

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richard v. British Columbia*,
2012 BCSC 1464

Date: 20121003
Docket: S024338
Registry: Vancouver

Between:

William Joseph Richard and W.H.M.

Plaintiffs

And

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

Defendant

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

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

Counsel for the Plaintiffs:

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Douglas J. Lennox

Counsel for the Defendant:

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Counsel for the Public Guardian and
Trustee of British Columbia:

Alison L. Murray, QC

Place and Date of Hearing:

Vancouver, B.C.
August 2, 2012

Place and Date of Judgment:

Vancouver, B.C.
October 3, 2012

I

[1] These proceedings under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, involve claims arising out of the Class Members' residency at the Woodlands School in New Westminster, B.C.

[2] This Court approved the settlement of the action in reasons indexed as 2010 BCSC 773. Those reasons fully set out the background to the litigation.

[3] The Settlement Agreement provides that:

1. Class members or their legal representative will have 12 months from the first date of publication of notice of court approval of this settlement to submit a written claim for compensation in a form to be agreed by the parties (the "Claim").

[4] The initial 12-month claims period expired on 19 September 2011. In reasons indexed as 2011 BCSC 1410, I extended that deadline until 19 September 2012. Class counsel now brings application for a further extension to 19 September 2013.

[5] The defendant seeks an order for class management of the claims process, "including direction to class counsel to file 100 claims by September 19, 2012 and the remainder no later than March 19, 2013".

II

[6] The evidence on this application makes it clear that the claims process is much more complicated and time consuming than the parties apparently considered in the negotiation and finalization of the Settlement Agreement.

[7] Class counsel has been retained by 809 Class Members to advance claims. Another 24 Class Members have been identified as potential claimants.

[8] To date, only a handful of claims have been filed. Of these, nine so-called "precedential" claims have been decided by the Adjudicators in decisions published on 31 May and 1 June 2012 (the "Precedents"). These claims took much longer to adjudicate and required much more by way of an evidentiary record than was ever

expected by the parties. A brief illustration of the difficulties facing the parties follows.

[9] Section 2 of the Settlement Agreement provides for three distinct types of claim:

2. In order to be eligible for compensation, the claim must establish one or more of the following requirements:
 - a. The class member was the subject of misconduct of a sexual nature by a Woodlands employee, volunteer or, subject to paragraph 3, resident;
 - b. The class member was the subject of misconduct of a physical or psychological nature by a Woodlands staff member or volunteer;
 - c. The class member suffered physical or psychological injury reasonably attributable to negligence in the operations or management of Woodlands, where such injury is more than *de minimis* or trivial.

[10] The Precedents clarify that claims for misconduct under sections 2(a) and 2(b) of the Settlement Agreement are “event based” and that once the described misconduct is proven, the claimant is eligible for compensation without proof of any resulting damage or loss. But claims under section 2(c) target injuries reasonably attributable to “negligence in the operation or management of Woodlands”.

[11] Many of these latter claims cover allegations of medical malpractice and require the production of an extensive evidentiary record in the view of class counsel. Class counsel describes the record in seven of the precedential claims:

In none of its responses filed to date has the Defendant suggested any amount of money owing to any class members. They have fully disputed each claim, stating that the amount payable in each claim was \$0. The Defendant has fully litigated each claim, and appears to have significantly outspent Claimants Counsel on the claims litigated to date. The raw data on the seven claims tells the tale. The number of pages of material submitted on this initial batch of claims varied from 1,418 pages (WCA-002) to 4,263 pages (WCA-004). The total volume of material submitted on these seven claims was 19,046 pages. This included 20 affidavits and 23 expert reports submitted by the Claimants, and 22 affidavits and 43 expert reports submitted by the Defendant. It also included 361 pages of written argument by the Claimants and 675 pages of written argument by the Defendant.

[12] Such an extensive claims process was hardly contemplated by the Settlement Agreement. It appends a “Woodlands Class Action Settlement Claim Form” that clearly contemplates a fairly summary claims process. The timelines in the Settlement Agreement confirm this expectation:

- The Province is to file its response within 45 days; and
- The Adjudicator is to make best efforts to render a decision within 30 days of receipt of all materials and any oral hearing date, whichever is the later.

[13] The timelines were greatly exceeded in the case of the Precedents. Various reasons for the delays are advanced but it avails little to assign blame, if, indeed, there is any to assign.

