NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21

Date: 20160330
Docket: CA 441503
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant/Cross respondent

-and-

David Bruce Carvery

Respondent/Cross appellant

Judges:	Fichaud, Bryson and Scanlan, JJ.A.
Appeal Heard:	January 25, 2016, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal dismissed and cross appeal dismissed, without costs, per reasons for judgment of Fichaud, J.A.; Bryson and Scanlan, J.A. concurring
Counsel:	Alexander Cameron for the Appellant/Cross respondent
	Bruce Outhouse, Q.C., and Justin E. Adams for the Respondent/Cross appellant
	Michael Dull, watching brief, for the Respondent

Reasons for judgment:

[1] Mr. Carvery alleges that, when he was eleven, he was sexually abused by his juvenile probation officer. At the time, Mr. Carvery was under the court-ordered supervision of the Department of Community Services. The probation officer was employed by the Province in that Department. Mr. Carvery sues the Province for breach of the Province's direct fiduciary duty to a child in its charge, and vicariously for the probation officer's breach of his own fiduciary duty. The Province moved for summary judgment on the pleadings to dismiss both claims. The motions judge held that Mr. Carvery's direct claim should proceed, but summarily dismissed Mr. Carvery's vicarious claim.

[2] The Province appeals and Mr. Carvery cross appeals. On the appeal, the issue is whether the *Proceedings Against the Crown Act* precludes a claim that the Province has breached its fiduciary duty. On the cross appeal, the issue is whether an employer may be vicariously liable for its employee's breach of his fiduciary duty.

1. Background

[3] Mr. Carvery sued the Attorney General, representing Her Majesty in right of the Province ("Province"). He claimed that a provincial employee sexually molested him as a boy. The Province moved under Rule 13.03 to dismiss the claim by summary judgment on the pleadings. On such a motion, the facts pleaded in the challenged Statement of Claim are assumed. Mr. Carvery's pleaded allegations include:

- Mr. Carvery was born in Halifax in 1963.
- In early 1975, a court ordered him, aged eleven, to attend for probationary supervision by the Department of Community Services of the Province of Nova Scotia ("Province").
- At the time, the Province employed Mr. Cezar Lalo as a youth worker in the Department of Community Services. The Province assigned Mr. Lalo to be Mr. Carvery's probation officer.
- Between April 1975 and October 1975, Mr. Carvery "met regularly with [Mr.] Lalo and was counselled by him and reposed trust in him".

- In these sessions Mr. Carvery was "entirely within the power and control of the Defendants [Mr. Lalo and the Province], and was subject to the unilateral exercise of the Defendants' power or discretion".
- During that period, Mr. Carvery "was subjected to sexual abuse by [Mr.] Lalo".
- According to the Amended Statement of Claim, these events meant the Province "allowed an unqualified agent, employee, servant, and youth probation officer entrusted with the care of [Mr. Carvery] to abuse [Mr. Carvery]".
- As a result, Mr. Carvery "has suffered injuries and losses".

[4] The procedural course of Mr. Carvery's claims has winnowed the issues.

[5] In April 1996, Mr. Carvery gave the Province a Notice of Intended Action. He waited until December 15, 2008 to file his Originating Notice with the Supreme Court of Nova Scotia. The Originating Notice sued Mr. Lalo and the Province. Mr. Carvery's Statement of Claim cited assault and negligence, breaches of contract, statutory duty and trust, and claimed that the Province was vicariously liable for Mr. Lalo's conduct.

[6] In October 2011, Mr. Carvery obtained default judgment against Mr. Lalo.

[7] The Province's Defence, filed in March 2009, cited the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

[8] In July 2011, the Province moved for summary judgment to dismiss Mr. Carvery's claim. The motion relied on the limitations defence.

[9] In October 2011, Mr. Carvery moved in the Supreme Court for an amendment to his Statement of Claim to plead that the Province had breached its fiduciary duty. Justice Moir granted an Order that permitted the amendment and, on October 19, 2011, Mr. Carvery filed the Amended Statement of Claim.

[10] In February 2012, Justice Moir granted a Consent Order, signed by counsel for Mr. Carvery and the Province, stating:

> IT IS HEREBY ORDERED that The Attorney General of Nova Scotia's Motion for Summary Judgment is hereby granted and the Plaintiff's action as against The Attorney General of Nova Scotia is dismissed saving and excepting those

> allegations made by the Plaintiff involving a breach of fiduciary duty on behalf of The Attorney General of Nova Scotia.

The Order's theory was that a claim for breach of fiduciary duty is not subject to a limitation in the *Limitation of Actions Act*. See *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at pages 60, 69-71, per LaForest, J. for the Court on this point, discussing the topic under Ontario's limitations legislation.

[11] In September 2013, the Province moved to amend its Defence, to plead that the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360 ("*PAC Act*") precludes a claim for breach of fiduciary duty against the Province. On September 25, 2013, Justice Wood of the Supreme Court granted the Order, consented by counsel for Mr. Carvery, and the Province filed the Amended Defence.

[12] At the same time, Justice Wood granted an Order permitting Mr. Carvery to further amend his Statement of Claim, to plead that the Province was vicariously liable for Mr. Lalo's breach of his own fiduciary duty. Mr. Carvery filed the amendment on October 2, 2013. Then, on October 9, 2013, the Province further amended its Defence to plead that vicarious liability for a breach of fiduciary duty is not a recognized cause of action.

[13] In July 2014, the Province filed a motion in the Supreme Court under Rule 13.03 (summary judgment on the pleadings) to dismiss Mr. Carvery's direct and vicarious claims against the Province for breach of fiduciary duty.

[14] Justice Jamie Campbell heard the motion on May 7, 2015 and issued a written decision on July 8, 2015 (2015 NSSC 199), followed by an Order on August 13, 2015. The judge partially granted the Province's motion, by dismissing Mr. Carvery's claim that the Province was vicariously liable for Mr. Lalo's breach of fiduciary duty. But the judge permitted Mr. Carvery to proceed with his claim that the Province directly breached its fiduciary duty, and dismissed that aspect of the Province's motion. Later I will discuss the judge's reasons.

[15] In July 2015, the Province applied for leave to appeal to the Court of Appeal from Justice Campbell's decision. Mr. Carvery then filed a notice of contention and cross appeal.

2. Issues

[16] The Province challenges the motions judge's ruling that Mr. Carvery's direct fiduciary claim may proceed. The Province's Notice of Appeal cites five grounds. Its factum withdrew the fifth. The others are that the judge erred:

- in finding that the Crown may be liable under s. 3(3) of the *PAC Act* for breach of fiduciary duty,
- in his interpretation of s. 3(3),
- in finding that "the medieval petition of right process is 'received law' in Nova Scotia and preserved by s. 3(3)", and
- in reaching inconsistent conclusions that the Crown may be vicariously liable under s. 3(3), but cannot be vicariously liable for breach of fiduciary duty generally.

[17] Mr. Carvery's Notice of Contention cites bases other than s. 3(3) of the *PAC Act* to support the judge's ruling that the Province may be sued for breach of the Province's fiduciary duty.

[18] Mr. Carvery's cross appeal submits that the judge erred by dismissing Mr. Carvery's claim that the Province is vicariously liable for Mr. Lalo's breach of fiduciary duty.

