2007 01T4955 CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER
PLAINTIFFS

-and-

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

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

DEFENCE

2008 01T0845 CP

BETWEEN:
SARAH ASIVAK and JAMES ASIVAK
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0844 CP

BETWEEN:
SELMA BOASA and REX HOLWELL
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0846 CP

BETWEEN:
EDGAR LUCY and DOMINIC DICKMAN
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2007 01T5423 CP

BETWEEN:
TONY OBED, WILLIAM ADAMS AND MARTHA BLAKE
PLAINTIFFS

AND:
THE ATTORNEY GENERAL OF CANADA
DEFENDANT

Filed Nov. 21/12 DP

Introduction

1. The Defendant, the Attorney General of Canada ("Canada"), denies the allegations in the Statements of Claim (the "Claim"), as though each was set out here and individually and specifically denied. Canada puts the Plaintiffs to the strict proof of the allegations in the Claim.

2. The Claim, which is brought as five class actions, alleges abuses and breaches of duties at five schools (the "Schools") in Newfoundland and Labrador. The Plaintiffs state they are either former students of the Schools or their family members.

3. The International Grenfell Association (the "IGA"), the Moravian Church (the "Moravians") the Labrador and Western School Boards (the "Boards") and the Government of Newfoundland and Labrador (the "Province"), by their purpose, operation and management, created and ran the Schools (hereinafter we refer to these parties collectively as the "Operators").

4. The Schools existed and were operated prior to 1949, the year of Confederation between Canada and Newfoundland. The Schools continued to operate for several decades post Confederation.

5. The Plaintiffs allege that Canada ran the Schools and/or was responsible for the Schools. The Plaintiffs allege that Canada, by its purpose, operation or management, of the Schools breached certain duties to protect the Plaintiffs from harm. Canada denies these allegations. Canada did not owe any legal duties to the Plaintiffs, nor did Canada breach any such duties or cause any harm to the Plaintiffs.

The Operators

6. The IGA, by its purpose, operation and management, created and ran three of the Schools, which were located in St. Anthony, Cartwright and North West River. The IGA was incorporated in 1914 under the *Companies Act* of 1899. The IGA is currently recognized as an "incorporation without share capital - in good standing".

7. The Moravians, by their purpose, operation and management, created and ran two of the Schools, which were located at Nain and Makkovik. According to the Moravians' website, the Moravian Union (Incorporated) is a legally incorporated body. The Moravian Union (Incorporated) is part of the world wide Moravian Church of the Christian religion with its head office located in London, England. It is responsible for the direction and control of its Churches, missionaries, and employees worldwide including, but not limited to, the Moravian Church in Newfoundland and Labrador. The Moravian Church in Newfoundland and Labrador was incorporated under the *Moravian Church in Newfoundland and Labrador Act,* SNL 1970, c. 40.

8. The Boards, by their purpose, operation and management, created and ran the Schools. The Labrador School Board created, operated and managed four Schools at Cartwright, North West River, Nain and Makkovik. The Western School Board created, operated and managed one School at St. Anthony. The Boards were incorporated in 1969. Provincial legislation provides for the assumption of liabilities of past boards by successor boards.

9. The Province, by its purpose, operation and/or management, created and ran the Schools. Upon entering Confederation in 1949, the Province continued to have exclusive legislative authority over education. The Province's exclusive legislative authority over education remains in effect today. Both before and after Confederation, the Schools existed and were run in accordance with Provincial legislation, regulations and policy.

10. For example, the Province enacted a statute in 1970 giving the Minister of Social Services and Rehabilitation the power to erect a dormitory in North West River to provide accommodation for Aboriginal people; provide financial assistance for its operation; set up an administrative board to operate it; and conduct inspections (*The Northern Labrador (Social Services and Rehabilitation) Act*, SNL 1970, No. 23, s. 11 (1)).

11. The first provincial *Education Act* was passed in 1836. Subsequent acts and amendments gradually formalized the role played by the Province, Boards, philanthropic organizations and religious denominations in the administration and delivery of education to students in

Newfoundland and Labrador. Canada pleads and relies on the *Schools Act, 1997*, SNL 1997, c. S-12.2, and its predecessor legislation.

