NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Attorney General) v. MacQueen,***
2007 NSCA 33

Date: 20070327
Docket: CA 268308, 271464 & 271524
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and Sydney Steel Corporation, a body corporate

Appellants

v.

Neila Catherine MacQueen, Joseph M. Pettipas, Ann Marie Ross and Kathleen Iris Crawford, Ispat Sidbec Inc., a body corporate; Canadian National Railway Company, a body corporate; The Attorney General of Canada representing Her Majesty the Queen in right of Canada; and Domtar Inc., a body corporate

Respondents

- and -

The Attorney General of Canada representing Her Majesty the Queen in right of Canada

Appellant

v.

Neila Catherine MacQueen, Joseph M. Pettipas, Ann Marie Ross and Kathleen Iris Crawford, Ispat Sidbec Inc., a body corporate; Canadian National Railway Company, a body corporate; The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and Sydney Steel Corporation, a body corporate; and Domtar Inc., a body corporate

Respondents

- and -

Ispat Sidbec Inc.

Appellant

v.

Neila Catherine MacQueen, Joseph M. Pettipas, Ann Marie Ross, Kathleen Iris Crawford, and The Estate of Carl Anthony Crawford by his executor or representative Kathleen Iris Crawford

Respondents

Judge(s): Cromwell, Saunders & Hamilton, JJ.A.

Appeal Heard: January 30, 2007, in Halifax, Nova Scotia

Held: Appeal of Ispat Sidbec Inc. allowed; appeal of The Attorney General of Canada and The Attorney General of Nova Scotia dismissed, as per reasons for judgment of Hamilton, J.A.; Cromwell & Saunders, JJ.A. concurring

Counsel:
David G. Coles, Q.C. & Christopher C. Harmes, Articled Clerk, for the appellant, Ispat Sidbec Inc.
Angela Green, Melissa Cameron & Harry Glinter, for the Attorney General of Canada
Agnes MacNeil & Alison Campbell, for the Attorney General of Nova Scotia & Sydney Steel
Raymond F. Wagner & Michael G. Robb, for the individual respondents
Dennis James, for Canadian National Railway (watching brief)
Michael S. Ryan, Q.C. & Thomas P. Donovan, Q.C., for Domtar Inc. (Not present)

Reasons for judgment:

[1] The case management judge, Justice A. David MacAdam, denied the applications of the three appellants, Ispat Sidbec Inc. ("Ispat"), The Attorney General of Canada ("Canada") and The Attorney General of Nova Scotia ("Nova Scotia"), made pursuant to **Civil Procedure Rule 14.25**, to strike a portion of the respondents' statement of claim.

[2] The portion of the statement of claim that the appellants sought to have struck relates to the respondents' claim that each appellant breached its fiduciary duty to the respondents. They allege this fiduciary duty arose when, while it owned and/or operated the steel plant and/or the coal coking ovens in Sydney, Nova Scotia, it released "contaminants" knowing they were harmful to the respondents, without informing the respondents of this harm or exercising its discretion to prevent the harm. They also allege it arose with respect to Canada and Nova Scotia when by their actions and words they indicated to the respondents that there was no connection between the contaminants on their properties and the plant and/or ovens and that it was safe for them to live on their properties. With respect to Ispat, the respondents also allege it had a fiduciary duty to inform them that these actions and words of Canada and Nova Scotia were false.

[3] Each appellant appealed the June 30, 2006 interlocutory decision, reported at (2006) 246 N.S.R. (2d) 213, and their three appeals were heard together.

[4] In addition to claiming a fiduciary duty owed by each appellant to them by virtue of the appellants ownership and /or operation of the plant and/or ovens, the respondents also claim in their statement of claim that some of the appellants and other named defendants are liable to them in battery, nuisance, trespass and negligence and that they are strictly liable for the release of certain contaminants. Those claims are not at issue in these appeals. The respondents propose to have their action certified as a class action.