[19] I will discuss the issues under two headings:

(1) Did the judge err in law by allowing Mr. Carvery to proceed with his direct claim for breach of fiduciary duty? [The Province's four remaining grounds of appeal and Mr. Carvery's Notice of Contention]

(2) Did the judge err in law by dismissing Mr. Carvery's claim that the Province is vicariously liable for Mr. Lalo's breach of fiduciary duty? [Mr. Carvery's cross appeal]

3. The Appellate Standard of Review

[20] In a motion for summary judgment on the pleadings under Rule 13.03, the facts in the challenged pleadings are assumed. The issues on appeal are legal,

meaning the Court of Appeal applies correctness: *e.g. Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, para. 15.

4. The Test Under Rule 13.03

[21] Rule 13.03(3) says no affidavit is receivable for or against the motion, which must be determined solely on the pleadings.

[22] Summary judgment on the pleadings clears the docket of claims or defences that are bound to fail. It neither blunts the analysis of a difficult legal question through oversimplification, nor stifles the evolution of legal principle. Not every question may be isolated for legal scrutiny. A point that turns on its factual context has elements of mixed fact and law. Unless the factual component is clear and complete in the pleaded allegations that are assumed under Rule 13.03, that point is not for summary judgment on the pleadings. The Rules offer other avenues that include a motion for summary judgment on the evidence under Rule 13.04 and an application hearing under Rule 6, in appropriate cases, or trial. I refer to the following authorities.

[23] In the seminal ruling of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Justice Wilson for the Court said:

> 18 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: … [citations omitted].

[24] Recently, in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 18, the Chief Justice for the Court said it was "useful to review the purpose of the test and its application", then continued:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> …
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. … [citing *Donoghue v. Stevenson*, [1932] A.C.

> 562 (H.L.) and *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.)] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[25] This Court has said that a motion for summary judgment on the pleadings succeeds only if the responding party's claim or defence is "certain to fail" because it is "absolutely unsustainable", *i.e.* it is "plain and obvious" that it "discloses no cause of action or defence". *Cragg v. Eisener*, 2012 NSCA 101, para. 9, and authorities there cited; *Cape Breton v. Nova Scotia*, para. 21.

5. First Issue – May the Crown be Sued for Breach of Fiduciary Duty?

[26] Nova Scotia's *PAC Act* was enacted in 1951 (S.N.S. 1951, c. 8). The wording of its provisions that govern this appeal has been un-amended since then. Pertinent are the following:

> **Interpretation**
>
> 2 In this Act,
>
> …
>
> (b) "Crown" means Her Majesty in right of the Province;
>
> (c) "officer", in relation to the Crown, includes a minister of the Crown and any servant of the Crown;
>
> …
>
> (f) "proceedings against the Crown" includes a claim by way of set-off or counterclaim raised in proceedings by the Crown and interpleader proceedings to which the Crown is a party;
>
> (g) "rules of court" means rules of court made under the authority of the *Judicature Act* or of the *County Court Act*.
>
> …
>
> **Consent unnecessary**
>
> 3(3) Subject to this Act, where a person has a claim against an officer of the Crown or a corporation owned or controlled by the Crown that, if this Act had not been passed, might be enforced subject to the consent of an officer of the Crown, then the claim may be enforced as of right without such consent.

PART I

SUBSTANTIVE LAW

Right to enforce claim against Crown

4 Subject to this Act, a person who has a claim against the Crown may enforce it as of right by proceedings against the Crown in accordance with this Act in all cases in which

(a) the land, goods or money of the subject are in the possession of the Crown;

(b) the claim arises out of a contract entered into by or on behalf of the Crown; or

(c) the claim is based upon liability of the Crown in tort to which it is subject by this Act.

Tort liability of Crown

5(1) Subject to this Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject

(a) in respect of a tort committed by any of its officers or agents;

(b) in respect of any breach of the duties that a person owes to his servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to ownership, occupation, possession or control of property;

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Act of officer or agent

(2) No proceedings lie against the Crown under clause (a) of subsection (1) in respect of an act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or his personal representative.

Tort of officer in performing legal duty

(3) Where a function is conferred or imposed upon an officer of the Crown as such by common law or by statute, and that officer commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort is the same as if that function had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

…

PART II

JURISDICTION AND PROCEDURE

Judicature Act

7 Subject to this Act, proceedings against the Crown in the Supreme Court shall be instituted and proceeded with in accordance with the *Judicature Act*.

…

Power of court in proceedings against the Crown

16(1) Subject to this Act, in proceedings against the Crown the court may make any order, including an order as to costs, that it may make in proceedings between persons, and may otherwise give the relief that the case requires.

…

Notice to the Crown

18 No action shall be brought against the Crown unless two months previous notice in writing thereof has been served on the Attorney General, in which notice the name and residence of the proposed plaintiff, the cause of action and the court in which it is to be brought shall be explicitly stated.

…

PART IV

MISCELLANEOUS AND SUPPLEMENTAL

…

Rules of court

23 Any power to make rules of court or county court rules includes power to make rules for the purpose of giving effect to this Act, and any such rules may contain provisions relating to proceedings against the Crown in substitution for or by way of addition to any of the provisions of the rules applying to proceedings between subjects.

…

Abolition of other proceedings against Crown

25(1) Except as provided in this Act, proceedings against the Crown are abolished.

Mandamus preserved

(2) This Act does not limit the discretion of the court to grant relief by way of *mandamus* in cases in which such relief might have been granted before the enactment of this Act, notwithstanding that by reason of this Act some other and further remedy is available.

> **Conflict**
>
> 26 Except as otherwise provided herein, where this Act conflicts with any other Act this Act shall prevail.

[27] The Province's straight-forward submission to the motions judge was that section 25(1) "abolished" causes of action against the Crown, except those expressly listed by s. 4, which does not mention fiduciary claims. The Province's brief to Justice Campbell put it this way:

> 19. The point advanced here, based upon the foregoing authorities, is not complex. Simply put, the old methods of proceeding against the Crown – monstrans de droit, traverse of office, the Chancery bill procedure – were done away with in 1951 by s. 25. Proceedings against the Crown were abolished by that provision, "except as provided by this Act".
>
> 20. The *Proceedings Against the Crown Act* authorizes proceedings against the Crown as of right and "proceeded with in accordance with the Judicature Act" (s. 7). But only three sorts of proceedings against the Crown are admitted: claims in contracts (4(b)), claims in tort (4(a)) [*sic* – should read "4(c)"], and, cases where "the land, goods or money [of] the subject are in the possession of the Crown" (4(a)).
>
> 21. A claim of breach of fiduciary duty is purely an equitable claim. It is not a tort or contractual claim, both of which are creatures of the common law Courts. Neither is the claim advanced here one in which, "lands, goods or money" are in the possession of the Crown.
>
> 22. The result must be that the Plaintiff's claim of breach of fiduciary duty must be set aside. The Nova Scotia Crown is immune from the claim. …

[28] The motions judge disagreed. Justice Campbell expressed two lines of reasoning, based on ss. 25(1) and 3(3) of the *PAC Act*:

Section 25(1):

- Section 25(1) says "[e]xcept as provided in this Act, proceedings against the Crown are abolished". Justice Campbell said s. 25(1) abolished the former procedures, but not substantive causes of action. The former procedures were replaced by the general rules of civil procedure. He referred to the English *Crown Proceedings Act* of 1947, 10 & 11 Geo. VI, c. 44, which was the template for Canada's provincial Crown proceedings statutes, including Nova Scotia's *PAC Act* of 1951.

