COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Richard v. British Columbia,***
2009 BCCA 185

Date: 20090430
Docket: CA035869

Between:

William Joseph Richard and W.H.M.

Appellants
(Plaintiffs)

And

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

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low
The Honourable Madam Justice Neilson

J.J. Arvay, Q.C.
B. Elwood
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A. Murray, Q.C. — Counsel for the Public Guardian and Trustee of British Columbia

Place and Date of Hearing: Vancouver, British Columbia
October 2 & 3, 2008

Place and Date of Judgment: Vancouver, British Columbia
April 30, 2009

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] In this class action brought on behalf of persons who, while resident at Woodlands School, suffered physical, sexual or emotional abuse, Madam Justice Satanove amended the certification order to exclude all claims prior to August 1, 1974. August 1, 1974, is the date the *Crown Proceedings Act*, S.B.C. 1974, c. 24, first came into effect in British Columbia. The reasons for judgment of Madam Justice Satanove are indexed as 2008 BCSC 254.

[2] In making the order, the judge found the issue was not *res judicata* and held, on the authority of *Arishenkoff v. British Columbia*, 2005 BCCA 481, 47 B.C.L.R. (4th) 1, leave to appeal ref'd [2005] S.C.C.A. No. 556 [*Arishenkoff No. 2*], it was plain and obvious the claims pre-dating August 1, 1974, could not succeed.

[3] The representative plaintiffs appeal. They contend:

1. the application to amend the certification order is *res judicata*, and
2. *Arishenkoff No. 2* does not preclude an action in equity for breach of fiduciary duty that arose prior to August 1, 1974.

[4] At the hearing of the appeal counsel for the appellants asked, in the alternative and in the event we hold against them on both issues, for an amendment to their prayer for relief in the statement of claim to include a claim for a declaration for damages.

[5] The action is brought on behalf of children who were resident at Woodlands School, a residential facility long operated by Her Majesty the Queen in Right of the Province of British Columbia (the "Province") for the mentally handicapped and persons in need of psychiatric care (including children). The statement of claim alleges patients under the care of the Province suffered physical, sexual, emotional and psychological abuse at the hand of the respondent's employees, agents and representatives. The claim is framed in assault, intentional infliction of mental suffering, breach of fiduciary duty, breach of contract (with the children's legal guardians), breach of a duty of care (negligence) and negligent and fraudulent misrepresentation. It is a claim for general, aggravated and punitive damages.

[6] The tortuous path of this action is set out in the reasons for judgment. The *res judicata* issue arises directly out of that complicated history. While I will not relate all of the complications, some description is required.

[7] The action was first certified as a class proceeding by Madam Justice Morrison in March 2005 in reasons for judgment indexed as 2005 BCSC 372, with W.H.M. appointed as the representative plaintiff. On October 6, 2005, this Court, sitting as a five justice division, released its reasons for judgment in *Arishenkoff No. 2*. In September 2006 Madam Justice Morrison ordered, in reasons for judgment indexed as 2006 BCSC 1462, that a second representative plaintiff, Mr. Richard, be added. Counsel then acting for the representative plaintiffs, from the law firm Poyner Baxter, took the view that *Arishenkoff No. 2* precluded claims arising before August 1, 1974, on the basis of Crown immunity. A tentative settlement was reached with the Province of those claims arising after that date. That settlement made no provision for the many claims of class members arising before August 1, 1974.

[8] In June 2007 two applications came before Mr. Justice Butler. W.H.M. applied for an order removing Poyner Baxter as counsel for the plaintiffs on the basis of conflict of interest. Poyner Baxter opposed that motion and applied as counsel for orders amending the class to include only

claims arising after August 1, 1974, removing W.H.M. as a representative plaintiff, scheduling a hearing date for the purpose of reviewing the proposed settlement, and, in the alternative, creating two sub-classes of claimants. Mr. Justice Butler, in reasons for judgment indexed as 2007 BCSC 1107, ordered Poyner Baxter removed as counsel for the plaintiffs and declined to make the other orders requested. In the result, Mr. Justice Butler dismissed, without consideration on its merits, Poyner Baxter's application to remove W.H.M. as a representative plaintiff and to amend the class definition. In reaching this result, Mr. Justice Butler said at para. 50:

> In the circumstances, the only possible order is to remove [Poyner Baxter] as class counsel and allow new class counsel to attempt to resolve the conflicts that have arisen, and either move the case toward trial or restart the settlement process.

[9] After the appointment of new counsel for the representative plaintiffs, the Province, relying upon *Arishenkoff No. 2*, applied for an order amending the class to exclude all claims arising prior to August 1, 1974, saying Crown immunity provides a complete answer to the claims. The application was heard by Madam Justice Satanove and gives rise to the instant appeal.

[10] The representative plaintiffs took the same position before Madam Justice Satanove as they take before us: (i) the application is *res judicata* because a similar application brought by Poyner Baxter was dismissed; and (ii) *Arishenkoff No. 2* does not preclude all claims pre-dating the coming into force of the *Crown Proceedings Act*.