[14] The challenges facing class counsel in preparing a claim are significant. Mr. Klein describes that process in his written submission:

The process for preparing a claim includes the following steps:

- (a) Interviewing the client or their representative to determine if they meet the criteria as a Class Member. In some cases it is also necessary seek further information from the Province to determine Class Membership.
- (b) Preparing a retainer package and introduction letter and mailing it to the potential client.
- (c) Answering questions the potential claimant or their representative may have upon receipt of the retainer and waiting for its return to our office.
- (d) Opening a physical and electronic file.
- (e) Converting the Woodlands resident file records from a Tagged Image File ("TIF") document into a Portable Document Format ("PDF") document.
- (f) Organizing and combining the converted medical records from separate Woodlands resident records into one electronic document and electronically filing the document into the client file.
- (g) Reviewing the Woodlands resident file records. Class Member files typically range from 300 to 2,000 pages and are not chronologically organized.
- (h) Reviewing Woodlands' internal administration documents for information relevant to the claim. At present there are approximately 42,680 such documents, comprising more than 85,000 pages.

- (i) Conducting an in-depth interview of the client where possible. Some clients have difficulty communicating. This is sometimes due to a client's intellectual and physical disabilities. This is also due to the anxiety and stress many feel in discussing their Woodlands experience. Interviews must, at times, be conducted over several sessions in order to establish rapport and to accommodate the client's varying needs.
- (j) Finding, contacting and interviewing potential witnesses such as family members, past and current caregivers. Some witnesses are no longer an active part of a client's life and finding them can prove difficult.
- (k) The interviews often result in new information that was not in the resident file, requiring the file to be re-reviewed to find supporting evidence of the new information.
- (l) Drafting affidavits for clients and other witnesses, and arranging for the affidavits to be sworn.
- (m) Retaining and instructing one or more experts. Often at least one expert is required to provide an opinion on the physical and psychological injuries. The expert report often takes 3 to 8 months to obtain as the experts must review the client's entire file and provide a detailed report while still maintain their regular practice. There are only a limited number of experts, and often files must wait for an expert to be available.
- (n) Preparing and submitting the claim form package.

[15] The Province takes the view that in light of the outcome in many of the precedential claims on standard of care issues, class counsel will face grave difficulties in advancing further claims based on allegations of malpractice. The Province submits (at paras. 45 and 46 of its submission):

- 45. The precedential decisions represent a near total loss for the claimants. The significance of this is that it is incumbent on class counsel to significantly pare down the remaining claims to those that are actually viable.
- 46. The Province does not accept, in light of the precedential decisions, that anywhere near 809 viable claims remain.

[16] This view founds the Province's position that many of the claims can now be advanced in the summary manner contemplated by the Settlement Agreement.

III

[17] I am satisfied that the claims process is much more complicated than the parties originally conceived. Whether the Precedents will expedite the preparation and resolution of the remaining claims remains to be seen.

[18] There is no disagreement between the parties as to the Court's jurisdiction to grant a blanket extension of the claims deadline. This is so notwithstanding the potential argument that such extensions ought only to be considered in individual cases under the Settlement Agreement.

[19] But the Province rightly points out that in granting the extension, the Court should not effectively deny it the benefit of certainty in the claims process for which it bargained; that is, the certainty that the claims deadline represents. This is especially so in the context of the uncapped settlement that we have here. I am very sensitive to this concern.

[20] However, in balancing the interests engaged in these proceedings I have concluded that the extension requested by class counsel to 19 September 2013 should be granted.

[21] I direct that the parties provide updates to the Court by way of judicial management conferences every three months commencing on a convenient date in this month.

[22] I hope that the Province's optimism on the guidance provided by the Precedents is warranted and that we realize some real economies in the claims process in the result.

[23] Without finding fault in either parties' conduct of the litigation to date, I make a number of further observations. I hope that the Province will do all in its power to reasonably expedite the claims process going forward. As well, I hope that class counsel will be guided by the Precedents in filtering the outstanding claims and that class counsel will continue to dedicate significant resources to the process. In this

regard, I ask that class counsel consider the possibility of involving another firm or firms in the process. In asking that this possibility be considered, I am in no way to be taken as criticizing the diligence and dedication of class counsel in advancing the claims to date. However, class counsel estimates that he can file claims only at the rate of four or five per month. That filing rate puts the viability of the Settlement Agreement at risk.

[24] It remains to appoint new Adjudicators under the Settlement Agreement and I ask for immediate submissions in this regard.

“Chief Justice Bauman”