No. 26013 IN THE SUPREME COURT OF CANADA (On appeal from the British Columbia Court of Appeal) BETWEEN: THE CHILDREN'S FOUNDATION APPELLANT (DEFENDANT) AND: PATRICK ALAN BAZLEY RESPONDENT (PLAINTIFF) AND: THE SUPERINTENDENT OF FAMILY AND CHILDREN SERVICES IN THE PROVINCE OF BRITISH COLUMBIA AND HER MAJESTY THE QUEEN in right of the Province of BRITISH COLUMBIA as represented by THE MINISTRY OF SOCIAL SERVICES AND HOUSING INTERVENERS (DEFENDANTS) AND: THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS (INTERVENER) AND: T! HE UNITED CHURCH OF CANADA (INTERVENER) AND: WILLIAM RICHARD BLACKWATER,W.C.A.,C.H.B.,THE ESTATE OF S.S.D. by his personal representative L.W., R.A.F., COLBERT MELVIN GOOD, S.G.G., R.G., G.J., R.J.J., R.V.J., A.J.J., M.L.J., R.H.J., E.B.M., L.G.P., DENNIS STEWART, DANIEL WATTS, D.W., M.W., M.B.W., M.W., A.W, LEROY BARNEY and FLOYD MOWATT. (INTERVENERS) AND: HER MAJESTY THE QUEEN in right of ALBERTA as represented by the MINISTER OF JUSTICE and ATTORNEY GENERAL of ALBERTA (INTERVENER) ---------- FACTUM OF INTERVENERS WILLIAM RICHARD BLACKWATER ET AL ----------! ---------- Hutchins Soroka & Grant Gowling ! Strathy & Henderson Barristers & Solicitors Barristers and Solicitors 501 - 21 Water Street 2600 - 160 Elgin Street Vancouver, B.C. V6B 1A1 Ottawa, Ontario Tel: (604) 685-1229 K1P 1C3 Fax: (604) 685-0244 Tel: (613) 232-1781 Peter Grant Fax: (613) 563-9869 Diane Soroka Ottawa Agents Counsel for Applicants Alexander, Holburn Beaudin & O'Grady & Young Lang Barristers and Solicitors Barristers and Solicitors Suite 880 - 55 Metcalfe Street 2700 - 700 West Georgia Street Ottawa, Ontario P.Q. Box 10057 Pacific Centre Tel: (613) 563-2682 Vancouver, B.C. Fax: (613) 563-2485 Tel: (604) 688-1351 James O'Grady, Q.C. Fax: (604) 669-7642 Agent for the Solicitors for the William M. Holburn, Q.C. Appellant Counsel of Appel! lant McCarthy Tetrault D. Brent Adair Personal Law Barristers and Solicitors Corporation Suite 1400 - 40 Elgin Street Barristers and Solicitors Ottawa Ontario, K1P SK6 1402 Bay Avenue Tel: (613) 238-2000 Trail, B.C. V1R 4B1 Fax: (613) 563-9386 Tel: (250) 368-9171 Colin Baxter Fax: (250) 368-3369 Ottawa Agents D. Brent Adair Counsel for Respondent Burke Robertson Ministry of Attorney General Barristers and Solicitors 6th Floor, 1001 Douglas Street 70 Gloucester Street Victoria, B.C. V8V 1X4 Ottawa, Ontario, K2P OA2 Tel: (250) 356-8866 Tel: (613) 236-9665 Fax: (250) 356-9154 Fax: (613) 2354430 J. Douglas Eastwood V. Jermifer MacKinnon Counsel for Interveners Ottawa Agents ! Her Majesty the Queen in Right of The province of ! British Columbia Barnes, Sammon Barristers and Solicitors 200 Elgin Street, Suite 400 Ottawa, Ontario, K2P 1L5 Tel: (613) 594-8000 Fax: (613) 235-7578 W.J. Sammon Counsel for the Intervener The Canadian Conference of Catholic Bishops Gowling, Strathy & Henderson Barristers and Solicitors 2600 - 160 Elgin Street Harper Gray Easton Ottawa, Ontario K1P 1C3 Barristers and Solicitors Tel: (613) 232-1781 3100 - 650 West Georgia Street Fax: (613) 563-9869 Vancouver, B.C., V6B 4P7 Henry S. Brown, Q.C. Tel: (604) 687-0411 Ottawa Agents Fax: (604) 669-9385 C.E. Hinkson, Q.C. Counsel for Intervener The United Church of Canada Gowling, Strathy & Henderson Barristers and Solicitors 2600 - 160 Elgin ! Street Minister of Justice and Attorney Ottawa, Ontario KIN 8J3 General of Alberta Henry Brown, Q.C. Rm. 519, Bowker Building 9833 - l09 Street Edmonton, AB T5K 2E8 William Olthius / T. Hurlburt ---------- TABLE OF CONTENTS

of Care 4. Foreseeability of Risk 5. The American Case Law is Far From Clear B. Policy Considerations 1. Abuse of Authorit! y Test is Appropriate 2. The "Cost Internal! ization" Argument 3. If There is No Vicarious Liability, Victims May Have no Effective Recourse 4. Entitlement to Redress and Deterrence for the Future PART IV - ORDER SOUGHT PART V - LIST OF AUTHORITIES ---------- PART I - THE FACTS 1. Interveners William Richard Blackwater et al. (hereinafter "Interveners") accept the facts as set out in Respondent's Factum. 2. Interveners, except Floyd Mowatt, are all individual Plaintiffs in the case of Blackwater et al v. Plint et al, B.C. Supreme Court, Docket A960349, Vancouver Registry, which concerns the Alberni Indian Residential School. Brenner, J. ruled on June 4, 1998, that Canada and the United Church of Canada (hereinafter the "UCC") were both employers at the Alberni Indian Residential School and were both liable.! The case is proceeding on all other issues of liability. (Blackwater et al v. Plint et al, (dune 4, 1998) Brenner, J. (B.C.S.C.) 3. At issue in that case is the liability, including vicarious liability, of the UCC and the Government of Canada for the sexual assaults perpetrated by various members of the staff at the school upon the Interveners. These staff members were mostly lay people jointly employed by the UCC and the Government of Canada. 