Authorson v. Canada: Opportunity Lost?

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I. *Historical Context*

"The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth."

Per Southin J. (as she then was) in *Girardet v. Crease & Company*[3]

Since the 1970s, Canadian courts have developed the concept of the fiduciary to a degree that is unparalleled in any other Commonwealth jurisdiction.[4] Plaintiffs frequently plead breach of contract, negligence, and breach of fiduciary duty as concurrent theories of liability. It is clear, however, that not every breach that occurs within a fiduciary relationship will be a fiduciary breach. It is well known that the negligent performance of legal or investment advisory services does not necessarily lead to a finding of breach of fiduciary duty.[5] The issue then, is what additional requirements, if any, must be met in order to establish a breach of fiduciary duty. In particular, are conflict of interest, failing to act in the beneficiary's best interests, or malfeasance necessary? Are there situations where negligent performance of an obligation by a fiduciary will suffice? This is an important question for which guidance from the Supreme Court of Canada is needed.

The Supreme Court of Canada has the opportunity to answer this question in *Authorson v. Canada (Attorney General)*[6].

Authorson is a class action. Authorson and the other members of the class are disabled veterans whose pensions or allowances are being administered by the federal government through the Department of Veterans Affairs ("DVA") because they are incapable of managing the funds themselves. In the action, they sued the Crown for a declaration that its failure to invest the funds or to accrue and pay interest on the funds

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[3] (1987), 11 B.C.L.R. (2d) 361 (S.C.) at 362.

[4] For a discussion of the usage and expansion of the scope of the fiduciary concept in Canadian law, see D.W.M. Waters, *The Reception of Equity in the Supreme Court of Canada (1875-2000)* (2001), 80 Can. Bar Rev. 620 [hereinafter "Waters"].

[5] *Canada Trustco Mortgage Co. v. Bartlet & Richards* (1996), 28 O.R. (3d) 768 (C.A.) at 774; *Hunt v. TD Securities Inc. et al.*, [2003] O.J. No 3245 (C.A.) at paras. 32-42.

[6] (2001), 58 O.R. (3d) 417 (C.A.), leave to appeal to the Supreme Court of Canada granted October 17, 2002 [hereinafter "*Authorson Appeal*"].

constituted a breach of fiduciary duty, and claimed compensation for this breach.

In *Authorson*, the Court of Appeal for Ontario found that, as administrator of the veterans' funds, the Crown undertakes to do with the veterans' money what they would do for themselves if they were able to.[7] The Crown failed to invest the veterans' funds, and the Court of Appeal upheld the decision of the lower court stating that the motions judge

> was correct in declaring both that the Crown had a fiduciary obligation to those veterans whose funds were administered by the DVA and that it breached that obligation by failing to invest or pay interest on the funds under its administration.[8]

What was clear in *Authorson* was that the Crown's failure to invest the veterans' funds was negligent. The Crown could easily have done so, but simply failed to do it. There was no evidence that the Crown preferred its own self-interest, nor that it engaged in conduct that would typically form the basis of a finding of fiduciary breach.

The Supreme Court of Canada has yet to make a definitive statement as to whether a finding of malfeasance is required for a finding of breach of fiduciary duty. Rather, it has left open the possibility that a breach of fiduciary duty will be found on the right facts absent a finding of malfeasance or conflict. As noted above, the potential for this result was the subject of criticism by Southin J. in the solicitor's negligence case of *Girardet v. Crease & Company*. She stated:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty was in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But fiduciary comes from the Latin "fiducia" meaning "trust". Thus, the adjective "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud.[9]

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[7] *Ibid.* at para. 77.

[8] *Ibid.* at para. 81.

[9] *Girardet*, *supra* note 3 at 362.

