Federal Court Cour fédérale

Date: 20130524

Docket: T-1542-12

Citation: 2013 FC 546

Ottawa, Ontario, May 24, 2013

PRESENT: The Honourable Mr. Justice Harrington

PROPOSED CLASS PROCEEDING

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSON

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] The plaintiffs have filed suit in this Court against Her Majesty in Right of Canada for damages allegedly suffered as a result of children being forced to attend the Kamloops and Sechelt Indian Residential Schools as day pupils. Her Majesty has moved to have the action stayed as she intends to claim indemnity from the religious orders involved in their operation. Section 50.1 of the *Federal Courts Act* requires this Court to stay a principal action "where the Crown desires to institute a counter-claim or third party proceedings in respect of which the Federal Court lacks jurisdiction."

THE DECISION

[2] I have come to the conclusion that this Court has jurisdiction over the Crown's proposed third party proceedings and therefore shall dismiss the motion.

THE ACTION

[3] The plaintiffs, personally and on behalf of others, propose a class action comprising three classes: the "survivor class", the "descendant class" and the "Band class".

[4] In broad terms, the action is based on alleged breach of aboriginal rights, breach of the constitutional rights of Aboriginal peoples, and breach of the fiduciary duties owed to them by Her Majesty arising from the requirement that survivor class members attend Indian Residential

Schools. This is said to have intentionally inflicted mental distress and to have caused cultural, linguistic and social damage and irreparable harm.

[5] The basis of the third party claim against the religious orders is that they had some day-to-day responsibility in the operation of the Indian Residential Schools, including the selection, hiring, supervision, discipline and dismissal of staff, religious and moral teaching, guidance and discipline. Her Majesty seeks contribution or indemnity from them and specifically invokes the *Negligence Act* of British Columbia with respect to their vicarious liability for the acts and omissions of their retainees.

[6] Under the *Federal Courts Rules*, a proposed class action is immediately put under case management. I was appointed case manager, along with Prothonotary Lafrenière. At the first case management conference, the Attorney General, on behalf of Her Majesty, who has yet to file a Statement of Defence, informed the Court of his intention to seek indemnity against the religious orders involved in the administration of the two schools, but in his opinion he could not do so in this Court on the grounds that it lacks jurisdiction. Hence, the invocation of s. 50.1 of the *Federal Courts Act*. The Federal Court and the provincial superior courts now have concurrent jurisdiction over actions against Her Majesty. The choice of forum normally rests with the plaintiff. However, the effect of s. 50.1 is, for all intents and purposes, to deprive the plaintiffs of their choice and to require them to pursue Her Majesty in the forum she selects, which in this case would be the Supreme Court of British Columbia.

[7] A timetable was worked out leading to a hearing in Vancouver. The proposed third parties were put on notice. With respect to the Kamloops IRS, they are:

a. the Order of the Oblates of Mary Immaculate in the Province of British Columbia;

b. the Archbishop of the Roman Catholic Archdiocese of Vancouver;

c. the Bishop of the Roman Catholic Diocese of Kamloops; and

d. the Sisters of Saint Ann.

With respect to the Schlelt IRS, they are:

a. the said Oblates;

b. the said Archbishop; and

c. the Sisters of the Instruction of the Child Jesus.

They all filed written submissions and fully participated in the proceedings.

[8] The plaintiffs responded to the stay motion by submitting that this Court indeed has jurisdiction over the proposed third parties. Therefore, no stay should be granted. Furthermore, and in any event, they intend to amend the statement of claim to limit their recovery from the Crown to the extent that it is severally liable, that is to say to the extent it is found to be liable and not entitled to indemnity from the proposed third parties. A draft was submitted which they are prepared to issue without change.

