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

Citation: *Anderson v. Canada (Attorney General)*, 2014 NLTD(G) 144
Date: 20141124
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 -

Stack J.

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

Before: The Honourable Mr. Justice Robert P. Stack

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

Date(s) of Hearing: November 18, 2014

Summary:

On an application for directions, the Court held that the evidence and findings of fact in respect of one cause of action shall be binding upon the parties, including the third parties, in respect of the second cause of action. Because it now appears that the majority of the facts to be determined by the Court in respect of each of the two causes of action overlap and are interwoven, it was directed that a single trial be held encompassing the common issues between the Plaintiffs and the Defendant and the third party claims.

Appearances:

Kirk Baert, Celeste Poltak, Chesley F. Crosbie, Q.C. 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

Rolf Pritchard, Q.C. and Mark Sheppard	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
Stephen J. May and Leanne M. O'Leary	Appearing on behalf of The Moravian Church in Newfoundland and Labrador
Jed Blackburn	Appearing on behalf of The Moravian Union (Incorporated)

Authorities Cited:

CASES CONSIDERED: Anderson v. Canada (Attorney General), 2014 NLCA 24; **Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154; **Walkerton (Town) v. Erdman** (1894), 23 S.C.R. 352; **Allen v. Stone** (1996), 146 Nfld. & P.E.I.R. 308, 68 A.C.W.S. (3d) 105 (Nfld. C.A.); **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R 817; **Lam v. University of British Columbia**, 2014 BCSC 673; **Campbell v. Flexwatt Corp.** (1996), 3 C.P.C. (4th) 208, 65 A.C.W.S. (3d) 717 (B.C.S.C.); **Martin v. McNaughton**, 2009 BCSC 870; **Aylsworth v. Richardson Greenshields of Canada Ltd./Richardson Greenshields du Canada Ltée** (1987), 20 B.C.L.R (2d) 43, 7 A.C.W.S. (3d) 277 (S.C)

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

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] If a proceeding invokes two causes of action and it has been directed that the trial of each proceed separately, what is the effect of the evidence adduced and the facts found in phase one of the trial on phase two? What if there are additional parties to the second phase of the trial that had not contemplated participating in the first phase? These issues have lately arisen as we are on the verge of beginning an eight week trial in this complex and historical class action. The answers have the potential of delaying the trial. The desire to have the common issues dealt with sooner rather than later was succinctly put by Rowe, J.A. in **Anderson v. Canada (Attorney General)**, 2014 NLCA 24 at para. 1: "As many of those involved in the class action are elderly, an expeditious disposition of the case is important".

[2] The class members, all aboriginals, either attended or had family members who were residents at schools in 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. In respect of the former, Canada has joined Her Majesty in Right of the Province of Newfoundland and Labrador (the "Province") as a third party, saying to the Province, in effect, "if we are liable to the Plaintiffs then because the negligence was yours you must indemnify us for the damages that we are ordered to pay". The Province has, in turn, made similar claims against the International Grenfell Association (the "IGA"), The Moravian Church in Newfoundland and Labrador (the "Moravian Church") and The Moravian Union (Incorporated) (the "Moravian Union"), saying that respectively they operated the schools and so are liable for any resulting damages. As we will see, it is conceded that there is no ability for Canada to claim contribution or indemnity in respect of the fiduciary duty claim.

[3] The claims by these aboriginal peoples allege that they involuntarily attended schools where they were separated from their families, were denied their

culture and were subjected to terrible abuses – psychological, physical and sexual. The procedural history of the matter to date is complex; it has already twice been to the Court of Appeal and back. It is necessary, however, to set out some of that history in order to understand how we arrived at our present predicament.

[4] Prior to being assigned to me as trial judge the proceeding was meticulously case managed by another judge of this Court. In a decision that bears directly on the matter presently before me (**Anderson v. Canada (Attorney General)**, 2013 NLTD(G) 154), she set forth the procedural history to that point:

