



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

Citation: *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 8

Date: January 19, 2016

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
(DISCONTINUED)** FIRST
THIRD PARTY

**AND: THE INTERNATIONAL GRENFELL
ASSOCIATION
(DISCONTINUED)** 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
(DISCONTINUED)** FIRST
THIRD PARTY

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

- 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
(DISCONTINUED)
AND: **THE MORAVIAN CHURCH IN** SECOND
NEWFOUNDLAND AND LABRADOR THIRD PARTY
(DISCONTINUED)
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
NEWFOUNDLAND AND LABRADOR
(DISCONTINUED)** 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: January 18, 2016

Summary: The Plaintiffs applied to have a professor of economics qualified to provide expert witness testimony on economics and statistical analysis, particularly with respect to public finance, and specifically with regard to federal transfers to Newfoundland and Labrador in connection with programs for aboriginal persons.

It was held that the proposed evidence is relevant and necessary and that the professor is a properly qualified expert. No exclusionary rule precludes his testimony. Consequently, it was held that the professor may provide opinion evidence to the Court.

Appearances:

Kirk Baert and
Celeste Poltak

Appearing on behalf of the Plaintiffs

Jonathan Tarlton,
Mark Freeman and
Melissa Grant

Appearing on behalf of the Attorney General
of Canada

Authorities Cited:

CASES CONSIDERED: **R. v. Mohan**, [1994] 2 S.C.R. 9; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 186; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 181; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 174; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 138; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 167.

TEXTS CONSIDERED: Lederman, et al, *The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis, 2014).

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] The Plaintiffs propose to call as an expert witness in this common issues trial Professor Wade Locke of the Department of Economics at Memorial University of Newfoundland (“MUN”). He is proffered by the Plaintiffs as an expert in economics and statistical analysis, particularly with respect to public finance, and specifically with regard to federal transfers to Newfoundland and Labrador (“the Province”) in connection with programs for aboriginal persons.

[2] We are now approaching the conclusion of the Plaintiffs’ case 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. 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

[3] 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.

[4] Canada concedes that Dr. Locke is a properly qualified expert on the subject matters for which he is being proffered. It was responsible of Canada to do so because Dr. Locke's training and experience eminently qualify him to give such testimony: he has a Ph.D. in economics; is a full professor and head of the Department of Economics at MUN; and has taught, written, consulted and spoken on a broad range of topics at the intersection of economics and public administration.

[5] As well, Canada raises no exclusionary rule that would prevent the proposed testimony of Dr. Locke.

[6] Canada does, however, assert that the evidence of Dr. Locke is irrelevant and is, therefore, unnecessary. I, however, am satisfied that the proposed evidence of Dr. Locke is both relevant and necessary. Consequently, Dr. Locke may provide opinion evidence as requested by the Plaintiffs. Let us look at the disputed factors.

(A) **Relevance**

[7] Relevancy is a threshold requirement for the admission of any evidence, but it is not an onerous undertaking: "it is a rational method of fact-finding based on logic, common sense and experience" (Lederman et al, *The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis, 2014) at 791). The authors go on to say at the same page that expert opinion evidence "must have some probative value to make the existence or non-existence of a material fact more probable or less probable than it would be without the evidence."

[8] On previous **Mohan** applications in these proceedings I have noted that evidence is *prima facie* admissible if so related to a fact in issue that it tends to establish that fact (see **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 186 at paras. 8 to 10; **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 181 at paras. 24 to 27; **Anderson v. Canada (Attorney General)**, 2015

NLTD(G) 174 at para. 6; and **Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 138 at para. 7).

[9] Canada says that the evidence of Dr. Locke was originally commissioned by the Province when it was a third party to these actions to support the Province's claim for set-off against any damages that it might be ordered to pay to Canada. In essence, the Province claimed that Canada short-changed it in the amount paid on behalf of aboriginal peoples during the class period and any monies that it might be ordered to pay to Canada should be reduced accordingly. Canada goes on to say that because the Province is no longer a party its arguments no longer have application to the common issues trial and consequently the evidence of Dr. Locke is irrelevant.

[10] Last November, when I dismissed the third party claim against the Province, I also ruled that the Plaintiffs could amend their claims to seek against Canada damages for unjust enrichment, in addition to damages for breach of fiduciary duty (**Anderson v. Canada (Attorney General)**, 2015 NLTD(G) 167). The remedy sought is disgorgement of monies that the Plaintiffs say were properly payable by Canada to the Province for the benefit of the class members.

[11] The Plaintiffs say that the evidence of Dr. Locke is relevant to that issue and is necessary. I agree that it is relevant insofar as it identifies and calculates the alleged monetary shortfall upon which the Plaintiffs' claims are based. If the opinions of Dr. Locke are accepted, and if the position taken by the Plaintiffs is otherwise supported by the facts and the law, a basis for an award of damages for disgorgement based upon the principles of unjust enrichment could be established.

[12] The evidence of Dr. Locke is also relevant to the issue of breach of fiduciary duty insofar as the Plaintiffs say that Canada had a duty to adequately fund programs in the Province for aboriginal persons. In its Fresh as Amended Defence filed on December 31, 2015, Canada takes 10 paragraphs to set forth the nature and extent of its funding contributions to the Province. The nature, purpose and extent of funding provided by Canada to the Province for the benefit of aboriginal persons living in Labrador have been in issue since the outset of these

claims. It is not open to Canada to argue that evidence of the amount of that funding and how it compared to the funding of programs for aboriginal persons in other parts of the country is not relevant.

[13] After it has closed its case, Canada is free to argue that Dr. Locke has inappropriately compared funding of specific initiatives in the Province with general funding pursuant to a federal statutory regime in the rest of Canada, or that one should look beyond “aboriginal” funding to other payments by Canada to the Province, by way of equalization or otherwise. Canada may also wish to argue at the conclusion of the trial that I will be unable to tie funding by Canada, which may or may not have been adequate for the Province’s purposes, to a direct entitlement of the class members to damages. But those are all matters for the conclusion of the trial, relating as they do to the ultimate reliability of Dr. Locke’s evidence and its application to the legal issues with which I am faced. They are not appropriate issues for this threshold consideration of relevancy.

(B) Necessity in Assisting the Trier of Fact

[14] Once the opinion evidence of Dr. Locke has been found to be relevant it must also be found to be necessary because the conclusions he presents require analysis by an expert in economics. They therefore provide information “which is likely to be outside the experience and knowledge of a judge or jury” (**Mohan** at para. 23).

[15] The purpose of the present application is to determine whether Dr. Locke should be permitted to provide opinion evidence to the Court, not to assess the merits of the Plaintiffs’ claims. Dr. Locke has applied his academic training and experience to the writing of a report that would be beyond my ability as a layperson to replicate. I therefore find that his opinion will provide necessary assistance in the manner put forth by the Plaintiffs.

DISPOSITION

[16] Professor Wade Locke may provide expert witness testimony in this trial on the subjects of economics and statistical analysis, particularly with respect to public finance, and specifically with regard to federal transfers to the Province in connection with programs for aboriginal persons.

ROBERT P. STACK
Justice