IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Morrison Estate v. Nova Scotia (Attorney General), 2008 NSSC 281

Date: 2008/10/14
Docket: S. H. No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, By His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, By His Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs/Respondents

and

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), Jamie Muir, and Keith Menzies

Defendants/Applicants

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Judge: Justice A. David MacAdam

Heard: August 8, 11, 2008, in Halifax, Nova Scotia

Written Decision: October 14, 2008

Subject: CPR 14.25(1)(a), (b) and (d) - Application to Strike - Fiduciary Duty

Summary: The plaintiffs, among a number of causes of action, allege the defendants owe them a fiduciary duty in respect of the provision of long term health care. The Province of Nova Scotia, effective 2001, created a single-tier system, no longer permitting private pay residents to contract directly with nursing homes and/or long term health care facilities.

Issue: Should the plaintiffs' claim that the defendants, or any of the them, owed, and breached, a fiduciary duty to the plaintiffs be struck?

Result: The onus on the defendants was to show, on the basis of the pleadings, the plaintiffs did not have a "rational argument" in support of their allegation. The statutes created public, rather than private, duties and did not give rise to a fiduciary duty to the plaintiffs, or others in the position of the plaintiffs.

However, by Regulation the Minister of Health, in setting the per diem rate for a nursing home and a home for the aged, was required to have "regard to the best interests of the resident." The Minister obviously had a discretion in establishing the per diem, and in view of the Regulation, in exercising that discretion was to have regard to the interest of the resident. As such, it cannot be said the plaintiffs do not have at least a "rational argument" that in setting the per diem rate the Minister owed them a fiduciary duty.

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Written Decision:	October 14, 2008
Counsel:	Raymond F. Wagner and Dale Dunlop, for the Plaintiffs Catherine J. Lunn, for the Defendants/Applicants

By the Court:

[1] By Originating Notice and Statement of Claim dated September 8, 2005, the plaintiff, Elmer Stanislaus Morrison, by his litigation guardian Joan Marie Morrison, and Joan Marie Morrison commenced this proceeding against the Attorney General of Nova Scotia.

[2] The plaintiffs gave notice that they would be seeking to certify the proceeding as a class proceeding, referencing the decision of the Supreme Court of Canada in *Western Canadian Shopping Centers Inc. v. Dutton*, [2001] 2 S. C. R. 534. The plaintiffs say there is an identifiable class that would be fairly and adequately represented by them; that their claims raise common issues; and that the class proceeding would be a preferable procedure for the resolution of such common issues.

Background

[3] The plaintiffs allege that in February 2002, due to his age and infirmity, it was decided Mr. Morrison required long-term care. In accordance with the policy of the Nova Scotia Department of Health, he and Ms. Morrison submitted to a

mandatory financial assessment by the Department of Health to facilitate his admission to a long-term care facility. They were determined to have sufficient income and assets that Mr. Morrison could only be admitted to a long-term care facility on "a private pay basis". As a consequence Mr. Morrison was required to use his income and assets to pay for his long-term health care.

[4] The Statement of Claim alleges that the Attorney General of Nova Scotia, in failing to provide for the cost of the medically necessary health treatment for Mr. Morrison, as well as for members of the proposed class in similar situations, "has violated a number of statutes, all of which are designed to ensure that Nova Scotians and other Canadians have access to healthcare services as required without reference to an individual's ability to pay for such services." Among the statutes alleged to have been violated by the defendants are the *Health Services and Insurance Act,* R.S.N.S., c. 197, the *Homes for Special Care Act,* R.S.N.S., c. 203, the *Canada Health Act,* R.S.C. C-6., the *Canadian Charter of Rights and Freedoms, Constitution Act,* 1982 Schedule B to *Canada Act 1982 (U.K.*) 1982 c. 11, the *Social Assistance Act,* R.S.N.S., c. 432, the *Matrimonial Property Act,* R.S.N.S., c. 275 and the *Survival of Actions Act,* R.S.N.S., c.543.

[5] In 2007 the plaintiffs amended the Originating Notice (Action) and Statement of Claim. By Consent Order, a further Amended Statement of Claim, entitled Fresh Amended Originating Notice (Action) (herein "New Statement of Claim"), was filed. By this New Statement of Claim the parties to the proceeding were amended by the addition of the remaining named plaintiffs and by identifying the Department of Health, (herein "DOH"), and the addition of the named individual defendants.