> [1] In this class action the Plaintiffs seek damages for the physical and mental harm they allegedly suffered as students (or their family members suffered as a result of their attendance) at residential schools in Labrador after Confederation in 1949.
>
> [2] The issues initially certified by Fowler, J. in June 2010, were affirmed by the Court of Appeal on December 21, 2011 **Anderson v. Canada (Attorney General)**, 2011 NLCA 82 (CanLII).
>
> [3] On October 17, 2012, I denied the Attorney General of Canada's ("Canada's") application to add proposed defendants (see **Anderson v. Canada (Attorney General)**, 2012 NLTD(G) 148) on the basis that they were neither persons "necessary" or who "ought to" be added under *Rule* 7.04(2)(b).
>
> [4] As my decision acknowledged was its right, in November 2012, Canada served Her Majesty in Right of Newfoundland and Labrador (the "Province") with a Third Party Notice under *Rule* 12.02(1), *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Schedule D. The Province has also issued and served Third Party Notices on The International Grenfell Association, The Moravian Church in Newfoundland and Labrador and The Moravian Union (Incorporated).
>
> [5] In the within application, the Plaintiffs seek to strike or sever and/or stay all Third Party Claims; Canada opposes the Application, but all Third Parties represented at the hearing either supported the Plaintiffs' position or took no position.

[5] The case management judge refused to strike the third party claims but was concerned that the proceedings involving the Third Parties were in their infancy and would take considerable time to be ready for trial. She also found that the

issues in the negligence claim as between the Plaintiffs and Canada were interwoven and overlapped with the third party claims (**Anderson**, 2013 NLTD(G) 154 at paras. 56-57):

> [56] As the case management judge, I am not in a position to make any conclusion on the relationship (if any) between Canada and the Third Parties. The **Blackwater**, **Lewis (Guardian ad litem of)** and **L.R. v. Bromley Estate** decisions reflect a wide range of possible results and the trial judge will decide whether the facts (including the funding agreements) and any statutory provisions involved justify a finding of a fiduciary, constitutional, exclusive, strict, non-delegable duty (statutory or otherwise), vicarious liability and/or a common law delegable duty.
>
> [57] In addition to consideration of historical records and legislation, addressing some of these issues would require the trial judge to consider evidence from witnesses on the relationships between the Plaintiffs, the class members, Canada and the Third Parties and each party's level of involvement in the operations of the schools. If the trial judge concluded that the facts warranted a finding of either a common law delegable duty (that was delegated), or vicarious liability, on both Canada and the Province (as an example only), since the Plaintiffs have sued Canada only and are not prepared to waive recovery of proportionate liability, there may be claims for contribution. In either of these scenarios, the third party claims would be characterized as interwoven issues.

[6] At the same time, however, she too recognized the need to have the matter dealt with expeditiously (**Anderson**, 2013 NLTD(G) 154 at para. 71):

> [71] As to prejudice, I am acutely aware that members of both the original and family class [sic] are of advanced average age and there is a real risk that some would not survive to testify at the common or individual issues trial [sic] should this matter be delayed by an additional year or more. As the procedural history reflects, the parties have already been significantly delayed in the proceeding of the Plaintiffs' Claims.

[7] Canada is the only Defendant to the claim for breach of fiduciary duty. As found by the case management judge (**Anderson**, 2013 NLTD(G) 154 at para. 82), the fiduciary duty cause of action does not involve the Third Parties:

> [82] It is conceded that the fiduciary duty alleged cannot involve the Third Parties. I conclude, however, that the other duty of care alleged [negligence] can and will involve the Third Parties. My dilemma is that the issues that were certified almost three and a half years ago involve both duties.

[8] In order to have the matter proceed quickly in light of the interwoven and overlapping issues in the negligence cause of action, the case management judge put the Plaintiffs to an election. They could choose to have the negligence cause of action severed and stayed from the trial of the fiduciary duty cause of action which would permit the latter to proceed to trial within the year. Or, they could choose to have both causes of action tried together in the ordinary course which would necessarily result in the delay referred to in paragraph 71 of her decision referred to above. As stated by her (**Anderson**, 2013 NLTD(G) 154 at para. 84):

> [84] I conclude therefore that I should impose on the Plaintiffs the requirement that they make a choice to either:
>
> a) Confine the certified issues for the common issues trial … to the fiduciary duty alleged for both the survivor and family classes and for which liability cannot be apportioned, in which case all proceedings (including Third Party claims) relating to any duty for which liability can be apportioned shall be severed and stayed to be determined at a later date (if necessary) with the Third Parties reinstated and given full procedural rights; or
>
> b) Not confine the certified issues … to the fiduciary duty alleged to be owed to the survivor and family classes, in which case the Third Party claims shall not be severed and stayed and the Third Parties shall continue to have status as a party to these proceedings.

