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

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 181
Date: December 9, 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: December 7, 2015

Summary:

Plaintiffs proffered a proposed expert, Dr. Richard Enns of the University of Calgary, on socio-historical aspects of the trial of five class actions before the

Court. It was held that Dr. Enns may provide expert testimony on (1) the treatment, needs, care, protection and education of residents in Canadian Indian Residential Schools before and after 1949, including the standard of care of the day and (2) the history and development of federal knowledge, policies and oversight of the Indian Residential School System. It was further held that Dr. Enns is not qualified to give expert evidence in relation to those two topics as they relate to Newfoundland and Labrador. Finally, it was held that Dr. Enns is not qualified to give expert evidence in relation to the concept of "total institutions", the knowledge of Canada of such institutions or the adverse impact on residents of residential schools.

Appearances:

Chesley F. Crosbie, Q.C., Jessica Dellow, David Rosenfeld, Kirk Baert, Celeste Poltak, James Sayce, Alan Regel and Steven 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: R. v. Mohan, [1994] 2 S.C.R. 9; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 174; **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77; **R. v. D.D.**, 2000 SCC 43; **Bergen v. Guliker**, 2015 BCCA 283; **Krawchuk v. Scherbak**, 2011 ONCA 352; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 138; **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] Professor Richard Enns is being proffered by the Plaintiffs as an expert witness on:

1) the treatment, needs, care, protection and education of residents in residential schools across Canada before and after 1949, including the standard of care of the day;
2) the history and development of federal knowledge, policies and oversight of this system throughout Canada, including Newfoundland and Labrador after 1949; and
3) the concept of "total institutions", the knowledge of Canada of such institutions and, in particular, the adverse impact on residents of residential schools.

[2] Dr. Enns has prepared a report for presentation to the Court, titled *Standards of Care in Government-funded Residential Schools and Residences in Canada after 1949* (the "Report").

[3] My consideration of whether Dr. Enns may provide expert testimony in this trial is based on the factors set out by the Supreme Court of Canada in **R. v. Mohan**, [1994] 2 S.C.R. 9. At page 20, Sopinka, J., writing for the Court said:

> Admission of expert evidence depends on the application of the following criteria:
>
> (a) Relevance;
> (b) Necessity in assisting the trier of fact;
> (c) The absence of any exclusionary rule;
> (d) A properly qualified expert.

[4] Let us now look at the circumstances before me to see why I have admitted a portion of the Report and excluded the rest.

[5] We are well along in the common issues trial arising out of five class actions. Class members are aboriginal people who 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") claiming that by its purpose, operation or management of the Facilities it breached a fiduciary duty owed to the students of the Facilities to protect them from actionable physical or mental harm.

[6] As we saw above, Dr. Enns is being put forth as an expert witness in three distinct areas. We need, therefore, to understand how each relates to the matters at issue in this trial. The first, "the treatment, needs, care, protection and education of residents in residential schools across Canada before and after 1949, including the standard of care of the day" refers to both "Indian Residential Schools"[1] and the Facilities. This is also the case with respect to "the history and development of

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[1] I will use the phrase "Indian Residential Schools" and variations of the same to refer to the institutions located in parts of Canada other than Newfoundland and Labrador operated by Canada under the auspices of the *Indian Act* and its predecessors and in respect of which a settlement with former residents was reached in 2006. I will use the term "Facilities" to refer to the institutions in this Province that are the subject matter of these class actions.

federal knowledge, policies and oversight of this system throughout Canada, including Newfoundland and Labrador after 1949" – reference is to both the Indian Residential School System and the Facilities. Finally, "the concept of 'total institutions', the knowledge of Canada of such institutions and, in particular, the adverse impact on residents of residential schools" also includes both the Indian Residential School System and the Facilities. "Total institutions" is a term coined by an academic by the name of Goffman in the early 1960's to describe the social and psychological consequences of living in an institutional setting. Dr. Enns intends to testify as to the application of that concept to this case.

