IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richard v. British Columbia,* 2010 BCSC 773

Date: 20100707
Docket: S024338
Registry: Vancouver

Between:

WILLIAM JOSEPH RICHARD and W.H.M.

Plaintiffs

And

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Defendant

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

Counsel for the Plaintiffs:	David A. Klein, Shauna J. Tucker
Former Class Counsel:	Kenneth J. Baxter, Patrick J. Poyner, Samuel Poyner, A/S
Counsel for the Defendant:	D. Clifton Prowse, QC, Ward K. Branch, Audrey G. Lieberman
Counsel for the Public Guardian and Trustee of British Columbia	Alison L. Murray, QC
Place and Dates of Hearing:	Vancouver, B.C. 27 January 2010, 4 March 2010, 11 March 2010, 4 May 2010
Place and Date of Judgment:	Vancouver, B.C. 7 July 2010

I. Background

[1] Woodlands School ("Woodlands") was a residential facility in New Westminster, British Columbia for children and adults with mental and physical disabilities. It was operated by the Province of British Columbia until December, 1996, when it closed.

[2] Various residents of the facility complained of physical, sexual and psychological abuse suffered by them while in the care of the Province. This action was commenced on 2 August 2002. The plaintiffs' plead, and the Province denies, systemic negligence in the operation and management of the institution.

[3] Two investigative reports into these allegations have been undertaken: the first by Ms. Dulcie McCallum, "*The Need to Know: Administrative Review of Woodlands School*", August 2001 (the "McCallum Report") and the second by the Public Guardian and Trustee ("PGT"), "*The Woodlands Project, July 2002 – June 2004*: *A Report of the Public Guardian and Trustee of British Columbia, August 2004* "(the "PGT Report").

[4] The McCallum Report reached these conclusions (at pages 18 and 21):

> Names of the residents and staff involved with the incidents will remain private. Details of the physical abuse found in the records include hitting, kicking, smacking, slapping, striking, restraining, isolating, grabbing by the hair or limbs, dragging, pushing onto table, kicking and shoving, very cold showers, very hot baths resulting in burns to the skin, verbal abuse including swearing, bullying and belittling, inappropriate conduct such as extended isolation, wearing shackles and belt-leash with documented evidence of injuries including bruising, scratches, broken limbs, black eyes and swollen face.
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> After a review of the records available, it has been determined that the abuse at Woodlands was systemic in nature.
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> There did not appear to be any mechanisms to guard against or to prevent abusive behaviour other than the policy and complaints filed by witnesses. In an environment where many of the residents were not in a position to complain or would not be believed, their vulnerability was exacerbated.

[5] The PGT Report essentially supported the findings of the McCallum Report.

[6] The Province has disputed the findings of these reports.

[7] There have been two individual lawsuits brought by former residents of Woodlands against the Province. Both of these trials resulted in judgments in favour of the plaintiffs: *H.J. v. British Columbia*, [1998] B.C.J. No. 2926 (QL) (S.C.) ("*H.J".*) (judgment for $100,000) and *Boyd v. British Columbia* ("*Boyd")* (judgment for $20,000).

[8] The trials of these actions were time consuming. The trial in *H.J.* lasted six weeks. The trial in *Boyd* lasted four weeks. There are over one thousand living former residents of Woodlands. Assuming that each of them brought an individual action, and that each trial lasted an average of five weeks (the average trial time in *H.J.* and *Boyd*), counsel estimate that the resolution of the claims would take approximately 100 years of continuous trial time.

[9] This proceeding under the *Class Proceedings Act*, R.S.B.C.1996, c.50 (the *CPA*) offered a more efficient procedure for the resolution of the many potential claims. The action was certified by Madam Justice Morrison on 17 March 2005 (2005 BCSC 372). These common issues were certified:

> 1. Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation or management of Woodlands School to protect those persons therein confined from abusive conduct of a physical, sexual, emotional and/or psychological nature by employees, agents or other persons similarly confined in the institution?
> 2. If the answer to common issue no. 1 is "yes", what amount of punitive damages is awarded?
> 3. If the answer to common issue no. 2 is "yes", what amount of punitive damages is awarded?

[10] The class certified by Morrison, J. was amended by Satanove, J. (now Kloegman, J.) in February, 2008 to exclude from the class persons who suffered abuse or injury in the facility prior to 1 August 1974. This was the inevitable outcome after the Court of Appeal's decision in *Arishenkoff v. British Columbia,* 2005

BCCA 481, which held that the Province had crown immunity for wrongs which occurred prior to 1 August 1974, the date on which the *Crown Proceedings Act* came into force.