[9] The Plaintiffs elected to proceed with the hearing of the fiduciary duty phase of the trial only. The Third Parties take the position that they were precluded from participating in that phase of the trial and essentially stopped, or severely slowed down, their trial preparations pending its result. They were not invited to participate in subsequent discussions concerning the fiduciary duty phase of the trial, including the scheduling of the trial dates.

[10] Importantly, the case management judge did not sever the third party claims from the Plaintiffs' negligence claim against Canada. Rather, the entire cause of action in negligence – the Plaintiffs' claim against Canada, Canada's third party claim against the Province and the Province's third party claims against the operators of the schools – was severed from the fiduciary duty claim and was stayed. That is, the case management judge made a substantive decision that the third party claims should not be severed from the negligence claim by the Plaintiffs against Canada. She then provided directions as to the procedure by which the trial of the two causes of action could proceed. It is only the procedural aspect of the matter that is presently before me as trial judge.

[11] Two months before the trial was scheduled to commence, at a meeting I held with the respective counsel for the Plaintiffs and Canada, Canada raised the question that is now before me: what effect will the evidence adduced and the findings of fact from phase one of the trial have upon phase two? Because the interests of the Third Parties were once again in play, I scheduled a subsequent meeting to which the Third Parties would be invited.

[12] The parties were asked to submit their positions in writing in advance of the meeting and I am thankful that have done so. Because there was no agreement the matter was set down for a hearing on the first day of trial.

[13] What follows are, in broad summary, the respective positions of the parties:

1) Plaintiffs: the evidence and findings of fact in phase one of the trial should be binding upon the parties in phase two; the Third Parties may participate in phase one of the trial; although the Plaintiffs would prefer that there be no delay, they appear resigned to the fact that some delay may be necessary; if there is delay, then the trial should no longer be bi-furcated and early trial dates should be set for the hearing of all of the issues involving all of the parties;

2) Canada: the evidence and findings of fact in phase one of the trial should be binding upon the parties in phase two; the Third Parties may

participate in phase one of the trial and they should be given adequate time to prepare; the trial should no longer be bi-furcated; and

3) Third Parties: the evidence and findings of fact in phase one of the trial should *not* be binding upon the parties in phase two; if I hold otherwise, however, then the Third Parties should be able to participate in phase one of the trial and they should be given adequate time to prepare; better, still, the trial should no longer be bi-furcated (I note that the Province takes a different view of this as will be seen later).

BASIS FOR THE APPLICATION

[14] For the purposes of the record, Canada has brought an application for directions relating to the conduct of the trial of the proceeding. The matters before me engage both the *Class Actions Act*, S.N.L. 2001, c. C-18.1, and the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. The two intersect by virtue of section 40 of the *Class Actions Act*:

> 40. The *Rules of the Supreme Court, 1986* apply to class actions to the extent that those rules are not in conflict with this Act.

[15] My authority to provide further directions as to the conduct of the trial stems from my inherent jurisdiction over the trial process bolstered by a number of statutory and regulatory provisions as follow:

1) Section 13 of the *Class Actions Act*:

> 13. Notwithstanding section 12, the court may make an order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

2) Rule 7A.01(4)(a) and (c) of the *Rules of the Supreme Court, 1986*:

7A.01. (4) The rules of court, including Rule 7A, and the procedures to be followed with respect to class proceedings shall be interpreted and applied to achieve the objects of the Act, and in particular

(a) to promote the effective and economical use of the judicial system; ... and ...

(c) to ensure that parties responding to a class proceeding are able to present their case fairly to the court.

3) Rules 12.06(1)(b), (d) and (e) and (2) of the *Rules of the Supreme Court, 1986*:

12.06. (1) Where a third party files a defence, the defendant serving the third party notice or the third party may, on notice to all the parties to the proceeding, apply to the Court for directions and the Court may,

...

(b) order the proceeding to be tried in such manner as the Court may direct;

...

(d) give the third party liberty to appear on the trial or hearing of the proceeding and to take such part therein as may be just;

(e) make such other order as may appear to the Court proper for having the rights and liabilities of the parties conveniently determined and enforced, or for determining the extent to which the third party is to be bound by any order in the proceeding; ...

(2) Any order made under rule 12.06(1) may be varied or rescinded by the Court at any time.

4) Rule 38.01(1)(d) of the *Rules of the Supreme Court, 1986*:

38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

...

