COURT OF APPEAL FOR ONTARIO

CITATION: Robertson v. Ontario, 2024 ONCA 86
DATE: 20240206
DOCKET: COA-23-CV-0056

Brown, George and Monahan JJ.A.

BETWEEN

Kathryn Robertson by her estate representative Allison Gaanderse, Maurice Albert Orchard by his estate representative Christina Kinder, Bernard Renaud by his estate representative Lori Renaud, Jean Patricia Pollock by her estate representative Pamela Christine Smith, Innis Ingram, Christina Kinder, Lori Renaud, Pamela Christine Smith and Allison Gaanderse

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

His Majesty the King in Right of Ontario

Defendant (Respondent/
Appellant by way of cross-appeal)

Joel P. Rochon, Golnaz Nayerahmadi, Annelis K. Thorsen and Juela Xhaferraj, for the appellants/respondents by way of cross-appeal

Christopher Wayland, Jennifer Boyczuk and Karlson Leung, for the respondent/appellant by way of cross-appeal

Heard: November 27 & 28, 2023

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated December 20, 2022, with reasons reported at 2022 ONSC 5127.

Monahan J.A.:

A. OVERVIEW

[1] The appellants seek to certify a class proceeding against the provincial government arising from its response to the risks posed by COVID-19 to long-term care ("LTC") home residents in Ontario. The proposed proceeding asserts three separate causes of action against the respondent (collectively, the "Claims"):

(i) a claim in negligence arising from the acts or omissions of the Minister of Long-Term Care (the "MLTC"), the Minister of Health (the "MOH"), and the Chief Medical Officer of Health (the "CMOH") (collectively, the "Crown Officers");

(ii) a claim for breach of fiduciary duty arising from the acts or omissions of the Crown Officers; and

(iii) a claim for breach of the appellants' rights under s. 7 of the *Charter*, arising from the acts or omissions of the Crown Officers.

[2] On December 20, 2022, the motion judge certified the appellants' class action against Ontario arising from the alleged negligence of the MLTC in responding to the risk posed by COVID-19 to residents of Ontario's LTC homes. The motion judge struck all the appellants' other proposed claims (the "Struck Claims") on the basis that they were certain to fail.

[3] This is an appeal and cross-appeal from the motion judge's certification decision. The appellants appeal the motion judge's decision not to certify the

Struck Claims, while the respondent cross-appeals the certification of the claim arising from the alleged negligence of the MLTC.

[4] For the reasons that follow, I would dismiss both the appellants' appeal and the respondent's cross-appeal.

B. THE MOTION JUDGE'S REASONS

(1) Motion Judge's Identification of the Governing Principles

[5] The focus of the motion judge's analysis was on whether the Claims satisfied the "cause of action" requirement in s. 5(1)(a) of the *Class Proceedings Act, 1992*, S. O. 1992, c. 6 (the "*CPA*"). Namely, he sought to determine whether, assuming the facts alleged to be true, it is plain and obvious that the Claims cannot possibly succeed and are doomed to fail.

[6] To make this determination, the motion judge observed that the claim must be read generously: *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 120. This generous approach, the motion judge found, is particularly appropriate because, as noted by the Supreme Court, "the law is fluid, evolving over time so that actions that yesterday were deemed hopeless may tomorrow succeed": *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 21.

[7] In short, the motion judge proceeded on the basis that the test for striking a statement of claim at the pleadings stage is a stringent one with a difficult burden for defendants to meet.

(2) Motion Judge Certifies Negligence Claim Against Only the MLTC

(a) The Appellants' Negligence Claim

[8] The appellants' negligence claim is based on their assertion that thousands of elderly residents in Ontario's LTC homes died or sustained serious illness from COVID-19 because of the gross negligence of the Crown Officers. The appellants say that by the end of January 2020, the Government of Ontario was aware of the presence of COVID-19 in the province and knew that the residents of LTC homes were amongst the most vulnerable to the deadly virus. Yet for weeks, as other jurisdictions took action to control its spread, the Crown Officers did nothing, even though they had regulatory authority over LTC homes. Then, when action was finally taken, it proved to be too little, too late. As a result, over thousands of LTC residents died and many thousands more endured life-threatening illness.