THE LAW AND ANALYSIS

[7] Let us look at each **Mohan** factor in turn in light of the various matters on which Dr. Enns wishes to opine. The nature of my conclusions requires that I do so in a different order than how the factors are set out in **Mohan**.

(A) A Properly Qualified Expert

[8] I begin my analysis by examining whether Dr. Enns is qualified to give the evidence that is captured by the Report. The expert evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (**Mohan** at page 25). If Dr. Enns is not qualified to give such evidence then his evidence is inadmissible and the other **Mohan** factors become moot.

[9] Dr. Enns holds: (i) a Ph.D. in Educational Psychology (Learning, Assessment and Development) from the University of Alberta; (ii) an M.S.W. in Family Therapy with Adolescents from the University of Manitoba; (iii) an M.A. in Western Canadian and Aboriginal History from the University of Manitoba; and (iv) a B.A. with Double Honours in History and Religion from the University of Manitoba.

[10] Dr. Enns is currently the Associate Dean and an Associate Professor at the University of Calgary, Faculty of Social Work. He has lectured and taught classes in, *inter alia*, "Social Work and Residential Schools", "Residential Schools and Child Welfare", and "Aboriginal Issues". His teaching interests include First Nations and Aboriginal history, including residential schools, Indian missions, federal Indian education policy and Indian treaties. They also include, however, mental health, families, immigration and refugees, and social work theory and methods. Although he has researched and written on the subjects of federal Indian education policy in western Canada in the late 1800s and the historical failings of Indian Residential Schools, the vast majority of his teaching and writing has been in other areas.

[11] In their brief the Plaintiffs asserted that Dr. Enns has provided expert opinion to courts on two prior occasions, including an opinion offered to the Alberta Court of Queen's Bench with respect to standards of care in Indian Residential Schools in Alberta. He admitted on cross-examination, however, that he has never been qualified by a court as an expert witness. He has, however, been engaged by counsel to provide reports on behalf of plaintiffs in two actions: the case in Alberta referred to above and this one.

[12] Canada says that Dr. Enns is a social worker who has his masters and doctorate degrees in that field. Canada submits that Dr. Enns has no special or peculiar knowledge through study or experience in respect of the matters on which he undertakes to testify. Canada concedes that Dr. Enns has taken "an interest" in the Federal Indian Residential School System but that does not make him an expert for the purposes of this trial. In sum, argues Canada, Dr. Enns has no special knowledge in respect of the standards present in the Facilities or in the Provincial education or welfare systems during the class period. As such, he is not a qualified expert and should not be permitted to give evidence in this action.

Indian Residential Schools and the Facilities

[13] Dr. Enns is perhaps uniquely qualified to opine on historic standards of care relating to Indian Residential Schools. His studies, teaching and research combine

history and social work. His study and other work in the subject area of Indian Residential Schools in the rest of Canada qualify him to opine on that subject. I am concerned, however, that he has unduly expanded his qualifications to testify for the purpose of this trial. In particular, I am not satisfied that his training and experience relating to matters outside of Newfoundland and Labrador qualify him to opine specifically with respect to the Facilities.

[14] The status of aboriginal peoples and the systems for the education and welfare of their children in Canada and Newfoundland were very different leading up to and following Confederation in 1949. Because a person is knowledgeable about the system in Canada does not automatically make him an expert on Newfoundland.

[15] Nevertheless, a person with knowledge of the Indian Residential School System could use that knowledge as a springboard to become an expert on the Facilities. That is what Dr. Enns purports to have done. I find, however, that he has fallen short. It must be kept in mind that the Report is the second iteration of the work by Dr. Enns in this regard. The first was completed in just two months between November 2012 and January 2013. The Report itself was completed in May of 2015 after further review by Dr. Enns of the material used in his first report.

