SUPREME COURT OF NOVA SCOTIA
Citation: Carvery v. Nova Scotia (Attorney General),
2015 NSSC 199

Date: 20150708
Docket: Hfx. No. 244401
Registry: Halifax

Between:

David Bruce Carvery

Plaintiff

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia and Cezar Lalo

Defendants

Decision

Judge: The Honourable Justice Jamie Campbell

Heard: May 7, 2015 in Halifax, Nova Scotia

Written Decision: July 8, 2015

Counsel: Bruce Quthouse, Q.C. and Justin Adams for the Plaintiff
Michael Dull and Mattie Carter (watching brief only)

Alex Cameron for the Defendants

Campbell, J.

[1] David Carvery was only 11 years old Cesar Lalo was assigned to act as his probation officer. Mr. Carvery says that for around 7 months in 1975 he had to meet regularly with Lalo and was sexually abused by him. He wants compensation. He's unlikely to get much from Mr. Lalo. Mr. Carvery says that the Province of Nova Scotia, which employed Cesar Lalo should bear some responsibility for what happened to him.

[2] The Province of Nova Scotia has made a motion for summary judgement on the pleadings to have Mr. Carvery's claims dismissed before they even get to a trial. The Attorney General says that the claim has no chance of succeeding. The legal arguments at this stage have nothing whatsoever to do with the merits of any claim that Mr. Carvery might have. And they have nothing to do with the fairness of proceeding with those claims. They involve a purely technical legal exercise.

Summary

[3] Mr. Carvery sued the Province directly for the abuse that he says he suffered at the hands of its employee. He filed a Notice of Intended Action which shows that he knew about the nature of his claim. He then did nothing about it for over twelve years. The action was barred by the *Limitation of Actions Act*. [1] It was dismissed.

[1] R.S.N.S. 1989, c. 258

[4] But, claims in equity are not time limited in that way. Mr. Carvery then made his claim based on a breach of fiduciary duty. That's a claim in equity. That's where the *Proceedings Against the Crown Act*[2] comes in. The Province of Nova Scotia, represented by the Attorney General, says that the *Proceedings Against the Crown Act* sets out a comprehensive list of the kinds of actions that can be taken against the government of Nova Scotia. Claims in equity are not on the list.

[5] Mr. Carvery has a response to that. He argues through his counsel that the *Proceedings Against the Crown Act* was never intended to remove the rights that people already had when the act was passed in1951. And, in 1951 there still existed a little known and little used, centuries old, petition of right. That old common law right was imported into the law of Nova Scotia in 1758 and remained available. That right would allow a claim in equity to be made against the government.

[6] That might be, but the Attorney General argues that the *Proceedings Against the Crown Act* specifically abolished all other proceedings against the Crown. Even if the petition of right existed in Nova Scotia in 1951 it can no longer be used. There's a response to that too. What was abolished were the old forms of proceedings. The procedures might be gone but the substantive right remains.

[7] The arguments are ponderously esoteric. They eventually reach the point though that it can be said that Mr. Carvery's claim based in equity is not clearly unsustainable or sure to fail just because it's a claim in equity. The motion for

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[2] R.S.N.S. 1989, c. 360

summary judgment is not granted with respect to the claim based on the Province's breach of its fiduciary duty.

[8] But even that doesn't end it.

[9] The Attorney General asserts that the Crown can't be held vicariously liable for a breach of fiduciary duty on the part of its employees. The Province could be held vicariously liable Lalo's wrongful acts and the breach of his duty of care in tort law. There would be need to establish any fault or lack of care on the part of the Province.

[10] But the Province can't be held responsible for Lalo's breach of the any responsibilities that he owed to Mr. Carvery arising from a fiduciary relationship. Fiduciary obligations are based on relationships. If one party to that relationship (Cesar Lalo) breaches his obligations to the other (Mr. Carvery), a third party to that relationship (the Province) cannot be held responsible for that. The Province can be held liable for a breach of its own duties of any fiduciary relationship that it may have had with Mr. Carvery. Those duties might include the duty to properly delegate authority and the duty to supervise. It just can't be held responsible for Lalo's breach of his fiduciary responsibilities.

[11] The motion for summary judgment on the pleadings is granted with respect to the claim based on vicarious liability for Cesar Lalo's breach of his fiduciary duty.

Broader Implications

[12] The legal issues raised here about whether the Province of Nova Scotia can be answerable for a breach of fiduciary duty has potential implications beyond this

case. Those implications don't drive the interpretation of the law. If a law is not ambiguous a court has to apply it barring constitutional issues. The broader implications should not drive or even influence the interpretation. They have not in this case. They do however form an interesting backdrop to this litigation.

[13] The Provincial Crown has a fiduciary duty to aboriginal people, specifically the Mi'kmaq in Nova Scotia. [3] If the Crown is able to rely upon the drafting of its own 1951 statute to prevent the enforcement of a constitutional obligation it would be at the very least perplexing. If the Attorney General's interpretation were correct that potentially would have implications for the manner in which the Province would be called upon to respond to any such fiduciary obligations. [4]

[14] The Province has a fiduciary duty to wards of the state, or children in care. [5] The obligation might be there but under the interpretation argued by the Attorney General enforcement would be a problem. The classes of fiduciary relationships are not closed. The interpretation urged by the Attorney General would make the

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[3] "It should no longer be controversial to say that the fiduciary duty binds the provincial Crown insofar as its activities affect Aboriginal peoples." Peter Hutchins and David Schulze with Carol Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995), 59 Sask. L. Rev. 97, page 13 of 35. "The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their perspective jurisdictions. …But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust." Brian Slattery "Understanding Aboriginal Rights" (1987) 66 C.B.R. 727,755.See also Leonard I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.R. 735.

[4] The Attorney General argues that because the claims of First Nations are constitutional in nature the *Proceedings Against the Crown Act* would have no bearing on them in any event. Constitutional claims are not made under the *Proceedings Against the Crown Act*.

