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

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 146
Date: October 23, 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: October 20, 2015

Summary: Plaintiffs seek to adduce evidence at a common issues trial in a class action of "common harms" suffered by aboriginal students who attended boarding schools in Newfoundland and Labrador following confederation with Canada. The Plaintiffs prevented the opposing parties from pursuing such issues in examinations for discovery and produced no relevant documentation. It was held that the Plaintiffs cannot adduce such evidence at this stage of the proceeding because to do so would be prejudicial to the opposing parties. Curing such prejudice by delaying the trial would unduly prejudice the class members.

Appearances:

Chesley F. Crosbie, Q.C., Jessica Dellow, David Rosenfeld, Kirk Baert, Celeste Poltak, James Sayce and Alan Regel	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 Michael H. 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: Canada (Attorney General) v. Anderson, 2011 NLCA 82; **Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154; **Anderson v. Canada (Attorney General)**, 2012 NLTD(G) 190; **R. v. Ipeelee**, 2012 SCC 13; **Seed v. Ontario**, 2012 ONSC 2681.

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1; *Criminal Code of Canada*, R.S.C., 1985, c. C-46.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] In this decision, I will explain why I have decided that the Plaintiffs may not adduce evidence on common harms allegedly suffered by the class members who testify at this class action common issues trial. In doing so, however, I will not opine on whether aggregate damages can be ordered in this case; that is an issue to be resolved at the conclusion of the trial.

[2] We are in the early stages of a long trial of the common issues in these class actions. Class members attended boarding schools (the "Schools"[1]) 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.

[3] There are five Schools in question and five individual class actions all commenced by different representative plaintiffs but with Canada as the defendant in each. The principal common issues can be stated as follows:

1) By its operation or management of the Schools, did Canada breach a duty of care owed to the students of the Schools to protect them from actionable physical or mental harm?

2) By its purpose, operation or management of the Schools, did Canada breach a fiduciary duty owed to the students of the Schools to protect them from actionable physical or mental harm?

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[1] The distinction between schools, dormitories and orphanages is an important one for the trial. For the purposes of this application, however, it is convenient to refer to them together.

[4] There are additional common issues. The one relevant for present purposes is: "[I]f the answer to [either] of the above common issues is 'yes', can the court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?"

[5] In respect of the common issue relating to negligence, Canada has joined Her Majesty in Right of the Province of Newfoundland and Labrador (the "Province") as a third party, seeking contribution from the Province towards any damages it is ordered to pay. The Province has, in turn, made a similar claim against the International Grenfell Association (the "IGA"), saying that it operated certain of the Schools for at least part of the class period and so is liable for any resulting damages.

[6] At the outset of the trial, evidence was adduced through the testimony of two class members as to what the Plaintiffs maintain are common impacts upon surviving residents of the Schools. After completion of the testimony of the first witness (both in chief and cross-examination) and after the completion of the examination in chief of the second witness, the Province objected to the admission of such evidence. By way of example, the second witness was asked in examination in chief various questions about the consequences of her experiences at the schools, including whether she had ever attempted suicide. She was asked whether she had seen a psychiatrist and, if so, what her diagnosis was. She was asked about the circumstances of her marriages and the impact of her time at the Schools on her relationship with her children.

POSITIONS OF THE PARTIES

[7] The Province[2] says that because this is a common issues trial, evidence of individual circumstances cannot assist the Court in resolving the common issues. It

[2] For reasons that will become evident later, neither the Province not the IGA made oral submissions on the hearing of the application. References to the position of the Province are from its brief that was filed before those two parties took the position that they would not participate further in the application. The position put forth by the Province in its brief was adopted by Canada, however, and that is the reason it is referred to.

submits that evidence of the damages suffered by a small group of self-selected class members does not speak to the availability of an aggregate assessment of damages, or to any other common issue. Such evidence, submits the Province, may only be led in individual issues proceedings, and only if the class prevails on the certified common issues with respect to breach of duty. The Province warns that to hold otherwise is to risk "driving this trial into a quagmire of additional productions to scrutinize idiosyncratic circumstances that do not assist the Court with the task before it". Furthermore, the Province relies on Section 29(1)(c) of the *Class Actions Act*, SNL 2001, c. C-18.1, which it says precludes such evidence in support of a claim for aggregate damages. Therefore, it says, the disputed evidence should be excluded.

[8] Canada adopts the position of the Province and submits that the legal and procedural framework of the action precludes the Plaintiffs from adducing the evidence in question.

[9] The Plaintiffs, on the other hand, submit that they should be permitted to examine a small number of class members so they can describe, on a reasonable and limited basis, the common impacts they suffered in their lives due to their experiences at the Schools. They say that the common law relating to aggregate damages, together with the underlying theory and purpose of aggregate monetary relief, support their position. Moreover, the Plaintiffs say that they will suffer irreparable prejudice if they are barred from examining this small number of class members on such common impacts.