[9] The motion judge explained that in order for a negligence claim to succeed, plaintiffs must first show that the defendant owes them a private law duty of care. In this case, it was agreed that such a duty of care could arise in only one of two ways: (i) through "specific interactions" between one or more of the Crown Officers and the residents of the LTC homes; or (ii) through statute.

(b) No Pleading of ‘Specific Interactions’ between the Crown Officers and LTC Residents

[10] The motion judge determined that there was no basis to find that a duty of care arose through “specific interactions” between the Crown Officers and any of the LTC residents. He noted that although the MLTC and the CMOH did issue directives or guidance to the operators of the LTC homes during the COVID-19 pandemic, the operators are independent third parties licensed under the *Long-Term Care Homes Act, 2007*, S. O. 2007, c. 8 (the “*LTCHA*”).

[11] In the motion judge’s view, the appellants had not pleaded any facts alleging direct communication between any of the Crown Officers and the residents of the LTC homes. Therefore, any duty of care on the part of the Crown Officers to the residents of the LTC homes could only be established on the basis of statute.

(c) No Statutory Basis for Claim that CMOH and MOH Owed a Private Law Duty of Care

[12] The motion judge found no statutory basis for a private law duty of care on the part of the CMOH since their statutory authority, as set out in the *Health Protection and Promotion Act*, R.S.O. 1990, c. H. 7 (the “*HPPA*”), must be exercised in “the public interest”. In making this finding, the motion judge noted that the pleadings do not mention or identify any discrete group that may require or command special attention.

[13] With regards to the MOH, the motion judge remarked that the pleadings lacked any real focus on acts or omissions of the MOH. The appellants did not reference any statutory powers exercised by the MOH that particularly reference LTC home residents. This, he noted, was likely due to the fact that Orders in Council from 2019 effectively limited the directive-making powers of the MOH in relation to LTC homes.

[14] Based on the above, the motion judge therefore concluded that it is plain and obvious that neither the CMOH nor the MOH owes a private law duty of care towards residents of LTC homes.

(d) Motion Judge Certifies Negligence Claim against the MLTC

[15] The motion judge came to a different conclusion with respect to the MLTC, relying in particular on the preamble to the *LTCHA*. The preamble states that the provincial government "recognizes the responsibility to take action where standards or requirements under this Act are not being met or where the care, safety, security and rights of residents might be compromised".

[16] The motion judge further noted that s. 1 of the *LTCHA* provides that the "fundamental principle" to be applied in the interpretation of the Act is that "a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs

adequately met". The motion judge found that this "fundamental principle" reinforces the preamble's recognition of the government's responsibility to "take action" where the care, safety, security and rights of residents of LTC homes might be compromised.

[17] The MLTC is the government minister tasked with performing the duties, functions and responsibilities in respect of long-term care as set out in the *LTCHA*. The motion judge therefore found that it is at least arguable that there is sufficient closeness or "proximity" between the MLTC and LTC residents to impose a duty on the MLTC to "take action" where the lives of LTC residents are clearly at risk and their care, safety or security might be compromised.

[18] The motion judge acknowledged that s. 174.1 of the *LTCHA* requires the MLTC to consider "the public interest" when issuing directives respecting LTC homes, and that this could negate the imposition of a duty of care in relation to residents of LTC homes. However, he noted that the "public interest" is further defined in s. 174.1(c) as including, among other things, "the quality of care and treatment of residents within long-term care homes generally." He therefore interpreted the public interest criterion in s. 174.1 as arguably aligned with concerns about the health and safety of LTC residents.

[19] The motion judge also considered the fact that s. 181 of the *LTCHA* precludes claims for acts or omissions "done in good faith in the execution or

intended execution of a power or duty under this Act." Moreover, s. 2(1) of *Supporting Ontario's Recovery Act, 2020*, S. O. 2020, c. 26, Sched. 1, provides that no cause of action arises against "any person" as a direct or indirect result of an individual being infected with COVID-19, if the person made a "good faith effort" to act in accordance with public health guidance and applicable law, and was not grossly negligent.

