IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Richard v. HMTQ,***
2007 BCSC 1107

Date: 20070723
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

Before: The Honourable Mr. Justice B. Butler

Reasons for Judgment

Counsel for the Plaintiff, W.J. Richard and Class Counsel	J.M. Poyner, K. Baxter
Counsel for the Plaintiff, W.H.M.	D. Klein, S. Tucker
Counsel for the Ministry of Attorney General	C. Prowse, W.K. Branch
Counsel for the Public Guardian and Trustee	A. Murray
Date and Place of Hearing:	June 7 & 8, 2007 Vancouver, B.C.

INTRODUCTION

[1] This action is brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. It was certified as a class proceeding by order of Madam Justice Morrison on March 17, 2005. At that time, William Mcarthur (W.H.M. in the style of cause) was appointed as the representative plaintiff. On June 20, 2003, Justice Morrison ordered that Poyner Baxter be given carriage of the action and that it be appointed lead counsel. The order was upheld by the B.C. Court of Appeal in ***Richard v. British Columbia***, 2004 BCCA 337. Since that order was made, Poyner Baxter has acted as lead counsel.

[2] In the proceedings before me, two competing motions were heard. The representative plaintiff, William Mcarthur, applied for an order that Poynter Baxter be removed as counsel for the plaintiffs. Poyner Baxter opposed that motion and filed an application, as class counsel on behalf of the 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;

(b) a hearing be scheduled “for the purpose of reviewing and either approving or rejecting a proposed settlement agreement which has been negotiated between the parties”; and

(c) in the alternative, “renewed consideration be given to creating two sub-classes” of claimants.

[3] The trial of this matter has been scheduled to commence on January 21, 2008 with an estimated length of twenty-seven weeks. The competing motions

before me have been brought to end an impasse that is described in some detail below.

BACKGROUND

[4] These competing motions have a similar goal: to resolve the issues that have prevented the action from proceeding towards settlement or trial. The impasse has arisen, in part, because of the decision of the B.C. Court of Appeal in ***Arishenkoff v. British Columbia***, 2005 BCCA 481. In that decision, the Court of Appeal ruled that the ***Crown Proceeding Act***, R.S.B.C. 1996, c. 89, does not have any retroactive effect and that the Crown cannot be held liable for a tort committed by a servant or agent of the Crown before the statute came into force on August 1, 1974.

[5] The ***Arishenkoff*** decision is relevant to this action because of the nature of the claims by the class. The class was defined in the Certification Order as follows:

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

[6] The class, as defined, includes members who allegedly suffered such abuse both before and after August 1, 1974.

[7] At about the same time that the ***Arishenkoff*** decision was handed down by the Court of Appeal, the defendant entered into settlement negotiations with Poyner Baxter and with counsel for the Public Guardian and Trustee. Counsel entered into those discussions on the basis that there would be a mutual undertaking to maintain

strict confidentiality with respect to the settlement discussions. This included keeping the content of the settlement discussions confidential from the representative plaintiff, Mr. Mcarthur.

[8] In early June 2006, when Mr. Mcarthur found out about the settlement discussions, he retained David Klein to provide independent legal advice to him regarding the class action. Poyner Baxter met with Mr. Mcarthur and Mr. Klein with the consent of counsel for the defendant and counsel for the Public Guardian and Trustee. Copies of the proposed settlement agreement were provided to Messrs. Klein and Mcarthur. Following consideration of the proposed settlement, Mr. Mcarthur instructed Poyner Baxter on July 28, 2006 to reject it.

[9] While the proposed settlement was not before me, there was considerable discussion by counsel as to whether or not it was beneficial for the class members. The positions taken by the parties regarding the proposed settlement were placed before me. Mr. Mcarthur wrote to Mr. Poyner on July 28, 2006 and set out in that letter his consideration of the benefits and disadvantages of the proposed settlement. He concluded by stating:

> This has been a very difficult and stressful decision for me especially since I cannot talk to anyone except the lawyers about the settlement and what is best for the class members. I know that you have been working very hard on the case. I feel strongly though that the right thing to do is to reject the settlement offer.