[6] The plaintiffs allege the DOH was the party that determined whether seniors requiring public funding were eligible for admission to subsidized care in nursing homes. The individual defendants were identified as the Minister of Health, at the material time the alleged "wrongful decisions and actions identified in this Action were first undertaken by the DOH" and "the Executive Director of the Continuing Care Branch of DOH with executive responsibility for long-term care programs and services for seniors, including care in nursing homes".

[7] In the New Statement of Claim the plaintiffs assert that unlike under Medicare, under the *Health Services and Insurance Act*, RSNS, 1989, c.197, where funding is provided from the general revenues of the province and without cost to

the recipient, the provision of long-term facilities, including nursing homes, for the long-term care of seniors traditionally, prior to 2001, operated under a two-tier system, as follows:

> Until February l, 2001, admission to nursing homes and the payment for the care of seniors in nursing homes operated under a two-tier system with the following essential characteristics:
>
> (a) persons who had the financial capacity to pay the full per diem rate approved by the DOH and charged by the nursing home were obliged to do so on a private pay basis and retained the right to contract directly with a nursing home of their choice to be admitted and cared for without submitting to any financial or other assessment by the DOH; and
>
> (b) persons who did not have the financial capacity to pay for nursing home care could apply to have the DOH pay all or part of the per diem charges subject to a functional and financial assessment and would be placed on one or more waiting lists until a bed became available.

[8] The New Statement of Claim traces the history of the provision of long–term facilities for seniors until, in 2000, the responsibility was transferred from the Department of Community Services to the defendant, DOH. Effective February 1, 2001, the DOH decided to implement a single coordinated placement list, including both residents who paid privately as well as those who required public financial assistance. The plaintiffs state that, as a result, seniors with significant financial resources were no longer permitted to contract directly with nursing

homes for admission and care; rather, they were forced into the government-controlled waiting list and were compelled to submit “to an intrusive and psychologically stressful financial disclosure”.

[9] The New Statement of Claim contains a review of the impact on the plaintiffs of these new requirements, including an assertion that the plaintiff, the late Mr. Morrison, “. . . could only be admitted to a nursing home on ‘a private pay basis’ ”. Also, contained in the New Statement of Claim, is the assertion that the plaintiff, Mr. Lee, was also required to submit to a mandatory assessment in order to facilitate his admission to a nursing home. In the New Statement of Claim it is asserted that Mr. Lee and Ms. Lee were required to use both their income and assets to pay for his nursing care until both assets were depleted.

[10] The New Statement of Claim alleges various bases on which liability should rest with one or more of the defendants, including misfeasance in public office, equitable fraud and breach of fiduciary duty. The other allegations as to why the plaintiffs are entitled to remedies against the defendants are not in issue on this application.

[11] By Interlocutory Notice (Application Inter Partes) dated July 21, 2008, the defendants applied to strike certain portions of the plaintiff's Fresh As Amended Originating Notice (Action) and Statement of Claim, namely to strike the individual defendants as parties to the proceeding, and to strike several specific provisions in the New Statement of Claim as they relate to the allegations of misfeasance in public office and breach of fiduciary duty. The application also seeks to strike the claim of the Estate of the late Mr. Morrison for remedies pursuant to s. 15.1 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act*, supra.

[12] During the course of the hearing the plaintiffs agreed to delete the claim of the Estate of the late Mr. Morrison, as unsustainable in law. Following the hearing the parties advised that they had resolved the issue of the naming of the individual defendants, by agreeing to substitute the naming of the offices they held at the relevant period. Additionally it was apparently agreed that the tort of misfeasance in public office would remain in the Statement of Claim.

[13] In their submissions counsel acknowledged that the application to strike the claim of equitable fraud will turn on the success of the application to strike the

claim of breach of fiduciary duty. Consequently the only issue remaining on this application is the application to strike the paragraphs of the New Statement of Claim related to the allegation of breach of fiduciary duty.

The Law On Applications To Strike

[14] The Interlocutory Notice references *Civil Procedure Rule*, (herein "CPR"), 37.10, where the powers of the Court on hearing an application are outlined. These do not appear to be in dispute. The application was primarily advanced under CPR 14.25, (1), (a), (b) and (d). Although only subparagraphs (a) and (b) were referenced in the Notice, the authorities cited on the applicant's submission also referred to subparagraph (d). The relevant provisions read:

> 14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> ...

> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[15] Also relevant is subparagraph (2), which reads:

> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on a application under paragraph (1)(a).

[16] The parties do not disagree on the burden resting on the applicant in an application to strike portions of a plaintiff's Statement of Claim. This burden was described by Roscoe, J. A. in *Sable Offshore Energy Inc. v. Ameron International Corp.* [2007] N.S.J. 246, at para 13:

> ... the burden is on the defendant to convince the court that the claim is 'certain to fail'.

[17] In *Mabey v. Mabey* 2005 NSCA 35, at para 13, Roscoe JA, on behalf of the court, outlined the function of the court on an application to strike:

> ... In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried.

[18] Justice Roscoe also noted that under CPR 14.25(1)(a):

> . . . the application will not be granted unless the action is "obviously unsustainable'.

[19] To similar effect, Pugsley, JA, on behalf of the Nova Scotia Court of Appeal, in *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*, [1999] N.S.J. 258, at para.28, stated:

> The parties are in agreement that the test on an application under Rule 14.25 is a stringent one. Where the application involves striking a statement of claim, the applicant must establish under Rule 14.25 (1)(a) that it is 'plain and obvious' that it discloses no reasonable cause of action (*Fraser et al v. Westminer Canada Ltd. et al.* (1996), 155 N.S.R. (2d) 347.

[20] Then, at para. 29, he amplified:

> As put by Justice Freeman for the Court in *American Home Assurance Co. et al. v. Brett Pontiac Buick GMC Ltd. et al.* (No. 2) (1992), 116 N.S.R. (2d) 319, at p. 322:
>
> > The appellant faces an onerous double burden in appealing from the dismissal of an application to strike out the statement of claim, a serious matter that would result in the action being decided against the respondent plaintiffs without trial. A claim will be struck out only if, on its face, it is 'absolutely unsustainable' ... or 'is certain to fail because it contains a radical defect.'

[21] The applicants, in their written submission, reference *Fraser v. Westminer Canada Ltd.*, [1996] N.S.J. No. 540, at para. 17:

> 17 A recent review of the law relating to the striking of pleadings was set forth by Justice McQuaid in *Wakelin v. Superior Sanitation Services Ltd.* (1991), 85 Nfld. & P.E.I.R. 151. The P.E.I. Rule is the same as ours:
>
> > This Rule is a virtual duplication of Order 18, Rule 19 of the English *Rules of Practice*, and I would commend to any solicitor contemplating proceeding under our Rule 14.25, or required to defend against any application thereunder, a review of the commentary appearing in the *Supreme Court Annual Practice*.
> >
> > This is a rule whose limitations are, unfortunately, largely misunderstood. It does not open the door to what is, in effect, a pre-trial application, nor to an argument on a preliminary point of law. It has been said that it is not the practice in the civil administration of the courts to engage in a preliminary hearing on the merits; and further, if there is a point of law which requires serious discussion, there is provision elsewhere to set that matter down for preliminary argument.
> >
> > What, then, is meant by the expression "no reasonable cause of action (or defence)"?
> >
> > The authorities indicate that in point of law, every cause of action is a reasonable one, that is to say, one which has some chance of success when only the allegations in the impugned pleadings are considered. The fact that the case may, on the face of it, appear to be weak, and not likely to succeed, is no ground for striking it out.

> To warrant the striking out thereof, the pleading must be, on the face of it, obviously unsustainable, in which case, however, the remedy will be available only in plain and obvious cases. It will be exercised only where it is clear, beyond reasonable doubt, that there exists no reasonable cause of action in the sense above referred to.
>
> It has been further held by the authorities that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad.

[22] Both briefs reference the often-cited decision of the Supreme Court in *Hunt v. Carey Canada Inc*., [1990] S.C.J. No. 93, at para. 33. The applicant's brief cites as follows:

> 33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[23] The principles considered on an application to strike on the ground the pleading discloses no cause of action were outlined in *Williams v. Canada (Attorney General*), [2005] O.J. No. 3508, at paras. 15-17; *Hunt v. Carey Canada*

Inc., supra*;* and *Sherman v. Giles,* [1994] N.S. J. No. 572 at para 33. The plaintiffs, in their written submission, summarize:

> (a) The pleadings are to be read generously with a view to compensating for any minor defects;
>
> (b) All facts pleaded must be assumed to be true for the purpose of considering whether a cause of action is pleaded;
>
> (c) The Court should not admit affidavit evidence to refute the facts alleged in the statement of claim; and
>
> (d) The pleadings are to be evaluated as a whole. Particular paragraphs ought not to be viewed in isolation from the claim as a whole.