[20] The motion judge found that, despite these statutory immunity clauses, the negligence claim against the MLTC was not certain to fail. He relied on the fact that the statement of claim pleads that the government acted in a high-handed and callous manner, demonstrating a wanton and reckless disregard for the safety of LTC residents. He noted that gross negligence or recklessness has in certain cases been accepted as circumstantial evidence from which bad faith might be inferred. He therefore found that the facts as pleaded in support of the negligence claim go beyond the zone of good faith that is protected through common law or statutory Crown immunity.

[21] The motion judge acknowledged that the respondent might well prevail when the viability of the tort claim against the MLTC is fully argued and adjudicated on the merits at trial. However, given the facts as pleaded, he could not say at this stage that it was plain and obvious that the negligence claim against the MLTC had zero chance of success, and found that it satisfied the "cause of action" requirement in s. 5(1)(a) of the *CPA*.

(3) Motion Judge Strikes Breach of Fiduciary Duty Claim

[22] The motion judge noted that the Supreme Court in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, had made clear that in order to establish the existence of a fiduciary duty, the beneficiaries' vulnerability must arise from their relationship with the fiduciary, and the fiduciary must have a duty to act solely in the best interest of the beneficiaries.

[23] The motion judge found that the residents of the LTC homes in this case were vulnerable due to the realities of aging, related medical issues, and the risks associated with COVID-19, rather than their relationship with the provincial government. Further, Ontario did not own or operate the LTC homes nor did the language of the *LTCHA* support an arguable fiduciary duty to act solely in the interests of the residents of LTC homes.

[24] The motion judge thus had "no difficulty" concluding that the breach of fiduciary duty claim, on the facts as pleaded, is plainly and obviously doomed to fail and should be struck in its entirety.

(4) Motion Judge Strikes Claim of Breach of Section 7 of the *Charter*

[25] The motion judge explained that in order to establish a breach of s. 7 of the *Charter*, a claimant must show: (i) that a state action has deprived the claimant of a right protected by section 7; and (ii) the deprivation must contravene a recognized principle of fundamental justice.

[26] The motion judge noted that because the appellants had pleaded that the government response to COVID-19 was “arbitrary”, it was at least arguable that they had satisfied the second requirement, relating to an alleged contravention of a principle of fundamental justice. However, relying on the Divisional Court’s decision in *Leroux v. Ontario*, 2021 ONSC 2269 (Div. Ct.) (“*Leroux 2021*”), the motion judge acknowledged that mere inaction or delay does not amount to a state-imposed deprivation sufficient to trigger s. 7 of the *Charter*.

[27] Here the core allegation was that the government had failed to take potentially life-saving action in a timely manner. Because mere delay or inaction by government does not engage s. 7 of the *Charter*, the claim as pleaded had no chance of success and should be struck.

C. ISSUES ON APPEAL

[28] The following issues arise on the appeal and cross-appeal:

1. Did the motion judge err in striking the negligence claim against the MOH and the CMOH?
2. Did the motion judge err in finding that the negligence claim against the MLTC was not certain to fail, and therefore satisfied the “cause of action” requirement in s. 5(1)(a) of the *CPA?*
3. Did the motion judge err in striking the breach of fiduciary duty claim?
4. Did the motion judge err in striking the *Charter* s. 7 claim?

D. ANALYSIS

(1) Standard of Review

[29] To determine whether a pleading in a proposed class action meets the cause of action requirement in s. 5(1)(a) of the *CPA*, the motion judge must determine whether it is plain and obvious that the impugned claims cannot possibly succeed. As previously noted, the motion judge, under this test, was required to accept the factual pleadings as proven and to read the claim generously. In addition, the test requires that a claim not be dismissed simply because it asserts a novel cause of action: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

[30] The motion judge's decision that a claim fails to disclose a reasonable "cause of action" is a determination of law reviewable on a standard of correctness: *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 30, leave to appeal refused, [2019] S.C.C.A. No. 409; *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502, ("*Leroux 2023*"), at paras. 38-39.

