COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Richard v. British Columbia,***
2009 BCCA 77

Date: 20090213
Docket: CA036528

Between:

William Joseph Richard and W.H.M.

Respondents
(Plaintiffs)

And

**Her Majesty the Queen in Right of the Province
Of British Columbia**

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

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D.A. Klein S. Tucker	Counsel for the Respondents
A. Murray, Q.C.	Counsel for the Public Guardian & Trustee of B.C.
Place and Date of Hearing:	Vancouver, British Columbia 9 February 2009
Place and Date of Judgment:	Vancouver, British Columbia 13 February 2009

[1] **NEILSON J.A.**: This is an appeal from the order of a Supreme Court judge pronounced September 22, 2008, in her capacity as the case management judge dealing with document production in this class action: 2008 BCSC 1275. The appellant/Province takes issue with that part of her order that directed it to produce to the respondents any documents related to class members who have not opted out of the proceeding (the “Class Member Files”).

[2] The class is comprised of people who resided at Woodlands School from 1974 to 1996. Woodlands was a residential facility for the care and control of mentally and physically disabled persons and persons in need of psychiatric care. It is estimated that the potential class may have as

many as 2,200 members.

[3] The appellant says that the case management judge erred in ordering the production of the Class Member Files in three respects:

> a. in failing to properly determine whether the Class Member Files meet the test for relevance to the certified common issues;
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> b. in finding that the respondents' counsel is deemed to have "implied authorization" to review the Class Member Files; and
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> c. in failing to give weight to the overwhelming manageability problems associated with production of the Class Member Files.

[4] I would not give effect to those grounds of appeal, and would dismiss the appeal for the following reasons.

Background

[5] This action was commenced in 2002 following publication of two reports, each of which found that residents of Woodlands had suffered emotional, sexual, and physical abuse at the hands of staff and other residents. The amended statement of claim alleges that the Province was negligent and breached its fiduciary duty in failing to use reasonable care to ensure the well-being of Woodlands residents, and in failing to respond adequately to their complaints of abuse. Paragraph 20 of the amended statement of claim alleges that the Province caused or permitted systemic abuse at Woodlands:

> 20. In general, and in breach of its duty of care, fiduciary duty and contractual obligations, the Defendant operated or caused to be operated a residential facility whose patients, including the Plaintiffs and all members of the proposed class, were systemically subject to abuse, mistreatment, harassment, stress and isolation from family and community caused or permitted by the Defendant.

[6] On March 17, 2005, the action was certified as a class proceeding on behalf of all persons resident in British Columbia who were confined at the Woodlands School on or after August 1, 1974 and who suffered abuse at that institution. The common issues certified are:

> 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 on or after August 1, 1974 to protect those persons therein confined from abusive conduct of a physical, sexual, emotion and/or psychological nature by employees, agents or other persons similarly confined in the institution?
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> 2. If the answer to common issue no. 1 is "yes", was the defendant guilty of conduct that justified an award of punitive damages?
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> 3. If the answer to common issue no. 2 is "yes", what amount of punitive damages is awarded?

[7] Several events irrelevant to the issues before us slowed the progress of the action. Ultimately, a trial was set for September 2009, and discovery procedures commenced. By May

2008 the Province had produced approximately 25,000 documents relevant to the common issues. It resisted production of the Class Member Files, however, on grounds of relevance, confidentiality, and the time and costs associated with their production.

[8] As a result, the respondents brought a motion for production of those files in September, 2008, which led to the order from which this appeal is taken.

[9] On the appeal, the respondents applied to lead new evidence in the form of documents from the Province and discovery evidence that have become available since the hearing before the chambers judge. The Province consented to the admission of that material, and that application was accordingly allowed.

Discussion

[10] At the outset, I observe that this is an appeal from an interlocutory and discretionary order of a case management judge. This Court typically accords such orders considerable deference, and will not interfere unless the chambers judge was wrong in principle or made erroneous findings of fact, *G.W.L. Properties Ltd. et al v. W.R. Grace & Co.*, 22 B.C.A.C. 78, 19 C.P.C. (3d) 373

1. Did the chambers judge err in determining that the Class Member Files were relevant?

[11] Relevance is the focal issue under Rule 26(1). The chambers judge dealt with it at paras. 9-11 of her reasons:

> [9] The defendant submits firstly, that the only documents of relevance in these files are the Unusual Occurrence Reports, copies of which are in the administration files that have already been produced; and secondly, that any evidence of abuse contained in these files is not relevant to the common issues, only the individual claims.
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> [10] The plaintiffs submit that these files may contain evidence of abuse that went unreported, which is part of their allegation of systemic negligence.
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> [11] The defendant relies on the two decisions of Madam Justice Humphries in ***Rumley v. British Columbia***, 2002 BCSC 1653, A.C.W.S. (3d) 36, and ***Rumley v. HMTQ***, 2003 BCSC 234, 12 B.C.L.R. (4th) 121, wherein she strictly limited the examination for discovery of more than four representative plaintiffs and redefined the common issues to avoid evidence of individual occurrences. These decisions are helpful in their observations of the potential unmanageability of class action examination for discovery and trials, but the case before me has not yet arrived at that stage of proceedings. We are in the initial stage of discovery which envisions fairly broad document disclosure. Use of some of those documents may be circumscribed at a later stage, but I am of the view that broad disclosure is necessary at this stage in keeping with the principles of Rule 26(1) of the ***Rules of Court***.

[12] It is apparent that the conduct of this case has been modelled to a certain extent on the *Rumley* case, also known as *L.R.*, which involved similar allegations of abuse in a residential school. The common issues in this case mirror those certified in *L.R.*, and are limited to allegations of systemic negligence. The definition of that term is thus central to the issue of relevance.

[13] In *L.R. v. British Columbia*, 1999 BCCA 689, 180 D.L.R. (4th) 639, this Court allowed an appeal from an order refusing certification, and in doing so defined systemic negligence as the failure

to have in place management and operational procedures that would reasonably have prevented the abuse, as well as the failure to make the school reasonably safe for students from abuse by staff or other students. Policy, administration, staff qualifications and training, and dormitory conditions were listed as the primary areas of inquiry (paras. 19-22).

[14] On the appeal from that decision, the Supreme Court of Canada affirmed that definition, *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184. The Court also observed that systemic negligence is not specific to any one victim, but rather to a class of victims as a group. It viewed the central issues arising in a claim of systemic negligence as the nature of the duty owed to the class, and whether that duty had been breached. The Court acknowledged that individual issues of injury and causation would arise at a later stage of the action, but only if liability for systemic negligence had been established (paras. 27, 34, 36). The case was remitted to the Supreme Court of British Columbia for trial on the common issues.

[15] As set out in the reasons of the chambers judge, the Province relies on the difficulties subsequently encountered in the pre-trial discovery process in *L.R.* to argue that Class Member Files are not relevant to the common issues of systemic negligence in this case. They say that the chambers judge erred in finding that the records of individual class members from Woodlands have any relevance to the allegations of systemic negligence.

[16] The Province argues that the common issues confine relevant inquiry to an examination of Woodlands' practices and policies, and comparison of these with those of other similar institutions at the relevant times, to determine if they met the standard of care. It says that it is not appropriate to allow proof of a systemic common issue by simply compiling examples of abuse from individual cases. It maintains that if this case were permitted to develop in that way it would become unmanageable, as the Province would be required to respond to each individual incident in its defence. It argues that, having chosen to limit their claim to common issues of systemic negligence, the respondents have similarly limited the ambit of discovery. The individual Class Member Files have no relevance to the common issues and need not be produced.

[17] The Province relies on two subsequent decisions of the Supreme Court of British Columbia in *L.R.*, which it says demonstrate the importance of drawing a line between permitted areas of inquiry into systemic negligence, and the hazards of permitting discovery to extend to a wide-ranging inquiry into individual instances of abuse. In *L.R. v. British Columbia*, 2002 BCSC 1653, [2002] B.C.J. No. 2695 [*L.R. 2002*], Madam Justice Humphries dealt with an application by the defendant for examinations for discovery of class members beyond the four representative plaintiffs. In allowing the application in part, she made these observations as to the complexities of the interaction between the allegations of systemic negligence and evidence of individual instances of abuse:

> [5] This is an unusual class proceeding in that the certified issue involves an examination of alleged systemic negligence/breach of fiduciary duty in Jericho Hill school over a period of some 40 years, and if established, will ultimately form the basis for claims by several hundred students for potentially large damages upon proof of a connection between their individual allegations and the systemic negligence or breach of duty. The plaintiffs intend to prove their case through lay witnesses, experts, documents and discovery. They also wish to call a number of class members to testify about their individual experiences and the responses (or lack thereof) of supervisors, teachers, and administrative staff.
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> . . .

