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

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 138
Date: October 07, 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 1, 2015

Summary:

Plaintiffs proffered a proposed expert on the history of Newfoundland and Labrador who had prepared two reports for the Court. Despite concerns about the impartiality, independence and lack of bias of the proposed expert, his evidence was ruled admissible. The first of his reports was determined admissible, except for one section that strayed beyond his expertise. The second report was ruled inadmissible in its entirety because its data was unreliable and its conclusions were beyond the expertise of the witness.

Appearances:

David Rosenfeld, Kirk Baert, Celeste Poltak, Chesley F. Crosbie, Q.C. and Jessica Dellow	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. and Alex Borocca	Appearing on behalf of Her Majesty in Right of Newfoundland and Labrador
Philip J. Buckingham	Appearing on behalf of The International Grenfell Association

Authorities Cited:

CASES CONSIDERED: R. v. Mohan, [1994] 2 S.C.R. 9; **William v. British Columbia**, 2004 BCSC 1237; **Samson Indian Nation & Band v. Canada** (2001), 102 A.C.W.S. (3d) 1104, 199 F.T.R. 125 (F.C.T.D.); **Ross River Dena Council v. Canada (Attorney General)**, 2011 YKSC 87; **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23; **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77; **Brake-Patten v. Gallant**, 2012 NLCA 23; **Moore v. Getahun**, 2015 ONCA 55.

RULES CONSIDERED: *Rules of the Supreme Court, 1986,* S.N.L. 1986, c. 42, Sch. D., r. 46.07.

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] Should historian Robert H. Cuff, B.A. (Hons), B.Ed., M.A., be qualified to give expert evidence on behalf of the Plaintiffs at a trial of the common issues certified in a class action?

[2] The class members attended boarding schools 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. 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, 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 and/or dormitories for at least part of the class period and so is liable for any resulting damages.

[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 class period runs from Newfoundland's entry into the Canadian confederation in 1949 until the last of the schools closed in 1980. The claims are, therefore, historical in nature.

[4] Mr. Cuff has prepared two reports for presentation to the Court. The first, titled *Labrador Boarding Schools (1949-1979) – a Historical Review*, is dated May 29, 2015 (the "Narrative Report"); the second, is untitled and is dated June 4, 2015 (for convenience I will refer to it as the "Class Size Report" because it purports to

estimate the number of potential class members in this litigation)[1]. Mr. Cuff is being proffered as an expert historian, specifically with respect to the history of Newfoundland and Labrador. Because the Class Size Report is of a different type than the Narrative Report, I will address it separately in this decision.

THE LAW AND ANALYSIS

[5] The parties agree that the test for the admission of expert evidence is as stated by the Supreme Court of Canada in **R. v. Mohan**, [1994] 2 S.C.R. 9. At page 20, Sopinka, J., writing for the Court said:

> Admission of expert evidence depends on the application of the following criteria:
> (a) Relevance;
> (b) Necessity in assisting the trier of fact;
> (c) The absence of any exclusionary rule;
> (d) A properly qualified expert.

[6] Let us look at each criterion in turn.

(A) Relevance

[7] It is conceded that Mr. Cuff's evidence, *inter alia*, "provides historical context for Newfoundland's entry into Confederation and the interaction between Canada and the Province thereafter". Mr. Cuff's testimony, relating to the general history of the constitutional and other basis for the education and well-being of aboriginal children in Newfoundland following Confederation, is relevant to the common issues in this trial.

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[1] Mr. Cuff seems to have produced two other reports, an earlier narrative report dated January 10, 2013, and a "Reply Report" dated June 26, 2013; after inquiry by me the Plaintiffs have confirmed that for the purposes of this application they are only seeking admission of the Narrative Report and the Class Size Report.

(B) Necessity in Assisting the Trier of Fact

[8] Establishing necessity in this case is suggested to be problematical. Mr. Cuff was retained by the Plaintiffs "to research and write an opinion report providing a broad overview of provisions for the native peoples of Labrador during negotiations for union between Canada and Newfoundland 1946-49 and to investigate in historic context policies and programs for the education of native peoples in Labrador by the government of Canada from 1949 to 1979". Necessity is problematical because what Mr. Cuff has done is presumably what any person with access to the historical record could do – put them in a chronological order. But he has gone beyond that. His expertise as an historian allows him to contextualize the material. Although it is true that the Narrative Report is not, strictly speaking, an "expert report" in that it does not provide ready-made inferences that would be beyond the ability of the trier of fact to make, Mr. Cuff does perform a function that would be very difficult for a person neither trained nor experienced in the discipline of historical research and analysis.