[24] In respect to CPR 14.25(1)(b) and(d), the applicants cite the reasons of Roscoe, J.A. in *Sherman v. Giles*, *supra,*, and Nathanson, J. in *Finck v. Hartlieb*, [2006] N.S.J. No. 21.

[25] In *Sherman v. Giles*, *supra*, at para. 16, Justice Roscoe commented:

> 16 In this case, without the factual dispute raised by the affidavit evidence, it cannot be said that the action was obviously unsustainable. Although the Chambers judge relied on *Re MacCulloch, supra,* as support for finding this action was frivolous and vexatious, this case pales in comparison to the "duplicitous and multiplicity of actions" referred to by Glube, C.J. in *MacCulloch*. The Chambers judge relied on the principles listed in *Re Lang*

Michener al. and Fabian et el. (1987), 59 O.R. (2d) 353 which are said to lead to the conclusion that an action is frivolous or vexatious or an abuse of process of the court:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the cost of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[26] In *Finck v. Hartlieb*, *supra,* at paras. 6-7, Justice Nathanson stated:

> 6 In the case of *Re Lang Michener Lash Johnston et al. v. Favian et al.*, (1987), 37 D.L.R. (4th) 685, (Ont. H.C.J.) Henry, J. set out a list of principles taken from other case authorities in determining whether a pleading is frivolous or vexatious or an abuse of process. These include:
>
> > (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
> >
> > (c) vexatious actions include those brought for improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
> >
> > (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings; ...
>
> 7 These principles were cited and applied in ***Re MacCulloch (Bankrupt***) (1992), 115 N.S.R. (2d) 131 (S.C.T.D.), and ***Credit Union Atlantic Ltd. v. Herbert*** (1998), 172 N.S.R. (2d) 147 (S.C.).

[27] The applicants also reference the decision of Justice Scanlan in *Ofume v. Nova Scotia*, 2004 CarswellNS 264, where he struck the plaintiff's Statement of Claim pursuant to CPR 14.25(1)(b) & (d). However it should also be noted that he

also struck the Statement of Claim on the basis it did not disclose a reasonable cause of action, applying subparagraph (a).

[28] As to whether questions of law may be determined under CPR 14.25, Justice Pugsley, in *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board*), *supra*, at paras. 32-33, commented:

> 32 With respect, I am of the view that questions of law are appropriate for determination under Rule 14.25, in cases where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised.
>
> 33 Justice Chouinard, on behalf of the majority, in Morier v. Rivard, [1985] 2 S.C.R. 716, a case having significant similarities to the one before us, said at p. 745:
>
> > It is important to avoid litigation or to terminate it as quickly as possible when it cannot succeed in law. This is provided in the Code of Civil Procedure [i.e. Province of Quebec]. It is also the way litigation is disposed of in many other jurisdictions, by means of a motion or application to strike out the statement of claim.
> >
> > This is precisely what was involved in Sirros v. Moore [[1975] 1 Q.B. 118], where the English Court of Appeal allowed the application to strike out and Lord Denning wrote in the passage cite above:
> >
> > > Actions based on such allegations have been struck out and will continue to be struck out.

[29] There is nothing “false, scandalous, frivolous or vexatious” in the plaintiff’s commencement of this proceeding or in the allegations of fact and law. The characteristics outlined in *Re Lang Mitchener et al and Fabian et al*, as adopted by Roscoe, J.A. in *Sherman v. Giles*, *supra,* and by Nathanson, J. in *Finck v. Hartlieb, supra*, are not here present.

[30] There is similarly no “abuse of the process of the Court” in alleging the existence of a fiduciary duty, and its breach by the Defendants.

[31] The remaining issue is whether there is “no reasonable cause of action” in respect to the allegation of a fiduciary duty, and its breach by the Defendants.

[32] The authorities, in outlining the onus in an application to strike, reference the applicant convincing the Court it is “certain to fail”, “obviously unsustainable”, and that it is “plain and obvious that it discloses no reasonable cause of action”, as well as a number of other like phrases. Effectively the onus is on the applicant to show the plaintiffs do not have a “rational argument”. If the plaintiffs establish from the pleadings a “rational argument”, then they are entitled to “their day in Court”, with a full hearing on the merits of their “rational

argument". They do not need to establish they will be successful, only that they have a "rational argument" and "are entitled to a full hearing to have the merits of their "rational argument" determined".