[5] *K.L.B. v. B.C.* [2003] 2 S.C.R. 403.

development of fiduciary relationships virtually irrelevant to the Province of Nova Scotia which would have legislated itself out of that liability.[6] The province could do that. It would have to express that intention clearly and upfront in legislation.

[15] Counsel for the Attorney General has argued that equitable claims are discretionary and by their nature lack certainty, so that the government should not be exposed to such potentially open ended liabilities. The floodgates of uncertain claims do not appear to have opened in the last fifty years or so in provinces in which equitable claims against government can be pursued.

[16] Judges don't get to fix legislation that they believe is unfair or absurd by stretching the interpretation to remedy the unfairness or the absurdity. And, as the Attorney General has noted trenchantly, absurdity is not ambiguity. It is a practical reality and a self -evident point of law that elected officials have the jurisdiction to retain laws that judges think are preposterously outdated or to pass laws that judges think are unwise or unjust. The law however can be applied here without departing from those principles and without resorting to tortuously creative interpretation to permit Mr. Carvery's claim to be heard on its merits.

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[6] The development of new forms of fiduciary obligations appears to be a concern for the Attorney General. Counsel noted a speech given by the retired Chief Justice of Australia, in which Chief Justice Mason said, " All Canada is divided into three parts; those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!", cited in *A.(C.) v. Critchley* (1998), 166 DLR (4^{th}) 475 at 496. The imposition of fiduciary obligations on government with respect to children in care of the state would not be constitutional and presumably such claims would have to be made under the *Proceedings Against the Crown Act*.

Procedural History

[17] Mr. Carvery says that he couldn't report the sexual abuse while he was a child or a young adult and that he repressed the memories of it. He engaged a lawyer and filed a Notice of Intended Action against both Lalo and the Attorney General of Nova Scotia in April 1996. In order to sue the Province a person has to provide a notice in that form before actually filing a Notice of Action and Statement of Claim. No action was actually filed until December 2008, about 12 ½ years later. At that time Mr. Carvery sued both Cesar Lalo and the Province of Nova Scotia. He then claimed that Lalo and the Province were liable for breaches of contract, breach of a statutory duty, breach of trust and breach of the standard of care. He also claimed that the Province was liable for the torts committed by Lalo.

[18] The Attorney General filed a defence in March 2009. In that defence the Attorney General relied on the provisions of the *Limitation of Actions Act*. That legislation provides for a limitation period with respect to various claims. The limitation period had passed.

[19] The Attorney General filed a motion, like this one, for summary judgement, in July 2011. The argument was that Mr. Carvery's claim could not succeed because of that limitations defence. But, before the matter was heard, Mr. Carvery filed a motion to amend his Statement of Claim. That motion was granted and the Statement of Claim was amended. In that amended claim he said that both Lalo and the Province each had a fiduciary obligation to act in his best interests and that both of them had breached that duty.

[20] Cesar Lalo didn't file a defense at all. A Default Order was granted against him on 7 October 2011, with damages to be assessed.

[21] The Attorney General's motion for summary judgement was then heard in February 2012. At that time, Justice Moir granted summary judgement and dismissed all claims except for "those allegations made by the Plaintiff alleging a breach of fiduciary duty on behalf of the Attorney General of Nova Scotia." So, at this stage, the only matter left for resolution by the court was issue of the alleged breach of fiduciary by the Province. The limitation period that barred the other claims did not bar claims of that kind.

[22] Then in August 2013 Mr. Carvery filed another motion to amend his claim. The Attorney General responded with a motion to amend the defence. In light of the summary judgment order from February 2012, that does complicate matters.

[23] An order was granted in September 2013 permitting both amendments. The Attorney General's defence was amended to plead reliance on the *Proceedings Against the Crown Act*, and to allege that a claim for a breach of fiduciary duty was barred by the doctrine of *laches*. Mr. Carvery was granted leave to file a second amendment to the Statement of Claim so that it would now allege that the Province was vicariously liable for Lalo's breach of fiduciary duty.

[24] In October 2013 the Attorney General filed a Second Amended Statement of Defence. That defence said that all claims based on vicarious liability had been dismissed by Justice Moir in February 2012 and further that vicarious liability for a breach of fiduciary duty is not a recognized cause of action.

[25] So, at this stage, there is a Notice of Intended Action (1996), a Statement of Claim (2008), a Defence (2009), an Amended Statement of Claim (2011), a Default Order against Lalo (2011), a Summary Judgement Order (2012), an Amended Defence (2013), a Second Amended Statement of Claim (2013) and a

Second Amended Defence (2013). The claims started out as including tort claims. Those were barred by limitations. That left only the fiduciary claims. A default order was issued against Lalo. Mr. Carvery then claimed that the Province is not only responsible for its own fiduciary obligations but vicariously liable for Lalo's as well. The Province responded saying that it can't be held responsible for any fiduciary claims much less be held liable for Lalo's breaches.

[26] While all of that has been going on there has been another series of claims trudging along in parallel. After the Province filed its defence in 2009 it became evident to Mr. Carvery that there was serious problem with his case. The limitation periods had run out over the 12 ½ years between filing the notice of Intended Action and the Statement of Claim itself. So, in November 2010 he sued the lawyers who were involved, Kyle Langille and William Leahey. Both of them defended the action. Mr. Langille in his defence pled that he had not been authorized by Mr. Carvery to commence an action on his behalf. In November 2014 Mr. Carvery filed a Motion of Discontinuance with respect to his claim against Mr. Langille. In February 2015 the action against Mr. Leahey was consolidated with the action against the Province.

[27] The implication is that is that if the action against the Province is dismissed the only claim remaining would be the one against Mr. Leahey arising from on his representation of Mr. Carvery. He has a significant interest in making sure that Mr. Carvery's claim against the Province is allowed to proceed. His lawyer, Mr. Outhouse made the arguments in this motion on behalf of Mr. Carvery.