> [9] While it is difficult at this time to visualize the types of factual findings that will have to be made, it is clear that no instances of individual abuse will be in issue before me. Nevertheless, findings will likely have to be made about individual reports of abuse and how they were handled. How conclusions can be reached on the basis of such findings when the underlying truth or prima facie reasonableness of the reports cannot be before me is something still to be wrestled with. However, the fact that reports were or were not made and were or were not responded to is arguably relevant to the common issue, whereas the instances of alleged abuse themselves are not.
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> 13 There will be no examination on the allegations of individual instances of abuse, unless they are specifically mentioned under the “disclosures” heading set out above as having been reported. There will be no questioning on the evidence on general discipline, the physical set-up of the school, general misbehaviour, general lack of supervision or deficiencies in signing amongst staff, teachers, supervisors and administrators, except as they relate directly to the incidents set out under the “disclosures” heading. All these areas will be dealt with by the experts and the documents and can be, and I assume have been, covered in the examinations of the representative plaintiffs. An obvious corollary of this restriction on the defendant’s examination is a likely restriction on the plaintiffs’ ability at trial to adduce evidence of this sort through witnesses other than the experts and the representative plaintiffs.

[18] Subsequently, the defendant brought an application to decertify the class action, on the basis that class counsel was attempting to introduce individual issues into the common issues, making a class action unworkable and inappropriate: 2003 BCSC 234, 12 B.C.L.R. (4th) 121 [*L.R. 2003*]. Humphries J. responded by reframing the common issues into what was effectively a list of particulars of systemic negligence, which focused on procedures and procedural changes at the institution. In doing so she made the following observations on the relationship between the common issues and the individual issues:

> [30] In my view, it is not useful to begin the analysis of systemic negligence from the assumption that "it is now clear that sexual and physical abuse of children took place at the school throughout its history." That very assertion inappropriately and perhaps erroneously (without having heard the evidence it is too early to tell) informs the analysis of a developing and changing standard of care over 42 years in a way that undermines the potential for conducting this action as a class proceeding. To start from such an all-encompassing assertion necessarily puts the defendant to the task of identifying an unending series of circumstances in order to attempt to answer, refute or admit on a piece-meal basis the facts which underlie that assertion. This renders the proceedings unmanageable because individual complainants are not before the court, the alleged abusers will not be called, and the individual events of sexual misconduct are not in issue, even with regard to the *prima facie* reliability of the reports concerning them.
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> . . .
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> [57] In his reasons allowing certification of the common issue, Mackenzie J.A. stated that while the existence of a duty of care to protect students from abuse is not controversial, there are issues surrounding the standard of care. In that context, he

noted at paragraph 19 that the plaintiffs had chosen to restrict their grounds of negligence for the purposes of the class proceedings to systemic negligence, namely "the failure to have in place management and operations procedures that would reasonably have prevented ***the*** abuse" [emphasis by Humphries J.].

[58] It would be preferable if he had left out the word "the", as it is only with that word omitted that these proceedings move from the particular to the general in such a way that a common issue can exist. His statements in the preceding paragraph do not contain the word "the." In other words, if this class proceeding is founded on abuse that is assumed to have taken place at Jericho Hill School, then it is, in my view, irredeemably individual in nature and unsuitable for certification because of the problems identified in paragraph 30 above. It is only if standards of care are looked at in a general way to see if they meet the prevailing standards or a reasonable standard, and if not, whether such a failure is negligent, that there can exist the potential for a manageable class proceeding.

[59] Of course, the proceeding is still fraught with the problems recognized by the Court of Appeal: the standard of care may vary over 42 years, depending on a wide variety of factors; the prevailing standard of the day might be breached for some years and not for others; and the standards may differ depending on the type of abuse alleged and by whom it was inflicted. I add to that list the further difficulty of the changes in standards of care that might be required by the receipt of complaints whose validity can not be determined in this proceeding. I am of the view that variations in standard of care for specific situations involving particular students arising out of this latter point can only be dealt with in the context of the causation inquiry in the individual actions. Otherwise, the analysis will become so fragmented as to be useless for the common issue.

[60] The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.

. . .

