

**PROVINCE OF PRINCE EDWARD ISLAND  
PRINCE EDWARD ISLAND COURT OF APPEAL**

Citation: Reference under S-s.18(1) of Supreme Court Act 2009 PECA 01      Date: 20090122  
Docket: S1-AD-1144  
Registry: Charlottetown

**IN THE MATTER OF** A Reference from the Lieutenant Governor in Council pursuant to subsection 18(1) of the *Supreme Court Act*, R.S.P.E.I. 1988, Cap. S-10 regarding Broome, et al. v. Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust, Court File No. S1-GS-18887

Before: Chief Justice D.H. Jenkins  
Justice J.A. McQuaid  
Justice M.M. Murphy

**Appearances:**

Denise N. Doiron, counsel for the Government of Prince Edward Island  
J. Gordon MacKay, Q.C., agent for the solicitor for the respondents/plaintiffs, Intervenor  
Clint G. Docken, Q.C., solicitor for the respondents/plaintiffs, Intervenor  
David W. Hooley, Q.C., agent for the solicitor for the respondents/defendant, The Prince Edward Island Protestant Children's Trust, Intervenor  
Mark R. Frederick, solicitor for the respondents/defendant, The Prince Edward Island Protestant Children's Trust, Intervenor  
Blair E. Ross, Intervenor  
Susan M. Marshall, Intervenor

Place and Date of Hearing      Charlottetown, Prince Edward Island  
June 25 and 26, 2008

Place and Date of Judgment      Charlottetown, Prince Edward Island  
January 22, 2009

**Written Reasons by:**

Chief Justice D.H. Jenkins

**Concurred in by:**

Justice J.A. McQuaid  
Justice M.M. Murphy

**REFERENCE - torts - negligence** - Relationship required to find that the Province owed a duty of care, duty of supervision, fiduciary duty, non-delegable duty or could be held vicariously liable for alleged intentional torts comprising physical and sexual abuse committed against former residents of the Prince Edward Island Protestant Orphanage while they were children and residents of the Orphanage.

Authorities Cited:

**CASES CONSIDERED:** *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.); *Hedley Byrne v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Design Services Ltd. v. Canada*, [2008] S.C.J. No. 22 (SCC); *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Paxton v. Ramji*, [2008] O.J. No. 3964 (Ont.C.A.); *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83; *Holland v. Saskatchewan*, 2008 SCC 42 (SCC); 2003; *Re Eve*, [1986] 2 S.C.R. 388 (SCC); *K.L.B. v. British Columbia*, [1998] B.C.J. No. 470 (QL) (BCSC); affirmed regarding duty of care in [2001] B.C.J. No. 584 (QL) (BCCA); affirmed in [2003] 2 S.C.R. 403 (SCC); *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459 (QL.); *M.B. v. British Columbia*, [2003] 2 S.C.R. 477 (QL); *Blackwater v. Plint*, [2005] 3 S.C.R. 3 (QL); *Aksidan v. Canada (Attorney General)*, [2008] B.C.J. No. 178 (BCCA) (QL); *Hedley Byrne v. Heller*, [1964] A.C. 468 (H.L.); *Bazley v. Curry*, [1999] 2 S.C.R. 534 (SCC); *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (SCC).

**STATUTES CONSIDERED:** *Supreme Court Act* R.S.P.E.I. 1988 S-10, s.18, s-s.18(5); *An Act for the Protection of Neglected and Dependent Children* 1910, Acts of the General Assembly of Prince Edward Island, Cap. 15; *An Act Respecting the Maintenance of Deserted Wives and Children*, 1932, 22 George V, Cap. 7; *The Children's Act*, 1940, 4 George VI, Cap. 12; *The Children's Protection Act*, 1961, 10 Elizabeth II, Cap. 3; *An Act to Amend the Children's Protection Act*, 1961, 1972, 21 Elizabeth II, Cap. 7; *An Act to Incorporate the Prince Edward Island Protestant Orphanage*, 1921, 11 George V, Cap.27; *An Act to Amend An Act to Incorporate the Prince Edward Island Protestant Orphanage*, 1923, 13 George V, Cap.11; *An Act to further Amend An Act to Incorporate the Prince Edward Island Protestant Orphanage*, 1925, 15 George V, Cap.23; *An Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage*, 1927, 17 George V, Cap.32; *An Act to Amend an Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage*, 1929, 19 George V, Cap.28; *An Act to Amend an Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage*, 1932, 22 George V, Cap. 28; *An Act to Amend an Act to Incorporate the Prince Edward Island Protestant Orphanage* 11 George V, Cap.27, 1962 Elizabeth II, Cap.27; *An Act to Change the Name of the*

***Prince Edward Island Protestant Children's Home and Amend the Acts Respecting the Same***, 1977, 26 Elizabeth II, Cap.54

**TEXT CONSIDERED:** Klar, Q.C., Lewis N.: **Tort Law** 4<sup>th</sup> ed. (Thomson Canada Limited 2008); Fleming, John G.: **The Law of Torts** 9<sup>th</sup> ed. LBC Information Services 1998); Hogg, Peter W. and Monahan, Patrick J.: **Liability of the Crown** 3<sup>rd</sup> Ed. (Carswell, 2000)

Reasons for judgment:

**JENKINS C.J.P.E.I.:**

[1] This is a Reference pursuant to s.18 of the **Supreme Court Act** R.S.P.E.I. 1988 S-10. In an action commenced in 2002 (**Broome et al. v. Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust**, S1-GS-18887), 57 persons who were at various times between 1928 and 1976 residents in the Prince Edward Island Protestant Orphanage seek damages against the Government and the Trust alleging physical and sexual abuse. The Government and the Trust deny liability. The plaintiffs' assertion of Government liability is based on general duty of care, duty of supervision, vicarious liability, fiduciary duty, and non-delegable duty. In this Reference, the Lieutenant Governor in Council of Prince Edward Island asks the Court of Appeal for its opinion on the application of those legal doctrines to an Agreed Statement of Facts.

**Questions for consideration**

[2] In that regard, the Lieutenant Governor in Council has referred questions to the Appeal Division for hearing and consideration. The Reference and Questions for consideration are stated in Order-in-Council #EC2007-619 dated October 9, 2007, as follows:

1.
  - a) As at 1928, did the Province owe a general duty of care to children placed in the Mount Herbert Orphanage/Protestant Children's Home by parents, family members, guardians or charities?
  - b) If so, what was that duty of care, when did it arise and how did it arise?
  - c) If there was such a general duty of care as at 1928, what was the nature and scope of that duty?
2.
  - a) If there was not a general duty of care in 1928, did such a duty arise subsequent to 1928?
  - b) If so, what was that duty of care, when did it arise and how

did it arise?

- c) If there was a duty of care that arose after 1928, what was the nature and scope of that duty?
- 3.
- a) As at 1928, did the Province have any duty to supervise the operation of the Mount Herbert Orphanage/Protestant Children's Home?
  - b) If so, what was that duty of supervision, and when and how did it arise?
  - c) If there was a duty of supervision, what was the nature and scope of that duty?
- 4.
- a) If there was not a duty to supervise the operation of the Mount Herbert Orphanage/Protestant Children's Home at 1928, did such a duty arise subsequent to 1928?
  - b) If so, what was the duty of supervision, when did it arise and how did it arise?
  - c) If there was a duty of supervision after 1928, what was the nature and scope of that duty?
- 5.
- a) Was there any legislation or common law that made the Province vicariously liable for the acts or omissions of the Trustees, volunteers or staff of the Mount Herbert Orphanage/Protestant Children's Home either as at 1928 or subsequently?
  - b) If so, when and how did such vicarious liability arise, and what is the nature and scope of that vicarious liability?
- 6.
- a) As at 1928, did the Province owe a fiduciary duty to the residents of the Mount Herbert Orphanage/Protestant Children's Home by virtue of their being residents of the Mount Herbert Orphanage/Protestant Children's Home?
  - b) If so, how did such a fiduciary duty arise and what was the nature and scope of that fiduciary duty?
- 7.
- a) If the Province did not owe such a fiduciary duty to the residents of the Mount Herbert Orphanage/Protestant Children's Home as at 1928, did such a duty arise subsequently?
  - b) If so, what, when and how did such a fiduciary duty arise

and what was the nature and scope of that fiduciary duty?

8. a) As at 1928, did the Province have a non-delegable duty with respect to the care given to the former residents of the Mount Herbert Orphanage/Protestant Children's Home by the Trustees, volunteers and staff of the Mount Herbert Orphanage/Protestant Children's Home?
  - b) If so, when and how did that non-delegable duty arise and what was the nature and scope of that non-delegable duty?
9. If any of the above duties are found to have existed, did the Province owe any of the duty to the residents of the Mount Herbert Orphanage/Protestant Children's Home who were resident during a time when a parent was also a resident and/or employee of the Mount Herbert Orphanage/Protestant Children's Home?

### **Agreed Statement of Facts**

[3] The Reference directs this Court to consider the Questions having regard for the Agreed Statement of Facts submitted by the Office of the Attorney General, which states:

#### Agreed Statement of Facts

1. Throughout the history of P.E.I., the Provincial Government has passed legislation dealing with social issues, including both public and private legislation. Copies of such relevant legislation (including a chronological index) are appended as Schedule "A".
2. The Prince Edward Island Protestant Orphanage, later known as the Prince Edward Island Protestant Children's Home, was first established by the Orange Lodge in or about 1907. It was subsequently constituted a corporation with a Board of Trustees representing various protestant organizations and denomination[s] or about 1921 by virtue of a Private Act passed through the Provincial Legislature.
3. The Prince Edward Island Protestant Orphanage/Prince Edward Island Protestant Children's Home was operated under and by virtue of the Private Act, and subsequent amendments by Private Acts, that established it. The management and operation of the Home was entrusted to a Board of Trustees. Copies of the relevant legislation (including a chronological index) are appended as Schedule "B".
4. The Home was operated by the Trustees until it was closed in 1976. The Board of Trustees was responsible for the day to day

operations of the Home, including the hiring of staff, volunteers, daily care of the residents and setting policies as to the admission of residents, as well as the overall management and administration of the Home.