[16] What then are the shortcomings in Dr. Enns' knowledge of the Facilities? They stem largely from his lack of study and experience in the subject area and the material upon which he relied. He testified that for the purposes of the Report he reviewed some 133 documents. Yet, we know that the Province of Newfoundland and Labrador, the International Grenfell Association and the Moravian Church produced approximately 7500 relevant documents after May of 2015 – Dr. Enns reviewed none of these other than those that may have been repeated from his 133. Furthermore, the sources for his opinions on the Facilities are largely second hand (and sometimes third hand); that is, he relies upon the work of others whether in a book, a report or even a master's thesis. Notwithstanding the historical nature of his exercise, he does not refer to the work of the expert historians retained by the Plaintiffs and Canada. Even when Dr. Enns relies on a primary source, he refers to

institutions that are not the subject of this action – e.g., the Moravian mission in Hopedale and the Roman Catholic Oblates' school at or near North West River.

[17] I wrote just last week (**Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 174) that social science can be seen through more than one lens and that a properly qualified expert should be able to comment on other social science disciplines that are necessarily incidental to the expert's field of expertise. That assumes, however, that the view has not been distorted by the choice of lens. Here, Dr. Enns is constrained by his abundant knowledge of the Indian Residential Schools and his inadequate knowledge of the Facilities and the political, historical and cultural milieu in which they operated. He has no expertise in the history of Newfoundland prior to 1949, the aboriginal history of Newfoundland, or the denominational education or child welfare systems here during the class period.

[18] Rather than permitting him to view the Facilities through a refocused lens, Dr. Enns' Indian Residential Schools experience becomes a set of blinkers that distorts his vision. For example, on cross-examination with respect to a suggested lack of national standards for child care policies, Dr. Enns testified as to the responsibility of Canada for child welfare in certain provinces until as late as 1967. That testimony was presumably based upon the system of First Nations reserves set up in the rest of Canada that had no application in Newfoundland during the class period. It demonstrates Dr. Enns' lack of depth of understanding of the matters before me.

[19] Dr. Enns' knowledge of the Facilities and their historical, social and political context is simply too thin to qualify him to give expert evidence in this area.

"Total Institutions"

[20] The second area in respect of which I have concerns about the qualifications of Dr. Enns is the concept of "total institutions". He testified that his knowledge of this area comes from having read the 1960's work of Goffman, the originator of

the phrase, and some work by others. There was no evidence that he has formally studied or written on the topic. In Section D of the Report he provides little more than a summary of the findings of Goffman.

[21] Importantly, that section of the Report is not incidental to Dr. Enns' other analysis. It is a stand-alone chapter in respect of which the Plaintiffs seek to have Dr. Enns separately qualified. It does not specifically refer to the Facilities but appears to ask the Court to make inferences from his high level general discussion. I find that Dr. Enns is not qualified, by training or experience, to opine in this area.

Conclusion on whether Dr. Enns is a duly qualified expert

[22] I am satisfied that Dr. Enns is qualified to provide expert testimony on:

1) the treatment, needs, care, protection and education of residents in Indian Residential Schools across Canada before and after 1949, including the standard of care of the day; and
2) the history and development of federal knowledge, policies and oversight of the Indian Residential School System.

[23] I find that Dr. Enns is not qualified to give expert evidence in relation to those two topics as they relate to Newfoundland and Labrador and the Facilities. I also find that Dr. Enns is not qualified to give expert evidence in relation the concept of "total institutions", the knowledge of Canada of such institutions or the adverse impact on residents of residential schools. As I said at paragraph 17 of **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77:

> [17] To rule otherwise would be to give free reign to a 'roaming expert' (**R. v. A.K.** (1999), 125 O.A.C. 1, 45 O.R. (3d) 641 at paras. 103-104). Mr. Cuff is an expert in general Newfoundland history; that qualification does not permit his testimony to stray on to subject areas over which he has little familiarity and no mastery.

(B) Relevance

[24] The key determinations to be made at this common issues trial are whether Canada owed and breached a fiduciary duty to aboriginal people in Newfoundland and Labrador who attended the Facilities.

