IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 167
Date: November 25, 2015
Docket: 200701T4955CCP

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

- AND -

Docket: 200701T5423CCP

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

- AND –

Docket: 200801T0844CCP

BETWEEN:	**ROSINA HOLWELL AND REX HOLWELL**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION**	SECOND THIRD PARTY

- AND -

Docket: 200801T0845CCP

BETWEEN:	**SARAH ASIVAK AND JAMES ASIVAK**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

- AND –

Docket: 200801T0846CCP

BETWEEN:	**EDGAR LUCY AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

Before: Justice Robert P. Stack

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: November 16 and 17, 2015

Appearances:

Chesley F. Crosbie, Q.C., Jessica Dellow, David Rosenfeld, Kirk Baert, Celeste Poltak, James Sayce, Alan Regel and Stephen Cooper	Appearing on behalf of the Plaintiffs
Jonathan Tarlton, Mark Freeman and Melissa Grant	Appearing on behalf of the Attorney General of Canada
Peter Ralph, Q.C., Daniel Boone, Q.C., Alexander Barroca and H. Michael Rosenberg	Appearing on behalf of Her Majesty in Right of Newfoundland and Labrador
Philip J. Buckingham and Bridget Daley	Appearing on behalf of The International Grenfell Association

Authorities Cited:

CASES CONSIDERED: Anderson v. Canada (Attorney General), 2013 NLTD(G) 154; **Anderson v. Canada (Attorney General)**, 2014 NLTD(G) 144; **McNichol v. Co-operators General Insurance Co.**, 2006 NBCA 54; **Sable Offshore Energy inc. v. Ameron International Corp.**, 2013 SCC 37; **Angle v. Canada (Minister of National Revenue)**, [1975] 2 S.C.R. 248; **Johnston v. Sheila Morrison Schools**, 2012 ONSC 1322; **Lundrigan Group Ltd v. Pilgrim**, [1989] 75 Nfld. & P.E.I.R. 217, 14 A.C.W.S. (3d) 238 (Nfld. C.A.); **Congrégation du Très St-Rédempteur c Aylmer School Trustees**, [1945] S.C.R. 685; **R. v. Gough**, 2006 NLCA 3; **Brushett v Cowan** (1987), 40 D.L.R. (4th) 488, 64 Nfld. & P.E.I.R. 262 (Nfld. S.C.(T.D.)); **Pet Valu Inc.**

v. Thomas, [2004] 128 A.C.W.S. (3d) 489, O.J. No. 497 (Ont. Sup. Ct.); **Canson Enterprises Ltd. v. Boughton & Co.**, [1991] 3 SCR 534; **Verna Doucette v. Eastern Regional Integrated Health Authority**, 2010 NLTD 29; **Serhan (Trustee of) v. Johnson & Johnson**, 2011 ONSC 128; **Anderson v. Canada (Attorney General)**, 2011 NLCA 82; **Harvey v. Memorial University of Newfoundland**, 2013 NLTD(G) 51; **Petten v. E.Y.E. Marine Consultants et al.**, [1994] 120 Nfld. & P.E.I.R. 313, 373 A.P.R. 313 (Nfld. S.C.(T.D.)); **College of the North Atlantic v. Thorne**, 2015 NLCA 47; **Midnight Marine Limited v. Aviva Insurance Company of Canada**, 2015 NLTD(G) 112; **U.F.C.W., Local 1252 v. Cashin et al.,** [1988] 70 Nfld. & P.E.I.R. 139, 11 A.C.W.S. (3d) 301 (Nfld. C.A.); **Butler v. Kloster Cruise Ltd.**, [1992] 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.T.D.); **Visx Inc. v. Nidek Co.**, [1996] 72 C.P.R. (3d) 19, 69 A.C.W.S. (3d) 59 (FCA); **Diamond Estate v Robbins**, 2006 NLCA 1; **Canadian Industries Ltd. v. Canadian National Railway Co.**, [1940] 4 D.L.R. 629, 52 C.R.T.C. 31 (Ont. C.A.), affd. [1941] S.C.R. 591; **Shubaly et al v. Coachman Insurance et al.**, 2012 ONSC 5455; **Bazkur v. Coore**, 2012 ONSC 3468; **321665 Alberta Ltd. v. Mobil Oil Canada Ltd.**, 2010 ABQB 522; **Cahoon v. Franks**, [1967] S.C.R. 455; **Ascent Inc. v. Fox 40 International Inc.**, [2009] 178 A.C.W.S. (3d) 907, O.J. No. 2964 (Ont. Sup. Ct.); **Strother v. 3464920 Canada Inc.**, 2007 SCC 24; **Reference re Canada Assistance Plan**, [1991] 2 S.C.R. 525.

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1, *Family Law Act*, R.S.N.L. 1990, c. F-2; *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6; *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33; *Proceedings Against the Crown Act*, R.S.N.L. 1990 c. P-26.

RULES CONSIDERED: *Rules Of The Supreme Court,1986*, S.N.L. 1986, C. 42, Sch. D, rr. 7A.10 (2), 14.24, 15.02, 19.02, 37, 42.09, 55.02(1)(a).

TEXTS CONSIDERED: *The Law of Class Actions in Canada, (*Toronto: Canada Law Book, 2014*)* at p. 220 and p. 311 - W.K. Winkler et al*; The Doctrine of Res Judicata in Canada*, Third Ed. (Markham: Lexisnexis, 2010), at p. 53 - Donald Lange.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] We are now well into a long trial of the common issues in these class actions. Class members attended schools, dormitories or orphanages (collectively, the "Facilities") from 1949 until 1980 in what is now the Province of Newfoundland and Labrador. The representative plaintiffs have sued the Attorney General of Canada ("Canada") based upon two causes of action: negligence and breach of fiduciary duty.

[2] This decision resolves three mid-trial applications:

1) An application by the Plaintiffs to discontinue the Family Class proceeding;
2) An application by the Province:
   a) to have the question of apportionment of the fiduciary duty claim resolved; and
   b) to strike the third party claim against it; and
3) An application by the Plaintiffs:
   a) to amend the pleadings and the certification order to remove the certified negligence common issue;
   b) to approve a proposed agreement between the Plaintiffs and the Third Parties;
   c) to strike the third party claims;
   d) to make other amendments to the statements of claim, including to add a claim for disgorgement.

[3] Before we address the present applications, let me place them in the context of this litigation.

[4] There are five Facilities in question and five individual proceedings, each commenced in 2007 or 2008 by different representative plaintiffs but with Canada as the sole defendant. Each of the five proceedings was certified as a class action by Order of Fowler, J. dated June 7, 2010 and affirmed by the Court of Appeal on December 21, 2011. Virtually identical certification orders were made in each proceeding.

[5] The common questions at issue for present purposes can be stated as follows:

> 1) By its operation or management of the Facilities did Canada breach a duty of care owed to the students of the Facilities to protect them from actionable physical or mental harm?
>
> 2) By its purpose, operation or management of the Facilities did Canada breach a fiduciary duty owed to the students of the Facilities to protect them from actionable physical or mental harm?
>
> 3) By its purpose, operation or management of the Facilities did Canada breach a fiduciary duty owed to the families and siblings of the students of the Facilities?

[6] The Plaintiffs' named Canada as the sole defendant. Nevertheless, after two unsuccessful attempts, Canada managed to bring the Third Parties into the proceedings. It has joined Her Majesty in Right of the Province of Newfoundland and Labrador (the "Province"), seeking contribution from the Province towards any damages it is ordered to pay. The Province, in turn, made similar claims against the International Grenfell Association (the "IGA"), the Moravian Church of Newfoundland and Labrador ("MCNL"), and the Moravian Union ("MU"), saying that they operated certain of the Facilities for at least part of the class period and so are liable for any resulting damages (subsequently, with leave of the Court, the Province discontinued its claims against the MCNL and the MU).

[7] In May of 2013, following the initiation of the third party claims, the Plaintiffs moved to strike, or alternatively, sever/stay the third party claims. It was

determined that the Plaintiffs' claims of breach of fiduciary duty by Canada were not capable of apportionment (**Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154). The claims in negligence, on the other hand were able to be apportioned. Consequently, it was decided that while the fiduciary duty claims could proceed to trial without the involvement of the Third Parties, the claims in negligence could not. The Court therefore put the Plaintiffs to an election: (1) to proceed with a common issues trial relating to breach of fiduciary duty only (with the negligence claims, including the third party claims, to be stayed and to proceed at a later date), or (2) to continue with all of the common issues, in which case the third party claims would be determined as part of the common issues trial. The Plaintiffs chose the former.

[8] Immediately before the commencement of a common issues trial restricted to fiduciary duty in November of last year, Canada raised the issue of the application of fact findings in the fiduciary duty phase of the trial in the negligence phase (if it were to proceed in the future). Because it had become clear that the Plaintiffs intended to rely on substantially the same facts in both phases of the trial, I ordered that the common issues trial be held encompassing all claims among the Plaintiffs, Canada, and the Third Parties (**Anderson v. Canada (Attorney General)**, 2014 NLTD(G) 144). To provide the Third Parties time to prepare for trial, I also adjourned the common issues trial from November 17, 2014 to September 28, 2015. To accommodate the additional parties, the original eight week trial was expanded to 12 weeks.

