TAB 3

SUPREME COURT OF CANADA

CITATION: Reference re Broome *v.* Prince Edward Island, 2010 SCC 11, [2010] 1 S.C.R. 360

DATE: 20100401
DOCKET: 33051

IN THE MATTER OF A Reference from the Lieutenant Governor in Council pursuant to s. 18(1) of the *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, regarding Broome, et al. v. Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust

Hardy Broome, et al.
Appellants
v.
Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust
Respondents
- and -
Susan M. Marshall and Blair E. Ross
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 69) — Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

IN THE MATTER OF a Reference from the Lieutenant Governor in Council pursuant to s. 18(1) of the *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, regarding Broome et al. v. Government of Prince Edward Island and Prince Edward Island Protestant Children's Trust

Hardy Broome et al. *Appellants*

v.

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and

Susan M. Marshall and Blair E. Ross *Interveners*

Indexed as: Reference re Broome *v.* Prince Edward Island

2010 SCC 11

File No.: 33051.

2009: November 10; 2010: April 1.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Torts — Negligence — Duty of care — Relationship between Province and children residing in a privately operated children's home — Children allegedly physically and sexually abused while residing in home between 1928 and 1976 — Whether Province owed duty of care to children by virtue of common law, its statutory authority and responsibility or doctrine of parens patriae — Whether there was sufficient proximity between Province and children living in home to give rise to prima facie duty of care.

Torts — Duty of care — Non-delegable statutory duty — Children allegedly physically and sexually abused while residing in a privately operated children's home between 1928 and 1976 — Whether Province under statutory duty to care for residents of homes.

Torts — Vicarious liability — Fiduciary duty — Children allegedly physically and sexually abused while residing in a privately operated children's home between 1928 and 1976 — Whether sufficient control exercised over home by Province through legislative authority and statutory duties to establish vicarious liability of Province for alleged acts of physical and sexual abuse — Whether direct placement of some children in home by Province provides foundation

for Province's vicarious liability — Other than Crown wards, whether Province owed fiduciary duty to residents by virtue of their being either children or residents of children's home.

In an action against the Prince Edward Island Protestant Children's Trust ("Trust") and the Government of Prince Edward Island ("Province"), the plaintiffs alleged physical or sexual abuse as children while they resided in a privately owned and managed children's home ("Home") between 1928 and 1976. Children were taken to the Home for care; some had been orphaned while others could not be cared for by their parents. The Home was closed in 1976 and its remaining assets were vested in the Trust. Both the Province and the Trust deny liability. As a result of the action, the Lieutenant Governor in Council brought a reference to the Prince Edward Island Court of Appeal based upon an Agreed Statement of Facts asking the court for its opinion about whether the Province had certain duties toward children who had allegedly been abused while residing in the Home. In particular, the reference posed 21 questions asking whether the Province (1) owed a general duty of care to the children; (2) had a non-delegable duty in respect of the care given to the residents of the Home; (3) was vicariously liable for the acts or omissions of the Board of Trustees who were entrusted to operate the Home, or the volunteers or staff at the Home; or (4) owed a fiduciary duty to the residents of the Home. The Court of Appeal advised that the Province owed no such duties, subject to certain qualifications regarding: children who were placed in the guardianship of the Province; and those children who had been proposed for placement in the Home by a provincial employee in respect of whom the court declined to give an opinion.

Held: The appeal should be dismissed.

The reference questions were correctly answered by the Court of Appeal. Subject to the same qualifications stated by the Court of Appeal, the Province owed no duties towards the children residing in the Home. At all relevant times, the legislative scheme maintained two separate streams of child welfare, one private and one public. In order for a privately run children's home to have been considered part of the public stream, either the governing body must have consented to the application of the relevant terms of the legislation or approval must have been granted by the Lieutenant Governor in Council. Given that there is no evidence in the record that the Board of Trustees consented to the application of the relevant legislation to the Home or that approval was either sought or given, the Province had no statutory duties or obligations with respect to the operation, management or supervision of the Home which would give rise to a duty of care. Similarly, the legislation incorporating the Home in 1921 did not impose duties or obligations on the Province. As well, the fact that the Province indirectly funded the operation of the Home cannot support the existence of sufficient proximity between the Province and the children to give rise to a duty of care. The grants were given to the Home with no restrictions and with no accountability requirements; their use was solely at the discretion of the Board of Trustees. Finally, the power of courts to make orders in the best interests of a child under the *parens patriae* doctrine does not support the existence of a private law duty of care on the part of the Province towards children in the care of third parties, and no authority was presented for the proposition that the doctrine imposes a positive duty on the Crown to seek out and address cases of potential child abuse. As found by the Court of Appeal, no duty of care in negligence arose. The facts, considered in light of the applicable legislation, do not support the existence of sufficient proximity between the Province and the residents of the

Home, pursuant to the two-stage test used to determine whether a novel duty of care should be recognized.

With respect to the claim that the Province owed a non-delegable duty of care to the residents of the Home, the plaintiffs failed to show that the Province was subject to a statutory duty to use care in the first place. Subject to the qualification given by the Court of Appeal, the Home was not a child welfare agency under the legislation, the children were not foster children or wards of the Province, and the legislation created no role for the Province in the operation of the Home, for the care of the residents, for directing their care, or for ensuring that no harm came to them in the course of their care by the representatives of the Home.

The Court of Appeal also correctly rejected the contention that the Province was vicariously liable for the alleged acts of physical and sexual abuse by the Home's employees. Neither legislative authority nor the placement of children by the Province directly in the Home alone provides a foundation for the Province's vicarious liability. A sufficiently close connection between the Home and the Province has not been established.