The principle enunciated by Justice Southin, that mere carelessness by a fiduciary does not amount to a breach of fiduciary duty, was approved by the Court of Appeal for Ontario in *Fasken Campbell Godfrey v. Seven-Up Canada Inc.*[10]. At first instance, Sharpe J. (as he then was) stated:

> In my view, a claim for breach of fiduciary duty involves situations in which the solicitor takes advantage of the solicitor-client relationship by failing to make proper disclosure, acting for both sides without informing the client, breaching confidence, or other like behaviour. The claim here is not based on allegations of this quality but rather upon failure to render appropriate advice.[11]

In contrast, other courts have found a breach of fiduciary duty to exist in cases where there has been a simple failure to adhere to instructions given by the beneficiary.[12] In *Granville Savings and Mortgage Corp. v. Slevin*[13], the plaintiff mortgage corporation retained the defendant lawyers to obtain a first charge for the mortgage corporation, and the lawyers failed to obtain the first charge. The trial judge found that the lawyers were negligent, and in breach of their fiduciary duty to their client. The trial decision was reversed by the Court of Appeal, but later restored by the Supreme Court of Canada. Having found that the lawyers were negligent, Cory J. for the Court stated:

> In light of these conclusions, it is not necessary for us to consider the issue of fiduciary duty although the trial judge may well have been correct in finding that there was as well a fiduciary duty owed by the respondents to the appellant.[14]

In *Hodgkinson v. Simms*[15], La Forest J. approved the trial decision in *Granville*, and further supported the finding of fiduciary duty by noting that it was consistent with the code of professional conduct which informed the content of that duty.[16]

In *Transamerica Life Insurance Company of Canada v. Hutton et al.*[17], the plaintiff, Transamerica, retained a mortgage administration company, Metropolitan Trust Company of Canada ("Met Trust"), to

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[10] *Fasken Campbell Godfrey v. Seven-Up Canada Inc.* (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.) and (2000), 47 O.R. (3d) 15 (C.A.).

[11] *Ibid.* at 483.

[12] See *Fine's Flowers Ltd. et al. v. General Accident Assurance Co. of Canada et al.* (1977), 17 O.R. (2d) 529 (C.A.), where the Court of Appeal approved its earlier decision in *Laskin v. Bache & Co. Inc.*, [1972] 1 O.R. 465 (C.A.).

[13] (1990), 68 Man. R. (2d) 241 (Q.B.), rev'd [1992] 5 W.W.R. 1 (Man. C.A.), trial judgment restored [1993] 4 S.C.R. 279.

[14] *Ibid.* at 281(g).

[15] [1994] 3 S.C.R. 377.

[16] *Ibid.* at para. 501 *per* La Forest J.

ensure that funding conditions were met before the second advance of a two advance mortgage investment. The relationship between Transamerica and Met Trust was governed by a contract which held Met Trust to a standard of prudence. Met Trust delegated the due diligence function to an administrative clerk who performed her job poorly. Transamerica advanced the mortgage on bad advice and lost the investment. At trial, Cullity J. held that Met Trust was liable in negligence, breach of fiduciary duty, and breach of trust (since Met Trust was a trustee of Transamerica's mortgage investment funds as those funds passed through Met Trust's trust account prior to disbursement). There was no evidence of malfeasance or conflict of interest. Cullity J. held:

> On this basis, I am satisfied that the findings I have made with respect to Metropolitan Trust's breach of its obligations under the Administration Agreement are also sufficient to establish a breach of its common law duty to exercise the care and skill that it ought reasonably have known Transamerica relied upon. For the reasons already given, the relationship, and the obligations, created by agreement were fiduciary in nature, and in that sense, Metropolitan Trust's breaches can also be characterised as breaches of fiduciary duties.[18]

II. *Why Fiduciary Breach Matters*

Arguably, if the negligent performance of a service by a fiduciary amounts to a fiduciary breach, the threshold for liability may be lower than currently thought necessary for such a finding. A lower threshold is particularly important to plaintiffs because of the remedies a fiduciary breach affords. A reason that a litigant seeks to maintain concurrent causes of action is the expectation of preferable remedies in equity.

In *Canson Enterprises Ltd. v. Boughton & Co.*[19], the Supreme Court was evenly divided as to whether the causation, foreseeability, mitigation, and contributory negligence doctrines of the common law should now be built into the equitable compensation remedy. Equitable remedies are more favourable to the plaintiff. A defendant in breach of fiduciary duty may not be able to argue that the plaintiff's recovery should be limited by the principle of contributory negligence. Further, the plaintiff's recovery may not be limited by traditional common law principles of remoteness and foreseeability. Therefore, the plaintiff wants a finding of breach of fiduciary duty in order to enhance its recovery.[20]

The Supreme Court of Canada could take the opportunity in *Authorson* to provide guidance on the issue of when negligent performance of a service will suffice to establish a fiduciary breach.