[5] The fiduciary duty with respect to Canada is alleged to have arisen from the ownership and operation of the coke ovens from 1968 to 1974 by a federal crown corporation, Cape Breton Development Corporation ("Devco"), created by the **Cape Breton Development Corporation Act**, R.S. 1985, c.C-13, s.1. The fiduciary duty

with respect to Nova Scotia is alleged to arise from the ownership and operation of the plant and ovens from 1967 to 1988, except during the years when some aspects were operated by others or when they were closed, by a provincial crown corporation, Sydney Steel Corporation ("Sysco"), created by the **Sydney Steel Corporation Act**, S.N.S. 1967 (2nd Session), c.1. For the purpose of this appeal Canada and Nova Scotia have not raised the question of whether they are liable for the actions of their crown corporations.

[6] It is no longer alleged that Canada or Nova Scotia owed a fiduciary duty to the respondents arising from a statutory or regulatory function. That aspect of the respondents' claim was struck by the judge and has not been appealed.

[7] The applications to strike were made after the statement of claim was filed and before any defences were filed. No party took issue with the test to be applied by the judge on an application to strike. The judge stated:

> [12] The parties are not in dispute as to the burden resting on the defendants with respect to their respective applications to strike portions of the plaintiffs' statement of claim. Each of the defendants acknowledges the onus on them is to establish it is "plain and obvious" the plaintiffs' statement of claim discloses no reasonable cause of action, citing **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; 117 N.R. 321. Also acknowledged by the defendants is that a court, in considering an application to strike, is to assume the facts contained in the statement of claim are true and then to assess whether, assuming those facts to be true, a claim may be made out. The applications will only succeed if, on the facts as pleaded, the action is "obviously unsustainable". Also, in considering applications to strike, counsel for Ispat references **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323, 253 A.P.R. 323 (C.A.), where at p. 325, Macdonald, [J.A.] on behalf of the court, commented:
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> > " . . . it is not the court's function to try the issues but rather to decide if there are issues to be tried."

[8] All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in **Mabey v. Mabey**, (2005) 230 N.S.R. (2d) 272:

> [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". 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. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323; 253 A.P.R. 323 (C.A.). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; 117 N.R. 321.

Facts

[9] The judge outlined the pled facts in his reasons for judgment:

> [1] The plaintiffs have commenced this proceeding seeking redress for the alleged contamination of their persons and homes. They say they have lived in the area of a steel plant, coke ovens, tar ponds and related by-products operations, some of which have been carried on since 1900, located in the city of Sydney, Nova Scotia.
>
> [2] In the statement of claim, Ispat Sidbec Inc., (herein "Ispat"), is alleged to have owned and operated the steel works, defined to include the steel plant and coke ovens, from 1928 until December 31, 1967. Apparently in October 1967 Ispat, and its principal Hawker Siddeley, then known as A.V. Row Ltd., announced the intended closure of the steel plant for April 1968. Shortly following this announcement they agreed to the sell the assets used in the steel works to the Province of Nova Scotia. By the ***Sydney Steel Corporation Act,*** 1967 (2nd) SESS., c.1 the Nova Scotia Legislature created Sysco to operate the steel works. The plaintiffs allege in the statement of claim that Sysco was at all times an agent or instrument of the Province of Nova Scotia (herein "Nova Scotia"). As such, they further allege Nova Scotia is liable for all of the acts, omissions and liabilities of Sysco as "owner or occupier of the lands on which the steel works were operated". Sysco operated the steel works, with three exceptions in respect to the coke ovens, from 1967 until the steel plant was finally closed in 2000.
>
> [3] The plaintiffs say during six of the years the steel plant was operated by Sysco, the coke ovens were owned and operated by Her Majesty the Queen in right of Canada, (herein "Canada"). The plaintiffs say the coke ovens were sold to the Cape Breton Development Corporation, (herein "Devco"), in July 1968. Devco, the statement of claim alleges, was a federal Crown Corporation statutorily created in 1965 pursuant to the **Cape Breton Development Act**, 1985, c. 25, as amended. It was dissolved in June 2000, pursuant to the **Cape Breton Development**

