

1 of 2 DOCUMENTS

**\*\* Preliminary Version \*\***

*Case Name:*

**Alberta v. Elder Advocates of Alberta Society**

**Her Majesty The Queen in Right of Alberta, Appellant;**

**v.**

**Elder Advocates of Alberta Society and James O. Darwish,  
Personal Representative of the Estate of Johanna H. Darwish,  
deceased, Respondents, and  
Attorney General of Canada and Attorney General of British  
Columbia, Interveners.**

[2011] S.C.J. No. 24

[2011] A.C.S. no 24

2011 SCC 24

File No.: 33551.

Supreme Court of Canada

Heard: January 27, 2011;

Judgment: May 12, 2011.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish,  
Abella, Charron, Rothstein and Cromwell JJ.**

(103 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

**Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

*Court Catchwords:*

*Civil procedure -- Pleadings -- Motion to strike -- Government alleged to have artificially inflated accommodation charges required of elderly patients in long-term care facilities to subsidize medical expenses properly the responsibility of government -- Statement of claim alleging breach of fiduciary duty, negligence, unjust enrichment, bad faith exercise of discretion and breach of s. 15(1) of the Canadian Charter of Rights and Freedoms -- Whether disputed claims disclose cause of action.*

*Fiduciary duty -- Government -- Government alleged to have artificially inflated accommodation charges required of elderly patients in long-term care facilities to subsidize medical expenses properly the responsibility of government -- Whether principles of fiduciary duty applicable to private actors apply to governments -- Whether government owed fiduciary duty to patients.*

**Court Summary:**

Alberta is responsible for the cost of medical care required by the residents of nursing homes and auxiliary hospitals, but patients may be asked to contribute to the costs of their housing and meals through the payment of accommodation charges. A large class of elderly residents of Alberta's long-term care facilities alleges that the government artificially inflated the accommodation charges to subsidize the cost of medical expenses. They initiated a class action alleging that the Province of Alberta and the nine Regional Health Authorities who administered and operated Alberta's health care regime at the relevant times failed to ensure that the accommodation charges were used exclusively for that purpose. They claimed that this constituted a breach of fiduciary duty, negligence, bad faith and/or unjust enrichment, and made an equality claim under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. At certification, Alberta challenged the claims of fiduciary duty and negligence. The certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence. The Court of Appeal upheld the entitlement of the class to pursue the causes of action.

*Held:* The appeal should be allowed in part. The pleas of breach of fiduciary duty, negligence and bad faith in the exercise of discretion are struck from the statement of claim. The claim of unjust enrichment and the s. 15(1) *Charter* claim are allowed to proceed to trial.

In cases not covered by an existing category in which a fiduciary duty has been recognized, a claimant must show that (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary's control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. Vulnerability alone is insufficient to support a fiduciary claim.

Since the government, as a general rule, must act in the interest of all citizens, governments will owe fiduciary duties only in limited and special circumstances. The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement, and the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest. Generally speaking, a strong correspondence with one of the traditional categories of fiduciary relationship is a precondition to finding an implied fiduciary duty on the government. A general obligation to the public or sectors of the public cannot establish an undertaking to act in the alleged beneficiary's interest, and may make it difficult to show that a defined person or class of persons is vulnerable to the fiduciary's exercise of discretionary power. Nor can the requirements be satisfied simply when a public authority has been granted a discretionary power to affect a person's interest, when there is a general impact on a person's well-being, property or security, when an entitlement is contingent on future government action, or when there is a mere access to a benefit scheme. If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it.

Here, taking all the facts pleaded as true, the pleading of breach of fiduciary duty does not disclose a supportable cause

of action. The claimants' state of vulnerability, as alleged in their pleadings, does not arise from their relationship with Alberta. Although their financial situation may be affected by the levy of accommodation charges, that alone is not enough to warrant a fiduciary duty. Nothing in the legislation or in the factual relationship pleaded supports an undertaking by Alberta to act with undivided loyalty toward the claimant class members in the setting, receipt and administration of the accommodation charges, and the claimants point to no analogous duty in private law. The *Health Care Insurance Act* imposes an obligation on the Province to provide medical care, but provides no direction amounting to a statutory undertaking to act in the best interests of residents of Alberta generally, or in the best interests of patients residing in long-term care facilities in particular. Nor does the statute impose any obligation on the government to take into account anyone's interests in determining the contribution that may be sought from patients. The legal or substantial practical interests that are alleged to be affected by the Crown's exercise of authority -- the right to chronic care and the right to be assessed a reasonable fee for the receipt of care -- are insufficient to attract a fiduciary duty. Deciding how to fund and implement insured health care services requires constant balancing of competing interests between all segments of the population. The Crown would be unable to meet its obligations to the public at large if it were held to a fiduciary standard of conduct for one group among many. Moreover, the Province is not responsible for the class members, who will generally still be competent to manage their own affairs, or will be beneficiaries of duties owed by their own guardians and trustees. The plea of breach of fiduciary duty should be struck from the statement of claim.

The pleadings do not support a negligence claim. While the pleadings arguably evoke negligence in auditing, supervising, monitoring and administering the funds related to the accommodation charges, the legislative scheme does not impose a duty of care on Alberta. While the Minister has a general duty, under the *Alberta Health Insurance Act*, to provide insured health care services, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges. Similarly, the *Nursing Homes Act* and its regulations impose no positive duty on the Crown, but grant only permissive monitoring powers. The same is true of the *Regional Health Authorities Act* and the *Hospitals Act* and their accompanying regulations. Furthermore, in the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a *prima facie* duty of care. The specific acts alleged fall under the rubric of administration of the scheme. The mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

The allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. The facts necessary to support an allegation that the plea of bad faith discloses the tort of misfeasance in a public office cannot be extricated from the pleas of negligence and fiduciary duty, and the issue was not raised before the courts below.

It is not plain and obvious that the claim for unjust enrichment does not disclose a cause of action. The claim stands on different legal footing than the claims for breach of fiduciary duty and negligence. While public law remedies are the proper route for claims relating to restitution of taxes levied under an *ultra vires* statute, it may be possible to sue for unjust enrichment in other circumstances. Here, the claim pleaded is not for taxes paid under an *ultra vires* statute, and it should be allowed to proceed to trial, where its propriety may be explored more fully in the context of the evidence adduced.

The claim that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter* is not directly challenged by the Province. In light of the survival of the plea of unjust enrichment especially, the s. 15 claim should be permitted to proceed as part of the class action.

The action should not be decertified since a class proceeding remains the preferable procedure. The claim as pleaded does not require an individual assessment of the nexus between specific accommodation and meal charges in order to ground any potential liability to the class, and the *Class Proceedings Act* provides sufficient remedial flexibility to address any potential difficulties in assessing, awarding, and distributing damages.