4. Floyd Mowatt is the Plaintiff in Mowatt v. Clarke et al, a case in which all the evidence has been filed and in which the final arguments are to be heard by Dillon, J. in the week of September 28, 1998. The Anglican Church of Canada and the Anglican Diocese of Cariboo are Defendants in that case. The Anglican Defendants in that case tried to have the case against them dismissed summarily. Dillon, J. denied their application in April, 1998. In her reasons, she addressed the necessity to ascertain the relationship betwe! en the Government of Canada and the Churches which were involv! ed in th e operation of Indian Residential Schools. At issue in the Mowatt case, is the liability of Canada and the Anglican Church for sexual assaults committed on Mr. Mowatt by Derek Clarke, who was hired as a dormitory supervisor. (Mowatt v. Clarke et al (April 1998) Dillon, J. (B.C.S.C.) -2- PART II - POINTS IN ISSUE 5. Should an employer be held vicariously liable for sexual assaults perpetrated 10 by an employee on a child in the care of the employer? PART III - ARGUMENT 6. Interveners adopt the legal arguments of Respondent herein and wish to add the following additional arguments. A. THE TESTS FOR VICARIOUS LIABILITY 7. Vicarious liability can be founded on the principles of abuse of authority, mode of performance of authorized acts or duty of care. 1. Abuse of Authority 8. Although Huddart, J.A. seemed to consider the "abuse of authority" test as some! thing different from the Salmond test, Interveners submit that it is really a sub - test to be considered under the second branch of the Salmond test. 9. In essence, the "abuse of authority. test is another way of expressing the concept of an unauthorized mode of doing some act authorized by the master. It is predicated on the conferral of authority on an employee by the master. That employee then exercises this authority in an unauthorized manner thereby abusing that authority. 10. It is this element of one person having been vested with authority over another, and his use of that authority for improper purposes, which has been found to constitute the answer to traditional arguments that an assault does not have sufficient -3- causal nexus to the work for which an employee was hired to trigger an employer's vicarious liability for assaults committed by that employee. a) Assault may constitute an abuse of author! ity 11. As early as 1923, this Honourable Court decided t! hat an e mployer could be held vicariously liable for the criminal assault by one of its employees upon another subordinate employee when that assault constituted an abuse of the authority vested in the employee who committed the assault. The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt, [1923] S.C.R. 414 (hereinafter "Vaillancourt") 12. Although that case arose in Quebec and was decided in accordance with the terms of article 1054 of the Civil Code of

Lower Canada, there is no substantive difference between article 1054 of the Civil Code and the general statement regarding vicarious liability at common law (the Salmond test). The two tests read: Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed. Art. 1054 C.C. cited in Vaillancourt, supra, at p. 415 A master is not responsible for a wrongful act clone by his se! rvant unless it is done in the course of his employment. The "Salmond Test" as cited in B. (P.A.) v. Curry, judgment a quo, at para. 23 13. This Court has had no difficulty referring to cases in both common and civil law where the concepts are similar or where policy issues are in question. -4- See for example: Sorochan v, Sorochan, [1986] 2 S.C.R. 38 at pp. 43-44 (unjust enrichment), Central Trust v. Rafuse, [1986] 2 S.C.R. 147 at pp. 203-4 (alternative claims in tort and contract), London Drugs v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299 at p. 427 (privity of contract), Canadian National Railway Co. v. Norsk Pacific Steamship Col, [1992] 1 S.C.R. 1021 at p. 1174-5 (recovery of pure economic loss), Winnipeg Condominium Corporation No. 36 v. Bird Construction Col, [1995] 1 S.C.R. 85 at p. 120 (recovery of pure economic loss) 14. In the Vaillancourt ca! se, the Appellant company, more commonly known as the Hudson B! ay Compa ny, was found vicariously liable when one of its trading post managers, who was drunk at the time, "disciplined" a subordinate employee by shooting and seriously injuring him. The issue to be decided was whether or not the manager had been acting "in the performance of the work" for which he had been employed when he shot his subordinate. Mignault, J. stated the following: Dans ces especes, on ne trouve pas la particularise que presente la cause qui nous est soumise, c'est-a-dire la subordination entre la victime et le prepose qui a commis le delit, le ma'^tre commun ayant place cette victime sous les ordres de ce prepose. Le poste confie a Wilson se trouvait dans un endroit desert, et Wilson avait le controle du personnel du poste un peu comme le capitaine d'un navire a le controle de l'equipage. Or il ne manque pas d'arrets oD on a condamne l'armateur a raison de mauvais traitements infliges. aux matelots par les