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[17] (2000), 33 R.P.R. (3d) 1 (Ont. S.C.J.).

[18] *Ibid.* at para. 228.

[19] [1991] 3 S.C.R. 534.

[20] For a discussion on this point see Waters, *supra* note 4 at 685 & 691.

Unfortunately, it appears that the focus of the appeal will be upon whether the legislation relied upon by the Crown to defend its failure to invest the veteran's funds is contrary to the *Canadian Bill of Rights*. In granting leave to appeal, the constitutional question stated is whether the *Department of Veterans Affairs Act* is inoperable by reason of inconsistency with the due process requirements of the *Canadian Bill of Rights*[21].

III. *The Need for Guidance*

Whether or not malfeasance or conflict should be a precondition to a finding of fiduciary breach meshes with concerns about ambiguity in the law articulated by Professor Waters, who has written extensively on the topic. Professor Waters frames the issue of whether malfeasance is required for fiduciary breach as being an issue of defining the nature of fiduciary obligations, rather than defining the circumstances required for breach. In this context, Professor Waters has advocated that it is now important for the Supreme Court of Canada to "clearly spell out the difference between the negative fiduciary obligation - thou shalt not - and the positive obligation - thou shalt".[22] In other words, is the fiduciary under a negative obligation to avoid situations of conflict and the pursuit of self interest, or is the fiduciary subject to a positive duty to act in the 'best interests' of the beneficiary?

Professor Waters asserts that once this positive duty is imputed to the fiduciary, many (and we would suggest, ill-defined) obligations can be imposed upon the fiduciary.[23] Ultimately, it is arguable that to require a fiduciary to act in the best interests of the beneficiary is to include an obligation not to act with neglect within the scope of fiduciary obligation.[24] Conversely, the characterization of fiduciary duty as a negative obligation is what distinguishes fiduciary breach from mere negligence. In Professor Waters' view, "[t]he single obligation that applies to all non-trustee fiduciaries is the negative duty, as it were, that the fiduciary *not* let himself be in a conflict of interest and duty situation, and if he *does* make unauthorized personal gain while in that position surrender it".[25] Professor Waters states that neglect as an independent liability at law is only compatible with the negative fiduciary obligation of "thou shalt not".[26] If that is the case, the finding of breach of fiduciary duty in *Authorson* should properly be understood as including an obligation on the Crown "not to sit idly by".

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[21] *Canadian Bill of Rights*, R.S.C. 1985, App. III, Preamble, ss. 1, 2.

[22] Waters, *supra* note 4 at 685.

[23] Waters, *supra* note 4 at 682 [emphasis in original].

[24] Waters, *supra* note 4 at 683.

[25] Waters, *supra* note 4 at 682.

[26] Waters, *supra* note 4 at 683.

In *A.(C.) v. Critchley*[27], the Court addressed the provincial Crown's liability arising out of the care of four youths who had been placed in a group home. The plaintiffs were sexually and physically abused by the operator of the home. The allegation against the Crown was failure to supervise the operation of the home. The question was whether that failure amounted to a breach of fiduciary duty by the Crown. The Court of Appeal found that there was neither negligence nor breach of fiduciary duty by the Crown for failure to supervise. The Court of Appeal upheld the decision of the trial judge that the Crown was vicariously liable for the wrongs of Mr. Critchley. The result is difficult to reconcile with *Authorson*. Both decisions are about inaction by the party owing the fiduciary duty.

In his reasons in *Critchley*, Chief Justice McEachern identified the ambiguity surrounding the requirements for a finding of fiduciary breach and lamented the lack of direction from the Supreme Court of Canada on this issue. He observed:

> Our Supreme Court of Canada has led the way in the common law world in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern.[28]

McEachern C.J.B.C. advocated a retreat to what has been referred to herein as the need for a finding of conflict of interest or malfeasance as a basis for breach of fiduciary duty, stating:

> . . . I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty.[29]

Professor Waters expresses concern over the Canadian courts' widespread use of the 'best interests' definition of fiduciary duty, and also calls for the Supreme Court of Canada to clarify both the nature of the duty and the nature of the analysis. He states,

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[27] (1998), 166 D.L.R. (4th) 475 (B.C.C.A.).