[9] A significant number of pleadings, documentary productions, expert reports, case management conferences, examinations for discovery, and pre-trial applications were produced or held between last November and the revised trial date. The Plaintiffs have identified these as follows:

1) nine case management conferences;
2) defences to the Third Party Claim by MCNL, MU and the IGA;
3) written interrogatories;
4) production of over 6,100 documents between February 2015 and August 2015;
5) delivery of seven newly created expert reports;
6) eight days of examinations for discovery of seven witnesses;

7) discontinuance of the third party claims against the MU and MCNL; and
8) a Demand for Particulars that necessitated an application, hearing, revised pleadings and response to demands for particulars at the end of August 2015.

[10] On September 28, 2015, this common issues trial commenced. The Province and the IGA, in addition to the Plaintiffs and Canada, have been full participants to date. This has resulted a comprehensive trial brief with authorities being filed by each party; opening submissions by the Plaintiffs and the Province; cross-examinations by all parties on all witnesses called by the Plaintiffs (at least until the Agreement was announced); and an objection as to the scope of examination of the resident witnesses that led to truncated testimony from witnesses the week of October 5, 2015, argument on the objection, and a decision by this Court restricting the scope of the examination of resident witnesses.

[11] The Plaintiffs have reached an agreement with the Third Parties to terminate the latter's involvement in this proceeding (the Agreement). It is the Agreement that gives rise to the present applications with the exception of the application to discontinue the common issue relating to the Family Class. Let me deal first, therefore, with the Family Class proceeding.

1) FAMILY CLASS PROCEEDING

The Plaintiffs do not wish to pursue the Family Class claims

[12] The Family Class proceeding stems from the third of the common issues that I set forth above:

> By its purpose, operation or management of the Facilities did Canada breach a fiduciary duty owed to the families and siblings of the students of the Facilities?

[13] The Plaintiffs applied for: (a) leave to discontinue or abandon the Family Class claims; (b) leave to further amend the Fresh as Amended Statements of Claim to reflect this change; and (c) a consequential order amending the certification orders dated June 7, 2010 to remove the Family Class common issue.

[14] The Plaintiffs have informed the Court that on October 21, 2014, they advised Canada that they would not be pursuing claims on behalf of the Family Class at the common issues trial, which was then scheduled to commence on November 17, 2014. Furthermore, at a case management conference held on April 21, 2015, the Plaintiffs reiterated to the parties and advised the Court that they would not be pursuing the Family Class claims at trial.

[15] Despite the foregoing, no formal steps were taken to discontinue the Family Class claims. Notwithstanding the Plaintiffs' suggestion that there had been some kind of implicit or *de facto* discontinuance of the Family Class proceeding, it would be inappropriate to simply leave the Family Class claims to "wither on the vine". Because the Court was being asked to consider discontinuing the common issue claims in negligence to effect the Agreement, I suggested that this might be an opportunity to regularize the pleadings by addressing the Family Class claims.

The Statutory and Regulatory Regime

[16] By s. 35(1) of the *Class Actions Act*, a class action may be discontinued "only with the approval of the court on terms the court considers appropriate". Section 35 also addresses the question of notice and provides as follows:

> 35. (1) A class action may be settled, discontinued or abandoned only with the approval of the court on terms the court considers appropriate.
>
> …
>
> (5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court may consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the action;
(b) a statement of the result of the action; and
(c) a description of a plan for distributing settlement funds.

[17] Section 40 of the Class Actions Act provides that the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, apply to class actions to the extent that those rules do not conflict with the Act.

[18] Because the common issues trial is underway, Rule 19.02 applies:

> 19.02. (1) At any time after a proceeding is entered for trial or its hearing is commenced in chambers,
>
> (a) a plaintiff may discontinue the proceeding or withdraw any cause of action therein against any defendant; or
>
> (b) a defendant may withdraw the defence or any part thereof against any plaintiff,
>
> by filing a notice of discontinuance or withdrawal on which is endorsed the consent of all parties of record, or by leave of the Court.
>
> (2) An order of the Court under rule 19.02(1) may contain such terms as to costs, the bringing of any subsequent proceedings, or otherwise, as are just.
>
> [Emphasis added.]

The Plaintiffs may discontinue the Family Class Proceeding

[19] Canada submits that the central question on an application for discontinuance is whether the putative class members will be prejudiced. Although the abandonment or discontinuance does not have to be beneficial or in the best interests of the Family Class members, it submits that I must inquire into whether their rights are protected. Court supervision, says Canada, is designed to ensure that the class proceedings procedure is not abused (*The Law of Class Actions in Canada*, (Toronto: Canada Law Book, 2014*)* at p. 311 - W.K. Winkler et al). While notice to class members is the norm, Canada acknowledges there are

narrow and unique circumstances to consider in this case which would obviate the need for such notice here, where the family class claim was seemingly pleaded based on an Ontario statute that has no equivalent in Newfoundland and Labrador.

[20] Because the Court has the power under s. 35 of the *Class Actions Act* and Rule 19.02(2) to impose terms that are just, Canada also submits that the order of discontinuance should be a bar to any future action. This, says Canada, would respect the finality of the process and would be equivalent to a judgment under such circumstances and would entitle the Defendant to assert that the matter in question has passed into judgment binding both parties (**McNichol v. Co-operators General Insurance Co.**, 2006 NBCA 54, at para. 29).

[21] The Plaintiffs focus on the question of notice. They submit that, although pursuant to s. 35(5) this Court "may consider whether notice should be given under s. 20" when approving discontinuance, these circumstances warrant dispensing with advance notice to the Family Class.

[22] I agree that the Family Class proceeding should be formally terminated. Experienced class action counsel have determined that the Family Class proceeding has little likelihood of success. The Family Class claims are strictly derivative of the Survivor Class claims (See the *Family Law Act*, R.S.N.L. 1990, c. F-2; by virtue of the *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, awards for loss of care, guidance and companionship are confined to cases involving death, not injury). Consequently, the Family Class claims are based upon the common law only. Proving such claims will be difficult, says counsel for the Plaintiffs, be it on a class-wide basis or individually. Doing so will involve sailing into uncharted legal territory. In addition, the Plaintiffs concede that the Family Class claims face significant limitations issues. Consequently, I find that there is little or no prejudice to the Family Class members.

[23] I agree with Plaintiffs' counsel that the continued assertion of the Family Class claims will delay and complicate the trial of the Survivor Class claims, which are the primary claims under consideration. Pursuing the Family Class claims will prolong the litigation, with a need for additional evidence and more

determinations during and following the trial and on appeal. The nature of the claims and the elderly composition of the Survivor Class raise real concerns that further prolonging this litigation may deprive many Survivor Class members of access to justice because many may well not live to see any benefit from the litigation.

[24] I agree with Canada, however, that termination of the Family Class claims should be a bar to future claims by Family Class members against Canada arising from derivative claims of persons who attended at one or more of the Facilities. The Plaintiffs have long made clear that they do not intend to lead evidence or make arguments in favour of the Family Class. Consequently, had I not intervened and required this application to amend the common issues to discontinue the Family Class claims, at the end of the trial I would have had no choice but to answer that common question in the negative. That would have amounted to a judgment against the Family Class representative plaintiffs which would bind the Family Class members. Canada should be left in no worse position following this application than it would have found itself in had the Plaintiffs' effected their initial plan of action.

Notice can be given at the end of the trial

[25] No advance notice of the discontinuance of the Family Class proceedings is required. Notice at this stage would require the trial to be adjourned for a sufficient period to effect service and allow an appropriate time for response. Furthermore, although there was no direct evidence on this point, I understand that notice to class members in the past has cost in the vicinity of $65,000.

[26] To require notice prior to approving the discontinuance would therefore cause a further costly delay to the common issues trial without a proportional benefit. This is because:

1) the Family Class representative plaintiffs have provided class counsel with their approval and agreement with respect to the discontinuance of their Family Class claims;

2) Claims within a class action, or even a class action as a whole, are regularly discontinued throughout Canada without any advance notice to the class at issue;
3) The *Class Actions Act* does not require that notice of discontinuance be given to the class;
4) Notice to the class is discretionary and should only be required when notice may be necessary "to protect the interests of any class member or party or to ensure the fair conduct of the class action", pursuant to s. 21, or when notice may be necessary when the Court is "dismissing a class action or is approving a settlement, discontinuance, or abandonment", in the context of s. 35(5). Neither or those scenarios exist in this instance;
5) The Family Class claims face considerable obstacles both on their merits and because of limitations defences;
6) Further protraction of these proceedings prejudices the Survivor Class; and
7) Costs of notice would be disproportionate to the benefits it would achieve.

[27] Nevertheless, I have determined that ultimately Family Class members should be given notice of the discontinuance of the Family Class claim and the bar order. This can wait, however, until the end of the trial.