Fiduciary Duty

[33] The applicants, in respect to the concept of fiduciary duty, reference Ellis, *Fiduciary Duties in Canada*, (2004), pp.1-1 --1-2:

> Simplistically put then, a fiduciary duty is one that arises in the context of trust. A fiduciary individual is someone who stands in a position of trust to another individual. However as noted below a true "trust" relationship need not underlie a fiduciary relationship...
>
> > Originally a fiduciary duty was created only pursuant to a legal trust, enforced in the Courts of Equity, otherwise known as the courts of conscience:
> >
> > > In its early stages, the law of fiduciary relationship developed from the vesting of property in a trustee for the sole benefit of a beneficiary. The courts, concerned with the protection of the property for the benefit of the beneficiary recognized a fiduciary relationship which carried with it an obligation on the trustee to hold the property in trust for the beneficiary. (*International Corona Resources Ltd. v. Lac Minerals Ltd.* (1987, 62 O.R. (2d) 1 at 44-45 (C.A.) [leave to appeal to S.C.C. granted (1987), 62 O.R. (2d) 1n (S.C.C.)]).

> However, the fiduciary concept has so dramatically expanded that it is now universally applicable: where one party placed its "trust and confidence" in another and the latter has accepted - expressly or by operation of law - to act in a manner consistent with the reposing of such "trust and confidence," a fiduciary relationship has been established.
>
> It should not be presumed that fiduciary duties necessarily arise out of certain types of relationships (e.g. parties to a commercial transaction) . In summing up the existing jurisprudence on this issue, the Supreme Court of Canada in *Roberts v.* R., 2002 CarswellNat 3438 , 2002 CarswellNat 3439, [2002] S.C.J. No. 79 (sub nom. *Wewaykum Indian Band v. Canada*) 2002 SCC 79, (sub nom. *Wewaykum Indian Band v. Canada*) 220 D.L.R. (4th) (sub nom. Wewaykum Indian Band v. Canada) 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada)* [2003] 1 C.N.L.R. 341 stated the following:
>
> > ....[E]ven in the traditional trust context not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature... not all fiduciary relationships and not all fiduciary obligations are the same: These are shaped by the demands of the situation ... [para. 79]

[34] The applicants quote extensively from the reasons of LaForest, J. in *Hodgkinson v. Simms*, 1994 CarswellBC 438, including paras. 31-35:

> 31 Having distinguished the fiduciary principle from other related equitable and common law doctrines, it is now possible to examine the nature of the fiduciary duty itself with a surer hand. While the legal concept of a fiduciary duty reaches back to the famous English case of *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, until recently the fiduciary duty could be described as a legal obligation in search of a principle. Indeed, commentators busied themselves in an effort to sort out this area of the law; see Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; P.D. Finn, *Fiduciary Obligations* (1977); J.C.

Shepherd, *Fiduciary Law* (1981); Tamar Frankel, "Fiduciary Law" (1983), 71 Cal. L.R. 795; P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989). As I stated in *M. (K.) v. M. (H.),* [1992] 3 S.C.R. 6 at 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384 [[1984] 6 W.W.R. 481]:

> ... where by statute, agreement, or perhaps by unilateral undertaking, *one party has an obligation to act for the benefit of another*, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary ...
>
> It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. *It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.* The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added.]

32 This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; see *LAC Minerals*, supra, per Sopinka J., at p. 599, and per La Forest J., at p.646; *Canson*, supra, at p. 543; *M.(K.) v. M. (H.)*, supra, at pp. 63-64. Wilson J.'s guidelines constitute indicia that help recognize a fiduciary relationship rather than ingredients that define it.

33 In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

34 As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see supra, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

35 Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of *Dolton v. Capitol Federal Savings & Loan Assn.*, 642 P. 2d 21 (Colo. Ct. App., 1982), at pp. 23-24, in the banker-customer context, to be a state of affairs:

> ...which impels or induces one party "to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger." ... [and] ... has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution. ...

and at paragraph 39 of the decision:

> 39 In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "There is no substitute in this branch of the law for a 'meticulous examination of the facts' "; see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831.