12. Canada did not take any of the following actions, undertaken by the Operators, such actions include, but are not limited to:

    a. admission of children to the Schools;
    b. transportation of children to and from the Schools;
    c. living conditions and food within the Schools;
    d. selection, hiring, supervision, discipline and dismissal of staff at the Schools;
    e. academic, vocational, religious, and moral teaching of the students at the Schools;
    f. school curriculum and attendance at the Schools;
    g. medical treatment at the Schools; and
    h. supervision, day-to-day care, guidance and discipline of the students at the Schools.

Alleged duties

13. The following is Canada's attempt to summarize the myriad duties the Plaintiffs allege were owed and were breached by Canada in relation to the Schools:

    a. "non-delegable" fiduciary duty to protect the Plaintiffs from harm;

    b. duty of care (in negligence) to protect the Plaintiffs from harm.

14. Canada denies that it owed these duties. If anyone owed a fiduciary duty or duty of care to the Plaintiffs, it was the Operators, who, by their purpose, operation and management, created and ran the Schools at all times.

15. The Operators controlled the Schools on a day to day basis such that only they could have owed a duty of trust and loyalty to the Plaintiffs. Similarly, only the Operators could have been close enough to the Plaintiffs to potentially owe a duty of care.

16. While Canada, at various times and for various purposes, provided money to the Province for Aboriginal Peoples generally, the Province maintained authority over how such money was spent.

Agents

17. The Plaintiffs allege that Canada had "agents" or who acted on its behalf in relation to the Schools. Canada denies this allegation.

18. Canada did not create express or implied agency relationships with the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the existence of an express or implied principal/agent relationship between Canada and the Operators, or any other party.

19. Alternatively, even if some form of agency relationship could have existed, if the "agents" were causing harm to the Plaintiffs, then they were clearly acting outside the scope of any express or implied agency relationship or authority.

20. At law, Canada may only be found liable in tort for the negligent actions of a Crown servant that is acting in the scope of their employment. The Plaintiffs have not identified a Crown servant through whom any potential alleged liability could flow. Canada pleads and relies on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss. 3(b).

21. It was the Operators, by their own authority, purpose, operation and management that created and ran the Schools at all times. Canada had no role whatsoever in the purpose, operation or management of the Schools.

Delegates and "Non-delegable Duty"

22. The Plaintiffs allege that Canada had "delegates" who acted on Canada's behalf in relation to the Schools. Canada denies these allegations.

23. Canada did not make express or implied delegations to the Operators or anyone else in relation to the Schools. The facts do not satisfy the legal test for the delegation of any duty by way of express or implied delegation by Canada to the Operators, or any other party.

24. The Plaintiffs allege what they call at various times a "non-delegable" duty and a "non-delegable fiduciary duty". However, at law, "non-delegable duties" arise from statute; fiduciary duties, which are entirely different, arise only in certain factual circumstances.

25. "Non-delegable duties" require a statute that places full responsibility on one party for some activity. Where there is such a statute, the duty is "non-delegable" in the sense that the party that owes the duty cannot discharge its responsibility simply by delegating the activity to someone else. No such statute exists in this case, and the facts do not support the existence of a "non-delegable duty" owed to the Plaintiffs by Canada.

26. Canada did not owe a "non-delegable duty" or a "non-delegable fiduciary duty" to the Plaintiffs; therefore, Canada could not have inappropriately delegated such a duty. The facts do not satisfy the legal test for the existence of a "non-delegable duty" between Canada and the Plaintiffs, nor do the facts show the breach of any such duty by Canada.

Fiduciary Duty

27. Canada did not owe a fiduciary duty to the Plaintiffs. The Plaintiffs allege that the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs has been satisfied. Canada denies this. The facts plead do not satisfy the legal test for the existence of a fiduciary duty between Canada and the Plaintiffs.

28. There is no "cognizable Indian interest" present as asserted by the Plaintiffs. Canada did not exercise "discretionary control" over the Schools and/or the Plaintiffs. The facts necessary to ground a claim in fiduciary duty are not present in this case.

29. Alternatively, even if a fiduciary duty exists, Canada did not breach such a duty. If the Plaintiffs were owed a fiduciary duty, it would have been owed by the Operators, who by their purpose, operation and management actually created and ran the Schools.

