

2007 01T4955 CP

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

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER and JOYCE WEBBER
PLAINTIFFS

-and-

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

ORDER

2008 01T0845 CP

BETWEEN:

SARAH ASIVAK and JAMES ASIVAK
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0844 CP

BETWEEN:

SELMA BOASA and REX HOLWELL
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2008 01T0846 CP

BETWEEN:

EDGAR LUCY and DOMINIC DICKMAN
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

2007 01T5423 CP

BETWEEN:

TONY OBED, WILLIAM ADAMS AND MARTHA BLAKE
PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA
DEFENDANT

Filed Aug 28/08 me

UPON APPLICATION by the Defendant seeking further and better particulars from the Plaintiffs under Rule 14.23 of the *Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D, (Judicature Act)*;

AND UPON reviewing the materials and oral submissions supplied by the parties;

IT IS HEREBY ORDERED THAT:

1. The Plaintiffs shall provide responses to demands for particulars numbered: 3, 4, 5, 6, 7, 8, 27, 33, 34, 36, 37, 40 and 41 in accordance with Justice Butler's decision from the bench of July 26, 2012 attached hereto as Schedule A;
2. The Plaintiffs shall make best efforts to provide the responses to demands for particulars by August 10, 2012 or within such time as may be agreed by the parties. The Defendants shall then make best efforts to provide a statement of defence by September 10, 2012 or within such time as may be agreed by the parties; and
3. Either party may seek further assistance from the Court by way of case management regarding any issues that may arise from the execution of this Order.

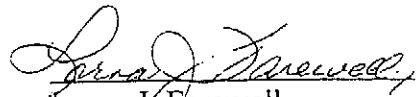
*Dated at St. John's, NL
this 28th day of August, 2012*

*Barlene Kelly
Senior Deputy Registrar*

CERTIFICATE OF TRANSCRIBER

I, Lorna J. Farewell, of St. John's, Newfoundland, hereby certify that the following pages of printed matter, numbered 3 to 12, are a true and accurate transcript of the proceedings heard before the Honourable Justice Gillian D. Butler on the 26th day of July, A.D. 2012, and recorded by a sound recording device, have been transcribed by me to the best of my knowledge and ability.

DATED at St. John's, in the Province of Newfoundland and Labrador, the 10th day of August, A.D. 2012.


Lorna J. Farewell
Judicial Assistant

July 26, 2012

Commencing at 3:25:36

THE COURT: Okay, thank you very much. Now, my proposal is that I deal with the 14.23 application and I am doing that in part because of the need to move this matter forward and everyone's desire to have some, an expeditious ruling on whatever we can do today. So, in addition to Rule 14.23 itself, which of course is set out in at least one if not ... I would in fact start with the following principles which I have found helpful. There is a Newfoundland decision known as – that – I don't believe either of the parties referred to it, 2010 No. 531, it's from our Court of Appeal and it establishes that the burden is on Canada in the particular case to show the relevance of the questions asked. It also stands for the principle that demand for particulars is the appropriate first step to gain additional detail of the plaintiffs' claim. From that decision, I also consider it relevant, that the plaintiffs did make a comprehensive reply too many of the questions asked. It cannot be said that they did not take requests seriously. Of the questions asked, many having sub-paragraphs, all but 17 have been answered to the defendant's satisfaction. Similarly, relying on ..., it cannot be alleged that the defendant here took a boilerplate approach to the demand with intentions of intentionally delaying(?) it's defence. Another

thing I found helpful was the textbook I often go to when I have to return to first principles and that was Odgers Principles of Pleadings and Practice, 29th Edition. And from Odgers I would stress the following principle on the issue of ... The object of particulars I accept is to enable the party asking to know what he has to meet at trial to save unnecessary expense and avoid surprise. In addition, if the plaintiffs' statement of claim, in this claim, could be characterized as vague in whole or in part, then the defendant is unsure what line of attack would be and the defendant should not be left to guess. To disallow particulars in those circumstances leaves it open to the plaintiff to give evidence at trial as to any fact which tends to support the vague allegation. I found that principle particularly relevant to the particulars that the plaintiff has to give in answer to questions posed in the category of agency.