[11] Madam Justice Satanove found the Province's application to amend the certification order to include only claims arising after August 1, 1974, was not *res judicata*. In so finding she said:

> [11] Not surprisingly, the plaintiffs oppose the defendant's application before me on the basis of issue estoppel. They argue that the pre-conditions for the operation of issue estoppel as set out by Dickson J. in *Angle v. Ministry of National Revenue*, [1975] 2 S.C.R. 248 at 254, have been met:
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> 1. the same question has been decided;
> 2. the judicial decision which created the estoppel was final; and
> 3. the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel was raised, or their privies.
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> [12] The defendant concedes that Justice Butler's decision was final and that it was a party to the prior proceeding, but it maintains that Justice Butler did not answer the same question that the defendant has asked me to answer.
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> [13] I agree with the defendant in this regard. Notwithstanding that the Notices of Motion brought by Poyner Baxter before Mr. Justice Butler and the Notice of Motion brought by the defendant before me is worded in the same terms, it is obvious from Justice Butler's judgment that he dismissed the application because Poyner Baxter was not in a position to bring it. His judgment, in my view, is more akin to a finding that Poyner Baxter did not have the status to bring such an application because it placed the firm in a direct conflict of interest and was a direct breach of duty to its clients.

> [14] The plaintiffs do not disagree that Justice Butler did not decide the question of amending the Class definition on the merits, but they say the opportunity was afforded to the defendant to argue the issue on the merits. This is true, but only relevant if Justice Butler had been prepared to deal with the application on the merits argued by Poyner Baxter. In other words, we do not know if Justice Butler agreed or disagreed with Poyner Baxter's argument about Crown immunity, because of his conclusion that Poyner Baxter should not be allowed to make the argument.
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> [15] It is unfortunate that matters have unfolded as they have and further costs have been incurred by the parties than may have been necessary. However, under the circumstances, I am of the view that the context in which Justice Butler dismissed Poyner Baxter's application was vastly different than the context in which the application has been brought before me. Therefore, the plaintiffs' preliminary objection that the defendant's application is *res judicata* is dismissed.

[12] Madam Justice Satanove then went on to allow the application, ordering amendment of the certification order to include only claims arising after August 1, 1974. She held:

> [16] I had the benefit of full submissions on the issue of Crown immunity and whether the Class definition should be amended, or whether the pre-1974 claims should be allowed to stand insofar as they seek equitable relief only. The history of the law in this area is fascinating, but it would serve no purpose to reconsider it because I am bound by the decision of the Court of Appeal in *Arishenkoff No. 2*. If it were otherwise, I might well be disposed to allow the Class definition to remain unamended and to allow the pre-1974 claims for breach of fiduciary duty to proceed.
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> [17] *Arishenkoff No. 2* was a decision of five Court of Appeal Justices who overturned the earlier Court of Appeal decision of *B. (K.L.) v. British Columbia*, 1999 BCCA 210, which was also a five Justice decision.
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> [18] Despite the submissions of the Public Guardian and Trustee on the application before me, I do not find either the facts or result in *Arishenkoff No. 2* to be distinguishable from the case before me. In *Arishenkoff No. 2* the Court was dealing with the claims for damages for wrongs, both sexual and non-sexual, allegedly committed by Crown employees or agents while the plaintiffs were confined in a residential school in the 1950's. The Chambers Judge held that the Crown could be liable for acts committed before the *Crown Proceedings Act*, S.B.C. 1974, c. 24, came into force, but the Crown was successful on appeal in persuading the Court that the true construction of the *Crown Proceedings Act* showed that the Legislature had abolished proceedings against the Crown by petition of right, dispensed with fiats, and rendered the Crown subject to all those liabilities to which it would be liable if it were a person.
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> [19] The question that the Court of Appeal decided in *Arishenkoff No. 2* is set out in paragraph 48 of that judgment:
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> > ... did the legislature intend to abrogate, for wrongs committed by a servant of the Crown before the proclamation of the *Act*, the commonly understood doctrine, whatever lay at the root of it, that no cause of action, even with a fiat, would lie against the Crown for the wrongs of its servants?

[20] The Court of Appeal stated unequivocally that there is nothing in the *Crown Proceedings Act* upon which one could answer the above question in the affirmative, and in fact there was an express indication to the contrary in sections 15 and 16 of the *Act*. The Court of Appeal held that it followed that the action must stand dismissed in all respects, which included a claim for breach of fiduciary duty.

[21] The plaintiffs argue that the Court in *Arishenkoff No. 2* dealt only with tort actions arising before 1974; it did not refer to equitable claims for relief such as breach of fiduciary duty. While it is correct that the question of law posed to the Court referred to torts, the question that the Court answered was as I have set out above. In other words, the Court found that any cause of action arising from wrongful conduct of a servant of the Crown was barred. This would undoubtedly include breaches of fiduciary duty arising from allegations of abuse.

The Issues

1. *Res Judicata*

[13] Is the application to amend the class to exclude the pre-August 1974 claims *res judicata* as the appellants contend?

[14] In *Angle v. M.N.R.* (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, the Supreme Court of Canada gave modern expression to the concept of *res judicata*, as manifested by issue estoppel, and later expanded upon the subject in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.

[15] In *Angle* Justice Dickson for the majority observed that *res judicata* encompasses estoppel of two types: cause of action estoppel and issue estoppel. Cause of action estoppel precludes a person from asserting a cause of action that has been determined in earlier proceedings by a court of competent jurisdiction. This form of *res judicata* is not asserted in this case.