5. The Province was not involved in the administration of the Home, was not involved in the day to day operations of the Home, and did not employ any person engaged by the Home to care for the residents. Dr. M.M. (Mac) Beck, a psychiatrist then an employee of the PEI Department of Health, at his own initiative volunteered to be a consultant to the Board. The Board accepted this offer and Dr. Beck attended regularly at the Home from 1964-67 and met with the children. Thereafter, he wrote an extensive Report for the Board containing a number of recommendations regarding the future role and operation of the Home.
6. The Plaintiffs were residents at the Home between 1928 and 1976. The Plaintiffs became residents when they were taken to the Home primarily by their parents, family members, guardians or charities.
7. While some of the Plaintiffs were "orphans", the majority were taken to the Home for temporary or longer term care as they could not be cared for by their parents, family members, guardians or charities. Some of the Plaintiffs were residents while a parent was also a resident and/or employee of the Home.
8. Between 1958 and 1962, 10 of the 57 Plaintiffs, comprising 4 separate families, were proposed by an employee of the Province for placement in the Home and were accepted as residents.
9. Between 1956 and 1964, 14 of the Plaintiffs, including the 10 referenced above, were placed in the guardianship of the Province through Court Order while still resident in the Home. The 14 Plaintiffs comprised 7 separate families.
10. The Home was funded primarily through charitable contributions from the people of Prince Edward Island. Occasional grants were made by municipal, provincial, federal and international groups and charities to assist with capital and other needs. Schedule "C" is a summary of the annual operating receipts and expenditures from 1928-1976 as taken from the Annual Reports for the subject years.
11. The Province did not directly fund the operation of the Home. The Province made financial contributions to the Home in the form of grants, of differing amounts, to the Board of Trustees at various times throughout the time period in question, as illustrated in Schedule "C".
12. In or about 1968, the Province entered into an agreement with the

Federal Government under the Canada Assistance Plan, whereby monies granted by the Province in relation to general welfare services within the province would be reimbursed by the Federal Government up to 50%. The grants to many private organizations, including the Home, were increased by the Province at that time, as the Province had the opportunity to be reimbursed by the Federal Government for up to 50% of the grants issued, and the Province availed itself of this opportunity for the remaining years thereafter.

13. The Provincial grants were given with no restrictions, and with no accountability requirements for how the funds were spent. The grants given in each year were a portion of the total monies received by the Home in each year, and a portion of the annual operating expenses incurred in each year. The use of the grant funds were solely at the discretion of the Board of Trustees.

[4] The Application Record before the Court also contains the following appended Schedules mentioned in the Agreed Statement of Facts:

Schedule A. Relevant legislation dealing with social issues:

- ***An Act for the Protection of Neglected and Dependent Children*** 1910, Acts of the General Assembly of Prince Edward Island, Cap. 15;
- ***An Act Respecting the Maintenance of Deserted Wives and Children***, 1932, 22 George V, Cap. 7;
- ***The Children's Act***, 1940, 4 George VI, Cap. 12;
- ***The Children's Protection Act***, 1961, 10 Elizabeth II, Cap. 3;
- ***An Act to Amend the Children's Protection Act, 1961***, 1972, 21 Elizabeth II, Cap. 6;
- ***An Act to Amend the Children's Act***, 1972, 21 Elizabeth II, Cap. 5.

Schedule B. Relevant legislation comprised of Private Acts regarding the establishment and operation of the Protestant Orphanage/Children's Home:

- ***An Act to Incorporate the Prince Edward Island Protestant Orphanage***, 1921, 11 George V, Cap.27;
- ***An Act to Amend An Act to Incorporate the Prince Edward Island***

**Protestant Orphanage**, 1923, 13 George V, Cap.11;

- **An Act to further Amend An Act to Incorporate the Prince Edward Island Protestant Orphanage**, 1925, 15 George V, Cap.23;
- **An Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage**,1927, 17 George V, Cap.32;
- **An Act to Amend an Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage**, 1929, 19 George V, Cap.28;
- **An Act to Amend an Act to Consolidate and Amend the Acts Incorporating the Prince Edward Island Protestant Orphanage**, 1932, 22 George V, Cap. 28;
- **An Act to Amend an Act to Incorporate the Prince Edward Island Protestant Orphanage** 11 George V, Cap.27, 1962 Elizabeth II, Cap.27;
- **An Act to Change the Name of the Prince Edward Island Protestant Children’s Home and Amend the Acts Respecting the Same**, 1977, 26 Elizabeth II, Cap.54.

Schedule C. Mount Herbert Orphanage/Protestant Children’s Home Expenditures and Receipts 1928-1976, showing annual aggregate expenditure; receipts (not including bequests and endowments which were allocated to the Capital Account) and Provincial Government portion of receipts.

## ANALYSIS

### Scope of opinion

[5] The **Supreme Court Act** directs that upon receiving a Reference, the Appeal Division will certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of reasons therefor, and any judge who differs from the opinion may in like manner certify his or her opinion and reasons.

[6] In accordance with s.18(5) of the **Supreme Court Act**, the Court caused public notice be given to notify interested persons that they could apply for status to make submissions to the court on the **Reference**. Upon hearing submissions for status, the court found that all persons who applied for status had an interest and were entitled to make submissions to the court at the hearing of the **Reference**.

[7] The Court received, heard, and considered submissions from the Government, from or on behalf of the other parties in the case ***Broome et al. v. Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust, supra***, and from Blair E. Ross and Susan M. Marshall.

[8] Some submissions addressed additional and different questions and alleged facts other than the questions and agreed facts stated in the Reference. Pursuant to the statutory provision under which a Reference is heard, the facts, questions and submissions considered by this Court are confined to the terms of the Reference. Accordingly, for this opinion this Court did not entertain any of the additional and different questions, alleged facts, or related submissions. As well, submissions were made that address matters of liability which are beyond the Questions in the Reference. This Court did not consider those matters either. Those are matters that may be entertained by a trial judge in an action or in some other forum after consideration by this Court of the questions of whether there is a general duty of care, duty to supervise, fiduciary duty, or non-delegable duty, or relationship factors that could form a basis for vicarious liability.

[9] In this Reference, I will refer to the Prince Edward Island Protestant Orphanage, which was renamed in 1962 the Prince Edward Island Protestant Children's Home, as the "Orphanage," the "Home" or the "Orphanage/Home."

### **Relevant legislation**

[10] Schedule A is a compilation of relevant legislation dealing with social issues, and in particular child protection. This legislation made provision for the apprehension and protection of neglected and dependant children, and created a supervisory role and duties for Government regarding community-based children's aid societies, temporary homes and shelters created by children's aid societies, and family-operated foster homes. The legislative scheme was for the children's aid societies to operate under the oversight of a Government-appointed superintendent in the more populated areas and for the superintendent himself to fulfill the role of arranging and providing care where there was no children's aid society in the area. The legislation referred to privately incorporated orphanages and children's homes such as the Orphanage, but did not make provision for the Government-appointed superintendent to have any role or responsibility regarding those facilities.

[11] The 1910 legislation was called the "***The Children's Protection Act of Prince Edward Island.***" It provided a scheme of public intervention and care for children found to be in need of protection by virtue, in general terms, of them being neglected, wayward, abused or orphaned. A government delegate known as the Superintendent

of Neglected and Dependent Children would report to the Commissioner who was the Minister responsible for the **Act**. There was provision for the creation of government-approved children's aid societies with objects of protecting children from cruelty and care and control of neglected children through temporary shelters, and of foster homes, in which a neglected child may be placed as a member of the family. Government was authorized to appoint a superintendent, whose role would be to promote, advise, and instruct children's aid societies, keep records regarding all children committed or placed under the Act, visit and inspect "*any place where a child is placed pursuant to the provisions of this Act*" and also industrial schools and shelters as may be directed by departmental regulations, and to prepare and submit annual reports to the Commissioner. There were extensive provisions regarding children's aid societies, and recognition that a society had the supervision and management of children and the duty of due diligence in providing a suitable home for a child, and provisions regarding police apprehension of neglected children and ensuing judicial process.

[12] The **Act** did not include any superintendent role in the supervision or operation in an orphanage or a children's home. It recognized potential for overlap between the public facilities covered by the Act and the privately operated orphanages and children's homes. An orphanage or children's home could with the consent of its trustees be used as a temporary home or shelter under the **Act**; but with the qualification that no children's aid society would have the supervision and management of children in a temporary home or shelter without the consent of the trustees of the orphanage or children's home. Section 15 stipulated that notwithstanding the provision of any bylaw, rule or regulation for the government or control of any incorporated orphanage or children's home, the trustees or governing body thereof may take advantage of the provisions of the **Act** by transferring any children under their guardianship to the Superintendent or to the local children's aid society to "*be placed out by the Superintendent or by such children's aid society in pursuance to the provisions of this act, and in such case it shall be the duty of the Superintendent to visit such child.*"

[13] The 1932 legislation was called "***The Deserted Wives' and Children's Maintenance Act.***" Its name describes its purpose and introduces its provisions for financial support. That **Act** contained no provision for Government involvement in a privately run orphanage; but it made provision for the operator of an orphanage to enforce a maintenance order against a father of a child who was a resident.