[10] Counsel for the Public Guardian and Trustee (“PGT”) made very limited submissions on the hearing of these applications. The Outline of the PGT states, in

part, "… the PGT remains of the view that the current proposed settlement is inadequate."

[11] The material before me on the applications included an affidavit of Gregory Schiller, the co-ordinator of the We Survived Woodlands Group. In his affidavit, Mr. Schiller states that, to his knowledge, "there is no support for the Settlement Agreement proposed by Poyner Baxter within the Woodlands Survivors community."

[12] On the other side, Mr. Poyner claims that the proposed settlement is very much in the best interests of the class members. He says that the second representative plaintiff, William Joseph Richard, supports the settlement and wishes to see it proceed, although no affidavit evidence from Mr. Richard was produced for these applications.

[13] As I advised counsel at the conclusion of the hearing of these applications, in spite of the considerable discussion as to whether or not the proposed settlement is beneficial to the class members, I cannot make any findings in that regard. The proposed settlement was not before me, nor was the issue as to whether or not the proposed settlement should be approved. In the circumstances, I cannot make findings in relation to the wisdom of the positions taken by the various parties and counsel, and it would be inappropriate for me to do so.

[14] It is evident that Mr. Mcarthur, on the one hand, is of the view that the proposed settlement should not be entered into. At the same time, Mr. Poyner is strongly of the view that the proposed settlement is in the best interests of the class

members. For the purpose of these applications, the significant fact is the strong divergence of opinion regarding the proposed settlement.

[15] After Mr. Mcarthur instructed Mr. Poyner to reject the proposed settlement on July 28, 2006, the following events occurred.

(a) On August 4, 2006, Poyner Baxter filed a motion, as class counsel on behalf of the plaintiffs, for an order that the Certification Order of March 17, 2005 be amended to provide:

(i) that W.H.M. be appointed as the representative plaintiff for the sub-class consisting of Woodlands residents who were abused at Woodlands **prior to, but not on or after, August 1, 1974**; and

(ii) that William Joseph Richard be appointed representative plaintiff for the sub-class of Woodlands residents who were abused at Woodlands on or after August 1, 1974.

(b) Madam Justice Morrison heard the applications and declined to order the creation of two sub-classes. On September 21, 2006, she ordered that Mr. Richard be appointed as a representative plaintiff along with Mr. Mcarthur. In making that order, she stated as follows at paras. 19-21:

> In my view, Mr. Mcarthur should remain as a representative plaintiff. From the evidence before me he appears to be fulfilling his obligations with integrity, sincerity and passion and he is concerned for all members.
>
> But Mr. Poyner is persuasive in his concerns that because Mr. Mcarthur suffered no abuse post-August 1, 1974, Mr. Mcarthur may ultimately be challenged on his qualifications as a representative plaintiff, that he may ultimately be found not to have a claim. That cannot be determined now, but Mr. Poyner would be remiss in his duties to the class if he did not ensure that there was a representative plaintiff who has a claim certain against the defendant. He seeks to have Mr. Richard appointed.

> There will be an order that Mr. Richard be appointed as a representative plaintiff along with Mr. Mcarthur in these proceedings. This does not mean that a sub-class has been created or sanctioned by the Court at this time. It would be premature, in my opinion, to create a sub-class at this point.

(c) On October 19, 2006, an application for leave to appeal from Madam Justice Morrison's order was filed by Poyner Baxter. This appeal was later abandoned.

(d) On November 14, 2006, Mr. Klein wrote Mr. Poyner on behalf of Mr. Mcarthur and requested that Poyner Baxter withdraw as counsel on the grounds that it had breached the duty of loyalty by filing the motion and the application for leave to appeal.

