenfell Association
Daniel Boone, Glenn Zakaib & Jed Blackburn	Appearing for The Moravian Union (Incorporated)

Authorities Cited:

CASES CONSIDERED: Anderson v. Canada (Attorney General), 2011 NLCA 82; **Anderson v. Canada (Attorney General)**, 2012 NLTD(G) 148; **Anns and Others v. Merton London Borough Council**, [1978] A.C. 728, [1977] 2 W.L.R. 1024 (H.L.); **R. v. Imperial Tobacco Canada Limited**, 2011 SCC 42; **Lewis (Guardian ad litem of) v. British Columbia**, [1997] 3 S.C.R. 1145, [1997] S.C.J. No. 109; **Taylor v. Canada (Minister of Health)**, 2009 ONCA 487; **Johnston v. Sheila Morrison Schools**, 2012 ONSC 1322; **Furlong Estate v. Newfoundland Light and Power Company** (2000), 195 Nfld. & P.E.I.R. 120, 48 C.P.C. (4th) 361 (Nfld. S.C.(T.D.)); **Blackwater v. Plint**, 2005 SCC 58; **L.R. v. Bromley Estate**, 2013 NLCA 24; **Vardy v. Dufour**, 2008 NLCA 22; **Johnson Tiles Pty. Ltd. v. Esso Australia Ltd.**, [2000] F.C.A. 1527, 104 F.C.R. 564; **Bittner v. Louisiana-Pacific Corp.**, [1997] B.C.J. No. 2281, 43 B.C.L.R. (3d) 324 (S.C.); **McDougall v. Collinson**, 2000 BCSC 398; **Endean v. Canadian Red Cross Society**, [1997] B.C.J. No. 1209, 148 D.L.R. (4th) 158 (S.C.); **T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)**, 2010 ABQB 262; **Campbell v. Flexwatt Corp.**, [1996] B.C.J. No. 1487, 25 B.C.L.R. (3d) 329 (S.C.); **Cooper v. British Columbia (Registrar of Mortgage Brokers)**, [1999] B.C.J. No. 1360, B.C.L.R. (3d) 293 (S.C.); **Robertson v. Proquest Learning and Information LLC**, [2010] O.J. No. 3261, 84 C.P.R. (4th) 224 (Sup. Ct.); **Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 46

STATUTES CONSIDERED: *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *The Indian Act*, S.C. 1951, c. 29; *The Juveniles Act*, R.S.N. 1970, c. 190; *Limitations Act*, S.N.L. 1995, c. L-16.1

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D

TEXTS CONSIDERED: Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003); Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at 359, fn. 6.

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] In this class action the Plaintiffs seek damages for the physical and mental harm they allegedly suffered as students (or their family members suffered as a result of their attendance) at residential schools in Labrador after Confederation in 1949.

[2] The issues initially certified by Fowler, J. in June 2010, were affirmed by the Court of Appeal on December 21, 2011 **Anderson v. Canada (Attorney General)**, 2011 NLCA 82.

[3] On October 17, 2012, I denied the Attorney General of Canada's ("Canada's") application to add proposed defendants (see **Anderson v. Canada (Attorney General)**, 2012 NLTD(G) 148) on the basis that they were neither persons "necessary" or who "ought to" be added under *Rule* 7.04(2)(b).

[4] As my decision acknowledged was its right, in November 2012, Canada served Her Majesty in Right of Newfoundland and Labrador (the "Province") with a Third Party Notice under *Rule* 12.02(1), *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D. The Province has also issued and served Third Party Notices on The International Grenfell Association, The Moravian Church in Newfoundland and Labrador and The Moravian Union (Incorporated).

[5] In the within application, the Plaintiffs seek to strike or sever and/or stay all Third Party Claims; Canada opposes the Application, but all Third Parties represented at the hearing either supported the Plaintiffs' position or took no position.

THE CERTIFIED ISSUES

[6] There are five actions relative to five residential schools in Labrador (the "Schools"). For purposes of this application, the relevant, certified common issues are:

a) By its purpose, operation or management of either of the Schools, did Canada breach a duty of care owed to the students to protect them from actionable physical or mental harm?

b) By its purpose, operation or management of either of the Schools, did Canada breach a fiduciary duty owed to the students to protect them from actionable physical or mental harm?

c) By its purpose, operation or management of either of the Schools, did Canada breach a fiduciary duty owed to the families and siblings of the students at either of the Schools?

d) If the answer to any of the above questions is "yes", can the Court make an aggregate assessment for 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 Canada guilty of conduct that justifies an award of punitive damages? and,

f) If the answer to (e) is "yes", what amount of punitive damages ought to be awarded?

[7] Taking a broad and purposeful approach to interpretation of the Order, while the certified common issues do not address causation directly, I conclude that it is inherent in issue (d). In other words, in order to address whether the Court can make an aggregate assessment for the damages suffered, the Court must address what (if any) losses were caused by Canada's breach of general or fiduciary duty if either is established.

