IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Richard v. HMTQ,***
2008 BCSC 254

Date: 20080229
Docket: S024338
Registry: Vancouver

***Brought under the Class Proceedings Act,* R.S.B.C. 1996, c. 50**

Between:

William Joseph Richard and W.H.M.

Plaintiffs/Respondents

And

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

Defendant/Applicant

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiffs/Respondents: David Klein
Shauna Tucker

Counsel for the Defendant/Applicant: Karen Horsman
D. Clifton Prowse
A. Lieberman

Counsel for the Public Guardian and Trustee: Alison L. Murray

Date and Place of Hearing: February 21 and 22, 2008
Vancouver, B.C.

[1] The Defendant seeks the amendment of the Certification Order made by Justice Morrison on March 17, 2005 in this matter. The amendment sought to be made is underlined below:

2. The Class is hereby defined as

All persons resident in British Columbia, who were confined to the provincial institution more recently known as Woodlands School on or after August 1, 1974, 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 common issues for the Class are hereby defined as:

(i) 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 emotional and/or psychological nature by employees, agents or other persons similarly confined in the institution?

[2] The plaintiffs oppose the motion on two grounds:

1. An application by the plaintiffs' former solicitors for exactly the same relief had already been heard and dismissed by Justice Butler on July 23, 2007. The defendant was a party to that application and attended the hearing. The plaintiffs submit that the defendant should not be permitted to re-litigate the issue.

2. It is not plain and obvious that the plaintiffs who were Woodlands residents prior to August 1, 1974 do not have a cause of action in equity. The plaintiffs submit that their claim for breach of fiduciary duty is not affected by the ***Crown Proceeding Act*** or the decision of the B.C. Court of Appeal in ***Arishenkoff v. British Columbia***, 2005 BCCA 481 ("***Arishenkoff No. 2"***).

[3] This litigation has had a tortuous history. The action was commenced on August 2, 2002 by the law firm of Poyner Baxter on behalf of persons who were resident at Woodlands School in New Westminster, British Columbia. Woodlands School was a residential facility operated by the defendant for disabled children. The plaintiffs allege in their Statement of Claim that there was sexual, physical and psychological abuse at the institution and they seek general, aggravated, punitive and special damages and compensation for breach of fiduciary duty.

[4] The defendant filed a Statement of Defence on October 18, 2002 asserting, amongst other things, Crown immunity from tort actions prior to August 1, 1974.

[5] The action was certified as a Class Proceeding by Madam Justice Morrison on March

17, 2005. At that point in time the defendant conceded that the pleadings disclosed a cause of action for all Class members. On October 6, 2005 the Court of Appeal released its decision in ***Arishenkoff No. 2***. That case involved an action against the Province for general, aggravated, punitive and special damages arising out of breach of fiduciary duty, breach of trust, negligence and failure of the defendant to fulfill its non-delegable duty, or duty of special diligence, to the plaintiffs who were Doukhobor children confined at a residential facility operated by the defendant.

[6] In the case at bar, a tentative settlement was reached between plaintiffs with claims arising after 1974 and the defendant, but a goodly portion of the class was relying on claims that arose before 1974. Poyner Baxter took the position that as a result of ***Arishenkoff No. 2***, the plaintiffs' claims arising before 1974 were barred by Crown immunity.

[7] In June 2007 the parties appeared before Mr. Justice Butler on two applications. The first was brought by the representative plaintiff, William McArthur, for an order that Poyner Baxter be removed as counsel for the plaintiffs for conflict of interest. Poyner Baxter opposed that motion and filed an application as Class counsel on behalf of the entire Class for orders that:

> a. the Certification Order be amended by amending the Class definition to include only claims arising after August 1, 1974 and by removing Mr. McArthur as a representative plaintiff;
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> b. a hearing be scheduled for the purpose of reviewing and either approving or rejecting a proposed settlement agreement which had been negotiated between the parties; and
>
> c. in the alternative, renewed consideration be given to creating two sub-classes of claimants.

[8] In reasons reported at ***Richard v. HMTQ***, 2007 BCSC 1107, Mr. Justice Butler found that Poyner Baxter was in a conflict of interest as it had breached its duty of loyalty to Mr. McArthur, ignored his interests and must be removed as Class counsel. Mr. Justice Butler refused to deal with the issue of the proposed settlement agreement because he said the argument was not before him, and he could not make any findings as to whether it was beneficial to the Class members. He went on to state that if he were to order the amendment of the Class definition (which was the same amendment being sought in the present application before me), he would be allowing Poyner Baxter to usurp the role of Class representative. Justice Butler stated at para. 50:

> In the circumstances, the only possible order is to remove it [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] Thus, Justice Butler dismissed both the application to amend the Class definition and to remove Mr. McArthur as representative plaintiff.

[10] Poyner Baxter has been granted leave to appeal the order removing it as counsel for the Class: ***Richard v. W.H.M., 2007 BCCA 570***. There has been no appeal of the order dismissing

the application to amend the Class definition. However, the defendant has now applied to the Court of Appeal to be added as an appellant to the Poyner Baxter appeal. It is unknown at this time whether the defendant will be granted such status, or whether the Court of Appeal will deal with Justice Butler's dismissal of the application to amend the class definition.

[11] Not surprisingly, the plaintiffs oppose the defendant's application before me on the basis of issue of 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:

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.

[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.

[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.

[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.

[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.

[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.

[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.

[19] The question that the Court of Appeal decided in ***Arishenkoff No. 2*** is set out in paragraph 48 of that judgment:

> … 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.

[22] In conclusion, I will allow the defendant's application and I will amend the Class definition as set out in the defendant's Notice of Motion. However, I will consider submissions regarding a stay of execution of my judgment until such time as the matter has been heard by the Court of Appeal or the parties otherwise agree.

"The Honourable Madam Justice Satanove"