off! iciers du navire dans ltexercice de leurs fonctions. Vaillancourt, supra, at p.429-430 15. In likening the situation at the isolated trading post to that of a ship where the crew is under the control of its captain, Mignault, J. pointed to the fact that it was the H.B.C. which had placed the manager in the position of authority which he then abused. The conduct of the Post manager in shooting the clerk was certainly not "incidental to or characteristic of the employer's enterprise". The fact was that the "employer's enterprise" required the isolation of its employees and a chain of -5- command analogous to that on a ship. In the same way, Appellant's enterprise required the "complete control" over the children in care, including the Respondent. 16. Mignault, J. had no difficulty applying the "abuse of authority" test in order to determine whether or not the manager of the post had been acting in the performance of th! e work for which he was employed. This confirms that 75 years ! ego, thi s Court recognized that the "abuse of authority" test is not something which is necessarily separate and apart from the Salmond test which, itself, is not substantively different from the test under art. 1054 of the Civil Code. 17. Just as in Vaillancourt, the critical factor was the authority held by the manager of the isolated H.B.C. post, so in the case at bar, the Appellant had given Mr. Curry complete control over the children he was supervising, including Mr. Bazley. Unlike the Vaillancourt case, in which Mr. Vaillancourt was an adult who presumably voluntarily worked at the post, Mr. Bazley, a child, had absolutely no control over being placed with the Children's Foundation or in the care of Mr. Curry. 18. American courts have also had to consider the issue of "abuse of authority". In the case of Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991), which involved the rape of a detainee by a City police officer, the court found the City of Los Angele! s liable for the officer's assault. 19. Huddart, J.A.'s analysis of the "abuse of authority" test is consistent with

Vaillancourt, supra, and the Mary M case, supra. She stated (at par. 84): In Norberg, supra, McLachlin J. reminded us (et 272) that the archetypical statue relationship is parent and child, a relationship where dependency is "all - encompassing and pervasive". When the appellant conferred the authority of a parent on Mr. Curry, it put him in the place of the most powerful person a child can know - that of a parent upon whom the child is totally dependent. It encouraged the development of the intense emotions that predictably can be can be -6- mishandled, particularly in the absence of the incest taboo. With the accept ance of parental authority and its delegation must, in my view, come acceptance of responsibility for the consequences of its abuse b! y the person upon whom you conferred it. 20. Child custod! ial situ ations such as the case at bar are even more extreme than cases of an isolated fur trace post or a police detention centre in terms of the powerlessness of the victims of the assaults relative to those whose commit them. b) Analogy to sexual harassment 21. The "abuse of authority" which founded liability in Vaillancourt is the same thread as that which runs through cases regarding harassment in the workplace which constitute a useful analogy to the case at bar. In situations involving two adults, when one of them has authority over the other, and abuses that authority, the result will be that the employer is vicariously liable for the actions of his abusive employee. 22. In the Robichaud case, which was argued on the basis of the Canadian Human~ Rights Act, this Court found that the statutory liability imposed by that Act "serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who cont! rol it and are in a position to take effective remedial action to remove undesirable conditions.. This Court cited with approval the following passage from the United States Supreme Court: ... In both cases, it is the authority vested in the supervisor by the employer that enables him to commit the wrong; it is precisely because the supervisor is understood to be clothed with the employer' s authority that he is able to impose unwelcome sexual conduct on subordinates. Meritor Savings Bank, F.S.B. v. Vinson, 106 S.Ct. 2399 (1986), at pp. 2410-2411, as cited with approval in Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, at pp. 95-96 (emphasis added) -7- 23. In Janzen v. Platy, Chief Justice Dickson applied Robichaud and found the defendant employer liable for the sexual and verbal harassment of employees by another employee who was in a position of authority over them: ! ...