> **Corporation Divestiture Authorization and Dissolution Act**, R.S.C. 2000, c-23. As such, the plaintiffs allege, Canada is the legal successor to the dissolved Devco.
>
> [4] The statement of claim alleges Devco owned and operated the coke ovens from July 1968 until in and about 1974 when they were sold back to Nova Scotia and Sysco. Apart from a temporary closure between 1983 and 1985, they were again owned and operated by Sysco and Nova Scotia until permanently closed in 1988.
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> . . .
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> [6] The plaintiffs also claim against the remaining named defendants, excepting only Hawker Siddeley Canada Inc., in respect to their involvement in the ownership or operation of the steel works and/or the Sydney tar ponds, where, it is alleged, contaminants created in the steel making process were dumped.

[10] While there is elaboration of the facts in the 48 page statement of claim, the essence of the pled facts relevant to this appeal is that the appellants at different times owned and/or operated the plant and/or ovens which gave them discretion to make decisions as to how they were operated, that they knew that the plant and/or ovens were emitting contaminants that were harmful to the health and property of the respondents who lived nearby, but that they failed to disclose this information to the respondents or to prevent these harmful emissions.

[11] In addition, with respect to Canada and Nova Scotia, but not Ispat, it is relevant that the statement of claim alleges that their actions and words indicated to the respondents that there was no connection between the contaminants emitted from the plant and/or ovens and any contaminants on their land and that it was safe for them to live on their property. With respect to Ispat, the statement of claim alleges that it did not correct these actions and words of Canada and Nova Scotia, even though it knew they were false. These last two allegations are set out in the statement of claim as follows:

> 48. In fact, the Defendants Canada and Nova Scotia have told, and continue to tell, the Plaintiffs and Class Members that (i) there is no connection between the Contaminants present on their lands and their respective operations, and (ii) that the Neighbourhoods are a safe place to live. This is a continuing and ongoing representation made by each Nova Scotia and Canada
>
> (a) by their actions in failing to move the Plaintiffs and Class Members from their contaminated homes or to remediate their properties, and

> (b) by their words such as the various statements to that effect recorded at the following websites maintained by Nova Scotia: www.gov.ns.ca and www.tarpondscleanup.ca .
>
> 49. None of the Defendants [which would include Ispat] has ever stepped forward to correct Canada or Nova Scotia in statements that they know to be untrue. . . .

[12] The respondents specifically point to the appellants' failure to provide them with information concerning the harmful emissions that was contained in three reports commissioned by Canada and issued between 1959 and 1974. The respondents state that they did not become aware of the nature, extent and ramifications of the emissions until 2003, making them vulnerable until then to the operational decisions of the appellants.

[13] On the basis of these facts the respondents claim breach of fiduciary duty in paragraphs 126 and 127 of their statement of claim:

> 126. By virtue of
>
> (a) Their ownership and occupation of the lands and facilities from which the Contaminants were emitted,
>
> (b) Their sole discretion to make decisions regarding the operation of the Steel Works (in the case of the Steel Works Defendants), . . . and
>
> (c) The information that each of the Defendants possessed about the nature and potential effects of the particular Contaminants produced and emitted by the operations in which they were involved, which knowledge arose from their management of the Steel Works (the Steel Works Defendants), . . . and, in the case of the Steel Works Defendants, from their knowledge of the contents of the Katz Study, the Havelock Study and the Choquette Study, to the exclusion of the Plaintiffs and Class Members,
>
> all of the Defendants owe the Plaintiffs and Class Members a fiduciary duty to act in the best interests of the Plaintiffs and Class Members in dealing with the dissemination of information concerning the contamination described herein and in the remediation of the contamination described herein.

127. All of the Defendants have breached their fiduciary duties by choosing not to:

(a) Fully disclose the known nature and effects of the Contaminants;

(b) Fully disclose and inform the Plaintiffs and Class Members of the health risks associated with exposure to the Contaminants;

(c) Take any steps to prevent the spread of the Contaminants to the Neighbourhoods; and

(d) Take any steps to remediate the contamination now present on the lands in the Neighbourhoods.