(e) On February 22, 2007, Mr. Mcarthur filed his motion in this Court to remove Poyner Baxter as counsel. This was in response to a motion filed by Poyner Baxter requesting a review of the proposed settlement agreement.

(f) On April 17, 2007, Poyner Baxter filed its motion for the relief as set out in paras. 2(a)-(c) of these reasons.

[16] The negotiations between the defendant and Poyner Baxter, on behalf of the class, ended in approximately June 2006, at which time the defendant stated it was not prepared to negotiate further. Given the difficulties that have arisen between class counsel and the representative plaintiff, nothing has been done to further advance a possible settlement. Given the approaching trial date, counsel acting on behalf of the plaintiffs will need to begin preparing for trial. This has not yet occurred, given the impasse.

ALLEGATIONS

[17] Mr. Mcarthur's application to remove counsel is based on allegations of conflict and a breach of the duty of loyalty. These allegations are based on the following circumstances:

(a) Poyner Baxter did not follow Mr. Mcarthur's instructions and did not advise the defendant that the proposed settlement was rejected;

(b) the application to create two sub-classes and remove Mr. Mcarthur as representative plaintiff of the post-August 1, 1974 sub-class was made without consultation with or instructions from Mr. Mcarthur, and was contrary to his wishes;

(c) the filing of leave to appeal the order of September 21, 2006 was made without consultation with or instructions from Mr. Mcarthur, and was contrary to his wishes;

(d) in the course of the applications prior to September 2006, Poyner Baxter filed the affidavit of Kenneth Baxter dated August 3, 2006, attaching documents, the intent of which was to show that Mr. Mcarthur "does not qualify as a Settlement Class Member under the terms of the proposed Settlement Agreement" and that he was not a resident of Woodlands after August 1, 1974. These steps were taken without consultation with or instructions from Mr. Mcarthur, and were contrary to his wishes;

(e) at the hearing of the applications in 2006, Poyner Baxter took the position that Mr. Mcarthur and any class members who suffered abuse at Woodlands prior to August 1, 1974 had no possible claim. This was done without consultation with or instructions from Mr. Mcarthur, and was contrary to his interests;

(f) the three alternative orders sought by Poyner Baxter in this application were brought without consultation with or instructions from Mr. Mcarthur, and are contrary to his wishes;

(g) the present motion to amend the class definition would have the effect of "decertifying" the action for all class members who were abused at Woodlands prior to August 1, 1974; and

(h) at the hearing of these applications, Poyner Baxter took the position that Mr. Mcarthur "has no right of action" (para. 16 of class counsel's submissions). This, clearly, is contrary to Mr. Mcarthur's interests.

[18] Mr. Poyner does not contest any of the above. He frankly admits that had he been acting for an individual client, the steps he has taken in this matter would certainly be contrary to provisions of the Professional Conduct Handbook. He says that when acting as class counsel in a class proceeding, other considerations must be taken into account. In particular, once an action has been certified under the ***Class Proceedings Act***, any steps taken by class counsel must be governed by class counsel's view as to the best interests of the class as a whole. He goes further and states that it is Mr. Mcarthur who finds himself in a position of conflict. He says that in light of the ***Arishenkoff*** decision, Mr. Mcarthur has no right of action and so his interests are in direct conflict with the class members who do have a right of action. He further says that any decision that leaves Mr. Mcarthur as one of two representative plaintiffs will allow the current impasse to continue, as the representative plaintiffs will continue to each give contradictory instructions.

[19] Mr. Mcarthur responds by saying that there is still an argument available to the class members who were in attendance at Woodlands prior to August 1, 1974,

on the theory that the ***Arishenkoff*** decision does not consider breaches of fiduciary duty committed by the Crown prior to that date. Counsel for the PGT agrees. Both say that the positions taken by Poyner Baxter ignore that argument to the detriment of those class members.