[the supervisor] used his position of authority, a position! ac corded him by the respondent, to take advantage of the appellants. [...] It was the respondent's responsibility to ensure that this power was not abused. Janzen v. Platy, [1989] 1 S.C.R. 1252 at 1293-1294 24. In Boothman v. Canada, [1993] 3 F.C. 381 (F.C.T.D.) the Crown was found vicariously liable for the infliction of nervous shock by an employee against a subordinate. The Federal Court found the employee had used the authority given by the employer to harass, intimidate and assault the subordinate. The employment relationship increased the probability of wrongdoing and went beyond the mere giving of opportunity. 25. The U.S. Supreme Court has most recently clarified the rules under the terms of Title VII of the Civil Rights Aa of 1964. While the American statutory regime may differ in some respects from the law applicable in the case; at bar, the underlying reasoning for finding vicarious liability on the part of an employer for sexual haras! sment by a supervisor of an employee is basically the same. Several courts, indeed, have noted what Faragher has argued, that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship. [...] Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than bv common workers; emploYers have greater opportunity and incentive to screen them. train them. and monitor their performance. Beth Ann Faragher v. City of Boca Raton, U.S.S.C. No. 97-282, June 2 '6, 1998, at p. 8

(emphasis added) -8- 26. In the case at bar, Appellant The Children's Foundation created and continued the system in which its employees, includi! ng Curry, were "clothed with" authority and placed in loco par! entis to Mr. Bazley who, as a child, was powerless in every respect. This authority was clearly abused by Curry. Appellant is thus vicariously liable for the assaults perpetrated by Curry in the same way as it would have been vicariously liable had Curry sexually harassed another, subordinate employee. 27. An employer may be held vicariously liable for sexual harassment or assault of one of his employees by another because it is the employer's responsibility to ensure that abusive employees are not put in positions of authority over others. In other words, adult employees are entitled to expect such protection from their employers. Are children, then, less entitled to expect the same of entities, such as the Appellants, which assume control of their lives? 2. Mode of Performance of Authorized Acts 28. The Appellant argues that they should not be vicariously liable because "the wrongful act must be considered a mode of performing the authorized acts.. (par.43) With r! espect, this is a semantical debate. To accede to this argument is to accept that no intentional tort can be a basis for vicarious liability as no employer would authorize an assault (Vaillancourt and Gauthier), fraud (lloyd v. Grace & Smith), or theft (The Queen v. Levy Brothers). Vaillancourt, supra, Gauthier v. Beaumont, Supreme Court of Canada, No. 25022, July 9, 1998, Lloyd v. Grace & Smith [1912] A.C. 716 ~.L.); The Queen v. Levy Brothers [1961] S.C.R. 189 29. These cases are within the Salmond test as the tort was committed in the course of the performance of the duties or the exercise of the authority given to the employee ~ a enterprise cha~cteri~ic o~ "employer's en reprise". (Appellant's -9- Factum, par.60, 83) In Lloyd, the employee certainly did not have authority to commit fraud. In Levy Brothers, the employee did not have the authority to steal, just as in this case Curry did not have the authority t! o sexually assault the children. 30. However, in all of ! these ca ses, the "employer's enterprise" necessitated conferring duties and authority on the employees which were then used abusively. 31. This Court also had no difficulty in finding vicarious liability on the part of a municipality in a recent case on police brutality under art. 1054 of the Civil Code of Lower Canada which, as we have seen, is not substantively different from the Salmond test. The municipality argued that the force used by the police was excessive and thus not within the scope of the police officers' employment. 32. Mr. Justice Gonthier did not rely on the "abuse of authority" concept, but rather relied on the mode of performance" test. He also pointed to vicarious liability as an important deterrent: There is no doubt that at the time they brutally beat the appellant, the respondents Beaumont and Thireault were performing the duties for which they were employed: they were on duty and were conducting an interrogation in the course ! of a criminal investigation into allegations of theft of a safe. If, as the respondent municipality suggests, the employer's liability was only engaged where it is shown that a delict was committed by its employees in the public interest, in the fight against crime or for the protection of the municipality's citizens, but was not engaged where the alleged acts are excessive, para. 7 of art. 1054 C.C.L.C. would be totally meaningless. The employer would have no incentive to exercise control over the conduct of its police officer employees. It is very fortunate that the respondent did not knowingly endorse the brutal acts committed by its employees, but this does not relieve it from liability under para. 7 of art. 1054 C.C.L.C. Gauthier, supra, at para. 93 -10- 33. Thus, the sexual assaults perpetrated by Curry on the Respondent were equally carried out in the course of! his duties under the "mode of performance" test relied upon b! y this C ourt in the Gauthier case. 34. Under either of the "abuse of authority" or the "mode of performance" tests which, Interveners submit, are basically two sides of the same coin, Appellants must be held vicariously liable for the sexual assaults perpetrated by Curry. 3. Duty of Care 35. In Swiss Bank Corp. v. Air Canada, the Federal Court dealt with liability for theft of