[35] The applicants then note the observations of Justice Major, in *Gladstone v. Canada (Attorney General)*, 2005 CarswellBC 911, where the appellants , who had been arrested for attempting to sell fish in violation of the *Fisheries Act*, R.S.C. 1985, c. F-14, claimed interest for the period the Crown held the proceeds, on the basis the proceeds were held in trust. The Supreme Court rejected the argument of a breach of fiduciary duty, finding the statute did not create a trust relationship. The applicants refer to the reasons of Justice Major, at paras. 24-26:

> 24 The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. As its core is the obligation of one party to act for the benefit of another. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), Dickson, J. (as he then was) stated at p. 384 that:
>
> > I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

25 Also, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 409, La Forest, J. stated:

> In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.

26 Other characteristics of a fiduciary relationship were described by Sopinka J. in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 599. These are: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. However, these are simply characteristics and not necessarily determinative of a fiduciary relationship.

[36] Counsel for the applicants elicits from *Guerin, Frame, LAC Minerals, Hodgkinson* and *Gladstone* five principles to a fiduciary relationship:

a. One party has an obligation (imposed by statute, agreement, or unilateral undertaking) to act for the benefit of another;

b. The fiduciary has the scope of the exercise of discretionary power,

c. The fiduciary can unilaterally exercise the power or discretion so as to affect the interests of the beneficiary;

d. The beneficiary is particularly vulnerable to the conduct/acts or omissions of the fiduciary holding the discretionary power;

e. These characteristics are simply characteristics of a fiduciary relationship and are not determinative in themselves.

[37] On the other hand, the Plaintiffs, referencing *Attorney General (NS) v. MacQueen et al.*, 2007 CarswellNS 155, at para. 28, note the concept of fiduciary duty is an evolving one with the categories not closed, and that the duty depends on the nature of the relationship not the specific category of actor.

[38] Hamilton, JA, on behalf of the Court, stated in *Attorney General (NS) v. MacQueen et al.*, *supra*, at para 33:

> 33. However, the Supreme Court of Canada most recently dealt with fiduciary duty in *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325 (S.C.C.):
>
> > 24 **The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. At its core is the obligation of one party to act for the benefit of another**. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. (as he then was) stated at p. 384:
> >
> > > I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

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>
> (Emphasis mine)

[39] Justice Hamilton continued, stating:

> . . . where there is no allegation that the fiduciary duty claimed arose from a statute or an agreement, that the central question to ask is whether on the basis of the facts pled the respondents could reasonably have expected that the appellants, or any of them, would act in their best interests . . .

At para 35, she referenced the statement by LaForest , J. in *Hodgkinson*, *supra*, stating:

> 35. In *Hodgkinson*, *supra*, referred to in the quote from *Barrett, supra*, set out in para. 27 above, LaForest, J., in addition to setting out the central question to be asked to determine whether a fiduciary duty arose, sets out some factors that may be relevant in answering this question: the presence of loyalty, trust and confidentiality in the relationship, giving rise to a duty of loyalty, p. 405, discretion, influence, vulnerability and trust, p. 409, evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party, p. 409, and trust, confidence, complexity of subject matter, and community or industry standards, p. 412.

[40] In their submission counsel for the plaintiffs refers to various paragraphs in the New Statement of Claim as providing a factual foundation to support the existence, and the breach, of a fiduciary duty. The allegations of fact reference certain of the obligations of the DOH in licensing and regulating long-term care facilities, including nursing homes, for the long-term care of seniors. Also referenced are the obligation of the DOH to determine the per diem rate that each nursing home is entitled to charge, as well as the change from the two–tier system to the eventual single placement list and assessment process. The allegation is that the single placement list and assessment process, together with the later implementation of the single entry access system, created a DOH controlled nursing home care rationing system which, in relation to private pay seniors, prevented them from directly applying to and contracting with nursing home operators and forced them onto the government controlled waiting list and compelled them to submit to intrusive and psychologically stressful financial

disclosure. The submission refers to the allegations in the New Statement of Claim outlining the involvement of the two named individual defendants in effecting this change and the chronology under which this change came into force. Referencing the effect on Mr. Morrison and Mr. Lee, the allegation is that the DOH owed the plaintiffs and class members a fiduciary duty to act in their best interests in making and implementing decisions relating to their admission to, and health care in, nursing homes, including the determination of the cost and sources of payment for such healthcare services.