Judge's Decision

[14] The judge refused to strike the respondents' claim that each appellant had breached its fiduciary duty to the respondents arising from its ownership and/or operation of the plant and/or ovens, focussing on the evolving nature of fiduciary duties:

> [72] Like Justice Allan in **Brogaard v. Canada (Attorney General)**, supra, I am satisfied the law is evolving in respect to fiduciary duties, particularly as to the circumstances in which they may be found to exist. Whether the law has now evolved to the extent a plaintiff, injured by activities of a defendant, is owed a fiduciary duty by that defendant to at least disclose the nature of the risk and/or harm being occasioned, may be "dubious, novel, unlikely to succeed or subject to valid defences." It is unnecessary for me, on this application, to decide whether the law has so evolved. I am satisfied, however, there is, at least an arguable or justiciable issue. As noted by the plaintiffs, in reviewing the law relating to the onus on the defendants on an application to strike portions or all of a statement of claim, it is only necessary for the plaintiffs to resist the defendants' assertion the impugned provisions are "absolutely unsustainable" and it is "plain and obvious" they will fail. The defendants, in this instance, have not satisfied me a cause of action, based on a fiduciary duty arising from the ownership and/or operation of the steel works and/or coke ovens, is "absolutely unsustainable" and it is "plain and obvious" they will fail.

Issue

[15] The only issue before us is whether the judge made a reviewable error when, assuming the facts pled in the statement of claim to be true, he found that the respondents' claim that each of the appellants owed them a fiduciary duty arising from its ownership and/or operation of the plant and/or ovens was not "absolutely unsustainable," that it was not "plain and obvious" that it would fail.

Standard of review

[16] The standard of review on this appeal of an interlocutory order is that this Court will not interfere unless the judge has applied a wrong principle of law or a patent injustice would result; **National Bank Financial Ltd. v. Potter** (2005), 238 N.S.R. (2d) 237; **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143.

Arguments

[17] While the appellants did not abandon the arguments contained in their facta, at the hearing they focussed on the absence of pled facts showing a relationship between them and the respondents that could give rise to the fiduciary duty claimed, that could reasonably give rise to an expectation that they were obliged to act in the best interests of the respondents when they operated the plant and/or ovens and when they received information concerning the alleged harmful emissions from the plants and/or ovens. Generally the appellants argued that the facts pled do not support the existence of a relationship that could give rise to a fiduciary duty.

[18] Ispat also argued that the law does not require it, as a private corporation, to disclose information about its operations to others.

[19] Canada also pointed to the lack of the special elements of trust, loyalty and confidentiality inherent in a fiduciary relationship in the relationship between it and the respondents, the respondents' over-reliance on the concept of vulnerability and the purposes and objectives of the statute that created Devco. Canada argued that the statute does not provide for a fiduciary duty owed by Devco to the respondents, but instead provides that Devco was to act in the interests of a broader constituency by reorganizing and rehabilitating certain coal mining operations in Cape Breton and by promoting and financing industry in Cape Breton to provide employment outside of the coal-related industries.

[20] Nova Scotia argued the same point with respect to the statute that created Sysco, pointing to its object being that Sysco should continue to operate the plant and the coke ovens until their future could be assessed:

> s.20. The object of the Corporation is to continue the operations of Sydney Works for a sufficient time to assess the long-term future of Sydney Works and to give effect to that assessment.

[21] It also pointed to the objective referred to in the agreement between the Dominion Steel and Coal Corporation, Limited and Nova Scotia, included in the Appendix to the statute that created Sysco, of operating the plant and/or ovens in the best interests of the greater public:

> AND WHEREAS Nova Scotia has determined it to be in the best interests of the public to continue operations at Sydney Works for a sufficient time to assess the long-term future of Sydney Works . . .

