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SCC rejects novel fiduciary duty claim

Claims against government will 'rarely' succeed: top court

CRISTIN SCHMITZ OTTAWA

Novel ad hoc breach of fiduciary duty claims against governments will "rarely" succeed and judges should not permit "speculative" or "hopeless" claims to proceed to trial, the Supreme Court has admonished.

On May 12 the top court left the door ajar for such fiduciary duties to be imposed on governments in future, but emphasized that "the circumstances in which this will occur are few."

The court's 9-0 judgment in *Alberta v. Elder Advocates of Alberta Society* permits a multi-million-dollar class action brought by Alberta nursing home residents against the province to proceed to trial with the plaintiffs' unjust enrichment and s. 15 Charter equality rights claims.

But in partially allowing Alberta's appeal against the certification of the class action, the high court struck out, for disclosing no cause of action, the plaintiffs' other pleas that the Crown was negligent, acted in bad faith in exercising its discretion and breached its fiduciary duty to them.

The class comprises more than 12,500 people who have resided at provincial long-term care facilities since Aug. 1, 2003. They (or their estates) contend

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DAN RIEDLHUBER FOR THE LAWYERS WEEKLY

Class counsel Allan Garber of Edmonton says Chief Justice Beverley McLachlin makes noteworthy statements on the law of unjust enrichment, fiduciary duty and class certification.

BC law society expands powers of articling students

JEREMY HAINSWORTH VANCOUVER

Articling students in B.C. will have an expanded role in representing clients as of Sept. 1 after the Law Society of British Columbia (LSBC) approved amendments to credentialing rules May 13.

The change means access to certain legal services for the public at lower rates than a lawyer would charge.

But, benchers heard, principles or supervising lawyers need to be aware there will be disciplinary if not insurance consequences if work isn't supervised properly.

Bencher David Renwick told benchers the change means there will be 300 more people available to handle cases and improve access to legal services.

Renwick said students would be allowed to provide all legal services a lawyer can provide on the proviso they are competent, properly supervised and properly prepared to provide those services.

LSBC disciplinary committee chair Art Vertlieb added that there will be serious disciplinary consequences if students are not adequately supervised. "That's really critical that that's brought home," he said.

Vertlieb

According to a May 3 memo from the credentials committee, under the newly adopted rule articling students must not appear as counsel on an appeal in the Court of Appeal, the Federal Court of Appeal or Supreme Court of Canada, in a civil or criminal jury trial or on a trial proceeding by way of indictment in B.C. Supreme Court unless the principal or another practising lawyer is in attendance at the time that the court appearance is made and is directly supervising the provision of the service.

In other words, an articled student may lead evidence or make submissions under supervision.

As well, a student must not give or accept an undertaking unless their principal or another practising lawyer supervising the student has also signed or accepted the undertaking.

"They opened the door in the right direction to help the public," said bencher Ken Walker, who was lauded for the push to begin an expanded role for students in Kamloops, B.C. "It is a high step forward and it is in the public interest."

"Students represent the future of our profession and we, the benchers, have a responsibility to encourage, supervise and mentor these students," he said.

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NEWS

‘Speech is not the paramount right’: Prof. Weinrib

Keegstra
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focus of unwanted attention because over the last three decades he has aggressively represented not only Keegstra but white supremacists, Holocaust deniers, Nazis and anti-Semites. Keegstra was just the first in a long line of unpopular clients.

Christie's legal career has not made him much money, in a disciplinary hearing before the Law Society of British Columbia in 2007 evidence was presented that Christie had made on average only $50,000 a year before taxes in the previous five years. The hearing involved professional misconduct and was unrelated to the cases outlined above. Christie was fined $2,500. While his professional earnings have been modest, Christie does acknowledge that he has received gifts from supporters over the years.

Christie has often been accused of being not just an advocate for those he represents, but more of a fellow traveller in the world of Holocaust denial and racial hate. Christie says he does not necessarily embrace his clients' ideas but "I share one idea with them. They should be allowed to share their ideas." For Christie, *Keegstra* and many of the other cases he has taken on are all about democracy, about the right to think and speak freely without state intervention. "It's the individual's right to say what they want" he insists. In his view the best constraint on hate speech is counter speech, not the courts or "various dubious human rights commissions."

Professor Lorraine Weinrib, from the University of Toronto law school has written on *Keegstra*. She doesn't share Christie's advocacy of wide-open free speech. "Speech is not the paramount right," she says. Professor Weinrib points to a long history of laws in Canada and the democratic world restricting speech including prohibitions against defamation, treason, the incitement of violence and obscenity and even, though archaic, blasphemous libel (s. 297 of the *Criminal Code*). She believes that s. 319(2) of the *Criminal Code* recognizes the importance of free speech and is narrow enough on the issue of hate speech that the restrictions are reasonable. In spite of the divided Supreme Court judgment, Professor Weinrib believes the *Keegstra* case remains very important. She calls the judgment "well wrought" and says it remains a guide to the entire legal system in dealing with hate speech issues. She points to its frequent citation in the courts. "*Keegstra*," she says "seems to have a good shelf life."

There is an inescapable irony in Keegstra's present position. A man who was once extraordinarily active and determined in trying to foster hate and ridicule against an identifiable group is now himself the object of contempt and community rejection. He lives as a near recluse. According to argument presented at the time of one of his trials he considers himself victimized because of the views he held and apparently still holds. The tormentor has become the tormented. ■

↘ This is one in a series of backward glances at some of the most important and curious cases in Canadian legal history. Is there a case you think should get the Backstory *treatment? Email us at tlw@lexisnexis.ca*

Only supervising lawyer responsible for students

Students
Continued From Page 1

LSBC president Gavin Hume said he has met with the chief justices of the provincial supreme and appeals courts, as well as the chief judge of the provincial court on the issue. "They always said 'we didn't have any issue with an expanded role for students,'" Hume said.

Hume

However, benchers wanted assurances that there would be ways of ensuring articling students would be properly supervised.

"We need to communicate strongly to the profession, to underscore the need to supervise," said bencher Rita Andreone. "The responsibility to supervise [lies] squarely on the shoulders of the supervising lawyer."

Andreone

One point of contention with benchers was that the proposed change allowed unsupervised students to represent clients in indictable cases in provincial court but not in the Supreme Court of British Columbia.

Bencher David Crossin said the consequences of allowing the practice in one court and not the other was akin to using clients as "cannon fodder."

"I see no distinction in the nature of the court," he said. "The consequences are the same, the procedures are the same, the witnesses are the same, the Crown counsel is the same, the judiciary is the same."

Crossin

The issue was resolved with an amendment allowing students to deal with indictable offences in provincial court alone only if the offence is in the absolute jurisdiction of a provincial court judge.

LSBC director of the lawyers' insurance fund Susan Forbes said supervising lawyers need to know lack of supervision could lead to insurance issues and underscores the need for proper supervision. "There is no insurance coverage if there is no supervision," she said. But, "we don't envision any gaps in coverage. It has never happened. We have never denied coverage."

Forbes

Bencher Carol Hickman suggested lawyers' insurance rules be examined for possible changes to ensure there is no ambiguity about coverage.

Details on the expanded role will be sent to lawyers through the Benchers Bulletin, E-Briefs and be available on the LSBC website, said communications manager Robyn Crisanti.

Hickman

Bencher David Mossop suggested undertakings be obtained from all principles that students would be adequately supervised. ■

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