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Fiduciary Duties and Public Authorities Two Years after Alberta v. Elder Advocates: Where Are We Now?

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FIDUCIARY DUTIES AND PUBLIC AUTHORITIES TWO YEARS AFTER ALBERTA V. ELDER ADVOCATES: WHERE ARE WE NOW?

I. Introduction

Fiduciary duty claims against the Crown originated in cases involving Aboriginal interests and the Crown's private capacity conduct, such as public guardian and trustee. The evolution of fiduciary law in Canada and the oft-stated need for "flexibility" have, however, coincided with fiduciary duty claims against the Crown arising in other areas, including the oversight of foster-care homes,[1] public sector employment relationships,[2] and the supply and pricing of electricity.[3] As such, the existence and scope of fiduciary duties owed by the Crown were uncertain.

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1 *K.L.B. v. British Columbia*, 2003 SCC 51.

2 *Babcock v. Canada (Attorney General)*, 2005 BCSC 513.

3 *Swift Current (City) v. Saskatchewan Power Corp.*, 2007 SKCA 27.

In *Alberta v. Elder Advocates of Alberta Society* ("*Elder Advocates*"), the Supreme Court of Canada was asked to "clarify the approach to identifying fiduciary duties owed by the government to its citizens."[4] *Elder Advocates* involved a proposed class action by nursing home residents against Alberta for, among other things, breach of fiduciary duty arising out of Alberta's alleged use of certain payments to subsidize medical expenses. The Supreme Court of Canada struck the fiduciary duty plea and, in doing so, squarely addressed the extent to which the law imposes an *ad hoc* fiduciary obligation upon the Crown.

This paper considers the effect of *Elder Advocates* on fiduciary duty claims against the Crown. It is in three parts. The first part reviews the Supreme Court's analysis of the fiduciary duty claim in *Elder Advocates* and summarizes its effect on the law. The second part examines a range of decisions post-*Elder Advocates* and argues that, predictably, *Elder Advocates* appears to have "chilled" the courts' willingness to entertain new *ad hoc* fiduciary relationships on the part of the Crown. The third part attempts to distil considerations for practitioners who are either contemplating bringing or are confronted with a fiduciary duty claim against the Crown.

II. Alberta v. Elder Advocates of Alberta Society

A. The Fiduciary Duty Claim and the Lower Court Decisions

As noted, *Elder Advocates* involved a proposed class proceeding by over 12,000 residents of Alberta's long-term care facilities alleging that Alberta artificially increased charges for accommodation and meals in order to subsidize medical expenses that, by law, are Alberta's responsibility. The plaintiff claimed that Alberta owed a fiduciary duty to residents to ensure that any amount Alberta charged for accommodation and meals reflected the actual cost, was in the residents' best interests, and would not be used to subsidize health care costs. The pleading emphasized vulnerability, alleging that the residents are frail and elderly, incapable of caring for themselves or living independently, and that each requires long term care.

At the certification hearing, the chambers judge struck out the plea of breach of fiduciary duty.[5] The judge distinguished between public and private duties on the part of government, finding in effect that only the latter are capable of supporting a fiduciary duty.[6] The judge essentially found the plaintiffs had failed to plead facts against Alberta that could give rise to a private law duty and, accordingly, that the fiduciary duty claim against the Crown was bound to fail.[7]

The Court of Appeal reversed the chambers judge and allowed the class to pursue the fiduciary duty claim. The Court of Appeal cited a passage from the Supreme Court's decision in *Hodgkinson v. Simms* indicating that a fiduciary duty can arise out of the specific circumstances of a particular relationship.[8] The Court found "an arguable case can be made" for the existence of a fiduciary duty in the circumstances of the case, holding specifically that the accommodation charge "could well carry with it a duty [on Alberta] to administer that sum in the class members' best interests."[9]

Thus, the Court of Appeal's decision in *Elder Advocates* continued the expansion of potential fiduciary duty claims against the Crown and contributed to the climate of uncertainty.

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4 *Eder Advocates*, para. 24.

5 2008 ABQB 490.