[8] Further, the certified issues do not specifically refer to a constitutional duty, an exclusive duty, a strict duty, a duty *sui generis*, a statutory duty, non-delegable duty or vicarious liability. However, each of these is alleged in the amended statements of claim and represents a potential conclusion for the trial judge on the facts.

[9] Canada, however, takes the position that vicarious liability is not a certified issue and cannot be pursued at the common issues trial. I disagree. Applying the same approach, I conclude that common issue (a) is broad enough to cover allegations of both direct liability and liability arising vicariously. In the next section, I shall discuss in greater detail the nature of the two distinct duties alleged in certified common issues (a) and (b).

THE NATURE OF THE DUTY

[10] Since I have been case managing this file, counsel for the Plaintiffs has focused primarily on the fiduciary duty they allege; however, the Plaintiffs have pleaded both a fiduciary duty and a general duty of care owed by Canada to the Plaintiffs and I have referred to this in prior decisions in this class action.

[11] Further and contrary to the submissions of counsel for the Moravian Union, the two distinct duties claimed were recognized by the Court of Appeal in **Anderson v. Canada (Attorney General)**, 2011 NLCA 82 at paras. 17 and 64-79. Our Court of Appeal specifically recognized that the direct negligence claim alleged in this case was one that was not yet settled by existing authority and must meet the two-stage test from **Anns and Others v. Merton London Borough Council**, [1978] A.C. 728, [1977] 2 W.L.R. 1024 (H.L.).

[12] It is useful to quote directly from one of the Plaintiffs' Amended Statements of Claim for examples of the general duty of care and vicarious liability alleged. In the Anderson and Webber action it is claimed (*inter alia*):

48. In the alternative, if Canada failed to properly assume those common law and constitutional obligations, it breached its fiduciary and common law duties owed to the class by failing to do so.

...

53. Canada participated in the funding, oversight and administration of the School until 1979. These operative and administrative responsibilities, carried out on behalf of Canada or by its agents included:

(a) the operation and maintenance of the School during the Class Period; ...

...

58. Canada, and its respective servants and agents compelled members of the Survivor Class to leave their homes, families and communities, and forced members of the Survivor Class to attend (and sometimes live in) the School, all without lawful authority or the permission and consent of Survivor Class members or that of their parents. Such confinement was wrongful, arbitrary and for improper purposes.

...

66. Through its servants, officers, employees and agents, Canada was negligent and in breach of its non-delegable fiduciary, and common law duties of care to the Survivor Class and the Family Class during the Class Period. Particulars ... include the following: ...

67. Canada, through its employees, agents or representatives also breached its duty of care to protect the Survivor Class Members from sexual abuse by the student perpetrators while those particular Plaintiffs and the Survivor Class Members were attending and residing at the School ...

...

72. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Survivor Class Members, including Anderson, Allen and Webber, suffered injury and damages including:

(a) isolation from family and community;
(b) forced confinement;
(c) assault and battery;
(d) sexual abuse;
(e) emotional abuse;

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(f) psychological abuse;
(g) deprivation of the fundamental elements of an education;
(h) an impairment of mental and emotional health amounting to a severe and permanent disability;
(i) a propensity to addiction;
(j) an impaired ability to participate in normal family life;
(k) alienation from family, spouses and children;
(l) an impairment of the capacity to function un the work place and a permanent impairment in the capacity to earn income;
(m) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the School experience;
(n) depression, anxiety and emotional dysfunction;
(o) suicidal ideation;
(p) pain and suffering;
(q) deprivation of the love and guidance of parents and siblings;
(r) loss of self-esteem and degradation;
(s) fear, humiliation and embarrassment as a child and adult, and sexual confusion and disorientation as a child and young adult;
(t) loss of ability to fulfill cultural duties;
(u) loss of ability to live in community; and
(v) constant and intense emotional, psychological pain and suffering…

…

74. As a consequence of the negligence and breach of duty and breach of a non-delegable or fiduciary duty and intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable, the Family Class Members, including Webber, suffered injury and damages including:

(a) they were separated and alienated from Survivor Class Members for the duration of their confinement in the School;
(b) their relationships with Survivor Class Members were impaired, damaged and distorted as the result of the experiences of Survivor Class members [sic] in the School;
(c) they suffered abuse from Survivor Class members [sic] as a direct consequence of their School experience;
(d) they were unable to resume normal family life and experience with Survivor Class Members after their return from the Schools;

[13] As these paragraphs confirm, in addition to the fiduciary duty, the Plaintiffs claim that Canada may be liable in negligence by way of joint operations and administration through its servants, officers, employees and agents. The Plaintiffs

seek damages for the harm caused by Canada directly or by persons for whom Canada is vicariously liable. This causes Canada to argue that there is a contradiction within the Plaintiffs' position, asserting a singular duty on the one hand and a joint duty on the other. I make no conclusion on whether such claims are contradictory; I note only that both are alleged and represent very different forms of potential responsibility, which has complicated my assessment of whether the Third Party claims should be struck or severed/stayed.