air cargo under the Warsaw Convention which provides for limited liability unless the damage was caused by the carrier, his servants or agents where the servant or agent was acting within the scope of his employment. The Court referred to Vaillancourt (at p. 784) and relied on modem English cases citing Lord Denning: The law on this subject has developed greatly over the years. During the l9th century it was accepted law that a master was liable for the dishonesty or fraud of his servant if it was clone in the course of his employment and for his master's benefit. Dis! honesty or fraud by the servant for his own benefit took the case out of the course of his employment. [...1 But in 1912 the law was revolutionised by Lloyd v. Grace Smith ~ Col, [1912] A.C. 716, where it was held that the master was liable for the dishonesty or fraud of his servant if it was clone within the course of his employment, no master whether it was clone for the benefit of the master or the benefit of the servant... 36. In the passages relied upon by the Federal Court, Lord Denning, after reviewing the cases and stating they were "baffling", concluded that they depended upon the nature of the duty owed by the master to the person suffering the damage. The master is under a duty to use due care to keep goods safely ld protect them from theft and depredation. He cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his -11- ! servant, he is answerable for the way in which the servant ! con ducts himself therein. No master whether the servant be negligent, fraudulent, or dishonest, the master is liable. But not when he is under no such duty. Morris v. C.W. Martin & Sons Ltd., [1965] 2 Lloyd's Rep. 63 at p. 69, 70, as cited with approval in Swiss Bank Corp. v. Air Canada, [1982] 1 F.C. 756 at p. 782-783, aff'd [1988] 1 F.C. 71 37. Thus, for Lord Denning, the key element in finding vicarious liability was tI ~e existence of a duty of caret In this case, the Children's Foundation, which stood in loco parentis to Mr. Bazley, clearly owed him such a duty of care and is answerable for the way Mr. Curry carried out his responsibilities. 4. Foreseeability of Risk 38. The Appellant, British Columbia, cites Harper and James, The Law of Torts, [par.11] which stases "[t]he employer should be held to expect risks to the public also, which arise "out of and in the course of" his employment of labour". 39. The potential for sexu! al assault is precisely what the Appellant should have recognized as a "risk"' when it undertook the care of children. This was not an unreasonable expectation of risk. The vulnerability of children in general and particularly of these children who were in such need certainly should have alerted the Appellant to the "risk" of sexual assaults by those who had constant contact with children and who had complete control over their daily rives and routines. In such circumstances, sexual assault is an obvious risk of the business of child caret 40. Contrary to the argument of B.C. [par. 60] that "there is no evidence that children who are apprehended by the Province face a greater risk of abuse", the history of apprehension of aboriginal children over the lest 100 years and their removal to residential schools demonstrate a serious risk of abuse. -12- "Looking Forward, Looking Back", Report of the Royal Commission on Aborigin! al Peoples, Vol. 1, Chapter 10 5. The American Case Law is! Far Fro m Clear 41. Intervener, the Canadian Conference of Catholic Bishops (hereinafter "CCCB") argues (at paras. 15-19) that the courts have been reluctant to impose vicarious liability in cases of sexual assault, particularly when dealing with religious, charitable, non-profit organizations. 42. However, with the possible exception of one American case, Maguire v. State, none of the cases cited by the CCCB are analogous to the case where a child is cared for by an entity whose employees stand in loco parentis to the child. 43. In Maguire, the Supreme Court of Montana split on the issue of whether the state should be held vicariously liable for the rape of an adult with serious mental disabilities by her caretaker at an institution run by the state. Both the majority and the dissent pointed out that in other jurisdictions in the U.S., the state would be held liable. Obviously, the answer to the question of vicarious liability for sexual assaults is not a subject! of unanimity in the United States.