Disposition of the Family Class

[28] The Family Class application is granted. Accordingly. It is ordered that:

1) The Plaintiffs have leave to discontinue the Family Class claims;

2) The Plaintiffs have leave to amend the Fresh as Amended Statements of Claim to effect the discontinuance of the Family Class claims and to remove the Family Class representative plaintiffs as parties to the actions;

3) Each of the certification orders dated June 7, 2010 is amended by removing the Family Class common issue;

4) The Family Class representative plaintiffs and the Family Class members are barred from bringing any future action against Canada alleging that by its purpose, operation or management of the Facilities Canada breached a fiduciary duty owed to the families and siblings of the students of the Facilities. The parties may determine the form of the bar order. If they are unable to settle its terms, I will do so; and

5) Included with the notice of any final determination of these class actions (whether by way of judgment or otherwise), shall be notice to all of the class members in a form and by such means as will ensure that not just the Survivor Class members but also the Family Class members shall be notified as to how their respective claims were dealt with by the Court.

2) THE APPLICATION TO RESOLVE THE ISSUE OF APPORTIONMENT OF THE FICUCIARY DUTY CLAIM

[29] The application by the Province presents four issues for the Court:

1) Should the Court entertain the application?
2) If I do hear the application, is Canada estopped from seeking to apportion any liability that it might incur for breach of fiduciary duty?
3) If not, is Canada's liability for breach of fiduciary duty nevertheless incapable of being apportioned?
4) In the result, should Canada's third party claim against the Province be struck?

[30] I note that at the outset of its submissions, the Province requested that the third question not be answered.

The Court will entertain the present application

[31] Canada appears to concede that the Court should decide the Province's application alleging *res judicata*. But, says Canada, the application should be dismissed.

[32] The Court derives its power to entertain this application from s. 13 of the *Class Actions Act*, Rules 14.24 and 42.09 of the *Rules of the Supreme Court, 1986*, and its inherent jurisdiction to control its process, which includes the ability to determine questions of law during the course of a trial.

[33] Section 13 of the *Class Actions Act* provides that:

> 13. Notwithstanding section 12, the court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[34] Furthermore, insofar as the application invokes *res judicata* or abuse of process, Rule 14.24 provides jurisdiction to strike a claim "at any stage of a proceeding".

[35] The fact that the proposed settlement between the Province and the Third Parties is contingent on the resolution of the present application militates strongly in favour of hearing it. As the Supreme Court of Canada held in **Sable Offshore Energy Inc. v. Ameron international Corp.**, 2013 SCC 37 at para. 11, judicial policy favours the settlement of litigation because such settlements are in the public interest as well as the interests of the litigants, and they contribute to the effective administration of justice.

Canada is estopped from claiming for apportionment of liability for breach of fiduciary duty

[36] I have decided that the question of apportionment for breach of fiduciary duty is not open for further argument in this case. The ship of apportionment of fault for breach of fiduciary duty set sail two years ago. It is not returning.

[37] The requirements for issue estoppel were set out by the Supreme Court of Canada in **Angle v. Canada (Minister of National Revenue)**, [1975] 2 S.C.R. 248 at page 254:

1) that the same question has been decided;
2) that the judicial decision which is said to create the estoppel was final; and,
3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[38] The holding that Canada cannot seek to apportion liability for breach of fiduciary duty satisfies all of the elements of the **Angle** test.

The same question has been decided

[39] This is a matter that has been decided against the position now being advocated by Canada, with its concurrence, in these very proceedings. Let us begin by going back two years. At para. 82 of **Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154, Butler, J. held:

> It is conceded that the fiduciary duty alleged cannot involve the Third Parties. I conclude, however, that the other duty of care alleged can and will involve the Third Parties.

[40] What was the source of this "concession" by Canada? While it may be found elsewhere, for our purposes let us turn to the "Brief of the Attorney General of Canada in Response to the Plaintiffs' Sever/Stay Motion", filed on May 17, 2013. It was signed on behalf of Canada under the names of Jonathon Tarleton, Mark S. Freeman and Melissa Grant - the counsel who continue to represent Canada in this matter. At para. 4 it states:

> The Plaintiffs allege Canada breached a fiduciary duty and was negligent. The fiduciary duty claim is made exclusively against Canada and **Canada agrees that alleged liability for any breach of fiduciary duty cannot be apportioned with others**. While the Plaintiffs focus their claim and their application on "constitutional fiduciary duty," **Canada's third party claim against the Province is narrowly focussed on negligence**. The third party claim relates solely to the degree of fault for any negligence liability. The supposed basis for any such liability would be Canada's provision of funding to the Province.
>
> [Emphasis added.]

[41] And again at para. 12:

> The Statement of Claim presents fiduciary duty as an exclusive duty owed by Canada. **Canada agrees liability for any breach of alleged fiduciary duty cannot, by its very nature, be apportioned with other parties based upon degree of fault.**
>
> [Emphasis added.]

[42] As would be expected, the concessions referred to above were made after Canada issued its Third Party Notice on November 12, 2012.

[43] Now that the issue of apportionment of damages for breach of fiduciary duty has been raised by the Province, one can look back and see the seeds of Canada's present prevarication. In the "Pre-trial Brief of [Canada] (amended)" filed on September 14, 2015, at paras. 392 and 393, Canada asserts:

> If Canada is liable to the Plaintiffs for **breach of fiduciary duty or negligence**, then Canada says that the Province's wrongdoing and fault were, in fact, the primary cause [sic] of any harm to the Plaintiffs…**By statute, the Province should be made to contribute**….
>
> [Emphasis added.]

[44] Canada relies on the *Contributory Negligence Act*. The brief does not explicitly assert that contribution is sought for damages for fiduciary duty, only that in Canada's view wrongdoing and fault by the Province were the primary causes of any harm to the Plaintiffs. It was only in a Further Reply to a Demand for Particulars dated September 11, 2015 that Canada states unequivocally that it was seeking apportionment with the Province in respect of both the negligence and fiduciary duty claims.

[45] In the context of the history of this case to date, nothing before that would cause one to become alerted that Canada would attempt to depart from its earlier stated position that **"**liability for any breach of alleged fiduciary duty cannot, by its very nature, be apportioned with other parties based upon degree of fault".

[46] Where does that leave us? The concession by Canada found its way into a decision of the Court. But in making her decision, Butler, J. did not rely only on the clear and unequivocal concession by Canada that the fiduciary duty claim could not be apportioned. She also relied upon case law and stated, at paras. 29 to 31:

> [29] However, before a court can conclude that a plaintiff has limited her claim to those damages attributable to the fault of the one defendant pursued, the pleadings must be clear. In **Taylor**, the plaintiff had made several amendments to her statement of claim and clarified that she sought from Health Canada only "those damages that are attributable to its proportionate degree of fault" (para. 2).
>
> [30] The Ontario Court of Appeal held that the court had jurisdiction to apportion fault between a party and a non-party and that, in the circumstances of that case, it was appropriate to do so (para. 29). As a result, the third party claims were struck.

> [31] A similar result was ordered in **Johnston v. Sheila Morrison Schools**, 2012 ONSC 1322 (CanLII), where relying on **Taylor**, the third party claims were set aside on the basis that:
>
> a) the plaintiffs had limited their claims to the several liability of the respondents;
>
> b) a third party claim was unsuccessful in such circumstances since the plaintiff could only seek that portion of the damages attributable to the named defendant. In those circumstances a right of contribution and indemnity did not arise; and
>
> c) **there could be no right to contribution and indemnity on a breach of fiduciary duties, such duty not being subject to apportionment**.
>
> [Emphasis added.]

[47] Subsequently, at para. 84 of her decision, Butler, J. described the fiduciary duty claim as one "for which liability cannot be apportioned".

[48] The ruling by Butler, J. as to apportionment was central to her decision not to strike or sever the third party claims but instead to put the Plaintiffs to their election to bifurcate the trial. Indeed, the fact that liability could only be apportioned in respect of the negligence claim was the reason for bifurcation. This meant that the Third Parties would not be necessary parties to a trial on the claim for breach of fiduciary duty. Had I not subsequently come to the conclusion that the facts in respect of breach of fiduciary duty and negligence were so tightly interwoven that there would be no meaningful efficiencies in bi-furcating the trial, the fiduciary duty phase would have proceeded almost a year earlier without the involvement of the Third Parties.

The judicial decision which is said to create the estoppel was final

[49] For my purposes trying the same case, the ruling by Butler J. regarding apportionment was final. I have no jurisdiction to consider an appeal from the

decision of the case management judge. Her ruling on a substantive legal issue binds me as trial judge.

[50] Depending on the context, preventing relitigation is especially important within the same litigation. In **Lundrigan Group Ltd. v Pilgrim**, [1989] 75 Nfld. & P.E.I.R. 217, 14 A.C.W.S. (3d) 238 (Nfld. C.A.), Marshall, J.A., for a unanimous court on this point, said at para. 31:

> [31] […] It is a well settled principle that such decisions are final in the adjudicating tribunal, not only as to the matters dealt with but also with respect to questions which the parties had the opportunity to raise. The unsuccessful party will not be permitted to reargue its case before the same court relying upon additional material unless that material could not have been ascertained by reasonable diligence and contains evidence which would, if established, be demonstrably capable of altering the result (see **Phosphate Sewerage Co. v. Malleson** (1879), 4 App. Cas. 801; **Fenerty v. City of Halifax** (1920), 50 D.L.R. 435; and **Scotia Chevrolet Oldsmobile Limited v. Wynate** (1970), 15 D.L.R.(3d) 438).

