# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Richard v. HMTQ,***
2005 BCSC 372

Date: 20050317
Docket: S024338
Registry: Vancouver

Between:

**WILLIAM JOSEPH RICHARD**

PLAINTIFF

And:

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

DEFENDANT

Before: The Honourable Madam Justice Morrison

## Reasons for Judgment

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|---|---|
| Counsel for the Plaintiff | James M. Poyner<br>Kenneth J. Baxter<br>Patrick J. Poyner |
| Counsel for the Defendant | Ward K. Branch<br>Deborah Baumgard |
| Counsel for the Public Guardian and Trustee | Gail Dickson |
| Date and Place of Hearing: | January 31,<br>February 1 and 2, 2005<br>Vancouver, B.C. |

[1] The plaintiff seeks that this action be certified as a class proceeding pursuant to the provisions of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***CPA***"). Counsel for the plaintiff also seeks an amendment to the Writ of Summons and Statement of Claim adding WHM as a plaintiff in this action and that WHM be appointed as the Representative Plaintiff for the

class.

[2] The plaintiff proposes that there is an identifiable Class which consists of the plaintiff in this action, and at least 200 other individuals who may qualify as Class Members. The plaintiff submits that the Class be defined as follows:

> All persons resident in British Columbia, who were confined to the provincial institution more recently known as Woodlands School and who, while so confined, suffered physical, sexual, emotional and/or psychological abuse and have suffered injury, loss or damage as a result thereof.

[3] The plaintiff claims the Statement of Claim raises a number of common issues, and for the purposes of a proposed class action, those common issues are as follows:

> 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”, was the defendant guilty of conduct that justifies an award of punitive damages?
>
> 3. If the answer to common issue no. 2 is “yes”, what amount of punitive damages is awarded?

[4] The plaintiff suggests that a resident Class Member may opt out of this proceeding by notifying the law firm of Poyner Baxter in a time and manner directed by the court.

[5] The defendant opposes the application, stating that this case is not suitable for class action treatment. The defence alleges that the proposed class definition is not appropriate under these circumstances; it is not objective. Further, there are other more practical and efficient means to resolve any claims that persons may have with regard to Woodlands School. That class certification is not a proper tool to root out “a few bad apples”.

**The Legislation**

[6] The plaintiff brings this application under the ***CPA***. Section 2 of the ***CPA*** provides that one member of a class of persons resident in British Columbia may begin a proceeding in court on behalf of members of that class.

[7] Section 4 of the ***CPA*** provides as follows:

> Class certification
>
> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether

or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[8] Under s. 1 of the ***CPA***, “common issues” are defined to mean:

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[9] The defendant concedes there is a cause of action disclosed.

**Background**

[10] A provincial mental health facility known as the Woodlands School or Woodlands (“Woodlands”) was a residential facility for the care and control of mentally handicapped persons and persons in need of psychiatric care. Located in New Westminster, British Columbia, it was operated by the defendant from 1878 to 1996, when the facility was closed. Admissions to

Woodlands were either by voluntary committal, or under the relevant statutory health authority legislation of the time.

[11] The plaintiff on the original Statement of Claim was William Richard who was born March 14, 1958, now 47 years old. He was at Woodlands from 1972 to 1975, between the ages of 14 and 17. In the claim, he alleges repeated sexual assaults by staff members at Woodlands, plus repeated physical abuse. There are also allegations of psychological and emotional abuse, and a claim that he was deprived of proper food and nutrition. Also that he was denied access to a proper education and skill training.

[12] Counsel for the plaintiff seeks to add the additional plaintiff, WHM in an amended writ and statement of claim. This plaintiff was born March 23, 1959 and will soon be 46 years of age. He was sent to Woodlands in August, 1964 by his parents when he was 5 years of age. He was re-admitted on three other occasions, in June, 1965 at the age of 6, in July, 1965 and then in June, 1973 when he was 14. He alleges physical abuse by staff at Woodlands when he was 6 ½ years of age, and that he was badly beaten by 3 staff members at Woodlands when he was 8.

[13] At the age of 14, he alleges that over a 6 month period, on 2 to 3 occasions a week, he was forced by a staff member to perform oral sex on that staff member. An eye condition was not diagnosed until he was 12, resulting in visual problems that persist.

