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# CROSS-OVER LIABILTY: PRINCIPLES FROM THE RESIDENTIAL SCHOOLS CASES

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## A. INTRODUCTION

A number of large Canadian charitable organizations, especially national denominations of religious bodies, have an organizational structure composed of separately incorporated yet affiliated entities which are located across the country but overseen by a national governing entity.

Such multiple corporate organizational structure results in insulating assets from liabilities, as well as generally reflecting, where applicable, the ecclesiastical connection between the affiliated entities. However, recent case law suggests that a multiple corporate structure could still leave affiliated corporate entities exposed to liability where a member or employee of either an affiliated member entity or a governing entity is found liable for damages in a lawsuit. This type of liability between corporations is generally referred to as "cross-over liability".

Recent case law involving residential schools has examined cross-over liability in the context of abuses which allegedly occurred during the historical operation of residential schools by entities that were affiliated to national church organizations. The residential schools cases involved allegations of abuse against entities affiliated with organizations, such as the Anglican Church of Canada ("Anglican Church" or "Anglican Church of Canada"), the United Church of Canada ("United Church" or "United Church of Canada") and the Roman Catholic Church ("Catholic Church" or "Roman Catholic Church").

It should be noted that the vast majority of the residential schools cases reviewed were decided at the trial level. As such, the law in this area may be subject to change in the foreseeable future as decisions are being appealed and new cases involving allegations of abuse at residential schools are brought to trial. Furthermore, the decisions to date are somewhat contradictory and inconsistent with each other and therefore do not permit a clear conclusion to be drawn at present on what the law is in Canada on the issue of cross-over liability.

An additional benchmark case on the application of cross-over liability to charitable organizations and not-for-profit organizations is *Re Christian Brothers of Ireland in Canada* [2000] O.J. No. 1117 (QL). A more detailed examination of the issues involved in the *Christian Brothers* case will be dealt with in a

subsequent Charity Law Bulletin.

## B. COMMENTARY REGARDING INDICIA OF CROSS-OVER LIABILITY

### 1. General Commentary on Cross-over Liability

In the recent decision of *Residential Schools (Re)* [2002] A.J. No. 1265 (QL) the Alberta court dismissed legal claims against the General Synod of the Anglican Church of Canada ("General Synod"), for the acts of an associated entity. This Alberta decision is consistent with several decisions reached by courts in Ontario, Saskatchewan and Newfoundland, that have held the "Anglican Church of Canada" and the "Roman Catholic Church" are not entities at law and therefore were not proper parties to suits arising out of allegations of sexual abuse against residential schools operated by a separately incorporated religious entity.

The review of the relevant case law suggests that the courts will attribute cross-over liability between two separately incorporated associated church entities if one entity can be characterized as an employer of employees of the second entity. At the same time, courts have been quick to dismiss the attribution of liability to an incorporated national Church entity for the acts of a separately incorporated associated entity where the national Church entity had no involvement whatsoever in the operation or control of the separately incorporated entity, such as a residential school, as described in further detail in this memorandum.

In the British Columbia case of *W.R.B. v. Plint* [1998] B.C.J. No. 1320 (QL), the court held both the United Church of Canada and the Federal Government of Canada were vicariously liable for the sexual assaults committed by the dormitory supervisor of a residential school which was jointly operated by the United Church and the Federal Government. The residential school was not incorporated and did not exist as a separate legal entity.

In arriving at its conclusion, the court in *Plint* examined whether the United Church or the Federal Government could be properly characterized as the directing or controlling entity of the residential school. In reaching its finding of vicarious liability, the court stated vicarious liability is entirely dependent on the relationship between the wrongdoer and the person or entity to whom a party seeks to attribute vicarious liability. The court stated the ultimate question was who bore the vicarious liability for the assaults committed by Plint against the plaintiffs and in answering that question the court found the United Church and the Federal Government had jointly controlled the activities of the dormitory supervisor through the office of the principal.

Based on the reasoning in the *Plint* case, it appears that a national organization that has significant control over the operations of an associated entity will likely be found vicariously liable, whether or not the latter associated entity is separately incorporated. In determining whether vicarious liability would attach to the United Church, the court in *Plint* appeared to view the issue of separate incorporation of entities as secondary to the issue of the exertion of actual control over operations and activities by a separate entity.

It is worth noting that where judges have concluded that an incorporated national church organization was not a proper party to an action against a separately incorporated associated entity, the judges have relied on

affidavit evidence and supporting documentary evidence which describes the operations and /or responsibilities of the national church entity in question. For example, in the British Columbia case of *B.M.* v. *Mumford* [2000] B.C.J. No. 2490 (QL), the judge noted the affidavit evidence was supported by the contents of different editions of the Handbook of the General Synod of the Anglican Church of Canada, which stated the Anglican Church of Canada had no power to discipline either the priests or bishops within the respective dioceses. The reasoning in the *Mumford* case was followed by the Ontario case of *Lariviere* v. *General Synod of the Anglican Church of Canada* (2001) 207 D.L.R. (4th) 765 (QL).