CANADA'S DEFENCE

[14] Subsequent to my decision denying Canada's request to add defendants, Canada filed its Defence which provides clarity to its position on the Plaintiffs' claims. In it, Canada denies that it either ran the Schools, owed any legal duties to the Plaintiffs, or breached any duties allegedly owed.

[15] Further, Canada alleges that The International Grenfell Association created and ran three of the Schools and the Moravians ran the other two. It asserts that these Schools existed prior to Confederation, that upon entering Confederation in 1949 the Province continued to have exclusive legislative authority over education, and that the Schools existed and were run in accordance with Provincial legislation, regulations and policy.

[16] Canada maintains that it was the operators, by their own authority, purpose, operation and management that created and ran the Schools at all times and that Canada had no role whatsoever.

[17] In its Third Party Claim against the Province, also filed on November 21, 2012, Canada repeats these denials but nevertheless claims against the Province for contribution and indemnity "to the extent that Canada is found liable to pay damages to the Plaintiffs".

THE PROVINCE'S DEFENCE TO THE THIRD PARTY CLAIM

[18] The Province defends, with a general denial, that it created, managed, operated or ran the Schools. It admits that The International Grenfell Association and The Moravian Church, as well as the Labrador and Western School Boards, did so.

[19] The Province alleges that the nature of the claim presented by the Plaintiffs is not one that lends itself to a Third Party action by Canada against the Province, as the liability alleged is uniquely and solely Canada's, as a result of Canada's duties, constitutional or otherwise. Nevertheless, the Province's Third Party Notices claim contribution and indemnity from the Second and Third Third Parties to the extent that the Province is found liable to pay damages to Canada.

[20] At the time of the release of this decision, neither of the other third parties had filed Defences to the Third Party claims.

THE APPLICATION TO STRIKE OR SEVER/STAY THE THIRD PARTY CLAIMS

[21] The Application seeks an order that any third or fourth party claims be severed from the existing actions to be prosecuted in a separate proceeding to be conducted independently. In the alternative, it seeks an order staying the third and fourth party proceedings. In his argument, however, Mr. Baert on behalf of the Plaintiffs argued that the Third Party Claims should be struck altogether. I shall address this request first.

Striking the Third Party Notices

[22] Counsel for the Plaintiffs referred to paragraph 17 of the Supreme Court of Canada's decision in **R. v. Imperial Tobacco Canada Limited**, 2011 SCC 42 at para. 17, for the test to be applied to striking a claim as follows:

> 17 ... A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action...

[23] I accept that this is the test for striking a claim and that such a result would be appropriate were the third party proceedings limited to the alleged fiduciary duty of care (which Canada concedes cannot be the subject of a third party claim for apportionment). However, the Plaintiffs have also alleged a general duty of care owed and specified that Canada was vicariously liable for the actions of others, including the Province. If this is established at the common issues trial, Canada (as the only defendant) may be found liable for 100% of the losses suffered by the Plaintiffs from the actions of Canada and others. In such a case, Canada could seek contribution from those other persons.

[24] I found the Supreme Court of Canada's decision of **Lewis (Guardian ad litem of) v. British Columbia**, [1997] 3 S.C.R. 1145 at para. 20, [1997] S.C.J. No. 109, helpful to the issue before me. At paragraph 20, Cory, J. stated:

> 20 The strict duty to perform a particular act imposed by statute and the common law duty to take reasonable care if an act is undertaken reflect two divergent positions on a spectrum of liability. Within that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principal's liability for the negligence of an independent contractor. Whether or not there will be liability for the negligence of the acts of the independent contractor will depend to a large extent upon the statutory provisions involved and the circumstances presented by each case. ...

[25] McLachlin, J. (as she then was) added the following comments that also assist in understanding the spectrum of liability:

> 49 The issue is whether the Crown's duty to users of its highways is non-delegable. The phrase "non-delegable" refers to the inability of the employer of an independent contractor to escape liability for the negligence of the contractor. The general rule at common law is that a person who employs an independent contractor will not be liable for loss flowing from the contractor's negligence. This rule for a long time admitted only three exceptions: (1) where the employer was negligent in hiring the contractor; (2) where the employer was negligent in supervising the contractor; and (3) where the employer hired the independent contractor to do something unlawful. A fourth exception crystallized in *Pickard v. Smith* (1861), 10 C.B. (N.S.) 470, 142 E.R. 535. Lord Blackburn stated the rule as: "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor" (*Dalton v. Angus* (1881), 6 App. Cas. 740 (H.L.), at p. 829). This exception is referred to as the "non-delegable duty" rule.
>
> 50 In essence, a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent. But if it applies, it is no answer for the employer to say, "I was not negligent in hiring or supervising the independent contractor." The employer is liable for the contractor's negligence. The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation -- the duty to ensure that the independent contractor also takes reasonable care.
>
> ...
>
> 52 Rather than confirm or add to a hodgepodge of categories, we should seek the underlying principles that justify the imposition of a non-delegable duty on a person who hires an independent contractor to have work done. This is the approach that Cory J. takes. Whether a non-delegable duty arises "will depend upon the nature and the extent of the duty owed by the defendant to the plaintiff" (para. 17). "In some circumstances, the duty to take reasonable care may well be discharged by hiring and, if required, supervising a competent contractor to perform the particular work" (para. 19). There is no categorical rule that common law duties arising from the exercise of a statutory power are never non-delegable. Rather, "[w]hether or not there will be liability for the negligence of the acts of the independent contractor will depend to a large extent upon the statutory provisions involved and the circumstances presented by each case" (para. 20). Cory J. goes on to conclude that in this particular case, the wording of