## Cases Cited

**Distinguished:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221, aff'd (2002), 58 O.R. (3d) 417, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40; *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; **referred to:** *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4) 225; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Bennett v. British Columbia*, 2009 BCSC 1358 (CanLII); *Drady v. Canada*, 2007 CanLII 27970, aff'd 2008 ONCA 659, 300 D.L.R. (4) 443, leave to appeal refused, [2009] 1 S.C.R. viii; *Gorecki v. Canada (Attorney General)* (2006), 208 O.A.C. 368; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931); *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

#### Statutes and Regulations Cited

*Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, ss. 3, 4.

*Canada Health Act*, R.S.C. 1985, c. C-6, ss. 2, 19(2).

*Canadian Charter of Rights and Freedoms*, ss. 1, 15, 24(1).

*Class Proceedings Act*, S.A. 2003, c. C-16.5, ss. 30 to 33.

*Constitution Act*, 1982, s. 52.

*Hospitalization Benefits Regulation*, Alta. Reg. 244/90, ss. 5(1)(d), 5(8).

*Hospitals Act*, R.S.A. 2000, c. H-12, ss. 1(c), 25 to 27, 28(2), 29, 37, 38(1), 41, 43(l).

*Indian Act*, R.S.C. 1952, c. 149, s. 118(1).

*Nursing Homes Act*, R.S.A. 2000, c. N-7, ss. 1(a) "accommodation charge", 1(c) "basic care", 8 to 10, 12, 14, 19, 24.

*Nursing Homes General Regulation*, Alta. Reg. 232/85, ss. 2, 4.

*Nursing Homes Operation Amendment Regulation*, Alta. Reg. 260/2003, s. 2.

*Nursing Homes Operation Regulation*, Alta. Reg. 258/85, ss. 3(1), 8, 9.

*Pension Act*, R.S.C. 1927, c. 157.

*Pension Act*, R.S.C. 1970, c. P-7.

*Protection of Children Act*, R.S.B.C. 1960, c. 303.

*Regional Health Authorities Act*, R.S.A. 2000, c. R-10, ss. 5, 9, 13, 14, 21.

*Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1.

*War Veterans Allowance Act*, R.S.C. 1985, c. W-3, s. 15(2).

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Finn, P. D. "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts*. Toronto: Carswell, 1989, 1.

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated August 2010, release 6).

### History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Conrad, Berger and Rowbotham JJ.A.), 2009 ABCA 403, 16 Alta. L.R. (5) 1, 469 A.R. 270, 315 D.L.R. (4) 59, [2010] 2 W.W.R. 197, 203 C.R.R. (2d) 344, 79 C.P.C. (6) 19, 70 C.C.L.T. (3d) 30, 470 W.A.C. 270, [2009] A.J. No. 1336 (QL), 2009 CarswellAlta 1986, reversing in part a decision of Greckol J., 2008 ABQB 490, 94 Alta. L.R. (4) 10, 453 A.R. 1, [2008] 11 W.W.R. 70, 59 C.C.L.T. (3d) 23, 59 C.P.C. (6) 243, [2008] A.J. No. 909 (QL), 2008 CarswellAlta 1104. Appeal allowed in part.

### Counsel:

G. Alan Meikle, Q.C., Ward K. Branch and Michael Sobkin, for the appellant.

Allan A. Garber and Nathan J. Whitling, for the respondents.

Christine Mohr, for the intervener the Attorney General of Canada.

Anthony Fraser, for the intervener the Attorney General of British Columbia.

The judgment of the Court was delivered by

**1 McLACHLIN C.J.:**-- It is a sad reality of life that as people age they may become unable to care for themselves and be obliged to live in special facilities providing greater or lesser degrees of assistance and medical care. In Alberta, chronic care for the elderly is provided through nursing homes and auxiliary hospitals. In principle, the government of Alberta is responsible for the costs of residents' medical care, but residents may be asked to contribute to the costs of their housing and meals through the payment of accommodation charges. In this case, 12,500 residents of Alberta's long-term care facilities ("LTCFs") sue as a class, alleging that the government artificially elevated the required resident contributions to subsidize medical expenses that are properly the responsibility of government.

**2** The class has filed a statement of claim in which it alleges that the government's conduct constitutes a breach of fiduciary duty, negligence, bad faith in the exercise of discretion and/or unjust enrichment. The class seeks the return of monies or damages equivalent to the amount of any over-payment of the permitted accommodation charges. It is on the basis of these allegations that the action was certified. The class also brings an equality claim under s. 15 of the *Canadian Charter of Rights and Freedoms*, which Alberta does not seek to have struck but argues should not proceed

by way of class action.

3 At certification, the Province of Alberta challenged the claims of fiduciary duty, negligence, and bad faith in the exercise of discretion. The certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence (2008 ABQB 490, 94 Alta. L.R. (4th) 10). The Court of Appeal upheld the entitlement of the plaintiff class to pursue all three causes of action (2009 ABCA 403, 16 Alta. L.R. (5th) 1). The Crown in Right of Alberta now appeals to this Court, contending that all the claims should be struck out and the action decertified.

4 This is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out.

5 I conclude that the pleas of fiduciary duty, negligence and bad faith in the exercise of discretion disclose no cause of action and should be struck out in their entirety, but that the claim of unjust enrichment should survive. It follows that the certification of the class is upheld, and the unjust enrichment claim may proceed to trial, together with the claim for discrimination under s. 15(1) of the *Charter*.

#### I. Background

6 Since this action is at a preliminary stage and the facts as pleaded are assumed true for our purposes, it is unnecessary to exhaustively review the factual and statutory background. Nevertheless, a brief overview is helpful to understand the context of the claims made.

7 When this action was commenced, the Province of Alberta and nine Regional Health Authorities ("RHAs") administered and operated Alberta's health care regime under a number of interlocking statutes and regulations, including the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, the *Nursing Homes Act*, R.S.A. 2000, c. N-7, and the *Hospitals Act*, R.S.A. 2000, c. H-12. The RHAs received block-funding from the Province to deliver health care services, and the RHAs were responsible for managing the provision of health services: *Regional Health Authorities Act*, R.S.A. 2000, c. R-10, s. 5. Alberta Health Services is the successor to the nine former RHAs. Although this action was brought against the RHAs as well as the Crown in Right of Alberta, the RHAs took no part in this appeal, and an action remains pending against them. The relief sought in this Court relates only to the Crown in Right of Alberta.