Further, in the above mentioned Alberta case *Residential Indian Schools (Re)* [2002] A.J. No. 1265 (QL) described in more detail below, the judge relied on the contents of the minutes of the Board of Management of the Missionary Society of the Anglican Church of Canada ("MSCC") as evidence that the transfer of the operation of the residential schools had taken place from the Diocese of Calgary to the MSCC at the recorded date. Given these developments, it appears the accuracy and completeness of handbooks, minute books and any brochures may be of significance in helping to document transfers and ownership of assets that may assist in protecting against liability.

2. Specific Commentary on Case Law Re Indicia of Cross-over Liability

In *F.S.M. v. Clark* [1999] B.C.J. No. 1973 (QL), a British Columbia court found the Anglican Church of Canada liable for the sexual assaults performed by the dormitory supervisor of a native Indian residential school. The General Synod of the Anglican Church of Canada was not named as a party to this action. The court held there was a strong connection between the type of risk created by the employment of the dormitory supervisor in relation to the sexual assaults and that the Anglican Church of Canada had a reasonable degree of control over the hiring and dismissal of the supervisor. Thus, the Anglican Church was found vicariously liable for the sexual assaults, along with the Minister of Indian and Northern Affairs for their collective role in hiring the dormitory supervisor. The Anglican Church was also found to be in breach of its fiduciary duty towards the sexual assault victim.

However, in the subsequent case of *B.M.* v. *Mumford* [2000] B.C.J. No. 2490 (QL), the court granted a summary judgment dismissing sexual assault claims against the Anglican Church of Canada and the General Synod for alleged sexual assaults performed by a bishop and priest of the Anglican Church. In arriving at this conclusion, the court noted the following:

- The General Synod and the relevant diocese are separate legal entities created pursuant to different provincial and federal legislation.
- The Anglican Church of Canada operates as a federation and the General Synod exercises expressly defined power and concerns itself generally with matters that affect the whole (nation-wide) church.
- The General Synod had no role whatsoever in the licensing, hiring, payment or the general day-to-day direction and supervision of either the bishop or the priest.
- At the relevant time, the Anglican Church of Canada had no power to discipline either priests or

Bishops within the diocese.

- The plaintiff had pleaded that the Anglican Church and the General Synod were employers of the priest and the bishop, together with the relevant diocese or Synod. Yet, the plaintiff did not prove the allegation. In finding the Anglican Church and the General Synod were not employers of the priest and the bishop, the court relied on principles from employment law in listing the criteria in determining whether one entity is an employer of employees of another entity. The criteria are, whether the alleged employer entity:

  1. exercises direction and control over the employees;
  2. bears the burden of remuneration;
  3. imposes discipline;
  4. has the authority to dismiss the employees;
  5. is perceived to be the employer by the employees.

The court in *Mumford* went on to describe the plaintiff's additional allegation that the Anglican Church and the General Synod were principals with the bishop and the priest being the agents. In doing so, the court referred to the following statement from *C.A*. v. *Critchley* (1998), 60 B.C.L.R. (3d) 92 (C.A.):

> *The present state of the law, however, in both in Canada and the United States makes it almost impossible for an innocent principal to avoid liability even for the deliberate wrongs of an employee or agent.*

However, the court in *Mumford* went on to state that either a master-servant or principal-agent relationship must be established in order for liability to attach. The court found the plaintiff did not establish the same in the case at bar.

The *Mumford* case was followed by the Ontario *Lariviere* case where the court granted a motion for summary judgment dismissing the actions against the General Synod of the Anglican Church for the alleged sexual assaults performed by an Anglican priest.

The reasoning that no liability can be attributed to an umbrella entity where no "employer/employee" relationship is found to exist, has also been applied in the Newfoundland case of *John Doe* v. *Bennett* [2000] N.J. No. 203 (QL), which held an archbishop of an Archdiocese was not vicariously liable for the acts committed by a priest of one of its dioceses. The court in *John Doe* also applied the same reasoning to lateral entities in finding there was no such liability between separate dioceses.

The *Mumford* case was also followed by the most recent Alberta case of *Residential Indian Schools (Re)* [2002] A.J. No. 1265 (QL) where the court granted summary judgment to dismiss claims against the General Synod because it was found to have had no involvement in the operation of the residential schools where alleged abuses had occurred. Summary judgment was also granted dismissing claims against the two dioceses in questions for the periods of time the dioceses were not in operation of the residential schools.

Similarly, in the Saskatchewan case of *S. (G.)* v. *Canada (Attorney General)* (2001) 108 A.C.W.S. (3d) 459 (QL), the court held that the Archdiocese of Regina had no involvement with the operation of the residential schools or any administrative control over the operator of the school where alleged sexual abuse took place. As such, the Archbishop of the Archdiocese of Regina representing the Roman Catholic Church was struck out as a party.