[84] With respect to the hundreds of individual files, I realize the plaintiffs wish to use the documents in them to fix the defendant with knowledge of a pattern of wide-spread long-standing abuse arising out of a multitude of individual incidents, and that this could be relevant not only to standard of care but to punitive damages. However, I do not envision this trial as encompassing that type of evidence because the mere filing of the documents, without allowing the defendant to answer to their substance, would serve no useful purpose. The plaintiffs have that evidence and eventually may be able to make some use of it in the individual trials; in this proceeding, however, its only use would be to allow the plaintiffs to obtain admissions or information leading to a train of inquiry respecting the management and operations procedures in place at a particular time. Aside from that limited purpose, the files cannot be used to allow this proceeding to degenerate into mini-trials where the individual incidents, their prima facie validity, the need for response or the adequacy of response to a particular situation become relevant in themselves. The enumerated questions, particularly those aimed at adequacy of supervision, are wide enough to encompass the systemic issues relating to the standard of care which the plaintiffs

wish to address.

[19] In short, the Province does not deny that the Class Member Files may contain evidence to support individual claims of negligence or breach of fiduciary duty. It says, however, that the respondents have chosen not to present individual claims, and those files thus have no relevance to the common issues.

[20] The respondents reply that systemic negligence cannot be proven simply by comparing institutional policies. What was happening to individual class members at Woodlands is relevant to determining what policies were required, whether existing policies were properly enforced, and whether there was institutional abuse in the form of unwritten policies or practices that led to abusive treatment. It is only by reviewing the individual Class Member Files that such patterns can be discerned.

[21] I acknowledge the evident tension between systemic allegations and individual occurrences in class actions of this nature. However, I am not persuaded that the chambers judge erred in finding that the Class Member Files are relevant and producible at this stage of the proceeding. As she pointed out, this case is at the stage of discovery. Relevance is broadly defined, and covers any document that directly or indirectly may enable a party to advance his case or to destroy that of the opposing party, or which may lead to a train of inquiry or disclose evidence: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 2002 BCCA 219, 100 B.C.L.R. (3d) 146 at para. 12.

[22] I am satisfied that the Class Member Files meet that standard of relevance, and the respondents are entitled to receive and review them. In my view, at the least, they may reveal conduct of residents and staff that sheds light on the policies and operational procedures at Woodlands that are the focus of the allegations of systemic negligence. While the decisions of Humphries J. in *L.R. 2002* and *L.R. 2003* sound a cautionary note as to the complexity of the relationship between individual incidents of abuse and issues of systemic negligence, it is evident that the individual files of class members from the Jericho Hill School were produced in that case. As well, Madam Justice Humphries acknowledged that findings would likely have to be made about whether individual reports of abuse were made and how they were handled *(L.R. 2002* at para. 9), and that information in individual files might lead to a train of inquiry respecting management and operational procedures in place at a particular time (*L.R. 2003* at para. 84).

[23] Ultimately what use can be made of information from the Class Member Files in prosecuting the trial of the common issues will be a matter for case management and for the trial judge. It is not for this Court to impose its views on that matter at this preliminary stage, before the contents of the Class Member Files are even known.

[24] I would accordingly not give effect to this ground of appeal.

2. Does the respondents' counsel have deemed authorization to review the Class Member Files?

[25] This ground of appeal raises concerns about confidentiality and the potentially sensitive nature of the information in the Class Member Files, some of which will include material about residents who were young, vulnerable, and sexually abused. The appellant says that the Class Member Files may also contain sensitive personal information about third parties such as family members and other residents.

[26] The chambers judge dealt with the issues of privacy and confidentiality at paras. 13-15 of her reasons for judgment:

> [13] Further, I do not agree that production of the Class Member Files will result in breach of third party rights. The Notice being sent out to potential members specifically addresses the confidentiality issue and tells them how to opt out of the class if they wish to retain confidentiality. By remaining a class member and becoming part of the litigation they are effectively giving up confidentiality as far as the litigation is concerned. That is not to say that their personal information will be publicized at large. In addition to the implied undertakings of counsel, in this case plaintiffs' counsel and staff have signed an express confidentiality agreement. I am satisfied that reasonable means have been employed to protect confidentiality as far as possible.
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> [14] If I am wrong in dismissing the defendant's relevancy, breadth and privacy arguments, I am of the opinion that plaintiffs' counsel is impliedly authorized to obtain the documents in any event. While there appears to be no previous decision expressly stating this, the law is clear that members of a plaintiff class are clients of counsel for the representative plaintiff, and share a solicitor/client relationship with him or her.
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> [15] Justice Butler, in a previous decision in this case at 2007 BCSC 1107, 284 D.L.R. (4th) 481, scrutinized the duties and obligations of plaintiff's counsel in a class action and concluded that there existed a solicitor/client relationship between counsel and class members that included a duty to act in the best interests of the class as a whole. If plaintiffs' counsel is expected to fulfill the duties and obligations of a solicitor for the entire class he must, by implication, be authorized to act for the entire class without the need for individual, signed consents. Therefore, I am ordering production of the Class Member Files, subject to the restrictions of the ***Youth Criminal Justice Act***.