[11] There are now 1,168 class members. The amended class definition removed approximately 500 Woodlands residents from this action.

[12] Klein Lyons, a firm of highly experienced class action counsel, came on the record of these proceedings for the plaintiffs in September 2007. I need not relate the background to this change in counsel.

[13] Klein Lyons undertook the massive preparation necessary to take this matter to trial. A new trial date was set. It was anticipated that the six month common issues trial would begin on 11 January 2010.

[14] In the spring of 2009, mediation proceedings began before Donald R. Munroe QC. A six day mediation was conducted in September and October, 2009. This led to the execution of a settlement agreement on 9 October 2009 (the "Settlement Agreement"). The Settlement Agreement was formally approved by the Province on 4 December 2009.

[15] Class counsel describes the structure of the agreement in his written submission so (at paras. 51 and 52):

> The basic structure of the settlement is to create an efficient procedure by which claims will be submitted in writing and will be resolved by judges of the Supreme Court of British Columbia appointed by the Chief Justice. A class member may elect to make a brief oral presentation to supplement his or her written submission, but this is entirely at the class member's option. The settlement defines the criteria for eligibility for compensation, and defines the range of awards that can be made within each compensation category. The awards range from $3,000 to $150,000 and are comparable to what might be obtained in a tort action. The criteria for eligibility have, however, been relaxed from what a class member might face in a tort action. For example, class members do not have to overcome limitations defences, and they can present evidence that would not ordinarily be admissible.
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> The Settlement Agreement also provides that compensation is event-focused. That is, eligibility and quantum of compensation may be proved by evidence concerning the event which caused the injury. This is to be distinguished from determining compensation based on a class member's

> testimony as to harm suffered following the event. This is because many class members lack the intellectual capacity and/or communication skills to describe the harm they suffered. Drs. O'Shaughnessy and Daylen, who are familiar with the resolution of abuse claims involving persons with intellectual disabilities, stress the importance of allowing class members to prove harm by other means. The settlement structure achieves that goal.

[16] There is no ceiling for the total compensation to be paid to members of the class.

[17] Class counsel brings application at this time for approval of the settlement under s. 35(1) of the *CPA*, for approval of class counsels' fees and disbursements under s. 38 of the *CPA* and for approval for the payment of an honorarium in the amount of $10,000 to the representative plaintiff, W.H.M. for "distinguished service to the class".

II. Communication with Class Members

[18] Notice of certification was issued to class members on 21 November 2008 by direct mail to their last known addresses as provided from the Province's records and multiple publication in twenty-eight newspapers across British Columbia. Fifty-seven individuals requested to opt out of the proceeding.

[19] Notice of the settlement was sent to class members by direct mail on 17 December 2009 and was published in several newspapers across the Province. Class members were advised of the date of this hearing and of their right to object.

[20] Klein Lyons has continuously posted updates about the case on its website during the litigation, and has posted the court decisions so that class members could follow the progress of the case. Klein Lyons has also designated staff to manage member communication. Lawyers in the firm of class counsel have regularly attended a support group of former Woodlands residents called "*We Survived Woodlands*" and have worked with non-profit groups charged with advocating on behalf of the rights of the disabled, including the British Columbia Coalition of People with Disabilities. To date, there have been no written objections received from class members concerning the settlement.

[21] The only issues attracting any dispute on the initial hearing of this matter included these:

i) the use of the Registry of this Court for the purpose of administering the claims filed;

ii) the need, or otherwise, for provision to be made for the funding of Litigation Guardians for any of the class who require that assistance and who are not yet represented in that capacity by the PGT;

iii) the need for some arrangement to be made to better bring home to many in the class the possibility of advancing a claim for compensation.