[9] In many other cases involving aboriginal issues, experts on the history of the surrounding events have been qualified to testify (see for example, **William v. British Columbia**, 2004 BCSC 1237; **Samson Indian Nation & Band v. Canada** (2001), 102 A.C.W.S. (3d) 1104, 199 F.T.R. 125 (F.C.T.D.); and **Ross River Dena Council v. Canada (Attorney General)**, 2011 YKSC 87).

[10] I recognize that the history here "only" goes back 70 years or so and that the considerations are different than those involved when a group of aboriginal litigants seek to identify ancient legal rights. Nevertheless, many of the key participants are either dead, very elderly or are unavailable. Even if they were available to testify their recollections would likely largely rely on the documents themselves. Furthermore, their testimony would not likely provide the contextual analysis that can be provided by a properly trained and experienced historian. At the very least, with or without *vive voce* testimony, the trial would be greatly lengthened if the historical record could not be viewed through the lens provided by an historian and I had to rely on the efforts of counsel to present the competing realities. Whether or not expert historical evidence is admitted, it will be left for me to decide the facts in this case, but I would likely be greatly assisted by expert evidence.

[11] Consequently, the evidence of the type being sought to be adduced through Mr. Cuff is more than just helpful (see **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23, per Cromwell, J. for the Court at paragraph 21). The Supreme Court of Canada has confirmed that the "necessity" component of the admissibility test ought not to be judged by too strict a standard. Rather, the requirement is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury" (**Mohan** at page 23). Identifying and reviewing the relevant historical documents among thousands of documents produced and then organizing them contextually results in a concise and comprehensible presentation of information that is beyond the experience and knowledge of the reasonable judge or juror.

(C) The Absence of Any Exclusionary Rule

[12] Canada asserts that in the Narrative Report Mr. Cuff strays from a narrative of historical events into providing opinions (or rhetorical questions). Two examples were proffered during cross-examination. In both instances Mr. Cuff was able to point to how the opinion cited or the question raised came from an historical document; that is, they were not the thoughts of Mr. Cuff.

[13] I am not troubled by Mr. Cuff frequently citing letters containing lay and legal opinions as if they are "facts". To the historian they may be facts. Mr. Cuff is certainly not a legal historian and I read nothing more into his recitation of opinions than incorporation into his narrative historical records containing opinions. Following an earlier *voir dire* in this trial, I admitted into evidence without the necessity of a witness, 550 historical documents to be relied upon by the Plaintiffs. Included among those documents were both lay and legal opinions. Their admission into evidence was limited, however. I ruled that they are not to be taken as establishing the accuracy of any opinion expressed by an author. That is, they are proof that the opinion was held and that it was communicated as shown in the record; they are not proof that the opinion is correct. The same caveat holds true for the Narrative Report.

[14] Canada asserts that Mr. Cuff's opinions regarding jurisdiction, legislative authority and "responsibility" (be it moral, political, legal or otherwise) are not necessary and are offside a general exclusionary rule. Such opinions and conclusions are, says Canada, legal issues that are within the sole purview of the Court. To the extent that Mr. Cuff attempts to place an opinion in a context by which its accuracy is assumed by him, then in the absence of some other admissible proof of that accuracy, his narrative is to be discounted. This is particularly so where his report may be said to stray into a legal conclusion (although Canada pointed to no specific examples). This, however, is not a reason to exclude the Narrative Report. Opposing counsel will have the opportunity to cross-examine Mr. Cuff. Any shortcomings or limitations in the Narrative Report can be addressed at that time.

(D) A Properly Qualified Expert

[15] The expert evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (**Mohan** at page 25).

Mr. Cuff's Background and Qualifications

[16] Mr. Cuff has Bachelor's (honours) and Master's degrees in history, from Memorial University of Newfoundland (MUN) and the University of Western Ontario, respectively. He also has a Bachelor's degree in Education from MUN.

[17] Having spent a large part of his working life in the field of Newfoundland and Labrador historical research and writing, Mr. Cuff is now employed by a consulting firm. In that capacity he has carried out a broad range of inquiry into the history of Newfoundland and (on occasion) Labrador.

[18] Mr. Cuff has done some research into the school system in Newfoundland and Labrador, most notably for the *Encyclopedia of Newfoundland*.