[9] The religious orders, for their part, took no position on this Court's jurisdiction. They say the third party proceedings are doomed to failure in virtue of the proposed amendments to the

statement of claim. Furthermore, the Crown is precluded from suing them in light of the *Indian Residential Schools Settlement Agreement* which was approved by various provincial courts and which came into effect in 2007. That settlement did not extend to day pupils, but they say the hold harmless provisions are all encompassing. The Bishop of Kamloops adds that neither he nor his predecessors were ever involved in the Kamloops Indian Residential School. They all conclude that the motion to stay should be dismissed and that Her Majesty be denied the right to institute proceedings against them in any court.

JURISDICTION OF THE FEDERAL COURT WITH RESPECT TO THE CROWN

[10] The first matter to decide is whether this Court has jurisdiction over the Crown's indemnity claim against the religious orders. If it does, theoretically the Crown could still pursue them in the provincial courts but would not be entitled to a stay under s. 50.1.

[11] My conclusion that this Court has jurisdiction over an action by the Crown against the religious orders for contribution or indemnity derives from this Court's overall jurisdiction, including its jurisdiction over the Crown as a litigant. Although the administration of justice, including the establishment of courts, is a matter for the provinces in accordance with subsection 92(14) of the *British North America Act* (now known as *Constitution Act, 1867*), section 101 goes on to provide that Parliament may establish a general court of appeal, which it has in the form of the Supreme Court of Canada, and "additional Courts for the better Administration of the Laws of Canada". The Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada are the four such courts currently in place.

[12] Until the 1970s, it had been widely assumed that Parliament could assign jurisdiction to the Federal Court, or to its predecessor the Exchequer Court, with respect to any matter over which it had legislative authority. It was not necessary that there be actual federal law to administer. The general law of a province would suffice.

[13] As regards the Crown as a litigant, since the preamble of the BNA Act provides for union "with a Constitution similar in Principle to that of the United Kingdom", and since in that country Her Majesty could select the forum in which she sued, and in which she consented to be sued, Parliament could confer jurisdiction upon the Federal Court over any action in which the Crown was a plaintiff, or a defendant, irrespective of the law to be administered.

[14] Thus in *Quebec North Shore Paper Company v Canadian Pacific Limited,* [1977] 2 SCR 1054, a contractual dispute arose with respect to a terminal to be used to facilitate the movement of newsprint from Baie Comeau to the United States. Section 91(2) of the BNA Act gives authority to Parliament to make laws with respect to "the regulation of trade and commerce." Section 23 of the *Federal Court Act*, as it then was, gave the Federal Court concurrent jurisdiction in all cases in which a claim for relief was made or a remedy was sought in relation to "works and undertakings connecting a province with any other province or extending beyond the limits of a province."

[15] Chief Justice Laskin, speaking for the Court, held that although Parliament had jurisdiction to legislate with respect to extra-provincial works and undertakings in accordance with s. 91 of the BNA Act, at page 1058, he disagreed with:

> The contention on the part of the respondents, which was in effect upheld in the Federal Courts, … that judicial jurisdiction under s. 101 is co-extensive with legislative jurisdiction under s. 91 and, therefore, s. 23 must be construed as giving the Federal Court jurisdiction in respect of the matters specified in the latter part of the section, even in the absence of existing legislation, if Parliament has authority to legislate in relation to them.

[16] He held that provincial law, in that case Quebec law, which the parties had selected to govern their relationship, was not referentially adopted and thus was not federal law. He said at pages 1065-66:

> It is also well to note that s. 101 does not speak of the establishment of Courts in respect of matters within federal legislative competence but of Courts "for the better administration of the laws of Canada". The word "administration" is as telling as the plural words "laws", and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised.

[17] As there was no such law, the Federal Court was held to be without jurisdiction.

[18] To expand upon his comment with respect to the Crown, Chief Justice Laskin added at page 1063 that:

> It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.

[19] However, the situation was held to be quite different in situations in which the Crown is a plaintiff. While Her Majesty has the right to select the forum in which she consents to be sued, her situation in our federal state is constrained by the BNA Act such that she cannot take action in the Federal Court unless there is an existing body of federal law essential to the disposition of the case.