[14] The 1940 legislation was called "***The Children's Act.***" This was omnibus children's legislation that contained provision for legitimization of children born "*out of lawful wedlock,*" protection of neglected and dependent children, children of unmarried parents including affiliation orders and maintenance, deserted wives and

children, parents' maintenance, adoption by deed, and adoption. This legislation repealed the **Children's Protection Act** of 1910 and the **Deserted Wives' and Children's Maintenance Act**. Part II, which dealt with protection of neglected and dependent children, brought forward the provisions regarding children's aid societies and foster homes and the duties of the Superintendent. Those duties included the duty: *"to direct and supervise the visiting of any place where a child is placed pursuant to the provisions of this Part."*

[15] The 1940 legislation did not create any role for the Superintendent in the management, operation, or supervision of privately operated children's homes or orphanages. There was provision that an orphanage or children's home could, with the consent of the trustees or governing body, be used as a temporary home or shelter by a children's aid society; but with the qualification that no children's aid society would have the supervision or management of children in *"an orphan asylum or other children's home mentioned in sub-section (2) without the consent of the Trustees or governing body thereof."*

[16] The provisions regarding children's residence are noteworthy. Section 15 stipulated that every society or person to whose care a child is committed *"under the provisions of this Part,"* and every person entrusted with the care of any such child shall, from time to time, permit such child to be visited, and any place where such child may be or reside, to be inspected by the Superintendent. Section 16 permitted admission to temporary homes or shelters by Ministers of religion. Section 17 made provision regarding transfer of children by an institution and for placement out by the Superintendent by language similar to s.15 of the 1910 **Act**.

[17] The 1940 **Act** contained more extensive provisions regarding the apprehension of neglected children, selection of foster homes, competing responsibilities for the custody of children, the control over and protection of wayward children.

[18] The **Children's Protection Act** of 1951, which appears within the revised statutes, was not appended to the Agreed Statement of Facts. This legislation introduced the nomenclature "Director of Child Welfare" in place of the Superintendent and "child welfare agencies" which appear to be in place of children's aid societies. The scheme of the **Act** does not appear to extend of the role of the Director of Child Welfare to affect or be involved in the operations of an orphanage or children's home operated by a board of trustees.

[19] The **Children's Protection Act 1961** appears to replace and repeal the **Children's Protection Act** of 1951. The 1961 legislation included a definition of "orphan." **Section 3** directed that a duty of the Director of Child Welfare once appointed was to inspect or direct and supervise the inspection of any institution

*“established for the care and protection of children or place where a child is placed pursuant to the provisions of this Act.”* Section 14 was a new provision regarding powers of the Director or a child welfare agency over children committed to their care. It stipulated a duty to *“keep such ward in a suitable place and [to] exercise during such period [of temporary care and custody] all the rights of the legal guardian of such ward, except [adoption].”* This **Act** did not contain provisions **to** extend the role of the Director of Child Welfare to supervise or become involved in the operations of an orphanage or children’s home operated by a board of trustees.

[20] The amending provisions in 1961 and 1972 do not affect matters in this **Reference**.

[21] Schedule B is a compilation of the private acts regarding the establishment and operation of the “Prince Edward Island Protestant Orphanage.”

[22] The Act of incorporation passed in 1921 recited that there was an increasing number of applicants for admission, and it had been deemed necessary and desirable that a new and more modernly equipped orphanage be created and that the management thereof be placed on a permanent and representative basis. The Legislature therefore constituted named representatives of various protestant benevolent organizations, including the Grand Orange Lodge, ladies’ auxiliaries, and six different protestant church denominations to be a body corporate, with provision for them and their successors in office to acquire, hold and deal fully with the Orphanage property, including borrowing and enacting bylaws, rules and regulations not inconsistent with the constitution of the incorporating legislation as the Trustees may consider to be in the interests of the Orphanage. The **Act** provided for appointment by the Trustees of an executive committee and directed that: *“The executive shall, subject to the Board of Trustees, have the active management and affairs of the Orphanage and shall employ, hire and dismiss such agents and servants on such terms and conditions as the executive may find expedient.”* The **Act** contained provisions for public reporting among the various organizations represented on the Board of Trustees. There was no provision for any Government involvement in the business or property of the Orphanage.

[23] The amending legislation enacted over the following decade acknowledged increased land holdings of the Orphanage, made provision for financial endowment by other protestant benevolent organizations, revised and refined the provisions for election of trustees, created a salaried management position of secretary and then secretary-treasurer under the direction of the Board, and included provisions for public notice of the annual meeting.

[24] The 1962 **Act** changed the name of the body corporate to “Prince Edward

Island Protestant Children's Home."

[25] The 1977 **Act** recognized that it was no longer practical to continue to operate the Home, advised it was expedient to change the name and objects of the body corporate in order that it may provide for the education of Protestant children in need of financial support, and renamed the body corporate the "Prince Edward Island Protestant Children's Trust" with the objects of providing financial assistance for the education of Protestant children in accordance with and subject to such conditions as may be prescribed by the by-laws of the Trust.

### **Liability of the Crown**

[26] This **Reference** engages the question of when a government can be liable in negligence. As a preliminary matter, it should be mentioned that tort law, including the law of negligence, applies to the Government in the same way it would apply to any individual. Historically, at common law the Crown was immune from tort liability; but Crown immunity has been abrogated by statute. Today, the victim of a Crown tort has the right to sue for damages. Crown liability arises under recognized heads of private tort liability but only in that manner. There is no special public law of torts. The Crown is liable in tort to pay damages only if a plaintiff can establish facts that amount to a legal cause of action against the Crown. **See:** Hogg, Peter W. and Monahan, Patrick J.: **Liability of the Crown** 3<sup>rd</sup> Ed. (Carswell, 2000), at pp.25-26, and 135-142.

### **Two classes of relationship in Agreed Statement of Facts**

[27] The overall tenor of the Questions for consideration is whether the Government had some kind of duty in law to protect from harm the children who were resident in the Orphanage, either by virtue of them being children per se, or being residents in the Orphanage. The questions pose the existence of a "general" duty and also of conventional private law duties. Regarding those circumstances, I will express and explain my opinion that there is no "general" duty of care in tort law, and that in the context of conventional private law duties, the Government did not have a tort-law duty of care, duty of supervision, fiduciary duty, non-delegable duty, or potential vicarious liability for the alleged wrongful acts of other persons merely because the plaintiffs were children or because they were children who were residents of the Orphanage. Underlying this opinion is the absence of a requisite proximal relationship between the Government and the children as residents of the Orphanage to establish the basis for a private law duty of care.

[28] The presence of Fact Nos. 8 and 9 makes this opinion subject to two qualifications. Each of those Agreed Facts introduces an additional factor in the

relationship between the Government and the particular class of children therein described that is beyond the overall tenor of the Questions for consideration based on the Agreed Statement of Facts.

[29] Fact #9 raises one qualification. Regarding the 14 children who were placed in the guardianship of the Province through court order while resident in the Orphanage, the requisite relationship for the creation of a duty of care thereupon became present and remained for the period of time **during which** the Province's statutory delegate was the guardian of those children. In that situation, there was a direct relationship. Those children were wards of the Province, and the Government had a corresponding duty of care to those children.

[30] The content **or scope** of the duty of care would be ultimately determinable at trial upon consideration of the applicable statutory provisions and the evidence of the applicable relationship factors. In general terms, it would be analogous to the duty the British Columbia courts found to exist and the Supreme Court of Canada affirmed in *K.L.B. v. British Columbia*, [1998] B.C.J. No. 470 (QL) (BCSC); affirmed regarding duty of care in [2001] B.C.J. No. 584 (QL) (BCCA); affirmed in [2003] 2 S.C.R. 403 (SCC). In *K.L.B. supra*, the government duty of care was to children who were wards of the state and had been placed in foster homes, and the duty was found to have arisen under the child protection legislation, which required the Director to keep the children in a suitable place and in fulfillment of that duty to visit and inspect the institution, home or place where the children were placed.

[31] The Government duty of care toward children who were its wards is specific, and is to the children who were under its guardianship. The advent and existence of that duty did not create a "general" duty or a tort-law duty to all children, or all the children who were resident in the Orphanage, and it did not create an Orphanage-related duty regarding the administration, operation, or supervision of the operation of the Orphanage.

[32] Fact #8 raises the other qualification. Regarding the 10 children who were proposed by an employee of the Province for placement in the Orphanage and were accepted as residents, whether a duty of care would arise in those circumstances would depend on consideration of the law of negligent misstatement and the applicable facts as found at trial.

[33] Again, in any event such a duty would be only to the particular class of children covered by Fact #8, and the content or scope of such duty would not involve or create an Orphanage-related duty regarding the administration, operation, or supervision of the operation of the Orphanage.

[34] In the presence of two classes of relationship being presented for consideration, I will address the overall tenor of the Questions for consideration pertaining to operation of the Orphanage and all the children who were resident in the Orphanage first, and then I will comment further regarding Government private law duty of care to children who became its wards and circumstances which could invoke a duty of care toward children who the Government proposed for placement.