(d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the

> proceeding notwithstanding the provision of any rule to the contrary; …

5) Rules 46.09 and 46.18 of the *Rules of the Supreme Court, 1986*:

> 46.09. The Court may, at a trial, make an order directing the method of proving any fact or document or of adducing any evidence if it appears that the order can be safely made having due regard to the interests of justice.
>
> 46.18. Any evidence taken at a trial may be used at any subsequent stage of the proceeding.

[16] It is important to note that this is not an appeal from the decision of the case management judge; nor is it a review of that decision. That decision was not appealed from. The Plaintiffs made their election and all of the parties proceeded accordingly. It seems that no one - not the case management judge, not me as trial judge, nor any of the many counsel involved for any of the parties – put their mind to the present issue. The application for directions is not, therefore, a collateral attack on the directions given by the case management judge. On the eve of trial, an issue not previously contemplated has arisen requiring further direction from me as the trial judge. Nor is it suggested that the matter has been raised by Canada in bad faith in an effort to delay the Plaintiffs' day in court.

[17] It is not entirely clear what representations were made to the case management judge as to the evidence that would be required to be adduced at each of the two phases of the trial as directed by her. In fairness, however, such a division of causes of action was not contemplated at the time of the hearing. What was sought was a dismissal, severance or stay of the third party proceedings, not a severance and stay of one cause of action involving all of the parties. Nevertheless, the case management judge sought supplemental submissions from the parties on the nature of the evidence to be adduced at trial so that she could assess the effect of her directions on the conduct of the trial. After doing so, she found (**Anderson**, 2013 NLTD(G) 154 at para. 81):

> [81] In addition to the concerns that I have expressed when considering each of the three components of the test for severance (interwoven issues, savings in time and cost and prejudice), I have given considerable thought to the broader question of what the common issues trial would look like if the

> Third Party Claims were severed/stayed and in comparison, how it would proceed if they were not severed/stayed. In both this broad and practical approach to resolution of the Application, and in the consideration of the more academic exercise, the difficulty I have had lies with the general negligence alleged … because it is the only claim made for which liability may be subject to apportionment.

[18] The case management judge addressed the evidence that would be called at the common issues trial (both causes of action) as opposed to at a trial of the liability issues between Canada and the Third Parties (**Anderson**, 2013 NLTD(G) 154 at paras. 58, 59, 61 and 62):

> [58] Turning now to the second factor [savings in time and cost], counsel for the Plaintiffs asserts that the common issues trial in the main action will turn upon:
>
> a) pure questions of law as between Canada and Aboriginal persons;
> b) historical documentation offered and produced by Canada with respect to its own knowledge or belief about its legal obligations;
> c) expert evidence respecting the standard of care at the relevant times; and
> d) expert evidence regarding the propriety of making an aggregate award of damages.
>
> [59] Counsel for the Plaintiffs [Mr. Baert] submits that he has no intention of calling evidence on the operation of the Schools and that he is content to rely upon the records and expert opinion referenced above. He asserts that Canada constitutionally inherited jurisdiction over Indians and their lands at the moment of confederation and that this responsibility cannot be delegated. The Plaintiffs are satisfied that (if the special duty of care they allege is owed is established by this means) Canada's breach will be established by Canada's own position that it had nothing at all to do with the Schools…
>
> [61] However, Mr. Baert acknowledges that Canada may present evidence on the operations of the Schools in defence of the duty and neglect alleged against Canada. Should Canada choose to do so, as I previously stated, the roles played by the Province and the other Third Parties will be the subject of some evidence at the main common issues trial.
>
> [62] In light of the multiple possible findings on nature, extent, delegation, breach of duty and causation, **were the Third Party Claims severed and a subsequent trial held with respect to contribution and indemnity, I conclude that there may be some duplication in evidence between the**

> **two hearings which would naturally affect the costs incurred by the parties.** However, such duplication would not extend to evidence of individual circumstances because this evidence would be reserved for the individual issues trials, not the common issues trial; I also conclude that the parties' expert evidence would not be duplicated. At this early stage it would be impossible to calculate the extent of duplication in evidence....
>
> [Emphasis added.]

[19] The Plaintiffs now state that at the fiduciary duty phase of the trial they will be relying on the following witnesses:

1) between 12 and 15 and class members;

2) an expert on the history and background of residential schools in Canada and the Province;

3) an expert on the standard of care at the schools at the relevant time periods;

4) an expert as to aggregate damages in this class proceeding.