Finally, the authority and duties of the Board of Trustees with respect to the operation of the Home and the supervision of the children left no room for a fiduciary relationship between the Province and the children. Other than children who were in provincial guardianship, there were no changes in the relationship between the Province and the residents of the Home, either as a result of a change in factual circumstances or legislative amendments, that would have given rise to a fiduciary relationship.

The limited record put forward in this case, namely a very brief statement of facts and a compendium of legislation, impeded the Court of Appeal in making definitive pronouncements on the issues raised in the reference. The utility of the reference procedure may be called into question where the factual basis for the reference is quite limited.

Cases Cited

Distinguished: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3; *Bazley v. Curry*, [1999] 2 S.C.R. 534; **referred to:** *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Carmarthenshire County Council v. Lewis*, [1955] 1 All E.R. 565; *Ellis v. Home Office*, [1953] 2 All E.R. 149; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *King v. Low*, [1985] 1 S.C.R. 87; *Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

Statutes and Regulations Cited

Act to Incorporate The Prince Edward Island Protestant Orphanage, S.P.E.I. 1921, c. 27.

Children's Act, S.P.E.I. 1940, c. 12, Part II [rep. & sub. 1950, c. 6, s. 22], ss. 7, 15, 107.

Children's Protection Act, R.S.P.E.I. 1951, c. 24 [rep. & sub. 1961, c. 3, s. 29].

Children's Protection Act, 1961, S.P.E.I. 1961, c. 3, ss. 1(d), (n), 3(2), 4 to 7, 14, 15, 25.

Children's Protection Act of Prince Edward Island, S.P.E.I. 1910, c. 15, ss. 2(b), 3, 5, 13.

Deserted Wives' and Children's Maintenance Act, S.P.E.I. 1932, c. 7.

Indian Act, S.C. 1951, c. 29.

Supreme Court Act, R.S.P.E.I. 1988, c. S-10 [rep. 2008, c. 20, s. 73], s. 18.

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Klar, Lewis N. *Tort Law*, 4th ed. Toronto: Thomson Carswell, 2008.

Strayer, Barry L. *The Canadian Constitution and the Courts*, 3rd ed. Toronto: Butterworths, 1988.

APPEAL from a judgment of the Prince Edward Island Court of Appeal (Jenkins C.J.P.E.I. and McQuaid and Murphy JJ.A.), 2009 PECA 1, 282 Nfld. & P.E.I.R. 61, 868 A.P.R. 61, 304 D.L.R. (4th) 384, [2009] P.E.I.J. No. 3 (QL), 2009 CarswellPEI 3, in the matter of a reference concerning issues of whether the Province had various duties towards children

allegedly sexually and physically abused while residing in a privately owned children's home. Appeal dismissed.

Clinton G. Docken, Q.C., *Reynold A. J. Robertson, Q.C.*, and *Mark Freeman*, for the appellants.

Denise N. Doiron, for the respondent the Government of Prince Edward Island.

Mark R. Frederick and *David W. Hooley, Q.C.*, for the respondent the Prince Edward Island Protestant Children's Trust.

Written submissions only by the intervener Susan M. Marshall.

No one appeared for the intervener Blair E. Ross.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal arises from a reference by the Lieutenant Governor in Council to the Prince Edward Island Supreme Court, Appeal Division (now the Court of Appeal). The reference asked the court for its opinion about whether the provincial government, in the period

between 1928 and 1976, had certain duties toward children who had allegedly been physically and sexually abused while residing in a privately operated children's home. The court opined that, subject to certain qualifications, there were no such duties and the appellants now contest that conclusion (2009 PECA 1, 282 Nfld. & P.E.I.R. 61). The Court of Appeal, in my respectful view, made no error and the appellants' appeal ought to be dismissed.

II. Overview of the Facts and Proceedings

[2] The appellants are plaintiffs in an action in the Supreme Court of Prince Edward Island. This proceeding was brought against the Prince Edward Island Protestant Children's Trust and the Government of Prince Edward Island (the "Province"). The appellants allege that they were physically or sexually abused as children while residing in the privately owned and managed Mount Herbert Orphanage, the legal name for which was the Prince Edward Island Protestant Orphanage or, from 1962, the Prince Edward Island Protestant Children's Home ("Home"). Children were taken to the Home for care; some had been orphaned while others could not be cared for by their parents. The Home was closed in 1976 and its remaining assets were vested in the Prince Edward Island Protestant Children's Trust. Both the Province and the Trust deny liability.

[3] Central to the appellants' claims against the Province is that it had either a direct or indirect role in the Home's operation, management and supervision and that this gave rise to various duties to its residents. The Province and the Trust take the position that the Home was privately operated and that the Province had neither a role in, nor any authority with respect to its

operation, management or supervision.

[4] In an attempt to clarify the role and responsibilities of the Province in relation to the Home and its residents, the Lieutenant Governor in Council referred 21 questions to the Prince Edward Island Court of Appeal. This reference procedure, at the relevant time provided for by the *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 18, permitted the executive branch to seek an advisory opinion from the appellate court of the Province (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 8-16). The relevant parts of the section provided:

> **18.** (1) The Lieutenant Governor in Council may refer any question to the Appeal Division for hearing and consideration.
>
> (2) The Appeal Division shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons therefor, and any judge who differs from the opinion may in like manner certify his opinion and reasons.
>
> . . .
>
> (7) The opinion of the court upon a question is deemed a judgment of the court, and an appeal shall lie therefrom as from a judgment in an action.