### **Questions 1 and 2: General duty of care**

#### Negligence

[35] In its broadest sense, a negligence action compensates persons who have suffered injury as a result of the unreasonable conduct of other persons. The law of negligence is restricted in terms of: (1) actors who are required to observe a duty of care; (2) victims who can claim compensation; (3) activities which can be regulated; and (4) losses which can be compensated. Negligence is a cause of action within the law of torts. A tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages. The law of torts determines which losses or injuries suffered by which individuals will be remedied, how, and to what extent. Tort law is principally judge-made law, and it has the ability to be flexible and fluid, to represent societal concerns and values as they change. Negligence as a type of law of wrongful conduct leading to liability has been part of the common law of torts for hundreds of years. The basis of contemporary negligence law is the English House of Lords judgment in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Negligence law does not compensate all injuries caused by wrongful conduct. It is a principal task of the law to discriminate between compensable and non-compensable losses. In a case where compensation is demanded, the first question is whether the law imposes upon the actor a duty of care so that the activity in question does not harm the complainant. See: Klar, Q.C., Lewis N.: *Tort Law*, 4<sup>th</sup> ed. (Thomson Canada Limited 2008) pp.157-162.

#### Duty of Care

[36] In considering whether there is a duty of care, the question is whether in a particular case the law will impose a duty upon the defendant to take reasonable care for the benefit of the plaintiff. This is considered to be a question of law. The existence of a duty of care is predicated upon two fundamental propositions. The first is that the plaintiff must be able to demonstrate that the defendant's conduct was negligent vis-a-vis the plaintiff, as tort law regulates conduct only for the benefit of selective victims of that conduct, not like in criminal cases for the general benefit of the state. The second proposition is that for reasons of policy, there are limitations on the kinds of actors, victims, activities, and injuries that can be dealt with in negligence

law; duty of care acts as a limitation device. See: **Klar, supra, at p.165.**

[37] While duty of care is the necessary first element for proving negligence, the existence of a duty of care does not by itself suggest or establish liability of a defendant. To prove liability, a plaintiff would also need to show a breach of the duty of care of a defendant by not acting reasonably; the breach being a proximate cause of the plaintiff's injury; and injury of the kind for which the defendant should be held liable. This **Reference** considers only the first element of duty of care.

[38] In his text, **The Law of Torts**, 9<sup>th</sup> Ed., Professor John G. Fleming encapsulates the legal notion of duty of care (at p.149):

Negligence does not entail liability unless the law exacts a 'duty' in the circumstances to observe care. 'Duty' may therefore be defined as an obligation, recognized by law, to avoid conduct fraught with unreasonable risk of danger to others.

[39] **Donoghue v. Stevenson** stated a general conception of the relations giving rise to a duty of care in what has become known as the "neighbour principle":

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[40] The relations upon which a duty of care will be found to exist is not frozen in time and changes to meet the needs of society. **Hedley Byrne v. Heller & Partners Ltd.**, [1963] 2 All E.R. 575 stated:

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the Courts' assessment of the demands of society for protection from the carelessness of others.

[41] The law recognizes the negligence action is only one mechanism of social control, and that tort law must frequently step aside so that other values, policies and objectives can be promoted. The English case **Anns v. Merton London Borough Council**, [1978] A.C. 728, made a significant contribution to the understanding of how a common law duty of care is established by taking into account not only the neighbour principle, but also policy considerations which might negate a duty of care. **Anns** attempted to formulate a general conception of the duty relationship that could be applied to all factual disputes:

Through the trilogy of cases in this House, *Donoghue v. Stevenson*, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* and *Home Office v. Dorset Yacht Co. Ltd.*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighborhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[42] Canadian negligence law adopted the *Anns* two-stage duty approach, and from there developed a Canadian tort law analysis. In a series of decisions following *Anns*, the Supreme Court of Canada developed the general principles that are applicable when determining whether a duty of care exists. The modern Canadian doctrine began with *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and runs through *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, *Holland v. Saskatchewan*, 2008 SCC 42; and *Design Services Ltd. v. Canada*, [2008] S.C.J. No. 22 (SCC). See: *Design Services Ltd. supra*, at para.25; and see *Paxton v. Ramji*, [2008] O.J. No. 3964 (Ont.C.A.), at para.29.

[43] The question is whether there is a private law duty of care owed by the defendant to the plaintiff. Answering this question involves application of the analytical framework developed by the Supreme Court of Canada for determining whether a duty of care arises. See: Feldman J.A. in *Paxton, supra*, at paras. 30-36; applying *Design Services Ltd., supra*, at paras.24-27, *Syl Apps, supra*, at paras. 25-33; and *Cooper, supra*, at paras. 27-34. The first question for determination is whether the proposed cause of action fits within an established category of relationship giving rise to a duty of care. Where it does, where the relationship between the plaintiff and the defendant is of a type that has already been judicially recognized as giving rise to a duty of care or is analogous to a recognized category, then a court may usually infer that sufficient proximity is present, and that if the risk of injury was foreseeable, a prima facie duty of care will arise. If however, the proposed duty of care is a novel one, not previously judicially recognized, then an *Anns* test must be performed to determine whether the alleged wrongdoer owes a duty of care to the plaintiff. An *Anns* test includes three components, which are considered in a two-stage process: (1)

reasonable foreseeability of harm; (2) proximity; (3) policy factors. The first stage determines whether there is a prima facie duty of care by analyzing reasonable foreseeability and whether there is a sufficiently close and direct relationship of proximity, including policy considerations that affect the relationship. The second stage considers whether, despite finding a prima facie duty of care, there are residual policy reasons to reject a duty of care.

[44] The basic proposition underlying “reasonable foreseeability” is that an actor must take reasonable care to avoid acts or omissions which the actor can reasonably foresee would likely injure his or her neighbour. The question is whether the person harmed was so closely and directly affected by one’s act, that the actor ought reasonably to have the injured person in contemplation as being so affected. There must also be a relationship of sufficient proximity between the actor and the injured person. The question here is whether despite the reasonable foreseeability of harm, it is unjust or unfair to hold the actor subject to a duty because of the absence of any relationship of proximity between the injured person and the actor. The factors to be considered in a proximity analysis are diverse and depend on the circumstances of the case. Defining the relationship may involve consideration of the expectation of the parties, representations, reliance, and the property or other interests involved; there is no definitive test. These are the kind of factors that allow evaluation of the closeness of the relationship between the actor and the injured person and to determine whether it is just and fair having regard to the relationship to impose a duty of care in law on the defendant (**Cooper, supra, at paras.33-35**).

[45] If a prima facie duty of care is found, then at the second stage of the **Anns** test, the court addresses whether there are residual policy considerations that militate against finding a duty of care. At this stage, the preliminary conclusion is submitted to an examination about whether there are any residual policy reasons would negate the duty of care.

[46] Policy considerations play a role in both stages. The difference is that at the first stage, regarding proximity, relevant questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant; while at the second stage, the policy stage, the considerations are more concerned with the legal system and society more generally.

#### Application of the test for duty of care

[47] The first question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The first inquiry at this stage is whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized (**Cooper, supra** at para.41).

Upon my review of the duty of care jurisprudence, the answer to this question is no. Indeed, there have been many cases where a duty of care not to harm children or to protect children from harm has been found to exist for particular actors, both individual and government. There have been cases where a duty of care on government has been found to have arisen from a statutory duty of a government actor, for instance where a child is the ward of the state. But there is no precedent where a general duty of care of government toward children per se or toward children who are resident in a care facility that is operated by a third party not under the supervision or control of a government has been found to exist.

[48] The next question then is whether this is a situation in which a new duty of care should be recognized. The first stage of the ***Anns*** test requires an examination of the relationship between the parties to determine if it meets the requirement of sufficient proximity. The question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care.

[49] It may appear arguable that the plaintiffs could show that it was reasonably foreseeable that the alleged negligence in failing to oversee the operation of or activities within the Orphanage might result in harm to the children who were resident there. I will return to this proposition later, near the end of the discussion of duty of care. However, mere foreseeability would not be enough to establish a prima facie duty of care. The plaintiffs would need to show proximity too (***Cooper supra***, at para.42.). They would need to show that some delegate within the provincial Government was in a close and direct relationship with the children making it just to impose on the Government a duty of care toward the children. In addition to showing foreseeability, the plaintiffs must be able to point to factors arising from the circumstances of the relationship that impose a duty.

[50] ***Cooper, supra*** dealt with the duty of a Registrar of Mortgage Brokers toward investors for losses they suffered following a misappropriation of funds by a registered mortgage broker. The investors asserted the Registrar had a duty of care toward them to act more effectively. In its analysis of proximity, the Supreme Court of Canada stated (at paras. 43-44) that the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar was appointed:

... That statute was the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

(Incidentally, the Supreme Court in ***Cooper*** held that the statute did not impose on the Registrar the particular duty of care that was in issue in that case.) The general legal principle applies in the present case.

[51] Following this direction in *Cooper, supra*, the factors giving rise to proximity in the present case, if they exist, would be expected to arise from statutory provisions under which the Province had responsibilities toward children per se or toward children who were residents at the Home in particular. However, I also wish to consider all submissions for the existence of any common law obligations that the Province may have had toward children.

[52] Upon reading the Agreed Statement of Facts, it is apparent that proximity is a major hurdle to be overcome by the plaintiffs.

[53] The plaintiffs submit that a number and variety of relationship factors contribute to satisfy proximity. They submit:

- (1) It is a basic proposition that those persons responsible for the welfare of Canadian children have always had a duty imposed on them and been held to a high standard. The Agreed Statement of Facts states the Government provided regular funding for the Orphanage; and has legislated mandates and oversight for foster children from the time of inception of the Orphanage. These interactions created a direct and proximate relationship between the Government and the children at the Orphanage such that they should be considered neighbours in law – in other words, that the Government had a common law duty of care to the children of the Home since its inception.
- (2) The nature and scope of duties in tort law constantly change to meet the needs of society. By way of analogy, in the 1950's there was judicial recognition that prison officials had a duty of care to prisoners and educators had a duty of care to the pupils to protect them from danger.
- (3) There was closer proximity in this case from 1958 to 1964 when the Government proposed children for placement in the Home or for children who were placed in the Orphanage and then in the guardianship of the Province. This additional factor in the relationship invoked more direct proximity between Government and the Orphanage, as supervision for one child essentially meant supervision for all children.
- (4) Upon the event of Dr. Beck's report it was clearly foreseeable that Government's conduct would expose children at the Home to harm of the sort which they allege in their action.