[14] On behalf of both men, the allegations are of sexual and physical assault, intentional infliction of mental suffering, negligence, breaches of duty and breaches of fiduciary duty committed by the Crown through its authorized servants, agents, representatives and/or employees. Further, that the plaintiffs continue to suffer harm and injury including physical injury, mental distress and anguish, loss of dignity and self-esteem, humiliation and embarrassment, impairment of normal and proper sexual functioning, impairment of relationships with family members and other persons, psychological trauma, continuing fears and anxiety, and forgone career and educational opportunities. There are also allegations of depression, suicidal thoughts and gestures, post-traumatic stress disorder, sleeping disorders, problems with anger management, loss of income, loss of ability to earn income and loss of enjoyment of life.

[15] They allege duties owed by the defendant to the plaintiffs, including fiduciary duties. The duties alleged to be owed by the defendant to the plaintiffs are set out in detail in paragraphs 15 and 16 of the Statement of Claim.

[16] Woodlands' population of children and adults ranged from 1200 to a few hundred, depending on the years. There were complaints of abuse over the years. In the spring of 2000, the Ministry of Children and Family Development (formerly the Ministry for Children and Families) ("the Ministry") commissioned an administrative review of Woodlands to be prepared by Dulcie McCallum. Her report, submitted to the Ministry, was dated August, 2001. The title of the review was The Need To Know.

[17] In brief, that report found that Woodlands presented an opportunity for abuse to occur, and that both physical and sexual abuse did occur at Woodlands. Ms. McCallum found that by the late 1970s there was a policy at Woodlands that abuse would not be tolerated, but

Woodlands responded to any allegations of abuse more as a personnel issue, and the focus was not on the needs of the residents. She further found a lack of internal safeguards to prevent abuse, and the report voiced a concern with regard to abuse as an issue for parents of those residents at Woodlands. Ms. McCallum reported no evidence that parents or relatives were notified when an incident of abuse may have occurred, and there was little evidence of police involvement. She found systemic abuse, and an absence of any integrated approach to abuse at Woodlands.

[18] On May 30, 2003 the then Minister of Children and Family Development issued what amounted to an apology in addressing the members of the legislature in Victoria. The apology recognized that some did not receive the level of care and treatment that they deserved at the institution, that the institutional model was now recognized as "flawed" and there had been mistreatment of some. And that some of those were developmentally disabled people. The apology recognized that harm had been suffered by some former residents of Woodlands. The period for the review was primarily from 1975 to 1992, given the records available for Ms. McCallum.

**The Position of the Plaintiff**

[19] The plaintiff contends that the requirements of s. 4 of the ***CPA*** have been satisfied, and as the ***CPA*** is procedural, once s. 4 is satisfied, certification of the Class by the court is mandatory.

[20] Section 4(1)(a) states that the pleadings must disclose a cause of action. At this stage also, the court assumes that the facts alleged in the pleadings are true. The plaintiff is alleging that the defendant breached its duty of care and the fiduciary duties which it owed to the plaintiff and to the putative class. Counsel for the plaintiff states the action is framed in negligence, and he refers to it as "systemic negligence", and breach of fiduciary duty.

[21] Section 4(1)(b) states there must be an identifiable class of 2 or more persons. In addition to Mr. Richard and the proposed plaintiff, WHM, counsel for the plaintiff has provided information that their office has communicated with at least 200 potential members of the Class. In addition, the Public Guardian and Trustee of British Columbia ("PGT"), earlier in these proceedings, filed an affidavit that it was his understanding that there were approximately 1500 former residents of Woodlands still alive. It is acknowledged that obviously a number of former residents of Woodlands will be deceased by now. But the numbers are not known at this time.

[22] Relying on the decision of ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172 (Ont.Ct.Gen.Div.), the plaintiff says there is sufficient evidence for an identifiable class of persons in this case. In the ***Bywater*** decision, persons who had been exposed to smoke from a fire in a subway tunnel, part of the Toronto Transit Commission System, were seen as an identifiable class of persons in a certification application under the Ontario ***CPA***. The court there found that the class definition did not have to include a reference to damages resulting from smoke inhalation as this would unduly narrow the class and anticipate entitlement.

