The Supreme Court of Newfoundland and Labrador
Trial Division (General)

To: Kirk M. Baert & Celeste Poltak

Date: 27 December 2012

Re: *Anderson v. Canada (Attorney General)*
2007 01T 4955 CCP
Rules 30.08 and 30.11

Attached hereto is a revised cover page of Justice Butler's recent decision on the above-noted matter; the neutral citation was incorrect on the original page.

Please replace with the cover page you currently have.

Thanking you,
Helen

From the desk of: Helen R. Thoms-Walsh,
Judicial Assistant
Ph: 729-4033 / E-mail: HThomsWalsh@supreme.court.nl.ca

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

Citation: *Anderson v. Canada (Attorney General)*, 2012 NLTD(G) 190
Date: 20121219
Docket: 200701T4955CCP

BETWEEN: **CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**

PLAINTIFFS

AND: **THE ATTORNEY GENERAL OF CANADA**

DEFENDANT

AND: **GOVERNMENT OF NEWFOUNDLAND AND LABRADOR**

THIRD PARTY

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

Docket: 2007 01T 5423

BETWEEN: **TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0844

BETWEEN: **SELMA BOASA AND RITA CHIDO** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0845

BETWEEN: **SARAH ASIVAK AND DELANO FLOWERS** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

Docket: 2008 01T 0846

BETWEEN: **EMILY DICKMAN AND DOMINIC DICKMAN** PLAINTIFFS

AND: **ATTORNEY GENERAL OF CANADA** DEFENDANT

*** This page being replaced by first page due to typo however, this is marked as filed, 1st page is not (citation error)

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Filed | 2012-12-19 | MEN

Before: The Honourable Madam Justice Gillian D. Butler

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

Date of Hearing: December 5, 2012

Summary:

There is no fixed rule limiting the scope of discovery in class action proceedings to the issues relevant solely to the stage of the proceedings. However, on the facts it was appropriate to limit the discovery of the Representative Plaintiffs before the hearing of the common issues trial to the common issues set out in the Certification Order. The Court held that questions posed respecting the Representative Plaintiffs' experiences at the residential schools (but not the consequences of their experiences) fell within the scope of the common issues (being allegations of the existence of a duty of care and breach thereof).

Appearances:

Chesley F. Crosbie, Q.C., Kirk M. Baert, & Celeste Poltak	Counsel for Plaintiffs
Jonathan D.N. Tarlton, Mark S. Freeman, & Melissa A. Grant	Counsel for The Attorney General of Canada
Rolf Pritchard, Q.C.	Counsel for Government of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: Canadian Imperial Bank of Commerce v. Deloitte and Touche, [2008] O.J. No. 3304, 47 C.B.R. (5th) 39 (Sup. Ct.); **Ramdath v. George Brown College of Applied Arts and Technology**, 2012 ONSC 2747, [2012] O.J. No. 2475; **Szeto v. Dwyer**, 2010 NLCA 36, [2010] N.J. No. 187; **Kent v. Kent**, 2010 NLCA 53 [2010] N.J. No. 287; **Seascape 2000 Inc. v. Attorney General of Canada**, 2012 NLTD(G) 185.

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001 c. C-18.1

RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D (under the *Judicature Act*, R.S.N.L. 1990 c. J-4) r. 30.08 and r. 30.11; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 1.04 and r. 29.2.03.

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] On December 5, 2012, I reserved my decision on the Application of the Attorney General of Canada ("Canada"), filed under Rules 30.08 and 30.11 of the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D (under the *Judicature Act*, R.S.N.L. 1990 c. J-4). Canada seeks an Order compelling two Representative Plaintiffs (Ms. Anderson and Ms. Asivak) to answer questions on discovery regarding their experiences at identified residential schools, such questions having been objected to at their discoveries on September 11–14, 2012.

