



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

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 174

Date: December 1, 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 FIRST
NEWFOUNDLAND AND LABRADOR THIRD PARTY**

**AND: THE INTERNATIONAL GRENFELL SECOND
ASSOCIATION 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 FIRST
NEWFOUNDLAND AND LABRADOR THIRD PARTY**

**AND: THE INTERNATIONAL GRENFELL SECOND
ASSOCIATION 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** FIRST
NEWFOUNDLAND AND LABRADOR THIRD PARTY
AND: **THE INTERNATIONAL GRENFELL** SECOND
ASSOCIATION 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** FIRST
NEWFOUNDLAND AND LABRADOR THIRD PARTY
AND: **THE MORAVIAN CHURCH IN**
NEWFOUNDLAND AND LABRADOR SECOND
(DISCONTINUED) THIRD PARTY
AND: **THE MORAVIAN UNION**
(INCORPORATED) THIRD
(DISCONTINUED) 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** FIRST
NEWFOUNDLAND AND LABRADOR THIRD PARTY

AND: **THE MORAVIAN CHURCH IN**
NEWFOUNDLAND AND LABRADOR SECOND
(DISCONTINUED) THIRD PARTY

AND: **THE MORAVIAN UNION**
(INCORPORATED) THIRD
(DISCONTINUED) THIRD PARTY

Before: Justice Robert P. Stack

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

Date of Hearing: November 30, 2015

Summary:

Plaintiffs proffered a proposed expert on the political history of Canada with a special interest in the political history of Newfoundland. His testimony was found to satisfy each 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.

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) 138; **William v. British Columbia**, 2004 BCSC 1237; **Samson Indian Nation & Band v. Canada**, [2001], 102 A.C.W.S. (3d) 1104, 199 F.T.R. 125 (F.C.T.D.); **Ross River Dena Council v. Canada (Attorney General)**, 2011 YKSC 87; **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77; **Brake-Patten v. Gallant**, 2012 NLCA 23.

EDITED ORAL REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] Professor Peter Neary is being proffered by the Plaintiffs as an expert on the political history of Canada with a special interest in the political history of Newfoundland. I am satisfied that he be permitted to give expert evidence on those subjects at the trial of the common issues certified in these class actions.

[2] Professor Neary has prepared a report for presentation to the Court, titled *The First Peoples and the Entry of Newfoundland into Confederation, 1945-1954*, dated July 9, 2015 (the “Report”). Before he can do so he must be accepted by the court as a witness capable of proving relevant and necessary opinion evidence.

[3] What is the nature of the proceeding at which it is intended that Professor Neary testify? There are five class actions before me. 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”) 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.

THE LAW AND ANALYSIS

[4] The parties agree that the factors for the admission of expert evidence remain as stated 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.

[5] Let us look at each factor in turn.

(A) Relevance

[6] It is conceded that Professor Neary's evidence, *inter alia*, addresses in its historical context the nature and extent of the agreement between Newfoundland and Canada with respect to the funding and operation of services provided for aboriginal peoples, including class members. It is therefore relevant to the common issues in this trial.

(B) Necessity in Assisting the Trier of Fact

[7] I have already ruled that the testimony of Mr. Cuff, another historian, is necessary in the context of this litigation, the evidentiary basis for which is largely premised on historical documents (**Anderson v. Canada (Attorney General)**),

2015 NLTD(G) 138). For the same reasons, the evidence of Professor Neary is also necessary.

[8] I noted in my decision relating to the evidence of Mr. Cuff that in many other cases involving aboriginal issues, experts on the history of the surrounding events have been qualified to testify (see the cases cited there, for example, **William v. British Columbia**, 2004 BCSC 1237; **Samson Indian Nation & Band v. Canada** [2001], 102 A.C.W.S. (3d) 1104, 199 F.T.R. 125 (F.C.T.D.); and **Ross River Dena Council v. Canada (Attorney General)**, 2011 YKSC 87).

[9] In assessing the issue of necessity it is important to bear in mind that although the expert historical evidence will be admitted, it remains for me to decide the facts in this case.

(C) The Absence of Any Exclusionary Rule

[10] Canada asserts that in the Report Professor Neary strays from a narrative of historical events into providing opinions. Experts in history, says Canada, should be limited to compiling facts and primary records for the Court's ease of use in its fact finding. The historians should not opine on "responsibility" or "duty" or the like. These issues, says Canada, are well outside any permissible scope for proper historical narrative. Where an expert so strays, their opinion and report should not be received or should be given no weight.

[11] Specifically, Canada claims that at times, the Report goes outside Dr. Neary's specific areas of expertise. At other times, says Canada, the Report delves into legal opinion and the ultimate issue. This, it says, is offside a **Mohan** general exclusionary rule.