[5] The reference asked the Court of Appeal for its opinion as to whether the relevant legislation and other factors gave rise to various duties and responsibilities on the part of the Province in relation to the residents of the Home. In brief, the Court of Appeal was asked whether the Province: owed a general duty of care to the children placed in the Home; had any statutory duty to supervise the operation of the Home; was vicariously liable for the acts or omissions of the Board of Trustees, who were entrusted to operate the Home, or the volunteers or

staff at the Home; owed a fiduciary duty to the residents of the Home; or had a non-delegable duty in respect of the care given to the residents of the Home. This proceeding did not address directly the rights of or the harm inflicted on the alleged victims, or the Province's liability for the alleged abuse; it simply sought the opinion of the Court of Appeal concerning the Province's duties, if any, to the children resident in the Home at the relevant times, based on the Agreed Statement of Facts and the legislation. The complete text of the 21 questions and the statement of agreed facts referred to the Court of Appeal are set out in an appendix to my reasons.

[6] I underline the point that the factual basis for the reference is quite limited. The record consists of a very brief statement of facts and a compendium of legislation. In light of this limitation, the opinion of the court is and must be understood to be based on the record provided to the court: B. L. Strayer, *The Canadian Constitution and the Courts* (3rd ed. 1988), at pp. 331-32. Moreover, the court has discretion to give qualified answers to, or to decline to answer, the reference questions if the record does not permit a definitive response: *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 10; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806; and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 26-30.

[7] The very limited factual basis for the reference impedes the Court in making definitive pronouncements about the issues raised to the point of putting the utility of the reference process in question. The Court of Appeal appropriately found that it had to limit the scope of its answers. It thus added two important qualifications to its general conclusion that

the duties for which the appellants contend did not arise. The reference relates to the situation of the plaintiffs who, as noted, were residents of the Home between 1928 and 1976 and who were taken there primarily by their parents, family members, guardians or charities (Agreed Fact #6). The Court of Appeal found it necessary, however, to make distinctions among this group and these distinctions led the court to add the two qualifications to which I have just referred (paras. 85-93).

[8] First, 14 of the plaintiffs were placed in the guardianship of the Province between 1956 and 1964 while still resident in the Home (Agreed Fact #9). The Court of Appeal concluded that the Province owed a duty of care to those specific children for the period of the wardship (paras. 29-31, 89-93, and 138). The Province also owed these 14 children a fiduciary duty as wards during the period of the wardship (paras. 120-22 and 142). Second, between 1958 and 1962, 10 of the 14 plaintiffs just described were proposed for placement in the Home by a provincial employee, before they were accepted as residents (Agreed Fact #8). The Court of Appeal ultimately declined to give an opinion concerning a duty to these children. It reasoned the potential liability of the Province in connection with negligent placement of children was not before the court, as the reference questions and the Agreed Statement of Facts focussed on the duties of the Province to children as residents of the Home, rather than because of their placement by the Province in the Home (paras. 33, 85 and 137).

[9] These qualifications were not challenged in this appeal and what follows is subject to them.

III. Analysis

[10]The appellants contend that, contrary to the Court of Appeal's conclusion, the child welfare legislation in force at the time, along with other factors, support the existence of various duties or liabilities owed to them by the Province. Their position may best be considered by answering four questions:

1. Did the Province owe a duty of care by virtue of the common law, its statutory authority and responsibility, or the doctrine of *parens patriae*?

2. Did the Province owe a non-delegable duty?

3. Was the Province vicariously liable for the acts or omissions of the Trustees, staff, or volunteers, working in the Home?

4. Did the Province owe a fiduciary duty to the residents of the Home?

[11]I will address these questions in turn.

A. *Duty of Care in Negligence*

(1) The Appellants' Position and the Relevant Legal Principles

[12] As the Court of Appeal correctly noted, the appellants must establish either the duty of care for which they contend has been settled by existing authority, or that their case meets a two-stage test which is used to determine if a new duty of care should be recognized. Although the appellants maintain that their situation is analogous to cases in which a duty of care has been found, they do not contend, nor in my view could they, that their case is sufficiently similar to other decided cases so that it could be said that the existence of a duty of care to them is settled by authority. Thus, I agree with the Court of Appeal that their claim is based on a novel duty of care and must be assessed according to the two-stage test used to determine whether such duties should be recognized.

[13] That two-stage test was first enunciated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), and later accepted and endorsed by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2. Since then, the *Anns/Kamloops* test has been applied by the Court in many cases including *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, and *Design Services Ltd. v. Canada*, 2008 SCC

22, [2008] 1 S.C.R. 737. This test is the appropriate one even though the appellants mainly rely on statutory duties. Such duties do not generally, in and of themselves, give rise to private law duties of care. The *Anns/Kamloops* test determines whether public as well as private actors owe a private law duty of care to individuals enabling them to sue the public actors in a civil suit: see, e.g., *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 16; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 22.

[14] The first step under the *Anns/Kamloops* test is to ask whether the relationship between the appellants and the respondents discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care. If it does, the analysis moves to the second step which is concerned with whether there are residual policy considerations, transcending the relationship between the parties, that negate the existence of such a duty.