8 Under the *Canada Health Act*, R.S.C. 1985, c. C-6, a province does not qualify for contribution from the federal government for health care expenditures if the province permits user charges under its health care insurance plan, with certain exceptions. For example, user charges for "accommodation or meals provided to an in-patient who ... requires chronic care and is more or less permanently resident in a hospital or other institution" are allowed: *Canada Health Act*, s. 19(2). As a condition of funding, chronic care must be provided as an insured hospital service: *Canada Health Act*, s. 2.

9 In Alberta, the Province must pay for "benefits in respect of health services provided to residents [of the province]", unless exempted by statute or regulation: *Alberta Health Care Insurance Act*, s. 4(1). Generally, persons attending hospitals in Alberta are not liable for services insured under the *Canada Health Act*. User charges are permitted for accommodation and meals: *Hospitals Act*, ss. 38(1) and 43(l).

10 Nursing homes, or LTCFs, are regulated by the *Nursing Homes Act* and receive funding from both the Alberta government, by way of the RHAs, and the nursing home residents themselves. Nursing home operations -- which are run by either private operators or the RHAs, not by the Province -- may impose on residents an accommodation charge for housing and meals, not to exceed a maximum daily amount prescribed by regulation: *Nursing Homes Act*, ss. 8 and 24; *Nursing Homes Operation Regulation*, Alta. Reg. 258/85, s. 3(1). An "accommodation charge" is a "charge in respect of nursing home care payable by a resident for accommodation and meals in a nursing home or an approved [hospital that provides nursing home care]": *Nursing Homes Act*, ss. 1(a) and 10(2). "Basic care" costs remain the fiscal

responsibility of the Province: *Alberta Health Care Insurance Act*, ss. 3 and 4.

**11** Auxiliary hospitals, which also provide for the care of long-term or chronic patients, are funded and operated in the same way: *Hospitals Act*, ss. 1(c), 28(2) and 37, and *Ministerial Order 1/2006*. The accommodation charges paid by residents of auxiliary hospitals are governed by the *Hospitals Act*, s. 41, and the *Hospitalization Benefits Regulation*, Alta. Reg. 244/90, s. 5(1)(d).

**12** Collectively, these accommodation charges are the subject of the present action.

**13** The representative plaintiffs are James Darwish, in his capacity as the personal representative of the estate of his mother, Johanna Darwish, and the Elder Advocates of Alberta Society, a non-profit group. Mr. Darwish was his mother's guardian and trustee when she lived in an LTCF; he is now her executor. When preparing her estate tax returns, he was advised by the local RHA that approximately two-thirds of the monthly accommodation charge his mother had been paying was for a "care component". He concluded that the remaining one-third had been allotted to accommodation and meals. Mr. Darwish contends that the allocation for accommodation and meals that residents must pay is more than required, and in effect requires residents to subsidize medical care costs that are entirely the responsibility of the Province, and for which Alberta is not entitled to charge residents under the legislative scheme. Together with the Elder Advocates, he commenced an action to recover the amount of the overpayment.

**14** On August 1, 2003, Alberta's Minister of Health and Wellness promulgated the *Nursing Homes Operation Amendment Regulation*, Alta. Reg. 260/2003, s. 2, which raised the maximum accommodation charge payable by residents of the province's nursing homes and auxiliary hospitals. The plaintiffs' contention is that the Minister increased the permissible charge even though he was aware of a "past practice" on the part of LTCFs to apply the accommodation fees "to subsidize health care and off set care funding", and that, despite this knowledge, the Province instructed operators to charge the maximum allowable.

**15** The representative plaintiffs sought to certify a class action under the *Class Proceedings Act*, S.A. 2003, c. C-16.5, maintaining that the Crown and the RHAs have failed to ensure that the monies paid by the residents of LTCFs for "accommodation and meals" are used exclusively for that purpose. The pleadings allege that the Province is only allowed to charge for the *actual* cost of accommodation and meals, and not to use funds collected at the maximum level to subsidize basic care costs. They claim the residents of Alberta's chronic care facilities have been overcharged and seek return of the overpayment or damages.

## II. The Decisions of the Alberta Courts

**16** The class consists of about 12,500 residents who are institutionalized in LTCFs in Alberta. More than half are 85 years of age or older, and all have some form of chronic disability or incapacity. They are not capable of living on their own and require varying degrees of care, including help with feeding, toileting and other fundamental aspects of daily life.

**17** The representative plaintiffs pleaded numerous causes of action: (i) breach of fiduciary duty; (ii) breach of duty of care; (iii) breach of contract; (iv) unjust enrichment; (v) *ultra vires* action; (vi) *ultra vires* tax; and (vii) breach of s. 15(1) of the *Charter*. "Bad faith in the exercise of discretion" was also pleaded. I refer throughout to the pleas contained in the plaintiffs' Fresh Statement of Claim No. 2, issued March 1, 2010.

**18** The certification judge approved the class definition and 67 common questions (2008 ABQB 490, 94 Alta. L.R. (4th) 10). In deciding to certify those questions, Justice Greckol declined to certify others based on fiduciary duty and *ultra vires* tax, striking them from the claim as they were bound to fail. She also struck a claim for a duty of care with respect to *setting* the accommodation charges, but permitted the plea of negligence in monitoring the collection and management of accommodation charges to stand. Finding that the requirements of certification were made out, Greckol J. concluded that a class action was the preferable procedure.

19 The Court of Appeal dismissed an appeal by the Province and permitted a cross-appeal by the representative plaintiffs (2009 ABCA 403, 16 Alta. L.R. (5th) 1). In unanimous reasons, the court reinstated the plaintiffs' claim that Alberta owed and had breached a fiduciary duty to the class. The Province now appeals to this Court.

### III. Analysis

20 The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: See *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

21 The issue we must decide on each of the disputed claims is whether this test is met and, separately, whether the class action should be decertified.

#### A. *The Claim for Breach of Fiduciary Duty*

22 The question is whether the pleading of breach of fiduciary duty discloses a supportable cause of action, taking all the facts pleaded as true: *Hollick*, at para. 25; *Hunt*, at p. 991. Fiduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or *cestui que trust*, in managing the latter's affairs.

23 The plaintiff class argues that the categories of fiduciary duty are not closed and that basic principle supports their claim. The representative plaintiffs contend that they have pleaded sufficient facts to make it at least arguable that such a duty is owed to the vulnerable members of the class. In their view, fiduciary duty is a flexible principle aimed at protecting the vulnerable from abuses of power and should not be burdened by high hurdles or confined to limited categories.

24 Alberta, by contrast, argues that it does not owe the plaintiff class a fiduciary duty on the facts pleaded. In its view, the doctrine that permits imposition of a fiduciary duty on a government is narrowly confined, and does not extend to a claim such as this. Together with the intervening Attorneys General of Canada and British Columbia, Alberta asks the Court to clarify the approach to identifying fiduciary duties owed by the government to its citizens and to hold that no duty lies in the circumstances before us.