6 Alta. Q.B. at paras. 368-74.

7 Alta. Q.B. at para. 377.

8 Alta. C.A. at para. 98.

9 Alta. C.A. at para. 99.

B. The Supreme Court's Analysis

Writing for the Court, McLachlin C.J. began by distinguishing between government and private actors. She observed that although the broad principles governing fiduciary duties apply equally to private actors and governments, "they may play out differently where the alleged fiduciary is a public authority."[10]

She then reviewed the general requirements for the imposition of a fiduciary duty, starting with the three "hallmarks" of a fiduciary duty, as originally set out in Wilson J.'s dissenting reasons in *Frame v. Smith* and subsequently adopted in *Lac Minerals*:

(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 legal or practical interests; and

(3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Noting the Court's recent decision in *Galambos v. Perez*[11] ("*Galambos*"), McLachlin C.J. held that "it is now clear that vulnerability alone is insufficient to support a fiduciary claim."[12] She clarified that the *Frame v. Smith* factors are "not a complete code for identifying fiduciary duties,"[13] holding that in addition to "vulnerability arising from the relationship" the existence of an *ad hoc* fiduciary duty is the function of a threefold criteria rooted in the "foundational principles" outlined in *Guerin*, *Hodgkinson*, and *Galambos*.[14] She summarized the criteria and approach as follows:

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[15]

In discussing the undertaking of responsibility, McLachlin C.J. stated the "party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake."[16] She indicated that the undertaking may be found in the parties' relationship, a statutory imposition of responsibility, or under an express agreement to act as trustee of the beneficiary's interests.

McLachlin C.J. then considered the application of the general principles in the governmental context. She noted that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances."[17] McLachlin C.J. referred to cases involving Crown-Aboriginal relations, noting that the Crown's fiduciary duty to

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10 SCC, para. 26.

11 2009 SCC 48.

12 SCC, para. 28

13 SCC, para 29

14 SCC, para. 29.

15 SCC, para. 36.

16 SCC, para. 31.

17 SCC, para. 37

Aboriginal peoples "is unique and grounded in analogy to private law."[18] Importantly, she clarified that the Crown-Aboriginal cases do not serve as a "template for the duty of the government to citizens in other contexts."[19]

In applying the threefold criteria, McLachlin C.J. observed that the requirement of an undertaking to act in the beneficiary's best interests "will typically be lacking where what is at issue is the exercise of a government power or discretion."[20] She held that imposing such an undertaking on the Crown is "inherently at odds with its duty to act in the best interest of society as a whole" and that, thus, the Crown's "broad responsibility to act in the public interest" means there will only be rare situations where the Crown owes a duty of loyalty to a particular person or group.[21]

McLachlin C.J. cautioned that where the undertaking of loyalty is alleged to flow from a statute, the provisions in issue must be thoroughly examined and the language must "clearly support" the undertaking.[22] Further, in the "rare" case where an undertaking arises by implication from the relationship between the Crown and beneficiary, she observed that the content of the government's obligation "will vary depending on the nature of the relationship, and should be determined by focussing on analogous cases."[23]

In respect of the second criterion, McLachlin C.J. reasoned that the need for government to act in the interests of society as a whole means it "may be difficult" to show that there is a defined person or class of persons who are vulnerable to the exercise of discretionary power.[24] She observed that, subject to s. 15 of the *Charter*, government is entitled to distinguish between different groups in the imposition of burdens or provision of benefits. Given this, outside of a "private duty being carried out by government," there is unlikely to be a specific class of persons to whom the government owes an exclusive duty of loyalty.[25]

Finally, McLachlin C.J. indicated it will also be difficult to satisfy the third criterion in respect of government. She reasoned that the affected interest "must be a specific *private law* interest to which the [claimant] has a pre-existing distinct and complete legal entitlement" in order to ground a fiduciary duty claim against the Crown.[26] She clarified that government conduct that impacts generally on a person's well-being, property or security will not be sufficient.[27]

In applying the criteria to strike out the fiduciary duty plea, McLachlin C.J. first noted that the pleading's emphasis on the residents' vulnerability is insufficient to establish a fiduciary duty and, in any event, the alleged vulnerability does not arise from the residents' relationship with Alberta. She observed that nothing in the legislation or pleaded factual relationship supports an undertaking by Alberta to act with undivided loyalty towards the residents "in the setting, receipt and administration of the accommodation charges." Finally, McLachlin C.J. characterized the setting of the impugned charges as being a legislative function and part of Alberta's balancing of competing interests in deciding how to fund health care services.

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18 SCC, para. 38

19 SCC, para 40.

20 SCC, para 42.

21 SCC, para. 44.

22 SCC, para. 45.

23 SCC, para. 46.

24 SCC, para. 49.

25 SCC, para. 49.

26 SCC, para. 51.

27 SCC, para. 51.

C. Implications of Elder Advocates

On a general level, the Supreme Court's decision in *Elder Advocates* develops the law governing the establishment of an *ad hoc* fiduciary relationship—as against both governmental and private actors—in at least three important respects. First, it confirms the application of a threefold test based on "foundational principles" to determine the existence of a fiduciary relationship in place of the *Frame v. Smith* criteria. Second, it reinforces the requirement first squarely expressed in *Galambos* that the fiduciary must have undertaken to act in the best interests of the beneficiary or "in accordance with the duty of loyalty."[28] Third, it effectively cautions against an overly "flexible" approach to recognizing *ad hoc* fiduciary relationships, regardless of whether the alleged fiduciary is the Crown or a private actor.