[20] In *McNamara Construction (Western) Ltd. v The Queen*, [1977] 2 SCR 654, the Crown had entered into a contract with McNamara for the construction of an institution for young offenders in Alberta. Speaking for the Court, Chief Justice Laskin reiterated the holding in *Quebec North Shore*, that the judicial jurisdiction contemplated by s. 101 was not co-extensive with federal legislative jurisdiction. Therefore, as he stated at pages 658-9:

> It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the British North America Act and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.

[21] The situation in *McNamara* was further complicated by the fact that there were other parties involved who intended to claim-over against the Crown. The parties were left in the unfortunate situation that since the Crown was suing on the general law of contract, which was provincial, it could not sue in the Federal Court, but on the other hand any claim against it for contribution or indemnity had to be pursued in the Federal Court, which at that time was the only court in which Her Majesty consented to be sued.

[22] The effect of *Quebec North Shore* and *McNamara* was aptly summarized by Chief Justice Jackett of the Federal Court of Appeal in *Associated Metals & Minerals Corp v The Ship "Evie W"*, [1978] 2 FC 710, [1977] FCJ No 264 (QL), where he said that in both cases the plaintiff was invoking the general law of contract applicable to all persons, *i.e.* provincial law, the general law of property and civil rights which, as such, could not be altered by Parliament. Therefore, the plaintiffs were unable to base their claims on existing federal law. Although arguably Parliament could have enacted a special law in relation to a federal subject matter, which would have prevailed over the provincial law and made it inoperative, it had not done so. That decision was affirmed by the Supreme Court, [1980] 2 SCR 322, without need to discuss jurisdiction because of its recent decision in *Tropwood AG v Sivaco Wire & Nail Co*, [1979] 2 SCR 157. However, the *Evie W* was later favourably referred to in *ITO-International Terminal Operators v Miida Electronics Inc*, [1986] 1 SCR 752, [1986] SCJ No 38 (QL) (the *Buenos Aires Maru*).

[23] In the *Buenos Aires Maru*, Mr. Justice McIntyre, after referring to both *Quebec North Shore* and *McNamara*, summarized the case law setting out the essential requirements to support a finding of Federal Court jurisdiction as follows at page 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867.*

[24] Unlike in *Quebec North Shore*, it was held that the Federal Court had jurisdiction. The difference is that while there was no federal law pertaining to interprovincial works and undertakings as such, the federal legislative class of "navigation and shipping" includes "Canadian maritime law" which, in turn, is co-extensive with Parliament's legislative jurisdiction.

[25] The *Buenos Aires Maru* is also important because it held that Canadian maritime law includes the common law principles of contract, tort and bailment, and set the stage for the Supreme Court incrementally changing the common law in such areas as stipulations for the benefit of a third party, claims in tort for pure economic loss and, more to the point, contributory negligence.

[26] This Court has jurisdiction over the action against the Crown. The statutory grant is found in s. 17(1) of the *Federal Courts Act* which now gives this Court "concurrent original jurisdiction in all cases in which relief is claimed against the Crown." Two sources of federal law, within the meaning of s. 101 of the *Constitution Act, 1867*, are essential to the disposition of the case, namely the *Indian Act* and the *sui generis* relationship between the Crown and Aboriginal peoples, which puts into play the Crown's honour. The constitutional basis for the *Indian Act* is s. 91(24) of the BNA Act which provides that Parliament has exclusive legislative authority with respect to "Indians and Lands reserved for the Indians."