- The judge said, in this respect:

> [72] The proceedings referenced in s. 25(1) are the old procedures and not the substantive rights. The procedures that were still available in England in 1947 when certain civil proceedings against the Crown were abolished, and which would have been available in Nova Scotia in 1951 included the writs of *capias ad respondum*, writs of *subpoena ad respondum*, writs of *scire facias*, the writ of extent, the writ of *diem clausit extremum* and *monstrans de droit*. The modes of procedures, including the old petition of right were abolished. It was no longer necessary to use the actual petition as a procedure but the substantive rights embodied in the ancient petition were not intended to be extinguished.
>
> [73] The interpretation is consistent [with] the interpretation of the English *Crown Proceedings Act* of 1947 on which the Nova Scotia legislation was at least to some extent modelled. The civil proceedings against the Crown that were "abolished" in that legislation were set out in a schedule which set out the old procedures by which a subject could sue the Crown. The removal of those procedures didn't change the substantive law. A civil proceeding could be taken against the Crown using the same forms as a person might use to take a civil action against another individual. That is what was abolished by s. 25(1) of the *Proceedings Against the Crown Act*.

Section 3(3):

- Justice Campbell (paras. 39-69) reviewed the history of proceedings against the Crown. He concluded that old English law permitted an equitable claim to proceed against the Crown by petition of right, with the Crown's consent, and this English law was received by the colony of Nova Scotia in 1758. [See *Uniacke v. Dickson* (1848), 2 N.S.R. 287 (Ch.) and *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 56 for Nova Scotia's date of reception, and *Conseil scolaire francophone de la Columbie-Britannique v. British Columbia*, [2013] 2 S.C.R. 774, paras. 14-15, 37 for the principles of reception.] Consequently, according to the judge, immediately before the enactment of Nova Scotia's *PAC Act* in 1951, a Nova Scotia claimant could have pursued an equitable fiduciary claim against the Crown, by petition of right with the Crown's consent.

- Section 3(3) of the *PAC Act* permits someone who "has a claim against an officer of the Crown or a corporation owned or controlled by the Crown that, if this Act had not been passed, might be enforced subject to the consent of an officer of the Crown", to enforce that claim "as of right

without such consent". Justice Campbell concluded that s. 3(3) "preserves" the right to sue the Crown for breach of fiduciary duty, without consent:

> [69] The legislation was not intended to take away the rights that already existed. What could have been done before with consent, could now be done without consent. The wording is unusual. In the rest of the [A]ct the references are to the Crown. In subsection 3(3) the reference is to an officer of the Crown or a corporation owned by the Crown. But if the subsection doesn't simply remove the requirement for consent and act toward some other purpose, it isn't clear what that purpose might be. It's [*sic*] only purpose appears to be to remove the requirement for consent where that requirement previously existed. A petition of right then could have been used before 1951 to make an equitable claim and after 1951 could be used without the requirement for consent.
>
> …
>
> [75] Section 3(3) preserves the rights that existed as of 1951 to take action against the Crown, subject to other provisions of the [A]ct. The petition of right was such a right. It would permit a claim to be made in equity against the Crown. The procedure involved has been abolished by s. 25(1) along with the other old writs and procedures but the right itself was preserved.

[29] On the appeal, the Province's grounds and factum focus on s. 3(3) of the *PAC Act*:

- The Province submits that there is a difference between a claim against the Crown's officer or corporation and a claim against the Crown, and that s. 3(3) applies only to the former. So s. 3(3) would not assist Mr. Carvery's direct claim against the Crown. To support its point, the Province says there is a logical inconsistency between the motions judge's ruling that there can be no vicarious liability for a breach of fiduciary duty (below, para. 71) and his conclusion that a "claim against an officer" in s. 3(3) is a direct claim against the Crown.

- As to petitions of right, the Province acknowledges that, in England, the petition of right process permitted an equitable claim against the Crown, with consent. But, says the Province, the petition of right countenanced a direct claim against the Crown, not against the Crown's "officer" or "corporation", who are the only defendants mentioned in s. 3(3). Secondly, the Province notes that Nova Scotia's Legislature never enacted a procedure for petitions of right, and contends that the English law on petitions of right

> was not received by the Nova Scotia colony in 1758. Accordingly, the Province submits that in 1951 Nova Scotia had no process for a claim against the Crown that was enforceable "subject to the consent of an officer of the Crown" to be preserved "as of right" under s. 3(3).

[30] In this Court, the Province's grounds of appeal and factum do not directly address s. 25(1). This is odd, given that s. 25(1) was the crux of the Province's submission to the motions judge, and Justice Campbell rejected the Province's interpretation.

[31] In my view, the availability today of a direct fiduciary claim against Her Majesty in right of the Province does not depend on s. 3(3) of the *PAC Act*. As I will explain, section 25(1) abolished (and the *PAC Act* replaced) the old procedures, but nothing extinguished causes of action. So it isn't essential that s. 3(3) affirmatively preserve causes of action. That means it is unnecessary to consider whether "a claim against an officer of the Crown or a corporation owned or controlled by the Crown" in s. 3(3) is a claim against the "Crown". Nor does the outcome turn on whether in 1758 the colony of Nova Scotia received the English law on petitions of right. Those two points are for another day.

[32] The Province's summary judgment motion rested on the simple premise that s. 25(1) abolished all substantive causes of action against the Crown except those (property, contract, tort) that were listed in s. 4. I agree that the primary focus is on s. 25(1). Since *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, paras. 38, 48-49, a fiduciary claim against the Province by a child in care is a cause of action known to the law (discussed below, para. 58). Whether Mr. Carvery can prove it in his circumstances is another matter, and is not an issue on this appeal. Section 25(1) is the only provision in the *PAC Act* that has expressly "abolished" anything. If Mr. Carvery's claim is to be dismissed summarily on the pleadings without trial, as a "plain and obvious" matter of law, the path to that conclusion starts with s. 25(1).

[33] In the Court of Appeal, the Province also makes an argument by implication from s. 4 of the *PAC Act*, and cites the common law immunity of the Crown, points that I will address after discussing s. 25(1).

(a) Express Abolition by Section 25(1)

[34] The analysis of s. 25(1) of the *PAC Act* involves the questions:

- What was "abolished" by s. 25(1)? In particular, did s. 25(1) abolish substantive causes of action or just procedure?

- If s. 25(1) abolished only procedure, did the *PAC Act* substitute a procedure that contemplates a direct claim against the Crown, without the Crown's consent, for the fiduciary cause of action recognized by *K.L.B.* in 2003?