[16] Issue estoppel is a more flexible principle and may apply where the cause of action is different but an issue or question of fact has been adjudicated. In *Angle*, at 254, Justice Dickson adopted the requirements for issue estoppel described by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 at 935, [1966] 2 All E.R. 536 (H.L.):

> … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies …

[17] In discussing the first criterion Justice Dickson said at 255:

> It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case*, quoted by Lord Selborne L.J. in *R. v. Hutchings*, at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope*. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier

proceedings: *per* Lord Shaw in *Hoystead v. Commissioner of Taxation*. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.*, at p. 301, set forth in these words the nature of the enquiry which must be made:

> …whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.
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> [Footnotes omitted]

[18] The Supreme Court of Canada addressed issue estoppel again in *Danyluk*. Justice Binnie referred to the above passages from *Angle*, and added at para. 24:

> In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[19] Further, he observed:

> [33] The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

[20] In the case at bar Madam Justice Satanove concluded the first of the three requirements (that the same question has been decided) was not met because Mr. Justice Butler did not decide the issue of amending the class definition, rather he dismissed the application because Poyner Baxter was not in a position to bring it.

[21] The appellants say this conclusion was in error. They contend that in dismissing, rather than adjourning, the application and having heard submissions from Poyner Baxter on the application of *Arishenkoff No. 2*, Mr. Justice Butler's dismissal of the application to amend the class stands as a decision on the same question. In their factum they put it this way: "Had Poyner Baxter been correct in the Court's eyes regarding the effect of *Arishenkoff No. 2*, then [W.H.M.] had no possible cause of action, there was nothing for [new] class counsel to explore with him, and the steps Poyner Baxter took against [W.H.M.'s] wishes were entirely appropriate".

[22] The appellants say the Province should not be allowed to bring its own application when the application filed by then counsel for the class plaintiffs, for the same relief, failed. On a correct analysis, they say, the same question was asked and answered by Mr. Justice Butler in July 2007. At most, say the appellants, the only basis on which Madam Justice Satanove could have considered the application to amend the class boundary was as an exercise of her discretion to refuse to apply

issue estoppel because it would cause an injustice.

[23] The Province denies that Mr. Justice Butler dismissed the application to re-define the class on its merits, and submits that, viewed correctly, the order of Mr. Justice Butler is responsive only to the conflict of interest of class counsel. The Province observes the first application on the issue of amending the class to adjust for the consequences of *Arishenkoff No. 2* was brought by class counsel taking a position adverse to their client (the representative plaintiff W.H.M.) and others like him whose claims pre-dated August 1974. This produced a conflict of interest that fatally undermined the ability of class counsel to continue in that role, such that counsel were removed to permit new class counsel to review the application of *Arishenkoff No. 2* to the issues in this action.

[24] In my view, the Province's application is not caught by issue estoppel because the issue was not decided on its merits by Mr. Justice Butler. Mr. Justice Butler said at para. 47 that the breach of fiduciary duty claim was an issue that "needs to be explored by counsel for the class." If Mr. Justice Butler had rejected the argument based on *Arishenkoff No. 2,* the claim could proceed directly without the need for further exploration by class counsel. Thus, as a result of the view he took on the conflict of interest allegation and the merits of W.H.M.'s application to remove Poyner Baxter as counsel for the class plaintiffs, Mr. Justice Butler side-stepped the issue, properly so, in light of his conclusions. By this side-step he avoided deciding the substantive legal issue until new counsel had the opportunity to form an opinion on the application of *Arishenkoff No. 2* to this action and provide advice. I consider that in these unusual circumstances, nothing can be made of the fact the application of Poyner Baxter was dismissed rather than adjourned.

[25] It appears to me the judge's view of the events leading up to this application, her appreciation of the law of issue estoppel, and her application of that law were entirely correct. I would not accede to this ground of appeal.

2. Application of *Arishenkoff No. 2*

[26] Until the passage of the *Crown Proceedings Act* in 1974, actions against the Crown faced the long standing hurdles of procedural and substantive Crown immunity. In those days, in order to obtain a direct remedy against the estate of the Crown, a plaintiff was required to use the petition of right procedure whereby a petition was submitted to the Lieutenant Governor who could grant a "fiat that right be done". Fiats were routinely refused, however, for claims for personal injury and property damage on the premise "the King can do no wrong". This history is recounted in *Arishenkoff No. 2*.

[27] On August 1, 1974, this landscape changed with the coming into force of the *Crown Proceedings Act*. The question has been whether, after that date, a claim for damages may be brought against the Crown for injury arising from wrongs by employees, agents or representatives of the Crown committed before that date.

[28] This Court addressed the question in *Davies v. British Columbia*, 1999 BCCA 210, (*sub nom*. *B. (K.L.) v. British Columbia*) 64 B.C.L.R. (3d) 23, leave to appeal ref'd [1999] S.C.C.A. No. 259 [*B. (K.L.)*]. The action in *B. (K.L.)* was for negligence and breach of fiduciary duty, said to have taken the form of physical and sexual abuse occurring—with one exception—prior to August 1, 1974, while the plaintiffs were in foster care as wards of the Superintendent of Child Welfare. The statement of defence pleaded "the Queen says that no claims against her in tort or equity are actionable for events which occurred prior to [August 1, 1974]". The Supreme Court of British Columbia ordered three points of law set down for hearing. As taken from para. 9 of *B. (K.L.)* they were:

1. Is section 17 of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86 and the *Crown Procedure Act*, R.S.B.C. [1960], c. 89 an absolute bar to the plaintiffs' claims in negligence for damages suffered as a result of incidents prior to August 1, 1974?