[15] The appellants submit that the Province had a duty of care to the children in the Home because its relationship to them was a type of paternalistic relationship of supervision and control analogous to that between a parent and child. They separate their submissions into distinct arguments about a duty of care arising at common law, by statute or by virtue of the *parens patriae* doctrine. However, in my view, all of these submissions must be considered in relation to the critical question of whether there was sufficient foreseeability of harm and sufficient proximity between the Province and the children living in the Home to give rise to a *prima facie* duty of care. Although the Court of Appeal found that the harm was not foreseeable, in my view the limited facts before the Court make it difficult to come to a decision

about the issue of foreseeability. For example, we have no facts about what the Province knew or might reasonably be taken to have known at the time the alleged harm occurred. Accordingly, in my view, it is better to focus the analysis on whether there was sufficient proximity between the Province and the children in the Home.

[16] The question of whether there is sufficient proximity is concerned with whether the relationship between the plaintiff and defendant is sufficiently close and direct to give rise to a legal duty of care, considering such factors as physical closeness, expectations, representations, reliance and the property or other interests involved: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paras. 23-24 and 29.

[17] While the appellants rely heavily on the relevant statutory provisions, they also point to a number of other considerations which they say establish the necessary proximity between them and the Province. These factors include that the Province provided funding to the Home; that there was a *parens patriae* duty owed by the Province to the children in the Home; and that there were children in the Home whom the Province had proposed for placement there or for whom it had guardianship while they were residing there. Citing *Carmarthenshire County Council v. Lewis*, [1955] 1 All E.R. 565 (H.L.), and *Ellis v. Home Office*, [1953] 2 All E.R. 149 (C.A.), they say that their relationship to the Province is similar to the relationship between teachers and students, or prison officials and prisoners, both categories of cases in which a duty of care has been recognized. The parties place no reliance on any possible distinction between

nonfeasance and misfeasance in their submissions on proximity.

[18] Before moving on to the relevant legislation, I note that in the Court of Appeal, the appellants relied on the fact of the regular presence in the Home of Dr. Beck, a psychiatrist in the employ of the provincial Department of Health, between 1964 and 1967. According to the Agreed Statement of Facts, Dr. Beck became involved with the Home on his own initiative as a volunteer and reported to the Board of Trustees, not the Province. Although he is said to have authored a report which he provided to the Board, containing recommendations regarding the future role and operation of the Home, there is no further information in the record about its contents (Agreed Fact #5). The Court of Appeal concluded that, on these facts, Dr. Beck's involvement did not materially contribute to the appellants' attempt to establish proximity between the Province and the residents of the Home. In this Court, the appellants have not pursued any arguments relying on the facts relating to Dr. Beck. I will therefore say nothing further about them other than that I see no reason to doubt the correctness of the Court of Appeal's approach to this issue.

[19] I will now turn to the relevant legislation.

(2) The Legislation

[20] Whether sufficient proximity exists here turns mainly on the role of the Province in relation to the Home. This, in turn, is primarily a question of statutory

interpretation although, as mentioned, the appellants rely on other factors as well in support of the existence of a duty of care on the part of the Province. The relevant legislation consists of the child welfare laws of the Province during the period and the statutes relating to the incorporation and operation of the Home. I will deal with these two types of legislation in turn.

(a) *The Child Welfare Legislation*

[21]During the period in issue, Prince Edward Island's child welfare legislation effectively created a two-stream system of child welfare. One stream was essentially a private one. This private stream consisted of orphanages and children's homes, like the one in issue here, which were operated by benevolent organizations. While some of these organizations received funding from the Province, on the face of the legislation they operated independently. As we shall see, contrary to the position advanced by the appellants and Ms. Marshall, who had intervener status before the Court of Appeal and made written submission in this Court, the legislation enacted by the Province during this period did not create any general duty of care towards children residing in the Home. The other stream was a public one, consisting of Children's Aid Societies (or Child Welfare Agencies, as they were later called) which were approved by the Province under statute and were subject to statutory standards and obligations in relation to child welfare.

[22]Until 1961, the statutes do not support the appellants' contention that the Province had any role in the operation, management or supervision of the Home. A more

difficult question is whether this changed with the significant amendments made in 1961. However, for reasons I will set out below, my view is that these amendments did not fundamentally change the structure of the provincial child welfare scheme. It continued to consist of two streams, a public one and a private one, with the Home being part of the latter.

[23] My detailed review of this legislation follows.

(i) Legislation to 1961

[24] I will consider here two pieces of legislation: the child welfare legislation enacted in 1910 and in 1940. Both of these Acts were amended on a number of occasions. However, these amendments were not placed before the Court on the reference and no submissions have been directed to them. I will therefore not address the various amendments in my reasons other than in passing.

1. *The 1910 Act*

[25] The time period covered by the reference begins in 1928. At that time, the child welfare legislation in effect was *The Children's Protection Act of Prince Edward Island*, S.P.E.I. 1910, c. 15. It provided for the appointment by the Lieutenant Governor in Council of the Superintendent of Neglected and Dependent Children, who was responsible for assisting in the establishment of Children's Aid Societies (organizations whose object was the care and protection of children), and in visiting institutions where

children were placed pursuant to the legislation. The 1910 Act provided for the creation and supervision of temporary homes or shelters for neglected children, and made provisions for the apprehension of neglected children, the selection of foster homes (by Children's Aid Societies), the surrender of children by parents, and wardship.