25 This case thus raises the question of when governments, as opposed to individuals, may be bound by a fiduciary duty. Fiduciary duty originated as a private law doctrine. In the past, state actors have been held to be under a fiduciary duty in limited circumstances, namely, in discharging the Crown's special responsibilities towards **Aboriginal** peoples and where the Crown is acting in a private capacity, as in its role as the public guardian and trustee. This claim does not fall within either of these situations.

26 In my view, the same broad principles apply to private actors and governments, though they may play out differently where the alleged fiduciary is a public authority. I will therefore proceed by examining the requirements of imposing fiduciary duty generally, and then turn to examine how those requirements apply in the governmental context.

#### (1) The General Requirements for Imposition of a Fiduciary Duty

27 The plaintiff class argues that, in addition to traditionally recognized categories like trustee or solicitor-client relationships, a fiduciary duty more broadly may arise whenever one person exercises power over another "vulnerable" person. They rely on *Frame v. Smith*, [1987] 2 S.C.R. 99, where Wilson J., in dissenting reasons later adopted and applied in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, outlined the hallmarks of a fiduciary duty:

Relationships in which a fiduciary obligation have been imposed seem to possess three general



characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

**28** It is now clear that vulnerability alone is insufficient to support a fiduciary claim. As Cromwell J. explained in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 67:

An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines.

Cromwell J. concluded, at para. 68, that:

[68] ... while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406. [Emphasis added.]

**29** As useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Galambos* that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.

**30** First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

**31** The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.

**32** The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in *Galambos*, at para. 77:

The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [Emphasis added.]

**33** Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must

be established on a case-by-case basis.

**34** Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.

**35** In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

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

## (2) Fiduciary Duties in the Governmental Context

**37** The general principles discussed above apply not only to relationships between private actors, but also to cases where it is alleged that the government owes a fiduciary duty to an individual or class of individuals. However, the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances. As Dickson J., as he then was, wrote for the majority in *Guerin*, at p. 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. [Emphasis added.]

**38** Binnie J., for the Court, made the same point in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". *Guerin* exceptionally recognized that the Crown was under a fiduciary duty in the management of Indian lands for their benefit. But the Court there noted, at p. 385, that the fiduciary duty owed to the **Aboriginal** peoples of Canada is unique and grounded in analogy to private law:

The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. [Emphasis added.]

Noting the unique nature of the fiduciary duty owed by the Crown in the **Aboriginal** context, courts have suggested that this duty must be distinguished from other relationships: *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.), at paras. 66-67.

**39** In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court confirmed that the fiduciary duty owed by the Crown to **Aboriginal** peoples with respect to their lands is *sui generis*, at p. 1108:

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the

Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to **aboriginal** peoples. The relationship between the Government and **aboriginals** is trust-like, rather than adversarial, and contemporary recognition and affirmation of **aboriginal** rights must be defined in light of this historic relationship. [Emphasis added.]

Similarly, in *Wewaykum*, Binnie J. suggested that the fiduciary duty owed by the Crown to **Aboriginal** peoples is not restricted to instances where the facts raise "considerations 'in the nature of a private law duty'" (para. 74).

**40** The unique and historic nature of Crown-**Aboriginal** relations described in these cases negates the plaintiff class' assertion that they serve as a template for the duty of the government to citizens in other contexts. The same applies to the only other situation where a Crown fiduciary duty has been recognized -- such as where the Crown acts as the public guardian and trustee.

**41** The special nature of the governmental context impacts on the requirements of a fiduciary relationship just discussed.

**42** First, the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion.

**43** The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of *one side's* interests ... The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle" in T. G. Youdon (ed.), *Equity, Fiduciaries and Trusts* (1989), at p. 27 (underlining added). See also *Hodgkinson*, per Sopinka J. and McLachlin J., as she then was, dissenting, at p. 468.

**44** Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

**45** If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 40; *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.), at para. 28, aff'd (2002), 58 O.R. (3d) 417 (C.A.), at para. 73, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40. The mere grant to a public authority of discretionary power to affect a person's interest does not suffice. A thorough examination of the provisions in issue is mandatory: *Guerin* addressed the *Indian Act*, R.S.C. 1952, c. 149, s. 18(1) (which confirms the Crown's duty to manage Indian lands for their use and benefit); *Authorson* dealt with the *Pension Act*, R.S.C. 1970, c. P-7, the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3, s. 15(2), and the *Pension Act*, R.S.C. 1927, c. 157 (which set out the obligation of the government to hold and administer funds on behalf and for the benefit of incapable veterans and their dependants); and *K.L.B.* found that the language in the *Protection of Children Act*, R.S.B.C. 1960, c. 303, did not encompass the duty asserted.

**46** If the alleged undertaking arises by implication from the relationship between the parties, the content of the obligation owed by the government will vary depending on the nature of the relationship, and should be determined by focussing on analogous cases: *K.L.B.*, at para. 41.

**47** Generally speaking, a strong correspondence with one of the traditional categories of fiduciary relationship -- trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward

or parent-child -- is a precondition to finding an implied fiduciary duty on the government.

**48** In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to **Aboriginal** peoples by clear government commitments from the *Royal Proclamation* of 1763 to the *Constitution Act, 1982* and considerations akin to those found in the private sphere. It may also be met where the relationship is akin to one where a fiduciary duty has been recognized on private actors. But a general obligation to the public or sectors of the public cannot meet the requirement of an undertaking.

**49** For similar reasons, where the alleged fiduciary is the government, it may be difficult to establish the second requirement of a defined person or class of persons vulnerable to the fiduciary's exercise of discretionary power. The government, as a general rule, must act in the interest of all citizens: *Bennett v. British Columbia*, 2009 BCSC 1358 (Can LII), at paras. 61 and 71; and *Drady v. Canada*, 2007 CanLII 27970 (Ont. S.C.J.), at para. 28, aff'd 2008 ONCA 659, 300 D.L.R. (4th) 443, leave to appeal ref'd [2009] 1 S.C.R. viii. It is entitled to make distinctions between different groups in the imposition of burdens or provision of benefits, subject to s. 15 of the *Charter*, which forbids discrimination. As stated in *Galambos*, the claimant must point to a deliberate forsaking of the interests of all others in favour of himself or his class. In the **Aboriginal** context, an exclusive duty in relation to **Aboriginal** lands is established by the special Crown responsibilities owed to this sector of the population and none other. Similarly, where the government duty is in effect a private duty being carried out by government, this requirement may be established. Outside such cases, a specific class of persons to whom the government owes an exclusive duty of loyalty is difficult to posit.