ISSUES

[10] I agree with the formulation by the Plaintiffs of the narrow issues that are presently before me:

> (a) Are the Plaintiffs permitted to examine class members for the purpose of generally describing the common impacts they suffered in their lives due to their experiences at the Schools?

(b) If the Plaintiffs are permitted to do so, what is the scope of examination and cross-examination and is there a right to seek the medical records of such witnesses?

[11] Furthermore, I agree with the Plaintiffs that it is premature to question the appropriateness of the certified aggregate monetary relief common issue. By an order of Fowler, J. dated as of June 7, 2010, the common issues were set forth. Canada appealed. By a decision filed on December 21, 2011, the certification of the class action was affirmed by the Court of Appeal (**Canada (Attorney General) v. Anderson**, 2011 NLCA 82). Although that decision does not expressly mention the common issues, including the common issue relating to aggregate damages, it affirms the order of Fowler, J. and therefore confirms the common issues as set forth therein. Therefore, absent an application for decertification, the common issue relating to aggregate damages remains to be decided by me. I have determined that I cannot do so, however, until all of the evidence, including properly qualified expert evidence, has been heard.

THE LAW AND ANALYSIS

Evidence required at the common issues trial

[12] Because the common issue of aggregate damages is a given, what needs to be decided is what evidence of common damages, if any, is appropriate during this phase of the trial. Determination of the first two common issues, relating respectively to whether Canada breached a duty of care or a fiduciary duty owed to the class members, does not require any evidence as to causation or damages. Let us look at the second common issue for example:

> By its purpose, operation or management of the Schools, did Canada breach a fiduciary duty owed to the students of the Schools to protect them from actionable physical or mental harm?

[13] That common issue requires the Court to assess whether Canada breached a fiduciary duty to protect the class members from actionable physical or mental harm. It does not require the Court to determine whether such breach caused any such harm or, if so, the measure of damages flowing from such causation. These issues would be left to the individual trials that would follow any finding of breach of duty following this common issues trial.

[14] This has been acknowledged by the Plaintiffs as set forth by the Court of Appeal in its decision upholding the certification of the common issues (**Canada (Attorney General) v. Anderson**, 2011 NLCA 82, at para. 110):

> 110. From the [Plaintiffs'] perspective the certified common issues affect all class members and include the presence of a duty of care; the standard of care owed; whether a breach of duty of care occurred; the degree of care and control that Canada enjoyed over the Schools; and legal issues surrounding the scope and content of Canada's duties to aboriginals of Newfoundland and Labrador following Confederation. The [Plaintiffs] believe that the only individual matters to be resolved would be those of causation and damages.

[15] The Plaintiffs argue that the last sentence from the quotation above refers to what would need to be determined at individual trials. It does not, however, limit the nature of the evidence that can be brought at the common issues trial insofar as it relates to aggregate damages. The Plaintiffs say that although it is true that breach of duty does not invoke causation and damages, a finding of aggregate damages requires both. This was agreed to, albeit by way of *obiter dicta*, by the case management judge in an application by the Plaintiffs to strike the Third Party Claims:

> 7. Taking a broad and purposeful approach to interpretation of the [Certification] Order, while the certified common issues do not address causation directly, I conclude that it is inherent in [the aggregate damages] issue. In other words, in order to address whether the Court can make an aggregate assessment for the damages suffered, the Court must address what (if any) losses were caused by Canada's breach of general or fiduciary duty if either is established.
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> (**Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154, per Butler, J.)

[16] Nevertheless, it is clear that the parties have approached this case on the basis that causation and damages would be addressed in another phase of this proceeding. By their own conduct of the case leading to trial the Plaintiffs have forestalled the introduction of evidence of causation and damages. This is the legal and procedural framework of the action referred to by Canada. Let us see how this framework constrains the Plaintiffs.

Scope of examination for discovery

[17] We begin with the formulation by the Court of Appeal of the Plaintiffs' position on the issues to be resolved at the common issues trial quoted from above. Nowhere there does it refer to common harms derived from individual experiences: "The [Plaintiffs] believe that the only individual matters to be resolved would be those of causation and damages". Individual matters generally are not addressed in a common issues trial.

[18] The Plaintiffs' subsequent conduct was consistent with the view that evidence from individual class members would not form part of the common issues trial. During the discovery phase of this action their position confirmed such a limited view of what was at stake in the common issues trial. This is illustrated by an affidavit sworn by one of Canada's counsel attached to which are transcripts of three examinations for discovery. Those transcripts illustrate that counsel for the Plaintiffs was very assertive in insisting that counsel for Canada not ask questions of Plaintiffs' witnesses relating to their personal circumstances. Plaintiffs' counsel objected to questions being asked of the witness relating to matters as mundane as the daily schedule that was followed at the Schools[3].