Discoveries Should be Confined to the Stage of the Class Action

[2] Plaintiffs' counsel relies on sections 12 and 18(3) of the *Class Actions Act*, S.N.L. 2001 c. C-18.1, in support of the position that, in class action proceedings, discoveries prior to the common issues trial must be confined to the common issues certified. I set out these sections below:

> **12.** (1) In a class action,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and

> (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 27 and 28.
>
> (2) The court may give a common judgment respecting the common issues and separate judgments respecting another issue.
>
> **18.** (3) In deciding whether to grant a defendant leave to discover other class members, the court may consider
>
> (a) the stage of the class action and the issues to be determined at that stage;
>
> (b) the presence of subclasses;
>
> (c) whether the examination for discovery is necessary in view of the defence of the party seeking leave;
>
> (d) the approximate monetary value of the individual claims, if any;
>
> (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be examined; and
>
> (f) another matter the court considers relevant.

[3] While counsel for Canada is largely in agreement with this general proposition, I note that neither section 12 nor section 18 restrict discovery in this fashion; indeed I conclude that such a restriction is not always appropriate.

[4] In **Canadian Imperial Bank of Commerce v. Deloitte and Touche**, [2008] O.J. No. 3304, 47 C.B.R. (5th) 39 (Sup. Ct.), a motion to restrict discovery before the common issues trial, to the common issues as certified, was denied. On the facts of the case before it, the Ontario Supreme Court held that Deloitte was entitled to ask questions about all relevant facts and circumstances relevant to the issues as pleaded (including damages) (see paragraph 61).

[5] In the **CIBC** decision the Ontario Superior Court held that permitting discovery questions beyond those relevant to the stage of the class proceedings was consistent with the principle of "judicial economy in class actions [as] an important

objective" (see paragraph 55). This led the Ontario Superior Court of Justice at paragraph 56 to conclude:

> ... that restricting Deloitte's discovery rights in the manner proposed by the Plaintiffs would or could in all the circumstances here severely prejudice/abrogate Deloitte's rights without substantially promoting judicial economy.

[6] In the case before me, the ages, health and isolated residences of the Representative Plaintiffs do suggest some judicial economy in discovering them once only, instead of repeating the exercise at each stage of the class action proceeding.

[7] On the other hand, I note that Counsel for the Plaintiffs has filed and will pursue an Application under Rule 38; in this Application the Plaintiffs seek a preliminary determination of whether a fiduciary duty existed between the parties. This is a relevant consideration for me on the question of whether I should limit the scope of discoveries at this stage of the proceeding to matters relevant to the common issues.

[8] In light of the foregoing and notwithstanding my conclusion (that there is no firm rule restricting discoveries to the matters relevant only to the stage of the class action proceeding) as well as my concerns expressed in paragraph [6] above, I shall accept counsels' general agreement that the current discoveries should be confined to matters relevant to the common issues.

[9] I move now to the dispute on whether the objectionable questions are indeed outside of the common issues as defined.

Discoveries Restricted to Defendant's Position in the Pleadings

[10] Paragraph 7 of the Certification Order granted on June 7, 2010 states:

THE COURT ORDER AND DECLARES that the common issues for the Class are:

(a) by its operation or management of the ... School did the defendant breach a duty of care owed to the students of ... School to protect them from actionable physical or mental harm?;

(b) by its purpose, operation or management of the ... School, did the defendant breach a fiduciary duty owed to the students of the ... School to protect them from actionable physical or mental harm?;

(c) by its purpose, operation or management of the ... School, did the defendant breach a fiduciary duty owed to the families and siblings of the students of the ... School?;

(d) if the answer to any 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?;

(e) if the answer to any of these common issues is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?; and

(f) if the answer to common issues (e) is "yes", what amount of punitive damages ought to be awarded?

[11] The Plaintiffs allege that since Canada's Defence asserts that no duty was owed by Canada to the students at the residential schools in question, discovery must be confined to the position in its Defence. I disagree.

[12] It is the pleadings as a whole that provide the backdrop for the assessment of relevancy of questions posed on discovery. The Plaintiffs' own claims give rise to assertions of a duty of care between the parties as well as the allegation that such duties were breached. I conclude therefore that, before the common issues trial, Canada must be permitted to pursue these assertions at discovery in order to assess the risks it faces (if any) on the Representative Plaintiffs' claims.

Questions Are Broader Than the Common Issues and Are Related to Individual Claims

[13] Stated broadly, the common issues are the alleged fiduciary duty, the existence of a duty of care, and alleged breach.