[51] It is to be noted that although the quotation above refers to "material" and "evidence", at issue in that case was the failure to refer to a rule of civil procedure, i.e. a matter of law. Consequently, I do not read the decision of Marshall, J.A. as being restricted to changes in the factual matrix; the principle applies to legal "material" as well. Laws can change by way of retroactive legislation or by appellate courts (for our purposes the Court of Appeal of the province and the Supreme Court of Canada) pronouncing that the law is to be interpreted or applied differently than previously accepted. But, if the law has not changed between the time of the initial adjudication and the attempt at relitigation, or if the facts as presented following due diligence do not differ materially, then the adjudicating tribunal – in this case me – does not have jurisdiction to hear the matter the second time.

[52] The finality of the decision by Butler, J. of two years ago that any breach by Canada of an alleged fiduciary duty to the Plaintiffs is not capable of apportionment is evidenced by the reliance placed upon it by the parties. Following the Plaintiffs' election to proceed with only the fiduciary duty phase of the trial, the

Third Parties effectively put down tools and sat back to await its outcome. The Plaintiffs and Canada prepared for trial. Without consulting the Third Parties, the Court set aside eight weeks beginning in November of 2014 to conduct the trial which would exclude the negligence issue and the Third Parties. Once a single trial was ordered, it was only at considerable inconvenience and expense that the Third Parties complied with the ambitious trial readiness schedule that I imposed and were ready for the September 28 commencement of this trial. Everyone – the Plaintiffs, the Third Parties, the Court and, in my view, Canada itself – relied to their detriment upon the common understanding that the fiduciary duty claim was not capable of apportionment.

[53] In addition, the Province has commissioned expert historical and economic evidence that it says assists in establishing that Canada breached a fiduciary duty owed to the Plaintiffs. It did this as an alternative to the negligence claim as it understood that it had been conclusively determined that Canada could not seek contribution or indemnity from it in respect of the fiduciary duty claims.

[54] Finally, the Plaintiffs, the Province and the IGA have achieved a resolution of the negligence claims that would see the trial simplified and proceed without the participation of those last two parties. Although they did so after they became aware that Canada would now seek to apportion fault for any breach of fiduciary duty, their actions are consistent with how for two and a half years everyone – the Plaintiffs, Canada, the Third Parties and the Court – understood the case to be proceeding.

> *The parties to the judicial decision were the same persons as the parties to the proceeding in which the estoppel is raised*

[55] The ruling by Butler, J. that the fiduciary duty claim is one for which liability cannot be apportioned was made in this proceeding so necessarily involved the same parties, thus meeting the third criterion in **Angle**.

Abuse of Process

[56] Coupled with issue estoppel is the Court's inherent ability to prevent abuses of process. Canada's position raises that spectre. In its brief for this application, it explains:

> In 2013, at the time the application to strike or sever the third-party claim was brought, [Canada] did not pursue a claim for contribution on the basis of breach of fiduciary duty, further to her understanding of the law at the time.

[57] Essentially, Canada appears to be saying that it misunderstood the effect of **Johnston**. At the same time it suggests that factual information that it has received since the Third Parties have been reintroduced to the proceeding has recast its view of its entitlement to seek apportionment for breach of fiduciary duty. First, I find these positions to be irreconcilable; second, I find neither position compelling. Canada finds itself today in the same legal and factual position in which it stood in 2013. There has been nothing new disclosed that would change the factual matrix of the case. Nor has there been a thunderbolt from the Supreme Court of Canada reinterpreting the principles espoused in **Johnston** or any other change in the law. There has been no material change in the pleadings that provides a legal basis for a restructured position by Canada.

[58] From the beginning, Canada has pleaded that it is the Province and the IGA (and the Moravians) who were responsible for and ran the Facilities. Whatever further details it may have learned in the past year change nothing in respect of Canada's underlying position. Canada has obviously either changed its mind with respect to claiming an ability to apportion fault for fiduciary duty or has discovered that it was previously in error.

[59] It is important to reiterate that I am not faced with only the admission by Canada that fault for breach of fiduciary duty is not capable of being apportioned. There has been judicial resolution of the issue. This is not therefore a situation where a person is merely trying to resile from a concession on a matter of law;

Canada's position has crystalized into a judicial pronouncement on the matter that has been relied upon by the parties and the Court. Consequently, the principle espoused by Rinfret, C.J.C. in his minority judgment in **Congrégation du Très St-Rédempteur c Aylmer School Trustees**, [1945] S.C.R. 685, at para 54, relied upon by Canada, that "[…] it is a well-recognized principle that admissions of a party can only bear on the facts and that no court can be bound by admissions on the law which the parties might pretend to make" has no application here.

[60] Canada's present position can be categorized as nothing more than a collateral attack on the decision of Butler, J. It amounts to an abuse of process. In essence, it is an attempt to appeal her decision, not by prayer to the Court of Appeal, but by relitigating the matter before me. But the Court of Appeal has said that such collateral attacks are not to be countenanced. In **R. v. Gough**, 2006 NLCA 3, at paras. 48 and 49, Wells, C.J.N.L. said for a unanimous court:

> 48. As noted above, it is not necessary to decide here whether the proposition that usage of adjoining land in support of land proven to have been sufficiently occupied to dispossess a legal owner may, in certain circumstances, be sufficient to dispossess a legal owner of both the occupied parcel as well as the adjacent "used" parcel is sound. Even if that proposition were accepted as sound, it cannot be employed to reopen, years later, an earlier judicial determination of the extent of a claimant's rights in respect of a previously adjudicated adverse possession. The nature and extent of a claimant's rights arising from an adverse possession of a title holder's property cannot be adjudicated on the instalment plan. If nothing else, principles relating to abuse of process by relitigation would prevent it.
>
> 49. Those principles are conveniently explained in a recent Canadian text dealing with the subject. The author, Donald Lange, did an exhaustive review of Canadian decisions over the last hundred or so years. At pages 347-348, he explains the policy underlying the principle. He writes:
>
> > A statement on the doctrine of abuse of process found in Fieldbloom v. Olympic Sport Togs Ltd.[(1954), 14 W.W.R. 26 (Man. C.A.)] reflects the balancing policy grounds of the estoppel doctrines. Both abuse of process by relitigation and estoppel provide a means of achieving justice between the parties in an adversarial system but, at the same time, carry with them the seeds of injustice in relation to parties litigating. Coyne J.A. stated:
> >
> > > The court has an inherent power and duty to protect itself, and its processes and proceedings, in order to preserve and

> further the proper and due administration of justice, and that power and that duty is apart from and above any Rules made under The Queen's Bench Act. The power is not, however, to be exercised without careful consideration and remembering not only that injustice must not be done to the party applying nor abuse of the process of the court permitted, but also that injustice must not be done to the other party. The power is a discretionary one, to be exercised on legal principles.

> The policy supporting abuse of process by relitigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited namely, to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

And, at page 361, he comments:

> Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in Henderson [(1843), 3 Hare 100]. To breach the rule in Henderson, even though the parties are not the same, is an abuse of process. In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. **A party is not entitled to relitigate a case because counsel failed to raise an argument which the party wanted to raise or relitigate an issue indirectly by "a cleverly camouflaged effort".**
>
> [Emphasis added.]

[61] A finding that Canada should be estopped from asserting that fault can be apportioned for a breach of fiduciary duty is more than a mere technical application of principles of law. Given the uncertainly in the legal principles relating to apportionment of fault for the breach of a fiduciary duty discussed

below, I am reluctant to preclude Canada from advancing its argument. Fairness dictates that a party be permitted to advance all arguments in its arsenal unless to permit it to do so would cause an even greater countervailing unfairness to the other parties. That is the situation in which we find ourselves; the injustice to the Plaintiffs and Third Parties outweighs any negative effect upon Canada.

It is not necessary to decide whether the law would otherwise permit Canada to apportion liability for breach of fiduciary duty

[62] Because I have found that attempting to relitigate the issue of apportionment of fiduciary duty is an abuse of process, I will not embark on a detailed examination of the law in that regard. Both the Province and Canada submit that to do so would be premature. I agree. The complete factual matrix within which to assess the position is not yet before the court.

[63] I acknowledge, as well, that the legal analysis would be complex. Even the Province admits that courts in other provinces have concluded that "there is some debate" as to "whether contributory fault should be available to reduce damages for (non-fraudulent) breach of fiduciary duty".

[64] Canada relies on s. 3 of the *Contributory Negligence Act*, which permits apportionment of damages where they are attributable to the fault of more than one party. The issue is: what are the "faults" that can be apportioned? Rather than deal with it extensively by way of *obiter dicta*, let me just say that I find compelling the argument that apportionment under the *Contributory Negligence A*ct is not confined to negligence and can apply to certain other torts (**Brushett v Cowan** (1987), 40 D.L.R. (4th) 488, 64 Nfld. & P.E.I.R. 262 (Nfld. S.C.(T.D.)). What would take further analysis is a determination of whether "fault" as contemplated by the *Contributory Negligence Act*, R.S.N.L. 1990 c. C-33 includes a breach of fiduciary duty.

[65] Although Canada cited one case where apportionment was found to be available for a breach of fiduciary duty (**Pet Valu Inc. v. Thomas**, [2004] 128 A.C.W.S. (3d) 489, OJ No. 497 (Ont. Sup. Ct.) at para. 24), that decision

simply expanded the notion that "the right to contribution [under the applicable contributory negligence legislation] is not restricted to negligence, but applies broadly to other causes of action based on fault".