[27] The Province argues that the chambers judge erred in finding that the failure of a potential class member to opt out of a class action is an implied release of that person's personal information to class counsel. As well, it says that she was wrong in holding that class counsel was implicitly authorized to obtain personal records of potential class members by virtue of the solicitor/client relationship between them.

[28] In my view, it is not necessary to consider those issues, as they were supplemental to the judge's primary conclusion that reasonable means had been employed to protect third party confidentiality, and I see no error in that finding.

[29] The Class Member Files are relevant documents in the care and control of the Province and are *prima facie* producible under Rule 26(1). Privacy rights of third parties are not an absolute bar to their production, but are one of several interests to be considered and balanced in determining the proper ambit of document discovery, once relevance has been established: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paras. 36-37, *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, [2005] 1 S.C.R. 724 at para. 24.

[30] As the chambers judge noted, in this case several steps have been taken to protect those privacy interests. The notice published pursuant to s. 19 of the *Class Proceedings Act*, R.S.B.C.

1996, c. 50 included the following:

> **CONFIDENTIAL DOCUMENTS**
>
> In order to better represent the class in this lawsuit, Class Counsel has sought a court order for production of documents relating to the operation of Woodlands School. Class Counsel has entered into an undertaking to keep such materials confidential, and to only use them for the purposes of advancing this lawsuit. If you were a resident of Woodlands School, and you do not wish Class Counsel to have access to documents relating to your experience at the Woodlands School, you can contact Class Counsel to exclude yourself from this lawsuit as described below.

[31] As well, class counsel are bound by the usual implied undertaking to keep all discovery evidence confidential and to use it only for the purpose of the litigation: *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157.

[32] Further, in this case class counsel, their staff, and anyone who may have access to documents produced by the Province have been required to sign a comprehensive written confidentiality agreement that provides extensive and explicit protection for third party information produced by the Province in the course of this litigation.

[33] In my view, the chambers judge correctly found that these were adequate measures to protect third party privacy rights and ensure confidentiality of sensitive material in the Province's documents, including the Class Member Files. It is therefore unnecessary to consider the Province's criticism of her alternative findings.

3. Did the chambers judge give proper weight to the management problems associated with production of the class member files?

[34] The chambers judge dealt with this issue at para. 11 of her reasons for judgment, which has been set out at para. 11 of these reasons.

[35] The Province estimates that the Class Member Files may comprise as many as 2.2 million pages, and the review and production of that material will take many thousands of hours. It will almost certainly result in loss of the September trial date, and further delays in an action that encompasses events that occurred almost 35 years ago. The Province argues that production of the Class Member Files is accordingly unrealistic and not cost-effective.

[36] Expansion of the discovery process has become an inevitable result of increasingly complex litigation, and there is no question that this proceeding is complex. The respondents have produced decisions in which voluminous document production has been approved by the court, despite the associated time and costs. In that sense, this case is not unique.

[37] I accept that the court has some discretion to limit production in such cases. As in the case of privacy considerations, it is a matter of balancing the competing concerns, such as cost, efficiency, and relevance. The Province cites the well- known statement of McEachern C.J. in *Peter Kiewit Sons Co. of Canada Ltd. et al v. British Columbia Hydro & Power Authority, et al* (1982), 134 D.L.R. (3d) 154, 36 B.C.L.R. 58 that Rule 26(1) should not be slavishly applied to require production of voluminous documents of only possible relevance.

[38] The chambers judge acknowledged that admonition, but distinguished it on the basis that production of the Class Member Files did not represent a futile search for documents of unknown relevance. In my view, that distinction was properly drawn, and I would not interfere with her conclusion that the obvious problems of manageability are counter-balanced by the relevance of the files that are to be produced.

Conclusion

[39] I would accordingly dismiss the appeal.

[40] **FINCH C.J.B.C:** I agree.

[41] **GROBERMAN J.A.**: I agree.

[42] **FINCH C.J.B.C.**: The appeal is dismissed.

"The Honourable Madam Justice Neilson"

CORRECTION – 12 MARCH 2009

Para. [17] – The last word in para. [9] of the quotation from *L.R. v. British Columbia*, 2002 BCSC 1653, [2002] B.C.J. No. 2695 [*L.R. 2002*] should be "not" instead of "riot".