[23] Section 4(1)(c) is the source of much of the dispute in this application. That section states that a requirement to be met before certification is that the claims of the class members must raise common issues, whether or not those common issues predominate over issues

affecting only individual members. The plaintiff is correct in saying that at this stage, common issues are not to be weighed against individual issues.

[24] Both parties have referred to ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184, 2001 SCC. 69. This case concerned Jericho Hill School, a residential school for children who were deaf, and also some children who were blind. The school operated from the 1950s to 1992 when it was closed. An investigation ordered by the government established that there was widespread abuse of children at the school, abuse that was sexual, physical and emotional.

[25] The application was denied in the initial chambers hearing, but was allowed by the B.C. Court of Appeal. Mackenzie J.A. and the B.C. Court of Appeal found that the duty of the school was to "reasonably protect its students from sexual abuse" throughout the time that the school was operating. That was a period of 42 years. The Supreme Court of Canada confirmed that all members share an interest in the question of duty and breach of standard of care, and the resolution of those issues would be necessary to a resolution of each class member's claim.

[26] In the case before me, counsel for the plaintiff argues that a class action will avoid duplication of factual and/or legal analysis. That the resolution of the issues is necessary to the resolution of each class member's claim here, as it was in ***Rumley***. And further, the issue is a substantial ingredient of each of the class member's claims. There will obviously be individual issues of causation and damages to be litigated later in separate trials, should certification be granted.

[27] At paragraph 21 of the Court of Appeal decision in ***Rumley*** (1999), 72 B.C.L.R. (3d) 1, Mackenzie J.A. stated "The overall history and evolution of the school is likely to be important background for the claims generally, and it would be needlessly expensive to require proof in separate individual cases".

[28] Both counsel also pointed to the decision of ***Hollick v. Toronto (City)***, [2001] 3 S.C.R. 158, 2001 SCC 68. ***Hollick*** involved an application for certification under Ontario's ***CPA*** based on complaints of noise and physical pollution from a landfill near the city. In that case, the common issues were found to be negligible compared to the individual issues. Certification was sought for some 30,000 people who lived in the vicinity of the landfill. The motions judge ordered certification, but the Divisional Court overturned the certification, stating that an identifiable class had not been established, nor had the plaintiff satisfied the commonality requirement. The court found there must be a "substantial ingredient" of the common issue in each member's claim. Although the representative need not show that everyone in the class shares the same interest in the resolution of the proposed common issue.

[29] In this case, the plaintiff has taken the proposed common issues directly from the ***Rumley*** decision. Relying on the ***Rumley*** decision, the plaintiff suggests that the proposed common issues in this case are the same as those approved by the B.C. Court of Appeal and affirmed by the Supreme Court of Canada in ***Rumley***.

[30] In paragraph 27 of the Supreme Court decision, Chief Justice McLachlin agreed that the class members shared an interest in whether or not Jericho Hill School had breached their duty of care. Further, that no class member could prevail without showing that duty and breach. That these would be necessary to the resolution of each member's claim. She agreed with the B.C.

Court of Appeal that the issues of duty and breach were common to the class.

[31] Counsel for the plaintiff argues that the same should be found here. While the answer may not be common, the question or issue is common.

[32] The most recent case cited by both counsel is the Ontario Court of Appeal case of ***Cloud v. Canada*** (2004), 2 C.P.C. (6th) 199 (Ont.C.A.).

[33] This was an application for certification for class action on behalf of former students of the Mohawk Institute Residential School, a native residential school in Ontario. The majority of the Divisional Court upheld the motion judge in finding that the action should not be certified, on the grounds that there was no identifiable class of plaintiffs and no common issues, thus a class action was not the preferred procedure. However, the Ontario Court of Appeal upheld the dissenting judgment of Cullity J. in the Divisional Court.

[34] The court agreed that the primary challenge in a residential school case was to determine if there were common issues, and that was the primary issue in the ***Cloud*** case. The action covered the years from 1922 to 1969, with 150 to 180 students at the school each year. The claim was that the school was run in a way designed to create an atmosphere of fear, intimidation and brutality. Damages were sought for breach of fiduciary duty, negligence, physical and sexual abuse and breach of aboriginal rights and Treaty rights.