[27] Sections 114 and following of the *Indian Act*, and its predecessors, have dealt with Indian Residential Schools for more than a century. In addition, such obligations as may fall upon the Crown with respect to Aboriginal peoples form part of federal law. To repeat what Chief Justice Laskin said in *Quebec North Shore*, at page 1063: "In so far as there is a common law associated

with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada…”

[28] Quite apart from s. 35.(1) of the *Constitution Act, 1982*, the *Canadian Charter of Rights and Freedoms*, by which: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”, matters involving the honour of the federal Crown in relation to Aboriginal peoples form part of federal law. In *R v Badger*, [1996] 1 SCR 771 at paragraph 41, [1996] SCJ No 39 (QL), the Supreme Court stated that “the honour of the Crown is always at stake in its dealing with Indian people.” This honour principle derives from the Crown’s fiduciary obligation towards Aboriginal peoples (*R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77 (QL); see also *Mitchell v Canada (Minister of National Revenue-MNR)*, 2001 SCC 33, [2001] 1 SCR 911, [2001] SCJ No 33 at para 9).

JURISDICTION OVER THE PROPOSED THIRD PARTIES

[29] Although the *Indian Act* confers jurisdiction over parts thereof to the Federal Court, it cannot be said that there has been a comprehensive granting of jurisdiction which would cover the present case. The statutory grant of jurisdiction in cases in which the Crown is a plaintiff is found in s. 17(5)(*a*) of the *Federal Courts Act* which provides that: “The Federal Court has concurrent original jurisdiction (*a*) in proceedings of a civil nature in which the Crown or the Attorney General claims relief…”. Although the numbering is different, this is the same grant of jurisdiction which was in place in *McNamara*.

[30] Therefore, the issue is whether there is existing federal law, be it statute, regulation or common law, which nourishes this Court's jurisdiction and is essential to the disposition of the case.

[31] On the negative side, the Crown submits that in its pith and substance its claim for contribution or indemnity is based upon the *Negligence Act* of British Columbia. It has been well established in cases such as the *Buenos Aires Maru*, and even earlier in *Kellogg Company v Kellogg*, [1941] SCR 242, that s. 101 courts can only apply such provincial law as may be incidentally relevant. Issues of comparative fault in this case go to the heart of the proposed third party proceedings. They are not incidental.

[32] However, one pleads the facts, not the law. The Crown cannot oust the Federal Court's jurisdiction by invoking provincial law. Even a contractual choice of law clause would not oust this Court's jurisdiction. See the *Tropwood*, above.

[33] Absent a statute, the question is whether there is a federal common law dealing with contributory negligence. In my opinion, there is. In *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, [1997] SCJ No 111 (QL), the Court was faced with the common law rule that contributory negligence on the part of a plaintiff deprived it of any recovery. The Court held that maritime law applied, which is uniform throughout the country, rather than provincial law, in that case the Newfoundland *Contributory Negligence Act*. The Court held that the common law principles embodied in Canadian maritime law, *i.e.* the *Buenos Aires Maru*, above, were applicable even in the absence of federal legislation. The Court judicially reformed the Canadian maritime law pertaining to contributory negligence by allowing for comparative fault.

[34] Given the inter-relationship between Canadian maritime law and Canadian federal common law, the latter has thus likewise been reformed by allowing for comparative fault. Indeed, Canadian maritime law and the common law with respect to contract, tort and bailment, have developed in tandem. In addition to the *Buenos Aires Maru*, and *Bow Valley Husky*, one need only consider *Q.N.S. Paper Co v Chartwell Shipping Ltd.*, [1989] 2 SCR 683, [1989] SCJ No 96 (QL), *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021, [1992] SCJ No 40 (QL), *London Drug Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299, [1992] SCJ No 84 (QL) and *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.* [1999] 3 SCR 108, [1999] SCJ No 48 (QL). Indeed, in *Fraser River* the Court was not concerned with the fact that the insurance policy in question was a hull and machinery policy, and thus governed by federal law in accordance with s. 22(2)(*r*) of the *Federal Courts Act* being a "claim arising out of or in connection with a contract of marine insurance;" a dispute over which the Federal Court has concurrent jurisdiction (*Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc*, [1983] 1 SCR 283).