More specifically, *Elder Advocates* clarifies the approach to evaluating fiduciary duty claims in the governmental context. It confirms that a single analysis applies to determine the existence of a fiduciary relationship, regardless of whether the alleged fiduciary is the Crown or a private actor. Also, it resolves that case law involving Crown-Aboriginal relations and the Crown's "private capacity" do not serve as a "template" or precedent for establishing a fiduciary duty against the government in other contexts. Finally—and perhaps most significantly—it firmly places government's unique function at the centre of the analysis, linking it to each of the constituent elements.

However, where a governmental fiduciary duty is recognized, *Elder Advocates* leaves the question of the content of the duty partially unsettled. As noted, McLachlin C.J. directs only that the content will "vary depending on the nature of the relationship, and should be determined by focussing on analogous cases." Arguably, the court's thin guidance underlies the notion that there will be few—if any—cases in which a court will have to grapple with the content of an *ad hoc* fiduciary duty in the governmental context.

In summary, *Elder Advocates'* emphasis on government's role and function (in particular, McLachlin C.J.'s express recognition that the imposition of a fiduciary duty on the Crown is "inherently at odds with [the Crown's] duty to act in the best interests of society as a whole"), together with the confirmation that the establishment of an *ad hoc* fiduciary relationship requires an undertaking to act in the beneficiary's best interest, practically excludes the possibility of an *ad hoc* fiduciary duty being foisted upon the Crown. Indeed, McLachlin C.J. effectively acknowledges as much, saying that the circumstances in which an *ad hoc* fiduciary duty will be imposed on the Crown "will be few."[29]

III. Fiduciary Duty Claims in the Governmental Context Two Years Later

The Chief Justice's prediction that circumstances in which the Crown will be found to owe a fiduciary obligation would be few and far between has been borne out in the cases that have followed in the wake of *Elder Advocates*, including in two Supreme Court of Canada decisions. The SCC has given guidance as to the application of the *Elder Advocates* test in *Professional Institute of the Public Service of Canada v Canada (AG)*[30] ("*PIPSC*") and *Manitoba Métis Federation Inc. v. Canada (Attorney General)*[31] ("*Metis Federation*"). *PIPSC* confirms the necessity of applying a rigorous *Elder* analysis even where fiduciary obligations have been found in analogous private law settings, while *Métis Federation* highlights the different approaches to establishing fiduciary duties where the interest that is said to be affected is an aboriginal as opposed to a private interest.

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28 *Galambos* at para. 75.

29 SCC, para. 44.

30 2012 SCC 71.

31 2013 SCC 14.

The handful of lower court decisions that have applied *Elder* in the context of a governmental fiduciary claim confirm the difficult task of establishing a fiduciary obligation under the *Elder* framework (although at least one court has refused to strike such a claim at the pleadings stage, as will be seen below). Most, unsurprisingly, have found claims to fail on the first branch of the *Elder* test—the undertaking to act in the best interests of the alleged beneficiary. As such, *Elder Advocates* appears to have emboldened courts' willingness to strike claims in fiduciary duty against the government at the pleadings stage.

A. Application of the Elder Test by the Supreme Court

1. Professional Institute of the Public Service of Canada v. Canada (AG), 2012 SCC 71

This was the Court's first opportunity to apply the *Elder Advocates* test. At issue was the role of the government as administrator of public service pension plans (the "Plans"). The plaintiffs commenced a class proceeding, challenging actions of the government which had notionally reduced and then eliminated an actuarial surplus in the superannuation accounts, which record payments in and out of the Plans. The plaintiffs alleged that the government owed them a fiduciary duty with respect to the surplus. The action was dismissed after trial.