[26] Contrary to the appellants' submissions, the 1910 Act did not impose obligations on the Superintendent in respect of privately run institutions such as the Home. While the appellants are correct to point out that the Superintendent had statutory obligations in relation to establishing and advising Children's Aid Societies (s. 3), there is no evidence that the Home was a Children's Aid Society. Put another way, the Home was a privately run orphan or children's home, not a provincially approved child welfare provider (i.e. a society approved by the Lieutenant Governor in Council for the purposes of the 1910 Act, s. 2(b)). Similarly, while the Superintendent had a statutory duty to direct and supervise the visiting of a place where a neglected or dependent child had been placed, this statutory duty only applied to children placed *pursuant to the provisions of the Act* (s. 3(d)). This included places in the public stream: temporary homes and shelters provided for under the Act by the municipal government (s. 5), Children's Aid Societies, and foster homes. It did not include institutions such as the Home which were operated by third parties. The 1910 Act applied to such institutions only when the governing body agreed to become part of the public stream. There is no evidence that the Home did so. So, for example, an orphan or children's home could be used as a temporary home or shelter under the Act, but only with the consent of the governing body of the orphan or children's home (s. 5(2)). The consent of the governing body of an orphan or children's home

(operating as a temporary home or shelter under the 1910 Act) was further required for a Children's Aid Society to supervise and manage the children there (s. 5(3)). However, as noted, there is nothing in the record to show that the Home ever did so.

[27] The appellants contend that the 1910 Act conferred on the Superintendent a right of inspection and that this provision in effect created a duty to inspect the Home (s. 13). However, as pointed out earlier in the discussion of s. 3(d), this right of inspection only applied to places where a child was committed for care *under the provisions of the Act*. There is no evidence in the record that any of the appellants were so committed.

[28] In short, the legislative scheme maintained two separate streams of child welfare, one private and one public. The Province only had roles and duties in relation to an institution in the private stream, such as the Home, if its governing body consented to the involvement of the Province. I conclude, as did the Court of Appeal, that on the record before the Court, the 1910 Act did not impose on the Province any statutory duties in relation to children residing in the Home. The statute thus does not support the existence of any proximity between those children and the Province by virtue of their residence in the Home at that time.

2. *The 1940 Act*

[29] The 1940 Act, entitled *The Children's Act*, S.P.E.I. 1940, c. 12, repealed and replaced the 1910 Act, as well as the previous legislation dealing with financial

support for deserted wives and children (*The Deserted Wives' and Children's Maintenance Act*, S.P.E.I. 1932, c. 7). The 1940 Act, Part II, maintained the distinction between privately and publicly streamed institutions and the corresponding role of the provincial government (through the Superintendent, or as the office was later called, the Director of Child Welfare) as it existed in the 1910 Act. Nothing in the 1940 Act imposed any new duties on the Superintendent in respect of privately run orphan or children's homes such as the Home. As in the earlier legislation, the Superintendent's right of inspection of places where children were being cared for was only engaged when such children were placed there under the terms of the Act (s. 15). The 1940 Act also maintained the public/private streams that existed in the 1910 Act through the inclusion of provisions that required the consent of the governing body of private institutions, before the duties of the Superintendent would be engaged in relation to children in private care. Once again, an orphan or children's home could be used as a temporary home or shelter for neglected children, but only when the governing body of the orphan or children's home consented to such an arrangement (ss. 7(2) and 7(3)).

[30]I agree with the Court of Appeal that the 1940 Act "did not create any role for the Superintendent in the management, operation, or supervision of privately operated children's homes or orphanages" (para. 15). Throughout the time when the 1910 and 1940 Acts were in force, there were in effect two streams of child welfare in the Province. Given that the Home was operated by a private organization (and not a publicly regulated one), and there is no evidence in the record that the Trustees consented to the application of the relevant terms of the Act to the Home, the Superintendent had no statutory duties or

obligations with respect to the operation, management or supervision of the Home.

[31]The continuing relevance of what I have referred to as the private stream of child welfare is particularly clear in Part VI of the 1940 Act, headed "Adoption by Deed". Binding transfers of guardianship were contemplated to be made by agreements in writing. There is specific provision in s. 107 for the assignment of guardianship of orphans and others to charitable institutions, refuges or homes, and that when this was done, the committee or managers of such institutions were deemed to be the legal guardians of the children. The significant point is that this process called for no involvement on the part of the courts, Children's Aid Societies or the Superintendent.

[32]As in the case of the 1910 Act, the 1940 legislation did not give any statutory duties to the Superintendent/Director in relation to children residing in the Home.

[33]In 1950, Part II of the Act was substantially amended and renamed *The Children's Protection Act*, S.P.E.I. 1950, c. 6, and later published in the Revised Statutes of 1951 (c. 24). These amendments were not part of the record on the reference and they were not included or mentioned in the materials and arguments put before this Court. The Court of Appeal adverted to the amendments and concluded that: "The scheme of the Act does not appear to extend . . . 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" (para. 18). In the absence of submissions to the contrary, I see no reason to doubt this conclusion.

(ii) The 1961 Act

[34]In 1961, *The Children's Protection Act* was repealed and replaced by *The Children's Protection Act, 1961*, S.P.E.I. 1961, c. 3. By this time, the Superintendent was known as the "Director of Child Welfare" and Children's Aid Societies were known as "Child Welfare Agencies".

[35]The appellants contend that the 1961 Act imposed a duty on the Director to inspect the Home. They go on to argue that this duty of inspection supports a finding of sufficient proximity between the Province and the children resident in the Home. However, my view is that the two premises of this submission are faulty. On a correct reading of the 1961 Act, it did not extend the scope of the Director's duties in relation to privately run institutions such as the Home and even if it did, the bare duty to inspect is not a sufficient basis for a finding of proximity. As the Court of Appeal observed, the 1961 Act did not give the Director either responsibility or authority in relation to the operations of privately run institutions such as the Home. The 1961 Act was substantially amended in 1972. The appellants placed the 1972 amendments before the Court, but made no submissions with respect to them. I see no reason, therefore, to doubt the conclusion of the Court of Appeal that the 1972 amendments do not affect the matters in issue.