[35] Apart from the federal common law of contributory negligence, which is a law of Canada within the meaning of s. 101 of the *Constitution Act, 1867* and which is essential to and at the pith and substance of the third party proceedings, the religious orders had been retained on behalf of Her Majesty, pursuant to section 114 of the *Indian Act*, to educate the day pupils. This is not a case such as *McNamara* which related to the construction of a building, but rather is a case relating to the administration of the *Indian Act*.

[36] In *McNamara*, above, the dispute related to the construction of a penitentiary, not to the administration of a penitentiary. Thus, the general law of contract, *i.e.* provincial law, applied. This case however is akin to *Rhine v The Queen* and *Prytula v The Queen*, [1980] 2 SCR 442. Those two cases, which were joined for hearing, dealt with the Federal Court's jurisdiction over claims by the Crown for monies owed under the *Prairie Grain Advance Payments Act* and under the *Canada Student Loans Act*. The *Federal Court Act*, then as now, provided that the Court had concurrent jurisdiction "in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief". Chief Justice Laskin distinguished *McNamara*, above, and held that the Federal Court had jurisdiction. In *Rhine*, he said at page 447:

> What we have here is a detailed statutory framework under which advances for prospective grain deliveries are authorized as part of an overall scheme for the marketing of grain produced in Canada. An examination of the *Prairie Grain Advance Payments Act* itself lends emphasis to its place in the overall scheme. True, there is an undertaking or a contractual consequence of the application of the Act but that does not mean that the Act is left behind once the undertaking or contract is made. At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the transaction which became the subject of litigation in the Federal Court. It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.

[37] The same principles held true with respect to *Prytula*, above, as well as in this case.

[38] Consequently, the tri-partite test summarized in the *Buenos Aires Maru* is satisfied. The *Indian Act* is an existing body of federal law, which are laws of Canada, essential to the disposition of the case, and subsection 17(5)(*a*) of the *Federal Courts Act* is a statutory grant of jurisdiction.

[39] Furthermore, the third party claim is based on common law tort arising from federal, not provincial, law, the dividing line between which is difficult to draw. I am of the view that this case aligns with *Kigowa v Canada*, [1990] 1 FC 804, [1990] FCJ No 60 (QL) and *Peter G. White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190, [2007] 2 FCR 475, [2006] FCJ No 808 (QL), rather than with *Stoney Band v Canada (Minister of Indian Affairs and Northern Development)*, 2005 FCA 220, [2006] 1 FCR 570, [2005] FCJ No 1181 (QL). The religious orders were acting on behalf of Her Majesty and so were required to act honourably. Section 35 of the Charter applied. Non-government organizations may exercise delegated government powers or be responsible for the implementation of government policy. Such entities in carrying out those powers are part of "government" (*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86 (QL) and *Onuschak v Canadian Society of Immigration*, 2009 FC 1135, 357 FTR 22, [2009] FCJ No 1596 (QL)).

MAY THE STATEMENT OF CLAIM BE AMENDED?

[40] Had it not been for the fact that this matter was under case management, the plaintiffs would have unilaterally amended their Statement of Claim. Rule 200 of the *Federal Courts Rules* permits a party, without leave, to amend its pleadings at any time before another party has pleaded thereto. The Crown has not yet pleaded to the Statement of Claim. To the extent that leave may be required, which I doubt, leave shall be given.

SHOULD HER MAJESTY BE PROHIBITED FROM ISSUING THIRD PARTY PROCEEDINGS?

[41] The position of the plaintiffs and the proposed third parties is that as a result of the proposed amendments, Her Majesty has no cause of action. In effect, they wish to enjoin her from filing a third party statement of claim.

[42] In *British Columbia Ferry Corp v T&N plc*, [1996] 4 WWR 161, [1995] BCJ No 2116 (QL), the trial judge struck a third party claim as the plaintiff was limiting recovery to the sole conduct of the defendants which would therefore preclude claims by them against others. The Court of Appeal, however, modified that decision to permit the third party proceedings to continue even if the defendants only sought a declaration of liability.