[66] Neither of the cases referred to above addresses the unique features of a claim for breach of fiduciary duty. The three judges of the Ontario Superior Court of Justice Divisional Court in **Johnston** (cited by Butler, J. as referred to in para. 47 above) did, however:

> ...there can be no right to contribution and indemnity on account of a breach of fiduciary duties. Liability for breach of a fiduciary duty is not subject to apportionment.

[67] Canada says that **Johnston** can be distinguished. They also argue that the claim for apportionment of fault for breach of fiduciary duty is not totally dependent on the *Contributory Negligence Act* but also derives from equity (**Canson Enterprises Ltd. v Boughton & Co.**, [1991] 3 SCR 534). As interesting as those arguments may be, they will have to be made in another case. The issue of apportionment of fiduciary duty has been long settled in this proceeding. The present applications have already delayed this litigation. To examine fully the legal framework and analysis required to decide a matter never addressed in this jurisdiction would be tangential to these reasons and would result in additional delay. Keeping this trial on course forecloses such an analysis at this time.

Dispostion of the *res judicata* argument

[68] All of the elements of estoppel, whether by *res judicata* or abuse of process, have been established. In this proceeding, Canada is barred from seeking contribution and indemnity for any liability that it may incur for breach of fiduciary duty. It is unconscionable that a party would raise an important legal issue mid-trial that has already been decided against it – with its concurrence – earlier in the same proceeding.

[69] The first part of the Province's application is allowed. Canada is estopped from now claiming that any liability found against it for breach of fiduciary duty can be apportioned.

[70] The second part of the Province's application seeking to strike Canada's third party claim is caught up in the Plaintiffs' application for approval of the Agreement and will be addressed below.

3) APPLICATION FOR APPROVAL OF THE AGREEMENT

[71] An agreement in principle was reached on October 19, 2015 between the Plaintiffs on the one hand and the Province and the IGA on the other hand. Minutes of the Agreement were agreed to and signed by the Plaintiffs and the IGA on October 26, 2015, and the Province on October 27, 2015, respectively. To effect the Agreement, the Plaintiffs, supported by the Province and the IGA, have made application raising three discrete issues:

1. Can and should the pleadings and the certification order be amended at this point to remove the certified negligence common issue?

2. Should the Agreement be approved?

3. Assuming the certification order is amended to remove the negligence common issue, should the third party claim be struck?

The Agreement

[72] The Agreement generally provides as follows:

1) the Plaintiffs will seek leave to amend their claim to delete the claim for negligence and the certification order will be amended to delete the negligence common issue;
2) if leave to amend is granted, the Plaintiffs, the Province and the IGA will ask the Court to dismiss or permanently stay the third party claim of Canada against the Province on the grounds that the negligence claim has been dropped and the fiduciary duty claim is not subject to apportionment;
3) assuming the Court grants the above order, the Province and the IGA will take no further part in the action;
4) the expert witnesses retained by the Province, Professor Wade Locke and Dr. Peter Neary, will be made available to testify as part of the Plaintiffs' case if the Plaintiffs wish to call them as witnesses;
5) the Plaintiffs will execute a release of the Province and the IGA and the parties will see the issuance of a bar order enforcing same;
6) the Court will approve the Agreement on joint motion of the Plaintiffs, the Province and the IGA; and
7) the actions will continue against Canada alone as the Defendant, as scheduled and initially intended.

Analysis

[73] The Plaintiffs' position is as follows:

1) The Plaintiffs should be granted leave to amend their pleadings to remove the alleged negligence cause of action, and this Court can, and should, amend the certification order to remove the certified negligence common issue.
2) The proposed Agreement between the Plaintiffs and the Third Parties is not a traditional settlement agreement, but if Court approval is nevertheless required, it should be granted. Notice to the class of the Agreement, however, is not required.
3) Assuming the proposed Agreement is approved, if necessary, and the Plaintiffs' pleading and the certification order are amended to remove the negligence cause of action/common issue, Canada's third party

> claim can and should be struck as it is plain and obvious that its third party claim does not advance a viable cause of action at law.

[74] Canada takes no position on the proposed settlement insofar as the discontinuance of the negligence claim is concerned. It says that pursuant to sections 35 and 40 of the *Class Actions Act* and Rule 19.02(2), I should order that discontinuance of the negligence claim be a bar to any future negligence action.

[75] Section 35 of the *Class Actions Act* provides that any settlement agreement in a class action must be approved by the Court to be binding. Rule 7A.10 (2) sets out what materials and information must be included in an application for approval of a settlement in a class action:

> 7A.10. (2) An application to court for approval of a settlement of a class action shall include:
>
> (a) a brief history of the proceeding;
>
> (b) a brief statement of the facts that form the basis of the settlement;
>
> (c) a discussion of the relevant issues of law;
>
> (d) the terms of the settlement and its amount;
>
> (e) a statement of the form of payment of the settlement;
>
> (f) the method of quantifying individual claims and the distribution of the settlement funds to class members;
>
> (g) the total amount of legal fees and disbursements and their impact on the settlement;
>
> (h) details of unresolved claims, if any, including their number and how they are to be resolved;
>
> (i) a plan of action for resolving individual claims;
>
> (j) a statement of any differences in the manner of treatment of class members;
>
> (k) the procedure for disbursing unclaimed funds;

(l) information of related class or representative proceedings in other jurisdictions; and

(m) the form of a notice proposed to be sent to class members.

[76] The Plaintiffs argue that the Agreement is not a settlement to which Rule 7A.10 (2) applies. This is because, submit the Plaintiffs, they have not asserted any direct claim against the Province or IGA and have not named them as defendants. That makes this an agreement not to pursue a cause of action against a defendant that will then have a consequential impact on any claim against a third party. The Plaintiffs maintain that this remains within the purview of class counsel acting in the best interests of the class, and as such, neither court approval nor notice to the class are necessary in these circumstances.

[77] I disagree, notwithstanding that the Plaintiffs have not sued the Third Parties and there is no money changing hands. As a result of the latter, however, the information required by paras. (e) to (l) of Rule 7A.10 (2) are not applicable here. Nevertheless, the Plaintiffs, by agreement with two of the other parties to the litigation, have agreed to discontinue one of their causes of action as certified by the Court. Such an agreement, whatever the relationship between the agreeing parties and whatever the nature of the *quid pro quo*, is a settlement. The Third Parties get relief from the action and the Plaintiffs get in exchange a more streamlined trial and access to expert evidence that may not otherwise have been available to them.

The Agreement is approved

[78] Notwithstanding the order in which the issues have been presented by the Plaintiffs, the starting point is whether the Agreement should be approved.

[79] In **Verna Doucette v. Eastern Regional Integrated Health Authority**, 2010 NLTD 29, this Court, *inter alia*, approved a settlement in a class action, and in doing so, effectively amended both the class definition and the statement of claim. Thompson J., at paras. 7 to 9, canvassed authorities from across Canada and

provided a helpful summary of the various principles considered when approving a settlement in a class action in Newfoundland and Labrador. His starting point was that a settlement may be less than perfect. Better becomes the enemy of good. Consequently, the Court's role in reviewing a settlement in a class action is to approve it or to reject it. The Court cannot modify it.

[80] Several factors are to be considered in evaluating a settlement:

- likelihood of recovery, or likelihood of success;
- amount and nature of discovery evidence;
- settlement terms and conditions;
- recommendation and experience of counsel;
- future expense and likely duration of litigation;
- recommendation of neutral parties, if any;
- number of objectors and nature of objections;
- presence of good faith and absence of collusion;
- degree and nature of communications by counsel and Plaintiff with class members during the litigation;
- information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and
- the risk of not unconditionally approving the settlement.

[81] At para. 12, Thompson, J. reminds us that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions. It is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

[82] Later, at paras. 15 to 17, Thompson, J. stated that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved. On an application to approve a settlement in a class proceeding, all parties and their counsel are obliged to provide full and frank disclosure of all material information. The court is entitled to sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement.

[83] There is, however, a "strong initial presumption of fairness" when an agreement is negotiated and pursued at arm's length and recommended by experienced class counsel:

> Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.
>
> [**Serhan (Trustee of) v. Johnson & Johnson**, 2011 ONSC 128 at para. 55.]

[84] I am satisfied that the Agreement is fair, reasonable and was made in good faith. The Plaintiffs have satisfied me that the Agreement provides sufficient benefits to the parties and the class. It also eliminates serious risks facing the Plaintiffs and the class. What the Agreement does not do, however, is provide for a monetary payout to the class members. That, in and of itself however, is not a reason to reject the Agreement if it is otherwise fair and reasonable.

[85] What benefits do the Plaintiffs derive from the Agreement? First, the removal of the negligence claim, along with the consequent removal of the Third Parties, will significantly simplify the trial of these long-protracted class actions.

[86] The structure of the Agreement also benefits the Plaintiffs insofar as additional evidence is secured for their use. The Plaintiffs will have access to the *viva voce* evidence from two expert witnesses that the Province proposed to call. According to the Plaintiffs, Professor Wade Locke will greatly assist the Court in

its determination of aggregate monetary relief, and authoritative historical evidence will be gleaned from Dr. Peter Neary. The Plaintiffs will now have the option to call evidence in chief from both of these expert witnesses, when it was otherwise less than certain that they could be compelled to testify on behalf of the Plaintiffs.