The court in *S.(G.)* found there was no evidence the provincially incorporated entity was an agent of any other diocese or religious order in operating the residential school. In doing so, the court made note of the following:

- Each parish, diocese and religious order is a juridically separate entity under both Church (ie. "canon law" within the Catholic Church) and civil law;
- Each diocese or religious order has its own funds and there is no common fund amongst the various dioceses and religious orders;
- The archbishop or bishop of any diocese has no internal Church authority to demand information or require performance of any thing from any other dioceses;
- The only common interest between all Roman Catholic persons or juridical entities is a religious one, with no coordinated temporal activity undertaken by the entire Church;
- The operation of a school is a temporal activity, conducted by any one diocese or religious order [This is also not necessarily correct at *canon law*, since the operation of a school can be seen as a religious activity as part of the mandate of the Catholic Church];
- A common religious interest amongst a proposed class is not sufficient to indicate representative actions amongst the members;
- For liabilities to be exigible to any members of an association, the liability must attach by reason of the acts of those members themselves, or by reason of the acts of their agents; the onus of establishing the agency relationship is on the person who relies on it, "for none is implied by the mere fact of association"

However, in the Ontario case of *Wunnamin Lake First Nation v. Rowe* [2002] O.J. No. 2810 (QL), the court refused to grant summary judgment dismissing the action against the General Synod of the Anglican Church of Canada and the Missionary Society of the Anglican Church of Canada for the sexual abuse committed by an Anglican priest. The court went on to state that the issue would require a factual inquiry which would be best determined at trial. The court further noted that the incorporated national church bodies may have vicarious liability when mission work is done in a diocese.

There is now case law in Alberta that has held that the "The Roman Catholic Church" cannot be named as a party to an action because the Catholic Church is not a legal entity and is therefore not suable. *Residential Schools (Re)* [2001] A.J. No. 1127 (C.A.) (QL)

Similarly, in Ontario in the case of *Swales* v. *Glendinning* [2000] O.J. No. 2695 (QL), a motion by the Roman Catholic Episcopal Corporation of the Diocese of London for an order to dismiss an action against the Roman Catholic Church for the alleged sexual assaults committed by a Catholic priest was allowed. The court held the "Roman Catholic Church" was not a proper party to the action because it was not a corporation or an entity that had the capacity to be sued.

However, in *Residential Schools (Re)* [2000] Alta. D. 770.51.00.00-01 (QL), the Archbishop of the Catholic Archdiocese in question was named as the representative of the Roman Catholic Church in order to provide an identifiable individual who could provide evidence. In arriving at this conclusion, the court made reference to *International Assn. Of Science and Technology for Development* v. *Hamza* (1995), 122 D.L.R. (4th) 92 (Alta. C.A.), which held that an action can be brought for or against an unincorporated association by naming its members in a representative capacity.

3. Summary of the legal principles

Based on the review of the above case law, it appears there will most likely be cross-over liability to an incorporated national entity which has a significant degree of control over the actions of the members or employees of associated incorporated entities, such that the degree of control can be characterized as that which an employer would have over an employee or a principal would have over that of an agent. Similarly, it appears there will be less likely liability where a separately incorporated national entity has little or no involvement in the actions of members or employees of associated entities. Further, it appears similar principles apply to any cross-over liability which might occur between associated entities which are on an equal horizontal level in the hierarchy of associated entities.

In the case of a single national legal entity, such as the United Church of Canada, it appears liability in any part of the entity will affect the assets of all of the other parts of the national entity.

Where there are multiple entities and an employer/employee relationship or an agency relationship is found between the entities, whether the entities be related to each other on a vertical or horizontal level within a hierarchical structure, there will be a greater risk of cross-over liability.

## C. PRACTICAL STEPS TO BE TAKEN TO AVOID CROSS-OVER LIABILITY BASED ON RECENT CASE LAW

In light of the above case law involving residential schools, the following are practical steps that can be implemented in the structuring and operation of a large charitable organization composed of numerous branches or divisions or separate entities in order to assist in avoiding a finding of cross-over liability between associated entities:

- Ensure separate incorporation of each entity;
- Expressly define the limits of power and authority of the entities so that each separate entity is clearly self-contained in its operations; and

- Have each incorporated entity keep up-to-date records of activities in its own corporate minute book, to show its independence from other affiliated entities.

Also based on the recent case law, the following are pitfalls to avoid when trying to limit cross-over liability between separately incorporated affiliated entities:

- Avoid having a parent or umbrella entity involved in the licensing, hiring, disciplining, payment or general day-to-day direction and supervision of the employees of the affiliated entity;

- Avoid having a common bank account or other common financial fund between the various affiliated incorporated entities; and

- Avoid having any perception that one separately incorporated entity can be the employer of the employees of another entity as described above.

## D. CONCLUDING COMMENTS

There have been significant developments in the area of law regarding cross-over liability applicable to charitable and not-for-profit organizations and more developments in this regard are anticipated. As such, it is recommended that charities composed of multi-corporate organizational structures or anticipating establishing a multi-corporate structure to be aware of how these legal developments may affect their day-to-day operations and long term projects and corporate restructuring. Some of these legal developments have been summarized in this Charity Law Bulletin but it is not intended to be a comprehensive review of the topic.

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