

CASE LAW UPDATE

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Alberta v Elder Advocates of Alberta Society

2011 SCC 24 (released May 12, 2011)

Fiduciary Duty – Government – Civil Procedure

In this unanimous decision of the Supreme Court of Canada, the court determined that there is no fiduciary duty owed by the government to the plaintiffs. The plaintiffs, made up of a large class of residents of long-term care facilities in Alberta, alleged that the provincial government artificially inflated the cost of "accommodation charges" – a direct charge on residents for their housing and meals while in care – in order to subsidize the publicly funded costs of medical services. The plaintiffs claimed that this over-charging consisted of a breach of fiduciary duty, negligence, bad faith and/or unjust enrichment, and they further brought an equality claim under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Province of Alberta challenged the plaintiffs' statement of claim as not disclosing a cause of action.

The court stated that to establish a fiduciary duty outside of the existing categories, a claimant must show: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control (vulnerable in the sense that the fiduciary has a discretionary power over them); and (3) a legal or substantial practical interest of the beneficiary that stands to be affected by the exercise of control.

The court recognized that the government context necessarily refines the elements identified above. First, the requirement of an undertaking will be lacking where what is at issue is the exercise of government power or discretion; a fiduciary duty would conflict with the government's general duty to act in the best interests of society as a whole. Undertakings of loyalty to a particular group from the government will be rare.

Second, it may be difficult to establish a defined person or class of persons vulnerable to the exercise of discretionary power. Where the government duty is in effect a private duty being carried out by government, such as in the role of public guardian and trustee, this requirement may be found.

Third, the court indicated that it will be difficult for an individual to establish that government power affected a legal or significant practical interest. It is not enough that a government decision impacts on a person's well-being, property or security, but rather the affected interest

must be a specific private law interest to which the person has a pre-existing, distinct, and complete legal entitlement. A government benefit scheme is an entitlement of public law, not a private law interest.

Finally, the court indicated that the degree of control that must be exercised by the government in the fiduciary relationship must be equivalent or analogous to a direct administration of the interest. Legal control that arises from the ordinary course of statutory powers is insufficient.

In this case, the court found that there was no evidence in the pleadings of an undertaking by the province to act with undivided loyalty towards the class members when setting and administering accommodation charges. Nor did the relevant provincial legislation impose any obligations on the government to account for anyone's particular interests in setting the accommodation charge.

Although the court struck out the plaintiffs' claims relating to fiduciary duties, negligence and bad faith, the pleadings were found to disclose a supportable cause of action in the remaining claims and the plaintiffs as a class were allowed to proceed on those issues.