[22] Canada and Nova Scotia also argued that fiduciary duties, being creatures of equity, should only be used to supplement not duplicate common law causes of action, so that the reach of fiduciary duties should not be expanded to cover the pled facts in this case for which the common law of negligence, which includes the concept of limitation statutes that are put in place for good reasons, is available.

[23] The respondents did not argue that the fiduciary duty they claim arose as a result of a statute or an agreement. Rather, they argued that it arose from an implied unilateral undertaking by the appellants, to be implied from the pled facts. However, if we were to conclude that the respondents' failure to plead in their statement of claim that the basis of the alleged fiduciary duties is an implied undertaking, they seek the opportunity to amend their statement of claim to state this.

[24] The respondents accept that the test for determining whether a fiduciary duty exists in the absence of statute or agreement is the reasonable expectation that one party will act in the best interests of the other. There is no allegation in the statement of claim that the respondents had such a reasonable expectation. They argued that the reasonable expectation that the appellants would act in their best interests arose once the appellants had information indicating that the emissions were harmful, concealed it from the respondents, and continued to operate the facilities without taking action

to prevent this. They argued that by acting in this manner the appellants denied the respondents an opportunity to protect themselves, giving rise to the duty.

[25] They argued the concept of fiduciary duty should be expanded even if the common law of negligence provides a remedy because the remedy available for breach of a fiduciary duty may be more effective than that available for negligence and that the limitation statutes may reduce their opportunity for success on their negligence claim.

Analysis

[26] For the following reasons, I am satisfied the judge erred when he declined to strike the respondents' claim against Ispat based on fiduciary duty, but did not err in refusing to strike their claims based on fiduciary duty against Canada and Nova Scotia.

[27] The appellants did not apply to strike the respondents' negligence claims, that they owed the respondents a duty of care. Rather, they applied to strike the respondents' claims that they owed the respondents a fiduciary duty, a higher quasi-trust duty. The difference between these types of claims was dealt with by this Court in **Barrett v. Reynolds**, (1998) 170 N.S.R. (2d) 201:

> [196] The differences between these two duties may be regarded by some as overly subtle or as legal "technicalities". I do not agree. There are fundamental differences between a duty to take reasonable care and a duty of utmost good faith. LaForest, J. [in **Hodgkinson v. Simms**, [1994] 3 S.C.R. 377 at p. 405] summarized these differences as follows:
>
> > ". . . the fiduciary duty is different in important respects from the ordinary duty of care. In **Canson Enterprises Ltd. v. Boughton & Co.**, [1991] 3 S.C.R. 534, at pp. 571-73, I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also **Nocton v. Lord Ashburton**, [1914] A.C. 932, at pp. 968-971, per Lord Shaw of Dunfermline. However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and

> confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty."
>
> [197] As LaForest, J. put it in **Hodgkinson**, these differences must be attended to so "... civil liability will be commensurate with civil responsibility": at p. 405.
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> [198] There is nothing complicated or technical about what the duty of loyalty requires. The fiduciary must act in the client's interests (or in their mutual interest) to the exclusion of his or her own interests. One party has the obligation to act for the benefit of another: **Hodgkinson**, supra, at pp. 407-408.
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> [199] There are some relationships that are classified as fiduciary because of the discretion, influence and vulnerability inherent in the relationship. Trustee-beneficiary and agent-principal are two examples. In other relationships, their fiduciary nature, while not inherent, may nonetheless arise in particular circumstances: **Hodgkinson** at p. 409. In the case of relationships that are not inherently fiduciary, the key consideration in assessing whether the circumstances in the particular situation gave rise to fiduciary obligations is whether there was "... a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party": **Hodgkinson** at pp. 409-410.

[28] The case management judge was correct in noting that the concept of fiduciary duty is an evolving one. This follows from the law set out in **Guerin v. Canada**, [1984] 2 S.C.R. 335, that the categories of fiduciary are not closed because they depend on the nature of any specific relationship, not on a specific category of actor involved:

> It is sometimes said that the nature of 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. See, e.g. *Laskin v. Bache & Co. Inc*. (1971), 23 D.L.R. (3d) 385 (Ont.C.A.), at p. 392: *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216 (Ont.C.A.), at p. 224.