[28] *Ibid.* at 496.

[29] *Ibid.* at 500.

> One has the fear at the moment that Canadian courts have drifted into this 'best interests' formulation of fiduciary obligation without realising quite what they are saying. 'Best interests' does inevitably mean, as the writer has suggested, that any number or diversity of specific positive duties could be imposed upon the person who is found to be a fiduciary.
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> And when one has in mind the degree of ease the courts have to create 'fact based' fiduciary relationships, the possible consequences are considerable. 'Best interests' needs to be differentiated from the traditional no conflict/no profiting fiduciary obligation. The constant widespread use of 'best interests' in the lower courts, as if it were merely an alternative to speaking in terms of avoiding the pursuit of self-interest, could then be arrested. It then might be explained when the invocation of 'best interests' is appropriate and when it is not. If the imposition of positive duties upon the fiduciary is able to achieve results otherwise desirable but not at present doctrinally obtainable, and the Court can demonstrate when that analysis would be appropriate, then all is well. What is surely undesirable is a drift towards the positive duty that we may not intend.[30]

The opportunity for the Supreme Court of Canada to provide the clarity sought by McEachern C.J. B.C. and Professor Waters arises in *Authorson*. The balance of this case comment will focus upon a discussion of *Authorson* in the context of the law of fiduciary duty.

IV. *Authorson v. Canada (Attorney General)*

In *Authorson*, it was not disputed that the government had an obligation to provide pensions or allowances for veterans who suffered physical or mental disabilities as a result of service. Authority to make these payments was contained in various statutes administered by the DVA[31]. Entitlement to the pensions or allowances was generally determined by an independent administrative tribunal. The tribunal could vary, suspend, or terminate such a pension, and could also make a finding that a veteran was unable to manage the funds and direct that the funds be administered by the DVA or a third party. The DVA or other administrator was to, either explicitly or implicitly, handle the pension or allowance monies for the benefit of the veteran or his or her dependants.

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[30] Waters, *supra* note 4 at 685.

[31] Three different statutes were relevant to this case: 1) the *Pension Act*, R.S.C. 1985, c. P-6 and its predecessor regulations and legislation have provided disability pensions to war veterans who were either physically or mentally disabled as a result of service; 2) the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1 and its predecessors have provided for monetary allowances to veterans receiving active medical treatment; and 3) the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3 and its predecessors have provided income supplements to indigent veterans who served in a theatre of war.

In a case where the funds were being administered by the DVA, the cheques were made payable to a public officer within the DVA, and were deposited into the government's "consolidated revenue fund" at a chartered bank. This fund is the aggregate of all public monies on deposit to the credit of the Receiver General. For accounting purposes, the money was shown as being in a special purpose account in the name of the veteran. In cases where the veteran was capable of handling his or her money, the cheques would be in the name of the veteran. If and when the veteran recovered to the point of being capable of handling his or her own money, the funds would be turned over to him and future cheques would be payable directly to him.

The Crown admitted that the funds being administered by the DVA were not invested and that, with a few exceptions, interest on the funds was not paid or credited to the veteran. Neither the DVA nor the tribunal was given any explicit legislative authority to pay interest on the funds to the veteran. The *Financial Administration Act*[32], however, specifically delegated to the Minister of Finance the discretion to pay interest on special accounts.

In 1990, pursuant to section 21(2) of the *Financial Administration Act*, the Crown began to pay interest on the funds being administered by the DVA to veterans. In addition, the legislature enacted section 5.1(4) of the *Department of Veterans Affairs Act*, which purported to prohibit any claim for interest on the funds prior to January 1, 1990.

V. *The Decision of Justice Brockenshire on the Summary Judgment Motions*

The plaintiff class brought a motion for summary judgment seeking declarations fixing the Crown with liability. The defendant brought a motion for summary judgment seeking a dismissal of the action. The motions proceeded before Justice Brockenshire, and he released his reasons on the motions on October 11, 2000.

