CITATION: Papassay et al v. Ontario, 2016 ONSC 561
COURT FILE NO.: CV-14-0018
DATE: 2016-01-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HOLLY PAPASSAY, TONI GRANN, ROBERT MITCHELL, DALE GYSELINCK AND LORRAINE EVANS

And

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

BEFORE: Fregeau J.

COUNSEL: Mr. J. Kelly, Ms. L. Favreau and Ms. C. Blom, for the Applicant/Defendant

Mr. J. Ptak, Mr. G. Myers, Mr. S. Zaitzeff, Mr. C. Watkins and Mr. B. Feldthusen, for the Respondent/Plaintiff

HEARD: In writing

ENDORSEMENT

INTRODUCTION

[1] The Defendant, Her Majesty the Queen in right of Ontario (the "Crown") seeks leave to appeal the decision of the Honourable Justice Pierce dated May 28, 2015. In that decision, the motion judge dismissed the Crown's motion to strike the Plaintiffs' claim and found that the cause of action criterion in s. 5(1)(a) of Class Proceedings Act, 1992 was satisfied.

[2] The Plaintiffs are former Crown wards. This class action asserts that the Crown failed in its duties to Crown wards for whom the Crown was their legal guardian. The Plaintiffs allege that the Crown was negligent and breached a fiduciary duty owed to them when it failed to

commence proceedings on their behalf or failed to take steps to protect their ability to do so with respect to abuse committed by third parties.

[3] The motion judge held that "it is not plain and obvious that the Crown's obligation to its wards does not extend to protecting their legal rights." The motion judge further held that it was "conceivable that the plaintiffs will be able to prove that" the Crown owed Crown wards under their care and guardianship a fiduciary duty.

TEST FOR LEAVE TO APPEAL

[4] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

[5] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted." A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.)

[6] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting

leave be satisfied that the decision was actually wrong - this aspect of the test is satisfied if the judge granting leave finds the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co., [2003] O.J. No. 3442 (S.C.J.); Ash v. Lloyd's Corp. (1992), 8 O.R. (3d) 282 (Gen. Div.).* In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).

ANALYSIS

[7] The Crown has appealed the motion judge's decision on the duty of care issue pursuant to Rule 62.02(4)(a) and (b). The Crown has appealed the motion judge's decision of the breach of fiduciary duty claim under Rule 62.02(4)(b) only.

Issue 1 Does the motion judge's decision conflict with other decisions on the test for assessing a duty of care or is there reason to doubt the correctness of her decision on this issue?

[8] In her analysis of whether a defendant owes a plaintiff a duty of care, the motion judge expressly set out the correct test as established by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 2 S.C.R. (537) (SCC) and *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 (SCC) at paragraph 17 of her Reasons:

> [17] The Supreme Court of Canada in *Cooper* and *Imperial Tobacco* developed the following test for examining whether the defendant owed the plaintiff a duty of care:

1) Do the facts pleaded bring the plaintiff and the defendant within a relationship that has already been recognized as giving rise to a private law duty of care?

2) If not, the court must apply the two-part *Anns* test as follows:

    a) Is the relationship between the parties sufficiently proximate such that the defendant's failure to take reasonable care might foreseeably cause harm to the plaintiff? If foreseeability and proximity are established, then a *prima facie* duty of care arises;

    b) Are there policy reasons why the *prima facie* duty of care should not be recognized?

[9] The motion judge then applied this test to the facts of the case before her. The motion judge first considered "...whether a duty of care has been recognized between the Crown in its capacity as guardian to the plaintiffs or in an analogous capacity." This initial consideration is correctly drawn directly from *Cooper* at paragraph 41. The motion judge's analysis in this context included a review of the current legislation, the legislative history, relevant case law and the facts set out in the Statement of Claim. The motion judge concluded that "a private law duty of care analogous to that between parent and child has been recognized as subsisting between the plaintiffs and the defendant." Having done so, the motion judge then concluded that "it is therefore unnecessary to engage in the balance of the *Anns* test analysis."

[10] The conclusion that it was unnecessary to move on to the second stage of the *Anns* analysis is consistent with *Cooper*. In *Cooper,* the Supreme Court stated;

> *The second step of Anns generally arises only on cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care...the second stage of Anns will seldom arise and...questions of liability will be determined primarily by reference to established and analogous categories of recovery."*

[11] The motion judge specifically acknowledged the defendant's argument that the Crown's obligations to Crown wards had been delegated to children's aid societies by virtue of s. 32 of the *Child Welfare Act, 1965,* and by virtue of s. 63(1) of the *Child and Family Services Act.* The motion judge thoroughly traced and analyzed the relevant legislative history and rejected this argument.