[35] The dissenting judgment of Cullity J. in the Ontario Divisional Court, in finding there were common issues sufficient to satisfy the Ontario ***CPA***, had cited ***Rumley*** with approval. At paragraph 29 of the Court of Appeal judgment, referring to the reasons of Cullity J., the Court said:

> He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families... He found that the common issues could be defined in terms of those duties and their breach.

Cullity J. had further found that as in ***Rumley***, there was a failure to have proper management and operations procedures in place that reasonably could have prevented the abuse which occurred. He also found, and this was also approved by the Ontario Court of Appeal, that punitive damages were also properly included as common issues.

[36] At para. 32, the Appeal Court stated:

> In summary, he found that the focus of the trial of the common issues would be on the conduct of the respondents rather than on the precise circumstances of particular class members and that the existence of individual issues such as limitation periods or causation of harm to individual students was not enough to outweigh the conclusion that resolution of the common issues would significantly advance this action.

[37] The Appeal Court continued to quote with approval from the dissenting judgment of Cullity J., and dealt with the common issues requirement at length in its judgment, from paras. 48 to 72 inclusive.

[38] In brief, the common issue was found to be the alleged breach of various duties said to

be owed, with focus on how and why the respondents ran the school, in relation to systemic breach of duty.

[39] At para. 56, the court stated:

> Relying on ***Rumley***, he (Cullity J.) found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement.

[40] The court agreed with the assessment of Cullity J. At para. 69, Goudge J.A., writing for the court stated:

> Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

[41] Section 4(1)(d) of the ***CPA*** sets out the requirement that a class proceeding should be the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) sets out the relevant matters that the court must consider in determining whether a class proceeding would be the preferable procedure for a fair and efficient resolution of the common issues. There are five matters set out:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[42] The Supreme Court dealt with the first factor of whether questions of fact or law common to the members of the class would predominate over any questions affecting only individual members at para. 36 of the ***Rumley*** decision. Stating that the issues of injury and causation would be litigated later in individual proceedings, if the common issue were decided in favour of the class, the court was of the view that the individual issues would be a relatively minor aspect of the ***Rumley*** case:

> The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

[43] Counsel for the plaintiff takes the same view in this case before the court. That the essential question is whether the school should have prevented the abuse or responded to it differently, the issues of systemic negligence and breach of fiduciary duty. I agree that the common issues in this case do predominate over those affecting only individual class members.

[44] In the case before me, there is no suggestion that a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions. Nor is there evidence to suggest that any significant number of class members would prefer to proceed individually. As counsel points out, if there is certification, each class member would retain control over his or her individual action, and his or her ultimate recovery would be determined by the outcome in that individual proceeding.

[45] As for the issues set out in s. 4(2)(d) and (e), whether there are other means of resolving the claims that would be more practical and efficient, or whether the administration of the class action would create greater difficulties, again, the plaintiff looks to ***Rumley*** and also ***Cloud***. In those two cases, as well as the case at bar, the proposed class members can be said to be particularly vulnerable. At paragraph 39 in the ***Rumley*** decision, Chief Justice McLachlin stated:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

[46] She also quoted Mackenzie J.A.'s conclusion that:

> The communications barriers faced by the students both at the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence.

Mackenzie J.A. felt that a group action "should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively." The court in ***Cloud*** echoed those sentiments.

[47] In this case, the majority of Class Members are apparently mentally handicapped. To say they are vulnerable is stating the obvious.

[48] Section 4(1)(e) requires that the representative plaintiff must fairly and adequately represent the class, not have a conflict of interest, and must have a plan for the resolution of

proceedings. Counsel for the plaintiff submits that WHM satisfies these requirements. He was at Woodlands for a substantial time during the 1960s and 1970s, and he alleges both physical and sexual abuse on a number of occasions. He has lived on his own and now manages his own affairs, and has been employed for the last 12 years. He is apparently able to instruct counsel, and there is no evidence of any conflict that would prevent him from acting as a representative plaintiff.

[49] A proposed litigation plan has been filed as an exhibit. Presumably the plan will be changed from time to time should certification go ahead. The plan is obviously prepared by counsel for the plaintiff.