[41] The plaintiffs make two alternative, although not necessarily unrelated, submissions as to why the defendants owed them a fiduciary duty. The first alternative is in reference to the creation of the single entry access system and the provision that there was to be no access to nursing homes unless the prospective residents submitted to the process. Additionally the submission raises the setting of the per diem rate as another significant aspect of the mandatory single entry process implemented by the DOH which serves to point to the existence of a fiduciary duty. Reference is made to the hands-on involvement of DOH staff in the admission process of every single prospective nursing home resident in the province. The submission references the involvement of staff in “an assessment of

the minutiae of the prospective residents care needs" and in "an assessment of the minutiae of the financial circumstances of the prospective resident and their spouse."

[42] Clearly the involvement of the DOH arises from statute and regulation, relating to the licensing and operation of these facilities. It is, therefore, not equivalent to the circumstances in *MacQueen, supra*, where one of the issues, albeit not raised in the Court of Appeal, related to the allegation of the existence of a fiduciary duty, arising neither under statute nor regulation.

[43] The possibility of a fiduciary duty resting on governmental bodies is now recognized.

[44] In Ellis, *Fiduciary Duties in Canada*, at pages 19-2--19-3, the author writes:

> The traditional view had been that governments do not owe a fiduciary duty to citizens. In *Guerin v. R.* (1984), [1984] 2 S.C.R. 335, at p. 385, Dickson J. stated the following:
>
> > It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.

> However, in recent years, courts are allowing a wide variety of actions against governments of all levels to at least go to trial, often on the basis of the more famous dictum in *Guerin* that the categories of fiduciary should not be considered closed, but rather depend on the facts of the particular relationship. In any case, certain governmental authorities will be found to owe a fiduciary duty to those for whom it has a mandate to protect or serve. Obviously, except where a fiduciary duty of loyalty and trust is created by legislation regarding such a body, the finding of such a duty will depend on the factual situation and the breach against which the law seeks protection.

[45] It is not simply the plaintiffs, and any class members, to which the duty is owed in the circumstances of the statutes involved in this application. Although the plaintiffs, together with the class members, are directly involved, there are also the nursing home facilities and, indeed, the public at large, that is required to fund those residents who are determined not to have sufficient financial resources. The public has an interest in ensuring the existence of these facilities for the care of their family and friends and, in due course perhaps even themselves, who may require “long-term” health care for access to nursing homes.

[46] Recent authorities such as *Wareham v. Ontario (Minister of Community and Social Services*, 2008 CarswellOnt 176, suggest the exercise of discretion by government still does not typically give rise to fiduciary relationships. In *Wareham*, *supra*, the plaintiff maintained that delays in processing their

application for benefits under the Ontario disability support program caused them serious mental and physical harm and, among various causes of action, they alleged the Crown was liable for breach of fiduciary duty. The plaintiffs alleged the Crown breached a fiduciary duty to them by "delaying payments, placing itself under a conflict of interest by withholding retroactive payments, failing to notify them when the deficiencies in their applications were discovered and in failing to give reasons for their decision". Justice Cullity, after observing that the plaintiff's allegations were essentially that the Crown was not working efficiently and was consequently causing harm to the fragile mental and emotional state of the plaintiff, referenced the same passage from *Guerin, supra,* cited above in Ellis, Fiduciary Duties in Canada:

> . . . [F]iduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion do not typically give rise to a fiduciary relationship.

[47] Justice Cullity then, at para. 37, continues:

> 37 It is, I believe, a far cry from the existence of public duties to the imposition, or assumption, of an enforceable obligation owed to the applicants as individuals to act in their best interests and to protect their rights. As Sharpe J.A. stated in *Gorecki* (para 7):

> The only duty that the CPP imposes on the Crown or that the Crown assumes is a public law duty to fulfill the statutory terms of the CPP. This cannot be the source of a fiduciary duty owed to the appellant.

[48] Citing *Hislop v. Canada (Attorney General*) 2003 CarswellOnt 5183, counsel for the Crown noted the duty must be owed to a specific group of individuals, rather than the public at large. *Hislop* was reversed on other grounds, without disturbing the trial judge's conclusion on fiduciary duty: 2004 CarswellOnt 4915 (CA), affirmed at 2007 SCC 10. The plaintiffs, in response, appear to ignore the argument raised by the Crown, adding only that Justice McDonald did not address fiduciary duty in detail because she had determined that a *Charter* remedy was available to the plaintiffs. Nevertheless the public nature of the Crown's duty would, on the authorities, preclude the imposition of a fiduciary duty. In these circumstances, the nature of the duty to the plaintiffs, and the class members, is no different than the duty owed to the individuals claiming benefits under the Ontario disability support program in *Wareham, supra*.