2. Is section 17 of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86 and the *Crown Procedure Act*, R.S.B.C. [1960], c. 89 an absolute bar to the plaintiffs' claims for breach of fiduciary duty arising from incidents prior to August 1, 1974?

3. If so, is section 17 of the *Crown Proceeding Act* invalid as infringing either section 7 or section 15 of the *Charter of Rights and Freedoms*?

[29] The chambers judge determined that s. 17 of the *Crown Proceeding Act* was not an absolute bar to the claims in negligence and for breach of fiduciary duty arising from incidents prior to August 1, 1974.

[30] On appeal this Court held the cause of action accrued when the plaintiffs discovered the necessary connection between their injuries and the wrong done to them, a date after August 1, 1974 (the “discoverability rule”). In his reasons for judgment for the majority, Mr. Justice Esson declined to decide whether, prior to August 1, 1974, the plaintiffs would have had a right to pursue an action against the Crown for breach of fiduciary duty. He said in para. 34:

> Nor is it necessary to decide whether the chambers judge erred in deciding that before 1 August 1974 the plaintiffs would have had a right to pursue against the Crown an action for breach of fiduciary duty. That conclusion rests on a very few cases, the earliest being *Pawlett v. The Attorney General* (1668), Hardres 465, 145 E.R. 550 (Ex.), which indicates that the Court of Chancery would in some circumstances make an order against the Crown without a petition of right having been sought and a fiat issued. The instances in which any such power was exercised appear from the cases to have been narrowly limited and, as counsel for the Crown submits, seem to have [been] limited to orders ancillary to and in aid of a common-law right. None of the cases to which we were referred indicate that such a power was ever exercised to grant pecuniary relief in any situation remotely like that on which these actions are based. However, as the issue is now academic in every sense and unlikely to arise again, I prefer to go no further than to express my doubts that the judge's conclusion was right.

[31] In her dissenting opinion, Madam Justice Ryan concluded that the “discoverability rule” did not apply to make actions that occurred prior to August 1, 1974, actionable and that all claims advanced by the plaintiffs were barred by Crown immunity. She said in relation to claims for breach of fiduciary duty:

> [78] In *Haymour* [*Holdings Ltd. v. British Columbia* (1984), 59 B.C.L.R. 249 (C.A.)], the plaintiff company obtained a petition of right claiming that a conveyance of property to the Crown was void. The plaintiff then applied for, and received, an order in chambers to add Mr. Haymour as a personal plaintiff and a number of new causes of action including negligence and breach of fiduciary duty. In allowing the appeal from that order this Court concluded at p. 254:

> In this case we have an attempt not only to add new causes of action without a new fiat but, using procedural rules, to add causes of action for which a fiat could not have been granted.
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> …
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> [80] This reasoning excludes the notion that the plaintiff had an independent right to proceed against the Crown for breach of fiduciary duty without a fiat and petition of right. What lies behind the *Haymour* case is what had long been understood to be the law of this province, that any action which directly affected the estate of the Crown could only proceed by way of petition of right. This ancient proposition was clearly stated by Farwell L.J. in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), at p. 421:
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> > It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because *the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown*, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side ... could and did make declarations and orders which did affect the rights of the Crown.
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> [81] In my view the *Haymour* case embodies the law in this province on the subject. A petition of right could not be obtained for breach of fiduciary duty, and without a petition of right the respondents were not entitled to proceed against the Crown.

[32] The case of *Arishenkoff v. British Columbia* then came along. The plaintiffs were children of the Sons of Freedom sect of the Doukhobor religion who had been apprehended and confined for a period of time at New Denver, British Columbia. Their claims were for false imprisonment and maltreatment. The causes of action included breach of fiduciary duty, breach of trust and negligence. Before the trial commenced, Madam Justice Kirkpatrick, in reasons for judgment indexed as 2002 BCSC 488, 1 B.C.L.R. (4th) 368, determined one of the plaintiffs, Mr. Poznikoff, the "test" plaintiff for the Crown's application for summary dismissal, was not subjected to misconduct of a sexual nature so as to attract the exception in s. 3(4)(k) of the *Limitation Act*, R.S.B.C. 1996, c. 266, to the ultimate limitation period set out in s. 8.

[33] The parties then appeared again before Madam Justice Kirkpatrick: 2002 BCSC 951, 4 B.C.L.R. (4th) 58. The issues before her were three: whether the Crown could be held liable for a tort alleged to have been committed before the *Crown Proceedings Act* came into force; whether Mr. Poznikoff's claim for the tort of false imprisonment was statute barred as being outside the ultimate limitation period set out in s. 8 of the *Limitation* Act; and whether s. 3(4)(k) of the *Limitation Act* violates s. 15 of the *Charter of Rights and Freedoms* by providing a benefit to persons disabled by childhood sexual assault while denying that benefit to those disabled by other forms of childhood abuse.