The plaintiff argued that the Crown became a trustee or at least a fiduciary of the pensions and allowances it had under its administration, and was therefore bound in equity to invest the funds and to pay or credit interest thereon. The plaintiff alleged that the failure to invest or accrue interest on the funds constituted a breach of fiduciary duty.

Brockenshire J. began his analysis of the fiduciary duty issue with a consideration of whether the pension and allowance funds under administration were the property of the veterans. In this context, the Crown argued that the pensions and allowances being administered by the DVA became "public money" by virtue of the fact that they were deposited in the government's consolidated revenue fund to the credit of

[32] R.S.C. 1985, c. F-11.

the account of the Receiver General. Brockenshire J. rejected this argument, and found that the initial award of a pension or allowance started an income stream in which the veteran had a legal and/or equitable interest. He found that the plaintiff class had a property interest in their pensions and allowances, and a property interest in their claims for investment returns and interest. Alternatively, the plaintiff class had a property interest in their claims for damages in lieu of returns and interest. He found that the method of banking the funds in the consolidated revenue account did not change the nature of the pension and allowance amounts from being the property of the veteran to being the property of the Government of Canada. Rather, the banking system was completely consistent with the typical trust situation, where the trustee holds the legal title to the trust property, but holds it subject to the equitable title of the beneficial or true owner.[33]

Brockenshire J. went on to find that the Crown, in undertaking to administer the funds on behalf of the veterans and their dependants, became "at least" a fiduciary to each of the veterans. He relied upon the Supreme Court of Canada's decision in *Guerin v. The Queen*[34] for the proposition that the Crown could be a fiduciary or trustee, and found that the wording of various statutory provisions in themselves created a fiduciary obligation between the administrator and the pensioner and/or his or her family and dependents.[35]

Brockenshire J. found that the Crown, as fiduciary, was obliged to prudently invest and pay interest to the veterans on the money under its administration. He found that the obligations to invest and to pay interest are fundamental to the law governing trustees, and that the duty on a fiduciary administering funds for another is no different than the obligation of a trustee in the same circumstances. Brockenshire J. stated:

> It is obvious to me that the words "fiduciary" and "trustee" are largely interchangeable. If the word "trust", without more, is limited as some authors do, to a formal document in which a specific conveyance of funds or property is given to a named person to hold and deal with on specific terms for the benefit of another, then the word fiduciary would be broader than that of trustee. However I have no doubt whatsoever that a fiduciary, who has funds on hand to administer for another, is under the obligation of a trustee to invest and/or pay interest as above set out in *Halsbury's* and the ancient English cases.[36]

Justice Brockenshire rejected the Crown's argument that the DVA was relieved of a responsibility to invest or pay interest to the veterans

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[33] *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.) paras. 17-20 and 109 [hereinafter "*Authorson Motions*"].

[34] [1984] 2 S.C.R. 335 [hereinafter "*Guerin*"].

[35] *Authorson Motions, supra* note 33 at para. 28.

[36] *Authorson Motions, supra* note 33 at paras. 32.

because of a statutory provision requiring funds on hand to be paid into the consolidated revenue fund, a general provision that interest not be paid on money in the consolidated revenue fund, and statutory provisions that put the power of making an exception and paying interest in the hands of the Minister of Finance, rather than the DVA. He found that this argument was contradicted by the fact that interest was in fact paid on some of these accounts for years, and that some investments were in fact held in special accounts for the veterans. In addition, Brockenshire J. noted that the Minister could have acted upon its authority to pay interest at any time. He concluded that "[t]he point is that the Crown had the power and authority, and the failure to exercise it does not absolve the Crown."[37]

Ultimately, Brockenshire J. dismissed the Crown's motion, and granted judgment to the plaintiff class, declaring that:

> a) The class members had a properly interest in their pensions and allowances paid to and administered by the DVA;
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> b) The Crown was a fiduciary to the class members during the time that the class members' funds were being paid to and administered by the DVA;
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> c) The Crown breached its duty as fiduciary by failing to invest or pay interest on the funds under administration.[38]

With respect to the issue of whether a breach of fiduciary duty occurred, Brockenshire J. merely stated that "the Crown breached its obligations, by taking in and using those funds as if they were the Crown's, by failing to invest the funds, and by failing to pay interest on the funds it held."[39] Justice Brockenshire did not engage in any analysis of the requirements for a breach of fiduciary duty, and, in particular, did not acknowledge or address the issue of whether a finding of conflict of interest or malfeasance is required for a breach of fiduciary duty.