[49] In *A. O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771, Justice Hugessen, at para 11, observed:

> ... The relationship between the government and the governed is not one of individual proximity. Any, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not individually. The remedy for those who think that duty has not been fulfilled is at the polls and not before the Courts.

and in paragraph 43

> Similarly, in *Kamloops v. Neilsen,* [1984] 2 S.C.R. 2, Justice Wilson observed:
>
> ... In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public law duty. The plaintiff has to belong to the limited class of owners or occupiers of the property at the time the damage manifests itself. Loss caused as a result of policy decisions made by the public authority in the *bona fide* exercise of discretion will not be compensable. Loss caused in the implementation of policy decisions will not be compensable if the operational decision includes a policy element. Loss caused in the implementation of policy decisions, i.e. operational negligence will be compensable. Loss will also be compensable if the implementation involves policy considerations and the discretion exercised by the public authority is not exercised in good faith. Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.

[50] Although the duty to the plaintiffs, including to the class, may be distinct and different from the duty owed to the facilities and the duty owed to the public at large it nevertheless cannot be said that the statute relates only to an individual group rather than to the public at large. In view of the reasoning in *Gorecki*, referred to in the reasons of Cullity J. in *Wareham*, *supra*, the only duty imposed

on the Crown, and that was assumed by the Crown, is the public duty to fulfill the statutory terms of the statute and the regulations. This cannot, absent an unilateral undertaking or provisions in either suggesting such an obligation, be the source of any fiduciary duty to the plaintiffs.

[51] The plaintiffs, however, reference the provisions of regulation 28 B, which reads:

> The per diem rate for a nursing home and a home for the aged shall be determined by the Minister of Health having regard to the best interests of the resident.

[52] Clearly the Minister is directed to consider the "best interest of the resident" in determining the per diem rate. Under the single-tier system the rate would be applicable both in respect of the private pay residents as well as to the residents for whom the per diem rate is, at least in part, paid by the Crown. In this regard it would appear the Crown is undertaking a specific regulatory mandate, at least with respect to setting the per diem rates of residents. It is unclear how this is to be effected. Also unclear is what is meant by the phrase, "having regard to the best interests of the resident", in the context of setting the per diem.

[53] Plaintiffs' counsel submits this regulation creates a duty, not to the public at large, but to the residents. It is therefore a individual duty, rather than a public duty. There is nothing in the submissions by the Crown which assists me in assessing whether this regulation is creating an individualized duty to the residents and to what extent the duty applies. The regulation specifically refers to the setting of the per diem rate, and not to other aspects of licensing and operation of these facilities.

[54] In establishing the per diem the Minister is obviously exercising "discretionary power".

[55] Having regard to the burden on the applicant, in applying to strike the provisions of the New Statement of Claim relating to the allegation of fiduciary duty, I am not satisfied it is "plain and obvious" that the plaintiffs' claim that there exists a fiduciary duty and that it has been breached, cannot succeed. Having regard to the observations by Justice Pugsley in *Future Inns Canada Inc.*, *supra*, the issue relating to the application of regulation 28B to the plaintiffs contains sufficient uncertainty as to warrant a full hearing of the issue. It cannot be said it is "plain and obvious" that, in respect to the allegation of a "fiduciary duty and

breach", the New Statement of Claim "discloses no cause of action". It cannot be said the plaintiffs do not have a "rational argument".

[56] As observed by Justice Wilson in *Hunt v. Carey Canada Inc.*, *supra*, at para. 52:

> . . . where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[57] The interpretation and application of regulation 28 B, in these circumstances, meets the standard outlined by Justice Wilson.

[58] Although, as earlier noted, the statutes in question relate to the Crown's public duty, and not simply to the plaintiffs and other class members, the same cannot be said of regulation 28 B, in view of the admonition that " the per diem rate for a nursing home and a home for the aged shall be determined by the Minister of Health having regard to the best interests of the resident." In the circumstances it cannot be said the regulation has not created a fiduciary duty in favour of the plaintiffs and the class members, at least in respect to the setting of

the per diem rate. Whether there is such a duty, and, if so, the nature and scope of that duty and whether it has been breached by any of the defendants, must await determination following a full hearing.

J.