[19] This restrictive approach by the Plaintiffs caused Canada to bring an application before the case management judge seeking clarification of the scope of examination for discovery. In her decision (**Anderson v. Canada (Attorney**

[3] See, for example, the transcript of the examination of Carol Anderson dated September 11, 2013 at page 31, (Exhibit 1 to the affidavit of Melissa Grant sworn October 20, 2015).

General), 2012 NLTD(G) 190), Butler, J. held that the common issues, stated broadly, "are the alleged fiduciary duty, the existence of a duty of care, and alleged breach" (para. 13). The Plaintiffs appear to have argued before Butler, J. that Canada was not entitled to ask any questions whatsoever relating to the personal circumstances of the witnesses, whether during their time at the schools or later. She disagreed and held, at paras. 25 to 27:

> 25. On the specific facts of this case only, I conclude that Canada should be entitled to pose on discovery to the Representative Plaintiffs all questions regarding their experiences at the schools but related to the broad common issues of whether a duty was owed by Canada to the students of the residential schools, and any alleged breach of this duty.
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> 26. To clarify for the benefit of the parties, *at this stage of the proceedings* Canada shall be permitted to pursue questions of the Representative Plaintiffs relevant to the proximity relationship and reasonable foreseeability of harm alleged. As examples only, this would include issues of contact and/or dealings with authorities at the residential school, the operation of the school including routine and schedules (daily, monthly, seasonally and annually), as well as the students' expectations of Canada, any undertakings made by Canada, requests made by students, and responses given to requests made and/or any protections provided.
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> 27. To further clarify as to the breach of duty alleged, and as examples only, Canada shall be permitted to pursue questioning relative to the general living conditions, health, education, religious instruction, cultural maintenance, safety, socialization, discipline, extracurricular activities, alleged discrimination, and alleged breach of duty. From this line of questioning, I expect Canada to be able to assess how the Representative Plaintiffs consider that Canada fell short of the duty of care they expected of it, relative to the residential schools.
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> [Emphasis in original.]

[20] She disposed of the application in para. 29, in relevant part, as follows:

> 29. Therefore, in light of the positions of the parties (and notwithstanding my conclusion that there is no firm rule requiring discoveries in class actions to be restricted to issues current to the relevant stage of proceedings) **IT IS ORDERED:**
>
> 1) **THAT** Canada may pursue on oral discoveries of Representative Plaintiffs *at this stage of the proceedings* all questions regarding their experiences at the

> schools but related to the broad common issues of whether a duty was owed by Canada to the students of the residential schools and any alleged breach of this duty. This shall include but is not limited to the discovery questions refused and which were summarized in Canada's Brief;
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> 2) **THAT** Canada may not pursue on discovery of the Representative Plaintiffs *at this stage of the proceedings* any questions relative to the consequences of the Representative Plaintiffs' respective experiences at the residential schools in question….
>
> [Underlining added.]

[21] Where the parties were left could not have been made more clear. On discovery, Canada was prohibited from asking any questions relating to the consequences of the representative plaintiffs' respective experiences at the Schools. Those questions, if impermissible at discovery, are equally impermissible at trial, regardless of by whom they are posed.

Trial fairness

[22] This application ultimately reduces to a simple matter of trial fairness. How can it be fair to the other parties for the Plaintiffs to have insisted all along that questions about the consequences of attending the schools are out of bounds and then be permitted to go there themselves at trial?

[23] The Plaintiffs maintain that they only intend to examine a small number of class members so they can describe, on a reasonable and limited basis, the common impacts they suffered in their lives due to their experiences at the Schools. But I have no basis to infer that the consequences suffered by the few are representative of the common experience of the many. To overcome this impediment, the Plaintiffs suggest I take judicial notice of:

> … such matters as the history of … residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher

> unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

[24] The foregoing is a quotation from the Supreme Court of Canada decision in **R. v. Ipeelee**, 2012 SCC 13, at para. 60. **Ipeelee** is a case that informs the consideration mandated by Section 718.2(e) of the *Criminal Code*, R.S.C., 1985, c. C-46, that a sentencing judge consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to the circumstances of aboriginal offenders. Counsel for the Plaintiffs offered no authority holding that such judicial notice would apply as well to the assessment of damages in a civil litigation context. Furthermore, if such matters are to be accepted based upon judicial notice, then no evidence is required to be adduced in any event. **Ipeelee** does not assist the Plaintiffs at this stage of the proceedings although at the appropriate time I am prepared to hear submissions with respect to any role that judicial notice may play in a possible aggregate assessment of damages.