The Supreme Court's decision in *PIPSC* reinforces that outside the established *per se* categories of fiduciary relationship or the Aboriginal context, the *Elder Advocates* test for an ad hoc fiduciary duty will apply to a claim that the Crown owes a fiduciary duty. Rothstein J., writing for the Court, rejected a preliminary submission by the plaintiffs that a public pension plan administrator is in a fiduciary relationship to plan beneficiaries, *per se*, by analogy to the relationship between a private pension plan administrator and the plan's beneficiaries.[32] Rothstein J. returned to the underlying theme of *Elder Advocates*: the government's role in representing many and sometimes conflicting interests dictates that the Crown will not be presumed to be a fiduciary based solely on its role bearing a *similarity* to a traditional category of fiduciary.[33]

Turning to the question of whether the government as administrator was in an *ad hoc* fiduciary relationship, the Court applied the *Elder Advocates* criteria. Predictably, the assertion of a fiduciary relationship failed on the first branch, the undertaking to act in the beneficiary's best interest. Rothstein J. described this element as "critical."[34] He engaged in a close scrutiny of the relevant statutory framework, as directed by *Elder Advocates*, and concluded "I have been able to identify nothing in the [applicable legislation] that supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the Plan members, with respect to the actuarial surplus—the specific interest at issue here." In the course of finding that the undertaking criteria had not been made out, Rothstein J. points to the kind of clear statutory language which could make out an undertaking to act in the best interests of an alleged beneficiary:

> [126] By contrast, Bill C-78 establishes a legislated undertaking on the part of the Board (the administrator of the new Pension Funds) to act in the best interest of contributors, but only in respect of post-April 1, 2000 contributions. Section 4(1)(*a*) of Bill C-78 provides that the Board is "to manage amounts that are transferred to it ... in the best interests of the contributors and beneficiaries under those Acts". These words are not found in the *Superannuation Acts* in respect of the Superannuation Accounts.

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32 Referring to *Burke v. Hudson's Bay Co.*, 2010 SCC 34.

33 Para. 119.

34 Para. 124.

Proceeding to the second element of the *Elder Advocates* test, Rothstein J. helpfully broke it down into three sub-elements: "(1) a defined *person or class of persons* (i.e., the beneficiary or beneficiaries), who is or are (2) *vulnerable* to the fiduciary, (3) in that the fiduciary has a *discretionary power* over them."[35] While there was "no doubt" that the class members were capable of being the beneficiaries, the government, in exercising its discretion to amortize the actuarial surpluses, was not merely making accounting decisions, and not determinations as to the plan embers' entitlements.[36] The plaintiffs were therefore not vulnerable to the government's exercise of discretion.

Finally, Justice Rothstein found that there was no legal or substantial practical interest, which amounted to a private law interest, in the actuarial surpluses amortized by the government. The actual debiting or amortization was simply an accounting exercise, and the evidence did not establish a causal relationship between the debiting of the surplus and the obligation of the plaintiffs to contribute more to their pension plans.[37]

The Court's reasons in *PIPSC* reinforce the Chief Justice's direction in *Elder Advocates* that *ad hoc* fiduciary relationships will arise only where there is a "strong correspondence" with one of the traditional categories of fiduciary relationship—trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child.[38]. An analogy to a relationship in which an *ad hoc* fiduciary duty has been found as between private actors will not suffice. The plaintiff must be prepared to identify the three criteria set out in *Elder Advocates*.

2. Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14

In *Elder Advocates*, the Chief Justice distinguished the *sui generis* fiduciary relationship that arises between the Crown and Aboriginal peoples from other fiduciary duties that the Crown may owe.[39] As noted, she specifically rejected the contention that the law on the fiduciary obligations of the Crown in respect of Aboriginal peoples "serve[s] as a template for the duty of the government to citizens in other contexts."[40] In *Métis Federation*, the Court had an opportunity to apply to the same set of facts both the analysis pertaining to a fiduciary duty based on the *sui generis* relationship between the Crown and Aboriginal peoples, and the analysis pertaining to an *ad hoc* fiduciary duty on the part of the Crown towards members of the public generally.

The plaintiff in *Métis Federation* brought an action for *inter alia* a declaration that the federal Crown had breached fiduciary obligations owed to the Métis in implementing the *Manitoba Act*,[41] in respect of land to be set aside for the Métis upon Manitoba joining Confederation. The claim was dismissed after trial. The Supreme Court rejected the assertion of the existence of a fiduciary duty, based either on the relationship between the Crown and the Métis in respect of an Aboriginal interest, or on an *ad hoc* basis under the *Elder* analysis.

The Chief Justice and Justice Karakatsanis, writing for the Court on the fiduciary point (the dissent of Rothstein and Moldaver JJ was in respect of the constitutional obligation derived form the honour of the Crown), started from the proposition that the relationship between the Crown and Aboriginal

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35 Para. 128, emphasis in original.

36 Para. 137.

37 Paras. 139-40.

38 *Elder Advcoates*, para. 33.

39 *Elder Advcoates*, paras. 38-40.