Another principle from Ogder's text is no objection to the demand for particulars. The defendant must know the true facts of the case better than the plaintiff. Canada is, in my opinion, entitled to know the outline of the case that the plaintiff will try to make against Canada and which may be something very different from the true facts of the case. Ogder ... particulars will be ordered whenever that ... the applicant, in this case Canada, cannot tell what is going to be proved against them at the trial. How the plaintiff will prove the allegations is a matter of evidence of which

particulars will not be ordered. In addition to these principles I also accept from the authorities that each ... that particulars are that additional detail that allows a material fact or allegation to be identified and investigated and a proper response fashioned. Here I refer to the Ryan's Fishery case. I also accept that so long as the request is bona fide and does not seek evidence of ... particulars should generally be granted. That is, of course, the principle that Canada relies on from the Duffett case. And, finally, I do accept, as Mr. Tarlton? said, it has long been recognized in class actions that there is a stark imbalance between the parties in terms of access to documents. He cites in authority for that the Imperial Tobacco case.

Applying these principles to the facts before me, the plaintiffs amended statements of claim seem to allege agency relationship between Canada and others but the plaintiffs refused to provide particulars of the nature and the parameters of these alleged relationships.

... the plaintiff alleges vicarious liability but has not yet confirmed the nature of all the claim that he makes against Canada. I do find that there is a certain amount of vagueness in the pleadings and here's how I would apply the principles and my findings on the pleadings as I find at this stage to the situation before me.

In relation to Question (b) which has had asked whether agents includes delegates as used in paragraph 64 and to which the plaintiff has responded, "no, not necessarily". I would characterize that as an unsatisfactory answer because it does not assist Canada in knowing the case it has to meet at trial. ... in avoiding surprise that question must be answered by the plaintiffs in a more direct and a comprehensive fashion. In relation to Question ... which the plaintiff has not yet answered, No. 4 sought the name, sought or requested the name any ... the plaintiff ... in agents. And the plaintiffs have indicated that that is irrelevant and, in any event, information is in Canada's own knowledge. I find here that the plaintiff used the term "agent" in its claim so it must have had some basis on which to allege that Canada had agents. It therefore should answer the question. Similarly, in Question 5 which was asked, does the plaintiff allege the entities called agents were in a principle/agent relationship with Canada, and for which the plaintiff says the question is irrelevant and any agency relationship with the plaintiff in its knowledge. I note, for example, in paragraph 58 of the statement of claim that the plaintiffs had said "Canada and its agents compelled members of the class to leave their homes". Since principle/agency relationship is alleged, the vagueness, I find, is whether in fact the plaintiff is relying on vicarious liability. The defendant's question does not ask the plaintiffs provide names, it just asks whether a principle/agent relationship is being alleged. I find that the defendant is

entitled to know and the question should be answered in relation to whether the agency or a principle/agency relationship.

Similarly, on No. 6, which asked to provide material facts that could show a relationship ... and which the plaintiff says is irrelevant if a principle/agent relationship did exist, the defendant is entitled to know the general facts that the plaintiff will rely upon to support it, then that question should be answered.

No. 7 asked for the name, asked the plaintiff to name ... in a principle/agency relationship and again the plaintiff thought that was irrelevant. If the plaintiff is certain, for example, Canada directed teachers, administrators, provincial civil servants, or other categories of individuals to compel class members to leave their homes, the defendant is entitled to know. And, again, since the defendant is not seeking names of people but rather just the entities, the question must be answered. And, finally, in that category, No. 8, which asks the plaintiff to provide material facts that could show a relationship of principle and agent, Canada and agencies, has the question ... and if a principle/agency relationship is alleged, the defendant is entitled to know the facts on which the plaintiff relies. There should be no surprise. When an agency relationship is alleged, the plaintiff should

tell Canada this because one of the purposes of pleading is to narrow the issue, so that question must be answered.