**50** No fiduciary duty is owed to the public as a whole, and generally an individual determination is required to establish that the fiduciary duty is owed to a particular person or group. A fiduciary duty can exist toward a class -- for example, adults in need of a guardian or trustee, or children in need of a guardian -- but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation. Group duties have not often been found; thus far, only the Crown's duty toward **Aboriginal** peoples in respect of lands held in trust for them has been recognized on a collective basis.

**51** Finally, it may be difficult to establish the requirement that the government power attacked affects a legal or significant practical interest, where the alleged fiduciary is the government. It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. Examples of sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person. The entitlement must not be contingent on future government action. For example, in *Authorson*, the right to the funds had already fully vested in the veterans' hands *before* the Crown took on the responsibility for administration: *Authorson* (C.A.), at paras. 60, 73(b) and 73(h); in the **Aboriginal** context, see *Guerin*, at p. 385. In other circumstances, a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest.

**52** Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. Although the receipt of a statutory benefit may affect a person's financial welfare, absent evidence that the legislature intended otherwise, the entitlement is a creation of public law and is subject to the government's public law obligations in the administration of the scheme.

**53** Moreover, the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise. The type of legal control over an interest that arises from the ordinary exercise of statutory powers does not suffice. Otherwise, fiduciary obligations would arise in most day to day government functions making general action for the public good difficult or almost impossible.

**54** It thus emerges that a rigorous application of the general requirements for fiduciary duty will of necessity limit the

range of cases in which a fiduciary duty on the government is found. Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. The truism that the categories of fiduciary duty are not closed (as Dickson J. noted in *Guerin*, at p. 384) does not justify allowing hopeless claims to proceed to trial: see M. V. Ellis, *Fiduciary Duties in Canada* (loose-leaf), at pp. 19-3 and 19-24.10. Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.

(3) Application to this Case

**55** I turn now to the application of these principles to the appeal before us. The core of the plaintiffs' pleading of fiduciary duty is found at para. 40 of the Fresh Statement of Claim No. 2:

The Crown owed a fiduciary duty to the Class members with respect to the implementation and administration of the Accommodation Charge to ensure that the Accommodation Fee was fair, reasonable and justifiable, that the Accommodation Fee reflects the cost of accommodation and meals, that the Accommodation Fee was in their best interests, and that moneys paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs. [Emphasis added.]

See also paras. 32-42.

**56** The plaintiffs' pleadings emphasize the vulnerability of the class members:

34. The Class members are frail, elderly, and have chronic disabilities. They are incapable of caring for themselves or living on their own. They are among the most vulnerable members of our society. A physician has determined that each Class member requires long-term care.

**57** However, vulnerability alone is insufficient to ground a fiduciary obligation, as discussed earlier. In this case, their state of vulnerability does not arise from their relationship with Alberta: *Galambos*, at paras. 67-68. Moreover, as Alberta points out, class members will generally still be competent to manage their own affairs, or will be beneficiaries of duties owed by their own guardians and trustees; the Province is not responsible for them. They are not being denied care and though their financial situation may be affected by the levy of accommodation charges, that alone is not enough to warrant a fiduciary duty.

**58** The plaintiffs do not point to anything in the legislation, or in the factual relationship pleaded, that supports an undertaking by Alberta to act with undivided loyalty toward the claimant class members, in the setting, receipt and administration of the accommodation charges. The *Alberta Health Care Insurance Act* imposes an obligation on the Province to provide medical care, including chronic care, but provides no direction amounting to a statutory undertaking to act in the best interests of residents of Alberta generally, or in the best interests of residents residing in LTCFs in particular. Nor does the statute impose any obligation on the government to take into account anyone's interests in determining the contribution that may be sought from residents. There may be a trust relationship between *operators* and residents with respect to residents' property, but no similar trust relationship is established between the *Province* and residents: *Nursing Homes Act*, s. 8(1); *Nursing Homes General Regulation*, s. 4; *Nursing Homes Operation Regulation*, ss. 8-9.

**59** Nor have the plaintiffs pleaded facts sufficient to establish an implied undertaking on the part of Alberta to act with undivided loyalty to the residents of LTCFs. They point to no analogous duty in private law. The facts pleaded do not assert any undertaking or any basis upon which such an undertaking could be posited.

**60** Indeed, it is not clear that the pleadings allege that the Crown, as distinguished from individual actors, is under a fiduciary duty. Although the action was brought against Her Majesty the Queen in Right of Alberta, the allegations in the pleadings are against the Minister of Seniors and Community Supports and the Department of Alberta Health and

Wellness. This makes it difficult to determine the second and third requirements of an undertaking to a defined group in relation to any legal or vital practical interests. The separate pleas against the RHAs may support a cause of action for breach of fiduciary duty, a matter not before us, but the pleas against the Crown do not. Absent pleadings fixing a specific undertaking on the Crown, how can we know to whom such a duty would be owed or indeed what duty is owed? Put simply, the pleadings against the Crown are too vague to permit the inference of a fiduciary duty on the Crown toward the plaintiff class.

**61** Apart from these difficulties, the legal or substantial practical interests alleged in the pleadings to be affected by the Crown's exercise of authority is insufficient to attract a fiduciary duty. The pleadings speak of the right to chronic care and the right to be assessed a reasonable fee for the receipt of care. The entitlement to chronic care flows exclusively from statute, and no one contests that Alberta continues to provide such care. The allegation, at base, is that the plaintiffs are paying more than their meal and accommodation cost, with the result that the Province is offsetting its obligation to meet medical costs and thus pocketing money it is not entitled to pocket. The situation is not unlike that in *Gorecki v. Canada (Attorney General)* (2006), 208 O.A.C. 368, where Sharpe J.A. wrote, at para. 6:

I agree with the motion judge's conclusion that it is plain and obvious that the action cannot succeed on the allegations of breach of fiduciary duty. The relationship between the Crown and the appellant flows entirely from the terms of the [Canada Pension Plan] and the statutory definition of that relationship bears none of the hallmarks of a fiduciary duty. The CPP confers no discretion on the Crown to act for the benefit of the appellant. The Crown does not undertake to administer CPP funds for the appellant's benefit. The only duty that the CPP imposes on the Crown or that the Crown assumes is the public law duty to fulfill the statutory terms of the CPP. This cannot be the source of a fiduciary duty owed to the appellant.

**62** Finally, I note that the specific fiduciary duty that the plaintiffs seek to establish relates primarily to *setting* the accommodation charges by regulation. This is a *legislative* function of government. Where the government acts in the exercise of its legislative functions, courts have consistently held that a fiduciary duty does not arise: *Guerin*, at p. 385; *Wewaykum*, at para. 74. Deciding how to fund and implement insured health care services requires constant balancing of competing interests between all segments of the population, since everyone receives health care. The Crown would be unable to meet its obligations to the public at large if we were to hold it to a fiduciary standard of conduct for one group among so many others. This aspect of the claim is doomed to fail.