Summary Judgment Motion

[28] The issue then is whether summary judgment on the pleadings should be granted with respect to the remaining claims against the Province.

[29] The heart of the dispute here is not about the interpretation of the law on summary judgment on the pleadings under Civil Procedure Rule 13.03. The test is whether it is "plain and obvious" that Mr. Carvery's claim for breach of fiduciary duty against the Province is "certain to fail" or is "absolutely unsustainable". On a motion the judge assumes that the facts as alleged in the Statement of Claim are true and then has to decide, based on those facts, whether it is plain and obvious that the case will fail.[7]

The Proceedings Against the Crown Act

[30] The Attorney General asserts that the matter is very simply resolved.

[31] The *Proceedings Against the Crown Act* provides at s. 25(1) that except as provided in the legislation, "proceedings against the Crown are abolished." Those who have claims against the Crown can only enforce them in cases in which land, goods or money are in the possession of the Crown, where the claim arises from a contract entered into on behalf of the Crown, or where the claim is one based upon the liability of the Crown in tort. If the claim can't be classified as being one of those three, it can't be taken against the Crown. And, the Attorney General says there's no room to get around that. The Crown is immune from law suits and the legislation intrudes upon that immunity only to the extent provided for by the act

[7] *Ahmed v. Dalhousie University*, 2014 NSSC 330

itself. "The purpose of that Act was simply to waive Crown immunity to the extent provided for in the Act."[8]

[32] That's where Mr. Carvery's legal dilemma arises. His claim is not based on any contractual relationship with the Crown nor is it based on the actual possession by the Crown of goods, land or money. The tort claims were barred by the limitation period. The February 2012 order makes it very clear that the only surviving claim is based on the alleged fiduciary obligations of the Crown. In order to be outside the scope of that February 2012 order dismissing the claims based on the limitation period, the claim must be classified as an allegation of a breach of fiduciary duty. But, if it is a claim of breach of a fiduciary duty, the Attorney General says that it is not a claim that is capable of being brought against the Crown. It is either caught by the *Limitation of Actions Act* or by the *Proceedings Against the Crown Act.*

[33] There can be little question that in law, a claim for a breach of fiduciary duty is not a tort claim. It is an equitable one that "evolved from the jurisdiction of the Court of Chancery."[9] In *M.(K.) v. M.(H.)* [10] Justice LaForest noted that the case involved a breach of fiduciary duty which "falls solely within the realm of equity"[11] or was within the "exclusive jurisdiction" of equity.[12]

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[8] *Ross Ritchie Ltd. v. Sydney Steel Corp.*, [2001] NSJ No. 229, para 60

[9] Michael Ng, *Fiduciary Duties* (2013) Thomson Reuters, Canada Law Book, P.1-1

[10] [1992], 3 S.C.R. 6, [1992] SCJ No. 85

[11] *Ibid*. para. 94

[12] *Ibid*. para. 84

[34] It does seem like an arcane and archaic distinction. The distinction between common law and equity is an ancient one. It goes back to the English Courts of Chancery which were established as early as the fourteenth century to "mitigate the rigour of the common law" by applying principles of fairness when the common law had become hidebound by rules.[13] Not surprisingly when the law is involved, chancery law or equity devolved from being fairness based to having its own convoluted rules, writs, remedies and procedures. It became at times even more weirdly byzantine than the old common law itself. [14]

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[13] *Earl of Oxford's case* (1615) 1 Ch Rep 1 per Lord Ellesmere, "to soften and mollify the extremity of the law"; *Lord Dudley v. Lady Dudley,* (1705) Prec Ch 241,244 " a moral virtue which qualifies, moderates and reforms the rigour, hardness and edge of the law."

[14] In *Bleak House* Charles Dickens wrote about fictional case of *Jarndyce v. Jarndyce*. It was a case in Chancery Court about an estate that went on in litigation over the course of generations. It was so complicated by the application of various equitable procedures that even the lawyers had lost any sense of what it might have been about. It was finally resolved when the entire estate was consumed by legal costs.

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

[35] There is no distinction anymore between courts of law and courts of equity[15] but lawyers continue to distinguish between common law claims and equitable claims.[16]

[36] Whether the distinction makes sense just isn't an issue though. If there were no practical difference between law and equity Mr. Carvery's claim would be barred by the limitation period. It's only because it is a claim in equity that it survived that challenge.

[37] So, the issue then is the interpretation of the *Proceedings Against the Crown Act* and where, if anywhere, equitable claims fit within it. The act doesn't refer to

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[15] The *Judicature Act* R.S.N.S.1989, c.240, s. 41 provides that if a plaintiff claims to be entitled to any equitable right that could before 1 October 1884 have been given only by a court of equity, the Nova Scotia Supreme Court shall give the person the same relief as would have been given by the Court of Equity Judge or the high Court of Chancery in England. Courts of equity and common law in England were merged in 1873.

[16] Why would it matter in 2015 whether a claim traces it legal roots to the Courts of Chancery in 14th century England? While the historical roots of the two areas of law may make the distinction appear irrelevant in any practical sense there have been important differences between law and equity. They are not the same thing. When a wrong is designated as a tort, that brings with it a body of legal doctrine about things like causation, remoteness, quantification and mitigation of damages as well as exclusion and limitation of liability. There is academic debate about whether law and equity have become "fused".

> Sufficient examples have been given to show that law and equity are not fused. What can be said is that more than a century of fused jurisdiction has seen the two systems, whose relationship is "still-evolving", working more closely together; each changing and developing and improving from contact with the other; and each willing to accept new ideas and developments, regardless of their origin. They are coming closer together. But they are not yet fused. (Jill E. Martin, *Modern Equity*, 16th ed. (London: Sweet & Maxwell, 2012) at p. 29) see *contra*. *United Scientific Holdings v. Burnley Borough Council* [1978] A.C. 904 (H.L.) per Lord Diplock at page 924-25 and *LeMesurier v. Andrus* 1986 O.J. No. 2371 para. 26, "the fusion of law and equity is now complete."

equitable claims. If it is intended to serve as a comprehensive list of the kinds of claims that can be made, equitable ones are not specifically included.[17].