[19] Four times before have courts accepted Mr. Cuff for the purpose of adducing historical opinion evidence – some being cases involving issues specific to Mi'kmaw peoples living in south and central Newfoundland. That evidence included testimony regarding general historic matters concerning governance, settlement and exploration of Newfoundland.

[20] In a trial before me in 2014, Mr. Cuff was qualified to give expert witness testimony on the following: the structure of Newfoundland government in the 19th century; game laws in Newfoundland to 1874; and the introduction of moose to the island of Newfoundland. In that case I did, however, constrain Mr. Cuff's ability to opine to matters in respect of which he is demonstrably qualified and I refused to admit his evidence in respect of specific matters to which I found he had strayed beyond that expertise (see **George v. Newfoundland and Labrador**, 2014 NLTD(G) 77).

[21] A Newfoundland and Labrador history generalist, Mr. Cuff has explored various aspects of our Province's history. He admits, however, to having neither training nor experience in:

1) The culture of residential schools in Labrador;
2) The human side of abuse;
3) Culture of residential schools administration in Canada;
4) Demographics; or
5) Statistics.

[22] Subject to what follows, so long as Mr. Cuff restricts his evidence to the areas in which he has expertise, his general qualifications are sufficient for him to provide evidence on the history of Newfoundland and Labrador.

Concerns Raised with Respect to Mr. Cuff's Ability to be Impartial, Independent and Unbiased

[23] For the reasons that I will outline shortly, Canada takes the position that Mr. Cuff should not be qualified to give expert testimony on this case because he is unable to provide fair, objective and non-partisan assistance to the Court.

[24] In **White**, the Supreme Court of Canada has held that the impartiality, independence and absence of bias of a proffered expert witness go to his qualifications to provide the intended evidence to the court. At paragraph 2, Cromwell, J. says:

> [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[25] At paragraph 53, Cromwell, J. confirms that concerns about the duty of the expert witness to be impartial, independent and without bias should be addressed in assessing whether the proffered witness is a properly qualified expert:

> [53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework… A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts ….
> [Citations omitted.]

[26] Before we examine Canada's specific concern, let us review in more detail the duties of impartiality, independence and lack of bias that an expert witness owes to the Court.

Experts' Duties to the Court

[27] Many Canadian jurisdictions have explicit rules governing the roles and duties of expert witnesses. This province does not[2]. Consequently, the common law principles prevail (**White** at paragraph 31). Cromwell, J. sets out the applicable concepts in paragraph 32:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another… These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[28] The proffered expert is duty-bound to be independent, impartial and unbiased. How is the expert's adherence to these duties tested? At the first instance by reliance on the expert himself. Mr. Cuff has stated in the covering letter to the Narrative Report:

> I acknowledge that it is my duty to provide evidence in relation to these proceedings that is fair, objective and non-partisan, that is only related to my area of expertise and to provide additional assistance to the court as may be required. I acknowledge that these duties prevail above and over any obligations which I may owe to any party by whom I have been engaged.

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[2] See **Brake-Patten v. Gallant**, 2012 NLCA 23, per Hoegg, J.A., at para. 66:

> In civil cases, the starting point for deciding whether expert opinion evidence is admissible is rule 46.07 of the *Rules of the Supreme Court, 1986*, S.N.L.1986, c. 42, Schedule D. Subject to the overriding discretion of the trial judge, the rule provides for notice of the proposed expert evidence to an opposite party as a condition of admissibility. It does not address, of course, the substantive principles relating to admissibility.

[29] Thus, Mr. Cuff has attested to his duties to the Court. This could be enough to meet the threshold for admissibility. As stated in **White** at paragraphs 48 and 49:

> [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
>
> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. **Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court.** I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
> [Emphasis added.]

[30] Counsel for Canada has raised a concern that Mr. Cuff may be "unable or unwilling to provide the Court with fair, objective and non-partisan evidence" because he has assumed the role of an advocate for the Plaintiffs. In an email to

counsel for the Plaintiffs, Mr. Cuff provided his draft work plan. The first item was:

> 1. Executive Summary ("What do the lawyers need?")
> - Evidence which points to the liability of the Government of Canada.
> - Identifying the categories of evidence which may be posed to counter.
> - Anticipating specific evidence: *"the issues on which this case will turn"*

[31] Canada takes the position that an "expert" who states as his task to find evidence supporting a finding of liability against the opposing party is acting as an advocate. Such a potential witness is neither impartial, independent or without bias.