[25] To find liability I must first decide whether a fiduciary duty was owed by Canada as alleged by the Plaintiffs. If I do, then I must determine whether the conduct of Canada fell short of what was expected of it in the circumstances. The Plaintiffs assert that Dr. Enns' evidence speaks directly to the latter issue. The Plaintiffs have consistently maintained that the experience of class members at the Facilities is analogous to the experience of other aboriginals at Indian Residential Schools in Canada. The Plaintiffs therefore submit that breach cannot be determined without evidence of what Canada knew when with respect to the failure of residential schools generally, both in Newfoundland and in the rest of Canada. Although I have found that Dr. Enns is not qualified to testify in respect of Newfoundland, there may well be other evidence adduced that makes the connection sought by the Plaintiffs.

[26] Even if a fiduciary duty is found here, however, Canada takes the position that any opinion of Dr. Enns on the alleged failings of Indian Residential Schools has no bearing on the determination of whether Canada breached a requisite standard *vis-à-vis* the class members at the Facilities.

[27] I disagree with Canada. Evidence is *prima facie* admissible if so related to a fact in issue that it tends to establish it. That does not end the inquiry, however. The Plaintiffs have identified the relevance of Dr. Enns' evidence. Later in these reasons, under the general exclusionary rules, I will discuss this matter more fully. For present purposes, however, I am satisfied that opinion evidence on the two topics in respect of which I have found Dr. Enns qualified is relevant and is therefore *prima facie* admissible.

(C) Necessity in Assisting the Trier of Fact

[28] The necessity component of the admissibility test ought not be judged by too strict a standard; the requirement is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury" (**Mohan** at para. 23). It must, however, be more than merely helpful (**R. v. D.D.**, 2000 SCC 43 at para. 21).

[29] According to the Plaintiffs, Dr. Enns' Report speaks to the technical standard of care in place in residential schools across Canada following the Second World War, and it further addresses federal oversight of this system. I have decided that both of these are directly relevant to breach.

[30] It is ultimately for the Court to assess the nature of any fiduciary duty owed by Canada and determine any breach. But, say the Plaintiffs, this assessment cannot be made in a vacuum and requires expert evidence. I agree. This is especially the case when the Court is considering historical standards. Dr. Enns' evidence as to the standards applicable throughout Canada in residential schools, their operation, and federal oversight of this system, provides this necessary assistance to the Court.

[31] Canada says that expert evidence is not required to establish a general standard of care. For this proposition it relies on **Bergen v. Guliker**, 2015 BCCA 283. That decision, however, relies upon the decision of the Ontario Court of Appeal in **Krawchuk v. Scherbak**, 2011 ONCA 352, where what was being assessed was the standard of care for a real estate agent who was acting for both the vendor and the purchaser. Epstein, J.A. said for the court at paragraph 125:

> [125] To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence [...] The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact

> […] External indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.
>
> [Emphasis added; citations omitted.]

[32] This is a case where neither the duty owed nor the applicable standard of conduct have been settled in the case law. Consequently, in the event that it is found that Canada owed a fiduciary duty to the class members, expert testimony will be helpful to establish the standard of conduct expected of the fiduciary and necessary to determine whether it has been deviated from on the facts of this case.

[33] Moreover, the evidentiary basis for the trial involves historical material that could shed light on what constitutes reasonable conduct. Dr. Enns has provided a socio-historical analysis in the Report. I have already found admissible testimony from two experts on the history of the interaction between Canada and the Province from 1949 to 1980 relating to the provision of education to the class members (**Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 138 and **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 174). Consequently, the Report is necessary in the same way, albeit for a different purpose.

[34] Dr. Enns goes beyond that general history, however, to examine a subject in respect of which that I have found him to be qualified, i.e., the circumstances at Indian Residential Schools in parts of Canada other than the Province. A key issue in this case is the Plaintiffs' claim of similarities between the Facilities and the Indian Residential Schools which is to be contrasted with Canada's assertion that such comparisons are inappropriate. The Indian Residential School System, therefore, has become the "elephant in the room" – we all know it is there but we have not yet talked about it. The Report is necessary to begin that conversation.