ISSUES

[20] (1) Has Poyner Baxter breached its solicitor's duty of loyalty to Mr. Mcarthur?

(2) Taking into account the answer to issue (1), what is the appropriate order to make to resolve the present impasse?

DISCUSSION

Issue (1)

Has Poyner Baxter breached its solicitor's duty of loyalty to Mr. Mcarthur?

[21] The relationship between Mr. Mcarthur and Poyner Baxter has three separate foundations, each of which, individually, give rise to a solicitor/client relationship. First, Mr. Mcarthur entered into a retainer agreement dated September 28, 2004 with Poyner Baxter. Second, as noted above, Mr. Mcarthur was appointed as the representative plaintiff, with Poyner Baxter having carriage of the action as class counsel by the June 20, 2003 order of this Court. Finally, when the action was certified under the ***Class Proceedings Act,*** Mr. Mcarthur became a class member.

[22] The retainer agreement is succinct. It provides that Mr. Mcarthur retains Poyner Baxter "as my lawyers to represent me in a claim for damages against the

owners and operators of Woodlands school…and hereby authorise them to institute a class action pursuant to the ***Class Proceedings Act*** naming myself as representative plaintiff…and to take such actions and conduct such proceedings as they may consider necessary or proper" on certain terms. The terms include a twenty-five percent contingency fee and that the client, Mr. Mcarthur, is not responsible for disbursements. There is nothing in the retainer agreement limiting or modifying the duties owed by Poyner Baxter to Mr. Mcarthur because the action is a class proceeding.

[23] There is no doubt that Mr. Mcarthur, having entered into the retainer agreement and having been appointed by this Court as the representative plaintiff, is in a solicitor/client relationship with Poyner Baxter. Canadian courts have held that class counsel also has a solicitor/client relationship with each and every member of the class once certification has been ordered. In ***Ward-Price v. Mariners Haven Inc***. (2004) 71 O.R. (3d) 664 (S.C.J.), Nordheimer J. stated as follows at para. 7:

> At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of the class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all of the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".

[24] In these circumstances, Poyner Baxter as class counsel and as Mr. Mcarthur's lawyer, owe him a duty of loyalty.

[25] The nature and extent of the lawyer's duty of loyalty was considered in detail in ***R. v. Neil***, 2002 SCC 70. In delivering the judgment of the Court, Mr. Justice Binnie set out at para. 19 three dimensions of the duty of loyalty:

> 1. the duty to avoid conflicting interests, including the lawyer's personal interests;
>
> 2. a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client; and
>
> 3. a duty of candour with the client on matters relevant to the retainer. If a conflict emerges, the client should be among the first to hear about it.
>
> [Citations omitted]

[26] Mr. Mcarthur says that the circumstances set out in para. 17 above amount to a clear breach of the duty of loyalty. Poyner Baxter has not followed Mr. Mcarthur's instructions with regard to the proposed settlement and has taken steps, by bringing the application in September 2006, to create two sub-classes and add another representative plaintiff without any consultation with Mr. Mcarthur as the representative plaintiff. In addition, Poyner Baxter has not only asserted that Mr. Mcarthur does not qualify as a settlement class member, but also that he has no right of action. As noted above, the current application to redefine the class would have the effect of "decertifying" the action for all claims that arose prior to August 1, 1974.

[27] Mr. Mcarthur argues that Poyner Baxter appears to be favouring the interests of other members of the class over the interests of Mcarthur and the pre-August 1,

1974 class members. Mr. Poyner's rejoinder is that the proposed settlement, which would provide no compensation for those class members who resided at Woodlands prior to August 1, 1974, is still in the best interests of the class as a whole.