(2) The Motion Judge Did Not Err in Striking the Negligence Claim Against the MOH and the CMOH

(a) Governing Principles

[31] It is well established that a public authority is liable in negligence only where the authority owes a "duty of care" to the person harmed: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at paras. 22-23. If the negligence claim against the public authority does not fall within a pre-existing category of cases in which a duty of care has previously been recognized, the plaintiff must satisfy the following three requirements: (i) the harm suffered by the plaintiff must have been reasonably foreseeable; (ii) there must have been sufficient "proximity" between the plaintiff and the public authority such that it would be "fair and just" to impose a duty of care on the public authority ; and (iii) there must be no residual policy reasons for declining to impose such a duty: *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, 162 O.R. (3d) 532, at para. 22.

[32] A relationship of "proximity" can be established either through "specific interactions" between the government and the claimant, or where the relevant legislation gives rise to a duty of care expressly or by necessary implication: *Imperial Tobacco Ltd*. at paras. 43-46. However, where the statutory scheme grants discretionary power to a public authority to act in the "public interest", this will generally preclude the existence of a private law duty of care in relation to a

particular group of affected individuals. This is because such powers are to be exercised in the general public interest and are not aimed at the protection of the private interests of specific individuals: *Eliopoulos (Litigation Trustees of) v. Ontario (Minister of Health and Long-term Care)* (2006), 82 O. R. (3d) 321 (C.A.), at para. 17 (discretionary powers conferred on the MOH under the *HPPA* are not capable of creating a private law duty of care.); *Williams v. Ontario*, 2009 ONCA 378, 95 O.R. (3d) 401, at para. 25 (directives issued by the CMOH to combat SARS were aimed at the interests of the public at large and therefore could not give rise to a private law duty of care.)

(b) No Duty of Care Arising from "Specific Interactions"

[33] The appellants argue that the motion judge erred in finding that the Claim failed to adequately plead any "specific interactions" between the Crown Officers and the residents of the LTC homes that could give rise to a duty of care. The appellants rely, in particular, on *Directive #3 for Long-Term Care Homes under the Long-Term Care Homes Act, 2007*, first issued on March 22, 2020 by the CMOH pursuant to s. 77.7 of the *HPPA* ("*Directive #3*"). This Directive sets out a number of precautions and procedures that LTC homes were required to implement immediately to limit the spread of COVID-19, including tightened procedures to be followed in the admission of new residents to LTC homes.

[34] The appellants argue that the motion judge adopted a “narrow and rigid approach” by insisting that a stand-alone claim in tort must be pled against each government officer and employee implicated in Ontario’s response to COVID-19 in LTC homes. According to the appellants, the motion judge’s analysis represents a “radical and improper departure from appellate jurisprudence” and would unjustifiably expand the scope of Crown immunity. They submit that the statement of claim properly pleads a tenable cause of action in negligence against Ontario for the “collective tortious acts and omissions” of the three identified Crown Officers and employees who led and implemented Ontario’s response to COVID-19 in LTC homes.

[35] I am not persuaded by the appellants’ submissions.

[36] The difficulty with the appellants’ negligence claim was not that it failed to identify specific government officers and employees whose acts or omissions might have engaged the vicarious liability of Ontario. Rather, as the motion judge pointed out, the shortcoming in the appellants’ pleading was that it failed to identify any “specific interactions” between the Crown Officers (or, indeed, any other Crown employees), which could give rise to a duty of care in favour of the residents of the LTC homes.

[37] For example, *Directive #3,* upon which the appellants particularly rely, was directed to the independent operators of the LTC homes, rather than the LTC

residents themselves. Moreover, *Directive #3* was one of dozens of directives issued by the CMOH during the course of the COVID-19 pandemic, pursuant to the CMOH's general authority under the *HPPA,* to take action in the public interest where there is "an immediate risk to the health of persons anywhere in Ontario". Those directives mandated necessary precautions and procedures to limit the spread of COVD-19 amongst the entire Ontario population.

[38] Far from representing a "radical and improper departure from appellate jurisprudence", the motion judge correctly applied the governing jurisprudence, particularly *Eliopoulos* and *Williams*. As noted above, these cases clearly establish that directives issued by the CMOH to combat a threat to public health in Ontario are issued pursuant to the CMOH's duty to act in the general public interest and for that reason cannot give rise to a private law duty of care.

[39] In fact, the circumstances in the present case are directly analogous to those in *Eliopoulos*, where a government plan to respond to West Nile Virus was directed to local boards of health and therefore could not give rise to a duty of care in favour of persons infected with the virus: *Eliopoulos*, at para. 17. Likewise, in this case, *Directive #3* was directed to the operators of LTC homes and therefore could not amount to a "specific interaction" with the residents of the homes.