> the statute, combined with policy considerations, imposes on the Crown, not only a duty to be careful in hiring or supervising independent contractors, but an additional non-delegable duty to ensure that the work of its contractors is done without negligence.
>
> 53 I agree with this analysis. I am not so sure as my colleague that s. 48 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1979, c. 280, which provides that the Ministry "shall direct the construction, maintenance and repair" of all highways, demonstrates clearly that the Ministry must "personally direct" and supervise these works in all their aspects (para. 26). It seems to me that those words are also consistent with a basic direction that works be undertaken. Yet I am satisfied in this case that the circumstances, taken together with the statutory provisions, suffice to establish a non-delegable duty of care on the Ministry with respect to highway maintenance. To determine whether a non-delegable duty should be imposed, the Court should examine the relationship between the parties and ask whether that relationship possesses elements that make it appropriate to hold the defendant liable for the negligence of its independent contractor. In the case at bar, the fact that road maintenance is entirely within the power of the Ministry is an important element to consider. So is the correlative fact that this renders the public, who often have no choice but to use the highway, totally vulnerable as to how, and by whom, road maintenance is performed. Finally, the fact that safety and lives are at issue is of critical importance. Cory J. correctly stresses these factors in concluding that the Ministry cannot discharge its duty in this case merely by proving that it exercised reasonable care in hiring and supervising the contractor. The Ministry must go further and ensure that the contractor's work was carried out without negligence.
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> **Lewis (Guardian ad litem of) v. British Columbia** at paras. 49-50, 52-53

[26] At a later date in this proceeding, the trial judge shall determine whether the facts support a fiduciary duty and/or a general duty of care (direct or vicarious) owed by Canada to the Plaintiffs. At this stage of the proceedings, I conclude only that, given the two separate duties alleged by the Plaintiffs, there is a broad spectrum of liability along which findings are possible.

[27] On behalf of the Plaintiffs Mr. Baert asserts that there are no tenable third party claims on the general duty of care alleged because the Plaintiffs have limited themselves to seeking damages caused solely by Canada. In support of this he

cites **Taylor v. Canada (Minister of Health)**, 2009 ONCA 487 at para. 9, where this distinction is explained as:

> 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. While the latter cannot entitle the defendant to contribution, the former can if the plaintiff is unsuccessful in establishing that no other person's negligence or fault was involved.

[28] The Ontario Court of Appeal in **Taylor** clarified that where there is a single indivisible injury (in that case, a disc herniation) caused by more than one person, while a plaintiff is entitled to recover 100 percent of her loss from the only defendant she sued, that defendant is entitled to recover its overpayment from third parties. The exception to this principle is where the plaintiffs' claim against the sole defendant is restricted to its share of the damages, and not 100 percent of the loss.

[29] However, before a court can conclude that a plaintiff has limited her claim to those damages attributable to the fault of the one defendant pursued, the pleadings must be clear. In **Taylor**, the plaintiff had made several amendments to her statement of claim and clarified that she sought from Health Canada only "those damages that are attributable to its proportionate degree of fault" (para. 2).

[30] The Ontario Court of Appeal held that the court had jurisdiction to apportion fault between a party and a non-party and that, in the circumstances of that case, it was appropriate to do so (para. 29). As a result, the third party claims were struck.

[31] A similar result was ordered in **Johnston v. Sheila Morrison Schools**, 2012 ONSC 1322, where relying on **Taylor**, the third party claims were set aside on the basis that:

a) the plaintiffs had limited their claims to the several liability of the respondents;

b) a third party claim was unsuccessful in such circumstances since the plaintiff could only seek that portion of the damages attributable to the named defendant. In those circumstances a right of contribution and indemnity did not arise; and

c) there could be no right to contribution and indemnity on a breach of fiduciary duties, such duty not being subject to apportionment.

[32] Before addressing whether the Plaintiffs have restricted their recovery, it is important to review the concepts of joint tortfeasors, several concurrent tortfeasors and several non-concurrent tortfeasors.