[29] However, the fact that the law of fiduciary duty is evolving, does not mean that a claim based on fiduciary duty should never be struck. As stated in **Prentice v. Canada,** 264 D.L.R. (4th) 742 at ¶ 24; leave to S.C.C. denied [2006] S.C.R. No. 26, not every novel claim should be permitted to proceed to trial:

> [24] [The novelty of a cause of action should not always prevent a plaintiff from proceeding with his or her action.] That does not mean, however, that a party who advances an unprecedented cause of action will have an easy time of it at the motion to strike stage. The courts are certainly prepared to give such a party his or her day in court, but the cause of action, novel as it may be, must still have some chance of being recognized at the end of the road. A cause of action is not "reasonable" simply because it has not yet been explored. The courts must not naively assume that something novel is or may be part of the normal course of evolution in the law. . . .

[30] Before deciding whether the respondents' claim against the appellants based on fiduciary duty should be struck, the judge should have conducted an analysis of the pled facts and asked himself whether that factual foundation could support the existence of a fiduciary duty applying the current test for such obligations. In his reasons the judge referred to a number of cases dealing with the applicable test, but he did not set out what pled facts he considered in light of this test or how they factored into his decision that the respondents claim was not "absolutely unsustainable." Rather he seems to have concluded that he did not have to do this analysis given the evolving nature of fiduciary duties:

> [72] Like Justice Allan in *Brogaard v. Canada (Attorney General)*, supra, I am satisfied the law is evolving in respect to fiduciary duties, particularly as to the circumstances in which they may be found to exist. Whether the law has now evolved to the extent a plaintiff, injured by activities of a defendant, is owed a fiduciary duty by that defendant to at least disclose the nature of the risk and/or harm being occasioned, may be "dubious, novel, unlikely to succeed or subject to valid defences." It is unnecessary for me, on this application, to decide whether the law has so evolved. **. . .**

[31] To determine if the judge erred in his decision we must consider whether the pled facts could possibly support the respondents' claim that the appellants owed them a fiduciary duty, applying the appropriate test.

[32] No case has been referred to us, nor have we been able to find one, where a court has considered whether a fiduciary relationship arises in a fact situation similar to the one alleged in this case.

[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:

> 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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> 25 Also, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 409, La Forest J. stated:
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> **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.**
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> 26 Other characteristics of a fiduciary relationship were described by Sopinka J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 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.**
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> (Emphasis mine)

[34] **Gladstone**, supra, suggests that in a case such as this, 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 with respect to the ownership and/or operation of the plant and/or ovens and with respect to the dissemination of any information they had with respect to the harmful effects of the emissions. The discretion the appellants had as to how they operated the plant and/or ovens, and what they did with any information they had with respect to the emissions, and the fact the respondents had no input into these

decisions, may be characteristics found in fiduciary relationships, but are not necessarily determinative of them.

[35] In **Hodgkinson**, supra, referred to in the quote from **Barrett**, supra, set out in ¶ 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.

[36] With respect to the importance of vulnerability in determining whether a fiduciary duty arose, LaForest, J., downplayed its importance in determining the existence of a fiduciary relationship in circumstances outside the established fiduciary categories. He used the term "power dependant relationships" to describe relationships characterized by unilateral discretion in which a party has power to make decisions that affect others. He noted that power imbalance is not the key factor to determine the existence of a fiduciary duty and stated at p. 412:

> In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". In my view, this concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. *Ipso facto,* persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. . . .

[37] Taking these factors into account with respect to Ispat, in light of the central question, 'Could the respondents reasonably have expected that Ispat would act in the respondents' best interests with respect to the operation of the plant and ovens and the dissemination of any information they had respecting the emissions?' I am satisfied the judge erred in deciding that it was not plain and obvious that the respondents have no cause of action against Ispat based on fiduciary duty.