VI. *The Decision of the Court of Appeal*

The Crown appealed from the decision of Brockenshire J., on the ground that he erred in finding that the Crown had breached its fiduciary duty to the plaintiff class.

On appeal, the Crown did not seriously contest the finding of Brockenshire J. that the veteran has a property interest in the funds under

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[37] *Authorson Motions, supra* note 33 at paras. 33-34.

[38] *Authorson Motions, supra* note 33 at para. 109.

[39] *Authorson Motions, supra* note 33 at para. 105.

administration by the DVA. It raised three arguments in challenging Brockenshire J.'s finding.

First, the Crown argued that the legislative scheme sets up a closed system of administrative law in which the relevant board or agency has exclusive jurisdiction, and the courts cannot therefore apply the private law of fiduciary duty. The Court of Appeal rejected this argument. Although the Court acknowledged that the governing legislation stakes out an area of exclusive administrative law jurisdiction relating to veterans' pensions, it found that this administrative area does not extend to the question of whether an appointed administrator has acted improperly in failing to invest or pay interest on the funds it administered. The legislation does not immunize the conduct of the administrator from scrutiny by the courts and private law.[40]

Second, the Crown argued that any trust in this case is at most a "political trust", enforceable only in Parliament, not a fiduciary obligation enforceable by the courts. It argued that, where there is administration by the Crown of funds in the exclusive possession of the Crown, and the statutory scheme does not explicitly place a fiduciary duty on the Crown, the Crown is subject only to a governmental obligation, enforceable politically. The government is not subject to a private law obligation enforceable by the courts.

The Court of Appeal also rejected this argument. It found that the fact that each veteran has a property interest in the fund being administered is a clear indication that this is not a political trust. Where there is a political trust, the Crown is holding public funds or property whose distribution is found to be the province of the political arena, not the courts. Furthermore, the seminal case of *Guerin* demonstrates that the terms "trust" or "fiduciary" need not appear in the relevant legislation in order to bind the Crown. Finally, the Court found that the fact that the Crown administers funds in its possession pursuant to a statutory scheme that does not explicitly place a fiduciary duty upon it does not compel the conclusion that the Crown can only be sanctioned in Parliament, and not in the courts.[41]

Third, the Crown argued that *Guerin* is distinguishable from the present case, and should not have been relied upon by Justice Brockenshire. The Crown argued that in *Guerin*, the finding of a fiduciary duty turned on the special nature of aboriginal title in land and the *sui generis* relationship between the Crown and aboriginal people. In the absence of this special relationship, the Crown should not be found to be a fiduciary, but, rather, should simply be subject to a political trust.[42]

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[40] *Authorson Appeal, supra* note 6 at para. 55.

[41] *Authorson Appeal, supra* note 6 at para. 64.

[42] *Authorson Appeal, supra* note 6 at para. 65.

The Court of Appeal rejected the Crown's contention that the Supreme Court of Canada's decision in *Guerin* has such a limited scope. The Court held that Dickson J. in *Guerin* did not find that the sole source of the Crown's fiduciary obligation is the *sui generis* aboriginal interest in the land in question. Rather, that fiduciary duty was created by the aboriginal right to the land together with the obligations placed on the Crown by the *Indian Act* in disposing of the land. Dickson J. made clear that it is the nature of the relationship, not the specific category of actor involved, that gives rise to the fiduciary duty. As such, there is no suggestion in *Guerin* that the Crown can only be a fiduciary in the context of the Crown and aboriginal people.[43]

In reliance upon *Guerin*, the Court of Appeal considered the nature of the relationship between the veterans and the Crown in this case, and ultimately found that the Crown owed a fiduciary duty to the veterans whose funds were being administered by the DVA. In this context, the Court stated:

> The nature of the relationship between the administrator and the veteran carries hallmarks that clearly bring it within the fiduciary principle. By statute, the administrator has the obligation to act for the benefit of the veteran in administering his pension. The statute does not spell out how that is to be done but leaves it to the discretion of the administrator. In this relationship, the veteran exhibits the vulnerability that comes with being adjudged incapable of managing his pension for himself. He is dependent on the administrator to do so for his benefit. In the language of La Forest J., quoted above, given all the surrounding circumstances, the veteran reasonably could have expected that the administrator would act in his best interests while administering his pension. These characteristics of the relationship between the administrator and the veteran resonate as strongly where the administrator is the Crown as where the administrator is a private citizen and the appellant does not seriously contest that the latter falls within the scope of the fiduciary principle.[44]

The Court then went on to delineate the scope of the duty owed by the Crown to the veterans. Relying upon the Supreme Court of Canada's decisions in *Hodgkinson* and *M.(K.) v. M. (H.)*[45], the Court held that the scope of the obligations of a fiduciary depends upon the particular circumstances of the relationship, and, more specifically, upon the nature of the fiduciary's undertaking. The Court also placed emphasis upon the reasonable expectations of the individuals for whom the fiduciary has undertaken to act. Ultimately, the Court concluded that Brockenshire J. was correct in finding that the Crown had a fiduciary duty to invest the funds being administered by the DVA and to accrue and pay out interest on the funds. The Court stated as follows:

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[43] *Authorson Appeal, supra* note 6 at para. 65-69.

[44] *Ibid.* at para. 73(g).

[45] [1992] 3 S.C.R. 6.

> *Hodgkinson*, makes clear that the precise range of duties which the law places on a fiduciary depends very much on the precise circumstances of the particular relationship. Where an individual has taken on the responsibility of acting for another so as to become a fiduciary, the court will require that he act consistently with his undertaking. This insures that those who may be vulnerable and who have come to reasonably expect that the fiduciary will act in their best interests in a certain respect will not have their expectations dashed. In the words of La Forest J. in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at p. 63, 96 D.L.R. (4th) 289, equity will impose on a fiduciary a range of obligations coordinate with his undertaking.
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> In the circumstances of this case, the Crown as administrator is directed to manage the veteran's fund for his benefit since he is incapable of doing so himself. The Crown thus undertakes to do with his money what he would do for himself if he were able to. That surely requires that the funds not sit idle but rather that the Crown grow the funds by investing them or accruing interest on them. Such an obligation is coordinate with the undertaking of the Crown to administer the funds for the veteran's benefit. ...
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> Hence, there is nothing in the legislative framework providing for these payments and their administration that would undercut the reasonable expectation of the incapacitated veteran that the Crown, in administering his funds in his best interests, would accrue interest on them. In our view, to have the effect of curtailing the Crown's fiduciary duty short of this obligation the legislation would have to clearly indicate that there was no such obligation.[46]

Having found a duty to invest and to pay interest to the veterans, the Court found that Brockenshire J. was also correct in finding that the Crown breached its fiduciary duty to the plaintiff. The Court's analysis of the breach of this duty, however, is limited to the following statement:

> In summary, we find that Brockenshire J. was correct in declaring both that the Crown had a fiduciary obligation to those veterans whose funds were administered by the DVA and that it breached that obligation by failing to invest or pay interest on the funds under its administration.[47]

Ultimately, the Court of Appeal dismissed the Crown's appeal.

VII. *Analysis*

The Court of Appeal in *Authorson* engaged in a lengthy analysis of whether the Crown owed a fiduciary duty to the veterans, and if such a duty existed, whether that duty included an obligation to invest the funds and to pay interest on them. Once the Court concluded that a fiduciary duty existed and that it included the duty to invest and to pay out interest, neither Brockenshire J. nor the Court of Appeal discussed the

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[46] *Authorson Appeal, supra* note 6 at paras. 76-77, 80.

[47] *Ibid.* at para. 81.

requirements for a breach of fiduciary duty. The Court simply adopted a "strict liability" or contractual approach to the question of breach of fiduciary duty, whereby the failure to invest and to pay out interest automatically gave rise to that result. The aforementioned issue, of whether a finding of malfeasance is required for a breach of fiduciary duty, was, in effect, a 'non-issue' for the Court.