[87] The proposed Agreement will have the benefit of limiting the case to the fiduciary duty claim against Canada. This is what the Plaintiffs say they intended at the outset of these class actions eight years ago. The Plaintiffs' intention to concentrate on the claim against Canada for alleged breach of fiduciary duty has long been recognized. As stated by Butler, J. in November of 2013:

> [10] Since I have been case managing this file, counsel for the Plaintiffs has focused primarily on the fiduciary duty they allege.[…]
>
> [**Anderson v. Canada (Attorney General)**, 2013 CanLII 73498 (NL SCTD), at para. 10]

[88] In fact, the Plaintiffs' election in December 2013 to defer the negligence phase of the trial in favour of pursuing the fiduciary duty phase against Canada alone can be seen as tantamount to abandoning the former. This is partly because of the advanced age and impaired health of many class members who have testified before me. Given the time that it would have taken to complete the fiduciary duty phase of the trial through to the final disposition of all avenues of appeal, it would be far from certain that there would ever have been a subsequent negligence trial. Exacerbating these discouraging effects are the legal challenges inherent in presenting a subsequent common claim in negligence and the cost of doing so.

[89] Moreover, the Plaintiffs submit that the removal of the negligence claim should not impact the ultimate level of compensation sought and received for the class members if successful on liability because damages are sought on a global basis irrespective of the cause of action alleged.

[90] The Plaintiffs also acknowledge that the negligence claim is the more difficult cause of action to prove on a common basis in the circumstances of these class actions. See, for example, the Court of Appeal decision on certification where

it was recognized that the duty of care alleged by the Plaintiffs has not been "settled by existing authority" (**Anderson v. Canada (Attorney General)**, 2011 NLCA 82 at paras. 64 to 79).

[91] The Plaintiffs recognize that further complicating the claim in negligence is the fact that it encompasses five Facilities over a span of 30 years. The Plaintiffs could, for example, be unsuccessful in proving negligence for some or all of the Facilities for some or all of the class period. This would occur if they failed to prove the prevailing standards of care over the various time periods or failed to tender sufficient evidence of breach over all or some of the decades in dispute. Even then, if the Plaintiffs were able to establish all the other elements of negligence, Canada's common law duty of care could be negated as a matter of law by its "policy" defence. The Plaintiffs submit that these risks are eliminated with the removal of the negligence cause of action (although I note that Canada maintains that it will argue that the defence of governmental policy applies in the context of an alleged breach of fiduciary duty as well).

[92] Finally, the Plaintiffs' maintain that Canada's third party claim against the Province is questionable. The Province would only be potentially liable to Canada in negligence, if apportioned, and only for the period following May 1, 1973, being the date on which the Newfoundland and Labrador *Proceedings Against the Crown Act*, R.S.N.L. 1990 c. P-26, was proclaimed into force. This leaves the Province immune for at least 24 of the 30 years of the class period. Furthermore, the Province has claimed a significant equitable set-off as against Canada for any liability associated with breach of a common law duty. The utility of the Province's continued participation in this action is limited to Canada and only causes compounding delays to the claims the Plaintiffs seek to assert against the Canada.

[93] All of the risks, concerns, and associated expenses identified above are alleviated on account of the Agreement by way of removal of the negligence claim and the assumed consequential removal of the Third Parties from these class actions.

The Plaintiffs may discontinue the Negligence Claim

[94] As we have seen, in a class action pursuant to Rule 7A.08, "[a]fter a certification order has been granted, a party may only amend a pleading filed by that party with leave of the court."

[95] Granting leave to amend pleadings is a discretionary exercise, and in deciding whether to grant leave, the test traditionally employed by this Court is whether an amendment (a) causes injustice to the other side; (b) raises a triable issue; (c) is embarrassing; and (d) provides particulars (**Harvey v. Memorial University of Newfoundland**, 2013 NLTD(G) 51 at para. 7). This is also generally consistent with the requirements to strike under Rule 14.24. The Court in **Harvey** went on to say, quoting from **Petten v. E.Y.E. Marine Consultants et al.**, [1994] 120 Nfld. & P.E.I.R. 313, 373 A.P.R. 313(Nfld. S.C.(T.D.)) at paras 91 and 101:

> [*M*]*ala fides* or other inappropriate behaviour on the part of the Plaintiffs aside, the primary determinant of the issue will be an assessment of the potential injustice to the other side, if the amendment were to be granted. Generally there will be no injustice if the other side can be adequately compensated in costs[…] [S]o long as injustice to the other parties will not be the result and the proposed amendment complies with the rules as to pleading and supplies proper particulars, the amendment will not be denied just because the amendment will have the result of complicating the trial or adding or substituting new causes of action, provided the new cause of action arises out of the same or substantially the same facts as the original cause of action.
>
> [Emphasis added.]

[96] This test is met in this instance.

[97] Amendment applications are typically made in the context of adding or clarifying a cause of action – not to remove a cause of action, as the Plaintiffs are proposing here. Accordingly, there is no need to consider whether the amendments sought consequential to approval of the Agreement raise a triable issue, are embarrassing, or provide particulars.

[98] There can be no injustice caused to Canada. There is no additional evidence or discovery that may be required stemming from the removal of the negligence cause of action. The Plaintiffs' claim has been narrowed – not expanded. Canada may wish to have the negligence issue maintained as the bridge to its third party claim against the Province. But Canada's claim is merely derivative of the Plaintiffs' claim. These are their actions. The Plaintiffs should not be compelled to continue with a cause of action in respect of which they see little prospect of success. Canada should be placed in no better position than it would have been had the Plaintiffs had not included the negligence claim in the first place.

The certification order can be amended during the common issues trial to remove the negligence common issue

[99] By s. 9(3) of the *Class Actions Act*, "[t]he court may amend a certification order on the application of a party or class member or on its own motion." There is no time restriction associated with the Court's discretion in this regard.

[100] This broad power to amend is supplemented by s. 13:

> The court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[101] As stated in *The Law of Class Actions in Canada* at p. 220, "[a] party may bring a motion to decertify or amend the certification order at any point in the proceeding including during the trial of the common issues".

[102] It follows, therefore, that because I have granted the Plaintiffs leave to amend their pleading to remove the negligence cause of action, the certification order must also be amended to remove the negligence question. This is because it would no longer have any basis in the pleadings. No injustice would accrue to Canada by the certification order being amended at this time to remove the negligence common issue.

A Bar Order Will Issue

[103] I agree with Canada, however, that discontinuance of the negligence claims should be a bar to future claims by Survivor Class members against Canada that by is operation or management of the Facilities, it breached a duty of care owed to students of the Facilities to protect them from actionable physical or mental harm.

Notice

[104] Advance notice need not be given to the Survivor Class prior to the amendment to the certification order. The Court may amend a certification order on the application of a party or class member, or even on its own motion. Notice is discretionary.

[105] Here I find myself in the same position with respect to notice as I found myself in the Family Class proceeding. Ideally, advance notice of the change to the certified common issues would be provided to class members. But in exercising my discretion I find compelling the need to determine the remaining common issues in a reasonable period of time. I am also cognizant of the fact that the fiduciary duty claim is the Plaintiffs' principal claim. That claim remains, as do the damages available to the Class members, if successful. The cost and time involved in providing advanced notice to the class members is not warranted. They shall, however, have notice of the Agreement and its consequential effects on the pleadings and common issues after the proceeding has been finally determined (by judgment or otherwise).

The Third Party Claims are Struck

[106] On a Rule 14.24(1)(a) application to strike, the Plaintiffs and the Province must demonstrate that it is plain and obvious that Canada cannot succeed with its third claim against the Province. I acknowledge that the test is a "stringent" one - if there is "any possible basis whatsoever on which a [party] might successfully

argue entitlement at law" it is inappropriate to strike the claim (**College of the North Atlantic v. Thorne**, 2015 NLCA 47, paras. 47 and 48).

[107] Because I have found that Canada may not seek to apportion any fault for breach of a fiduciary duty owed to the Plaintiffs in this case, necessarily its third party claim must be struck. The claim in negligence, which can be apportioned, has been discontinued. The third party claim by Canada against the Province requires a foundation in the claim against it by the Plaintiffs. Because the third party claim cannot rest upon the Plaintiffs' cause of action relating to fiduciary duty, and because that is the only remaining cause of action, in this case the third party claim must be struck. It is plain and obvious that it cannot succeed.

[108] Similarly, because the third party claim by the Province against the IGA is derivative of Canada's third party claim, with the latter being struck, so too must the former.

Disposition of the Application to Approve the Agreement

[109] It is ordered that:

1) The Plaintiffs have leave to discontinue the their claims in negligence;
2) The Plaintiffs have leave to amend the Fresh as Amended Statements of Claim to effect the discontinuance of the negligence claims;
3) Each of the certification orders dated June 7, 2010 is amended by removing the negligence common issue;
4) The Survivor Class representative plaintiffs and the Survivor Class members are barred from bringing any future action against Canada alleging that by its operation or management of the Facilities Canada breached a duty of care owed to students of the Facilities to protect them from actionable physical and mental harm. The parties may determine the form of the bar order. If they are unable to settle its terms, I will do so;
5) Canada's third party claim against the Province is struck;
6) The Province's third party claim against the IGA is struck; and

7) Included with the notice of any final determination of these class actions (whether by way of judgment or otherwise), shall be notice to all of the class members in a form and by such means as will ensure that the Survivor Class members shall be notified as to how the claims in negligence were dealt with by the Court.