[35] As background for the analysis, Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, in *Liability of the Crown*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2011), paras. 1.3 (b), (c), (d) and (e), offer a helpful genealogy of the transition from petitions of right to modern Crown liability legislation:

> **(b) Equitable relief**
>
> … The practice of suing the Attorney-General for equitable relief against the Crown fell into disuse until the decision in *Dyson v. Attorney-General*, [1911] 1 K.B. 410. In that case, the Court of Appeal decided that the Exchequer's power to give equitable relief had been transferred to Chancery in 1841 and could after the Judicature Acts of 1873-1875 be exercised by all divisions of the High Court. The fact that this power had not been exercised between 1841 and 1910, when *Dyson* was decided, does not mean that no equitable relief was obtained against the Crown during that period; equitable relief was available on a petition of right.
>
> **(c) Contract and tort**
>
> In the nineteenth century, the petition of right, which had been little used in the preceding three centuries, enjoyed a revival. Remedies were needed for breaches of contract and for torts committed by the Crown. The petition of right, whose cumbersome procedure was simplified in 1860, was the only obvious candidate. There was no doubt that the petition of right lay for the recovery of property; and the wide conception of property and imperfect recognition of other legal conceptions in the middle ages had brought within the ambit of the petition of right some claims that would now be thought of as contractual or tortious. In the nineteenth century it became necessary to decide whether the petition of right could be used as a remedy in contract and tort generally.
>
> With respect to contract, the answer was yes. In *Thomas v. The Queen*, (1874) L.R. 10 Q.B. 31, it was held that the petition of right lay to recover from the Crown unliquidated damages for breach of contract. …
>
> With respect to tort, however, the answer was no: the courts refused to extend the petition of right to torts. The courts quoted the old maxim that "the King can do no wrong", and they concluded that he could neither commit nor authorize the commission of a tort. …

The exclusion of tort claims from the petition of right procedure immunized the Crown from liability in tort, because no other remedy was available for the purpose. The injured subject was not necessarily without redress because in many (but not all) cases an action could be brought against the individual Crown servant who committed the tort, and in practice the Crown itself would defend the action and pay any damages. Nonetheless, it was a serious defect in the law that the Crown itself was not liable as of right. The defect was not remedied in the United Kingdom until 1947, when tortious liability was finally imposed on the Crown by the Crown Proceedings Act 1947 [10 & 11 Geo. VI, c. 44]. In Australia and New Zealand, all jurisdictions except for the state of Victoria had imposed tortious liability on the crown by 1902. But in Canada, nine of the ten provinces did not act until after the United Kingdom had provided the model; only Quebec and the federal jurisdiction had imposed tortious (delictual) liability on the Crown before 1947.

...

(d) Royal fiat

As a procedural vehicle, the petition of right was unsatisfactory. Although the procedure was simplified by the Petitions of Right Act of 1860, the petition of right remained subject to the fundamental limitation that it could proceed to adjudication only if the King signified his consent by endorsing the petition *fiat justitiae* – let right be done. Of course, by 1860, responsible government was fully developed, so that the discretion to grant or deny the royal fiat was in reality the discretion of the cabinet. In short, the government could be sued only if it consented to be sued.

(e) Statutory reform

The law of Crown liability migrated to the British colonies, along with the rest of the public law of England. The petition of right became the procedure for suing the colonial governments. After the advent of responsible government, each colonial government enjoyed the privilege of granting or denying the royal fiat when faced with a lawsuit. Each colonial government became immune from liability in tort.

… The Crown Proceedings Act 1947 finally abolished the petition of right, including the requirement of the fiat, and permitted the Crown to be sued in the same fashion as a private person. (As noted above, this Act also imposed tortious liability on the Crown.). …

In Canada, the petition of right, including the requirement of the fiat, remained the procedure for suing the Crown in all jurisdictions until after the enactment of the Crown Proceedings Act 1947 in the United Kingdom. In 1950, the Conference of Commissioners on Uniformity of Legislation in Canada prepared a Model Act for adoption by Canadian jurisdictions. The Model Act was based on the United Kingdom Act and incorporated its major provisions. Between 1951

> and 1974, the Model Act was enacted in substance by all of the Canadian provinces, except Quebec. …
>
> The present position in Canada is that, in general, the Crown may be sued in the ordinary courts by the procedure that would be appropriate in suits between subjects. …

[36] As noted by Professor Hogg's text, the English *Crown Proceedings Act 1947* ("*1947 Act*") was the template for Canada's provincial statutes, including Nova Scotia's *PAC Act*. Section 13 of the *1947 Act* was the precursor to Nova Scotia's s. 25(1). Section 13 said:

> **Civil proceedings in the High Court.**
>
> 13. Subject to the provisions of this Act, all such civil proceedings by or against the Crown as are mentioned in the First Schedule to this Act are hereby **abolished**, and all civil proceedings by or against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise. [bolding added]
>
> …

The First Schedule of the *1947 Act* said:

> FIRST SCHEDULE
>
> PROCEEDINGS ABOLISHED BY THIS ACT
>
> 1 (1) Latin informations and English informations.
>
> (2) Writs of capias ad respondendum, writs of subpoena ad respondendum, and writs of appraisement.
>
> (3) Writs of scire facias.
>
> (4) Proceedings for the determination of any issue upon a writ of extent or of diem clausit extremum.
>
> (5) Writs of summons under Part V of the Crown Suits Act, 1865.
>
> 2 (1) Proceedings against His Majesty by way of petition of right, including proceedings by way of petition of right intituled in the Admiralty Division under section fifty-two of the Naval Prize Act 1864.
>
> (1) Proceedings against His Majesty by way of monstrans de droit.

[37] *Halsbury's Laws of England*, 4th ed. (Reissue), vol. 12(1) ("Crown Proceedings and Crown Practice") comments on what was abolished by s. 13, and what replaced it:

102. The Crown Proceedings Act 1947.

…

Subject to certain exceptions, the Act abolished the special forms of procedure which previously governed civil proceedings by and against the Crown. As a result, these proceedings are, subject to certain special provisions, governed by the same rules as proceedings between subjects. …

…

115. Abolition of old forms of procedure. Subject to the provisions of the Crown Proceedings Act 1947, the special forms of procedure under which proceedings were brought by and against the Crown prior to 1 January 1948 have been abolished.

…

117. Proceedings in the High Court. All civil proceedings by or against the Crown in the High Court are to be instituted and proceeded with in accordance with rules of court and not otherwise.

…

(3) PRACTICE AND PROCEDURE

122. In general. In general, subject to certain special rules of practice and procedure, civil proceedings by or against the Crown whether in the High Court or county court take the same form as civil proceedings between subjects.

[38] Section 13 of England's *1947 Act* "abolished" the old procedures that pertained to the Crown, and replaced them with the civil rules of court. Section 13 did not abolish substantive causes of action.

[39] Under the principles of statutory interpretation, the wording, statutory scheme and context, and legislative objective of Nova Scotia's *PAC Act* lead to the same conclusion.

[40] Section 25(1) of the *PAC Act* states that "proceedings" are abolished. It says nothing of substantive causes of action.

[41] What are "proceedings"?

[42] Section 2(f) of the *PAC Act* says "proceedings against the Crown" "includes" set-off, counterclaim and interpleader. These are procedures, not substantive causes of action.