[14] Canada asserts that its outstanding questions are relevant to these issues and that the Representative Plaintiffs are the best source of direct evidence of the alleged experiences of the class members at the schools.

[15] Canada suggests that by restricting questions to experiences that were either personal to or witnessed by the Representative Plaintiffs (as opposed to the consequences of the experiences of the Representative Plaintiffs) the questions posed relate to one of the common issues. Further, Canada asserts that no similar objection to questions of this nature was raised on the examination of Representative Plaintiffs Webber, Lucy, Adams, and Obed.

[16] Plaintiffs' counsel objects on the basis that a Representative Plaintiff's individual experience would not be relevant to the common issues between the parties "at this stage". They suggest that Canada's questions cross over into issues that will be determined at later stages of this litigation.

[17] Plaintiffs' counsel referred to the Ontario decision in **Ramdath v. George Brown College of Applied Arts and Technology**, 2012 ONSC 2747, [2012] O.J. No. 2475, which decision concerned a class action having similar common issues (Was there a special relationship, were representations made and, if so, were they breached?).

[18] I pause to mention firstly that the court in **Ramdath** relied upon Ontario Rules 1.04(1.1) and 29.2.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. These Rules have codified the proportionality principle and required Ontario courts to consider proportionality factors in making a determination that a person is required to answer a question or produce a document.

[19] While Newfoundland and Labrador has not incorporated the proportionality principle in its *Rules*, I conclude that the principle nevertheless applies to procedural matters in this jurisdiction. Our Court of Appeal first addressed it in the context of interrogatories in **Szeto v. Dwyer**, 2010 NLCA 36, [2010] N.J. No. 187, at paragraphs 52-76 and some months later to a subpoena *duces tecum* in **Kent v. Kent**, 2010 NLCA 53 [2010] N.J. No. 287, at paragraph 74. Most recently this Court applied the principle to an Application to strike portions of a statement of claim in **Seascape 2000 Inc. v. Attorney General of Canada**, 2012 NLTD(G) 185 at paragraphs 24-30.

[20] I agree that proportionality is a relevant issue to the breadth and scope of the discovery process, to be applied with the objective of promoting and not frustrating the underlying purposes and objectives of the *Rules* and the class actions legislation. The time and types of processes involved must be proportionate to the expense and convenience of the parties, nature of the issues, nature of the proceedings, amount of money involved, time reasonably necessary to resolve the issue, complexity of the claims, and overall costs of the litigation.

[21] Applying the proportionality principles of the Ontario Rules in **Ramdath,** the Ontario Superior Court required the Plaintiffs to identify any documents they relied upon for their alleged misrepresentation and breach of contract claims (see paragraph 66).

[22] Albeit without reference to the proportionality principle, in **CIBC v. Deloitte** the Ontario Superior Court held that where "liability may hinge on findings relating in part to the specific nature of the relationship between the parties ... it would be grossly unfair to force [the defendant] to proceed to a trial of any or all of the common issues before it has been able to ascertain all facts relevant ..." to the common issues (see paragraph 32).

[23] The issues in the within class action are significant; they concern the management of residential schools in Labrador which the Plaintiffs or their families attended over decades, and at which it is alleged the students suffered mental and physical abuse. The Plaintiffs seek general, punitive and exemplary damages.

[24] In this case I accept that Canada's questions are motivated by a need to determine the factual basis for the Representative Plaintiffs' assertions of a duty owed and breached and not for any improper purpose. This evidence would have significant relevance to the common issues. Further, Canada's discovery of the Representative Plaintiffs is timely; there is no suggestion of unnecessary hardship or oppressiveness in the questions to which the Representative Plaintiffs objected. I conclude that the questions posed by Canada and objected to by the Representative Plaintiffs are consistent with an efficient and fair advancement of these class action proceedings.

[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.

[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.

[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.

[28] A summary of the discovery questions refused was provided at Tab C of Canada's Brief. I have reviewed each question/issue and conclude that they all fall within the broad parameters of questions related to one of the common issues as certified.

[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:**

(i) **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;

(ii) **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; and

(iii) **THAT** in light of my earlier ruling, on the interpretation of section 37 of the *Class Actions Act*, there shall be no order as to costs on this Application.

GILLIAN D. BUTLER
Justice