[34] Madam Justice Kirkpatrick struck Mr. Poznikoff's claim as being out of time. Applying *B. (K.L.)*, she held an action could be brought for events prior to August 1, 1974, only in the event the "discoverability rule" brought the cause of action forward to a date after August 1, 1974. She further held s. 8 of the *Limitation Act* operated to bar Mr. Poznikoff's claim and s. 3(4)(k) of the *Limitation Act*

did not violate s. 15 of the *Charter*. Mr. Poznikoff appealed the order dismissing his claim and the order dismissing his s. 15 *Charter* challenge to s. 3(4)(k) of the *Limitation Act*. The Province cross appealed the order that it could be held liable for sexual assault that occurred prior to August 1, 1974.

[35] In *Arishenkoff v. British Columbia*, 2004 BCCA 299, 30 B.C.L.R. (4th) 1 [*Arishenkoff No. 1*], this Court held all the causes of action pleaded by Mr. Poznikoff were barred by the *Limitation Act* and held s. 3(4)(k) of that *Act* did not infringe s. 15 of the *Charter*. The Court dismissed the cross appeal as hypothetical, given the disposition of the appeal. However, in the course of her discussion, Madam Justice Newbury, writing for the court, addressed the substance of the cross appeal in some detail, including the correctness of *B. (K.L.),* expressing, in *obiter dicta*, an apparent preference for the view expressed by Madam Justice Ryan in dissent in *B. (K.L.)*.

[36] While the cross appeal was hypothetical for the test plaintiff Mr. Poznikoff, it was not hypothetical for other plaintiffs who alleged sexual misconduct in the nature of torts or breach of fiduciary duty. For that reason the dismissal of the cross appeal was set aside and the cross appeal was heard by a five justice division of this Court. In *per curiam* reasons for judgment in *Arishenkoff No. 2*, this Court allowed the cross appeal and dismissed the action on the basis Crown immunity precluded the action in respect of events that occurred prior to August 1, 1974. In reaching that conclusion, this Court held that *B. (K.L.)* was wrongly decided, observing at para. 26:

> The difficulty which it causes is twofold: it adopts the analysis of Shaw J. in *Botting v. British Columbia* (1996), 27 B.C.L.R. (3d) 106 (S.C.) as to the origins of Crown immunity from actions in tort and founds part of its reasoning on its rejection of the submissions of the Crown which were themselves off the mark and from which before us it has resiled.

[37] This Court then addressed the issue afresh, holding the Crown cannot be held liable for a tort alleged to have been committed by a servant or agent of the Crown before the *Crown Proceedings Act* came into force on August 1, 1974:

> [47] The true issue is: Upon the true construction of the *Crown Proceedings Act*, S.B.C. 1974, c. 24, did the Legislature of British Columbia intend to enable, empower, or whatever verb one chooses, a person injured before the 1st August, 1974, by a tort of a servant of the Crown to recover from the Crown, by invoking the doctrine of *respondeat superio*r, redress for the damage thus inflicted?
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> [48] In other words, did the Legislature intend to abrogate, for wrongs committed by a servant of the Crown before the proclamation of the *Act*, the commonly understood doctrine, whatever lay at the root of it, that no cause of action, even with a fiat, would lie against the Crown for the wrongs of its servants? The proposition has been put forward that what underlay it was purely a matter of “procedure” – the Sovereign could not be impleaded in Her own courts save with Her own fiat. That was so, but there was more to the whole business than a mere matter of “procedure”. In our opinion, there is no warrant in the past for importing into this area of constitutional law modern distinctions between propositions of law which are “procedural” and propositions of law which are “substantive”. In the relationship of the Sovereign to the subject, all was inextricably intertwined.
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> …

> [55] In our opinion, there is simply nothing in this statute to lead to the conclusion that the Legislature intended that the Crown should be liable under the doctrine of *respondeat superior* for causes of action which had arisen against its servants before 1st August, 1974.

[38] On this appeal the appellants contend *Arishenkoff No. 2* did not decide that a claim for breach of fiduciary duty committed prior to August 1, 1974, cannot be advanced. They say the reasons for judgment in *Arishenkoff No. 2* only address claims in tort against the Crown, which the Court found are caught by the common law rule of Crown immunity that applied to acts done prior to August 1, 1974. They say the old petition of right procedure, expressed in the *Petitions of Right Act, 1860* (U.K.), 23 & 24 Vict., c. 34, enacted for British Columbia as the *Petitions of Right and Crown Procedure Act*, S.B.C. 1873, c. 19, and modernized in the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, only established a mechanism for bringing a petition of right and did not extend the procedure to claims in tort or claims based on the doctrine of *respondeat superior* for a tort committed by a Crown servant. The appellants say *Arishenkoff No. 2* stands for the proposition only that the *Crown Proceedings Act* does not make actionable in British Columbia that which, prior to its enactment, was not actionable before, and, as torts were not actionable prior to that date, the rule of Crown immunity discussed in *Arishenkoff No. 2* applies only to wrongs at common law. Any discussion in *Arishenkoff* of the maxim "the King can do no wrong" must be read, they say, in that context.

[39] A claim in equity, the appellants contend, in contrast could always be brought and so is not affected by the legislation or *Arishenkoff No. 2*. They refer to the recent development of breach of fiduciary duty as a distinct cause of action to supplement the common law causes of action, noting *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, *A. (C.) v. C. (J.W.)* (1998), 60 B.C.L.R. (3d) 92, (*sub nom. A.(C.) v. Critchley*) 166 D.L.R. (4th) 475 (C.A.), and *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403.