[20] Most importantly, the Plaintiffs submit that they will be relying upon the same evidence in the negligence trial, should it be held, and that all of the evidence and resulting findings of fact ought to be binding in both phases of the trial. The reason is obvious: this will be a relatively long trial and the Plaintiffs do not want to be put to the time and cost of recalling all of the evidence from the first phase of trial at the second. In fact, it is now clear that the factual matrix is so interwoven that the negligence trial will merely involve the application of different legal principles to the evidence relating to a breach of fiduciary duty.

[21] Consequently, if there were to be a fiduciary duty trial followed by a negligence trial, we would find ourselves facing a very different evidentiary circumstance than was assumed by the case management judge. Rather than there being a mere possibility of "some duplication in evidence between the two hearings", we now find ourselves faced with a scenario in which all (or substantially all) of the evidence would be duplicated.

ANALYSIS

[22] From the foregoing one can appreciate the present dilemma. The Plaintiffs and Canada are ready to commence the trial – the dozens of boxes of documents brought to the courtroom are testament to that. The Third Parties, on the other hand, are far from trial ready. Proceeding with the trial will prejudice some of the participants; not proceeding will prejudice others.

Will the Findings of Fact in the Fiduciary Duty Phase of the Trial Bind the Parties to the Negligence Trial?

[23] The Plaintiffs have submitted that the fact findings in the first phase of the trial should bind the parties, including the Third Parties, in the second phase. Canada agrees.

[24] The Plaintiffs correctly assert that there is one class proceeding before the Court necessitating one common issues trial. That there was and continues to be but one trial has not been changed by the case management judge's procedural direction that, at the Plaintiffs' election, the trial be conducted in two phases.

[25] It is partly on the mistaken premise that there are two contemplated trials and not a single trial in two phases that leads to the Third Parties taking the view that the evidence in the fiduciary duty phase will not be binding in the negligence phase. For example, the Province relies upon **Walkerton (Town) v. Erdman** (1894), 23 S.C.R. 352 at para. 32, which considered the testimony of a witness "in a previous action", and Rule 46.13 of the *Rules of Court, 1986* which addresses "evidence taken in another proceeding". The latter was addressed by the Court of Appeal at paragraph 13 of **Allen v. Stone** (1996), 146 Nfld. & P.E.I.R. 308, 68 A.C.W.S. (3d) 105 (Nfld. C.A.):

> [13] ...Various prerequisites must be met before evidence from a **previous judicial proceeding** may be admitted in a subsequent action. Normally, the action in which the evidence was given must have been between the same persons and the issues must have been similar. **Further, there must**

> **have been opportunity for cross-examination on those same facts and issues.** [Emphasis added.]

[26] We are not dealing with a previous action or a previous judicial proceeding in this case but with two phases of the same trial. The Province rightly points out, however, that fairness requires parties bound by findings of fact to be given an opportunity to cross-examine the other parties' witnesses and to call their own. I will address this later.

[27] The Moravian Church is of the view that because neither the Plaintiffs nor Canada appealed the directions given they must live with the result that the evidence in a fiduciary duty phase of the trial cannot bind the Third Parties in a subsequent negligence trial. The repetition of evidence and the prospect of contrary fact findings are simply the natural fallout from the procedure chosen.

[28] Counsel for the IGA largely adopts the submissions made on behalf of the Moravian Church. The IGA, thinking it was stayed from participating in the fiduciary duty trial, assumed that any fact findings flowing therefrom would not be binding upon it as a participant in the negligence phase of the trial. The basis for their position is procedural fairness. It relies upon **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R 817, at para. 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly....

[29] Counsel for the Moravian Union has correctly identified the interconnectedness between the evidentiary foundations for the two causes of action. He correctly submits that the case management judge, by permitting the Plaintiffs to elect a fiduciary duty hearing separate from the negligence claim, intended them to avail of a narrow, focused hearing against Canada in an expeditious manner without prejudice to the Third Parties. Now that it is obvious that the evidence that would be adduced at a fiduciary duty trial is neither narrow nor focused, he says, trial fairness requires that the Third Parties not be bound by any determinations made in their absence.

[30] The attraction of the Third Parties' respective submissions that the evidence adduced and fact findings from the fiduciary duty phase of the trial should have no binding effect on the negligence phase of the trial is that it would permit the fiduciary duty trial to proceed more or less as scheduled. As noted by the case management judge (**Anderson**, 2013 NLTD(G) 154 at para. 85), proceeding with just the fiduciary duty cause of action "may conclude the litigation in its entirety". But, then again, it may not.