[38] To the Attorney General, that's the game, set and match moment.

[39] Mr. Carvery argues that it isn't that simple. Subsection 3(3) of the *Proceedings Against the Crown Act* says that if a claim could have been made before the act with consent, it can be made now, without consent.

> 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 have been enforced subject to the consent of an officer of the Crown, then the claim may be enforced as of right without such consent.

[40] The idea being that the act was intended to modernize the law by making it easier and less cumbersome for people to sue the Crown not to take away old rights that already existed. That would assist Mr. Carvery if prior to 1951 an equity based action of this kind could have been taken. The matter then spins off into even more abstruse legal territory.

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[17] It is hardly surprising that claims for breach of fiduciary duty were not addressed in the1951 legislation. The concept of fiduciary duty itself was not new in the early 1950's but it was based at that time largely on agency law. That involved closed categories of relationships to which fiduciary obligations would attach. That changed substantially in the 1980's. In *M.(K.) v. M.(H.),* [1992] 3 S.C.R. 6 at para. 73 Justice LaForest said that the "fiduciary principle" in Canadian law really commenced with *Guerin v. Canada* [1984] 2 S.C.R. 335, continuing with *Frame v. Smith*, [1987] S.C.J. No. 49 and *LAC Minerals Ltd. v. International Corona Resources Ltd*, [1989] 2 S.C.R. 574. It has grown to become a remedy to enforce government obligations to defined vulnerable groups. As Cullity J. remarked in *Slark, infra*. at para. 117, "I continued to be unimpressed by the artificiality of asking how equitable claims that were effectively unknown to the law before the decision in Guerin would have been treated had they been considered by a court before 1st September, 1963."

The Petition of Right

[41] Traditionally the Crown could not be sued. The basis for that sounds strange where the Crown is the symbolic representation of a constitutional monarchy in a modern democratic state. It has been suggested that the sovereign couldn't be sued in his or her own courts and the monarch was presumed to do no wrong. Even centuries ago that seemed harsh. The subject could, as early as perhaps the fourteenth century, use what became known as the petition of right. [18] That old right becomes oddly very significant in this matter.

[42] While its early history is noted by Professor Hogg in *Liability of the Crown* [19] as being "obscure" it involved matters being referred to the king's commissioners for inquiry into the facts being alleged. If the issues raised matters that were capable of being dealt with in the ordinary courts a "fiat"[20] would be granted, and the king would respond. Hogg describes the petition of right as being a cumbersome and time consuming procedure which was made even more so by the king's "garland of privileges" in both pleadings and procedures. Between the fourteenth century and the nineteenth century the petition of right largely fell into

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[18] The ancient petition of right was not the creation of the 1627 *Petition of Right* which ranks with *Magna Carta* (1215) and the *Bill of Rights* (1689) as foundational documents in the otherwise unwritten British constitution. Similarly, the petition of right predates the British statutes of 1860 and 1947 which use the term and that permitted actions against the Crown. There is some debate as to whether the petition of right had its origin in legislation that dates from the time of Edward I or arose from feudal practise.

[19] Peter W. Hogg, *et. al.*, *Liability of the Crown* (Carswell, 2011) at 5.

[20] A matter could proceed only if the king signified his consent by endorsing the petition *fiat justitae,* translated as "let right be done".

disuse and other more obscure sounding remedies were used. [21] The petition essentially lay dormant for centuries. It still existed. It just wasn't used.

[43] The petition of right experienced a revival in the nineteenth century. With the development of the modern state remedies were needed to enforce obligations.[22] Medieval concepts of the state and the personal immunity of the monarch were long out of date even by that time.[23] It was revived in the nineteenth century and the different interpretations that it received eventually led to statutory reform in the 1860's. The scope of the revived petition had to be ascertained. At that time, the courts determined that the petition of right should apply where,

> the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service.[24]

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[21] As Professor Hogg notes "traverse of office" and "monstrans de droit" were better remedies to enforce rights of feudal tenure and the petition for a writ to liberate and the petition to the barons of the Exchequer were better remedies to enforce the payment of debts.

[22] The revival of the petition of right in the nineteenth century was described by H. Street in *Governmental Liability* Cambridge University Press, 1953 at 3 as "remarkable".

> "There was a large increase in government contracts, disputes over which contractors sought to settle by petition of right. Not surprisingly, the rules of procedure which had been unaltered for 400 years were not suited to nineteenth century conditions. Complaints by contractors led to the passing of the Petitions of Right Act, 1860, which introduced a simpler procedure by way of alternative to that of the fourteenth century."

[23] Some Crown privileges and immunities are necessary for effective running of a modern government. For example the Crown has the privilege to withhold certain information from the court and other litigants. The idea that the state should be immune from any form of claim based on the concept that the king can do no wrong or that the king could not be sued in his own courts is difficult to sustain and pay proper regard to practical modern reality.

[24] *Feather v. Reg.* (1865) , 6 B. & S. 257 at 294

[44] The question is whether the petition of right ever applied in Nova Scotia. The Attorney General argues that prior to 1951 there was simply no procedure by which a person could sue the Province of Nova Scotia. The right to sue the province was essentially created by the current legislation. While other provinces had legislation modelled on the British reforms of the nineteenth century Nova Scotia had no similar act.

[45] That position is argued to be consistent with the position taken by the Court of Appeal in *MacNeil v. Nova Scotia Board of Censors*[25]. In that case the issue was addressed literally parenthetically, with a comment identifying the *Proceedings Against the Crown Act* and adding, "(formerly except in Nova Scotia, petition of right.)" Nothing turned on the issue of the petition of right and its availability or non-availability in Nova Scotia.