[28] If this had been a claim other than a class action, I would have no hesitation in agreeing with the position put forward by Mr. Mcarthur. However, Mr. Poyner has directly raised the question as to whether or not the assessment of the duty of loyalty, in the context of class proceedings, would result in a different conclusion. Mr. Poyner argues that once the action has been certified under the ***Class Proceedings Act***, there is no question that class counsel owes its duty of loyalty and its other obligations as a solicitor to the class as a whole. He says that the result of that situation is that "class counsel's decisions are to be made having regard for the interests of the class as a whole and if an individual class member is dissatisfied, his or her option is to opt out. When a class consists of hundreds of members, as in the case at bar, the system can only work on this basis."

[29] Mr. Poyner takes some support for this position from the decision of Mr. Justice Brenner, as he then was, in ***Haney Ironworks Ltd. v. Manufacturers Life Insurance Co.*** (1998), 169 D.L.R. (4th) 565 (B.C.S.C.). In that case, Haney Ironworks applied for certification, to be appointed as the representative plaintiff and to have a settlement agreement approved by the Court. Gordon Moffat, a member of the proposed class, supported the application for certification, but opposed the application to approve the settlement agreement. He also applied to be appointed as a representative plaintiff of a sub-class. Mr. Moffat's applications were dismissed, the proceeding was certified with Haney Ironworks as the representative plaintiff and

the settlement was approved. In the course of his reasons, Brenner J. stated as follows at para. 30:

> On this application much was made of the apparent limited knowledge of the principal of Haney, Henry Pranke and the objector Gordon Moffat. I do not attach much weight to this. While the court must be satisfied that the intended plaintiff is an appropriate individual to be court approved as a representative, the reality is that these actions are to a large extent driven by counsel and class counsel are the individuals who are in a position to provide the necessary evidentiary support for certification and settlement applications.

[30] Poyner Baxter's position is that, with the obligation owed to all members of the class, class counsel must, in "driving the action", take those steps which appear to be in the best interests of the class as a whole.

[31] There is some support for this position in American caselaw. The first case to consider this issue was ***Pettway v. American Cast Iron Pipe Co.***, 576 F.2d 1157, a 1978 decision of the United States Court of Appeals for the Fifth Circuit. The case involved a complex class action employment discrimination suit. Class counsel refused to appeal from an order approving a settlement. The class representatives and a large majority of the sub-class involved objected to the settlement. The class representatives then retained new counsel to prosecute the appeal. The District Court denied a motion to substitute the new counsel in the place of the class attorney. The Court of Appeal overturned the District Court's approval of the settlement. In doing so, it considered the role of class counsel and the class representatives.

[32] Goldberg J. made the following comments regarding the differences between class proceedings and litigation involving a single plaintiff:

> In the context of individual-plaintiff litigation, the roles of the attorney and the client are well defined. The A.B.A. Code of Professional Responsibility envisions the attorney as an advocate of the interests of the client. Although the lawyer has some freedom to make tactical choices during litigation without consulting his client, the lawyer is expected to defer to the client's wishes on major litigation decisions. Unfortunately, it remains unclear whether this model can be carried over to the class action context, as no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. Certainly it is inappropriate to import the traditional understanding of the attorney-client relationship into the class action context by simply substituting the named plaintiffs as the client. The interests of the named plaintiffs and those of the other class members may diverge, and a core requirement for preventing abuse of the class action device is some means of ensuring that the interests and rights of each class member receive consideration by the court. Were the class attorney to treat the named plaintiff as the exclusive client, the interests of other class members might go unnoticed and unrepresented. Thus, when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. In such a situation, the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members.
>
> This does not mean, however, that the class attorney may ignore the wishes of the class representatives in making fundamental litigation decisions. As one court has stated, "An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved."
>
> [Citations omitted]

[33] Judge Goldberg also commented on the necessity of giving the appropriate weight to class counsel's views:

> We recognize that discretion on the part of the class attorney often is an unavoidable fact of class action life. We noted in our examination of the appealability question that the traditional notion of the "client" deciding important litigation questions is often problematic in the class action context because of the difficulty in identifying the client…The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of a majority, the attorney's views must be accorded great weight, and the trial judge's decision to ratify the attorney's action will seldom be overturned.
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> [Citations omitted]

[34] However, the court also concluded that at some point objections from the class may become so numerous that the court must conclude that the class has not agreed to the settlement and that the class attorney's perceptions of the best interests may be faulty.