[31] The Third Parties suggest that rather than a bi-furcation of the trial into separate hearings for each of the two causes of action the case management judge ordered two trials. They therefore rely on cases where third party proceedings have been severed from the action between a plaintiff and a defendant. That is not what happened here. The case management judge separated the fiduciary duty claim (involving only the Plaintiffs and Canada) from the negligence claim (involving them and the Third Parties). There is no identity of interests shared by Canada, the Province or the operators of the schools – each may seek to adduce evidence implicating one or more of the others. That is why the case management judge expressly refused to sever the third party claims from the Plaintiffs' claims in negligence – they are too interwoven to conveniently do so. This case is therefore not similar to **Lam v. University of British Columbia**, 2014 BCSC 673; here the efficacy of the class proceeding would be destroyed as a result of re-litigating issues of fact from the fiduciary duty phase of the trial in a subsequent negligence phase. Nor is it similar to **Campbell v. Flexwatt Corp.** (1996), 3 C.P.C. (4th) 208, 65 A.C.W.S. (3d) 717 (B.C.S.C.), where the common issues were such that there was no reason for the third parties to be involved in the determination of a threshold issue. Those decisions point to the necessity of considering each case based upon its unique circumstances.

[32] We now find ourselves at a place where the evidence and fact findings in the fiduciary phase of the trial overlap and are interwoven with the negligence cause of action and therefore also overlap and are interwoven with the third party claims. No longer does the mere fact that the same judge would hear the two phases of the common issues trial overcome the harm that could flow from different findings on the same or similar facts (see, for example, **Aylsworth v. Richardson Greenshields of Canada Ltd./Richardson Greenshields du Canada Ltée** (1987), 20 B.C.L.R (2d) 43, 7 A.C.W.S. (3d) 277 (S.C)). I cannot countenance a

situation where not just Canada and the Third Parties, but also the Plaintiffs, face differing findings of fact from the same, or substantially the same, evidence.

[33] If the negligence phase of the trial were to proceed on the basis that the evidence adduced and the fact findings made at the fiduciary duty phase were not applicable, then at least three negative implications would follow. First, the Plaintiffs and Canada would be put through the time and cost of adducing all of the same evidence again which would result in the continuation of the trial for another eight to twelve weeks. Of most concern in this regard is that the class members chosen to testify would have to retell their stories in court for the same factual purposes, assuming that they will be available to do so. Second, Canada may choose to adduce evidence from one or more of the Third Parties on the operation of the schools in the first phase of the trial but would not be able to cross-examine those witnesses. Third, having the same evidence adduced in the second phase of the trial but involving more parties - especially in light of evidence that may be called on behalf of the Third Parties - creates the risk that the same trial judge may make conflicting fact findings from essentially the same evidence. These are results that should be avoided because they are neither likely to be fair to the parties nor beneficial to the administration of justice (see **Martin v. McNaughton**, 2009 BCSC 870).

[34] I conclude, therefore, that the evidence adduced and fact findings made in the fiduciary duty phase of the trial shall be binding upon the parties to the negligence phase.

Are the Third Parties Entitled to an Adjournment to Prepare for Trial?

[35] No one seriously argued that trial fairness can be achieved by the fiduciary duty phase of the trial commencing before the Third Parties are given a reasonable opportunity to prepare. As put by the Moravian Church, if it is to be bound by the evidence in the fiduciary duty trial, then it needs the opportunity to participate meaningfully and a delay in the trial will be required.

[36] Even the Plaintiffs seem to have resigned themselves to the reality that the trial cannot continue immediately. This is because it would be manifestly unfair to expect the Third Parties to be ready to participate in a trial with little or no notice. At the time the Plaintiffs made the election to proceed with only the fiduciary duty phase, the pleadings in the third party claims had not closed, the Third Parties had not received or produced Lists of Documents, they had not participated in any examinations for discovery or received transcripts of those that had taken place, and they had not determined what, if any, expert evidence they may require. At least two of the Third Parties may bring applications for orders removing them as parties. Their estimates as to how long it will take them to prepare for trial range from six to 18 months.

Is Bi-furcation of the Trial Still Warranted?