**The Position of the Defendant**

[50] The defendant opposes the motion for certification, saying that it is not the proper tool to "root out a few bad apples". As an illustration of the unsuitability of class action treatment, counsel for the defence points to two decisions in British Columbia where individuals alleged misconduct at Woodlands. ***Boyd v. British Columbia***, 2001 BCSC 667 and ***H.(J.) v. British Columbia***, [1998] B.C.J. No. 2926 (S.C.). Quoting from the ***Boyd*** decision, counsel said the cases illustrate the limited relevance of one resident's experience to the allegations or complaint of another resident.

[51] The defence argues that a class action offers no benefit to the court, the defendant, or any proposed class members. It would not improve access to justice, and a doomed or flawed class action would only create frustration with the justice system, rather than improved access. That each case must turn upon its own specific facts.

[52] The defence points to the varying legal status of Woodlands residents, some who have the PGT looking after them, some who have private Committees and some persons who are now competent.

[53] Admission policies changed over time, some were involuntary commitments, some came in through different policies. And the statutes governing the treatment of patients at Woodlands changed with the times and possibility with different governments. Policies and manuals changed, and there was a wide variation of resident population. In the view of the defence, there was too much variety to prove systemic negligence, pointing to the residents who suffered from a variety of conditions and diseases and disabilities. The length of stay varied, the functional levels varied.

[54] As far as staff were concerned, the defence refers to Woodlands as "a small city staffed by a remarkable array of different individuals with different responsibilities, skills and duties." They ranged from doctors, nurses, social workers to security staff, groundskeepers, teachers, etc. There were also volunteers on site, family members, religious advisors and others.

[55] The premises consisted of 58 acres and a number of buildings. Different wards fulfilled different needs. Some were maximum security for male residents, for example, others were for younger children. There were also two offsite camps. It was never a "one size fits all" institution.

[56] Education and training of the residents varied a great deal, as did work experience. Recreation and social opportunities were equally varied. The defence says that allegations of

abuse were not limited to onsite at Woodlands.

[57] Thus there is the concern of the defence that the proposed class action as defined does not limit the necessary enquiry by time or space or the character or type of abuses. Counsel refers to it as a factual quagmire to be examined, and that such is without parallel in Canadian class litigation history.

[58] The evidential burden is on the plaintiff, and the defence claims the plaintiff has failed to satisfy this burden for two main reasons: first, there are no issues common to the entire class, and second, the class structure is not the preferable procedure, as the claims are too individual. The defence argues that a class action would delay rather than increase the speed of settling any claims.

[59] Counsel for the defence relies upon the case of ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534 to say that the test of "success for one class member must mean success for all" has not been met. That case involved over 200 investors who became participants in a federal program by purchasing debentures in the plaintiff company. A class action was commenced when interest that had been promised was not paid, and the complaint was that the sole shareholder and various affiliates and advisors had breached fiduciary duties to the investors by mismanaging funds. The issue was the Court of Appeal's allowance of individualized discovery from each class member. The Supreme Court found that to allow such discovery at that stage of proceedings would be premature. That action also determined that a class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members.

[60] Arguing that the facts in this Woodlands situation are too varied in terms of timeframe participants and abuse etc., the defence relies upon ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348 (Ont.S.C.). There the court decided that the application failed to disclose an identifiable class. The proposed class was all residents of Ontario, living or deceased, who had smoked cigarettes manufactured by the defendants, and all persons having derivative claims. The potential class was between 2.4 and 1.5 million members. The time span was approximately 50 years. The defence argues that like the ***Caputo*** case, the plaintiff in this case has not put forward sufficient evidence of any substantial ingredients of the claim common to all class members.

[61] Counsel for the defence put forward a great number of cases, but many of them were of limited assistance, with facts varying so widely as to make them inapplicable to this case. I cannot agree with the position of the defence that the court will not be in a position to provide a single comprehensive answer in a common issues trial.

[62] ***Nieberg (Litigation Guardian of) v. Simcoe County District School Board***, [2004] O. J. No. 2524 (Ont.S.C.), was cited by the defence as a similar situation where no proper common issues were found. In ***Nieberg***, the plaintiff sought certification with respect to alleged violations of ss. 7 and 15 of the ***Charter of Rights and Freedoms*** on behalf of special-needs students. The court there held it was too much of a generality to suggest that each proposed member's ***Charter*** rights were breached, and that this could only be determined through an individual and detailed analysis for each student, of their personal education plan. The court concluded at

para. 40 that the facts in that case did not meet "the required degree of particularity of common issues to make proceeding by way of class action fair or efficient. Instead, such an action would ultimately break down into individual proceedings." I cannot agree that this is the same situation before me.