[33] I refer to some of the basic first principles of tort stated by Professor Lewis Klar in *Tort Law*, 3rd ed. (Toronto: Carswell, 2003).

> A joint tort will arise in two general areas. The first is where one person is vicariously liable for the torts committed by another. This occurs as between master and servant, and principal and agent. Vicarious liability may also be imposed by statute ... In all of these cases, the tort-feasor and the person who is vicariously liable for the former's acts are joint tort-feasors.
>
> [at 487]

> A joint tort will also arise when two or more persons act together in furtherance of a common design or plan, during the course of which a tortious act is committed.
>
> [at 488]

> Every common law province has enacted contribution legislation whose primary purpose is to repeal the common law rule of no contribution between wrong doers.
>
> [at 492]

> Contribution between tortfeasors is only a concern when the *same injury* has been caused by the various parties. Where each party caused different injuries, each is responsible in full for that injury and contribution cannot be claimed.
>
> [at 495]

[34] Further,

> The expression "joint-tort-feasors" refers to tort-feasors jointly liable, e.g. those engaged in a concerted action who combine to injure the Plaintiff. The expression "several, concurrent tort-feasors" refers to those who independently act and cause the Plaintiff the same damage.
>
> Klar, "Contribution Between Tort-Feasors" (1975), 13 *Alberta Law Review*, at 359, fn. 6

[35] Since both joint tortfeasors and several concurrent tortfeasors cause the same injury, if one is held liable, the right of contribution arises. However, several, non-concurrent tortfeasors cause different damages; there is no right to contribution.

[36] I agree with counsel for Canada that the Plaintiffs' Amended Statements of Claim include claims based on joint operators, agency and vicarious liability.

[37] Relying on the references above, if the trial judge concluded that Canada engaged in a concerted action with others who combined to injure the Plaintiffs or acted independently, but caused the Plaintiffs the same damage, only Canada can be found liable (since it is the sole Defendant), but the right to claim contribution arises.

[38] Paragraph 72 of the Anderson Amended Statement of Claim does not limit the damages claimed by the Survivor Class to Canada's proportionate share. It seeks damages for the "intentional infliction of harm by Canada and its agents, including the Province, for whom Canada is vicariously liable". Similar wording is used in paragraph 74 respecting damages suffered by the Family Class.

[39] Despite Mr. Baert's arguments, unlike the class action plaintiffs in both **Taylor** and **Johnston**, I am not convinced that the Plaintiffs here are prepared to give up their right to collect 100 percent of their damages from Canada in a situation where the others contributed to the same loss. I accept that the Plaintiffs

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are seeking only to collect from Canada damages for losses caused by Canada in a situation of several, non-concurrent tortfeasors but that is entirely different. As paragraph [10] herein reflects, the Amended Statements of Claim have ample references suggestive of joint liability, entitling the Plaintiffs to recover 100 percent of the losses (caused by various parties) from Canada alone with a potential for contribution by Canada against others.

[40] Any doubt I had respecting the Plaintiffs' willingness to forego their right to recover 100% of their losses against Canada (and instead limit their recovery to Canada's proportionate degree of fault) was alleviated in the Supplementary Submissions of the Applicant, filed on October 2, 2013. On page 11, in answer to my direct question on whether the Plaintiffs seek to have Canada held 100% liable for damages alleged to arise from torts to which others may have contributed, the Plaintiffs did not waive their right to recover 100% of their losses from Canada.

[41] I would therefore distinguish the facts and pleadings here from both **Taylor** and **Johnston**. This is not a case where I can conclude that the Third Party claims have no possibility of success. I conclude that it is therefore inappropriate to strike the Third Party Claims. I turn now to whether they should be severed or stayed, which is a very different matter.

Severing or Staying the Third Party Claims

[42] Now that the Province, The Moravian Church in Newfoundland and Labrador, The Moravian Union (Incorporated), and The International Grenfell Association have been added as Third Parties pursuant to *Rule* 12.02(1), *Rule* 7.03(2) applies and states:

> (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.

[43] The relevant section of the *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33, states:

> 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.

[44] Sections 13 and 14 of the *Class Actions Act*, S.N.L. 2001, c. C-18.1, are also relevant. They state:

> Court may determine conduct of action
>
> 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.
>
> Court may stay other action
>
> 14. The court may stay an action related to the class action on terms the court considers appropriate.

[45] Consistent with the wording of these provisions, I conclude that the test is whether it would be just/fair and expeditious/appropriate to sever or stay the Third Party Claims (or either of them).

[46] In applying this test, I conclude that I am required to consider three factors:

- 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).

See **Furlong Estate v. Newfoundland Light and Power Company** (2000), 195 Nfld. & P.E.I.R. 120, 48 C.P.C. (4th) 361 (Nfld. S.C.(T.D.)).