[43] In *Taylor v Canada (Minister of Health)*, 2009 ONCA 487, [2009] OJ No 2490 (QL), after proceedings had been underway for some time, the plaintiff, in a class action, amended her statement of claim to those damages allegedly caused by Health Canada attributable to its proportionate degree of fault. She sued no other parties. The Attorney General of Canada brought a third party claim against others on the grounds that they might be liable for some or all of the plaintiff's injury. The third party claim was dismissed in first instance and in appeal on the grounds that the exposure of the Crown was limited to damages for which it would have no right to contribution from any person who might have caused or contributed to the damages suffered by the plaintiff. It was held that the Court was not prevented from apportioning fault without insisting that others be made parties. This would mean a shorter trial and reduced costs.

[44] As mentioned in *Taylor*, there is the issue of production of documents and discovery of non-parties. The *Federal Courts Rules* allow for such discovery and the proposed parties have undertaken that they will not oppose any reasonable request.

[45] Mindful as I am of *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, [2010] SCJ No 62 (QL), that unnecessary costs and complexities should be avoided, I consider it would be premature to strike a third party statement of claim before it is even filed. Were Her Majesty not concerned with this Court's jurisdiction, in accordance with rule 193 of the *Federal Courts Rules,* she was entitled to commence third party proceedings as of right. Unless incompatible, the general rules of the *Federal Courts Rules* are applicable to class proceedings (rule 334.1(1)).

[46] It remains to be seen whether Her Majesty decides to file third party proceedings in light of the Amended Statement of Claim. Should she so file, the religious orders may move to strike pursuant to rule 220 of the *Federal Courts Rules* on the basis that the third party proceedings disclose no reasonable cause of action. It should be noted, however, that no evidence is to be heard on such a motion. Consequently, the Court would not take into account the affidavits already on record with respect to the role of the Bishop of Kamloops and as to the scope of the *Indian Residential Schools Settlement Agreement.*

[47] A case strongly relied upon by the religious orders, *Dobbie v Canada (Attorney General)*, 2006 FC 552, 291 FTR 271, [2006] FCJ No 694 (QL), a decision of Mr. Justice Kelen, must be taken in context. In determining whether the Crown was "desirous" of instituting third party

proceedings, he held that one must consider whether those proceedings were frivolous, vexatious, or without any merit. He found both that the Crown had an arguable case and that the Federal Court did not have jurisdiction over the proposed third party claim. There, he granted the stay. Presumably, had he been of the view that there had been no basis for a third party claim, he would not have granted the stay. In the case at bar, the situation is quite different. As the Court has jurisdiction over the proposed third party claim, the Crown has the right to institute third party proceedings. Thereafter, on a proper record, the Court may be called upon to strike them.

[48] All that is at issue at the present time is whether the principal action should be stayed. It should not. The Court cannot and should not prevent the Crown, at this stage, from claiming against the religious orders in this Court or in the Supreme Court of British Columbia.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion on behalf of the defendant for a stay of the principal action is dismissed.
2. The plaintiffs are at leave to serve and file the Amended Statement of Claim, as it appears in their motion material, within fifteen (15) days hereof.
3. Thereafter, the defendants may file third party proceedings in this Court, within the normal delays.
4. Costs in the cause.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-12
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	MAY 24, 2013

APPEARANCES:

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Michael Doherty Kelli Bodnar	FOR THE DEFENDANT
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John M. Hogg, QC	FOR THE PROPOSED THIRD PARTIES (THE ROMAN CATHOLIC BISHOP OF KAMLOOPS / THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE)
Patrick F. Lewis	FOR THE PROPOSED THIRD PARTY (SISTERS OF INSTRUCTION OF THE CHILD JESUS)

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