As such, the Court of Appeal's decision in *Authorson* may stand for the proposition that a finding of malfeasance is not required for a breach of fiduciary duty and that mere negligent performance of a service or duty will suffice. The Court's lack of attention to the issue may suggest a lowering of the threshold to establish a breach of fiduciary duty. The fact that the Court of Appeal did not even acknowledge the existence of these issues, however, creates significant uncertainty as to whether this is the case.

Further uncertainty is created by the fact that, in the lower court, Justice Brockenshire, in finding a fiduciary breach, appears to have made a finding of traditional self-dealing or malfeasance on the part of the Crown. Brockenshire J. found that "the Crown breached its obligations, by taking in and using those funds as if they were the Crown's ".[48] It could be said that this amounts to a finding of conflict of interest by the Crown, such that it could be argued that the traditional requirement for breach existed in this case. The Court of Appeal, however, did not acknowledge or rely upon this aspect of Brockenshire J.'s decision in arriving at its conclusion that a breach of fiduciary duty occurred in this case. The impact of Justice Brockenshire's finding upon the finding of a fiduciary breach therefore remains unclear.

Moreover, throughout its reasons, the Court of Appeal blurred the line between breach of contract and breach of fiduciary duty. The Court conducted an overtly contractual analysis of the scope of the fiduciary duty owed by the Crown to the veterans. The Court focussed upon the nature of the Crown's undertaking, the nature or terms of the relationship between the parties, and the reasonable expectations of the veterans. These concepts are akin to the contractual notions of promises, "meeting of the minds", and "expectation interests". Indeed, the Court could have achieved the same result by finding that an implied contract existed between the Crown and the veterans which was breached by the Crown, thus entitling the veterans to their expectation damages.

The Court of Appeal's decision is illustrative of the concerns expressed by Professor Waters. The Court essentially adopted a 'best interests' formulation of the Crown's fiduciary obligations to the veterans. As a result of the Court's conclusion that the Crown undertook to administer the funds "for the veteran's benefit", "in [their] best interests", the Court imposed a specific obligation upon the Crown to

[48] *Authorson Motions*, *supra* note 6 at 105.

invest and pay interest to the veterans.[49] As feared by Professor Waters, however, it is not clear that the Court considered the distinction, if any, between a 'best interests' fiduciary obligation and the traditional no conflict fiduciary obligation, or the circumstances, if any, in which the invocation of the 'best interests' formulation of the duty may be appropriate. As such, it is arguable that the decision represents another example of an unintended shift towards a positive best interests duty which obviates a malfeasance requirement.

A way to reconcile these apparently divergent views as to whether negligent performance of a service will suffice for a breach of fiduciary duty is to look at the core or specific obligation assumed by the fiduciary. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*[50], La Forest J. stated:

> It is only in relation to breaches of the *specific obligations imposed* because the relationship is one characterized as fiduciary that the claim for breach of fiduciary duty can be founded.[51]

In *Authorson*, the specific obligation of the Crown, as trustee over the veterans' money, was to invest that money as if the veterans were managing the money themselves. The Crown's failure to perform the specific obligation to invest the money meant that the veterans received no value from the service being provided to them by the Crown. This, it is submitted, is the basis to characterize the negligent breach of the service as a fiduciary breach. In *Critchley* the question is, what was the specific obligation or the core function assumed by the Crown? Arguably the obligation did not extend to supervision of employees once the residential system was established. If the supervisory obligation of Mr. Critchley was not the core function of the Crown, then it is consistent with *Lac Minerals* in that the breach in that case was found not to be a fiduciary breach. In that way the decisions in *Critchley* and *Authorson* can be rationalized. It would be appropriate, and helpful, for the Supreme Court to now take the opportunity to clarify when the negligent performance of a service or obligation will be sufficient to establish a fiduciary breach. The lower court decisions which purport to stand for a definitive proposition that negligence will never be sufficient to establish a fiduciary breach need to be addressed and clarified.

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[49] *Authorson Appeal*, *supra* note 6 at paras. 76-77.

[50] [1989] 2 S.C.R. 574.

[51] *Ibid.* at 647(h) per La Forest J. [emphasis added]