Maguire v. State, 835 P.2d 755 (Mont.) 1992), at p. 759, 765-766 44. For example, the Stropes case concerned the sexual assault of a severely handicapped child by a nurse's aid employed by the institution in which the child had been placed. In that case, the Supreme Court of Indiana took the opposite point of view from that of the Supreme Court of Montana in Maguire and stated the following: The fact that this was a sexual assault is not per se determinative of the scope of employment question A blanket rule holding all sexual attacks -13- outside the scope of employment as a master of law because they satisfy the perpetrators' persona! desires would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other persona! motivations, such as anger or financial pressures. Rape and! sexual abuse constitute arguably the most egregious inst! ance of wrongful acts which an employee could commit on the job and fend themselves to arguably the most instinctive conclusion that such acts could never be within the scope of one's employment, yet other courts have recognized that the resolution of the question does not turn on the type of act committed or on the perpetrator's emotional baggage accompanying the attack. Rather, these courts indicate that the focus must be on how the employment relates to the context in which the commission of the wrongful act arose. Stropes v. The Heritage House Children's Centre, 547 N.E. 2d 244 (Ind. 1989) at p. 249 45. Neither is it clear, as suggested by Intervener CCCB, that a religious order could never be held vicariously liable for a sexual assault committed by a priest. American cases are complicated by consideration of issues of separation of church and state under the specific terms of the U.S. Constitution. The cases cited by Int! ervener CCCB (at paras. 17-18) do not deal with situations in which priests act as teachers or supervisors rather than qua priests in custodial care facilities in which the entity responsible for the facility acts in loco parentis to the children who are assaulted. 46. Nor do the cases cited by Intervener CCCB at paras. 17 and 18 of its Factum deal with the situation in which a church hires lay people to work in schools which are conducted and managed under the church's authority, as was the case in the Indian Residential Schools. -14- B. POLICY CONSIDERATIONS 47. The Appellant argues, in effect, there can never be vicarious liability for sexual assaults (par. 106) and that the employer should always be immune from vicarious liability for sexual assaults. Interveners submit that there should be no sUch immunity from vicarious liability for those entities whose business is the care of children. 48. We have already seen that ! an employer may be held vicariously liable for an assault comm! itted by his employee upon another adult (see Vaillancourt, supra, and Gauthier, supra). It would clearly be contrary to public policy to create an exemption to vicarious liability when the assaults are committed on children in the employer's caret 49. Interveners submit that in determining the test for vicarious liability for sexual assaults on children this Court should take, as its starting point, the particular vulnerability of children and the concomitant lever of protection required for children 1. Abuse of Authority Test is Appropriate 50. Interveners submit that the question of "abuse of authority" is appropriate in determining vicarious liability for sexual assaults on children provided that it is tailored to the fact that it is children who are the victims. 51. The test, when applied to children, should not be how a reasonable adult would have understood the relationship between the abuser and the child. Rather, the analysis should focus on the child! 's understanding of that relationship because it is the child's perception of the abuser's power which allows the abuser to manipulate the child, both in order to obtain sexual "favours" and to ensure the child's silence. -15- 52. In the context of the sexual assault of children by an adult, Interveners submit that the inherent vulnerability of a child to an adult should be taken as a given - whatever the formal relationship, if any, between the two. There should be no requirement for a child victim to prove his vulnerability according to an adult-oriented objective test in the way that an adult in an abusive employment situation