[12] The Crown submits that the motion judge should not have concluded that the relationship in the case at bar was analogous to the relationship between parents and children and that it was therefore necessary to proceed to the second stage of the *Anns* test. The Crown is not suggesting that motion judge's decision conflicts with other decisions on the test for assessing a duty of care. The Crown is arguing that the motion judge improperly applied the test.

[13] The motion judge's decision did not deviate from the well-established principles in addressing the duty of care issue. The motion judge identified and applied the correct test to the facts before her. I do not find that there is any substantive reason to doubt the correctness of the motion judge's decision on the duty of care issue.

Issue 2 Is there reason to doubt the correctness of the motion judge's finding that the plaintiffs may have a cause of action for breach of fiduciary duty?

[14] The Crown submits that the motion judge's failure to embark upon the analysis proposed in *Alberta v. Elder Advocates Society*, [2011] 2 S.C.R. 261 (SCC) for determining when governments may be bound by a fiduciary duty was in error.

[15] The motion judge identified the elements of a fiduciary relationship as set out in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.). The motion judge referred to *Alberta v. Elder Advocates*, which she characterized as being applicable to "cases where an existing category of fiduciary relationship has not been recognized." The motion judge then found that it has been recognized that guardians owe a fiduciary duty to their wards in the same way that parents owe a fiduciary duty to children in their care. Pursuant to this finding and based on her reading of *Alberta v. Elder Advocates*, the motion judge then found that "it is not necessary to embark upon the legislative analysis proposed in para. 45 of Alberta." The motion judge then concluded that the cause of action for breach of fiduciary duty was supportable, referring to the *Frame* analysis only.

[16] In *Alberta v. Elder Advocates*, McLachlin C.J. identified the question before the Court in that case as being when governments, as opposed to individuals, may be bound by a fiduciary duty. See para. 25. McLachlin C.J. stated that *Frame* was "useful" in explaining the source of fiduciary duties but was not a "complete code for identifying fiduciary duties." McLachlin C.J. went on to state that the elements that the Court set out in *Alberta v. Elder Advocates* are those

which identify the existence of a fiduciary duty in cases not covered by an existing category in which duties have been recognized." See para. 29.

[17] At para. 33, McLachlin C.J. observed that "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 traditional categories of...guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis."

[18] The Crown need not persuade me that the motion judge was wrong in her reasoning on this point. They do have to satisfy me that the correctness of the motion judge's reasoning and conclusion is open to "very serious debate." Pursuant to my reading of the motion judge's reasons and McLachlin C.J.'s reasons in *Alberta v. Elder Advocates* they have not done so.

[19] In my opinion, the motion judge's finding that the law has recognized that guardians owe a fiduciary duty to their wards is consistent with McLachlin C.J.'s description of this as a historically recognized "traditional category" in which fiduciary relationships exist. It was open to the motion judge to conclude that the *Alberta v. Elder Advocates* analysis did not apply to such traditional categories of fiduciary relationships. The correctness of her finding that the Crown may owe the plaintiffs a fiduciary duty on the facts of this case is not, in my opinion, open to "very serious debate."

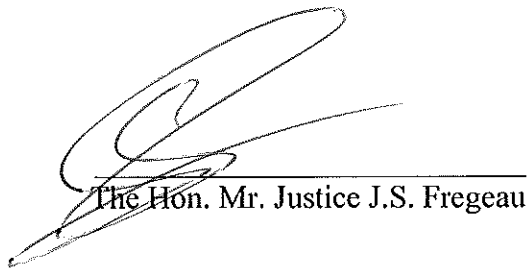
Issue 3 Is it desirable that leave to appeal be granted or does the appeal involve matters of such importance that leave to appeal should be granted?

[20] Based on my review of the material filed on this motion, it is not desirable that leave be granted nor does the proposed appeal involve matters of such importance that leave to appeal should be granted. I accept the submission of the plaintiffs that the issues raised by the Crown are not matters of general public importance which transcend the interests of the immediate parties. There is little dispute remaining in the jurisprudence as to the proper legal test for establishing a cause of action against public authorities in negligence or for breach of fiduciary duty.

[21] This was a pleadings and certification motion. The issue before the motions judge was whether the disputed claims disclosed a cause of action, assuming the facts pleaded to be true. The motion merely determined that it was not "plain and obvious" that the claims for negligence and breach of fiduciary could not succeed. The Crown remains fully able to raise the same issues at trial based on a complete evidentiary record. The fact that Crown liability is engaged does not make this a matter of public importance.

CONCLUSION

[22] Leave to appeal is denied. The plaintiffs shall have their costs of this motion fixed in the amount of $5,000.00.



The Hon. Mr. Justice J.S. Fregeau

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