[35] A similar issue arose in ***Parker v. Anderson***, 667 F.2d 1204, a decision dated February 18, 1982, of the United States Court of Appeal for the Firth Circuit. This was an appeal of the approval of a settlement of a class action against Bell Helicopter Co. and the award of the attorney's fees. The District Court's approval of the settlement was granted over the objection of all but one of the eleven representative plaintiffs, as well as over the objections of a number of the class plaintiffs. The objectors maintained that class counsel had not properly represented the class.

[36] The District Court found as a fact that when class counsel met with the representative plaintiffs, the plaintiffs were only interested in discussing their personal monetary demands and guarantees of promotion rather than the best interests of the class. The Appeals Court dismissed the appeal and, in doing so, stated as follows:

> The duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class. Objectors emphasize the duty of counsel in non-class litigation. The prevailing principles in that situation cannot be imported wholesale into a class action setting. The fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs… .
>
> The courts have recognized that the duty owed by class counsel is to the entire class and is not dependent on the special desires of the named plaintiffs. It has been held that agreement of the named plaintiffs is not essential to approval of a settlement which the trial court finds to be fair and reasonable... . The rationale implicit in these decisions is sound: the named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands. The trial court was not impressed favourably by the motivation of the objectors, finding as a fact that: "Plaintiff-Objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell at exorbitant figures."
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> [Citations omitted]

[37] The Court in ***Parker*** placed some emphasis on the fact that the District Court had concluded that class counsel consulted regularly and frequently with the class representatives throughout the case, and that class counsel had appropriately ascertained the named plaintiffs' reaction to the settlement before presenting it to the court.

[38] In ***Maywalt v. Parker and Parsley Petroleum Co.***, 67 F.3d 1072, the United States Court of Appeals for the Second Circuit dismissed an appeal by four of five representative plaintiffs. The District Court had approved a settlement of a class action and rejected the motion of the representative plaintiffs to appoint new class counsel. The class members were limited partners in oil and gas limited partnerships. There were allegations of fraud under Federal Securities law and other rights violations under State law.

[39] In considering the attempt by the class representatives to discharge class counsel, the Court stated:

> Inherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members. "The interest of lawyer and class may diverge, as may the interests of different members of the class... . "Both class representatives and class counsel have responsibilities to absent members of the class. …
>
> The fact that the named plaintiffs in a certified class action have been found to be adequate representatives of the class does not, however, mean that they have the right to replace class counsel at will. …The attorneys themselves have an obligation to all of the class members, and "when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. ….
>
> The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court. … A judge in a class action is obligated to protect the interest of absent class members. …The court is required to…consider whether class counsel provided fair and adequate representation to the class as a whole. …Where the named plaintiffs wish to appeal, but the class attorney concludes that an appeal is not in the best interest of the class, the district court must exercise its discretion in deciding whether to substitute class counsel to allow the named plaintiffs to maintain the appeal on behalf of the class.

[Citations and quotations omitted]

[40] The American cases are instructive given that the issues that arise as a result of the relationship between class counsel, the representative plaintiff and the class are the same issues that arise in British Columbia. The comments regarding the role of the court are particularly apposite. Pursuant to the provisions of the ***Class Proceedings Act***, the court has a significant role in overseeing the proceedings and protecting the interests of the "absent" class members. The court may "at any time make any order it considers appropriate respecting the conduct of a class proceeding" (s. 12). It has significant power and discretion with regard to the provision of notice (s. 19) and, most importantly, a class proceeding may be settled, discontinued or abandoned only with the approval of the court and on terms that the court considers appropriate (s. 35).