[32] On cross-examination, Mr. Cuff testified that the reference to seeking evidence that points to the liability of the Government of Canada should have been in quotation marks. He had asked retaining counsel what they needed and that was the response, said while laughing. This, he testified, became an in-joke between them.

[33] Without ruling on it, I note here that the email in question may not have been required to be divulged by Plaintiffs' counsel to the other parties. In another recent decision, Sharpe, J.A. for the Ontario Court of Appeal set out the parameters of disclosure during the iterative process of preparing an expert report (**Moore v. Getahun**, 2015 ONCA 55). At paragraph 55 he says:

> [55] While some judges have expressed concern that the impartiality of expert evidence may be tainted by discussions with counsel […] banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority. [Citations excluded.]

[34] According to Sharpe, J.A. at paragraphs 57 and 59 of **Moore**, such discussions are subject to litigation privilege and the objectivity of the expert witnesses is fostered elsewhere than by prohibiting contact with the instructing counsel and requiring production of all communications between the two. Not

surprisingly, one of the protections is to be found in the conduct expected of counsel as officers of the court:

> [57] First, the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses. I attach as an Appendix to these reasons The Advocates' Society's *Principles Governing Communications with Testifying Experts*, which provides a thorough and thoughtful statement of the professional standards pertaining to the preparation of expert witnesses. Principle 3 states:
>
> > In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.
>
> …
>
> [59] In *Medimmune*, at para. 111, the court emphasized that it is "crucial that the lawyers involved should keep the expert's need to remain objective at the forefront of their minds at all times."

[35] I will provide no further comment on whether the email referred to above would attract litigation privilege because the Plaintiffs concede that it was disclosed to the opposing parties and any privilege that it may have attracted was waived. Furthermore, counsel for Canada has expressly disclaimed any allegation that counsel for the Plaintiffs' acted in any way inappropriately. Joking or otherwise, however, counsel should be on guard not to communicate anything to a proposed expert witness that could detract from the expectations that the expert will remain impartial, independent and without bias.

[36] In assessing whether Mr. Cuff's evidence should be ruled inadmissible, I am to have regard to both his particular circumstance and the substance of his proposed evidence (**White** at paragraph 49). Notwithstanding the email referred to above, opposing counsel has not established that Mr. Cuff is, in fact, biased, or that he is acting as an advocate for the Plaintiffs. Canada has not pointed to anything in Mr. Cuff's background or to anything specific in the Narrative Report itself to establish that Mr. Cuff is unable or unwilling to discharge his duties to the Court. In this case, I am satisfied that there are sufficient safeguards to protect the integrity of the trial, including the nature of the evidence to be given by Mr. Cuff,

its ability to be assessed by the trier of fact after cross-examination and the likelihood of testimony from other potential experts.

[37] I have identified a concern about Mr. Cuff's impartiality and independence that does not preclude admission of his evidence at the first level of the admissibility analysis. Is that the end of the inquiry? Cromwell, J. says at paragraph 54 of **White** that it is not:

> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

[38] In these circumstances, given the limited (but necessary) utility of the evidence as to the chronology and context of the historic records, the potential helpfulness of the evidence is not outweighed by the risk of the dangers that are associated with expert evidence materializing.

[39] Mr. Cuff is therefore a qualified expert for the purposes of the Narrative Report, and the remaining **Mohan** factors have been resolved in favour of permitting his evidence. What then am I to do with any lingering concern that I have about his impartiality and independence? Cromwell, J. addresses this in **White** at paragraph 45:

> [45] … I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.

[40] Consequently, subject to the comments that I will make immediately below, it is open for me to hear the evidence of Mr. Cuff and to reserve the weight that I will ascribe to it to the conclusion of the trial.

The Roaming Expert

[41] Although overall I am satisfied at the admissibility stage that Mr. Cuff's evidence should be admitted and subjected to the normal rigours of the trial process, there is one section of his report that is of specific concern.

[42] Near the end of the Narrative Report is a sub-heading titled, "The culture of Labrador boarding schools". That section explores the experience of class members in the context of loss of cultural identity and systemic institutional abuse. It strays from history into the realms of cultural anthropology and sociology. In neither discipline is Mr. Cuff an expert. That section of the Narrative Report, therefore, is inadmissible. As I said at paragraph 17 of **George**:

> [17] To rule otherwise would be to give free reign to a 'roaming expert' (**R. v. A.K.** (1999), 125 O.A.C. 1, 45 O.R. (3d) 641 at paras. 103-104). Mr. Cuff is an expert in general Newfoundland history; that qualification does not permit his testimony to stray on to subject areas over which he has little familiarity and no mastery.