(i) Interwoven or Overlapping Issues

[47] In suggesting that the issues are interwoven, Canada relies heavily on the Supreme Court of Canada's decision in **Blackwater v. Plint**, 2005 SCC 58. In that case, former students of the Indian Residential Schools sued the Government of Canada and the United Church of Canada claiming damages for sexual abuse and other harm suffered during their attendance.

[48] The Supreme Court of Canada restored the trial judge's decision in which it had been held (*inter alia*) that:

a) The schools were operated jointly;

b) Both defendants were vicariously liable for the sexual assaults of the dormitory supervisor; and

c) Canada was 75 percent liable and the Church 25 percent liable, based on their respective level of supervision and direct contact.

[49] If Canada is not successful in defending liability altogether, its alternative position is that a finding similar to that in **Blackwater** is appropriate.

[50] I note, however, that in **Blackwater**, the Supreme Court of Canada disagreed with the trial judge's finding that a non-delegable statutory duty (to ensure the safety and welfare of students) arose by virtue of sections 113 and 114 of *The Indian Act*, S.C. 1951, c. 29. It held that since these provisions used the permissive term "may" (as opposed to the directive term "shall"), they limited the possibility of finding an obligation as strong as a duty. In addition, it held that the power of the government to enter into agreements with religious organizations for

the care and education of Indian children suggested that the duty was eminently delegable and was contracted out by the government. The Supreme Court of Canada found no basis for a finding of a non-delegable statutory duty on either defendant.

[51] Counsel for the Plaintiffs distinguishes **Blackwater** on the basis that, to the Plaintiffs' knowledge, in this case, there were no operational agreements executed by Canada and either of the Third Parties. He distinguishes the funding agreements (which are acknowledged to have been executed between Canada and the Province) on the basis that funding agreements would not be suggestive of a delegable duty that could be contracted out by Canada.

[52] Sections 113 and 114 of *The Indian Act* state as follows:

SCHOOLS

113. The Governor in Council may authorize the Minister, in accordance with this Act,

(*a*) to establish, operate and maintain schools for Indian children,

(*b*) to enter into agreements on behalf of His Majesty for the education in accordance with this Act of Indian children, with

(i) the government of a province,

(ii) the council of the Northwest Territories,

(iii) the council of the Yukon Territory,

(iv) a public or separate school board, and

(v) a religious or charitable organization.

114. The Minister may

(a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools,

(b) provide for the transportation of children to and from school,

(c) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations, and

> *(d)* apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school.

[53] The evidence placed before the trial judge in **Blackwater** supported a finding of a partnership between Canada and the Church in the operation of the Schools in question. I note, however, that in **Blackwater** Canada had admitted that it had delegated all its duties respecting the residential school to the provinces as permitted by the statute in question.

[54] In **Blackwater** the Supreme Court of Canada distinguished the language used in the legislation above, from that found in **Lewis (Guardian ad litem of) v. British Columbia** where a non-delegable duty was found. In the context of the non-delegable duty held to be owed to highway users in **Lewis (Guardian ad litem of) v. British Columbia,** the Supreme Court of Canada held that the defendant could not discharge its duty merely by proving that it exercised reasonable care in hiring the contractor. The Ministry was required to go further and ensure the contractor's work was carried out without negligence (para. 53).

[55] The Court of Appeal had recent occasion to address the issues of vicarious liability and non-delegable duty in **L.R. v. Bromley Estate**, 2013 NLCA 24. On the basis of the facts presented, it concluded that the employer of a priest could be vicariously liable for his sexual abuse of a student and statutory liability could also be imposed on the Province based upon a non-delegable duty by virtue of section 47(2) of *The Juveniles Act*, R.S.N. 1970, c. 190.

[56] As the case management judge, I am not in a position to make any conclusion on the relationship (if any) between Canada and the Third Parties. The **Blackwater, Lewis (Guardian ad litem of)** and **L.R. v. Bromley Estate** decisions reflect a wide range of possible results and the trial judge will decide whether the facts (including the funding agreements) and any statutory provisions involved justify a finding of a fiduciary, constitutional, exclusive, strict, non-delegable duty (statutory or otherwise), vicarious liability and/or a common law delegable duty.

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[57] In addition to consideration of historical records and legislation, addressing some of these issues would require the trial judge to consider evidence from witnesses on the relationships between the Plaintiffs, the class members, Canada and the Third Parties and each party's level of involvement in the operations of the schools. If the trial judge concluded that the facts warranted a finding of either a common law delegable duty (that was delegated), or vicarious liability, on both Canada and the Province (as an example only), since the Plaintiffs have sued Canada only and are not prepared to waive recovery of proportionate liability, there may be claims for contribution. In either of these scenarios, the third party claims would be characterized as interwoven issues.

(ii) Saving in Time and Cost

[58] Turning now to the second factor, counsel for the Plaintiffs asserts that the common issues trial in the main action will turn upon:

a) pure questions of law as between Canada and Aboriginal persons;

b) historical documentation offered and produced by Canada with respect to its own knowledge or belief about its legal obligations;

c) expert evidence respecting the standard of care at the relevant times; and

d) expert evidence regarding the propriety of making an aggregate award of damages.