[38] It is true that the respondents were vulnerable to the decisions Ispat made as to how it operated the plant and ovens and what it did with information it had relating

to that operation. While this characteristic is often found in fiduciary relationships, vulnerability is not a defining aspect of a fiduciary relationship; **Hodgkinson,** p. 412 and **Gladstone**, ¶ 26. Not every exercise of discretion gives rise to a fiduciary duty to those affected by the decision.

[39] There is no suggestion that Ispat and the respondents were anything but strangers. It is not alleged that there was any contact, discussion or dealings of any sort between them. There is no suggestion Ispat provided any information or advice to the respondents or that it was asked for any. Nothing in their alleged relationship suggests that Ispat owed the respondents any trust, loyalty or confidentiality. There is no suggestion in the statement of claim that there are community or industrial standards requiring companies like Ispat to operate in the manner the respondents suggest Ispat should have done. There is no suggestion Ispat acted any differently than other plant operators in its relationship with its geographical neighbours, the respondents. The respondents have not provided us with any case suggesting that Ispat had an obligation to correct any information provided to them by Canada or Nova Scotia.

[40] There is nothing in the pled facts that could reasonably give rise to an understanding between the respondents and Ispat that Ispat had relinquished its own self-interest and agreed to act solely on behalf of the respondents. Not only were they strangers, Ispat was obliged to act in the best interests of others, its shareholders. In the circumstances of this case I do not see this obligation as being compatible with it being obliged to act in the best interests of the respondents. To suggest on the facts alleged that Ispat owed a fiduciary duty to the respondents to act in their best interests as opposed to in the interests of its shareholders would represent a fundamental change in the law in Canada, and one I am not prepared to countenance here.

[41] The pled facts with respect to the relationship between the respondents and Canada and Nova Scotia suggest a different relationship. As set out above in ¶ 2 and 11, it is alleged that the actions and words of both Canada and Nova Scotia indicated, and continue to indicate to the respondents that there is no connection between the contamination of their property and the emissions from the plant and/or ovens and that it is safe for them to live on their property. This indicates there was intended communication between Canada and Nova Scotia on the one hand and the respondents on the other hand; that Canada and Nova Scotia provided information, if not advice, to the respondents with respect to the emissions and any harm they may do. Whether

the level of contact in providing information amounted to a relationship that might give rise to a fiduciary duty, will depend on the evidence at trial; **Barrett**, supra, ¶ 200 and 201. It may also be arguable that when Canada and Nova Scotia provided information to the respondents concerning their health in particular, and that it was safe to live on their land, a duty of loyalty was engaged.

[42] The success of any such arguments is yet to be determined. At this point it is only for us to consider whether there is an issue to be tried. Canada and Nova Scotia have not satisfied me, in light of their alleged contact with the respondents, that it is plain and obvious the respondents could not have reasonably expected that Canada and Nova Scotia would act in their best interests with respect to the operation of the plant and/or ovens, and especially with respect to the dissemination of information regarding the nature of the emissions (notwithstanding the statutory objectives in their respective enabling legislation).

[43] As to the argument made by Canada and Nova Scotia that the law of fiduciary duty should not be used to supplement the common law where negligence is already available to cover liability for their alleged wrongs, I am satisfied that is an argument that should be made at trial, not on a motion to strike such as this where the success of the negligence claim is yet to be determined. As stated in **Hunt v. Carey**, [1990] 2 S.C.R. 959:

> ¶ 53 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.
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> ¶ 54 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that

> "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.
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> ¶ 55 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[44] Accordingly, I would allow Ispat's appeal and order the respondents to pay costs to Ispat in the amount of $2,000 plus disbursements, at a time determined by the case management judge or the trial judge. I would dismiss the appeals of Canada and Nova Scotia and order that they each pay costs to the respondents collectively in the amount of $2,000 plus disbursements, at a time determined by the case management judge or the trial judge.

Hamilton, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.