[41] Canadian authors have not dealt extensively with the issues raised by these applications. Ward Branch *in Class Actions in Canada* looseleaf (Vancouver: Western Legal Publications, 1996), (Canada Law Book, 1996), makes the following comments regarding the respective roles and responsibilities of the representative plaintiff and class counsel:

> 7.400 After certification, the representative plaintiff has authority to instruct class counsel, direct the litigation, participate in discoveries, and authorize settlement (subject to court approval).
>
> 7.470 In *Lau v. Bayview Landclark Inc*., the court removed class counsel who failed to move the case forward. Plaintiff's counsel argued that only the representative plaintiffs were represented by the solicitors of record, and the latter owed no fiduciary, legal, ethical or professional duties to other members of the certified class. The court held that these submissions went too far … .

> The *Lau* decision indicates that class counsel owe fiduciary duties to class members, not just the named plaintiffs. Class counsel is required to act in the best interests of the class as a whole. Where they fail to do so, the court can intervene and remove them from the case.
>
> 6.140 It is the mandate of the class representative to act in the best interests of the class. This responsibility to the class may at times conflict with the class representative's preference for the resolution of the matter. In the U.S., some courts have characterised the duty of the class representative as fiduciary in nature.

[42] From the above authorities and the provisions of the ***Act***, I extract the following principles:

(1) The representative plaintiff has the mandate to act in the best interests of the class as a whole.

(2) The representative plaintiff has a significant role to play in the proceedings after certification. He or she acts in the class' best interest by directing litigation, instructing class counsel and authorizing settlement.

(3) Class counsel has a solicitor-client relationship with class members and owes the duties and obligations that arise as a result of that relationship to the class members. Class counsel also has a duty to act in the best interests of the class as a whole.

(4) Class counsel also has a solicitor-client relationship with the representative plaintiff and owes the duties and obligations that arise as a result of that relationship to the representative plaintiff. This includes a duty of loyalty to the representative plaintiff, which includes the duty to avoid

conflicting interests, the duty of commitment to the client's cause and the duty of candour.

(5) While class counsel has a significant role to play in the conduct of proceedings, class counsel may not ignore the wishes of the class representatives in making fundamental litigation decisions and may not prosecute an action with unfettered discretion.

(6) Given the relationship between the class, class counsel and the representative plaintiff, there is a risk that conflicts may arise. Class counsel must be conscious of the conflicts that may arise between the representative plaintiff and other class members, or between his or her own interests and the interests of the class members.

(7) When conflicts arise and cannot be resolved between the class members, class counsel and the representative plaintiff, an application for directions under s. 12, or for approval of the settlement pursuant to s. 35, should be made to resolve the conflict.

(8) The ultimate responsibility to ensure that the interests of the class members are not subordinated to the interests of either the representative plaintiff or class counsel rests with the court.

[43] Applying these principles to the facts of this case, I have concluded that Poyner Baxter has breached its duty of loyalty to Mr. Mcarthur and that the breach cannot be excused by the fact that it is acting as class counsel. The steps taken, as

outlined in para. 17 above go beyond merely acting in the best interests of the class. Poyner Baxter has ignored the interests of the representative plaintiff. It has done so based on its assessment that Mr. Mcarthur was providing instructions on the basis of his own personal interests.

[44] The steps Poyner Baxter has taken since the issue came to the fore in July, 2006 have been taken to limit or eliminate Mr. Mcarthur's involvement with the class proceeding and, in particular, with the settlement discussions. These steps were taken without consultation, and were clearly contrary to his interests and the interests of some of the other class members. While I have arrived at this conclusion, I do not intend to suggest that the steps taken by Poyner Baxter were motivated by anything other than their views as to what was in the best interests of the class as a whole. Nevertheless, the actions taken amount to a clear breach of both the duty of commitment to the client's cause and of the duty of candour.