[59] Counsel for the Plaintiffs submits that he has no intention of calling evidence on the operation of the Schools and that he is content to rely upon the records and expert opinion referenced above. He asserts that Canada constitutionally inherited jurisdiction over Indians and their lands at the moment of confederation and that this responsibility cannot be delegated. The Plaintiffs are satisfied that (if the special duty of care they allege is owed is established by this means) Canada's breach will be established by Canada's own position that it had nothing at all to do with the Schools.

[60] Amongst other things, the common issues trial must therefore focus on whether this "special" duty arises on the specific facts of this case.

[61] However, Mr. Baert acknowledges that Canada may present evidence on the operations of the Schools in defence of the duty and neglect alleged against Canada. Should Canada choose to do so, as I previously stated, the roles played by the Province and the other Third Parties will be the subject of some evidence at the main common issues trial.

[62] In light of the multiple possible findings on nature, extent, delegation, breach of duty and causation, were the Third Party Claims severed and a subsequent trial held with respect to contribution and indemnity, I conclude that there may be some duplication in evidence between the two hearings which would naturally affect the costs incurred by the parties. However, such duplication would not extend to evidence of individual circumstances because this evidence would be reserved for the individual issues trials, not the common issues trial; I also conclude that the parties' expert evidence would not be duplicated. At this early stage it would be impossible to calculate the extent of duplication in evidence. I also note that if the Plaintiffs are successful, they may choose not to participate at all in the contribution hearing but would be put to considerable expense if the Third Party Claims were heard as part of the common issues trial.

[63] A predominant factor for my consideration in this regard is the current litigation timetable. Discoveries of lay witnesses relevant to the claim against Canada are complete. Expert witness discoveries were completed in September 2013.

[64] During Case Management on November 8, 2013, counsel addressed two further Applications, the first relative to refusals (on examination for discovery) and the second on the *Limitations Act,* S.N.L. 1995, c. L-16.1. The first is scheduled to be heard on December 16, 2013, and the other tentatively for January 27, 2014. Notwithstanding these pending Applications, uncomplicated by the Third Party Claims, I conclude that there is a realistic prospect of the common issues trial proceeding late in the January–June 2014 term.

[65] Admittedly, the late addition of the Province and other Third Parties complicates matters in the sense that neither has yet prepared or delivered its Defence nor List of Documents. I accept that the parties and their lawyers are currently engaged in research respecting the operations of the Schools in question as far back as 1949. Further, Canada may discover a representative of the Province for which no dates have been set.

[66] Once the third party pleadings are closed, the process of discovery of documents and examination for discovery will commence. Any disputes on the discovery process will be subject to application.

[67] On the other hand, any appeal from this ruling could also de-rail the current litigation timetable, but likely not to the same extent.

[68] I conclude that if the Third Party claims were not stayed or severed, pending the resolution of the common issues, the common issues trials could not commence in the spring 2014 term and may realistically be delayed one to years.

[69] Class action legislation was enacted to address the complexities of mass tort claims and ensure timely and efficient access to justice. Permitting the Third Party Claims to be heard with the common issues trial would unduly complicate the matter and would be contrary to the spirit and intent of the legislation.

[70] As is apparent, some of my conclusions on this factor favour severance and others do not.

(iv) Prejudice

[71] As to prejudice, I am acutely aware that members of both the original and family class are of advanced average age and there is a real risk that some would not survive to testify at the common or individual issues trial should this matter be

delayed by an additional year or more. As the procedural history reflects, the parties have already been significantly delayed in the proceeding of the Plaintiffs' Claims.

[72] It is also important to reiterate on this factor that the Plaintiffs have passed the test for certification of issues that do not involve persons other than Canada.

[73] I am also aware that our *Rules* support the avoidance of multiplicity of proceedings, where at all possible. However, if the Plaintiffs are unsuccessful in their claims against Canada at the common issues trial, the litigation will come to an end and there will be no other procedures to consider.

[74] Finally, as stated previously, the trial judge can determine if (but for the actions of Canada, alone or in concert with others) the Plaintiffs would have suffered losses, without prejudice to Canada's right to seek contribution from joint tortfeasors. Third Party claims are not required to be heard with the common issues trial. The Court of Appeal confirmed in **Vardy v. Dufour**, 2008 NLCA 22, that even without participation of other persons who could be liable, the Court can assess liability of the original defendant, whether whole, partial or not proven (see paras. 27-31).

[75] In light of the foregoing, Canada has not satisfied me that there would be serious prejudice to the Defendant in severing the Third Party Claims.

CONCLUSION

[76] Third party claims are not precluded in class actions but they must be carefully managed. I found Rachael P. Mulheron's text, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Portland, Oregon: Hart Publishing, 2004) helpful to the preferred outcome of this Application. At pages 270–271 she reviewed several authorities that addressed the difficulties in joining third parties in class action proceedings.