III. The Test for Approval

[22] The test for approval is well established; it is whether the settlement is "fair and reasonable and in the best interests of the class as a whole" as Justice Gerow said in *Fakhri et al v. Alfalfa's Canada, Inc. cba Capers*, 2005 BCSC 1123 (at paras. 8 and 9):

> [8] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Factors which courts have considered in making that determination include:
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> 1. the likelihood of recovery, or the likelihood of success;
> 2. the amount and nature of discovery evidence;
> 3. settlement terms and conditions;
> 4. recommendations and experience of counsel;
> 5. future expense and likely duration of litigation;
> 6. recommendations of neutral parties, if any;
> 7. number of objectors and nature of objections;
> 8. presence of good faith and absence of collusion;
> 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
> 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
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> See ***Sawatzky v. Societe Chirugicale Instrumentarium Inc.*** (1999), 71 B.C.L.R. (3d) 51, at ¶ 19 (S.C.); ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*** (1998), 169 D.L.R. (4th) 565 at ¶ 23 (B.C.S.C.); ***Dabbs v. Sun Life Assurance Co. of Canada*** (1998), 40 O.R. (3d) 429 (Gen. Div.) affd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to the S.C.C. refused,

> [1998] S.C.C.A. No. 372; ***Parsons v. Canadian Red Cross Society*** (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.)
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> [9] The court has the power to approve or reject a settlement, but may not modify or alter a settlement. The standard against which the settlement is judged is that it is within a range of reasonableness, not perfection.
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> ***Sawatzky***, supra, at ¶ 21, ***Haney Iron Works Ltd.***, supra, at ¶ 22; ***Dabbs***, supra.

[23] Chief Justice Brenner (as he then was) observed in *Sawatzky v. Societe Chirugicale Instrumentarium Inc.* (1999), 71 B.C.L.R. (3d) 51, (at para. 12) (S.C.) that:

> All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[24] I will outline the test for fee approval below when I deal with that discrete issue. I turn to consider the terms of this settlement in light of the test.

[25] It is to be stressed that the PGT, who acts as Committee of the Estate of 164 individuals who are potential class members, although requesting ancillary conditions to the settlement, did not criticize the basic terms of the Settlement Agreement.

[26] Further, no class members formally appeared on the application in opposition to the settlement. Finally, no class members signified their opposition to it in writing.

[27] Class counsel contrasted the settlement and the work leading up to its conclusion against each of the factors noted above. The Settlement Agreement fares very well when considered in the light of those factors. Counsel concluded by describing the “fixed fund” and “claims made” models of settlement in these matters and stated:

> 109. There are relative advantages and disadvantages to both models. The fixed fund model has the potential advantage of easier administration but it has the potential drawback of providing less compensation, particularly to the

> most seriously injured, if the claims of all class members are averaged out. The claims made model may come with higher administrative costs, but it has the advantage of better tailoring compensation to specific injuries.
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> 110. The Representative Plaintiffs considered the pros and cons of these two types of settlement models during the mediation. The Representative Plaintiffs concluded that, in the dynamics of the negotiations, the most favourable available settlement for class members was the claims made approach. The settlement provides tort-level compensation to class members through an expedited process. It maximizes compensation for class members while controlling administrative costs.

[28] I agree with the thrust of this submission.

IV. Concerns

[29] I have identified the concerns addressed on the initial hearing of the application above. I turn to discuss each of them.

i) The Use of the Registry of this Court

[30] The Settlement Agreement provides for the use of judges of this court as adjudicators under the agreement. Paragraph 8 of the Settlement Agreement states:

> Eligibility and entitlement under this agreement shall be determined by an adjudicator (the "Adjudicator"). The Adjudicator shall be one of two or more Judges of the Supreme Court of British Columbia appointed by the Chief Justice of the Supreme Court of British Columbia pursuant to ss. 27(1)(a) and (c) of the *Class Proceedings Act*. The Adjudicators may establish a process for management of the hearing of the Claims so as to ensure a fair, just and timely hearing of the Claims on the merits, and consistency in the application of paragraphs 14 and 15 of this Agreement. There shall be no appeal from the decision of an Adjudicator.

[31] In the somewhat extraordinary circumstances of this difficult litigation, and of the vulnerable persons whose interests are to be advanced by its settlement, I have concluded that it is an appropriate use of judicial resources to utilize Judges of the Court in this manner. But that does not extend, in my view, to the use of the Registry's infrastructure to administer the scheme. The Registry of this Court faces very significant challenges in these times of budget constraint in meeting the current needs of the Court and those it serves.

[32] Following the initial hearing of this application, counsel met with representatives of the Registry to explore the issue. Eventually in further hearings I indicated to the parties that I would not approve a scheme which could add significant administrative duties on an already over-burdened staff. I indicated that to win approval, the Settlement Agreement must provide for private administration of the claims process in a model acceptable to the parties and to the Court. I noted that pursuant to paragraph 19 of the Settlement Agreement, the Province is required to pay "other administration costs". Notwithstanding that clause, I concluded that it was not proper for the Court to unilaterally dictate a new scheme for the administration of claims under the Settlement Agreement and to impose the cost thereof on the Province, without its consent.