Negligence

30. Canada did not owe a duty of care to the Plaintiffs. The Plaintiffs allege that the legal test for the creation of a duty of care has been satisfied. Canada denies this; the facts plead do not satisfy the legal test for the creation of a duty of care.

31. A proximate relationship did not exist between Canada and the Plaintiffs; proximity is necessary to give rise to a duty of care. Furthermore, Canada could not have reasonably foreseen the acts and harms allegedly suffered by the Plaintiffs at the Schools.

32. Furthermore, Canada was not and could not have been the "but for" cause of any harm allegedly suffered by the Plaintiffs at the Schools.

33. Alternatively, even if Canada owed a duty of care, Canada did not fall below any applicable standard of care. Canada says that the standard of care at the Schools can only be judged by the applicable "standards of the day". Even if Canada owed a duty of care (which is denied), the applicable "standards of the day" were not breached.

34. If anyone could have owed a duty of care that could have been negligently breached in the circumstances, it was the Operators. By their purpose, operation and management, the Operators created and ran the Schools.

Allegations of abuse and duties

35. Canada denies that it owed the duties alleged by the Plaintiffs. In particular, Canada denies that it owed a duty to promote the health, safety and well-being of Aboriginal persons, or their language, cultural and spiritual traditions, or to provide an education or educational services to the Plaintiffs. In the alternative, any actions undertaken by Canada were dictated by *bona fide* policy choices made by successive Canadian governments, which cannot give rise to liability at law.

36. Canada denies that the Plaintiffs were in Canada's custody, or wards of the state whose care and welfare required Canada to stand *in loco parentis* to them. The evidence shows the Plaintiffs' care while at the Schools was the responsibility of the Operators.

37. Canada denies that the living conditions at the Schools were inadequate or were below acceptable standards for the time periods and circumstances in question. In any event, Canada was not responsible for the living conditions at the Schools. The Operators were responsible for the daily operations of the Schools, including the food and living conditions. According to the documents, the conditions at the Schools varied by School, time period, relative wealth of the Operator responsible for the administration of the School, and the general level of economic health of the economy in any particular era.

38. Canada denies that the Plaintiffs were subjected to emotional, cultural, or spiritual abuse. In any event, such allegations disclose no cause of action in law. If any such cause of action exists, then only the Operators could have owed such a duty in the circumstances as the parties whose purpose, operation and management resulted in the creation and running of the Schools.

39. Canada denies that it sought to destroy the Plaintiffs' ability to speak their native language, or to lose the customs and traditions of their culture, by requiring that the formal education of the Plaintiffs be conducted in English. The first language learned by many of the Plaintiffs, often from their parents, was English.

40. Canada says there was extensive cultural intermingling between Aboriginal and non-Aboriginals communities in Newfoundland and Labrador. For example, both before and for decades after Confederation, there was no reserve system in the Province. In addition, Aboriginal children and non-Aboriginal children often attended the Schools together. It was the Province's policy not to treat Aboriginal and non-Aboriginal people differently.

41. Canada had no role in setting the curriculum at the Schools. The Operators were solely responsible for the curriculum at Schools. If particular Plaintiffs were in any manner

punished or demeaned for speaking their native languages, or for practicing their cultural or spiritual traditions, such actions were in no way directed by any policy or systemic practice by Canada.

42. If individual Plaintiffs suffered losses of language or culture, which is not admitted, such losses occurred as a result of myriad historical, personal, societal and community circumstances, as a result of the interaction of Aboriginal communities with non-Aboriginal communities, along with the progressive urbanization of Canadian society, as part of an observable international trend towards diminishing use of minority languages and culture, and not as a result of any acts or omissions of Canada. In any event, the Plaintiffs' allegations concerning loss of language and culture disclose no cause of action in law.

43. Canada denies that the students suffered systemic child abuse, neglect or maltreatment. Any instances of abuse, neglect or maltreatment were isolated and not incidents of a systemic problem that involved Canada in any way. Any abuse, neglect or maltreatment of students was caused not by the breach of any duty by Canada but solely by the acts or omissions of the Operators, for whose actions Canada is not liable.

44. The Operators accused of abusing, neglecting or otherwise mistreating the Plaintiffs were at no time employees, agents or delegates of Canada. The Operators were responsible for the actions of any persons who committed the alleged abuse.