[36]As previously mentioned, the appellants submit that the 1961 Act imposed

a duty on the Director to inspect the Home. The respondents disagree. The key provision is s. 3(2)(c), which sets out that the Director shall

> 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;

[37] The appellants read this provision as applying to the Home, since it was an "institution established for the care and protection of children". The respondents, however, read it as excluding the Home, since it was not an "institution established for the care and protection of children . . . pursuant to the provisions of this Act". What separates the parties is the question of whether the limiting language at the end of s. 3(2)(c) — "pursuant to the provisions of this Act"— applies to *both* an institution established for the care and protection of children and a place where a child is placed, or whether it only applies to the latter.

[38] The text of the paragraph, read in isolation, supports both interpretations. In addition, the definition of "place of safety" in s. 1(n) refers to "an institution established for the care and protection of children" without the qualifying words found in s. 3(2)(c). However, it is not sufficient to read the paragraph in isolation. Rather, it must be read in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002

SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking that approach, I agree that the respondents' reading of the provision is the correct one. The 1961 Act does not evidence any legislative intention to dismantle or significantly change the two-stream approach to child welfare — with a private and public component — that had been in place before its enactment. If the appellants' reading of the provision were accepted, it would lead to a significant departure from this basic structure of the child welfare system, and the 1961 Act as a whole does not support any legislative intention to do so.

[39]The duties of the Director of Child Welfare are set out in s. 3(2) of the 1961 Act. As with the previous Acts, the Director had a statutory duty to assist in the establishment and continued advising of Child Welfare Agencies, which were again defined as organizations approved by the Lieutenant Governor in Council (s. 1(d)), and were thus public or quasi-public in nature. The 1961 Act also sets out the parameters under which a child welfare agency could be established (ss. 4 to 7). While the Lieutenant Governor in Council had the authority to grant or revoke an order approving a Child Welfare Agency, he had no such authority in relation to privately run institutions which provided care for neglected children. As in previous versions of the Act, the Director had duties toward children committed to his care. Those duties applied to a child who was a ward of the state, for whom the Director was guardian (ss. 14 and 15), or who the Director placed in a foster home (s. 25). Nothing in the 1961 Act provided that privately run institutions which were previously outside the scope of the Director's authority were now being included within that scope.

[40]Even if the statute ought to be interpreted so that there was a duty to inspect the Home, on the record before me, the statute gives no direction as to the purpose or scope of such inspections, imposes no standards to be applied and requires no action to be taken as a result of an inspection. No authority is cited for the proposition that such a bare duty of inspection would be sufficient to support a finding of proximity between the Director and the children.

[41]The appellants make an additional argument in relation to the relevant statutes. They say that it is a reasonable inference from the agreed facts that the Home was a Children's Aid Society approved by the Lieutenant Governor in Council pursuant to statutory authority. This inference arises, say the appellants, from the fact that the Province was providing funding and, from 1958, placing children in the Home. I cannot agree. The Home could only have been a Children's Aid Society or agency if approval had been granted by the Lieutenant Governor in Council. There is nothing in the record provided on the reference to show that this approval was either sought or given.

[42]I conclude, as did the Court of Appeal, and subject to the same qualifications which I will elaborate on more fully below, that the 1961 legislation did not impose any duties on the Director in relation to the residents of the Home.

(b) *Act of Incorporation*

[43]The Home was incorporated in 1921, by a private act of the Legislature:

An Act to Incorporate The Prince Edward Island Protestant Orphanage, S.P.E.I. 1921, c. 27. As the Court of Appeal pointed out, the Act was amended on a number of occasions over the years (paras. 21-25). This legislation did not impose duties or obligations on the Province. As the Court of Appeal aptly observed, "There was no provision for any Government involvement in the business or property of the Orphanage" (para. 22). The Act provided for the establishment of a Board of Trustees, the appointment of Trustees and an executive committee, and set out that the active management of the Home would be the responsibility of the executive. The executive was also responsible for employing, hiring and firing agents and servants for the Home. Amendments to the Act from 1921 to 1977 did not alter the fact that the Home was privately managed and run, distinct from public facilities for neglected children. In short, this legislation does not at all assist the appellants in establishing proximity between the Province and themselves as residents of the Home.

[44] While it is clear that the statutory framework on its own does not demonstrate the degree of proximity required for recognizing a duty of care, I now turn to the other factors relevant to this analysis.

(3) Funding

[45] The appellants also rely on the financial relationship between the Home and the Province as a basis for finding proximity. The Province indirectly funded the operation of the Home in the form of grants between 1928 and 1976. Between 1928 and

1967, these grants represented anywhere between 8 and 18 percent of the operating receipts of the Home in a given year. These amounts increased to between 16 and 31 percent after 1968 as a result of arrangements between the Province and the federal government under the Canada Assistance Plan (Agreed Facts #11-12). However, the important point for the purpose of this appeal is that these grants were given to the Home with no restrictions and no accountability requirements; their use was solely at the discretion of the Board of Trustees (Agreed Fact #13). With respect, such a financial arrangement cannot support the existence of sufficient proximity between the Province and the children.