[40] This development, they say, builds on the long standing jurisdiction of courts to grant equitable relief against the Crown demonstrated, for example, in *Esquimalt and Nanaimo Railway Company v. Wilson* (1919), [1920] A.C. 358, 50 D.L.R. 371 (P.C.), *Pawlett v. Attorney-General* (1668), Hardr. 465, 145 E.R. 550 (Exch.), and *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.).

[41] The appellants say the lack of example of cases in which damages were sought for breach of fiduciary duty before August 1, 1974, does not reflect upon the application of Crown immunity, but rather upon the fact such a claim in equity was largely unknown against the Crown prior to *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, and largely unknown in any context except express trusts until *Nocton v. Lord Ashburton*, [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (H.L.). They observe that Mr. Justice Esson did not decide the issue in *B. (K.L.)* because of his view of the "discoverability rule" and that this Court in *Arishenkoff No. 2*, therefore, made no comment on the issue.

[42] In full and subtle submissions the appellants contend *Haymour Holdings Ltd. v. British Columbia* (1984), 59 B.C.L.R. 249 (C.A.), the case relied upon by Madam Justice Ryan in dissent in *B. (K.L.)*, and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50, support the proposition that a cause of action for breach of fiduciary duty could be brought against the Crown for pre-August 1, 1974, wrongs.

[43] Notwithstanding these intricate submissions, I am satisfied this Court is bound by *Arishenkoff No. 2* and Madam Justice Satanove was correct in concluding she was bound to apply it in respect to

all the claims before her. I acknowledge at the outset that the submissions made here by the plaintiffs on the ability of a claimant to sue for damages for breach of fiduciary duty, based on *Esquimalt and Nanaimo Railway Company v. Wilson*, *Pawlett v. Attorney-General* and *Dyson v. Attorney-General* were not advanced in *Arishenkoff No. 2.* While *Arishenkoff No. 1* describes the causes of action pleaded, and it is clear they parallel the pleadings in this case, the submissions of counsel and the Court in *Arishenkoff No. 2* did not single out the claim in equity for discussion from the discussion of the viability of claims for tortious acts committed prior to August 1, 1974.

[44] Nonetheless I am persuaded the claim is indistinguishable from the claim in *Arishenkoff No. 2*, and, as in that case, the claims pre-dating August 1, 1974, cannot be advanced.

[45] I have reached this conclusion on looking at the substance of the issue discussed in *Arishenkoff No. 2*, considering the views expressed by members of this Court in *B. (K.L.)*, and looking at the narrow scope of proceedings, including in equity, allowed against the Crown prior to the date on which the *Crown Proceedings Act* came into force.

[46] The issue in *Arishenkoff No. 2* was framed as a discussion in tort. There is, however, in my view, no reason to construe it so narrowly. The question was whether the plaintiffs could advance a claim, absent the damper of Crown immunity, for actions not caught by the ultimate limitation period in s. 8 of the *Limitation Act* because they were excepted by s. 3(4)(k). That section, although perhaps colloquially referred to as an exception for sexual assaults, applies to "misconduct of a sexual nature". This language would include claims for both sexual assault and breach of fiduciary duty where the breach is said to be sexual misconduct. Section 3(4)(k) provides:

> (4) The following actions are not governed by a limitation period and may be brought at any time:
>
> …
>
> (k) for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,
>
> (i) where the misconduct occurred while the person was a minor, and
>
> (ii) whether or not the person's right to bring the action was at any time governed by a limitation period;

[47] In my view, understood correctly, *Arishenkoff No. 2* addressed claims more broadly framed than simply tortious behaviour. This is demonstrated by the Court's consideration of *Tobin v. The Queen* (1864), 16 C.B. (N.S.) 310, 143 E.R. 1148, and *Feather v. The Queen* (1865), 6 B. & S. 257, 122 E.R. 1191. Those cases, as said in *Arishenkoff No. 2*, establish the court's acceptance of the principle "the King can do no wrong" such that a claim to recover damages said to be caused by wrongful conduct of the Crown committed prior to August 1, 1974, cannot be maintained.

[48] Even in *B. (K.L.)* the proposition advanced by the appellants was not accepted. Both the majority and dissenting reasons for judgment in *B. (K.L.)* support the view a claim for damages for breach of fiduciary duty before August 1, 1974, cannot proceed. In his para. 34, replicated above (para. 30), Mr. Justice Esson, without deciding, expressed his doubt as to the proposition, and Madam Justice Ryan in her paras. 78-81, replicated above (para. 31), held the claim could not proceed, concluding at para. 81:

> A petition of right could not be obtained for breach of fiduciary duty, and without a

petition of right the respondents were not entitled to proceed against the Crown.