**63** In my view, the facts as pleaded, which are accepted as true for the purpose of the instant motion, do not establish a fiduciary duty on the Crown. Accordingly, I would strike the plea of breach of fiduciary duty.

#### B. The Negligence Claim

**64** The plaintiff class pleads that Alberta is in breach of a duty of care to its members to act with due care, i.e. without negligence. It pleads:

43. The Defendants owed the Class members a duty to exercise all reasonable care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fee paid by the Class members, to ensure that the Accommodation Fee was fair, just, and reasonable, to ensure that the Accommodation Fee reflected the actual cost of accommodation and meals, and that Accommodation Fees paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs. [Emphasis added.]

**65** I note at the outset that the claim of negligence sits uncomfortably with the general thrust of the plaintiff class' grievance. That grievance, viewed broadly, appears mainly concerned with deliberate legislative and policy decisions.

Hints of this remain in the way the negligence claim is cast: the duty is said to be "to ensure" rather than merely to take reasonable care. That said, the pleadings arguably evoke negligence in "auditing, supervising, monitoring and administering the health care benefit". The duty of care asserted with respect to setting the accommodation fees has been struck and is not appealed. It is therefore unnecessary to consider whether this pleading raises a triable cause of action in negligence.

**66** The first and central question is whether the pleadings, assuming the facts alleged to be true, support a duty of care on Alberta to members of the plaintiff class. This requires us to determine first whether Alberta and the class members were in a relationship that gave rise to a *prima facie* duty of care, based on foreseeability and proximity. If a *prima facie* duty of care is established, the second step is to ask whether it is negated by policy considerations: See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30; and *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 14.

**67** The claim raised in this case has not been previously recognized as giving rise to a duty of care. Therefore, we must examine whether it meets the foregoing requirements for imposing a duty of care in negligence: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15.

**68** In this case, as in *Broome*, the plaintiff class relies on provincial statutory obligations as the source of a private duty of care. The allegation, in essence, is that statutory and regulatory duties brought Alberta into a relationship of proximity with members of the class, whom it was reasonably foreseeable would be affected by failure to discharge these duties in a non-negligent manner. The *Cooper* analysis applies to claims grounded in statutory duties. As the Court, *per* Cromwell J., stated in *Broome*, at para. 13:

[13] [The *Anns/Kamloops* ] test is the appropriate one even though the appellants mainly rely on statutory duties. Such duties do not generally, in and of themselves, give rise to private law duties of care. The *Anns/Kamloops* test determines whether public as well as private actors owe a private law duty of care to individuals enabling them to sue the public actors in a civil suit.

**69** Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

**70** In this case, the legislative scheme does not impose a duty on the Crown to act in relation to the class members with respect to the accommodation charges. A review of the relevant provisions discloses a general duty on the Minister to provide insured health care services: *Alberta Health Care Insurance Act*, s. 3. However, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges in the provisions. The *Nursing Homes Act* imposes no positive duty on the Crown, but grants only permissive monitoring powers. Reporting requirements are discretionary (i.e. at the demand of the Minister). While they flow up the chain of command (i.e. the RHA or operator must report to the Minister), the Minister need not respond: *Nursing Homes Act*, ss. 12 and 19. The same is true of the Act's regulations (*Nursing Homes General Regulation* and *Nursing Homes Operation Regulation*) and the *Regional Health Authorities Act*, ss. 9, 13, 14 and 21, and accompanying regulations; as in the *Hospitals Act*, ss. 25-27 and 29, and its regulations. This case is distinguishable from *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25 (C.A.), relied on by the plaintiffs, where the statute in question imposed on the public authority a *positive duty to act*.

**71** For these reasons, I conclude that the legislative scheme does not impose a duty of care on Alberta. However, the claimant class also argues that Alberta's conduct established a relationship of a sufficient proximity to support a duty of care. They rely generally on the fact that Alberta supervised, monitored and administered the accommodation fees. More particularly, they emphasize that Alberta directed the health authorities to charge the class members the maximum accommodation charge, without regard to the actual cost of accommodation and meals, and that information about the

rates was communicated by the health authorities directly to the class members at the direction of Alberta. This, they argue, is sufficient to create a relationship of proximity.

**72** In the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a *prima facie* duty of care. As stated in *Broome*, at para. 40:

Even if the statute ought to be interpreted so that there was a duty to inspect the Home, on the record before me, the statute gives no direction as to the purpose or scope of such inspections, imposes no standards to be applied and requires no action to be taken as a result of an inspection. No authority is cited for the proposition that such a bare duty of inspection would be sufficient to support a finding of proximity between the Director and the children. [Emphasis added.]

The specific acts alleged -- that Alberta directed the charges and that the health authorities communicated them to members of the claimant class -- fall under the rubric of administration of the scheme. As in *Broome*, the mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

**73** I therefore conclude that, assuming the facts pleaded to be true, the negligence claim is bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out.

**74** Were the pleadings to satisfy the first step of the *Anns/Cooper* test, they would fail at the second step, which asks whether the *prima facie* duty of care is negated by policy considerations. Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, *per* Laskin J., as he then was, for the Court. Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention. It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by *any* patient in the healthcare system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo Ch.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.

**75** For these reasons, I would find that the pleadings do not disclose a duty of care and that the cause of action as pleaded is bound to fail. I would therefore strike the plea of negligence in its entirety.

### *C. The Bad Faith Claim*

**76** The plaintiff class pleads that the instruction by the Minister of Health and Wellness to the LTCF operators to charge the maximum fee allowable under the regulations for accommodation and meals is a bad faith exercise of discretion. The plaintiffs say the Minister gave his instructions knowing full well of the past practice of certain LTCF operators of using surplus accommodation charges to subsidize basic care and operating costs properly the responsibility of the operator and the Province. This recklessness and breakdown of the orderly exercise of authority, they say, is sufficient to establish a distinct cause of action for bad faith.

**77** I agree with the Province's submissions that the allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. The pleadings disclose the explicit link between bad faith and negligence:

### **Negligence: Breach of Duty of Care and Bad Faith**

...