(4) Children in Provincial Guardianship or Proposed for Placement by the Province

[46] The appellants argue that the duty of care to all residents of the Home was expanded after 1958 when the Province began to place children directly in the Home, since, they contend, the supervision of one child essentially meant the supervision of all. This submission relates to the qualifications articulated by the Court of Appeal. The Court of Appeal chose not to address the duty of care issue in relation to the proposal by provincial employees that certain children be placed in the Home. The court reasoned that a potential duty in relation to allegedly negligent placement decisions was not properly before the court on the reference (para. 137). The Court of Appeal also was clear that duties did arise in relation to children who were resident in the Home when they became wards of the Province; the Province owed a duty of care as guardian to those children for the period of the wardship (para. 138). As I understand it, the appellants argue that

sufficient proximity between the Province and all children residing in the Home has been established because there were certain children in the Home whom the Province had proposed for placement there, or over whom it had guardianship while they were residing there. In other words, they contend that if the Province had a duty of care to one child resident in the Home there would be a duty to all who were resident at the same time, as it would be artificial to suggest that the Province could have a duty of care to one child but not to the child in the next bed or the next room.

[47]Respectfully, this does not necessarily follow for two reasons. First, the fact of legal guardianship matters in considering whether a duty of care exists. Parents, for example, owe duties to their own children but not necessarily to other children who may be near them. Second, even if, for the sake of the argument, one were to accept the appellants' point that a duty to one would give rise to a duty to all, the limited factual record here would not support the application of that principle to the other appellants. There is nothing in the record to show that any of the other appellants resided in the Home at the time that the 14 appellants who were in the guardianship of the Province were residing there. Similarly, the record is lacking with respect to 10 of the 14 children just mentioned who were initially proposed for placement in the Home by the Province. There is nothing in the record to show whether their placement occurred at the time any of the other appellants, who were not wards of the Province, resided there. In my view, the Court of Appeal made no error in refusing to find a duty of care on this record.

(5) Duty Based on *Parens Patriae*

[48] The appellants briefly submitted in their factum that the Province had a duty to them arising from the doctrine of *parens patriae*. Whether there exists a free-standing duty of *parens patriae*, owed by the Province to all vulnerable children, is not a question presented by this reference. Rather, the relevant reference questions focus on whether the Province owed a duty of care to the appellants, by virtue of their being residents in the Home. I therefore agree with the Court of Appeal's approach which was to consider the appellants' *parens patriae* submissions as part of their attempt to show sufficient proximity apart from the statutory framework.

[49] The *parens patriae* doctrine means different things in different contexts. Historically, it referred to a broad and virtually undefined authority of the Crown over the property and person of children and the mentally incompetent. These powers of the Crown came to be exercised by the courts so that it is now recognized that the superior courts have certain powers to step into the shoes of the parent and make orders in the best interests of the child: *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388. It has also sometimes been said that the Attorney General's standing to act in the public interest, such as in pursuing civil claims in public nuisance, is attributable to the Crown's role as *parens patriae*: *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 67. Although it is unclear from the appellants' brief submissions, it seems that they rely on the doctrine in the former sense, that is on the power of courts to make orders in the best interests of a child.

[50]This does not in my view support the existence of a private law duty of care on the part of the Province towards children in the care of third parties. The *parens patriae* power of the courts, as I understand it, is conceived of as a protective jurisdiction which confers the power to act. It is commonly exercised by a superior court on a case-by-case basis as a matter of judicial discretion; it is not generally thought of as a power of the executive branch of government. While it is sometimes spoken of as a duty on the part of the Crown (as, for example, in *King v. Low*, [1985] 1 S.C.R. 87, at p. 94, and *Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62, at p. 107), no authority has been presented for the proposition that the *parens patriae* doctrine imposes a positive duty to seek out and address cases of potential child abuse.

[51]The appellants have not shown that the *parens patriae* doctrine contributes in any way to the existence of proximity between the children in the Home and the Province.

(6) Conclusion Concerning Duty of Care in Negligence

[52]In my view, the facts set out in the Agreed Statement of Facts, considered in light of the applicable legislation, do not, excepting the qualifications stated by the Court of Appeal, support the existence of sufficient proximity between the Province and the residents of the Home between 1928 and 1976. I therefore agree with the Court of Appeal that no duty of care in negligence arose.

B. *Non-Delegable Duty*

[53] The appellants submit that the Court of Appeal should have found that the Province owed a non-delegable duty of care to the residents of the Home. I disagree.

[54] As Professor Klar states in his text *Tort Law* (4th ed. 2008), at p. 663, "[t]he essential feature of a non-delegable duty is that responsibility for its execution always rests on the person upon whom the duty is imposed. Although it may be delegated to another, the breach, no matter how committed, by the delegatee, will be treated as a breach by the delegator." See also *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at paras. 30-32. A non-delegable duty may have its source in statute, as the appellants here allege. For example, in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, the Court found that the relevant legislation imposed a non-delegable duty on the Ministry of Transportation and Highways to ensure that maintenance work on the highways was performed with reasonable care.

[55] The appellants make two principal submissions, but in my view neither can succeed. These arguments are simply restatements in a different form of the submissions already considered in my review of the legislation.

[56] First, the appellants submit that from 1910 to 1961, the legislation described above imposed a non-delegable duty on the Superintendent to instruct Children's Aid Societies as to the manner in which their duties were to be performed,

which included advising the Societies of their statutory obligation to provide places of temporary refuge for a period not exceeding three months (1910 Act, ss. 3 and 5). The Superintendent, the appellants submit, breached this duty by permitting children to be kept in the Home for a period exceeding three months. The short answer to this submission, however, is the one given by the Court of Appeal (and subject to the same qualification): the Home was not a Children's Aid Society, the children were not foster children or wards of the Province, and the legislation created no role for the Province in the operation of the Home or for the care of the residents (para. 128).