[37] Because the evidence adduced and the fact findings made at the fiduciary duty phase of the trial will be binding in the negligence phase, the trial will be postponed to permit the Third Parties to prepare to participate. Why therefore conduct the trial in two phases as all? The advantage of a bi-furcated trial has been lost and the adjourned trial should address all of the common issues as well as the third party claims. This, unfortunately, will have the effect of undermining the case management judge's efforts to find an expeditious means of getting at least one of the causes of action to trial.

[38] Nevertheless, the case management judge has already found that the third party claims are interwoven with the negligence issues between the Plaintiffs and Canada such that they should be tried together (**Anderson**, 2013 NLTD(G) 154 at para. 57). As put by her at paragraph 82, the negligence claim "can and will involve the Third Parties". As a result, there is not enough gained by conducting the fiduciary duty phase of the trial involving the Third Parties only to risk requiring recommencement of the trial at a later date to determine the negligence and third party issues. Thus, it would be more advantageous to hold a single trial designed to resolve all of the common issues together with the third party claims.

[39] Counsel for the Province alone takes the position that the best view of our present circumstances is that the case management judge did not preclude the Third

Parties from participating on the fiduciary duty phase of the trial. The Third Parties merely acted out of a misapprehension to that effect. Consequently, says the Province, all that is required is an opportunity for the Third Parties to participate meaningfully in the fiduciary duty phase of the trial. He submits, therefore, that there is no basis upon which I can modify those directions to direct that there be one trial only on all of the issues.

[40] The Moravian Church submits that upon the Plaintiffs' election the Third Parties ceased to be parties with a right to participate in the fiduciary duty trial. It points to the language used by the case management judge at paragraph 84 (reproduced above in its entirety) that if the Plaintiffs were to elect the trial in two parts and the second part were to become necessary, then "the Third Parties [would be] reinstated and given full procedural rights", but if the Plaintiffs were to choose to proceed to trial on all of the common issues, then "the Third Parties shall continue to have status as a party to these proceedings". This is the preferred approach to her directions. It is consistent with her intention that the Plaintiffs be entitled to proceed to trial against Canada on a narrow issue unburdened by the participation of the Third Parties.

[41] For the purposes of this decision it may not matter whether the effect of the case management judge's directions was to stay the participation of the Third Parties or whether they were merely under the misapprehension that such was the case. Nevertheless, I prefer the position of the Moravian Church as concurred in by the IGA and the Moravian Union – the intention of the case management judge was to cut the third parties out of the trial of the fiduciary duty issue between the Plaintiffs and Canada.

[42] It is clear that had the case management judge known the position we now find ourselves in she would not have offered the Plaintiffs an election that would only lead to unfairness, delay or both. I conclude that there shall be a single trial, with all of the parties present and by which all of the issues will be resolved. There will be delay, but not as much delay as there would be if the fiduciary duty trial were to be completed, a decision rendered, an appeal concluded and subsequently the negligence phase of the trial had to be scheduled to be held over an eight to 12 week period. Because we would then be faced with the Third Parties seeking an

additional six to 18 months to prepare we would be looking at trial dates some time in 2016, 2017 or later.

[43] Aside from the lost time and effort of trial preparation (some of the latter of which can be used later), the biggest risk to the approach to delaying the trial to permit the Third Parties to participate is that certain of the class members may not be available to testify. Although I am acutely aware of this risk, it was inherent in any decision to conduct a bi-furcated trial. It has, however, been exacerbated by the delay between the Plaintiffs' election last December and when this issue was first discussed among all of the participants late last month. Both the case management judge and the Court of Appeal have commented on the requirement that the case proceed expeditiously, given the advanced age of certain of the Plaintiffs and class members.

[44] Can there be some accommodation of the competing interests? There can. I order that the trial commence as expeditiously as possible. Counsel appear to be in agreement that the trial will likely take 12 weeks to complete. The Plaintiffs and Canada are ready to proceed to trial. The Third Parties say they need anything from six to 18 months to be trial ready. The time required can be lessened through cooperation among the parties coupled with forceful direction by me. If tight but realistic milestones are set for the necessary phases of trial readiness, the common issues trial, including the third party claims, can resume early next fall. The trial is therefore adjourned and will recommence on September 28, 2015 for 12 weeks. Counsel and I will meet on December 15, 2014 at 10:00 a.m. to discuss trial dates and to set deadlines for the performance of certain tasks related to preparedness for trial.

S. Stack J.

ROBERT P. STACK
Justice