[49] Nor, in my view, do the authorities cited by the appellants support the proposition a claim could lie in equity against the Crown for damages, prior to the enactment of Crown proceedings legislation. While there was in England a limited class of cases in which the courts of equity permitted an action for a declaration for legal title, as shown by *Hodge v. Attorney-General* (1839), 3 Y. & C. Ex. 343, 160 E.R. 734 (Exch.), and *Pawlett v. Attorney-General*, these cases did not provide a direct remedy against the estate of the Crown. In *Esquimalt and Nanaimo Railway Company v. Wilson* the Privy Council, at 365-66, recognized the possibility that the Crown could be brought before the Court of Chancery, citing as example *Pawlett v. Attorney-General*. However, in none of the cases cited was an order made requiring the Crown to transfer property to a party, and even in *Esquimalt and Nanaimo Railway Company v. Wilson*, the order contemplated was only declaratory of rights the Crown may have. The method by which such a declaration is obtained is by joining the Attorney General as a party, but of course no order for transfer of property could be made against the Attorney General, who stands only as a proxy for the Crown. This is consistent with the statement in *Hodge v. Attorney-General* at 346:

> I think the only decree which can be made in this case is for the Court to declare that the plaintiffs are equitable mortgagees of the property in respect of their lien, and to direct the Master to take an account of what is due to the plaintiffs on account of their lien, and then to decree that the plaintiffs shall hold possession of the property in question until their lien be satisfied. I do not think that I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the Crown; and I do not know any process by which this Court can compel the Crown to convey that legal estate. In the case before Lord Langdale the legal estate was not in the Crown; and there the Court directed a sale because it had jurisdiction over those who had the legal estate, and therefore could carry the sale into effect. In that case the Crown had only [an] equitable interest, and the difficulty which exists in the present case did not arise.

[50] The appellants rely upon *Dyson v. Attorney-General.* However, I do not read the speeches of that case as contemplating a direct order against the estate of the Crown. Although the appellants refer to the words of Cozens-Hardy M.R. at 417 “[t]he Court is not bound to make a mere declaratory judgment” as authority supporting the availability of other equitable remedies without a petition of right, I consider the reference is more correctly read as having the emphasis upon the word “bound”, that is, the court has discretion whether to make a mere declaratory judgment or not. In this I would give weight to the words of Farwell L.J. at 421:

> It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side (see *Deare v. Attorney-General*), could and did make declarations and orders which did affect the rights of the Crown.
>
> [Footnotes omitted]

[51] As Madam Justice Ryan at para. 82 recognized in *B. (K.L.)*, *Dyson v. Attorney-General* is not authority for the proposition that one could bring an action which directly affected the estate of the

Crown without a petition of right. She said:

> In the case at bar the respondents seek damages for breach of fiduciary duty. Such a claim directly affects the estate of the Crown and thus cannot be taken independently of the requirement for a grant of a fiat and petition of right.

[52] In *The King v. Central Railway Signal Co. Inc.*, [1933] S.C.R. 555, [1933] 4 D.L.R. 737, Chief Justice Duff described the principle thus at 563:

> Apart, however, from such remedies as the subject has by way of petition of right and in some special cases by statute, the rule is a rigorous one that His Majesty cannot be impleaded in any of His courts and this rule is just as rigorous in the case of an action *in rem* in which the proceeding is against some property belonging to His Majesty ([*Young v. The SS. "Scotia"*, [1903] A.G. 501 (P.C.)]). It is true that under modern procedure in certain cases a proceeding may be taken for a declaration of right by a subject against the Attorney General and in other cases where the interests of the Crown appear to be involved in litigation the Attorney General may be made a party (*Dyson v. Attorney General*; *E. & N. Rly. Co. v. Wilson*); but the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against any of His Majesty's property is competent in any of His Majesty's courts.
>
> [Emphasis added, footnotes omitted]

[53] In *The King v. Bradley*, [1941] S.C.R. 270, [1941] 2 D.L.R. 737, the Supreme Court of Canada confirmed that an action for a declaration, which could be brought against the Attorney General, was different from an action for property (money) of the Crown which could only be brought by petition of right. Again in *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1, the Supreme Court of Canada affirmed reasons of this Court distinguishing between an action for a declaration and an action for a claim against the interests of the Crown, as to which the petition of right procedure applied.

[54] The proposition advanced by the appellants, in any event, is contrary to the decision of this Court in *Haymour Holdings Ltd.*, to which Madam Justice Ryan referred in *B. (K.L.)*. Mr. Haymour had submitted a petition of right seeking a declaration that a conveyance of Rattesnake Island in Lake Okanagan was null and void. A chambers judge granted an amendment to the petition to include claims for damages for various torts and breach of fiduciary duty for actions that occurred prior to August 1, 1974. This Court allowed the appeal and struck the amendments on the basis such claims could not have been pursued by the petition of right procedure, saying at 254:

> In this case we have an attempt not only to add new causes of action without a new fiat but, using procedural rules, to add causes of action for which a fiat could not have been granted.

In saying this, this Court did not distinguish between the proposed claim in tort and the proposed claim in equity. I take the observation to be authority against the appellants' claim in this case.

[55] The appellants refer to *British Columbia Power Corporation, Limited v. British Columbia Electric Company Limited*, [1962] S.C.R. 642, 34 D.L.R. (2d) 196, *Wigg v. Attorney-General for the*

Irish Free State, [1927] A.C. 674 (P.C.), and *Cloud v. Canada (Attorney General)*, for the proposition that the jurisdiction to grant equitable relief in the nature of damages, against the Crown, without a fiat, is well-established.