[46] Another case built on that reference. In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* [26] Justice Roscoe cited *MacNeil* and went on to address the issue more specifically. Her comments were not simply made in passing. Justice Roscoe's reasoning process bears repeating in the context of this matter.

[47] The claim against the Province was for unjust enrichment based on overpayment of taxes. She found that the equitable claim could be maintained under the *Proceedings Against the Crown Act* because it involved "lands, goods or money of the subject" in the possession of the Crown.

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[25] (1974), 9 N.S.R. (2d) 483

[26] [1995] N.S.J. No.12

[48] Justice Roscoe also addressed some of the issues that relate to the act itself. She noted that Nova Scotia legislation made no reference to the petition of right. Others permitted actions that could formerly have been taken under the petition of right. Nova Scotia used another method to preserve the right. It allowed an action against the Crown in which the lands, goods or money of a person are in the possession of the Crown. Justice Roscoe cited a 1936 *Canadian Bar Review* article which stated that as of that time, the Maritime Provinces, or at least two of them, were in a different position from the rest of Canada with respect to the petition of right. While other provinces had legislation permitting a petition of right, Nova Scotia and New Brunswick did not.

> They are without any statutory provisions as to petition of right. Unlike other Canadian provinces, they have not enacted legislation patterned after the English Act, and petition of right seems an entire stranger to the practitioner in those provinces, even in cases where contractual obligations of the crown are involved, and the profession in some of these provinces has been pressing for reform limited probably to legislation not embracing tort. As the remedy of petitioning the Sovereign is a very ancient one, the Committee would assume that the subject even in those provinces might have some remedy at common law, but it must be noted that prior to the statute of 1860, the practice in England was uncertain and cumbersome, and even there legislation was necessary to make the remedy more generally available. [27](emphasis added)

[49] Justice Roscoe concluded that the 1860 English legislation was not in effect in Nova Scotia before 1951 so the petition of right was not available. The rules about the reception of English law into colonial Nova Scotia were not argued. Justice Roscoe's conclusion about the petition of right was not part of the *ratio decidendi* of the case. It did not lead her to the conclusion in that case. It was an observation but not a binding one. It should be noted though that the author of the

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[27] "The Bar as Litigant" , (1936) 14 *Can. Bar Rev*. 606, C.C. McLaurin , Chairman of the Canadian Bar Association's Committee on Comparative Provincial Legislation and Law Reform.

1936 article, C.C. McLaurin, suggested, in the portion highlighted above, that the ancient common law remedy might still have been available.

[50] The petition of right likely traces its roots to the reign of Edward I (1272-1307). When the English *Petition of Right Act*[28] was passed in 1860 the right was already part of English common law. The procedure for petition of right was simplified and but the kinds of matters for which the petition could be maintained were not significantly changed. It was a statutory recognition of a centuries old right. By that time it simply meant that the Crown could be sued but only with the consent of cabinet.

[51] That right appears to have been part of English law in 1758 when English law was received by the colony of Nova Scotia. [29] As noted in the passage from the 1936 McLaurin article, while the remedy of petitioning the sovereign was

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[28] 23 and 24 Vic. c.34

[29] *Uniacke v. Dickson* (1848) 1 N.S.R. 287 (S.C.N.S.), That date may be a source of some of the confusion. English law provided that when a colony was settled by British subjects, they took English law with them to the settled territory to fill the legal void. The law that was imported was both statute law and common law, except to the extent that it was unsuitable to the circumstances of the colony. When a colony was acquired by conquest the laws of the country existing the time remained until they were altered. Nova Scotia was held to be a settled colony not a colony obtained by conquest. That flies in the face of historical record including the Treaty of Utrecht (1713) which by which France ceded mainland Nova Scotia to Britain. Cape Breton came later in 1763. But, Nova Scotia was treated as a settled colony and English law was received as of 1758, the date of the first assembly. Canada was ceded by the French in 1763. French law would apply until it was changed. There was no common law petition of right available in Canada so in the absence of legislation, the subject in that colony could not take an action against the Crown. The absence of that right in Canada (Ontario and Quebec) has been taken to mean the absence of the right in Nova Scotia. The circumstances are legally very different.

cumbersome, presumably people in Nova Scotia had some kind of remedy against the Crown at that time and up until 1951. Peter Hogg notes,

> 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 government. After the granting of responsible government each colonial government enjoyed the privilege of granting or denying the royal fiat when faced with a law suit. Each colonial government became immune from liability in tort. [30]

[52] There is no suggestion that Nova Scotia was any different in that regard. The English common law was received in Nova Scotia as of 1758 at which time the ancient common law petition, which was both a substantive right and the process by which it was enforced, had been dormant for a few centuries. It had not yet experienced its Victorian revival. The English law [31] was amended by the *Petition of Right Act* in 1860 to make the process a bit simpler but in England the petition of right remained the way to sue the Crown until 1947. As Professor Hogg notes,

> In Canada, the petition of right, including the requirement for 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. (emphasis added)[32]

[53] While the was no *Petition of Right Act* in Nova Scotia and no legislation dealing with the issue before 1951, the ancient common law petition of right was a remedy that was available. [33] It was so difficult and cumbersome that it was rarely

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[30] *Liability of the Crown* at 8.

[31] Reference is made here only to the law of England and not to the laws of the United Kingdom. The issue of which legislation applied to which parts of the United Kingdom will not be unravelled here. Scottish law is distinctly different from English law.

[32] *Liability of the Crown* at 9.

[33] Other provinces enacted legislation that specifically referenced the petition of right. Those acts provided that the province could be sued in circumstances where before the passage of the

used but it was still there. There is no reason to believe that the petition of right was not available in 1951. The issue then is what the petition of right was available for.