40 *Elder Advcoates*, para. 40.

41 *Manitoba Act, 1870*, S.C. 1870, c. 3.

peoples is generally of a fiduciary nature, but that the existence of such a relationship does not determine whether a particular dealing between the parties gives rise to a fiduciary duty.[42]

The Court clarified that a fiduciary duty in the Crown-Aboriginal context arises in two ways:

(1) where the Crown assumes discretionary control over specific Aboriginal interests; or

(2) from an undertaking, where the three criteria set out in *Elder Advocates* are established.[43]

Under the first analysis, the question is whether the alleged beneficiary can establish (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest.[44]

As to the first criteria, the Chief Justice and Karakatsanis J. held that "there is little dispute that the Crown undertook discretionary control of the administration of the land grants under s. 31 and s. 32 of the *Manitoba Act*."[45] The Métis Federation's fiduciary duty claim failed under the first analysis, however, because the interest in land asserted by the plaintiffs had been found by the trial judge not to be an Aboriginal interest. The interest in land held by the Métis at the time Manitoba joined Confederation was not an interest which was exercised collectively, but rather individually. The right must be "distinctly Aboriginal"; it cannot be a private law interest that happens to be held by Aboriginal people.[46]

The Court went on to consider whether the plaintiffs had established an *ad hoc* fiduciary duty under the *Elder* test. Predictably, the plaintiffs failed at the first branch: establishing an undertaking of loyalty by the Crown. The same provisions of the *Manitoba Act* which would have sufficed to establish a crown assumption of control over an Aboriginal interest under the first analysis could not be relied on to establish an undertaking of loyalty to the exclusion of the interests of all others. Having regard to the relevant provisions of the *Manitoba Act*, the Court found that accommodation of other interests was expressly contemplated by the statute, belying an intention to act in the best interests of the Métis.[47]

Métis Federation emphasizes the importance of identifying a distinctly Aboriginal interest on the part of claimants seeking to establish a fiduciary duty on the basis of the Crown's *sui generis* relationship with Aboriginal peoples. Otherwise, these plaintiffs will find themselves having to meet the much more difficult analysis for an *ad hoc* fiduciary duty under *Elder Advocates*.

B. Lower Court Applications of Elder

There is now a number of lower court decisions in which *Elder Advocates* has been applied in the context of claims against the government. In general terms, the courts appear to have gratefully accepted the clarity provided by *Elder Advocates*, and the result, not unsurprisingly, has been for the most part to see the striking of claims that would seek to impose a fiduciary obligation on the Crown at the pleadings stage.

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42 Para. 48.

43 Paras. 49-50.

44 Para. 51.

45 Para. 52.

46 Para. 53.

47 Paras. 62-63.

1. Claims Failing at the Undertaking Element of the Elder Advocates Test

a. May v. Saskatchewan, 2013 SKCA 11—Pension Plan

This is an example of *Elder Advocates* being applied strictly. The plaintiffs brought an action against the government of Saskatchewan on behalf of the members of a public pension plan. The plaintiffs argued that the government was in a fiduciary relationship with plan members with respect to the administration of the plan and the payment of benefits. The action proceeded to trial, and was dismissed. The plaintiffs appealed.

The clarification provided by the Supreme Court of Canada in *Elder Advocates* was at the center of the Court of Appeal's decision in respect of the alleged fiduciary obligation. In rejecting the fiduciary claim, the Court of Appeal went directly to the policy rationale for limiting the recognition of fiduciary duties against governments as expressed in *Elder*[48]:

> There, the Court emphasized that the nature and responsibilities of governments must mean that they will owe fiduciary duties only in limited and special circumstances. This is so because imposing a duty on a government to act only in the best interests of a particular beneficiary or group of beneficiaries is simply at odds with its general obligation to mediate competing interests for scarce public resources and to act in the best interests of the community as a whole. For my part, I am unable to see how the Appellants' arguments can be reconciled with this basic limitation on the extent to which fiduciary obligations can or should be imposed on government.

The Court went on to note, almost as an aside, that the first branch of the *Elder Advocates* test had not been met[49]:

> In any event, and on a more particular note, in order for there to be a fiduciary-beneficiary relationship between the Government and PSSP members, it is necessary for the Appellants to establish an undertaking by the Government to act in their best interests ... In light of the Government's well-documented history of resisting the implementation of inflation-based increases in pension rates, the Appellants simply cannot discharge that burden.