45. In the alternative, if any employees or agents of Canada did abuse, neglect or mistreat students, Canada is not vicariously liable for those acts, as they were not authorized by Canada. None of the alleged acts of abuse were sufficiently related to the course or scope of employment or agency allegedly granted by Canada so as to justify the imposition of vicarious liability on it.

46. Canada is not and cannot at law be held directly liable in negligence, or breach of fiduciary duty, for any abuses which may have taken place. The Plaintiffs allege that Canada had a "duty to protect" the Plaintiffs from harm that was allegedly visited upon

them at the Schools. There is no such at large "duty to protect" Aboriginal people from harm imposed by Canada at law. It was not Canada's purpose, operation or management that led to the creation or running of the Schools. Canada owed no duty to the Plaintiffs.

Canada only provided funding to the Province

47. Canada admits it has provided some funding to the Province for use in programs for Aboriginal people. Canada did not administer any programs or services relating to education of Aboriginal people in respect of the Schools. The provision of funding by the Federal government to the Provincial government does not give rise to liability.

48. Canada had no agreements regarding the operation of the Schools. Canada did enter into agreements with the Province regarding funding arrangements for capital expenditures. Canada did not mandate the implementation of federal policy or guidelines with respect to the operation of the Schools. Over the years, Canada participated in various committees with the Province and, later, with Aboriginal Peoples. These committees discussed funding, but did not require mandatory reporting to Canada regarding the daily operations of the Schools. Canada was not responsible for and did not undertake the day-to-day operation and management of the Schools. At no time was Canada ever made aware of any allegations of abuse at the Schools.

49. Canada had no agreements, policies or guidelines regarding the daily operation of the Schools. Canada did not inspect or audit the Schools, and did not have the power or authority to do so. Canada reviewed the Province`s expenditures in order to determine whether the money was spent in accordance with the terms of applicable agreements. Canada was not responsible for and did not undertake the day-to-day purpose, operation or management of the Schools

The Indian Residential Schools Settlement Agreement ("IRSSA") and the Schools

50. By authority of the *Indian Act*, RSC 1985, c I-5, Canada and certain religious organizations did operate some "Indian Residential Schools" for the education of Aboriginal children. Certain abuses were committed against the children that attended

the Indian Residential Schools. None of these Indian Residential Schools were located or operated in Newfoundland and Labrador.

51. The IRSSA was approved by the Courts and came into effect on September 19, 2007. Canada concluded the IRSSA with former students of Indian Residential Schools, the Churches involved in running those schools, the Assembly of First Nations, and other Aboriginal organizations. The IRSSA includes the individual and collective measures to address the legacy of the Indian Residential School system.

52. The Plaintiffs' Claim fundamentally misconstrues the nature of the Schools in this case. The Claim alleges, both expressly and impliedly, that the Schools are akin to Indian Residential Schools that existed under the *Indian Act* and that were the subject of the IRSSA. This characterization of the Schools is inaccurate and Canada denies such allegations. The Schools in this case were not Indian Residential Schools. Canada did not, either under the *Indian Act* or by other purpose or authority, create, operate or manage the Schools.

53. Canada was involved with the *Indian Act* based Indian Residential Schools. In the context of the IRSSA, if the Schools in question were Indian Residential Schools, then they would be eligible for admission to the IRSSA. Article 12 of the IRSSA allows for the addition of an institution to the settlement if Canada was jointly or solely responsible for the operation of the institution. Contrary to the Plaintiffs' allegations, Canada was not jointly or solely responsible for the operation of these Schools. If there were facts and evidence showing that Canada was jointly or solely responsible for the Schools, then the Schools would be included in the IRSSA.

54. Canada was not jointly or solely responsible for the operation of the Schools and the care of the Plaintiffs there. It was not Canada's purpose, operation or management that led to the creation or running of the Schools, for example:

    a. the Schools were not federally owned;
    b. Canada did not stand *in loco parentis* as parent to the children at the Schools;

c. Canada was neither wholly nor partially responsible for the administration of the Schools;
d. Canada did not inspect, nor did it have the right to inspect, the Schools;
e. Canada did not stipulate that the Schools were Indian Residential Schools in accordance with the *Indian Act*.