[43] Section 7 of the *PAC Act* says that, subject to the *Act*, "proceedings against the Crown in the Supreme Court shall be instituted and proceeded with in accordance with the *Judicature Act*". The *Judicature Act*, R.S.N.S. 1989, c. 240, s. 2(g) defines "proceeding":

> "proceeding" means any civil or criminal action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons or originating motion or any other manner;

The word "proceeding" in the *Judicature Act* refers to the procedure by which a cause of action is heard. Section 41 of the *Judicature Act* then directs that every such proceeding "shall" entertain equitable causes of action:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> …
>
> (d) the Court shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any proceeding, in the same manner in which the court of equity judge, or the said Court of Chancery, would have recognized, and taken notice of the same, in any suit or proceeding duly instituted herein before the first day of October, 1884;
>
> …
>
> (f) subject to the foregoing provisions for giving effect to equitable rights and other matters of equity, and to the express provisions of this Act, the Court shall recognize and give effect to all legal claims and demands, and all estates, rights, duties and obligations and liabilities existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect prior to the first day of October, 1884, by the Court either at law or in equity;

[44] Section 23 of the *PAC Act* says that "[a]ny power to make rules of court … includes power to make rules for the purpose of giving effect to this Act, and any such rules may contain provisions relating to proceedings against the Crown". Section 23 refers to the power in s. 46 of the *Judicature Act*. Section 46 says that the judges of the Supreme Court and Court of Appeal "may make rules of court" on various topics including:

> (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;
>
> …
>
> (j) generally for regulating any matter relating to the practice and procedure of the Court …

[45] From those provisions it is clear that, "[e]xcept as provided in this Act", s. 25(1) "abolished" the former procedures for suing the Crown. Section 25(1)'s words "[e]xcept as provided in this Act" summoned sections 7 and 23 of the *PAC Act*, which substituted the procedures in the rules of court that applied to litigants generally. In 1951, those were the rules of the Supreme Court or County Court. Now they are the *Civil Procedure Rules* enacted under ss. 46 and 47 of the *Judicature Act*. The medieval writs that scribed the King's fiat in Latin are replaced by *Civil Procedure Rules* that permit a plaintiff to sue any defendant, without the defendant's consent, simply by filing and serving the prescribed Notice of Action or Application. This is subject to the procedural conditions that are expressly stated in the *PAC Act*, such as s. 18's requirement for two months prior notice to the Crown.

[46] This outcome is summarized by Hogg, *Liability of the Crown*, page 9:

> The present position in Canada is that, in general, the Crown may be sued in the ordinary courts by the procedure that would be appropriate in suits between subjects. …

[47] Section 25(1) did not abolish substantive causes of action. The *PAC Act*'s objective was to simplify the procedure for suing the Crown, not to extinguish claims against the Crown.

(b) Implied Preclusion by Section 4

[48] The Province contends that the listing of causes of action (property, contract and tort) in s. 4 of the *PAC Act* impliedly precludes other causes of action against the Crown. This is a submission of *expressio unius est exclusio alterius*.

[49] I respectfully disagree.

[50] As discussed in the passage from Hogg's *Liability of the Crown*, before the modern Crown liability legislation claims against the Crown for recovery of property and in contract depended on the petition of right with the Crown's consent

or fiat, while the Crown was immune from claims in tort. The usage of the petition of right had waxed and waned for centuries. The authorities cited on this appeal have described the old writs as "anachronistic", "dormant", "cumbersome" and "regressive". With the pervasive spread of governmental functions in the mid-twentieth century, the arcane procedures were undermining the utility of contract and property law. Clearly there was work to be done. To fill the gap in tort, sections 4(c) and 5 of the *PAC Act* expressly permitted claims in tort, including vicarious liability for tort. Sections 4(a) and (b) clarified the situation for contractual and proprietary claims.

[51] Section 4 of the *PAC Act* deals with property, contract and tort. It is not an exhaustive code of every conceivable cause of action that implicates the Crown. Section 4 does not impliedly abolish or preclude substantive causes of action against the Crown that have independently evolved in the law outside the fields of property, contract and tort.

[52] In *Re MacNeil v. Nova Scotia Board of Censors* (1974), 53 D.L.R. (3d) 259 (N.S.S.C.A.D.), at p. 263, appeal dismissed *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, Justice Macdonald for the Court said:

> … Staying with the Act [the *PAC Act*] for the moment it seems to me to be restricted by s. 3 [now s. 4] to claims arising out of torts, contracts and cases in which the lands, goods or money of the plaintiff are in the possession of the Crown. The application in issue does not fall within any of such classes. …

[53] In *Nova Scotia (Attorney General) v. Annapolis (County)* (1996), 153 N.S.R. (2d) 278 (S.C.), Justice Haliburton said, of the *PAC Act*:

> 24 Implicit in the MacNeil decision is the proposition that section 25(1) does not operate to immunize the Crown against actions other than those enumerated in section 4. …

[54] In *B.M.G. v. Nova Scotia (Attorney General)*, 2007 NSSC 27, appeal and cross appeal dismissed *sub. nom. Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, a thirteen year old boy was sexually molested by the same Cesar Lalo while Mr. Lalo was the boy's juvenile probation officer. B.M.G. sued the Province for direct and vicarious liability. The direct action included a claim that the Province breached its fiduciary duty. The trial judge heard the fiduciary claim on its merits, then found that B.M.G. had not proven a breach by the Province. The trial judge held that the Province was vicariously liable for Mr. Lalo's tortious

conduct and awarded substantial damages and prejudgment interest. On appeal, Justice Cromwell for the Court held:

> [2] … In my view, the judge did not err in finding that the Province had not been negligent and did not breach a fiduciary duty to B.M.G. Neither did he err in finding the Province vicariously liable for Lalo's wrongful acts.
>
> …
>
> [54] … The judge did not err in concluding that the evidence did not support findings of negligence or breach of fiduciary duty against the Province.

In *B.M.G.*, the claim that the Province directly breached its fiduciary duty was tried and appealed, on its merits, under the *Civil Procedure Rules*. There was no issue or suggestion that s. 4 of the *PAC Act* had impliedly precluded the claim in the starting gate.

[55] In *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, Justice Cory, for the majority on this point, rejected the Province's suggestion that Nova Scotia's *PAC Act* be interpreted to impliedly exempt the Crown from liability:

> 29 … The arguments of the Crown are regressive and to accept them would severely restrict the ability of injured persons to claim against the Crown. I would add that the United Kingdom's *Crown Proceedings Act, 1947* which was before the Court in *Anns, supra*, is similar to the Nova Scotia statute.
>
> 30 If the Crown wishes to exempt itself from tortious liability in the construction and maintenance of highways it is a simple matter to legislate to that effect, and to leave the propriety of that legislative action for the voters' consideration. In the absence of a clear statutory exemption, the common law duty to maintain the highways must prevail.

[56] In Mr. Carvery's case, the Province urges that s. 4 not only abolished causes of action that existed in 1951. The Province says that s. 4 also pre-empted causes of action that would be unknown to the law until decades later. One of these is the fiduciary claim asserted by Mr. Carvery.

[57] The fiduciary concept has existed for centuries: *Walley v. Walley* (1687), 1 Vern. 484, 23 E.R. 609 (Ch.); *Keech v. Sandford* (1726), Sel. Cas. Ch. 61, 25 E.R. 223 (Ch.). It grew from trust, but carried a protean trait. Over time, it evolved a gap-filling capacity to satisfy the needs of justice in an open list of categories: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384, per Dickson, J. (as he then was); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 585-86, per LaForest, J.; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 404-414,

per LaForest, J; Leonard I. Rotman, *Fiduciary Law* (Toronto: Thomson Canada Limited, 2005), pp. 49, 58-61.