- (5) The duty of care existed pursuant to the legislative provisions regarding neglected and dependent children that was in existence in 1928, and ensuing legislation that created Government obligations to supervise inspections, and entitled children to protection from abuse and neglect.

[54] Upon application to the Agreed Statement of Facts of the legal principles involved in a duty of care analysis in accordance with the Supreme Court of Canada directions, it is my opinion that the Government did not owe a general duty of care to the children placed in the Orphanage by parents, family members, guardians or charities at 1928, and no such duty subsequently arose.

[55] Upon application of an **Anns** test, at stage one of the analysis it is clear that no prima facie duty of care arose. Regarding proximity, there was not a sufficient relationship between Government and the plaintiffs to form the basis of a legal duty of care by the Government to the children for the injuries which they allege, i.e. physical and sexual abuse, when they were residents of the Orphanage. This opinion is subject to the qualifications noted regarding Agreed Facts #8 and 9.

[56] There being no prima facie duty of care found, it is unnecessary to submit the analysis to a stage two examination about whether there are any residual policy considerations which make the imposition of a duty of care unwise.

[57] I will address each of the plaintiffs' submissions, and the various relationship factors or absence thereof.

1. No "general" duty of care

[58] The Government had no "general" duty of care toward children that created a private law duty of care to children who were in the situation of the plaintiffs in the present case.

[59] Apart from statute, there is no legal basis upon which to assert a general or overall duty of care in negligence to children in the Province. There is no legal authority or policy basis that supports the plaintiffs' contention that the Province assumed responsibility at common law, and then abdicated its responsibility, and such a contention is not borne out by the Agreed Statement of Facts. The Government did not owe a private law duty of care to children of the Province per se, or to children who were residents of the Orphanage merely because they were residents of the Orphanage instead of being residents of a Government-operated children's residence.

[60] Nor was any such broad based duty of care created by statute. I have

considered the relevant legislation from 1910 onward whereby the provincial Legislature dealt with social issues and in particular children in need of protection. I have also considered the private Acts from 1921 onward by which the Trust was created as a body corporate and the Orphanage was operated. The legislation created a role for Government regarding neglected children and duties for Government regarding foster children, but it did not create any role or duty for the Government to children placed in the Orphanage by parents, family members, guardians or charities or for Government involvement in the administration or operation of the Orphanage. The Orphanage was not a children's aid society or a place where children were placed under the legislation. The legislation did not stipulate a "general" tort-like duty of care toward all children per se or toward children who became residents at the Orphanage. The child protection legislation did not apply to the situation of children who were residents at the Orphanage.

2. No parens patriae-based duty of care

[61] The plaintiffs urge the Court to refer to the Province's *parens patriae* power as a foundation for a tort-law duty of care toward children of the Province in general and children who were resident of the Orphanage in particular. In my opinion, that submission is not supportable.

[62] The development and present status of *parens patriae* is canvassed in **Re Eve**, [1986] 2 S.C.R. 388. Originally, the power belonged to the King to have the care of those who were not able to take care of themselves, and was founded on the "*obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them.*" The power was not confined to children. The Crown had inherent jurisdiction to do "*what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.*" By the seventeenth century, the jurisdiction was transferred to the Lord Chancellor, and upon the creation of provincial superior courts in this country, to those courts, including Prince Edward Island: **Re Eve, supra** at paras.31-43 and 72. *Parens patriae* continues to exist as a jurisdiction of the superior courts, which can be exercised. It is considered to be distinct from wardship. It is my opinion that the Government of the Province has not had a *parens patriae* jurisdiction.

3. No statutory duty regarding the Orphanage

[63] There was no statutory obligation for the Government to be involved with the administration or operation of the Orphanage. The private Act pursuant to which the Orphanage operated did not stipulate any role for Government.

[64] The Orphanage was first established by the Orange Lodge in or about 1907. It was always operated by the Trustees, until it was closed in 1976. The plaintiffs' assertion of Government duty of care is essentially based on them being children and being residents at the Orphanage. In all the factual circumstances and the surrounding legislative environment, the relationship between the Government and the children as residents of the Orphanage was minimal, and clearly not a sufficient basis upon which to determine a private law duty of care.

[65] The plaintiffs became residents when as children they were placed in the Orphanage primarily by their parents, family members, guardians or charities. The Government had no authority or control over or involvement in the operation or administration of the Orphanage or the children who were resident there. The Orphanage was not a provincial Government operated institution. Had it been, then there would have been a materially different relationship constituting a sufficiently proximate relationship between the Government and the residents. However, the Province did not establish the Orphanage, and was not involved at any time in administration or day-to-day operation. Indeed, the Province had no statutory responsibility or authority to supervise or intervene in the operation of the Orphanage.

[66] When the Orphanage was incorporated by private act and constituted as a corporation in 1921, the use of private legislation to incorporate was a common practice as there was no general legislation regulating incorporations like there is today. The Orphanage was a legal entity whose affairs were managed by an executive elected by Trustees who were constituted under the provisions of incorporation of the Orphanage separate from Government.

4. No statutory duty arising from the child protection legislation

[67] During the material times, the Government had a statutory mandate including particular duties of oversight regarding children in need of protection and foster children. This is a factor for consideration when examining the existence of a proximate relationship in the present. On the basis of the Agreed Statement of Facts, this factor by itself did not create a proximal relationship between the Government and the residents of the Orphanage. The legislation treated foster homes and the Orphanage discretely as different kinds of services for different purposes. With foster care, the Government exercised the authority of the Province to take custody of children and place them in the care of another. On the other hand, the Orphanage was a privately-run institution where residents were privately placed, and not a foster home or a provider of foster care under the legislation. Indeed, specific legislative provisions stipulated that foster care legislation was not applicable to orphanages or

children's homes.

5. Provincial Grants

[68] The provision of provincial grants is a factor for consideration in examining the existence of a proximate relationship. The Government made grants to the Trustees to support their operations of the Orphanage. The Orphanage was funded primarily through charitable contributions from the people of Prince Edward Island. The Province did not directly fund the operation of the Orphanage. The provincial grants were given with no restrictions, and with no accountability requirements as to how the funds were to be spent. From 1928 to 1971, the provincial government grants provided between 10-18% of the Trustees' annual receipts. During the final operating years, from 1970 to 1976, the proportion increased to 20-31%. The funding is indicated to have been a charitable grant only, much the same in nature as any other charitable grant to other organizations by a government or from other organizations to the Orphanage. The Government grants did not provide for all or even a substantial portion of the funding required to operate the Orphanage on an annual basis and the grants did not confer upon or obligate Government regarding any control over the use of the funds. In the circumstances the Government grants are not a contributing factor toward a proximate relationship for general duty of care to the children who were resident at the Orphanage.

6. Dr. Beck's involvement

[69] The Agreed Statement of Facts does not form a basis to conclude that the involvement of Dr. Beck at the Orphanage was a material contributor to necessary proximity. He was involved at the Orphanage as a volunteer on his own initiative. His report was to the Board of Trustees of the Orphanage, not to the Province.

7. 1988 legislation not applicable

[70] The 1988 ***Child Protection Act*** was enacted after the Orphanage ceased operation, and is not relevant to the questions under consideration.

The Supreme Court of Canada trilogy in 2003

[71] I stated at the outset of this analysis that the existence of a Government duty of care in the circumstances of the Agreed Statement of Facts has not previously been judicially recognized. That said, the issue of Government duty of care to children whom the government has placed in the care of other persons has been considered quite extensively by the Supreme Court of Canada. It is helpful to refer to this jurisprudence regarding duties potentially owed by governments to children in

various circumstances. Guidance can be taken from the trilogy of cases decided in 2003: ***K.L.B. v. British Columbia***, [2003] 2 S.C.R. 403 (SCC); ***E.D.G. v. Hammer***, [2003] 2 S.C.R. 459 (QL); ***M.B. v. British Columbia***, [2003] 2 S.C.R. 477 (QL); and from the later case of ***Blackwater v. Plint***, [2005] 3 S.C.R. 3 (QL). The law was then further developed in a British Columbia case ***Aksidan v. Canada (Attorney General)***, [2008] B.C.J. No. 178 (BCCA) (QL) which is also a helpful reference.

[72] Those cases considered the question of whether and on what grounds a government can be held liable for tortious conduct of other actors. In the trilogy, the Supreme Court of Canada considered it desirable to develop the same legal doctrines that are now under consideration within this Reference – negligence, vicarious liability, fiduciary duty, and non-delegable duty – in a coordinated and systematic way (***K.L.B., supra***, at para.9).

[73] ***K.L.B., supra***, engaged a duty of care discussion. ***K.L.B., supra***, involved torts committed by foster parents against wards of British Columbia in the Government administered foster care system. The Supreme Court looked to the legislation which required the Superintendent of Child Welfare to make arrangements for the placement of children in foster homes “*as will best meet the needs of the child*” and affirmed the finding of the lower courts that the legislation imposed on the Province of British Columbia a duty of care to the children who were its wards. Based on the language of the statute applied to the circumstances of the wardship relationship, the Government duty of care was to place children in adequate foster homes and to supervise their stay. The applicable legislation, which was in existence in 1960, stipulated a duty on a children’s aid society to “*use special diligence in providing suitable foster homes for such children as are committed to its care.*” The lower courts considered that statutory standard to be declaratory of the standard generally applicable to the protection of children in care, in view of the vulnerability of children in care which invites a high standard of care by those charged with their welfare (***K.L.B., supra (BCCA), at paras. 8-11***). The Supreme Court addressed all the other mentioned legal doctrines as well.