may be required to do. 53. For example, a child in a custodial situation might well perceive a number a ~f adults working at various jobs within the institution as having authority over him, in a way that an adult in an employment situation might not. 54. This child-oriented test is justified in! that entities which specialize in child care purport to under! stand th e way in which a child's mind works and are in a position to take measures to guard against exploitation of the child by their employees. 2. The "Cost Internalization" Argument 55. Appellant the Children's Foundation argues (at para. 135) that non-profit or charitable organizations should not be held vicariously liable because they are not able to pass the cost of such liability along to the consumers of the service in the same way as a commercial corporation might be able to do. It characterizes the children as the consumers of the service in this case. 56. Interveners submit that Huddart, J.A. was correct in her analysis of the "cost internalization" argument (paras. 45-53 of the judgment a quo). The true consumer of the service is the community at large. It is the community at large which pays the costs of intervening in the child's life through government payments made to the nonprofit or charitable organizations in whose care the children are placed. Th! is was as true of the Indian Residential Schools as it is of the Children's Foundation. -16- 57. The reasoning put forward by Appellants and Intervener CCCB in this case is not only that the Salmond test should be strictly applied with no modification to take into account that the victim is a child, but also that the economic theory which has been stated by several authors to be the underlying purpose of the Salmond test should be pasted onto a situation which is clearly outside any commercial context. 58. The result, they argue, is that there should be no recourse in vicarious liability for children who are sexually assaulted while under their caret Thus, they argue the victimized children should bear the cost. 59. However, in London Drugs v. Kuehne & Nagel, supra, La Forest, J. warned against taking his comments on policy concerns in the context of that case "as having any relevance to the question of whether the emplo! yer's liability should be extended or restricted in other type! s of cas es. ~ London Drugs v. Kuehne & Nagel, supra, at pp. 336-7 60. The real result of Appellants' reasoning would be ~e entrenchment of two different legal standards for vicarious liability, dependent solely on the corporate statue of the defendant - a result which, Interveners submit, would be a travesty of justice. 61. One need only consider the example of two day care centres in whose care children are left for eight to ten hours each day while their parents are at work. One centre is a private, "for profit" centre, and the other is a public, government subsidized centre. If exactly the same sexual assaults of the children were to take place at both these centres then, according to Appellants' reasoning, there should be two very different results. The private day-care centre could be vicariously liable for its employee's actions, while the public one could not. -17- 62. There is no evidence to support the argument of ! Appellants and Intervener Churches that they are less able to pay the costs of the damages caused to the victims than, for example, a marginally profitable small business. The United Church of Canada, for example, has over $3.8 billion in assets and is the wealthiest Protestant church in Canada. Nor is there any evidence that members of religious congregations would consider the compensation of victims who were sexually abused as children while they were under the care of that congregation an unworthy cause to which they would not be willing to make any donations. Exhibit ~B" to para. 12 of the Affidavit of William Richard Blackwater in support of Interveners' Application for Leave to Intervene 63. A legal test that exempts religious, charitable or non-profit organizations from vicarious liability for sexual assaults in circumstances in which they cared for children is contrary to the principle that an employer should not have "absolute immunity". 64.! Interveners submit that this Court should be very cautiou! s indeed and should certainly not create either a blanket rule holding all sexual assaults outside the scope of employment or a blanket exemption for charitable, religious or non-profit

organizations simply on the basis of their statue as such. 3. If There is No Vicarious Liability, Victims May Have no Effective Recourse 65. If the arguments of Appellants that non-profit or charitable organizations should not be held vicariously liable for sexual assaults committed by their employees or agents are accepted by this Court, children who are the victims of these assaults in custodial situations may well be deprived of any effective recourse. 66. First, in Canada, the care of children in custodial situations is not given over to profit-oriented ventures, but rather it is traditionally given to charitable, non-profit, or governrnent-sponsored agencies. It would do the victims little good to retain a recourse in vicarious liability only against profit-oriented corporations! since this type of corporation is not given responsibility for child welfare. 67. Second, while in theory victims might have a recourse in direct liability based on negligence or breach of duty, in practice it would place a very heavy burden on the victims. 68. As the victims were children when the assaults took place, it may be decades before the children reach the age of majority and have recovered sufficiently to be able to take legal action. By this time, in Interveners' experience, documentation such as employment records, which was never under the victims' control, has long since disappeared or has been destroyed, and many of the people involved in the hiring and supervision of the abusive employee in question may no longer be alive. 