Scope of examination and cross-examination at trial

[25] If I were to allow the Plaintiffs to adduce evidence as to causation and damages, what is the reasonable limit on such testimony? The relief sought in this case is for physical and mental harms, making it an action for personal injuries. If the Plaintiffs wish to have causation and damages determined, then the other parties must be given a fair opportunity to cross-examine the witnesses. I do not see how there can be "limited" evidence on causation and damages. Once that door is opened there is no obvious or logical limit to the usual scope of examination or cross-examination.

[26] I understand that the opposing parties are not in a position to conduct cross-examination on causation and damages. I assume that if Canada was forestalled from pursuing questions relating to causation and damages at discovery, then the Plaintiffs' did not produce any documents in their possession or control relating to those issues, including medical reports. If I allow the Plaintiffs to adduce the desired evidence of causation and damages, then I must also order the necessary document production. Once that has been completed, the other parties may wish to

conduct further examinations for discovery and may engage one or more expert witnesses.

[27] Counsel for the Plaintiffs said at the hearing of this matter that the Plaintiffs would desist from asking such questions rather than produce the medical records at this stage of the trial. That would be the necessary election because in order to effectively cross-examine the witnesses, the opposing parties must first have the necessary documents. If the Plaintiffs do not wish to produce them at this stage of the trial then they are necessarily constrained in the scope of their questioning of these witnesses.

This case is about alleged systematic failures

[28] In this application the Plaintiffs made submissions relating to their election whether to pursue individual trials on causation and damages, the distinction between pecuniary and non-pecuniary damages, and a further distinction between determining causation and damages in a class action versus a traditional personal injury action. None of those arguments changes the fact that the Plaintiffs, by their own actions, have caused this common issues trial to be limited to whether there was a duty owed to the Plaintiffs by Canada (whether by nature fiduciary or in tort) and if so whether it was breached. These, if proven, would amount to systemic failures by Canada.

[29] In this vein see **Seed v. Ontario**, 2012 ONSC 2681, a decision of Horkin, J. of the Superior Court of Ontario arising out of that defendant's operation, administration and management of a boarding school for the visually impaired. Insofar as it relates to allegations of breach of duty owed to vulnerable persons attending school in a residential context it has many parallels to the case before me. In addressing whether there existed a common issue for the purposes of certification, Horkin, J. found at para. 139:

> 139. The focus in this action, as with other class proceedings alleging institutional abuse, is on systemic wrongs, not on the individual circumstances of

> class members. The court in determining these common issues will assess the knowledge and conduct of those in charge of the school over the class period.

[30] That is not to say, as was determined by Butler, J., that some evidence of individual experiences at the schools cannot assist the Court in trying the common issues. To borrow from her decision, questions asked of class members during examination-in-chief or cross-examination as to the general living conditions, health, education, religious instruction, cultural maintenance, safety, socialization, discipline, extracurricular activities, alleged discrimination, and alleged breach of duty are permissible. From this line of questioning, I will be assisted in my task of assessing whether Canada fell short of the duty the class members expected of it.

Aggregate assessment of damages

[31] Notwithstanding the foregoing, I must ultimately determine whether an aggregate assessment of damages can be made. Nothing in this decision should be construed as suggesting that such damages cannot be available to the class members if a breach of a duty owed to them is established. They have engaged an expert witness who will testify at a later stage of this trial. That testimony (if permitted over the objections of Canada) may well provide a basis upon which such an assessment can be made.

[32] At this stage of the trial I am simply ruling that, whether or not any such evidence would otherwise have been permissible to prove aggregate damages pursuant to Section 29(1)(c) of the *Class Actions Act*, it may not be adduced in this case because the Plaintiffs have conducted themselves in a manner that precludes it.

Prejudice cuts both ways

[33] It is true that the principal prejudice to the other parties caused by permitting the trial to veer into causation and damages can be cured by an adjournment to

permit the procedural steps as I have identified above. But that would only lead to further prejudice to all parties caused by the delay. That prejudice would, however, be worse for the class members. These actions are at least seven years old. Some of the claims go back to 1949. Many of the witnesses who have testified and who are proposed to testify are elderly and/or are unwell. This is obviously true of other class members as well. This Court and the Court of Appeal have emphasized how important it is to have the trial concluded in as timely a manner as possible. Following a lengthy delay in the original November, 2014 trial date, the trial is now underway. The adjournment in question would be for months, not weeks. The resulting delay in concluding the trial cannot be countenanced.

DISPOSITION

[34] The Plaintiffs may not adduce at the common issues trial evidence as to the impacts class members have allegedly suffered in their lives caused by their experiences at the Schools.

ROBERT P. STACK
Justice