[63] Counsel for the defence set out an analysis of the significant factual differences between ***Rumley*** and the case at bar. In particular, the factual differences of the number of years involved, the class size, the potential staff defendants, the individuality of the plaintiffs, the types of claims, vicarious liability pleaded, and the acceptance of responsibility. Counsel also pointed to significant differences in scope in the ***Cloud*** case, the residential school.

[64] Vicarious liability was not an issue in ***Rumley***. In this case, while the plaintiff is not pursuing vicarious liability at this stage, they are not abandoning the claim, raising the possibility that it will come into play at a later date.

[65] The defence has concerns with regard to the scope of the claim. They point out that although in ***Rumley***, the court recognized both negligence and fiduciary duty, the concept of fiduciary duty is less amenable to certification. Also, in ***Rumley***, the claims were limited to sexual abuse only, whereas here, the claims include physical and emotional abuse as well as sexual abuse. In ***Rumley***, the Court of Appeal refused to certify any cause of action other than a claim for sexual abuse. By including sexual, physical and emotional abuse in this case, the defence argues that the causes of action become more sensitive to particular facts in individual cases. Limitation issues come to the fore, and the difficulties with class certification become greater.

[66] The defence says that the scope of the class and the issues are so wide and varied that a class action is the wrong strategy. The court needs all the information, facts and precision, and needs to examine both sides of all issues, before making such an important determination. Counsel argues that the court has a triage function, and to hear the abstract issue or issues first, is not the most direct or efficient route. Rather, the disputes must be dealt with by hearing the cases individually.

[67] Other issues have to be considered, such as common law principles which may protect caregivers in some circumstances from liability and tort. It is suggested that the Woodlands staff face unique challenges. There is also a consideration of consent, according to the defence. This would require a detailed examination of evidence with regard to programs and individual treatment. There may also be an issue as to whether persons standing in the position of parents can use reasonable force on a child where necessary as a corrective measure. The defence also questions the claim of emotional abuse, and whether that constitutes an actionable tort.

[68] The long list of complaints made by the plaintiff will require individual analysis in order to determine liability, according to the defence. For example, in ***Rumley***, the allegations were limited to claims of sexual abuse. There was a refusal to certify certain other claims.

[69] In drawing further distinctions between this case and the ***Rumley*** decision, counsel for the defendant notes that in ***Rumley***, certification was assisted by the fact that the government had already accepted responsibility. Whereas in this case, no such admissions have been made. The apology by Mr. Hogg in the legislature was neither an admission of liability, a

consent to class certification or an agreement that there was systemic negligence at Woodlands; although the Crown concedes there were problems “with the institutional model”.

[70] With regard to Dulcie McCallum’s Report, the defence has not objected to the admission of this Report for this application, for the purpose of giving the court background information. However, such findings would not be admissible as proof of their contents, nor amount to evidence to be relied upon for certifying the action as a class action.

[71] With regard to punitive damages, if the first common issue fails, then punitive damages, as subsidiary damages must also fail, as they do not stand alone, sufficient to sustain an application for certification. In any event, the defence argues that punitive damages are not an appropriate common issue.

[72] Counsel for the defence concludes by arguing that there is no common issue that can be resolved in one trial without the court receiving evidence from individual class members.

**Analysis**

[73] Is a class action the preferable procedure? This raises litigation management, and the court must consider how the litigation will be conducted throughout.

[74] Despite the able argument of counsel for the defence, I am in agreement with the position of the plaintiff with regard to s. 4(2) of the ***CPA*** in considering the relevant factors in assessing preferability. I do not agree that the individual issues overwhelm the common issues in this case. There is obviously a serious question of volume, with as yet an unknown number of class members, and a time period still to be defined. In ***Rumley***, the time period is 42 years. In ***Cloud***, it was 47 years. Counsel for the plaintiffs at this time are unable to give a definitive answer as to the span of time in this case. That date will have to be fixed in due course after more information is obtained with regard to the individual Class Members. What is known is that those at Woodlands in the beginning years would no longer be alive at this time.