55. It is not surprising that there were no Indian Residential Schools, under the *Indian Act*, in Newfoundland and Labrador. The Plaintiffs identify as Inuit and Métis people. The *Indian Act* does not apply to Inuit and Métis people. The *Indian Act* did not and does not provide the statutory authority to create, operate or manage a hypothetical "Inuit/Métis Residential School" in Newfoundland and Labrador.

Family Class Claims

56. The Plaintiffs' Claim alleges that Canada owed and breached duties to certain family members of persons that allegedly attended the schools (the "Family Class"). Canada denies theses allegations.

57. With respect to the claims of the Family Class, Canada denies that it owed any duties to this group arising out of the Plaintiffs' alleged attendance at the Schools. In particular, Canada denies that it owed any duty of care or fiduciary duty to the Family Class. Canada denies that the Family Class has any cause of action at law whatsoever against Canada.

Damages

58. If the Plaintiffs suffered any of the damage, losses or injuries alleged, such damage, losses or injuries were not caused by any acts or omissions of Canada or for which Canada is liable. Rather, such damage, losses or injuries were caused by factors unrelated to Canada's conduct, including but not limited to events prior and subsequent to the Plaintiffs' alleged attendance at the Schools. Furthermore, the damage, losses and injuries alleged by the Plaintiffs are exaggerated, remote and unforeseeable.

59. Canada pleads and relies upon the *Contributory Negligence Act*, RSNL 1990, c. C-33.

60. Canada denies that the circumstances alleged, if proven, were such as to give rise to liability for punitive, exemplary, or aggravated damages.

61. If the Plaintiffs suffered any of the damage, losses or injuries alleged as a result of any acts or omissions of Canada for which Canada is liable, which is not admitted but denied, the individual Plaintiffs, and the Plaintiffs as a whole, were under a duty to exercise reasonable diligence and ordinary care in attempting to minimize their damages after the occurrence of damage, losses or injury as alleged in the claim. Canada pleads that the Plaintiffs, individually or as a group, failed to take reasonable actions which would have tended to mitigate any damages.

62. The Plaintiffs are seeking the assessment of an aggregate damages award from the Court. Canada denies that such an award could be assessed in this case even if liability were found (which is denied). The circumstances of each Representative Plaintiff are unique, as are the circumstances of every potential class member. There was no common experience amongst students at the same School, much less at different Schools. The allegations of cultural loss, language loss, physical abuse and sexual abuse are infinitely varied for each class member. Furthermore, the size of the potential classes is undefined in the Claim. Therefore, even if liability could be found (which is denied) it is simply not possible for the Court to assess an aggregate damages award in the circumstances.

Limitation periods

63. The Plaintiffs' Claims are not timely and, consequently, are statute-barred. Canada pleads and relies upon the *Limitations Act*, SNL 1995, c. L-16, the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, and the *Crown Liability Act*, SC 1952-53, c. 30. Canada also relies upon the equitable doctrines of *laches* and acquiescence.

64. Canada cannot be held vicariously liable in tort for conduct of Crown servants prior to May 14, 1953, which is the date upon which subsection 3(1)(a) of the *Crown Liability*

Act, S.C. 1952-53, c. c.30, came into force. Prior to that time, pursuant to the *Exchequer Court Act*, RSC 1927, c. 34, as amended by S.C. 1938, c. 28, Canada could only be held liable for the negligence of a Crown servant acting within the scope of his or her duties of employment. Furthermore, prior to amendment of the *Exchequer Court Act*, Canada could only be held liable for the negligence of a Crown servant on a public work. Canada denies any such negligence with respect to the Plaintiffs' Claim.

65. The Plaintiffs claim prejudgment interest; however, the failure of the Plaintiffs to give sufficient particulars of the damages claimed and the basis of such claims causes Canada to be unable to evaluate such claims. Consequently, the Plaintiffs are disentitled from claiming prejudgment interest. In the alternative, if the Plaintiffs are entitled to prejudgment interest, such interest may be awarded only for a period beginning on February 1, 1992, at the earliest by virtue of s. 36(6) of the *Federal Court Act*, RSC 1985 c. F-7, and s. 31(6) of the *Crown Liability and Proceedings Act*.

Relief sought

66. Canada repeats the foregoing denial of liability and requests that the Plaintiffs' action be dismissed with costs.

DATED at Halifax, Nova Scotia, this 16th day of November, 2012.

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