[77] In **Johnson Tiles Pty. Ltd. v. Esso Australia Ltd.**, [2000] F.C.A. 1527, 104 F.C.R. 564, the court relied on the following factors to sever the third party claims:

a) The cross claim raised a raft of separate and highly complex issues;

b) If the negligence claim failed, there would be no cross claim;

c) Separate trials offered finality and savings in time and expense; and

d) There was no evidence that the defendant had a risk of being unable to recoup from the third party, if it was later successful on the claim.

I believe each of these findings applies equally here.

[78] Third party claims were also severed in **Bittner v. Louisiana-Pacific Corp.**, [1997] B.C.J. No. 2281, 43 B.C.L.R. (3d) 324 (S.C.) (siding warranty); **McDougall v. Collinson**, 2000 BCSC 398 (investment advice); and **Endean v. Canadian Red Cross Society**, [1997] B.C.J. No. 1209, 148 D.L.R. (4th) 158 (S.C.). In **T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)**, 2010 ABQB 262, the third party claims were stayed until the plaintiff class members proceeded to individual issues trials.

[79] Counsel for the Plaintiffs also refer to **Campbell v. Flexwatt Corp.**, [1996] B.C.J. No. 1487, 25 B.C.L.R. (3d) 329 (S.C.) and **Cooper v. British Columbia (Registrar of Mortgage Brokers)**, [1999] B.C.J. No. 1360, 68 B.C.L.R. (3d) 293, (S.C.) where staying a Third Party Claim was viewed as the most sensible approach.

[80] Canada, however, refers to **Robertson v. Proquest Learning and Information LLC**, [2010] O.J. No. 3261, 84 C.P.R. (4th) 224 (Sup. Ct.), where the Ontario Court concluded (in the context of a class action for copyright infringement) that the terms of the licences and the circumstances surrounding them would be in issue at the trial and relevant to/ involved in any determination

of liability between the Plaintiffs, Defendants and Third Parties. The Court therefore declined to sever the Third Party Claims.

[81] In addition to the concerns that I have expressed when considering each of the three components of the test for severance (interwoven issues, savings in time and cost and prejudice), I have given considerable thought to the broader question of what the common issues trial would look like if the Third Party Claims were severed/stayed and in comparison, how it would proceed if they were not severed/stayed. In both this broad and practical approach to resolution of the Application, and in the consideration of the more academic exercise, the difficulty I have had lies with the general negligence alleged (certified issue (a) from paragraph 6 herein) because it is the only claim made for which liability may be subject to apportionment.

[82] It is conceded that the fiduciary duty alleged cannot involve the Third Parties. I conclude, however, that the other duty of care alleged can and will involve the Third Parties. My dilemma is that the issues that were certified almost three and a half years ago involve both duties.

[83] Section 9(3) of the *Class Actions Act* permits a court, on its own motion, to amend the terms of a certification order and section 13 permits the court to make whatever order it considers appropriate respecting the conduct of a class action and for such purposes, may impose on one or more parties the terms it considers appropriate.

[84] I conclude therefore that I should impose on the Plaintiffs the requirement that they make a choice to either:

a) Confine the certified issues for the common issues trial (stated in paragraph 6 herein) to the fiduciary duty alleged for both the survivor and family classes and for which liability cannot be apportioned, in which case all proceedings (including Third Party claims) relating to any duty for which liability can be apportioned shall be severed and

stayed to be determined at a later date (if necessary) with the Third Parties reinstated and given full procedural rights; or

b) Not confine the certified issues stated in paragraph 6 herein to the fiduciary duty alleged to be owed to the survivor and family classes, in which case the Third Party claims shall not be severed and stayed and the Third Parties shall continue to have status as a party to these proceedings.

[85] I recognize that the Plaintiffs' election may result in two common issues trials, but alternatively, it may conclude the litigation in its entirety.

[86] I acknowledge that in their November 19, 2012 Application, the Plaintiffs sought a ruling that they were entitled to determination of questions of law, in advance of trial, pursuant to Rule 38.01.

[87] In my March 19, 2013 decision (**Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 46), I denied this Application in part because:

- The Plaintiffs sought a determination on both grounds of liability alleged for the survivor class; and

- Were the case management judge to hear the Rule 38 Application (preliminary issue), the trial judge could be tasked with assessing similar evidence to determine related question, at a later date.

[88] The difference that I see here (in imposing upon the Plaintiffs an election on the fiduciary duty) is two-fold. Firstly, my March 2013 decision (**Anderson v. Canada (Attorney General)**) predated the addition of four Third Parties. Secondly, the confinement (if elected) will not result in two judges assessing similar evidence. The trial judge will be assigned to both common issues trials (if necessary).

[89] The Plaintiffs shall communicate their election to the Court and the parties by December 14, 2013.

GILLIAN D. BUTLER
Justice