The warning to litigants is clear: making out a fiduciary duty as against the Crown will be an uphill battle.

b. McCreight v. The Attorney General, 2012 ONSC 1983—Duty to Investigate Under Statute

This was a decision on the application of the Crown to strike pleadings on the basis that they failed to disclose a cause of action. The plaintiffs had been the subject of an investigation by the Canada Revenue Agency ("CRA") which resulted in the plaintiffs being charged in fraud and conspiracy. Ultimately, the plaintiffs were discharged.

The accused then brought an action against the CRA and a number of its employees, as well as Crown prosecutors who were involved in the investigation and subsequent criminal proceedings. The claims advanced included claims in malicious prosecution, negligence, conspiracy, misfeasance in public office, breach of fiduciary duty, and breach of *Charter* rights.

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48 Para. 33.

49 Para. 34.

The Court allowed the motion to dismiss the claim of breach of fiduciary duty. The motions judge held that the responsibilities of the CRA officers under the applicable legislative simply did not support he existence of an undertaking to act in the best interests of the plaintiffs:

> In the case at hand, the CRA officers have a duty to enforce the *Income Tax Act* and the relevant provisions of the *Criminal Code* for the benefit of society as a whole and there was no undertaking by them to act in the best interest of [the plaintiffs] during the course of their investigation [or] prosecution.[50]

c. Coombs v. Canada (Attorney General), 2012 NLTD(G) 84—Cessation of Benefits

The plaintiff was the widow of a fisherman who had, until the time of his death, been receiving monthly payments from the governments of Canada and Newfoundland pursuant to the Fisheries Early Retirement Program ("FER Program"). The FER Program was voluntary and did not provide for the continuation of payments to a spouse upon death of the recipient. The plaintiff claimed, inter alia, that Canada and Newfoundland had a fiduciary duty to herself and her husband to ensure that they each understood the terms of the FER Program, including the cessation of payment upon the participant's death and the possibility that the plaintiff would be left destitute.

In respect of the fiduciary duty claim, the court first determined that there was no *per se* fiduciary relationship between the plaintiff and the defendants. The Court then addressed whether an *ad hoc* fiduciary duty had been established, as per the test set out in *Elder*. The claim failed on the undertaking criteria:

> [43] The Plaintiff has not established any such undertaking by either Defendant to the Plaintiff or anyone in her position. As noted previously in this judgment, the Plaintiff was not a party to the FER Program contract entered into between Edmund Coombs and the Defendants nor was she entitled to any benefit provided pursuant to that contract. There is no statute that creates a duty towards her and there is no evidence of any undertaking made, either expressly or implicitly, by either Defendant that would ground such a claim. Thus, there is no fiduciary relationship between the Plaintiff and either Defendant and no fiduciary duty owed by either Defendant to her. Accordingly, without the necessity of determining if the other factors necessary to establish a fiduciary duty are present, the Plaintiff's claim under section 15 of the Amended Statement of Claim must be dismissed.

2. Refusal to Strike a Claim of Fiduciary Duty Against the Crown

At least one court has applied *Elder Advocates*, but refused to strike a claim of fiduciary duty at the pleadings stage, on the basis that the legislative scheme at issue may in fact establish an undertaking to act in the best interest of the plaintiff.

a. Ashak v. Ontario, 2013 ONSC 39—Statutory Assumption of Enforcement of a Private Law Interest

The plaintiff, Ms. Ashak, brought a claim against the Ontario Family Responsibility Office ("FRO"), which has a duty under the *Family Responsibility and Support Arrears Enforcement Act*[51] to enforce orders for child and spousal support and powers granted under both federal and provincial legislation to ensure compliance.

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50 Para. 66.

51 S.O. 1996, c. C. 31.

The FRO had suspended the passport of Ms. Ashak's ex-husband due to his failure to pay $200,000 in arrears of support. The ex-husband successfully applied to have his passport returned, and left the country. He failed to return to Canada, and died abroad without having paying his arrears. Ms. Ashak brought an action against the FRO in negligence and breach of fiduciary duty. The FRO moved for summary judgment. The motion was dismissed and the FRO appealed to the Divisional Court.

The Divisional Court dismissed the appeal, agreeing with the motions judge that it was not plain and obvious, on application of the 2013 ONSC 39 criteria, that there could be no fiduciary duty in the circumstances.