[75] There are a number of individual issues which will be central to each person’s claim. But those individual issues do not overwhelm the common issues.

[76] As was stated in paragraphs 83 and 84 of the ***Cloud*** decision:

> The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.
>
> This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. ... Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. [Referring to the ***Rumley*** decision]

[77] In my view, this case is very similar to the ***Cloud*** case, where resolving the common issues will take the action a long way. I also agree that a single trial of the common issues will

be a substantive saving to both the litigants and to the judicial process. In ***Cloud***, a concern was expressed that without a common trial, issues would have to be dealt with in each individual action "at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, A single trial would make it unnecessary to adduce more than once evidence of the history establishment and operation of the School and the involvement of each of the respondents." (at para. 86).

[78] On the issue of an interest in controlling individual litigation, the defence suggests there are several factors which would make individual litigation the more favourable option for proposed class members. For example, class members might be forced to make a decision as to whether to proceed with litigation before coming to emotional terms with the issue. On receiving notice, they must decide whether they agree to be bound by the result, or whether they should maintain their individual rights by opting out. Once in a class action, the class member loses the ability to choose their own counsel, settle their own claim on terms that they might wish to be bound by, and also lose the ability to control the management and timing of the litigation itself. In my view, there is ample protection for such individual decisions under the ***CPA***.

[79] The defence suggests that a multi-plaintiff structure could be one efficient method to settle individual claims, preferable to a class action. In my view, that argument is not persuasive in these circumstances.

[80] As in the ***Cloud*** case, behaviour modification is not a factor to be considered here. Woodlands has been closed for a number of years, similar to the situation in ***Cloud***.

**Conclusion**

[81] I am persuaded that the plaintiff has satisfied the requirements of s. 4 of the ***CPA***, based on the material before me.

[82] The pleadings disclose a cause of action, as has been admitted.

[83] There is an identifiable class of two or more persons, and I am satisfied that the claims of the Class Members raise common issues.

[84] There is no question in my mind that a class proceeding is the preferable procedure for the fair and effective resolution of the common issues, given the history of the institution, the types of allegations raised, and the special vulnerabilities of the proposed Class Members.

[85] There is no evidence to suggest that the representative plaintiff, WHM, cannot fairly and adequately represent the interests of the Class. A plan has been produced, and there is no evidence with regard to any conflict of interest.

[86] The decisions in ***Rumley*** and ***Cloud*** have been particularly persuasive, and of assistance in reaching my decision. I can only conclude that the access to justice for the individual Class Members will be assisted by a class action, where there is one single trial of the common issues. To rule otherwise may well deprive a number of proposed members of an opportunity to pursue a claim. I have regard to the comments of Chief Justice McLachlin in ***Rumley*** at paragraph 39, which has been quoted previously.

[87] The application for certification should succeed.

[88] The plaintiff seeks an amendment to the Writ of Summons and Statement of Claim which would add WHM as a plaintiff to this action. There will be an order granting such amendment. The Writ of Summons and Statement of Claim are amended in the form attached as Exhibit "A" to the affidavit of Kenneth J. Baxter, sworn October 1, 2004.

[89] There will also be an order appointing WHM as the Representative Plaintiff for the Class. This action is certified as a class proceeding pursuant to the provisions of the ***Class Proceedings Act***.

[90] The Class shall be defined as follows:

> 1. All persons resident in British Columbia, who were confined to the provincial institution more recently known as Woodlands School and who, while so confined, suffered physical, sexual, emotional and/or psychological abuse and have suffered injury, loss or damage as a result thereof.

[91] The proceeding shall be certified on a basis of the common issues as set out in paragraph 15(c) of the Baxter affidavit, as set out in paragraph 3 of this Judgment.

[92] A resident class member may opt out of this proceeding by notifying Poyner Baxter in a time and manner agreed upon by the parties or directed by the Court.

"N. Morrison, J."
Madam Justice N. Morrison

March 22, 2005 – ***Revised Judgment***

Corrigendum issued advising that on page 28, paragraph [90] 2 and [90]3, shall be changed to paragraphs [91] and [92].