[58] The fiduciary duty of a government to a child in its care was one such application that emerged long after the enactment of Nova Scotia's *PAC Act*. In *K.L.B.* (2003), *supra*, Chief Justice McLachlin, for the Court on this point, said:

> 38 The parties to this case do not dispute that the relationship between the government and foster children is fiduciary in nature. This Court has held that parents owe a fiduciary duty to children in their care: *M.(K) v. M.(H.)*, [1992] 3 S.C.R. 6. Similarly, the British Columbia Court of Appeal has held that guardians owe a fiduciary duty to their wards: *B.(P.A.) v. Curry* (1997), 30 B.C.L.R. (3d) 1.
>
> …
>
> 48 What then is the content of the parental fiduciary duty? This question returns us to the cases and the wrong at the heart of breaches of this duty. The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by law, is breach of trust. Different legal and equitable duties may arise from the same relationship and circumstances. Equity does not duplicate the common law causes of action, but supplements them. Where the conduct evinces breach of trust, it may extend liability, but only on that basis. As I wrote in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226: "In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. … The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other" (p. 272).
>
> 49 … But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. …

See also *Blackwater v. Plint*, [2005] 3 S.C.R. 3, at para. 57, per McLachlin, C.J.C. and *Reference re Broome and Prince Edward Island*, [2010] 1 S.C.R. 360, paras. 66-68, per Cromwell, J.. In *K.L.B.*, the Chief Justice cited *M.(K.)* as a progenitor of this fiduciary duty. In *M.(K.)* (1992), which involved a parental duty, Justice

LaForest for the majority said (page 62) that the development of this fiduciary obligation "was started in *Guerin v. The Queen"*. In *Guerin* (1984), Justice Dickson (as he then was) characterized as fiduciary the responsibilities of the federal government to an Indian band.

[59] In Mr. Carvery's case, the Province says that, in 1951, the legislators aimed prospectively to immunize the Crown from this fiduciary cause of action that arose thirty to fifty years later. Section 4 would accomplish this by listing only contract, tort and property, while maintaining a coy silence on fiduciary claims.

[60] The Province's submission attributes to the 1951 legislators either a generational span of prescience in the evolution of fiduciary causes of action, or a blind but willful rejection of whatever rationale might justify future developments in that field. It also attributes an intent to exclude vulnerable children from the reach of an otherwise remedial enactment, and the nonchalance to implement the legislators' aim by implication, without troubling to express themselves in their statute.

[61] I reject the submission. To paraphrase Justice Cory in *Swinamer*, if the legislators wanted to immunize the Province this way, they easily could have said so in the *PAC Act*, and faced any consequence from the electorate.

(c) The Crown's Common Law Immunity

[62] Lastly, the Province relies on its common law immunity from suit. Its reply factum says:

> 35. … The Crown was constitutionally immune from suit, at common law (see the case law at para 58, below). Legislation was necessary to subject the Crown to suit. It does not require a legislative prohibition to prohibit a claim against the Crown. It is prohibited at common law, unless legislation specifically endorses it. So the absence of a prohibition against fiduciary claims in the statute, does not advance the Respondent's case.
>
> …
>
> 58. Beyond this, there are further objections of particular relevance to the Crown. First, it is [a] long and well-established principle that the Crown cannot be sued in its own courts. In *Calder v. British Columbia*, 1973 SCR 313 Hall J. noted that the doctrine was recognized from the time of Henry III; see also *Smith v. NS (AG)* 2004 NSCA 106 per Cromwell JA at para. 81; *The Queen v. CBC* 1958 OR 55 (Ont. CA) para. 13.

[63] *Smith v. Nova Scotia (Attorney General)*, 2004 NSCA 106, cited by the Province's factum, deals directly with the *PAC Act*. Justice Cromwell said:

> 81 A thumbnail sketch of the position of the Crown in litigation before the legislation [the *PAC Act*] is therefore in order. The Crown could not be sued in the ordinary courts other than by a petition of right. The petition of right could only be taken out with the permission (*fiat*) of the Crown. The Crown could not be sued in tort and had many immunities and prerogatives in other proceedings against it: see generally, Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed, (Scarborough: Carswell, 2000) at 1-11. These rules persisted for centuries, but their rationale derives from the feudal principles that the lord could not be sued in his own courts and that the King could do no wrong. As a Carol Shield's character observed, history does indeed leave strange accidents behind.
>
> …
>
> (iii) Purpose and scheme of the PACA
>
> 83 Viewed in this context, the purpose of modern proceedings against the Crown legislation such as the PACA is clear. It was intended to overhaul, fundamentally, the previously existing common and statutory laws that gave the Crown a uniquely privileged position in litigation. Stated broadly, the legislation swept away many of the immunities and special procedural rights of the Crown as litigant and, in general, put the Crown in the same position as an ordinary litigant, subject to specified exceptions.
>
> …
>
> 85 I conclude that an important contextual consideration in interpreting s. 16(4) of the PACA [dealing with injunctions against Crown officers, which was the issue in *Smith*] is that, viewed in light of the law at the time of its enactment, its purpose was to reform, fundamentally, the pre-existing common and statute law with respect to proceedings against the Crown by placing the Crown, with some specified exceptions, in the same position as an ordinary litigant as regards liability, court jurisdiction, procedure and remedies.

[64] Nothing in this passage advances the Province's submission in Mr. Carvery's case. Justice Cromwell expressed the same views that I stated above.

[65] The *PAC Act*, s. 25(1), abolished the old procedures that immunized the Crown subject to the sovereign's grace, while ss. 7 and 23 affirmatively subjected the Crown to new procedures: in 1951 the rules of court, today the *Civil Procedure Rules*. By s. 47(3A) of the *Judicature Act*, the *Civil Procedure Rules* have "the force of law" as subordinate legislation. The *Rules* permit a plaintiff to have his cause of action - provided it is known to the law - adjudicated by a court, without

the defendant's consent. The common law's notion that "the Crown cannot be sued in its own courts" is ousted by legislation.

(d) Summary

[66] The motions judge did not err by dismissing the Province's motion for summary judgment respecting Mr. Carvery's claim of direct fiduciary liability.

6. Second Issue – Is there Vicarious Liability for Breach of Fiduciary Duty?

[67] This is an issue only because of the unusual procedural history of Mr. Carvery's claim.

[68] Mr. Carvery's original Statement of Claim of December 2008 pleaded tort (assault and negligence) by Mr. Lalo and vicarious liability of the Province. Then the Province moved for summary dismissal based on the *Limitation of Actions Act*. In February 2012, Justice Moir granted an Order, consented to by counsel for Mr. Carvery and the Province, that dismissed Mr. Carvery's action "saving and excepting those allegations made by the Plaintiff involving a breach of fiduciary duty on behalf of the Attorney General of Nova Scotia". In September 2013, Justice Wood granted another Order, permitting an amendment to Mr. Carvery's Statement of Claim to plead that the Province was vicariously liable for Mr. Lalo's breach of fiduciary duty.

[69] Typically, a civil claim for sexual abuse features an assertion of tort, such as assault, by the employee and vicarious liability by the employer. The court then considers whether the employer is vicariously liable for its employee's intentional tort. Vicarious liability for the employee's breach of fiduciary duty usually is not an issue. See: *Bazley v. Currie*, [1999] 2 S.C.R. 534; *Blackwater v. Plint*; *B.M.G.* (Supreme Court), paras. 117 ff.