On the undertaking point, the Court referred to the statutory scheme which required the FRO to enforce support orders for the benefit of the recipients under the order. The Court found that the statutory scheme at issue imposed the obligations on the FRO:

- The clerk or registrar of the court that makes a support order *is required to file* it with the office of the Director of FRO promptly after it is signed.
- Once filed, it is *the duty of the Director to enforce support orders* and to pay the amounts collected to the person to whom they are owed.
- Generally, *no person other than the Director of FRO shall enforce a support* order that is filed in the Director's office.
- Among the reasons the Director may refuse to enforce an order is when the recipient repeatedly *accepts payment of support directly from the payor.*
- The Director of FRO, in enforcing an order may take steps in the name of the Director but does *so for the benefit of the recipients under the order.*[52]

The class of defined beneficiaries was easily met: the legislation clearly anticipated that the duties performed by the FRO would be for the beneficiaries of support orders.[53] As for a legal or substantial practical interest that amounted to a specific private law interest, the Divisional Court saw no reason to interfere with the motions judge's holding that the FRO's duty to enforce money orders is akin to the duty of a person in the private sector who enforce money orders.[54]

Ashak may indicate a class of statutory obligation that more readily give rise to a fiduciary obligation, because the nature of the obligation is such that it does not engage concerns about the government's competing and potentially conflicting loyalties. Under the FRO's enabling legislation, the government has undertaken to intervene in the enforcement of a private law interest right of a discrete class of persons as against another discrete class of persons. The government, in such a case, has clearly indicated a preference for the interests of one group over another, and the fundamental rationale for limiting the imposition of fiduciary obligations on the Crown does not apply (or at least has less forceful application).

3. Impact of Elder in the Aboriginal Context

Although a full examination of the scope of *Elder Advocates* in the context of claims in the Aboriginal-Crown context is beyond the scope of this paper, a brief review of two post-*Elder* decisions in the Aboriginal context indicates that it has also had an impact in this context, despite the Chief Justice's clear direction that Crown-Aboriginal relations are unique, and not subject to the same analysis as an ad hoc fiduciary obligation to citizens in other contexts.

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52 Para. 48, emphasis in original.

53 Para. 50.

54 Para. 51.

It is important to note that both decisions summarized below were released prior to the Supreme Court's reasons in *Métis Federation. Anderson v. Canada*, 2011 NLCA 82.

In this class proceeding, the plaintiffs, survivors of residential school, brought claims against Canada in both negligence and breach of fiduciary duty based on Canada's operation, control and oversight of residential schools in Newfoundland and Labrador. The plaintiffs claimed that Canada owed them a fiduciary duty, to "preserve, protect and promote the health, welfare and education of non-aboriginal children,"[55] a duty which was breached, they alleged, by failing to adequately supervise the residential schools, and by undertaking a program of forced cultural integration. The class proceeding was certified and Canada appealed on a number of grounds.

The appeal was dismissed. The Court of Appeal found that the plaintiffs had shown an evidentiary basis on which to argue that the Crown assumed discretionary control of a cognizable aboriginal interest. In the course of its decision, the court made reference to the *Elder Advocates* analysis, indicating, perhaps, some confusion as to how the two analyses of fiduciary duty on the part of the Crown—that in respect of an aboriginal interest, and *ad hoc* duties in respect of private law interest—interact. For instance, the Court of Appeal referred to McLachlin C.J.'s warning that governments will owe fiduciary duties in only limited and special circumstances, and that a rigorous analysis of such claims will be applied at the pleadings stage.[56] The Court also seemed to consider that the Chief Justice's direction that "a strong correspondence with one of the traditional categories of fiduciary relationship" applies in the context of a claim in the Aboriginal context. The Court of Appeal ultimately decided that the existence of a fiduciary relationship could be determined at trial.

a. NTI v. Canada, 2012 NUCJ 11

The plaintiff, Nunavut Tunngavik Incorporated ("NTI"), brought an action against Canada in respect of alleged breaches of the Nunavut Land Claims Agreement ("NLCA"), claiming $1,000,000,000 in damages. This was an application for summary judgment for approximately $14 million in respect of the breach of one article of the NLCA, which required Canada to establish a general monitoring plan to collect and analyze information on the long-term state and health of the ecosystemic and socioeconomic environment in Nunavut. The NTI claimed Canada's breach of contract was also a breach of fiduciary duty.

Canada's argument was, *inter alia*, that the plaintiff had to establish the existence of a fiduciary duty on the basis of the *Elder Advocates* analysis. Canada submitted that *Elder Advocates* required both an undertaking to administer the interest of the beneficiary, and that the interest be a specific proprietary interest. Canada's argument appears to be an attempt to replace the requirement of an *assumption* of discretionary control over an aboriginal interest, as the test had previously been expressed in the Crown-Aboriginal context, with the same requirement of an *undertaking* of loyalty in respect of that interest.