4) APPLICATION FOR AMENDMENTS TO THE PLEADING

[110] The Plaintiffs brought an application for leave to further amend the Fresh as Amended Statements of Claim in the form attached to the Affidavit of David Rosenfeld sworn October 27, 2015. These amendments are not consequential to the amendments required in respect of discontinuance of the Family Class proceeding and the claim in negligence as discussed above.

[111] The Plaintiffs maintain that it would be an reasonable exercise of the Court's discretion to allow the amendments because:

1) no new causes of action are advanced;

2) there is no prejudice to Canada;

3) the factual matrix being advanced is in general conformity with the original pleading and is derived of facts known to Canada and evidence adduced (or to be adduced) at trial;

4) the claim for disgorgement is a remedy appropriately sought for breach of fiduciary duty; and

5) Canada has had notice of the disgorgement claim since the Province served the Locke Report on July 13, 2015, a report that Canada had the opportunity to discover upon on September 16, 2015.

[112] Canada says that certain of the amendments constitute evidence and not material facts, others are argumentative and are designed to embarrass it. Canada also argues that the claim for disgorgement is not pleaded with sufficient

particularity and constitutes a new cause of action. It claims that it would be prejudiced by its addition at this stage of the proceeding.

Analysis

[113] Rule 15.02 of the *Rules of the Supreme Court* governs amending pleadings:

> 15.02 (1) If an amendment does not include the addition, deletion, substitution of correction of the name of a party to a proceeding, a party may amend a pleading files by that party other than an order …
>
> (c) at any time with leave of the Court on such terms as it thinks just.
>
> (2) The Court may allow an amendment notwithstanding the effect of the amendments will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.
>
> [Emphasis added.]

[114] The Plaintiffs argue that this not an application where a party seeks to *expand* its pleading and *add* causes of action. Even in those cases, however, leave is almost always granted. As stated in Green, J. (as he then was) in **Petten** at para. 100:

> The amendment will not be denied just because the amendment will have the result of complicating the trial or adding or substituting new causes of action, provided the new cause of action arises out of the same or substantially the same facts as the original cause of action. This is so even where the proposed amendment raises for the first time allegations of intentional wrongdoing arising out of the same factual context….

[115] Rule 15 must be "liberally construed and given a wide scope" (see **Midnight Marine Limited v. Aviva Insurance Company of Canada**, 2015 NLTD(G) 112).

[116] One purpose of amending pleadings is to make them conform to the evidence adduced (or anticipated to be adduced) at trial. As stated in **Petten** at para. 87:

> [Rule 15] enables the court to correct non-prejudicial errors and allow a proceeding to be reshaped and refocused as the case develops so as to enable it to be decided on the basis of the real issues disclosed.

[117] The guiding principles on Rule 15 applications can be summarized as follows:

> …any reasonable and bona fide application to amend should be granted where it would not operate prejudicially towards the other party, or when such prejudice might exist, where that prejudice might be otherwise compensated for.
>
> (**Mac-Donald Construction Co. v. Ross**, [1980] P.E.I.J. No. 1 (P.E.I. S.C.) at para. 19)

[118] This is consistent with the proposition that "the court is not to dictate to parties how they should frame their case" as that right "ought always be preserved sacred" (**U.F.C.W., Local 1252 v. Cashin et al.,** [1988] 70 Nfld. & P.E.I.R. 139, 11 A.C.W.S. (3d) 301 (Nfld. C.A.). Nevertheless, the proposed amendments (a) must not cause injustice, (b) must raise a triable issue, (c) must not be embarrassing and (d) must contain particulars (**Butler v. Kloster Cruise Ltd.**, [1992] 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.T.D.) at p. 3). That is, they must conform to the general rules regarding pleadings.

[119] In **Visx Inc. v. Nidek Co.**, [1996] 72 C.P.R. (3d) 19, 69 A.C.W.S. (3d) 59 (FCA), at para. 16, the Federal Court of Appeal reiterated this principle:

> In determining whether an amendment […] should be allowed, it is often helpful for the court to ask itself whether the amendment, if it was already part of the proposed pleadings, would be a plea capable of being struck out under Rule 419. If yes, the amendment should not be allowed.

[120] The primary determinant will always be an assessment of potential injustice to the other side (**Petten** at para. 90). It is the opposing party, however, who is required to offer proof of actual prejudice, unless the totality of the facts warrants an inference of prejudice being drawn (**Diamond Estate v. Robbins**, 2006 NLCA 1, para. 80).

[121] If prejudice can be overcome, I must look to see if the amendment is one that could be struck pursuant to Rule 14.24.

General amendments

[122] Let us now examine the amendments sought here, other than the amendment to add disgorgement as a remedy. Canada's brief dealt largely with the latter, but it also has concerns with the general amendments proposed to the extent that they go beyond what is required to discontinue the Family Class proceeding and the claim in negligence.

[123] Having reviewed all of the proposed amendments to all of the Statements of Claim, I am satisfied that for the most part they are designed to reshape and refocus the pleadings as the case develops so as to enable the common questions to be answered on the basis of the real issues disclosed.

[124] I do not agree with Canada that some the proposed amendments go beyond pleading material facts and assert evidence or that others are designed to embarrass or vex Canada.

[125] There are five actions in substantially the same form. There are, however, differences in corresponding paragraph numbers arising out of the differing circumstances of the respective Representative Plaintiffs. Consequently, for the purposes of this decision I will refer to the proposed Fresh as Amended Statement of Claim in the Edgar Lucy proceeding (docket number 200801T0846 CCP). To the extent that I allow amendments to that pleading, the same permission applies, *mutatis mutandis*, to the other four Statements of Claim. But allowing

amendments does not mean that I have endorsed them. They are simply a recitation by the Plaintiffs of facts that they say are necessary to ground their claims and to answer the common questions. Proof of those facts, the ultimate assessment of their relevance and the weight and significance to be ascribed to them is the purpose of the trial.

[126] Let us look at the particular areas of concern for Canada.

[127] Canada takes issue with the proposed para. 12 to the extent that it alleges that one of the purposes of the Canadian Indian Residential Schools (in respect of which settlement was reached in 2007) was "complete *obliteration* of [aboriginal peoples'] traditional language, culture and religion". Canada highlights the use of the word "obliteration". I agree that the language is colourful but it does make the stark connection alleged by the Plaintiffs between the treatment of the aboriginal people of Labrador and the treatment of aboriginal people in the rest of Canada. I will permit the amendment.

[128] Another instance is para. 17 to the extent that it states "In one of the drafts of the Grey Book, Federal officials pencilled out express provision for Aboriginals". This, Canada says, is designed to embarrass it. I disagree. Although the language here, too, is colourful, it does conform to the evidence and highlights the Plaintiffs' position regarding the manner in which aboriginal issues were dealt with during the negotiations for Newfoundland's entry into the Canadian confederation.

[129] Canada questions what the two sentences proposed to be added to the end of paragraph 34 mean. The answer is obvious. The first ties back to the averment at the beginning of the paragraph. The second, although not elegantly worded, concludes the allegation. These changes are connected to the claim for disgorgement which I will discuss below.

[130] The proposed new paragraph 36 references legal opinions received by Canada in 1950 and 1964 relating to aboriginal people in Labrador. Canada says that pleading them is argumentative and embarrassing. It questions their relevance.

I disagree. The opinions, which are in the public domain, are being relied upon by the Plaintiffs to place in context their assertion that Canada did not fulfil its alleged fiduciary duties to the aboriginal peoples of Labrador. I will permit the amendment.

[131] Canada is not prejudiced by the amendments referred to. There is no injustice caused by allowing them. Different considerations apply, however, to the claim for disgorgement and I will address it next.

Claim for Disgorgement

[132] The Plaintiffs' now desire to claim that Canada should be ordered to pay to them monies that they say it failed to pay on their behalf to the Province.

[133] In the context of Rule 15 applications, non-compensable prejudice has been deemed to arise in situations where: (i) essential evidence would be lost if the amendment were permitted, (ii) the amendment would come so late that the other side would not be able to adequately respond or (iii) the amendment raises new facts giving rise to a new cause of action for which a statutory limitation period has already expired (**Midnight Marine Limited v. Aviva Insurance Company of Canada**, 2015 NLTD(G) 112 at para. 22).

[134] The Plaintiffs say that none of these concerns apply to this application because: (i) no further evidence is required; (ii) the amendments reflect the evidentiary shape of the case developed entirely from the Defendant's own documentary and oral evidence; and (iii) no new cause of action is alleged.