[45] The situation in this case is quite different from the circumstances described in ***Parker***, *supra*. Here, Mr. Mcarthur was found by Madam Justice Morrison to be concerned for all class members and to be "fulfilling his obligations with integrity, sincerity and passion". Madame Justice Morrison provided her comments on the relationship between class counsel and noted that what was important was that "each side listen carefully to the other and put the relationship back on track" (para. 29).

[46] She also recommended that the parties seek further assistance from the Court. Rather than do that, Poyner Baxter applied for leave to appeal and ultimately,

in the applications before me, to have Mr. Mcarthur removed as representative plaintiff. There was no evidence before me that there was the kind of detailed consultation with the class that satisfied the court in ***Parker*** that the representative plaintiffs were acting in bad faith. Poyner Baxter asserted that Mr. Mcarthur is acting out of personal interest, while the finding by Madam Justice Morrison was that he was fulfilling his duties appropriately and with integrity. There was no new evidence presented on these applications concerning that issue.

[47] It is unfortunate that there was no affidavit evidence from Mr. Richards to show what the level of consultation was with him as representative plaintiff. The absence of supportive affidavit evidence from Mr. Richards for the motions brought by class counsel is also a factor in the decision that I have reached. The fact that the PGT supports the position of Mr. Mcarthur regarding the need to explore the breach of fiduciary duty claim for the pre-August 1974 Woodlands residents is also of some significance. It is evident that this issue needs to be explored by counsel for the class.

Issue (2)

Taking into account the answer to issue (1), what is the appropriate order to make to resolve the present impasse?

[48] I now must consider which of the four possible courses of action to resolve the impasse is appropriate in the circumstances:

(i) amendment of the class definition to limit the class to persons resident in British Columbia who were confined to Woodlands

on or after August 1, 1974, and removal of Mr. Mcarthur as representative plaintiff;

(ii) issuance of a direction that, "following completion by the parties of the proposed settlement agreement", the agreement be presented to the Court for approval or rejection, pursuant to s. 35 of the ***Class Proceedings Act***;

(iii) amendment of the Certification Order to provide for two sub-classes, one for those persons who were confined to Woodlands prior to August 1, 1974, with Mr. Mcarthur as representative, and a second sub-class for those confined to Woodlands on or after August 1, 1974, with Mr. Richard as representative plaintiff; or

(iv) removal of Poyner Baxter as class counsel.

[49] With some reluctance, I have determined that the appropriate course to follow, in order to remove the present impasse and move the action forward, is to remove Poyner Baxter as class counsel. As I have described above, the steps taken by counsel have crossed an important line. When conflicts arise, class counsel should bring those conflicts to the attention of the court for resolution. Here, counsel has attempted to remove Mr. Mcarthur as representative plaintiff and to remove a significant portion of the class members through amendment of the class definition. Poyner Baxter has attempted to make the fundamental litigation decisions by ignoring the wishes of the representative plaintiff. Poyner Baxter is attempting to exercise its discretion to become "in fact, the representative of the class". As noted by Judge Goldberg in ***Pettway***, *supra*, this is unacceptable.

[50] If I was to order the amendment of the class definition or issue the direction sought in option (ii) above, I would be allowing Poyner Baxter to usurp the role of class representative. In the circumstances, the only possible order is to remove it 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. I appreciate that given the learning curve that new class counsel will have, the trial date may be endangered and that the settlement negotiations may have to go over ground that has already been covered in detail. However, these consequences are inevitable in these circumstances. Given the breaches of the duty of loyalty and the loss of confidence between Mr. Mcarthur as client and Poyner Baxter as solicitor for the class, there is no other option but for class counsel to be removed. In summary, I order that Poyner Baxter be removed as counsel for the class.

[51] With regard to the motions brought by Poyner Baxter, I dismiss the application to amend the class definition and remove Mr. Mcarthur as representative plaintiff.

[52] The other two applications are adjourned generally.

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B. Butler, J.