[70] The dismissal of Mr. Carvery's causes of action against the Province, except those sourced in fiduciary duty, has blocked the tortious avenue. So this cross appeal isolates an unusual issue - is it possible that an employer may be vicariously liable simply for an employee's breach of the employee's own fiduciary duty, without an accompanying tort?

[71] The motions judge's answer was - no. Justice Campbell's decision said:

> [89] It may be that in this context a better way of phrasing it is to say that vicarious liability is not itself a tort claim but it can only attach to or arise from a tort claim. One can't be held vicariously liable for a breach of contract or a breach of fiduciary duty. One can be held vicariously liable for a tort committed by another. Breach of fiduciary duty is a claim in equity. Liability in equity is personal. Traditionally it does not arise through vicarious liability.
>
> > Equity never recognized that a fiduciary could be held vicariously liable in equity for the acts of a delegate. Equitable liability was always for personal fault. [quoting Michael Ng, *Fiduciary Duties, Obligations of Loyalty and Faithfulness* (Toronto: Thomson Reuters Limited, 2014) (loose-leaf), p. 7-11]
>
> [90] A principal or trustee who owes a fiduciary duty can be held liable for delegation of duties when that delegation is improper, or when the duties themselves are ones that cannot be delegated. The fiduciary cannot delegate its own "discretions" or what might be called policy decisions. The fiduciary can delegate its actions to others, including agents and employees. The trustee is not responsible for the actions of the delegate or agent unless the choice of person wasn't reasonable or prudent or unless there was a failure to properly supervise the delegate or agent. The fiduciary is not made vicariously liable in that case for the actions of the delegate but only for his or her own default.
>
> …
>
> [94] How that applies in this case is determined by the relationships. If the Province had a fiduciary relationship with Mr. Carvery it would be responsible for any breach of that relationship, which might include improper delegation of authority or improper supervision of its employee. If Mr. Lalo had a fiduciary relationship in his own right with Mr. Carvery the Province could not be held vicariously responsible for that breach. The Province was not a party to that relationship. …

[72] On his cross appeal, Mr. Carvery chastises the motions judge for stating principles without citing supporting authority. Mr. Carvery's factum cites *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177 as a "compelling example", and *Bazley* for the principles that support vicarious liability in cases of sexual assault. Mr. Carvery lists trial decisions that he says have assigned vicarious liability for an employee's breach of fiduciary duty: *Andrews v. Keybase Financial Group Inc.*, 2014 NSSC 31; *National Bank v. Potter*, 2013 NSSC 248; *Davidson v. Noram Capital Management Inc.*, 2005 CanLII 63766 (O.S.C.); *Osborne v. Harper*, 2005 BCSC 1202; *Cuttell v. Bentz*, 1986 CanLII 882 (B.C.S.C.).

[73] With respect, I cannot accept Mr. Carvery's submissions.

[74] In *Strother*, vicarious liability was imposed based on s. 12 of British Columbia's *Partnership Act*, R.S.B.C. 1996, c. 348:

> 12 If, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners, loss or injury is caused to any person who is not a partner in the firm or any penalty is incurred, the firm is liable for that loss, injury or penalty to the same extent as the partner so acting or omitting to act.

Justice Binnie (para. 99) quoted s. 12, then said:

> 100 The words "wrongful act or omission" in s. 12 are broad enough to embrace an equitable wrong. There is nothing in the language of s. 12 to confine vicarious liability to common law torts: … [authorities omitted]
>
> 101 … The legislature has said that a "loss" is not necessary to ground recovery under s. 12. An injury without loss is sufficient.

[75] In Mr. Carvery's case, no statute imposes vicarious liability on the Province for the breach of a provincial employee's fiduciary duty. This is not *Strother*.

[76] *Bazley* involved a sexual tortious assault. The reasons of Justice McLachlin, (as she then was), for the Court, discuss vicarious liability for the tort, not for a breach of fiduciary duty. The same can be said of other sexual assault cases that have considered vicarious liability: *K.L.B.*, paras. 18-29; *Reference re Broome*, paras. 60-65; *B.M.G.*, (Supreme Court), paras. 117 ff., accepted by the Court of Appeal, para. 2.

[77] Several of the trial level decisions cited by Mr. Carvery involved either admissions with the effect of vicarious liability [*Andrews*, para. 10(a) and *National Bank*, para. 35], or vicarious liability for torts [*Andrews*; *National Bank*; *Davidson*, paras. 51, 77], or the employer's direct breach of fiduciary duty [*Andrews*, paras. 168-69]. *Cutell*, and *Osborne* involved the fiduciary misconduct of a real estate agent and rogue trader respectively. The courts [*Cutell*, para. 42 and *Osborne*, para. 233] held there was vicarious liability, but the summary rulings were unaccompanied by any analysis. None of these decisions addressed whether vicarious liability conforms to the principles that govern the fiduciary relationship.

[78] I will turn to those principles. Mr. Carvery's approach and that of the motions judge operate from the different perspectives of tort and equity.

[79] Mr. Carvery's submission starts with Mr. Lalo's tortious act, characterizes it as actionable against Mr. Lalo, then attributes liability back to the Province because Mr. Lalo was the Province's employee. That is the common law's trodden path to vicarious liability.

[80] It isn't equity's path to fiduciary liability. Equity proceeds from the fiduciary-beneficiary relationship, not the delegate's wrongful act. Equitable principles establish a structure to hold the fiduciary directly accountable for the misconduct of its delegate.

[81] In *Guerin*, p. 384, Justice Dickson (as he then was) said:

> … It is the nature of the relationship, not the specific character of actor involved that gives rise to the fiduciary duty.

[82] In *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, Justice Cromwell wrote more expansively:

> 58 In considering whether a fiduciary relationship exists, the fundamental purposes of this equitable concept must be kept in mind. These purposes, which have been expressed in both scholarly and judicial writing, are to protect and foster the integrity of important social relationships and institutions where one party is given power to affect the important interests of another. The fiduciary principle helps to prevent, and may provide redress for abuse of such power, thereby ensuring that interdependence does not lead to subjugation. This point was made by Leonard I. Rotman, "*Fiduciary Obligations*", in Mark Gillen and Faye Woodman (eds), *The Law of Trusts A Contextual Approach* (2000), 739-806, at 742:
>
> > Fiduciary law has its origins not only in equity but also in public policy. The creation of fiduciary doctrine may be traced to the need to protect the continued existence of certain types of relationships within a given society. …
> >
> > Fiduciary law exists to preserve the integrity of socially valuable or necessary relationships that arise as a result of human interdependency. Maintaining the viability of an interdependent society requires that interdependency be closely monitored to avoid the potential for abuse existing within such relations.
> >
> > Protecting the integrity of socially valuable relationships require that those who possess the ability to affect others' interests be prevented from abusing their powers for personal gain. …
> >
> > [Justice Cromwell's underlining]

[83] The character of the fiduciary-beneficiary relationship "breathes life" into the fiduciary's duties, "to provide a more custom fit than common law obligations": Rotman, *Fiduciary Law*, pages 150 and 280, and also discussed at pp. 13, 29, 33, 57, 66-69, 123, 239, 257-58, 263-64. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 646-47; *M.(K.) v. M.(H.)*, pp. 62-65; *Hodgkinson*, pp 413-414 .