[33] The parties now propose to make use of the offices of the British Columbia International Commercial Arbitration Centre ("BCICAC") and they have drafted a proposed claims protocol in that light. In my view, that protocol appropriately addresses the concerns I have expressed.

ii) Litigation Guardian Services

[34] I have already indicated that the PGT acts as Committee to a significant number of potential class members. I have the benefit of an affidavit filed by the PGT. In paragraph 10, Mr. Chalke describes his experience interviewing a number of the former residents of Woodlands:

> As set out in the Woodlands Project Report, 127 interviews of former residents were conducted. Many of those interviewed could not read or write. Many were non-verbal and only able to communicate by making vocalization sounds, nodding their head to indicate "yes" or "no" or by making signs to indicate a response. Some of those who were non-verbal became visibly upset or agitated when the name Woodlands was raised with them. The majority of those interviewed resided in group homes. Many of those interviewed apparently did not have family and so were interviewed in the presence of caregivers or members of MCFD. I understand the staff of the PGTBC were concerned that many of the 127 individuals lacked legal capacity, and had no available family to assist them.

[35] The PGT concludes on this point in paragraph 14 of his affidavit:

> I understand that there were approximately 1,150 potential class members (i.e., individuals who were resident at Woodlands after August 1, 1974). As set out above, 164 are current PGT clients. I am aware that approximately 100 potential class members have private committees. Of the remaining 886 class members, many will be legally incapable, will have no one in their lives to support them and may have claims to advance under the Settlement Agreement. These individuals will require a Litigation Guardian.

[36] The PGT further deposes to the fiscal impossibility of his office taking on further Litigation Guardian services without special remuneration. I accept the evidence of these budgetary difficulties.

[37] These concerns have prompted the PGT to depose at paragraph 22 of his affidavit:

> My office could only assume a role of Litigation guardian for non-PGT clients who have no other private individuals available and willing to act as Litigation guardian if the Defendant provided funding for the additional workload. I have, through my counsel, proposed to the Defendant a flat fee of $1,000 per non-PGT client in respect of whom the PGT acts as Litigation Guardian in pursing [sic] a claim. I am open to any proposal from the Defendant that would provide the financial resources so my office could provide this service if it is needed.

[38] Counsel for the Province suggests that it is unprecedented to require a defendant to fund the costs of a Litigation Guardian for a plaintiff. The sad history of the Woodlands experience, in the context of the vulnerable population who were exposed to it, is unprecedented. Extraordinary harm requires extraordinary measures in the cure. In my view, the proposal of the PGT, as noted in paragraph 22 of his affidavit, or an appropriate alternative, must be implemented in any acceptable settlement. To approve a scheme which does not ensure that its potential beneficiaries have a reasonable opportunity to enjoy its advantages is not acceptable.

[39] Once again, following the initial hearing of this application the parties and the PGT have met and have endeavoured to address the concerns raised by the PGT. They have tendered a PGT Protocol in response. I have concluded that it appropriately addresses this aspect of the settlement.

iii) Effective Notice

[40] All parties have acknowledged the superb efforts of class counsel in communicating developments in this litigation to potential members of the class. Nevertheless, the PGT is concerned that simple written notice to many in the class will be ineffective notice given their circumstances. The PGT proposes to address this concern with a term in the Settlement Agreement to this effect:

> Six months before the end of the claims period under the settlement agreement, the administrator or officer appointed by the court, at the defendant's cost, shall personally contact those Class Members identified as not having made a claim under the settlement agreement to provide effective notice of the settlement. After such personal contact, the administrator or officer shall provide the PGT with the name and address of any class member who appears to lack legal capacity and does not have a legal representative.

[41] I note that paragraphs 14 and 15 of Appendix A to the Proposal of BCICAC contemplate regular updates by the Registry to the defendants, class counsel, and the PGT of particulars of claimants who have filed with the Registry. Presumably this information will permit the parties to continue their efforts to ensure that eligible claimants are made aware of their rights under the Settlement Agreement. I also note that the parties have added paragraphs 3.1 to 3.4 to Apprendix A in a further effort to address this concern.