[135] Canada says that the Plaintiffs seek to amend their pleadings to allege it has been unjustly enriched and, therefore, the Plaintiffs are entitled to the remedy of disgorgement. It says further that considering the totality of the facts, making such

an amendment to the pleadings at this time warrants an inference of prejudice to the Defendant because:

a) The proposed remedy of disgorgement is essentially the Plaintiffs' attempt to graft a defence of equitable set-off being pleaded by the Province in answer to the Defendant's claim for contribution and apportionment of damages while, at the same time, supporting the position of the Province that such claim should be struck;

b) The Defendant would be entitled to apply to strike this new claim and, even if unsuccessful, the Defendant would also be entitled to seek further particulars of the new claim before pleading over to it. Those are procedural rights that the Defendant will either have to give up or they will delay the common issues trial;

c) The Defendant has not been provided discovery of suitable representatives from the Plaintiff class regarding this new claim; and

d) The amendments sought are, in essence, a new claim that the Defendant somehow wronged the Plaintiffs by not providing the Province with enough money as she allegedly did in other provinces.

[136] To this the Plaintiffs counter that even if the claim for disgorgement were a new cause of action, leave of the court should still be granted given that the claim nevertheless arises out of substantially the original factual footprint and because there is no prejudice to Canada.

[137] Furthermore, say the Plaintiffs, numerous judicial decisions, including by the Supreme Court of Canada, have confirmed that a claim for any type of damages is not a cause of action but a remedy. For this proposition, the Plaintiffs rely upon **Canadian Industries Ltd. v. Canadian National Railway Co.**, [1940] 4 D.L.R. 629, 52 C.R.T.C. 31 (Ont. C.A.), affd. [1941] S.C.R. 591; **Shubaly et al v. Coachman Insurance et al.**, 2012 ONSC 5455, at para. 19, also relying upon **Bazkur v. Coore**, 2012 ONSC 3468, at para. 15. As such, they say, the test applicable to the judicial exercise of discretion in permitting the amendment is even lower than the already low threshold typically governing Rule 15.

[138] This characterization is a consequential one: unless there is a new cause of action, there is virtually no impediment whatsoever to granting the amendment. Where no new cause of action is sought to be added, there is no requirement on the moving party to demonstrate an absence of prejudice. Instead, the 'classic rule' applies that the amendment should be allowed, no matter how late, unless there is prejudice and even that is no obstacle if it can be repaired (**321665 Alberta Ltd. v. Mobil Oil Canada Ltd.**, 2010 ABQB 522 at para. 17).

[139] The Plaintiffs rely upon **Cahoon v. Franks**, [1967] S.C.R. 455, the Supreme Court of Canada where it was determined that a new head of damage does not necessarily create a new cause of action. In **Ascent Inc. v. Fox 40 International Inc.**, [2009] 178 A.C.W.S. (3d) 907, O.J. No. 2964 (Ont. Sup. Ct.), it was held at para. 3:

> A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.
>
> [Emphasis added.]

[140] Therein lays the challenge to the Plaintiffs' assertion, however. The claim for disgorgement is not made out in the current pleadings and requires the amendments being sought. New facts are relied upon. The material facts are sought to be added by the amendments to, *inter alia*, paras. 30 to 32, 34, 38, 64, and 70 to 72 of the Edgar Lucy claim. Consequently, we are not dealing with "an alternative claim for relief arising out of the same facts previously pleaded" or the "particulars of an allegation already pled".

[141] Furthermore, the Plaintiffs are wrong in their assertion that no new evidence is required to prove their entitlement to disgorgement. My understanding is that the remedy requires referring to additional documentary evidence and the expert testimony of Dr. Locke. It is true that his evidence was anticipated previously as part of the claim of the Province for equitable set-off. But, to this point in the

proceeding, it has not been suggested that his evidence would have any relevance to the claim by the Plaintiffs against Canada.

[142] Finally, given the foregoing, the claim for disgorgement raises a new cause of action in respect of which there are limitation period issues.

[143] I conclude that Canada is right in asserting that disgorgement and restitution are remedies for the equitable claim of unjust enrichment. Thus, if a claim in unjust enrichment is being asserted by the Plaintiffs, they then could seek disgorgement as a remedy.

[144] I acknowledge, as well, that disgorgement can also be a remedy for breach of fiduciary duty because such awards restore to the beneficiary profits misappropriated and prevent the fiduciary from profiting by acting in a conflict (**Strother v. 3464920 Canada Inc.**, 2007 SCC 24 at paras. 75 – 79). That case distinguishes between disgorgement for a "prophylactic" purpose and for a "restitutionary" purpose. The former involves appropriating for the person to whom the duty is owed any benefit or gain obtained or retained by the fiduciary. The latter involves restoring to the beneficiary profit which properly belongs to the beneficiary but which has been wrongfully appropriated to the fiduciary.

[145] But the circumstances of that case differ from this. Here, the Plaintiffs seek disgorgement through an indirect process. They say that Canada, owing a fiduciary duty to them, failed to pay monies for their benefit to the Province. Because it owed and breached a fiduciary duty to the Plaintiffs, Canada must now pay those monies directly to them. That claim is not made out in the current pleadings, it requires additional evidence, and it may be barred by the expiry of a limitation period. It is a stand-alone claim that does not arise directly from the alleged fiduciary duty owed to the Plaintiffs by Canada. Rather, it claims that Canada has been unjustly enriched by retaining monies that the Plaintiffs now say ought to have been paid to the Province for their benefit.

[146] I am satisfied, however, that the new claim is pleaded with sufficient particularity to permit Canada to defend it.

[147] Because the Plaintiffs seek to add a cause of action, this part of the application turns on the potential for prejudice to Canada by adding the claim for unjust enrichment in the middle of the trial.

[148] If this was the first time that Canada was made aware of a claim that it improperly withheld from the Province monies promised for aboriginals in Newfoundland, then the prejudice would be obvious. In this case, however, in August past I allowed the Province to amend its defence to the third party claim to assert an equitable set off against Canada for the same monies now claimed by the Plaintiffs. The factual basis for the Plaintiffs' claim is the same as for the Province's – documents produced by Canada and the report of Dr. Locke. Canada has been in receipt of Dr. Locke's report since July. It has examined him for discovery. It is not anticipated that he will be called to be qualified to give expert testimony until at least January 18, 2016. Canada will, therefore, have had six months to prepare for the new evidence.

[149] Canada says that it has had no opportunity to examine the representative plaintiffs for discovery on the new cause of action. That may be true, but I fail to see what light the people who attended the Facilities as children could shed on the fiscal arrangements between Canada and the Province. They have already testified as to how they came to attend the Facilities, the conditions there and how they were treated, so I do not see what more they could add in relation to the claim for unjust enrichment.

[150] Canada has already advanced limitation defences to the Plaintiffs' claim. I assume that they will apply to this new cause of action as well.

[151] It is true that there are facts now being pled by the Plaintiffs in order to ground their claim for disgorgement that do not appear in their current pleadings. But they are not allegations of which Canada was unaware. In fact, they arise for

the most part, if not entirely, from the documents produced by Canada as we have already seen by the testimony of the expert historian Robert Cuff.

[152] Canada says that the issue raised is not justiciable. It says that because the issue is purely political it should not be addressed by the Court (***Reference re Canada Assistance Plan***, [1991] 2 SCR 525). I disagree. The Court of Appeal has already given these Plaintiffs wide latitude to bring novel and untested claims against Canada. This is but one more. I am not prepared to say that pursuant to Rule 14.24 it is plain and obvious that it has no prospect of success. To this point in the litigation we have already sailed very far into uncharted waters. I am not prepared to tell the Plaintiffs that they cannot search for disgorgement on the shores of this proceeding unless to do so would cause Canada irreparable prejudice.

[153] Canada has not established such prejudice. I will allow the amendments to plead unjust enrichment and the remedy of disgorgement. I will hear from the remaining parties as to what is required to permit Canada to plead in response.

COSTS

[154] Typically, costs are not awarded in class actions. This is a result of s. 37 of the Class Actions Act which provides:

> **37.** (1) The Trial Division and the Court of Appeal shall not award costs to a party to an application for certification under subsection 3(2) or section 4, to a party to a class action or to a party to an appeal arising from a class action at any stage of the application, action or appeal.
>
> (2) Notwithstanding subsection (1), the Trial Division and the Court of Appeal may award costs to a party in respect of an application for certification or in respect of all or part of a class action or an appeal from a class action where the court considers that
>
> (a) there has been vexatious, frivolous or abusive conduct by a party;

> (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for another improper purpose; or
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (3) A court that orders costs under subsection (2) may order that those costs be assessed in a manner that the court considers appropriate.
>
> (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

[155] Here I have found that on the application by the Province, Canada has committed an abuse of process. Consequently, pursuant to s. 37(2)(a) costs are payable by it to the other parties in respect of that application only.

[156] My preference in these types of matters is to award a lump sum amount (or gross amount) of costs pursuant to Rule 55.02(1)(a). The costs that are payable by Canada here are the incremental costs arising out of the Province's application. The parties were already before me on the two applications by the Plaintiffs and, in accordance with the general rule contained in s. 37(1), no costs are awarded in respect of those applications. A lump sum award of costs, although perhaps not as precise a tool as taxed costs, saves the time and expense occasioned by taxation. But to make a lump sum award of costs the Court requires some guidance from the parties in determining a fair amount. I was not provided with any meaningful assistance by the parties in this regard. Therefore, I am left to order that Canada pay the incremental costs of the other parties on the application by the Province in accordance with Column 1 of the Scale of Costs.

_____

ROBERT P. STACK
Justice