[35] In assessing the issue of necessity it is important to bear in mind that although the expert evidence will be admitted, it remains for me to determine whether a fiduciary duty was owed. If I do I then must decide the particular set of

obligations owed by Canada and whether its conduct fell short of those obligations. It remains too early in the trial for me to determine that those analyses will not involve consideration of the Indian Residential Schools. The testimony of Dr. Enns is therefore necessary to put before the Court a socio-historical perspective on the Indian Residential School system which would otherwise be outside my experience and knowledge.

(D) The Absence of Any Exclusionary Rule

[36] Canada asserts that in addition to being irrelevant and unnecessary, exclusionary rules dictate that Dr. Enns not be permitted to testify. Canada says that the Report contains inadmissible hearsay and lay opinions, it is an instrument of advocacy for the Plaintiffs, and it offers legal conclusions.

[37] According to Canada, the thinly veiled purpose of the Report is to cast general blame and guilt on Canada for its alleged past conduct and policy decisions in respect of the Indian Residential School System. Canada says that the Report wrongly assumes that the Facilities were subject to oversight by it.

[38] In addition, Canada says that if Dr. Enns is qualified to testify then large swatches of the Report should be excluded because they:

1) constitute findings of fact that usurp the role of the trier of fact;
2) draw conclusions without any authority;
3) offer conclusions as to facts that have no application or relevance to the present case;
4) are in the nature of speculation or conjecture;
5) offer legal opinions or legal conclusions;
6) stray into advocacy and argument;
7) are not wholly accurate and do not relate specifically to either the Facilities or the legal issues in this trial;
8) are in the nature of personal lay opinion based upon hearsay.

[39] Issues such as alleged bias and whether the prejudicial effect of the expert evidence will outweigh its probative value are to be assessed by the trial judge in his "gate-keeper" role (see **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23, per Cromwell, J.). Canada has not identified anything in the proposed testimony of Dr. Enns in the subject areas in which he is qualified to testify that would prohibit him from testifying. Merely because he was hired by different plaintiffs in respect of Indian Residential Schools in 2004 does not mean that he is unable to discharge his special duty to the court to provide fair, objective and non-partisan assistance (**White** at para. 2). Nor is there any basis to the remainder of Canada's complaints at this threshold level. These issues all go to the weight that I will give to the admissible portions of the Report, not its admission.

[40] At the end of the trial the testimony of Dr. Enns and the Report will be assessed in the context of the entirety of the evidence. To the extent that his opinions are:

1) based upon facts that are not otherwise proven,
2) do not logically follow from the facts upon which he relies;
3) are beyond his competency; or
4) are otherwise defective

they will be ascribed little or no weight.

DISPOSITION

[41] I find that Dr. Enns may provide expert testimony on:

1) the treatment, needs, care, protection and education of residents in Indian Residential Schools before and after 1949, including the standard of care of the day; and
2) the history and development of federal knowledge, policies and oversight of the Indian Residential School System.

[42] I find that Dr. Enns is not qualified to give expert evidence in relation to those two topics as they relate to Newfoundland and Labrador.

[43] I also find that Dr. Enns is not qualified to give expert evidence in relation the concept of "total institutions", the knowledge of Canada of such institutions or the adverse impact on residents of residential schools.

[44] The Report is therefore admissible, save for Sections C and D which contain the subject matters in respect of which I have found Dr. Enns not to be qualified. As to the inadmissible sections of the Report, it would be best if a revised report were adduced with those parts expunged. If that is not possible, then what I stated at paragraph 27 of **George** has application here:

> [27] Because we are in the middle of the trial, we are unlikely to receive a revised report. Therefore, the Cuff Report will be admitted into evidence as a whole. The Court will, however, follow the edict of the Supreme Court of Canada in **Sekhon** at para. 48 (albeit in a slightly different context), "It goes without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts".

[45] What weight I will assign to the remainder of the Report remains to be seen. I will, however, assign no weight to those sections that I have ruled inadmissible.

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ROBERT P. STACK
Justice