[54] The Attorney General argues that the petition of right was not available to enforce claims in equity.

[55] In the nineteenth century the legal landscape in England underwent some substantial reform. The statutory reform in in 1860 was an attempt to simplify the process. The courts determined that the petition of right could be used as a remedy in contract but not in tort. It had been dormant for about four hundred years and the interpretation was confused by the wide concept of property in the middle ages along with the imperfect understanding of other legal concepts such as tort and contract.

[56] There is some debate as to whether the ancient petition of right process would permit relief in equity.

> Nor, in my view, do the authorities cited by the appellants support the proposition a claim could lie in equity against the Crown for damages, prior to the enactment of crown proceedings legislation. While there was in England a limited class of cases in which the courts of equity permitted an action for a declaration for legal title, as shown by Hodge v. Attorney General (1839), 3 Y &C. Ex., 160 E.R. 734 (Exch.) and Pawlett v. Attorney General, these cases did not provide a direct remedy against the estate of the Crown.[34]

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legislation the petition of right would have been available. New Brunswick and Nova Scotia adopted different methods. The petition of right is not addressed directly.

[34] *Richard v. British Columbia* (2009), 93 B.C.L.R. (4th) 87 (C.A.) at para. 49

[57] In the old text, The Law and Practice of Petitions of Right [35] Walter Clode wrote;

> At the present time, and in the face of numerous petitions of right claiming equitable relief against the Crown, which have been presented and allowed to proceed in the Court of Chancery, it seems late to say that there is no authority for making claims enforceable, and yet with some qualifications such a statement would be substantially correct…
>
> It is quite true…that a suppliant may sometimes obtain relief by process issuing from the Chancery, as ancillary to and in aid of his common law right, instead of following out the usual procedure upon petition of right; but they do not show that a suppliant was ever entitled to equitable relief where he had non-enforceable right at common law. ..[36] (emphasis added)

[58] That would suggest that the petition of right process was not available to make claims in equity against the Crown.

[59] There is another school of thought though. That was addressed by Cullity J. in *Slark v. Ontario* [37]. In that case the court was dealing with the certification of a class action suit respecting a residential facility operated by the Crown. The breach of fiduciary duty was alleged and Crown responded with the argument that the action was not permitted under the Ontario legislation dealing with Crown liability. The issue again was whether the petition of right was available for claims in equity.

[60] Justice Cullity cited the conclusions of Sir William Holdsworth in his study of the evolution of what he described as the "elastic" remedy of a petition of right. He noted;

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[35] Walter Clode, (London: William Clowes and Sons, 1887)

[36] *Ibid.* at 141.

[37] [2010] S.C.J. No. 5187

> [T]he principle which right down the ages has governed the competence of this remedy…the principle that it should be available against the crown where the subject has a cause of action against a fellow subject.[38]

[61] Justice Cullity dealt directly with the 1887 quote from Walter Clode.

> In Clode, The Law and Practice of Petitions of Right (1887) …to which counsel for the Crown referred… it was accepted that equitable relief by way of a petition of right could be obtained in the Court of Chancery in support of a common law right. The learned author was, however, critical of nineteenth century cases in which this procedure had been permitted in respect of claims in equity, but recognized that a practice of allowing it had developed. Holdsworth refers to this practice without expressing similar doubts (above, at pages 31-32) and in Holmested's Ontario Judicature Act, 1915, (at page 1395) it was indicated that, despite earlier uncertainty, the procedure was in practice in this jurisdiction to enforce equitable rights.[39]

[62] Once again, the law in the nineteenth century was rediscovering the petition of right. What matters was the state of the then dormant law in 1758 and the developments in Nova Scotia since that time.

[63] As noted by Peter Hogg, in 1668 it was held that equitable relief was available against the King on a bill brought in the Court of Exchequer against the Attorney General.[40]Things changed in 1841 when the equitable jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, by the *Court of Chancery Act*.[41]At that time it wasn't clear whether the jurisdictional transfer included the power to award equitable relief against the Crown. After 1841 the Court of Exchequer ceased to exercise the power and the Court of Chancery did

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[38] *History of English Law*, cited in Slark, at para. 100.

[39] *Slark* at para. 109.

[40] *Liability of the Crown* at 6, *Pawlett v. A.-G.* (1668) Hardres, 145 E.R. 550. The court in *Richard v. British Columbia, supra., note 34* specifically rejected that interpretation of *Pawlett*.

[41] 1841, 5 Vic.,c.5, s.1

not assume it. The practice of suing the Attorney General for equitable relief fell into disuse between 1841 and 1910.[42] As the learned author notes, equitable relief was available on a petition of right, though the Crown was immune from the coercive remedies of injunction and specific performance.

[64] These distinctions are artificial in the extreme. It is particularly so when the requirement is to decide whether modern fiduciary law developed in the latter part of the twentieth century, would be enforceable in eighteenth century through a right that developed from feudal rules of the eleventh and twelfth centuries, and had fallen into disuse in the fourteenth century, to be revived in the nineteenth century.

[65] So, if the petition of right process was available in England in 1758 it was imported with the rest of the common law into Nova Scotia at that time. There was no legislation in Nova Scotia between 1758 and 1951 that would change the common law with respect to the availability of the petition of right. In 1758 a person in Nova Scotia could have taken an action against the Crown seeking an equitable remedy or making a claim based in equity. Nothing happened until 1951 to change that. The remedy may well have been unknown to practitioners but it still existed in common law.

[66] The issue then is whether the 1951 *Proceedings Against the Crown Act* has done anything to change that. Subsection 3(3) once again, provides that;

> 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,

[42] *Dyson v. Attorney- General* [1911] 1 K.B. 410 (C.A.)

> 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.