[84] It follows that the fiduciary's duties are personal: Rotman, *Fiduciary Law*, pp. 367-69. Various equitable axioms make this point. "[E]quity acts *in personam"*: *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, at para. 22, per Deschamps, J. for the majority, quoting authority. "[G]ood conscience … lies at 'the very foundation of equitable jurisdiction' ": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, para. 27, per McLachlin, J. (as she then was) for the majority. "Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal": *Guerin*, pp. 388-89, per Dickson, J. (as he then was). "Equity, as a court of conscience, directs itself to the behaviour of the person …": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 19, per Binnie, J. for the Court.

[85] Consequently, a fiduciary's breach of duty to a child in care rests on the court's assessment of the fiduciary's own conduct. In *M.(K.) v. M.(H.)*, Justice LaForest said (page 67):

> … Indeed, the essence of the parental obligation in the present case is simply to refrain from inflicting personal injuries upon one's child.

In *K.L.B.*, the Chief Justice said:

> 45 … Breach of fiduciary duty, however, requires fault. It is not a result-based liability, and the duty is not breached simply because the best interests of a child have not in fact been promoted.

[86] The personal quality of the duty means that, subject to recognized exceptions, the duty is not delegable. Pragmatic exceptions permit the fiduciary to delegate some functions. Rotman, *Fiduciary Law*, pp. 367-69.

[87] When delegation is permissible, equitable principles govern the fiduciary's direct liability to the beneficiary for the activities of the delegate. These principles establish the fiduciary's standards for the decision to delegate, choice of delegate, imposition of restrictions to safeguard the beneficiary from the delegate's potential misconduct, and supervision of the delegate. These standards channel equity's

approach to the fiduciary's accountability for the delegated actions. See Rotman, *Fiduciary Law*, pp. 369-74.

[88] Here the alleged fiduciary is a government. Generally, a government can only act through its employees or agents. In *Swinamer*, Justice Cory, speaking of a tort claim, said:

> 29 … Obviously the Crown can only be liable as a result of the tortious acts committed by its servants or agents since it can only act through its servants or agents. …

This practical reality that the government may act only through its employees means that the actions of the governmental fiduciary's employees may implicate the government's direct liability. In *K.L.B.*, the Chief Justice, speaking of a direct tort claim, said:

> 1. Direct Negligence by the Government
>
> 12 This ground of liability requires a finding that the government itself was negligent. Direct negligence, when applied to legal persons such as bodies created by statute, turns on the wrongful actions of those who can be treated as the principal organs of that legal person.

Accordingly, if the trial judge determines that the Province owed a fiduciary duty to Mr. Carvery, the fact that the Province must act through its employees may affect the scope of the Province's standard of conduct for Mr. Carvery's direct fiduciary claim against the Province. That is an issue of fact or mixed fact and law for the trial judge.

[89] Another way that a stranger (*i.e.* the Province, in the scenario proposed by Mr. Carvery's cross appeal) to a fiduciary relationship (between Mr. Lalo and Mr. Carvery in that scenario) may be jointly and severally liable is by treating the stranger as a co-fiduciary. Again this is direct, not vicarious liability. Two bases for co-fiduciary status are as a trustee *de son tort* and knowing participation, which includes "knowing receipt" and "knowing assistance". See: *Air Canada v. M. & L. Travel Ltd*, [1993] 3 S.C.R. 787, pp. 808 ff.; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805; Rotman, *Fiduciary Law*, pages 672-680. Whether or how this principle applies to Mr. Carvery's claim is for the trial judge.

[90] These equitable principles establish a matrix for determining whether the fiduciary is liable for a delegate's conduct. Any liability is direct, not vicarious. Rotman, *Fiduciary Law*, p. 370, says:

> Where, however, a delegation is improperly made, it has been suggested that the delegating trustee is not liable vicariously for the delegate's breach, but is liable, rather, for the improper delegation. As Scane indicates:
>
> > … the trustee is not liable vicariously to the beneficiaries of the trust estate for loss flowing from some act or omission of an agent to who[m] he has delegated a function, as is the owner of a motor vehicle for the torts of his driver. Where the trustee is made liable for such losses, he is made liable for his own default in the matter. He has given someone a particular power to affect the trust estate which he should have kept in his own hands. Or he has put such a power, which might in itself be properly delegated, into the hands of an improper person, thus increasing the possibility of loss. Or, having made an apparently prudent selection of his agent, his lack of diligence in supervising has enabled that agent either to cause or to magnify a loss which, had the trustee been alert, could have been prevented or mitigated.
> >
> > [R.E. Scane, "Trustees' Duties, Powers and Discretions – Power to Delegate and Duty to Account", in *Special Lectures of the Law Society of Upper Canada, 1980*, (Toronto: DeBoo, 1980), pp. 45-46]
>
> From a purely remedial or restitutionary standpoint, such distinctions are of little importance if they generate similar results. The paramount consideration for the courts where delegations exist is to protect beneficiaries' interests, not those of delegating trustees. …

[91] I return to the divergent perspectives, tortious proposed by Mr. Carvery, and equitable adopted by the motions judge. The authorities remind us not to conflate them.

[92] Professor Rotman discusses the distinctions between tortious, contractual and equitable paradigms throughout his text. He notes (page 225) that "the fiduciary concept is the most doctrinally-pure expression of Equity", then concludes that the distinctions have bite:

> The fiduciary concept is not tort law under another name, nor, for that matter, is it a form of contract … It is, historically and contemporarily, an independent cause of action deeply rooted in the very foundations of Equity. (p. 682)

[93] In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at pp. 272, 274, Justice McLachlin (as she then was), the only justice to expand on fiduciary duties in that appeal, said:

> The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.
>
> …
>
> The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is limited by the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, [1974] 2 S.C.R. 592, at p. 606. To cast a fiduciary relationship in terms of contract or tort (whether negligence or battery) is to diminish this obligation. If a fiduciary relationship is shown to exist, the proper legal analysis is one based squarely on the full and fair consequences of a breach of that relationship.

[94] In *M.(K.) v. M.(H.)*, page 60, Justice LaForest for the majority endorsed this view:

> … The importance of considering any equitable cause of action has recently been stated by Justice McLachlin in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at pp. 290-91:
>
> > These examples underline the importance of treating the consequences of this relationship on the footing of what it is – a fiduciary relationship – rather than forcing it into the ill-fitting molds of contract and tort. …

[95] The attribution to a non-fiduciary employer of tort-modelled vicarious liability, for an employee's non-tortious breach of the employee's personal fiduciary duty, is unsupported by the principles that underlie the fiduciary relationship. If the employer has a direct fiduciary duty, or the court treats it as a co-fiduciary, then equitable principles establish other avenues to hold the fiduciary directly accountable, in appropriate cases, for allowing its delegate an opportunity to offend.

[96] I have summarized the broad principles that are discussed at length in the cited authorities. The application of the principles in Mr. Carvery's case is for the trial judge, and would involve issues of fact or mixed fact and law. I should not be taken as having either commented on the merits of those issues or suggested an application of the principles to the facts as they may emerge at the trial.

[97] The motions judge did not err by summarily dismissing Mr. Carvery's claim that the Province was vicariously liable for Mr. Lalo's breach of his fiduciary duty.

7. Conclusion

[98] I would grant leave to appeal, but dismiss the appeal and cross appeal. As success was divided, the parties should bear their own costs.

Fichaud, J.A.

Concurred: Bryson, J.A.

Scanlan, J.A.