69. This may result in an impossible burden of proof for victims and result in a situation in which victims would have no meaningful recourse whatsoever against those organizations who were entrusted with their care wh! ite they were children. 4. Entitlement to Redress and De! terrence for the Future 70. Intervener CCCB complains (at para. 6-7 of its Factum) of the difficulties in dealing with what it terms "historical" abuses. Appellant (at para. 139) argues that standards today may be more stringent. However, at no time in Canada's legal history has the sexual assault of children been treated as anything less than abhorrent. Victims of sexual assaults perpetrated upon them when they were children are entitled to redress. 19 71. This Court has already noted the importance of deterrence and of placing responsibility on those in control who are in a position to take remedial action. 72. In Robichaud, supra, this Court stated that the statutory liability imposed by the Canadian Human Rights Act: ... serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable co! nditions. Robichaud, supra, at p. 95 73. In Gauthier, supra, Mr. Justice Gonthier concluded that had he accepted the municipality's argument: ... para. 7 of art. 1054 would be totally meaningless. The employer would have no incentive to exercise control over the conduct of its police officer employees. Gauthier, supra, at para. 93; see also London Drugs v. Kuehne & Nagel, supra, at p. 339, Beth Ann Faragher, supra, at p. 8 74. The purpose of vicarious liability is not merely to punish, it is to motivate those who control an enterprise to take preventive and remedial measures in order to ensure that their employees are properly qualified and well supervised so that abusive or dangerous situations do not arise in the first place. 75. The underlying premise for intervention in the family life of the child is that the government and the various charitable and non-profit agencies with whom it works in the field of childcare, can d! o better than the child's own family in giving that child a se! cure hom e and a proper foundation for a healthy adulthood. If this were note the case, there would be no reason to take a child into custodial care. 76. The appropriate resolution where private societies and governments are partners in child care is that both are vicariously liable. Blackwater, supra -20- 77. If the Appellants' and the Church Intervenors' arguments are accepted, there will be no incentive for nonprofit organizations to exercise control over their employees so as to ensure the safety of children in their caret Even though the Appellant is in the best position to ensure the persons it employs will not sexually assault children, it would be able to avoid vicarious liability on the basis of

its corporate statue. 78. If there can be no vicarious liability attributed to the nonprofit or charitable organizations to whom the care of children is entrusted, we will have lost a valuable incentive to take the measures ! necessary to ensure that children taken into care are safe from sexual predators and are, indeed, better off than they would have been if left in their homes. PART IV - ORDER SOUGHT 79. Interveners submit that the Appeal should be dismissed with costs to Respondent and these Interveners. 80. All of which is respectfully submitted on behalf of Interveners William Richard Blackwater et al. DATED AT Vancouver, British Columbia, this y day of September, 1998. Peter Grant Diane Soroka Attorneys for Interveners -21- PART V - LIST OF AUTHORITIES Cases Beth Ann Faragher v. City of Boca Raton, U.S.S.C. No. 97-282, June 26, 1998 Blackwater et al v. Plint et al, B.C.S.C. Docket A960349, June 4, 1998, Brenner, J. Boothman v. Canada, [1993] 3 F.C. 381 (F.C.T.D.) Canadian National Railway Co. v. Norsk Pacific Steamship Col,! [1992] 1 S.C.R. 1021 Central Trust v. Rafuse, [198! 6] 2 S.C .R. 147 Gauthier v. Beaumont, Supreme Court of Canada, No. 25022, July 9, 1998 The Governor ;and Company of Gentlemen Adventurers of England v. Vaillancourt, [1923] S.C.R. 414 Janzen v. Platy, [1989] 1 S.C.R. 1252 lloyd v. Grace dc Smith, [1912] A.C. 716 (H.L.) 40 London Drugs v. Kuehne ~ Nagel International Ltd., [1992] 3 S.C.R. 299 Maguire v. State, 835 P.2d 755 (Mont.) 1992) Mary M. v. City of Los Angeles 814 P.2d 1341 (Cal. 1991) Mowatt v. Clarke et al, B.C.S.C., April 1998, Dillon, J. . Queen v. Levy Brothers, [1961] S.C.R. 189 Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 Sorochan v, Sorochan, [1986] 2 S.C.R. 38 Stropes v. The Heritage House Children's Centre, 547 N.E.2d 244 (Ind. 1989) 20 Swiss Bank Corp. v. Air Canada, [1982] 1 F.C. 756 (T.D.), aff'd [1988] 1 F.C. 71 (F.C.A.) Winnipeg Condominium Corporation No. 36 v. Bird Construction Col! , [1995] 1 S.C.R. 85 Authors Looking Forward, Looking Back, Report of the 3 0 Royal Commission on Aboriginal Peoples, Vol. 1, Ch. 10