[67] If the petition of right process were in place prior to 1951, it is argued that Mr. Carvery could have taken his action under that process. It would require the consent of the Crown. The act removed the requirement for that consent. Actions that required consent before 1951, no longer require consent. The subsection would be oddly worded if it references a right, the petition of right, that didn't exist at the time. Further, the act has to be removing the requirement for consent for something.

[68] The Attorney General argued that under that interpretation the remainder of the *Proceedings Against the Crown Act* would be redundant. It would mean that any action could be taken without consent. But what is permitted is only an action that could have been taken before 1951, using the petition of right. It would exclude for example an action in tort. Coercive remedies, such as injunctive relief, could not have been ordered. The petition of right did not provide any kind of unrestricted right to take action against the Crown. The *Proceedings Against the Crown Act* makes it clear that tort claims for example can be made and it is an expansion of the scope of the petition of right.

[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 act 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 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.

[70] The next issue is subsection 25(1). It states that all "proceedings against the Crown" are abolished except those provided for by the act. That would seem to suggest that the only proceedings that can be taken are those set out in section 4. Those are land, goods or money in the possession of the Crown, contract or tort.

[71] It is argued on behalf of Mr. Carvery that "abolished" doesn't mean that. What are being abolished are the old procedures. The removal of the procedures is not intended to alter the substantive law. The petition of right was a procedure but was also a substantive right.

[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 the interpretation of the English *Crown Proceedings Act* [43] 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.*

[74] That is also consistent with the interpretation used by Haliburton J. in *Nova Scotia (Attorney General) v. Annapolis (County)*[44].

> 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. A right to claim against the crown by adverse parties apparently survives. With modern government involving itself in every aspect of human endeavour, the old rules can no longer be justified. Government departments and agencies are front and centre in licensing and controlling commerce, recreational activities, health and safety, marketing; in short, every imaginable activity, including of course, the protection of the environment.[45]

[75] Section 3(3) preserves the rights that existed as of 1951 to take action against the Crown, subject to the other provisions of the act. 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.

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[43] 10 & 11 Geo. VI, c. 44

[44] (1996), 153 N.S.R. (2d) 278, [1996] N.S.J. 412 aff'd at 154 N.S.R. (2d) 383 (C.A.)

[45] *Nova Scotia v. Annapolis Co.*, at para 24

New Brunswick Case law

[76] The courts in New Brunswick have addressed the issue and considered legislation in that province which is similar to the Nova Scotia act. In *Daigle and Rideout v. New Brunswick* [46] Stevenson J. dealt with a claim for damages arising from negligent misstatement made by a provincial employee. The issue was dealt with succinctly, with the statement that the tort was not one for which the province is made liable under the *Proceedings Against the Crown Act* [47]. Subsection 4(1) of that legislation sets out that the Crown can be liable in respect of certain torts to real or personal property, or torts causing bodily injury. Negligent misstatement was clearly not within the enumerated torts.

[77] Similarly, in *E.E. MacCoy Co. Ltd. v. New Brunswick* [48] Justice Stevenson was once again dealing with a claim based on the tort of negligent misstatement. He simply referred to his earlier judgement in *Daigle*.

[78] In *Crawford v. Agricultural Development Board and the Province of New Brunswick* [49] once again, Justice Stevenson of the Court of Queen's Bench ruled on the issue of whether some of the plaintiff's claims were barred by the New Brunswick *Proceedings Against the Crown Act*. The Crawfords claimed that the Agricultural Development Board had acted in bad faith in the negotiation, formation, performance and enforcement of a mortgage, breached their fiduciary

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[46] (1979) ,25 N.B.R. (2d) 261, [1979] N.B.J. No. 74

[47] R.S.N.B. 1973, c. P-18.

[48] (1979), 25 N.B.R. (2d) 255, [1979] N.B.J. No. 73 (Q.B.)

[49] (1993) ,136 N.B.R. (2d) 70, [1993] N.B.J. No. 245 (Q.B.)

relationship with the Crawfords and had made negligent misrepresentations and misstatements. The negligent misstatement and misrepresentation claims were torts that were not within the scope of the classifications of torts for which the Crown could be sued in New Brunswick.[50] The court addressed the breach of fiduciary duty and concluded that the legislation did not allow for a claim in equity to be made.[51]

[79] New Brunswick law is abundantly clear that an action cannot proceed against the Crown in tort unless it is one of the torts that is authorized by the legislation. Litigants have argued that the legislation should be read to bring it in line with other jurisdictions so that the province is simply liable for all torts committed by its officers or agents. The New Brunswick Court of Appeal soundly rejected that approach. It concluded in *Levesque v. New Brunswick*[52] that there can be no action in tort against the Crown unless it is one authorized by statute. The Court of Appeal reviewed the history of the legislation in different provinces as it developed in the early 1950's. Most provinces adopted a uniform statute that permitted actions against the Crown in respect of torts committed by its officers and agents. The Province of New Brunswick enacted what the court described as a more timid reform so that only specific kinds of torts could be claimed. [53]

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[51] *Ibid.,* para. 6

[52] 2011 NBCA 48, [2011] N.B.J. No. 163

[53] The New Brunswick legislation sets out the specific kinds of torts for which the province can be sued. They include a tort to real or person property or a tort causing bodily injury. The Nova Scotia legislation provides that the province can be sued more generally for torts committed by any of its officers or agents.

[80] There is no question in this case that the claim does not fall within the scope of section 4 of the Nova Scotia legislation. It is not a tort. Tort actions and equitable claims are different. In *Daigle, MacCoy*, and *Levesque* the actions were all tort actions. The tort actions were not of the kind specified in the New Brunswick legislation and would not be entertained. There could be no argument made, as was made here, that the petition of right applied. The petition of right was not available for tort claims. There could be no argument made that the act did not intend to eliminate substantive rights that existed at the time. *Levesque* is a decision from the Court of Appeal of New Brunswick. If it addressed the issue of equitable claims under the *Limitation of Actions Act* it would be strongly persuasive authority. It addresses only the issue of tort claims and not the survival of equitable claims under the petition of right.