[43] The section of the Narrative Report titled "The Culture of Labrador Boarding Schools" is inadmissible and Mr. Cuff may not testify on that subject matter.

The Class Size Report

[44] The Class Size Report differs from the Narrative Report in that the former purports to provide an estimate of enrolment numbers for the five schools that are the subject of the litigation during the class period (March 31, 1949 to when the last of the schools closed in June 1980). In it, Mr. Cuff takes historical data and

then uses statistical analysis to extrapolate a conclusion. In that sense it is a "true" expert's report insofar as it provides a ready-made inference for the trier of fact as to a matter in respect of which I have neither experience nor technical knowledge.

[45] In the Class Size Report, Mr. Cuff gleaned historical records as to dormitory capacity. He did not, however, have data relating to several of the schools for several of the years in question. Furthermore, he had no information on how long each (or even the average) student resided at each of the schools. He does not know whether the students were there for all or part of the year. He does not know what proportion of the students was aboriginal, however that might be defined. He does not know how many of the former students are still alive. His analysis is based on several unstated (and necessarily unexplained) assumptions.

[46] Following the assembly of the information that he discovered and his application of his assumptions, Mr. Cuff then took what little he had and performed, in his words, "addition, subtraction, multiplication and division" to extrapolate to an estimate of the persons who would be eligible for damages if the common issues trial holds Canada liable on one or both of the basis pleaded.

[47] It is obvious that the type of analysis required to determine the number of individuals in the class from the available data would be both more extensive and more sophisticated than that performed by Mr. Cuff. Mr. Cuff admits that he is not a statistician and that he has very little, if any, training in that regard. I am satisfied that the analysis conducted by Mr. Cuff was outside his area of expertise and I find that he is not qualified to testify as to any kind of statistical analysis relating to class size or otherwise.

[48] What Mr. Cuff may have provided of assistance to the Court in this regard is a compilation of historical records that could possibly enable a properly qualified expert to provide an opinion as to class size (although it may be that the data necessary for such an exercise does not exist). Counsel for the Province identified serious deficiencies in Mr. Cuff's review of the historical record. On page 3 of the Class Size Report, for example, in relation to the school at Nain, it states, "There was no data found for the period between 1953-57 (four school years)". Yet, on

cross-examination, Mr. Cuff was pointed to records prepared by the Moravians that appear to contradict him and provide information for at least two of the "missing" years. Mr. Cuff acknowledged that these documents were among those provided for his review at the outset of his retainer.

[49] The failure of Mr. Cuff to identify key documents within the purview of his expertise relating to the subject matter of the Class Size Report seriously undermines the reliability of not just that report, but possibly too, the Narrative Report. That is, Mr. Cuff's utility to the Court depends upon him conducting his research in a thorough and accurate manner. If he is unable to do so, then the extent to which I can rely on his research and analysis is greatly curtailed. As to the Narrative Report, however, the parties were content to leave any such issues to the cross-examination of Mr. Cuff when he testifies at the trial proper.

[50] I find that the Class Size Report is unreliable, both as to its historical foundation and statistical analysis. It may not be admitted into evidence.

DISPOSITION

[51] The Court finds Mr. Cuff qualified to give expert witness testimony on the history of Newfoundland and Labrador.

[52] The Narrative Report is admissible, save for the section titled, "The culture of Labrador boarding schools". Mr. Cuff may not provide testimony as to anthropological or sociological matters beyond his expertise. As to the inadmissible section of the Narrative Report, it would be best if a revised report were adduced with that part expunged. If that is not possible, then what I stated at paragraph 27 of **George** has application here:

> [27] Because we are in the middle of the trial, we are unlikely to receive a revised report. Therefore, the Cuff Report will be admitted into evidence as a whole. The Court will, however, follow the edict of the Supreme Court of Canada in **Sekhon** at para. 48 (albeit in a slightly different context), "It goes

> without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts".

[53] What weight I will assign to the Narrative Report as a whole remains to be seen. I will, however, assign no weight to that section that I have ruled inadmissible.

[54] The Class Size report is inadmissible. Mr. Cuff may not testify as to statistical analysis or other empirical matters beyond his expertise.

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ROBERT P. STACK
Justice