[74] ***E.D.G. v. Hammer, supra***, dealt with the liability of a public school board for wrongful acts of sexual assault by a night janitor toward a Grade Three pupil. At the Supreme Court level, the case turned on the issues of fiduciary duty and non-delegable duty. The claim in negligence had been abandoned during trial, although it was noted it would not have succeeded because the evidence did not show a school board failure to adequately supervise its employees, to protect its students from assault, or to investigate the credentials or qualifications of persons involved with students.

[75] ***M.B. v. British Columbia, supra***, dealt with Government liability for sexually

inappropriate behavior by foster parents against a ward of the Province who was 13 years old. The trial judge found negligence on the part of the Government social workers, and then found that such negligence was not the cause of the abuse. At the Supreme Court of Canada, duty of care and negligence were not in issue. There the case turned on the issues of vicarious liability and non-delegable duty, and the Supreme Court determined that in the circumstances neither was a basis for government liability.

[76] ***Blackwater, supra***, involved allegations of wrongs committed by school employees against children at an Indian residential school operated by the Government of Canada and the United Church of Canada in British Columbia in the 1940s, 1950s and 1960s. Children were taken from their families and sent to the school. At the Supreme Court of Canada level, the issue of negligence including existence of a duty of care was under consideration. Duty of care was found based on sufficient proximity between Canada and the Church as operator of the school on the one hand and the plaintiffs on the other.

[77] The main question in negligence was the applicable standard of care to define the extent of the duty of care. The question was what the Government and the Church knew or ought to have known of the wrongful acts. This was to be judged by standards applicable at the time. In other words, the question was whether the risk of sexual assault of the children was reasonably foreseeable at the time. The Supreme Court upheld the trial judge's finding on the evidence that the harm was not foreseeable. There was no evidence that the possibility of sexual assault was brought to the attention of the people in charge of the school, reporting had not been clear, and sexual abuse was "*an almost unthinkable idea at the time.*" Former employees were unaware of systemic sexual abuse, the doctor who cared for the children never suspected it, and on the two occasions where it was discovered, the perpetrator was immediately fired. The Supreme Court also declined to find constructive knowledge of a foreseeable risk to the children was established, holding that given the standards of the time, it could not be contended that the Government and the Church ought to have known of the risks, even though by contemporary standards, the measures taken were clearly inadequate and the environment unsafe.

[78] While the claim against them in negligence was dismissed, the result in ***Blackwater, supra***, was that the Government and the Church were liable for the wrongful acts of their employee based on vicarious liability.

[79] In ***Askidian, supra***, duty of care in negligence was in issue. Students in an elementary day school were sexually assaulted by a teacher. The students were all male aboriginal persons. The school was operated by a board under British Columbia legislation. The claims against the Government of Canada arose out of the status and

duties of Canada under the **Indian Act**. The trial judge found that the risk a teacher would sexually assault a student was not reasonably foreseeable by Canada when responsibility for the school was delegated, and there was no evidence that any adult actually knew or suspected the risk existed at the material time period. The British Columbia Court of Appeal did not decide the appeal on the foreseeability issue, because it held the claimants' appeal failed because Canada having properly delegated all aspects of education to provincial authorities, there were no policy reasons why Canada should be implicated. The Court of Appeal rejected the plaintiffs' claim that Canada retained a residual duty of care for the safety and welfare of the children that had application in the circumstances of that case.

[80] Regarding the issue of duty of care in negligence, the case presented by the Agreed Statement of Facts differs from the trilogy cases. Subject to the mentioned qualifications, the children in the Orphanage were not wards of the Government. The Government did not operate the Orphanage, and had no authority or control over the residents, either by statutory duty or authority or any other source of obligation or arrangement. In order for the Government to owe a *prima facie* duty of care to the children resident in the Orphanage, it would have to have had a relationship sufficiently proximate to the children resident or exercised some control over the Orphanage or over the children who were resident there.

#### Reasonable foreseeability revisited

[81] Before discussing proximity, I mentioned that reasonable foreseeability may appear to be arguable. Upon considering the jurisprudence and the Agreed Statement of Facts, it becomes clear that this case does not fall within the boundaries of reasonable foreseeability. As mentioned, the basic proposition underlying "reasonable foreseeability" is that one must take reasonable care to avoid acts or omissions which he or she can reasonably foresee would likely injure his or her neighbour.

[82] Upon consideration of the Agreed Statement of Facts, there is nothing that suggests or upon which to base an inference that the Government was aware of the possibility of abuse or sexual abuse occurring within the Orphanage, or that such abuse would have been in the mind of Government or should be constructively attributed to Government in the circumstances. The extent of any such duty would be determinable by the standards of the time it was alleged the duty of care arose, not the standards applicable today. See: **K.L.B., supra**, at paras. 13-15.

[83] The common law generally prescribes no duty to third parties absent some element of reasonably foreseeable harm arising out of one's actions in relation to such third parties.

[84] There are no reported contemporaneous cases imposing liability for allegations relating to institutional abuse from the time period. Knowledge of institutional abuse has been a relatively new phenomena to Canadian society largely arising out of the various residential school cases that have been brought during the past twenty years.

Qualification: Government proposing children for placement

[85] This answer does not address whether the Province owed a duty of care to children in connection with or as a result of its employee having proposed children for placement in the Orphanage who were accepted as residents. In this Reference, the questions and Agreed Statement of Facts are focused on Government duties to children in regard to their residence in the Orphanage, and correspondingly on Government duty to supervise or oversee the operations of the Orphanage. Any potential liability of Government for or in connection with negligent placement of children is not before the Court.

[86] If any such duty of care is to be considered, it could be anticipated to arise under the category of negligent advice or under some responsibility for placement. Since *Hedley Byrne v. Heller*, [1964] A.C. 468 (H.L.), it has been clear that in some circumstances negligent misrepresentation can give rise to tortious liability. Foreseeable reliance has been found when advice is given or information is provided by government officials. There are now many cases in which the Crown or municipalities have been held liable for negligent misrepresentation. The most common cases concern enquiries made of municipalities regarding existence of zoning or other municipal restrictions on land when the appropriate official provides an incorrect, unqualified answer to a serious inquiry of this kind, the municipality will be liable to the person who suffers loss by reasonably relying on the accuracy of the information. Where the circumstances are such that reliance was not foreseeable or not reasonable, there is no liability. See: Hogg and Monahan: *Liability of the Crown*, *supra* at pp.184-5.

[87] The facts before the Court on this Reference regarding circumstances of placement mentioned in Fact #8 are not sufficiently developed to enable this Court to determine whether a duty of care within the purview of negligent misstatement should be imposed on Government. Matters of proximity and foreseeability cannot be determined at this stage.

[88] This qualification is limited. Should a basis for such duty of care be found to exist, any such duty would be to provide a reliable proposal, and would not extend to being a general duty or tort-like duty toward children in the Orphanage. It would not be an Orphanage-related duty regarding the administration, operation, or supervision

of the operation of the Orphanage. Placement of children was not the basis for creation of a general duty to children placed in the Orphanage by parents, family members, guardians, or charities as at 1928 or afterwards.

#### Qualification: Children in guardianship of the Province

[89] Fourteen of the children were placed in the guardianship of the Province through court order while still resident in the Orphanage. My opinion regarding Question number one in this Reference is qualified regarding Government duty of care to those particular children during the period they were wards of the Province. The Province had a duty of care toward those particular children during the period of time they were its wards.

[90] Following the theme of analysis in this opinion, the Government duty of care to its wards had a statutory source. Section 12 of the 1951 **Act** contained permissive language which stated that where a child has been delivered or surrendered to the Director by a judge or a parent, the Director had authority to select the foster home or shelter in which the child shall be placed, and had further authority to inspect and visit such foster home or shelter at his discretion. Section 14 of the 1961 Children's Protection **Act** contained mandatory language which stated that where a child has been temporarily committed to the care and custody of the Director, the Director shall keep such ward in a suitable place and shall exercise during such period all the rights of the legal guardian of such ward. Section 15 stated that where a child has been permanently committed to the care and custody of the Director, the Director shall be the legal guardian of such child until he has attained the age of 18 years, is adopted or until some other legal guardian is appointed, or until the guardianship is terminated by a judge. Section 3 required the Director to inspect or supervise the inspection of any place where a ward was placed.

[91] In application of a **Cooper** analysis, and following the principles stated in the trilogy cases, it can be seen that where there is Government wardship, the facts fit within an established category of relationship giving rise to a duty of care. This is a relationship between particular children and the Government that is of a type that has already been judicially recognized as giving rise to a duty of care or is analogous to a recognized category. On that basis a court will usually infer that sufficient proximity is present, and if the risk of injury was foreseeable, a *prima facie* duty of care will arise.

[92] The content or scope of the duty of care would be determinable by statutory interpretation applied to the facts of the case, and is colourable by previous case law. Reference to Fact #9 and ss. 3 and 14 of the 1961 **Act** suggests the duty of care would be to keep the ward in a suitable place and to exercise all rights of the legal guardian

of such ward, and to inspect or supervise the inspection of the place where a ward is placed. Guidance regarding the particular content of such duty could be taken from the court decisions in *K.L.B., supra*. There, the Supreme Court of Canada implicitly approved a standard of special diligence that the British Columbia Court of Appeal considered to be declaratory. McLachlin C.J.C. stated that in the case of those exercising a form of control over a child comparable to that of a parent, the law imposes a heightened degree of attentiveness. She employed the “*careful parent test*” which imposes the standard of a prudent parent solicitous for the welfare of his or her child, and she stated that is the test that governs the placement and supervision of children in a foster home under the British Columbia legislation. That test does not make the government a guarantor against all harm, but it holds it responsible for harm sustained by children in foster care, when, judged by the standards of the day, it was reasonably foreseeable that the government’s conduct would expose those children to harm of the sort that they sustained (*K.L.B., supra* (SCC), para.14).