V. Class Counsel's Legal Fees

[42] The retainer agreement between class counsel and the representative plaintiffs complies with the provisions of s. 38(1) of the CPA. The retainer provided for a fee of 25% plus disbursements and taxes for work done on the common issues. During the course of settlement negotiations, the plaintiff W.H.M. asked that this fee be reduced. Class counsel agreed and the proposed fee has been reduced to 15% plus taxes (1.8%) and a levy for disbursements of 2% for a total charge to class members of 18.8% for work done on the common issues.

[43] Justice Garson (then of this court) helpfully set out a number of the principles to be applied on fee approvals in *Parsons v. Coast Capital Savings Credit Union*, 2009 BCSC 330 (at para. 9):

> The test for approving a retainer agreement under the *Class Proceedings Act* and a fee to be rendered pursuant to it is one of fairness and reasonableness, in reference to the factors set out in the oft-cited decision in *Yule v. Saskatoon* (1955), 1 D.L.R. (2d) 540 (Sask. C.A.). The object of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable and that class counsel is appropriately compensated.
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> Given the object of the *Class Proceedings Act*, the Court must ensure that Plaintiff's counsels who take on risky class actions on a contingent basis are adequately rewarded for their efforts and that hindsight is not used unfairly in the assessment of the reasonableness of the proposed fees. If proposed fees are to be reduced, some principled basis must be identified for doing so.
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> In assessing the reasonableness of the proposed fee, the amount payable under the Retainer Agreement is the starting point for the application for the Court's judgment. The issue for the Court is not to fix a fee by consideration of all the evidence but to decide whether the agreement operates reasonably in the context given the fee proposed.
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> The proposed fee of 30% of the Settlement fund is consistent with contingency fees approved in other B.C. class actions, which generally range from 15% to 33%. The B.C. Courts have noted that under the U.S. authorities, there is a presumptively reasonable rate of 30% which is adjusted for special circumstances.

[44] Canadian courts have listed factors to be considered when assessing fees. These include:

(a) the extent of the work done;

(b) the skill and competence of counsel;

(c) the complexity of the matter;

(d) the importance of the matter to the class;

(e) the result achieved;

(f) the individual claimant's contribution to the fee as a portion of their recoveries;

(g) the fee expectation of the representative plaintiff; and

(h) the risk of no recovery at all.

Reid v. Ford Motor Co., 2006 BCSC 1454 at para. 29.

Endean v. Canadian Red Cross Society, 2000 BCSC 971 at para. 35-64.

Vitapharm Canada Ltd., [2005] O.T.C. 208, 2005 CanLII 8689 (S.C.J.) at para. 67.

[45] In his written submission, class counsel addresses each of these factors. It is enough to say that I accept the submission that in all the circumstances the fee of 18.8% on each individual's claim is fair and reasonable. And I note that at the final hearing in this matter, the PGT raised no concerns with class counsel's proposed arrangement on fees.

[46] Further, for class members who wish to retain Klein Lyons to assist them with their individual claims, the firm will charge a 15% fee plus taxes and disbursements, that is: 15% of the remaining 81.2% of that individual's recovery. Such a model was approved by Justice Wong in *Knudsen v. Consolidated Food Brands Inc.*, 2001 BCSC 1837.

VI. Payment to the Representative Plaintiff, W.H.M.

[47] Again, a useful summary of the jurisprudence on this issue is found in *Parsons (supra)* at para. 25:

1. A representative plaintiff has the responsibility under the *Class Proceedings Act* to fulfill his or her duties to vigorously and capably prosecute the interests of the class.
2. A representative plaintiff is not automatically entitled to compensation for fulfilling his or her statutory responsibilities.
3. If the plaintiff's services to the class are over and above the usual responsibilities under the *Act*, he or she may be entitled to modest compensation on a quantum meruit basis.
4. The factors that will govern the entitlement to, and the amount of, such compensation include, but are not limited to:
    - significant commitment of time and energy to the litigation;
    - active participation in the instructing of counsel and decisions made in the litigation;
    - contribution of special expertise;
    - significant contribution to communication with the class;

- some other measurable significant contribution to the outcome; exposure to risk of costs; and
- some other special consideration or risks in being a named plaintiff.

[48] I will not detail the extraordinary efforts made on behalf of the class by W.H.M. In my view, this is a most appropriate case in which to approve such a payment and I would do so in the amount requested by counsel - $10,000.00.

VII. Conclusion

[49] For these reasons, I am now able to approve the Settlement Agreement and the two Protocols which I have identified. I also approve fees for class counsel. I congratulate the parties on reaching a compromise in this very difficult litigation.

"Anne MacKenzie, ACJ for:
The Honourable Chief Justice Bauman