[81] *Crawford* is different. It does address the issue of fiduciary claims. The analysis that is applied to that issue in its entirety is:

> A claim for a breach of a fiduciary duty is an equitable claim. The Act does not permit such claims to be made against the Crown. Section 21 of the Act makes it clear that only actions provided for by the Act may be maintained against the Crown.[54]

[82] The decision does not indicate whether the argument was made that the substantive rights under the petition of right would survive and that only the writs and procedures were abolished. As persuasive authority from another jurisdiction it must be given careful consideration. Given that it does not address the issues involved in this case, it is not a precedent that ought to be followed.

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[54] *Crawford* at para. 6.

[83] Mr. Carvery's claim is based on an allegation of a breach of fiduciary duty. That is an equitable claim. The ancient petition of right process permitted such claims against the Crown. Subsection 3(3) of the *Proceedings Against the Crown Act* provides that what could be done before 1951 with consent of the Crown, can now be done without consent. That means that the petition of right that was available and is still available but with no requirement for Crown consent. Section 25(1) abolished other proceedings against the Crown. That means that the old procedures are gone but the substantive rights remain.

[84] The words of Lord Denning and Justice Robert Jackson of the United States Supreme Court were invoked on behalf of Mr. Carvery. Judges should not regard the law as being static and should not interpret statutes narrowly as if they were being read through a keyhole. The purpose of the legislation should also be considered.

> The purpose of the Crown proceedings statutes is to facilitate proceedings against the Crown and ambiguous or unclear language should be interpreted in light of that purpose.[55]

[85] The language here is not particularly unclear. It does not require a creative, corrective or subversive approach to statutory interpretation. Respectfully, the legislation can be interpreted based on its plain language. The *Proceedings Against the Crown Act* does not insulate the Crown from liability for a breach of fiduciary duties.

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[55] Hogg, at 342 note 8

Vicarious Liability and Breach of Fiduciary Duty

[86] The Attorney General argues that the claims against the Crown that arise from Cesar Lalo's alleged breach of fiduciary duty cannot succeed. Those arguments do not apply to the liability of the Crown in its own right for its own alleged breach of fiduciary obligations to Mr. Carvery. The Attorney General says that the Province cannot be vicariously liable for Lalo's breach of fiduciary duty.

[87] The Attorney General argues that vicarious liability is a form of tort liability[56]. If it is a tort, section 5 of the *Proceedings Against the Crown Act* sets out the kinds of tort claims that can be made against the Crown. They include torts committed by officers and servants of the Crown. They do not include vicarious liability for fiduciary obligations of Crown servants.

[88] Once again, it wouldn't be included in reference to torts because the breach fiduciary obligations is not a tort claim. That choice of wording ties the vicarious liability to tort law and ties it to the provisions of the *Proceedings Against the Crown Act*.

[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

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[56] *KLB v. B.C.* 2003 SCC 51 at para. 96. In the context of that case however the court held that the government had not breached a fiduciary duty owed to wards of the state. There was negligence but not disloyalty or breach of trust. Vicarious liability was raised with respect to the negligence claim and because the claim that gave rise to the liability in the first instance was a tort, vicarious liability for that tort was also a claim in tort and barred by the limitations statute.

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 a personal fault. [57]

[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. [58]The fiduciary is not made vicariously liable in that case for the actions of the delegate but only for his or her own default. [59]

[91] That raises an issue in light of the modern expansion of the range of relationships to which fiduciary duties apply. It is especially true where governments are concerned. Traditionally, fiduciary law did not recognize vicarious liability. Once governments become subject to fiduciary obligations, whose actions matter?

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[57] Michael Ng, *Fiduciary Duties* p. 7-11

[58] *Wyman v. Paterson* [1900] A.C. 217 (U.K. H.L.)

[59] 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) at 45-46

[92] Sometimes substituting a delegate for a fiduciary just isn't possible. The example cited by Leonard Rotman in *Fiduciary Law* is of the residential schools system. The federal government had a fiduciary responsibility to aboriginal people and delegated authority to churches which, by their structures, were shielded from financial liability.

> In these circumstances the beneficiaries fail to remain as protected after the delegation of duties as they had been prior to the delegation. For these reasons, the idea that delegates can be substituted directly for the fiduciaries who have facilitated the delegation does not automatically follow.[60]

[93] Because of the *sui generis* nature of the relationship and the structures of the churches that shielded them from liability different considerations might apply. The government delegated its fiduciary obligations to other institutions. Generally though, vicarious liability does not apply to a breach of fiduciary obligations. The fiduciary obligation itself arises from a relationship. Holding another party who is a third party to the relationship responsible for its breach does not fit within the principles of equity.

[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. Lalo was its employee but for him to be liable as a fiduciary he would have to have a relationship with Mr. Carvery separate from any fiduciary

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[60] Leonard Rotman, *Fiduciary Law* (Thomson Carswell), 2005, at 371.

relationship that the Province might have with Mr. Carvery. If it were it could be liable without the requirement of a finding of any action or inaction on its part that contributed in any way to the breach of the duties of a relationship to which it was not a party. Vicarious liability does not apply to the breach of fiduciary duty.

[95] The claim against the Province based on vicariously liability cannot succeed in law. Summary judgement on the pleadings is granted with respect to that claim.

Conclusion

[96] It is not plain and obvious that Mr. Carvery's case cannot succeed at all. The *Proceedings Against the Crown Act* does not insulate the Province of Nova Scotia from liability for breaches of fiduciary duty. The motion for summary judgment on the pleadings with respect to that claim is dismissed.

[97] However, the Province cannot be held responsible for a breach of fiduciary duty by its employee Cesar Lalo. The motion for summary judgement with respect to that claim is granted.

[98] In light of the divided success on the motion no order for the payment of costs will be made.

J.