Now, looking at the other broad category which are questions requesting information on specific paragraphs of the claim, paragraph 23 and paragraph ? of the statement of claim sought particulars of International Grenfell Association's involvement, funding, and role in the school. The plaintiffs indicate that was within the sole knowledge of the defendant and I agree with the plaintiff here. At this stage of the pleadings I would not expect the plaintiff to know these details therefore I do not require the plaintiffs to answer this question.

I rule the same way on Question 24 which had sought particulars of Canada funding of ... the school between '49 and '79 and on the same basis, so that question need not be answered.

In relation to the question from ... ?(7) in which the defendant sought particulars of who or, I'm sorry, or what were the alleged servants or agents, I address this in regard to Demand No. 4. The plaintiff used the term "agent" so it must have some idea of the categories of persons who they allege are agents and the fact that the question must be answered.

In relation to Question 29 which was in relation to paragraph 62(d) the plaintiff had alleged that Canada had performed its duties negligently and that it was responsible for decisions made by its agents, the defendant asked for particulars of the decision. Now, the plaintiff characterized that question as "overbroad". They also indicated that the information was in the knowledge of the defendant and it constituted evidence(?). In this particular instance I agree with each of these grounds and I rule that that question need not be answered.

In relation to paragraph (n)(31) for paragraph 62(f) which alleged that Canada was responsible for the selection of delegated officers, the demand have asked what ... and the plaintiff indicated that this question was overbroad and the information sought within its sole knowledge. The extent of the question sought names, I order that the question is not to be answered. I also agree that this may constitute ... and I note that in this particular case the paragraph that was challenged itself already refers to category ... refer to employees and servants. But prior to discovery I would not expect the plaintiff to know more. So paragraph 31 is not to be answered.

Demand 33, in relation to paragraph 64, and asked who were the delegates and the plaintiff indicated this information was in Canada's knowledge, I

agree that Canada would have greater knowledge through its delegates, if any were; but I think the plaintiff should clarify if delegate ... agent and to what position in general, categories in general. The plaintiff is alleging that Canada delegated power or discretion, i.e., teachers, administrators, provincial government, etc. So that question, to that extent, must be answered.

Demand 34 was in relation to paragraph 6-(?) generally and the plaintiff there alleged that Canada and its agents breached its fiduciary duty. Canada asked what agents and the plaintiff said the information was within Canada's knowledge. That's previously addressed. I ruled that the defendant is entitled to know the general nature of the agents by category, so that question must be answered.

Demand 36, in relation to 66(d), the plaintiff had alleged that Canada delegated to and contracted with churches and ... the – Canada has asked what churches. The plaintiffs' response has been that is within the sole knowledge of the defendant. Now, again, I say that the plaintiff should identify parties by categories of which the plaintiff is currently aware and, in relation to churches, they may be able to identify specific churches but potentially without limiting the list and being able to ... government I think that question can also be answered.

In relation to Demand 37 which asked for particulars of agents operating the school, although the plaintiff suggested that was also within Canada's sole knowledge, I believe the plaintiff should address the question in the general ... category ... whether they are teachers, principals, administrators, etc. And in relation to Question 40, also looking for particulars of agents, particular interrogatory or, sorry, demand, looking for names and titles and responsibilities, I would say that consistent with my position on an earlier question of general categories should be supplied by the plaintiff, i.e., teachers, etc., but to the extent that the demand looks for names of ..., the plaintiff is not compelled to answer.

And, finally, in relation to No. 41, which addressed paragraph 72 of the amended statement of claim and again seeking particulars of agents, the plaintiff had alleged intentional infliction of harm by Canada and its agents. The defendant asked for particulars of the agents. The plaintiff says that that's within Canada knowledge, but I rule that the plaintiffs' allegations of vicarious liability require the defendant ... categories of persons for whom the plaintiff claims Canada is responsible. So, in short, unless I have missed something, again, I rule the plaintiff must answer 3 to 8, 27, 33 and 34, 36, 37 and, in essence, part of 40 and part of 41, but they need not answer 23, 24, 29 and 31.

Now, how much time will the plaintiff need to file replies?

3:42:16 approx.