[57] The appellants also submit that another non-delegable duty arose under s. 3 of the 1961 Act mandating the Director to inspect or direct and supervise the inspection of the Home. However, this submission fails for the reasons set out earlier. The Court of Appeal noted that, properly interpreted, the relevant statutory provisions do not make the Province responsible for the care of the residents, for directing their care, or for ensuring that no harm came to them in the course of their care by the representatives of the Home (para. 126).

[58] In short, while the appellants argue that if the Province was under a duty to use care then it could not divest itself of that responsibility by delegating its performance to the Home's Board of Trustees, the appellants have failed to show that the Province was subject to a duty to use care in the first place.

[59] I note, however, that the Court of Appeal correctly left open the question

of whether the legislation may have created other non-delegable duties, although this issue was not properly before the court on the reference (para. 129).

C. *Vicarious Liability*

[60]In addition to their submissions concerning the Province's direct liability, the appellants advance submissions that the Province is vicariously liable for the alleged acts of physical and sexual abuse that occurred in the Home between 1928 and 1976. Vicarious liability is based not on any personal wrongdoing by the party held responsible, but on the tortious conduct of someone else: Klar, at p. 645. Vicarious liability is generally appropriate where there is a significant connection between the party who creates or contributes to a risk and the wrong that flows from it: *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 41. The person or organization creating the risk should bear the loss: *Bazley*, at para. 31.

[61]The appellants' submissions here largely recycle their position with respect to a duty of care in negligence. They submit that the Province exercised sufficient control over the Home through legislative authority and statutory duties to establish the requisite connection. The Court of Appeal was correct to reject these contentions.

[62]Legislative authority is of course not enough to impose vicarious liability. If it were, a province would be vicariously liable for every act committed in a field within its legislative authority. Such a proposition cannot withstand serious scrutiny. As for the

appellants' submissions regarding the Province's statutory duties in relation to the children residing in the Home, they must be rejected for the reasons set out earlier. In short, there were no such duties.

[63] The appellants also submit that the control by the Province over the Home's employees was strengthened after 1958 when the Province began placing children directly in the Home. This, however, does not provide a foundation for the Province's vicarious liability. Placing children in the Home did not confer on the Province any control over the Home's employees. As the Court of Appeal put it, in my view correctly, at para. 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.

[64] The appellants rely on *Bazley* and *K.L.B.*, but in my view those authorities

are not on point. In *Bazley*, the Court determined that a not-for-profit organization should be held vicariously liable for the wrongful acts of one of its employees who was found to be a pedophile, since the care facility in which the abuse occurred was operated by the organization and was also responsible for employing and authorizing its employees to do everything a parent would do. The provincial government had no such role in relation to the employees of the Home. In *K.L.B.*, the relationship between foster parent tortfeasors and the provincial government was found not to be sufficiently close to impose liability, given the independence of foster parents from the Province in providing family care. In discussing *K.L.B.*, the Court of Appeal observed that even the relationship in issue there was "much closer in terms of relevant contacts than the minimal relationship between the Government and the Orphanage in the present case" (para. 107). To succeed in establishing vicarious liability, the appellants have to show a close connection between the Home and the Province. The appellants have failed to show such a connection.

[65]I conclude that the Court of Appeal was correct in finding that the agreed facts and legislative record did not support a finding of vicarious liability of the Province for the acts of the Home's employees.

D. *Fiduciary Duty*

[66]Subject to the qualification discussed above in relation to wards of the Province, the Court of Appeal concluded that the Province did not owe a fiduciary duty to the residents of the Home by virtue of them being children, or by virtue of them being

residents of the children's home (paras. 111 and 119). The appellants say that the Court of Appeal erred in this respect. The appellants emphasize the vulnerability of children in the care of others, and liken the circumstances of this case to those in which a fiduciary duty was found or assumed to be owed to children by parties with power over them in particular circumstances: *K.L.B.*; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3.

[67]I agree with the Court of Appeal that the authority and duties of the Board of Trustees with respect to the operation of the Home and the supervision of the children "left no room for a fiduciary relationship between the Government and the children who were residents there" (para. 114). Even taking into account the financial support of the Province, there is no evidentiary basis to support an inference that the Province directed or had the authority to direct the operation of the Home (para. 116). The cases relied on by the appellants are distinguishable on their facts. In *M. (K.)*, the fiduciary duty recognized by the Court was one owed by parents to children in their care. In *K.L.B.*, the fiduciary relationship between the provincial government and the children arose in the context of foster care: the Superintendent of Child Welfare was the legal guardian of the children. In *Blackwater*, where the Court assumed but did not decide there was a fiduciary duty, the federal government had a central role in running the residential school in which the abuse had taken place, and the children were taken from their families and placed there pursuant to a federal statute, the *Indian Act*, S.C. 1951, c. 29. There are no similar indicia of a fiduciary duty in this case.

[68] Finally, I agree with the Court of Appeal that there were no changes in the relationship between the Province and the residents of the Home between 1928 and 1976, either as a result of a change in factual circumstances or legislative amendments, that would have given rise to a fiduciary relationship (para. 119). This conclusion is subject to the qualification set out by the Court of Appeal at para. 142 of its opinion in relation to children who were in provincial guardianship.

IV. Disposition

[69] In my view, the Court of Appeal correctly answered all of the questions put to it. I would dismiss the appeal and answer the questions posed by the reference as did the Court of Appeal. I would make no order as to costs.

APPENDIX

(1) 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] [in] 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 P.E.I. 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.

(2) Reference Questions

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?

Appeal dismissed.

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