[93] This qualification is limited. The Government duty of care as guardian to its ward is specific to the children who were its wards while they were its wards. That duty did not create a “*general*” duty or a tort-law duty to all children, or **to** all the children who were resident in the Orphanage, and it did not create an Orphanage-related duty regarding the administration, operation or inspection of the Orphanage.

#### Conclusion on general duty of care

[94] In my opinion, the Province did not owe a general duty of care to children placed in the Orphanage by parents, family members, guardians, or charities in 1928, and no such duty subsequently arose.

[95] This opinion is subject to the qualification regarding Government duty of care toward children who were wards of the Province, and the qualification regarding and potential duty of care toward children proposed by the Province’s employee for placement in the Orphanage.

#### **Questions 3 and 4: Duty to supervise**

[96] These questions ask whether the Province had any duty to supervise the operation of the Orphanage as at 1928, and whether any such duty subsequently arose. I consider the question of duty to supervise the operation of the Orphanage to be different than the question of general duty of care owed to the children placed in the Orphanage by parents, family members, guardians or charities, and accordingly to be assessable separately.

[97] There is nothing in the Agreed Statement of Facts, the surrounding statutory

regime, or the common law that imposed on the Government a duty to supervise the operation of the Orphanage.

[98] In my answers to Question Nos. 1 and 2, I stated my opinion that the Province did not owe a general duty of care to the children who were resident at the Orphanage. Accordingly, in my opinion no duty to supervise the operation of the Orphanage arose within the content or scope of a general duty of care or a tort-like duty of care in negligence. It is also my opinion that there is no other justiciable basis in the law of torts or otherwise at common law upon which to ground a duty on the Province to supervise the operation of the Orphanage.

[99] No duty to supervise the operation of the Orphanage arose by statute either. On the basis of the Agreed Statement of Facts, the Orphanage was not a Children's Aid Society. The Orphanage was operated by the Trustees; and the Government had no role in the administration, operation, or supervision of the operation of the Orphanage.

[100] Section 5(d) of 1940 Act stipulated a duty of the Government's Superintendent to direct and supervise visiting of a place where a child was placed pursuant to that legislation; and s.3(1)(c) of the 1961 **Act** stated the duties of the Government's Director included inspection of any place where a child was placed pursuant to that Act. Those provisions created duties. However, they did not state a duty to supervise the operation of the Orphanage. The statutory role of the Superintendent was to supervise visiting any place where a child is placed "*pursuant to the provisions of this Part.*" The Orphanage was not included in that category. It was not a children's aid society or a foster home. The statutory duty of the Director to inspect was ancillary to his duty to keep children who were wards of the Province in a suitable place and to exercise all the rights of legal guardian of such wards. It was not a duty to supervise the operation of the Orphanage.

[101] In my opinion, the Province did not have any duty to supervise the operation of the Orphanage as at 1928, and no such duty subsequently arose.

### **Question 5: Vicarious Liability**

[102] The doctrine of vicarious liability imposes liability on a person for tortious conduct of another on the theory that the person may properly be held responsible where the risks of his or her enterprise materialize and cause harm, provided that liability is both fair and useful. The applicable legal and policy considerations in Canadian law of vicarious liability were fully explored and settled by the Supreme Court of Canada in **Bazley v. Curry**, [1999] 2 S.C.R. 534. Applying the legal precedents and policy considerations as a statement of principle, McLachlin J. (as she

then was) wrote for the court (at para.37):

[37] Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[38] Where the risk is closely associated with the wrong that occurred, it seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of operation, including potential torts. ...

[103] In **Bazley, supra**, which was a stated case, vicarious liability was imposed on a non-profit foundation that was the operator of two residential care facilities for the treatment of emotionally troubled children for wrongful acts of its employee who was found to be a pedophile. Within the care facilities, foundation employees were to do everything a parent would do, from general supervision to intimate child care duties.

[104] Vicarious liability was in issue in the Supreme Court of Canada trilogy cases rendered in 2003. In **K.L.B., supra**, McLachlin C.J.C. reaffirmed the directions in **Bazley, supra**, and summarized that the plaintiff must prove two things:

- (a) that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close to make a claim for vicarious liability appropriate; and
- (b) that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise, (which was the issue in **Bazley, supra**).

[105] In **K.L.B., supra**, whether vicarious liability could be fairly imposed was determined by the first issue. The relationship between foster parent tortfeasors and the Government was found not to be sufficiently close to serve the policy goals of fair and effective compensation and deterrence of future harm. McLachlin C.J.C. observed that the relationship that most commonly attracts vicarious liability is that of employer/employee. That addresses the policy goals because when an employer

creates a risk and that risk materializes and causes injury, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. Assigning responsibility to an employer for an employee's tort will also have a deterrent effect, because employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. By contrast, imposing liability in the context of an employer/independent contractor situation will not generally satisfy those two policy goals. Compensation will not be fair where the organization fixed with responsibility for the tort is too remote from the tortfeasor for the tortfeasor to be acting on its behalf. The tort can then not be regarded as a materialization of the organization's own risks. As well, vicarious liability will have no deterrent effect where the tortfeasor is too independent for the organization to be able to take any measures to prevent such conduct. Hence, the relationship of employer and independent contractor does not generally give rise to vicarious liability. In considering whether the tortfeasor is an employee or independent contractor, the inquiry must be a functional one involving a search for the total relationship of the parties. See: ***K.L.B., supra***, at paras. 19-21.

[106] The Province was not involved in the administration of the Orphanage. It was not an employer. It had no involvement in or control over the operations of the Orphanage. The Trustees were the operator, and they were not acting as agent for or on account of the Government. The Agreed Statement of Facts state that the Province did not employ any person engaged by the Orphanage to care for the residents. There is no basis to infer even an independent contractor relationship between the Province and any such person engaged by the Orphanage. There are no contact factors upon which a relationship could be founded between the Province and staff of the Orphanage upon which to base vicarious liability.

[107] The submission for vicarious liability fails on the requirement that the relationship be sufficiently close to make a claim for vicarious liability appropriate. Imposing vicarious liability in the face of such independence would be unfair and would serve no useful purpose (***K.L.B., supra***, at para.26). A relationship of government and foster parent would be much closer in terms of relevant contacts than the minimal relationship between the Government and the Orphanage in the present case, yet in ***K.L.B., supra***, vicarious liability was not imposed on government for the tortious conduct of foster parents.

[108] Upon applying the legal principles and the policy objectives of vicarious liability to the Agreed Statement of Facts, in my opinion there was no legislation or common law that made the Province vicariously liable for the acts or omissions of the Trustees, volunteers, or staff of the Orphanage as at 1928, and a scenario for vicarious liability did not subsequently arise.

### Questions 6 and 7: Fiduciary Duty

[109] A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests. See: **K.L.B., supra**, at para.49; **Blackwater, supra**, at para.57.

[110] In order for a fiduciary duty to be imposed, a fiduciary relationship must first be found to exist. The essence of a fiduciary relationship is that one party exercises power on behalf of another person and pledges to act in the best interests of the other person. See: **K.L.B., supra**, at para.48.

[111] In my opinion, the Province did not owe a fiduciary duty to the residents of the Orphanage by virtue of the children being residents of the Orphanage as at 1928. With reference to the Agreed Statement of Facts, as at 1928 the Province did not have a fiduciary relationship with the residents of the Orphanage, by virtue only of them being children, by virtue of them being residents in the Orphanage, or both.

[112] There was no fiduciary relationship between the Province and children as a result only of the children being residents of the Province. The relationship between them needs to be more direct (**K.L.B., supra** at para.39; **Blackwater, supra** at para.57).

[113] The residency of the children in the Orphanage did not provide the basis for a fiduciary relationship between the Province and the children. The Province did not have power or authority over the Orphanage or over its residents by virtue of them being residents there. There was no relationship of trust established between the Province and the residents. The relevant legislation for the Province's delegate did not permit or authorize the Province's delegate to have responsibility for or authority over a child who was resident in the Orphanage unless or until such time as custody of the child had been surrendered to or vested in the Province by a parent or guardian or pursuant to child protection legislation.

[114] The Board of Trustees had the power and authority over the Orphanage and over the residents of the Orphanage. The existence of a fiduciary relationship and the content of an associated parental fiduciary duty between the Trust and the children is not in issue in this Reference. The presence, full authority, and duties of the Trust regarding the operation of the Orphanage and supervision of the children left no room for a fiduciary relationship between the Government and the children who were residents there.

[115] The plaintiffs' submission in support of a fiduciary duty is not based on the Agreed Statement of Facts and is not sustainable. The factual scenarios in the

Supreme Court of Canada trilogy do not assist the plaintiffs. In all of those cases, the relationship between the Government and children was one of foster care and wardship. In the present case, the Orphanage was not a foster home, the children were not in foster care, and the children were not wards of the Province.

[116] The plaintiffs also submit that the Trustees who ran the Orphanage operated under the direction and financing from the Government, the Trust stood in *loco parentis* to the children, and so it follows that the Government owed a fiduciary duty to the children in the Orphanage. However, that hypothesis does not take into account material Agreed Facts which stipulate that the Province was not involved in the administration of the Orphanage, and the Province did not directly fund the operation of the Orphanage. There is no basis of support for an inference that the Government directed or had the authority to direct, the operation of the Orphanage; indeed, the Agreed Statement of Facts support the opposite conclusion.