The motions judge rejected Canada's argument. *Elder Advocates* had clearly established, he held, that different considerations inform the existence of a fiduciary duty in respect of aboriginal interests and private law interests.[57] He went on to find that a specific aboriginal interest in land had been identified, and that the NCLA constituted an assumption of discretionary control over that interest.[58] Canada's conduct in respect of the implementation of the monitoring plan was found to have fallen below "even the most minimal standard" expected of a fiduciary.[59]

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55 Para. 55.

56 Paras. 51-52.

57 Paras. 250-51.

58 Para. 262-63.

59 Para. 267.

IV. Considerations for Practitioners

Elder Advocates has provided practitioners with a clearer framework for analyzing fiduciary duty claims in the governmental context. In summary, the framework is as follows:

(1) Has the government actor undertaken to act in the best interests of the beneficiary or beneficiaries?

(2) Is the beneficiary a defined person or are the beneficiaries a defined class of persons vulnerable to the governmental actor's control? For this, there must be:

  (a) A defined person or class of persons;

  (b) Who are vulnerable to the governmental actor; and,

  (c) The vulnerability involves the governmental actor having *discretionary power* over the defined person or class of persons

(3) Does the beneficiary or do the beneficiaries have a legal or substantial practical interest that stands to be adversely affected by the governmental actor's exercise of discretion or control?

Practitioners prosecuting and defending a fiduciary duty claim against a governmental actor must carefully assess each branch of the framework, since a fiduciary duty will only be made out where the criteria are satisfied in full. Given the jurisprudence to-date, particular consideration must be given to the following in evaluating a governmental fiduciary duty claim under the framework:

- **Where is the undertaking of loyalty?** There must be evidence to support the governmental actor's forsaking of the interests of *all others* in favour of the beneficiary. Most of the reviewed unsuccessful post-*Elder Advocates* fiduciary duty claims have failed on this criterion. The applicable statutory provisions and relationship between the alleged beneficiary and governmental actor should be carefully scrutinized. The best evidence is likely an agreement or correspondence reflecting a specific relationship between the alleged beneficiary and governmental actor in respect to the interests at issue.
- **Does the claim involve government's exercise of a public power or discretion?** If so, *Elder* is clear that a fiduciary duty is highly unlikely to result. Consider whether the relationship at issue can be characterized as private or quasi-private.
- **What is the applicable statutory context?** While the applicable statute (or statutes) will be essential to satisfy the requirement of the undertaking of loyalty, it is also likely to assist with other aspects of the test, including an assessment of the nature of the governmental power or authority at issue.
- **Is there a "strong correspondence" to traditional fiduciary relationships?** While *PIPSC* makes it clear that similarity to a traditional category (e.g., trustee-beneficiary, agent-principal, lawyer-client, director-corporation) is insufficient to establish a fiduciary duty on the part of a governmental actor, practitioners should expect the court to analyze the alleged relationship with reference to traditional categories.
- **Who is affected by the alleged conduct?** The person or class of persons who are alleged to be vulnerable to the governmental actor's control should be discrete and precisely identified.
- **What is the affected interest?** The interest must be a "legal or substantial practical interest." It should also be identified with precision.
- **What is the content?** Be prepared to clearly articulate the content of the fiduciary duty and tie it closely to the relationship at issue. As has been seen, while to date there is little guidance on formulating content under the *Elder Advocates* analysis, a clear and precise description of the alleged content that is closely tied to the relationship between the parties is likely to be preferable.

- **Are the pleadings sufficiently detailed and particularized?** McLachlin C.J.'s analysis in *Elder* indicates that practitioners should expect the court to scrutinize the pleadings closely, including on an application to strike for failing to disclose a cause of action. Practitioners should carefully plead the elements of the claim, including the nature and source of the undertaking of loyalty, the discretionary nature of the governmental power at issue, the claimant's specific vulnerability to the governmental power, the legal or practical interests affected, and the manner in which the exercise of governmental power or control affects the interests.

And finally, in the context of claims in respect of duties owed by the Crown to Aboriginal peoples, **has the plaintiff clearly established that a distinctly Aboriginal interest is at stake?** If not, plaintiffs will find themselves attempting to establish an ad hoc fiduciary obligation under the much more stringent *Elder* analysis.

In conclusion, while the *Elder Advocates* framework is of general application, its application to government is firmly anchored in government's unique role and function. In the approximately two years since *Elder Advocates*, the cases that have considered and applied *Elder Advocates* have reinforced the importance of government's role and function to the evaluation of a governmental fiduciary duty claim and have demonstrated that—predictably—application of the *Elder Advocates* framework is unlikely to result in an *ad hoc* fiduciary duty being imposed upon the Crown.