44. In breach of their duty of care, the Defendants, acting recklessly, arbitrarily, and in bad faith, failed to exercise any, or any sufficient, care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fees paid by the Class members. In particular, the Defendants, acting recklessly, arbitrarily and in bad faith:
- a) Had no rational basis for determining what accommodation and meals consist of;
  - b) Had no rational basis for calculating the actual cost of accommodation and meals or the Accommodation Fee;
  - c) Had no rational basis for separating or distinguishing Health Care costs, which are the responsibility of the Defendants, from Accommodation Fees, which are the responsibility of the Class members;
  - d) Failed to conduct any analysis to determine the actual cost of accommodation and meals and levied, either directly or through their agents, the maximum Accommodation Charge across the Province of Alberta (save for a very few exceptions[]);
  - e) Failed to account or require an accounting to be provided to the Class members with respect to the disposition of monies paid by the Class members as Accommodation Fees;
  - f) Failed to put in place any, or any proper, reporting, accounting and financial records and systems;
  - g) Permitted or alternatively failed to prevent the Class members from being charged for Health Care costs which are the responsibility of the Defendants including but not limited to [a detailed list follows]; and
  - h) By letter dated August 1, 2003, the Crown, by its Minister of Seniors and Community Supports, did unlawfully [list of particular actions omitted].

#### **Policy Decisions: Breach of Duty of Care and Bad Faith**

...

49. In breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, did unlawfully and improperly direct and instruct the Predecessor Health Authorities and their agents to charge the maximum Accommodation Charge, notwithstanding the permissive and discretionary language of s. 3(1) of the *Nursing Homes Operation Regulation* and s. 8(2) of the *Nursing Homes Act*, as a result of which the Class members, save for a limited number of exceptions, were charged the maximum Accommodation Charge without regard to the actual cost of accommodation and meals.
50. In further breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, unlawfully and improperly directed and instructed the Predecessor Health Authorities and their agents to charge the Class members for Health Care costs set out in paragraph 44(g) herein in circumstances where:
- a) Such costs are Health Care costs pursuant to the *Nursing Homes Act* and regulations, the *Hospitals Act* and regulations, and Ministerial Directive D-317;
  - b) The Crown understood and has since acknowledged that such costs and services were the responsibility of the Defendants; and

- c) The Crown understood and has since acknowledged that such costs were included as part of the block funding for Health Care provided by the Crown to the Health Authorities.

51. As a result of the negligent, *ultra vires* and bad faith actions of the Defendants:

- a) There was no reasonable nexus between the Accommodation Fee and the cost of accommodation and meals;
- b) The Class members paid an Accommodation Fee that was contrary to the *Hospitals Act* and the *Nursing Homes Act*;
- c) The Class members' right and entitlement to publicly funded Health Care services and benefits was violated; [and]
- d) Under the guise of the Accommodation Charge, the Class members paid an Accommodation Fee that included the cost of Health Care services and benefits the Class members were entitled to receive at no cost as described in paragraph 41(i) herein.

52. As a result of the negligent and bad faith actions of the Defendants, the Class members have suffered damage and loss. [Emphasis added.]

**78** The law does not recognize a stand-alone action for bad faith. As the certification judge noted, at para. 408, the bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.

**79** At the hearing, counsel for the plaintiffs sought to argue that we should read the plea of bad faith as disclosing the tort of misfeasance in public office: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. Notwithstanding the difficulty of raising this interpretation of the pleadings for the first time in response during oral hearing, I do not see how this claim is sustainable at law: The facts necessary to support such an allegation cannot be extricated from the pleas of negligence and fiduciary duty, and a court is not obliged to divine causes of action apart from those deliberately pleaded and argued by a party. Misfeasance in a public office was not raised before the courts below, and I would not now accede to this submission.

**80** For these reasons, the plea of bad faith should be struck.

#### *D. The Unjust Enrichment Claim*

**81** The representative plaintiffs advanced a claim in restitution. Essentially, they plead that by overcharging them for accommodation and food, the government used their money to partially offset its obligations under the scheme, without being entitled to do so. The government, they plead, was thus unjustly enriched, and should be ordered to return the excess money thus obtained. They pleaded the following with respect to unjust enrichment:

#### **Restitution**

...

54. The Class members, with very limited exceptions, paid the maximum rates permitted by s. 3(1) of the *Nursing Homes Operation Regulation*, A.R. 258/85 as amended, such that the Class members experienced a deprivation equal to the amount of the Accommodation Fees.

55. The payment of the Accommodation Fees constituted a corresponding benefit to the Defendants in that the payments relieved the Defendants from inevitable expenses they were required to incur pursuant to the *Hospitals Act*, the *Nursing Homes Act*, and Ministerial Directive D-317.
56. There exists no juristic reason for the Class members' deprivation and the Defendants' corresponding benefit because:
- a) Section 19(2) of the *Canada Health Act*, R.S. 1985, c. C-6, s. 3(1) of the *Nursing Homes Operation Regulation* as amended, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters, are of no force or effect in that they violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in that they authorize the imposition of Accommodation Charges upon the Class members which may not be imposed upon other patients solely on the basis of the Class members' age and/or mental and/or physical disabilities, are not justified under s. 1 of the *Charter*, and are of no force or effect by operation of s. 52 of the *Constitution Act*, 1982;
  - b) Section 3(1) of the *Nursing Homes Operation Regulation* as amended, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters are *ultra vires* and inoperative in that contrary to the *Nursing Homes Act*, and the *Hospitals Act*, they purport to authorize the imposition of charges or fees against the Class members for goods and services other than accommodation and meals, including but not limited to [list of specific goods and services omitted], all of which are the financial responsibility of the Defendants;
  - c) The Letters are *ultra vires* and inoperative in that there was in fact no obligation on the part of the Long Term Care Facilities to impose the maximum Accommodation Charges, [and] there was no obligation on the part of the Class members to pay them;
  - d) The Crown's Minister of Seniors and Community Supports had no lawful authority in August of 2003 with respect to setting and monitoring the Accommodation Charge; ... [Emphasis added.]

**82** These pleadings mirror the test for unjust enrichment set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30:

As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment ...

The savings of an inevitable expense can constitute an enrichment of the defendant: *Garland*, at para. 31.

**83** The thrust of Alberta's argument on this point is that the claim of unjust enrichment is bound to fail because the doctrine does not apply to a public authority in a case such as this. Governments enact laws and regulations that require citizens to pay monies to government in a variety of situations, and as a general rule, the citizen should have no right to recover such payments. It argues that this position is justified in terms of public policy; governments should not be required to endlessly defend levies made under valid statutes and regulations.

**84** In reality, the situation is not so simple. As one writer delicately puts it, the application of restitutionary principles to public authorities in Canada "is a matter of some subtlety": P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at p. 22-1. Under the traditional common law doctrine, recovery from public authorities was recognized only on the grounds of *colore officii* (demands for unlawful payment from citizens by government officials for the receipt of benefits to which the citizen had a lawful entitlement) or duress (actual or implied). Payments made pursuant to *intra vires* statutory schemes were potentially recoverable; those made pursuant to *ultra vires* legislation were not necessarily so.