[117] It is notable as well that in ***K.L.B., supra*** the Supreme Court of Canada found the government's fiduciary duty did not include a broad and unspecified duty to act in the best interests of children. Rather, the duty is narrow and specific within the relationship to the issues of trust, loyalty, and promotion of other interests. It is a duty to avoid certain harmful actions that constitute a betrayal of trust and loyalty. The duty is to act in such a manner as to not abuse the trust of the child. Breach of fiduciary duty requires fault. If any such duty arose, it could be expected to be limited in nature and scope, as advised the analysis in ***K.L.B., supra***, at paras. 42-49.

[118] Overall, there is nothing in either common law or statute upon which to base a finding that the Province had a fiduciary duty to the residents of the Orphanage as at 1928.

[119] No fiduciary duty arose subsequent to 1928. There was no change in the nature of the relationship between the Province and the residents of the Orphanage subsequent to 1928 that would establish a fiduciary relationship. The Trustees continued to have and exercise full power and authority of administration and operation of the Orphanage and over the residents of the there. No amendments to the child protection legislation after 1928 conferred on the Province any power or authority over the children who were residents of the Orphanage. No amendment to the Act of incorporation of the Orphanage after 1928 conferred upon the Province any such power or authority. The Province did not have any legal basis upon which to assume power or authority over the residents by virtue only of them being residents of the Orphanage. As such, the Province could not have developed a fiduciary relationship with the residents.

### Qualification of opinion regarding fiduciary duty

[120] This answer does not address whether a fiduciary relationship came into being between the Province and particular children in connection with or as a result of it having proposed children for placement in the Orphanage as mentioned in Agreed Fact #8 or by particular children having been placed in the guardianship of the Province as mentioned in Agreed Fact #9. The content and consequences of those relationships of advice and wardship are not before the Court. This Reference asks whether the Province owed a fiduciary duty to the residents of the Orphanage by virtue of them being residents.

[121] Quite clearly, wardship forms a basis for a fiduciary relationship and it is expected that a guardian owes a fiduciary duty to its wards (*M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6). *K.L.B. supra*, adopted these principles, and discussed the associated rationale of government power to direct and supervise the placement of children and the acute vulnerability of children in need of protection. Any such fiduciary relationship and duty would arise in the manner and have its content determined as directed in the trilogy cases, particularly *K.L.B., supra*, at paras.38-49. Any such fiduciary relationship would arise by virtue of the Government's power of wardship over the child and related power to direct and supervise a placement. The content of the duty would be determinable by reference to the circumstances of the relationship.

[122] That is separate from the question in this Reference. Regarding that question, any such fiduciary duty does not arise by virtue of the children being residents in the Orphanage and does not create a fiduciary duty by the Government to the residents of the Orphanage as such.

### Question 8 Non-delegable duty

[123] The theory of the doctrine of non-delegable duty is that *"where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services"* (*K.L.B., supra*, at para.30 adopting the statement of Denning L.J. in *Cassidy v. Minister of Health*, [1951] 2 K.B. 343 (C.A.), at p.363). In general, a non-delegable duty arises when one is under a duty to use care and cannot obviate his duty by delegating the performance of it to another. In other words, the person with the duty must perform the duty himself, and it is not sufficient answer to say that it was delegated to someone else.

[124] The first question surrounding the issue of non-delegable duty is whether there

is a statutory basis. Consistent with the direction of the Supreme Court trilogy, in the present case any potential duty on the Province regarding the care given to the former residents of the Orphanage by the Trustees, volunteers and staff of the Orphanage as at 1928 and subsequently would be statutory and therefore, must be grounded in the language of the statute (*K.L.B., supra*, at paras.34-36; *Blackwater, supra*, at paras.47-48).

[125] Having reviewed the relevant statutory provisions, in my opinion there is no provision that forms the basis for an inference that the Province had a non-delegable duty in relation to the care given to the former residents of the Orphanage by the Trustees, volunteers and staff.

[126] There is no provision in the relevant legislation or in the private act of incorporation of the Orphanage that suggests that the Province was responsible for the care of the residents, for directing the care of the residents, or for ensuring that no harm came to the residents of the in the course of the provision of care by the Trustees, volunteers or staff of the Orphanage.

[127] Absent specific provisions in relation to the Province having any responsibility for the day-to-day operation of the Orphanage or care of the residents, there is no basis upon which to impose a non-delegable duty on the Province.

[128] The plaintiffs' submit there was a non-delegable duty on the Province's delegate, the Superintendent of Neglected and Dependent Children, by virtue of his duty to encourage and assist the establishment of children's aid societies for providing refuge for neglected and dependent children. However, the Orphanage was not a children's aid society, the children who were resident in the Orphanage were not foster children or wards of the Province, and the legislation created no duty or role for the Province in the operation of the Orphanage or care of the children who were resident there.

[129] The child protection legislation may have created non-delegable duties, which are not before the court on this Reference. Section 14 of the 1961 **Act** is a provision that creates a duty on a delegate of the Province, the Director, toward wards of the Province. The duty is to keep such wards in a suitable place and to exercise the rights of legal guardian. In *K.L.B., supra* (at paras.32-36) such duties associated with guardianship were viewed as non-delegable. However, upon reference to the legislation that was the source of the duty, the Supreme Court qualified that the duties were different at different stages of the placement process, and found there was no basis for imposing a non-delegable duty to ensure that no harm comes to the children while in foster care through the abuse or negligence of foster parents, because foster parents, not the Government, were responsible for the day-to-day care and ensuring

no harm came to the children in the course of care. Determination of the presence and parameters of non-delegable duty was found to be a matter of statutory interpretation. In *K.L.B., supra*, the Supreme Court concluded that the proponents of liability were not assisted by the doctrine of non-delegable duty. Similarly, in the present case there is no statutory non-delegable duty that relates to the care of residents in the Orphanage.

[130] The 1961 *Children's Protection Act* stipulated a duty to inspect the institution or a place where a child was placed pursuant to the provisions of the *Act*. The residents of the Orphanage generally were not placed pursuant to the provisions of the *Act*.

**Question 9 Duty to a resident(s) when a parent was also a resident and/or employee in the Orphanage/Home**

[131] I have found that the Government did not have a general duty of care, duty of supervision, fiduciary duty, or non-delegable duty to the residents of the Orphanage, and was not vicariously liable for the acts of others. This final question asks whether in those circumstances the Province owed any duty to the residents of the Orphanage who were resident during a time when a parent was also a resident and/or employee of the Orphanage.

[132] The plaintiff did not develop this submission.

[133] There appears to be no basis for this submission. A parent who was also a resident and/or employee of the Orphanage during the time the parent's child was in the Orphanage would have continued to be the legal parent of the child. As such, that parent would have continued to be in the position of legal authority and control over the child, and the duty to the child would rest with the parent.

[134] In my opinion, the Province did not owe any duty to the residents of the Orphanage who were resident there during the time when their parent was also a resident and/or an employee of the Orphanage, by virtue of such child being a resident of the Orphanage.

**ANSWERS**

[135] In accordance with the foregoing reasons, I certify in my opinion in respect of the questions referred by the Lieutenant Governor in Council to the Appeal Division (now the Prince Edward Island Court of Appeal) as follows:

**Questions 1 and 2 No general duty of care**

[136] The Province did not owe a general duty of care to children placed in the Orphanage by parents, family members, guardians or charities as at 1928, and no such duty subsequently arose.

[137] This answer does not address whether the Province owed a duty of care to children in connection with, or as a result of, its proposal for placement of children in the Orphanage, as mentioned in Agreed Fact #8. That question was not before this Court on the Reference.

[138] This answer is subject to the qualification that upon children who were resident in the Orphanage becoming its wards, the Province owed a duty of care as guardian to those children during the period of wardship. That Government duty of care was specific to those children who were its wards; it was not a general or tort-law duty of care to all children, or all children who were resident in the Orphanage; and it did not create a duty regarding the administration, operation, or supervision of the operation of the Orphanage.

**Questions 3 and 4 No duty to supervise the operation of the Orphanage**

[139] The Province did not have any duty to supervise the operation of the Orphanage as at 1928, and no such duty subsequently arose.

**Question 5 No vicarious liability**

[140] There was no legislation or common law that made the Province vicariously liable for the acts or omissions of the Trustees, volunteers or staff of the Orphanage as at 1928, and no such duty subsequently arose.

**Question 6 and 7 No fiduciary duty**

[141] The Province did not owe a fiduciary duty to the residents of the Orphanage by virtue of their being residents of the Orphanage as at 1928, and no such duty subsequently arose.

[142] This answer is subject to the qualification that the Province would have had a fiduciary relationship with and fiduciary duty as guardian to children who were its wards during the period of wardship.

**Question 8 No non-delegable duty**

[143] The Province did not have a non-delegable duty with respect to the care given to the residents of the Orphanage by the Trustees, volunteers and staff of the Orphanage as at 1928, and no such duty subsequently arose.

**Question 9 No duty to a resident(s) when a parent was also a resident and/or employee of the Orphanage**

[144] None of the above duties being found to have existed, the Province did not owe any such duty to the residents of the Orphanage who were resident during a time when a parent was also a resident and/or employee of the Orphanage.

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Chief Justice David H. Jenkins

I AGREE: \_\_\_\_\_  
Justice J.A. McQuaid

I AGREE: \_\_\_\_\_  
Justice M.M. Murphy