[12] Canada says that like that of Mr. Cuff, Dr. Neary's evidence should be limited to providing historical context. Statements in the Report such as those

listed below are either outside his area of expertise or are purely in the realm of legal opinion and advocacy and so should be excluded:

- a) "...In sum, the federal government's responsibility to assert itself was "inescapable, legally and otherwise" (p. 17).
- b) "But the constitutional outcome was remarkably simple: unless altered by the Terms of Union, the normal Canadian division of legislative powers and executive authority applied to the new Province" (p. 23).
- c) "Since the terms of union were silent about Indians and Eskimos, this meant that the federal Parliament and executive were responsible, as elsewhere in the country, for 'Indians and Lands reserved for the Indians'66 under Section 91:24 of the *British North America Act, 1867*" (p. 24).
- d) "... the federal government chose not to apply the Indian Act to Newfoundland. Legally, it could have done so ..." (p. 24).
- e) "Ottawa's choice in relation to Indians and Eskimos in Newfoundland was to leave administration to the province but provide limited financial support in acknowledgment of its underlying constitutional responsibility ... but it was not an agreement between equals" (pp. 24-25).
- f) "By definition, because of its overriding Section 91:24 authority the federal government was – and remains – the prime mover in relation to public policy concerning the First Peoples in Newfoundland and Labrador. Arguably, what happened on and after 31 March 1949, whether through action or inaction, was first and foremost Ottawa's responsibility. Ottawa was the party of the first part and St. John's the party of the second part. Under Section 91:24, Newfoundland proposed but Ottawa disposed" (p. 25).

[13] I disagree with Canada. This is not an instance of a "roaming expert witness" as that phrase was used by me in **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77. There, the proffered expert witness on historical matters had neither training nor experience in game protection and wildlife

management or in moose-vehicle accident mitigation. I disallowed his evidence to the extent that it strayed into those areas

[14] Here, Professor Neary has not strayed beyond his expertise. Social science disciplines do not exist in unassailable silos. To the extent that they comprise the study of human society they necessarily overlap. To understand history, therefore, one must have at least some understanding of politics, economics, geography, sociology and more. Each discipline is interrelated with and informs the others. Professor Neary's expertise is in the area of political history. The history of humankind's social organization can be studied through other lenses as well, with labels such as social history, economic history, and so on. Law, too, can be examined through at least two lenses: one as a technical system of rules that are enforced through the courts, studied as jurisprudence; the other as a system of social institutions that governs behaviour, the study of which falls within the bailiwick of social science. There is a sub-discipline called legal history in respect of which Professor Neary does not purport to be an expert.

[15] Yet, Dr. Neary's expertise in political history necessarily overlaps with an understanding of governmental institutions and at least some familiarity with constitutional law. I note that he has had at least two articles published in a well-known law journal.

[16] As will be seen below, I am satisfied that Professor Neary is qualified to comment on the "constitutional relationship" between Newfoundland and Canada. Forming an opinion on a constitutional relationship in an historical context does not necessarily amount to expressing an inadmissible opinion on constitutional law. Ultimately, his opinions are those of a historian, not of a jurist – to paraphrase his testimony at his qualification hearing, "interpreting the law is a matter for the Court, not the historian". It is I who must recognize and adjust for the historical filter through which he utilizes legal terms and phrases such as "legally", "responsibility", "party of the first part" and so on.

[17] This issue of incidental encroachment on legal commentary was addressed by Hoegg, J.A. of the Court of Appeal in **Brake-Patten v. Gallant**, 2012 NLCA 23, at para 88:

On a practical level however, there will be cases where the expression of an opinion by an expert may, depending on the subject matter, inevitably have to stray into the area of legal commentary. The fact that an expert's report may incidentally do so, should not necessarily so taint the report as to render it inadmissible in totality. It is only where the approach taken is so comprehensive and blatant that the court concludes that the reliability or utility of the opinion as a whole is seriously compromised - ie. [*sic*] so tainted as a whole as not to have a modicum of objectivity – that the report as a whole should be rejected as inadmissible. In other cases, the court should consider redacting offending portions and admitting the rest. In still other cases where the offending passages are minor or incidental, the report could be admitted with the issue being dealt with as one of weight.

[18] Based upon his vast experience in this area, which I only highlight below where I discuss his qualifications, Dr. Neary is permitted his opinions on the constitutional relationship between Newfoundland and Canada. Canada is entitled to challenge those opinions by way of cross-examination, by proffering its own expert witness and by making submissions at the end of the trial. Additionally, I will remain vigilant to ensure that only the opinions of Dr. Neary that are properly within his area of expertise are ultimately considered by me and to those I will only assign the weight to which they are properly due.

(D) A Properly Qualified Expert

[19] 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).

[20] Professor Neary holds Bachelor's and Master's degrees from Memorial University of Newfoundland ("MUN") and a Ph.D. from the London School of Economics. MUN conferred a honorary Doctor of Letters upon him in 2000. He has studied, taught and written on the history of Newfoundland and of Canada for

more than 50 years. He currently holds the title of Professor Emeritus at the University of Western Ontario, where formerly he was Dean of the Faculty of Social Science. His expertise in the subject matter upon which he is being asked to testify is conceded.

[21] Professor Neary has been described as “one of the foremost experts on the history of the relationship between Newfoundland and Canada”. He is the author of the acclaimed 1988 political history *Newfoundland in the North Atlantic World, 1929-1949*. He has previously written a two-part article on a topic very close to what is at issue in this proceeding: “The First Nations and the Entry of Newfoundland into Confederation”, *Newfoundland Quarterly*, Part 1, 105:2 (Fall 2012) and Part 2, 105:3 (Winter 2013). He has had two articles published in the *Dalhousie Law Journal*.

[22] Professor Neary is a properly qualified expert in the general history of Newfoundland and of Canada, with particular expertise in the political and constitutional relationship between Newfoundland and Canada from 1929 to the present.

DISPOSITION

[23] I find Professor Neary qualified to give expert witness testimony on the political history of Canada with a special emphasis on the political history of Newfoundland. The Report may be entered as an exhibit.

ROBERT P. STACK
Justice