**85** The traditional doctrine, though workable in some circumstances, has been criticized on the ground that it produced inconsistent and inequitable results. A series of judicial decisions, responding to these concerns, has narrowed the ambit of the doctrine.

**86** It has been held that benefits received by the government because of a mistake of law may be recovered, so long as the mistake caused the payment in question: *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1200-01, *per* La Forest J., for three of the six members of the Court, in *obiter*. Thus, where payments are made to a government under an *intra vires* law pursuant to an unlawful demand for payment which was based on a misinterpretation of the governing legislation, the payments may be subject to restitution.

**87** It has also been held that benefits received by the government pursuant to *ultra vires* legislation may be recoverable where the payment is made under practical compulsion or actual duress: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at p. 587, *per* Major J., for the majority. In that decision, the Court left open the question of the recoverability of payments made under *ultra vires* legislation *in the absence of compulsion*: *Eurig Estate*.

**88** Again, courts have held that benefits conferred under an *agreement* with a public authority that is beyond the power of the state actor to make are recoverable in a restitutionary claim: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575.

**89** Most recently, this Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, *per* Bastarache J., held that taxes collected by public authorities on the basis of an *ultra vires* statute are recoverable where the law is found to be unconstitutional. Restitution is generally "available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*": at para. 12. Bastarache J. suggested that where the claim is for unconstitutional taxes, the claim should be brought under public law principles, and not the private law rules of unjust enrichment. However, he added that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances": at para. 34. Although the Court rejected Justice La Forest's *obiter* proposal in *Air Canada*, at pp. 1203-04, that recovery of payments made under *ultra vires* legislation should never be possible, Bastarache J. did not go so far as to embrace Justice Wilson's dissent on this point (at pp. 1214-15), which would have permitted recovery in cases where unjust enrichment is applied.

**90** Alberta argues that *Kingstreet* stands for the proposition that an action for unjust enrichment cannot be brought against the government. The only recourse, it argues, is under public law principles, such as a claim for misfeasance in public office. The plaintiff class, in response, argues that Alberta interprets *Kingstreet* too narrowly. It fastens on Bastarache J.'s statement that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances".

**91** In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.

**92** With respect to whether or not a juristic reason exists, Alberta argues that the regulation setting the maximum allowable accommodation charge is a complete answer to any claim in restitution. However, the claim that the regulation is itself invalid is a *Charter* claim, subject to *Charter* remedies.

**93** Alberta argues that the cause of action for unjust enrichment must fail because there is a nexus between the levy and the cost of making the service or benefit available, and therefore that the applicable regulations are not *ultra vires*. However, the sufficiency of the nexus is a matter of reasonableness: see *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at para. 19, *per* Rothstein J., for the Court. It is better explored at trial than on a motion to strike.

**94** Finally, Alberta argues that the claim for unjust enrichment is simply another way of asserting breach of fiduciary

duty and negligence, and therefore should be struck. I cannot accept this argument. The claim for unjust enrichment stands on different legal footing than the claims for breach of fiduciary duty or negligence. On the law just reviewed, it should be allowed to proceed. I further note that the restrictions set out in *Welbridge* on suing governments (as opposed to government actors) in tort do not apply to actions for restitution: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

**95** In summary, the plaintiffs plead the three elements of unjust enrichment -- benefit, deprivation, and absence of juristic reason for the deprivation. Whatever its chances of ultimate success, it is not plain and obvious that the claim does not disclose a cause of action, and it should be allowed to proceed to trial. As the trial judge correctly observed, at para. 443:

I am satisfied that the cause of action based on unjust enrichment with the remedy of restitution is not hopeless, but rather analytically defensible, *albeit* novel, even dubious. I cannot say that it is "plain and obvious" that no claim exists; nor that the pleadings do not disclose a cause of action based on unjust enrichment with any hope of success.

**96** I would permit the plea of unjust enrichment to proceed.

#### *E. The Section 15(1) Claim of Discrimination*

**97** The plaintiffs plead that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter*. They say the charges were imposed solely on the basis of the class members' age, mental disability, physical disability, or some combination thereof, and the consequent infringement of their equality rights is not demonstrably justified under s. 1 of the *Charter*. They seek restoration of the accommodation charges and damages under s. 24(1) of the *Charter*, and a declaration that the listed provisions are of no force or effect to the extent of their inconsistency with s. 15(1).

**98** My understanding is that the plea for relief under s. 15(1) is not directly challenged by the Province. Although the Province argues that a class action is not the preferable procedure for the *Charter* claim or its remedy, the Crown does not seek to strike the plea of discrimination itself; instead, it asks that we order it to proceed in another form. In light of my other conclusions, especially the survival of the plea of unjust enrichment, and without commenting on its merits, I would permit the s. 15 claim to proceed as part of the class action.

#### *F. Whether the Claim Should be Decertified*

**99** Although the claims for unjust enrichment and breach of s. 15(1) of the *Charter* survive, Alberta nevertheless argues that the action should be decertified because a class proceeding is not the preferable procedure. Alberta submits that an individualized cost review would have to be conducted for each proposed class member, to determine whether particular charges for individual residents of specific LTCFs did not reflect the actual cost of accommodation and meals. Alberta argues that the charges will vary by time, regions, operator and resident, and -- on the plaintiffs' theory -- there is no wrong done unless it can be shown that the costs of accommodation and meals for a particular resident did not reflect the actual costs of providing those services.

**100** I would reject Alberta's argument: The common questions certified by the judge at first instance ask whether the accommodation charges, as a practice carried out on a class-wide basis, resulted in unjust enrichment. The claim as pleaded does not require an individual assessment of the nexus between specific accommodation and meal charges in order to ground any potential liability to the class. The *Class Proceedings Act* provides sufficient remedial flexibility -- by means of the aggregate assessment of damages (ss. 30-33) -- to address any potential difficulties in assessing, awarding, and distributing damages.

**101** For these reasons, I find that a class proceeding remains the preferable procedure and I decline to decertify the action.

## **Conclusion**

**102** Based on the foregoing, I would allow the appeal in part and strike the pleas of breach of fiduciary duty, negligence and bad faith. Without endorsing them, I would leave untouched the claim of discrimination under s. 15(1) of the *Charter* and the plea of unjust enrichment, along with any other pleas which survived in the lower courts and were not appealed to this Court. Certification of the class and the unaffected common questions will remain, since the action, in truncated form, survives.

**103** Costs will be in the cause.

*Appeal allowed in part.*

## **Solicitors:**

*Solicitor for the appellant: Attorney General of Alberta, Edmonton.*

*Solicitors for the respondents: Parlee McLaws, Edmonton.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.*

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