[56] These cases, in my view, do not establish the proposition advanced by the appellants. *British Columbia Power Corporation, Limited* is a case involving the assets of a Crown corporation, affirming the jurisdiction of the Supreme Court of British Columbia to appoint a receiver to preserve those assets pending determination of the constitutionality of legislation assigning those assets to the Crown Corporation. As such, it does not advance the proposition that a court could always, without regard to the principle of Crown immunity, award equitable damages against the Crown.

[57] *Wigg v. Attorney-General for the Irish Free State*, likewise, does not advance the case. The issue in *Wigg* did not concern a claim in equity for damages, but rather a declaration as to entitlement to retirement benefits under statutes passed bridging employment by the Crown and employment by the Irish Free State. In other words, the case does not address a remedy for a wrong in equity committed by agents, employees or representatives of the Crown.

[58] *Cloud*, it may be said, on its face permits a claim in damages for breach of fiduciary duty committed before the passage of the federal legislation analogous to our *Crown Proceedings Act*.

[59] The claim, brought as a class proceeding in Ontario, is for damages for torts and breach of fiduciary duty in respect of acts committed against former students and families of former students at the Mohawk Institute Residential School. In dissenting reasons preferred by the Ontario Court of Appeal, Justice Cullity of the Divisional Court, in reasons indexed as (2003), 65 O.R. (3d) 492, 41 C.P.C. (5th) 226, addressed the relationship between actions allowed under the *Exchequer Court Act*, R.S.C. 1952, c. 98, and the transitional provisions of the *Crown Liability Act*, S.C. 1952-1953, c. 30. He held there was no limitation relating to the date on which claims could be brought for vicarious liability of the Crown for breach of fiduciary duty. He said:

> [5] In my opinion, no such limitation would apply to the claims against the Crown for breach of fiduciary duty. These were claims in equity that were not affected by the provisions of the *Crown Liability Act,* 1953, and which might have been brought in the Exchequer Court before, or after, May 14, 1953, under the provisions of the *Exchequer Court Act*. As I have indicated, I do not believe that the concurrent jurisdiction of this court is excluded by s. 24(1) of the 1953 Act with respect to the earlier claims simply because that jurisdiction was conferred by an amendment to the *Crown Liability and Proceedings Act* that came into force in 1992.

[60] *Cloud* was decided before *Arishenkoff No. 2*, and does not address the proposition advanced here by the Province: that the court lacked jurisdiction before passage of the *Crown Proceedings Act* (or its analogous federal legislation) to entertain an action in damages for wrongs in equity committed by representatives of the Crown, and I would not follow it on this point.

[61] Nor, in my view, do the broad principles expressed in *Guerin* permit the action for damages to proceed. While *Guerin* clearly affirmed the broad reach of equity, the claim was brought in respect to a wrong done in the late 1950s, after abolition of Crown immunity in respect to federal matters in 1953.

[62] In short, the cases relied upon by the appellants do not address the essential question: was

a claim in equity for damages for equitable wrongs one which was known to the courts of equity prior to August 1, 1974, as the appellants contend?

[63] I see no evidence in any of the authorities with which we were presented to this effect, and much authority against it. Apart from the threads of the submissions I have already noted, one need only return to *Feather v. The Queen* and *Tobin v. The Queen*, both mentioned in *Arishenkoff No. 2*, to confirm that damages for misconduct arising prior to August 1, 1974, whether framed in tort or breach of fiduciary duty, as that cause of action has been enlarged by modern jurisprudence, are not available, and the *obiter dictum* of Mr. Justice Esson in *B. (K.L.)* is accurate. For example, in *Tobin v. The Queen* at 353-55 Erle, C.J. said:

> The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command. … To the same effect is 3 Bl. Comm. 246,—"The King can do no wrong; which antient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things,— first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people; for, this doctrine would destroy the constitutional independence of the Crown,— and, secondly, that the prerogative of the Crown extends not to do any injury."

And at 359:

> The authorities are abundant; and we refer to them as establishing strongly the negative proposition that a petition of right does not lie to recover damages from the King for a mere wrong supposed to have been done by him. Not a single instance of a recovery of such damages from the King has been cited.

[64] I conclude, for these reasons, a claim for damages for breach of fiduciary duty is blocked by Crown immunity in the same way as an action for damages in tort, and it is, as Madam Justice Satanove found, plain and obvious the claim cannot succeed.

[65] The appellants urge this Court, in the alternative, to modify the law of Crown immunity to permit their claim for damages for breach of fiduciary to proceed.

[66] In my view this would not be an appropriate step for this Court to take. The rule of Crown immunity has been abolished by the *Crown Proceedings Act*. *Arishenkoff No. 2* interpreted that *Act* as having prospective effect only. The invitation to change the terms by which the Legislature, the reformer of this law, has abolished the rule of Crown immunity is not one we should accept, and I would adopt the caution described in *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 760-61, 61 D.L.R (4th) 577.

[67] Last, as a further alternative, the appellants seek an order permitting them to amend their pleadings to allow a declaration as to damages for breach of fiduciary duty. I would not accede to this application for two reasons. First, and procedurally, the appellants advance this possibility only

now. It is a proposal that should be sought first in the trial court that has conduct of its own processes.

[68] Second, the Attorney General, against whom a declaration would be sought, is not a party to the action. In my view the suggestion confuses the role of the Attorney General in an action for a declaration, with the real target of the action, the respondent in this appeal.

[69] It follows I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Low"

I AGREE:

"The Honourable Madam Justice Neilson"