[40] Conversely, the circumstances here are clearly distinguishable from cases relied upon by the appellants, including *Fullowka v. Pinkerton's of Canada Ltd*.,

2010 SCC 5, [2015] 1 S.C.R. 132 or *Taylor*, where there were specific actions or representations that were directed at an identifiable class of persons, thereby providing a basis for a private law duty of care in favour of that class of persons.[1]

[41] Therefore, I am of the view that the motion judge did not err in finding that the Claim failed to plead any "specific interactions" between the Crown Officers and the residents of the LTC homes that could give rise to a private law duty of care.

(c) Neither the CMOH Nor the MOH Owe a Duty of Care to LTC Residents Arising from Statute

[42] As noted above, binding authority from this court clearly establishes that the exercise of statutory powers by the MOH and the CMOH under the *HPPA* cannot give rise to a private law duty of care because these powers are to be exercised in the general public interest. The motion judge relied upon this binding authority and found that there was no statutory basis to found a negligence claim against the CMOH and the MOH.

[43] The appellants nevertheless maintained that the motion judge erred in striking the negligence claim against the MOH and the CMOH on two grounds:

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[1] In *Fullowka*, the court stressed that the mine in which an explosion had occurred had been inspected many times by the regulator and that the inspectors had frequent direct and personal contact with the miners. In *Taylor*, Health Canada had made specific misrepresentations about the safety of joint implants and, when it became aware of these misrepresentations it failed to correct them, despite knowledge that the implants were being improperly imported and sold in Canada.

(i) he failed to take account of the fact that the preamble to the *LTCHA* recognizes a responsibility on the part of "the government" to take action to protect residents of LTC homes, which arguably imposes a duty on the MOH and the CMOH, in addition to the MLTC, to take action to protect the residents of the LTC homes; and

(ii) although the former Ministry of Health and Long-Term Care was in the process of being divided into two separate ministries commencing in 2019, this process was still ongoing with the onset of the COVID-19 pandemic in March 2020. Therefore, the appellants say, the motion judge erred in failing to find that the MOH continued to be responsible for the administration of the *LTCHA* through at least the early stages of the COVID-19 pandemic.

[44] I would not give effect to either of these objections.

[45] While it is true that the preamble to the *LTCHA* provides that "the government" recognizes the responsibility to take action on behalf of the residents of LTC homes, the *LTCHA* itself makes no mention whatsoever of either the CMOH or the MOH. Moreover, Orders in Council 1110/2019 and 1111/2019, approved on August 8, 2019 (collectively, the "2019 Orders in Council"), provide that the MLTC (and not the MOH) is to perform the duties, functions and responsibilities in respect of LTC that had previously been assigned to the former Minister of Health and Long-Term Care.

[46] The appellants say that the 2019 Orders in Council are ambiguous in this regard, since the appendices to both Orders (which list the statutes to be administered by each minister) include the *LTCHA*. According to the appellants, this suggests that both the MLTC and the MOH were granted continuing authority to administer the *LTCHA*, despite the August 8, 2019 appointment of a new minister being specifically assigned that responsibility.

[47] In my view, the appellants' interpretation of the 2019 Orders in Council cannot be correct. Both Orders expressly assign responsibility to administer the *LTCHA* to the MLTC, while simultaneously excluding such responsibility on the part of the MOH. It may well be, as the respondent argues, that the inclusion of the *LTCHA* in the appendix to the Order assigning responsibility to the MOH was due to an oversight. Regardless, whatever significance is to be attached to the inclusion of the *LTCHA* in the appendix to the Order assigning ministerial responsibility to the MOH, it cannot have the effect of rendering nugatory the express terms or the intended purpose of both 2019 Orders in Council, which assigned responsibility for the administration of the *LTCHA* to the MLTC and not the MOH: *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 S.C.R. 27, at para. 21. The fact that the MOH no longer had ministerial responsibility in respect of the *LTCHA* after August 8, 2019 is confirmed by the fact that after that date all such powers were in fact exercised by the MLTC and not the MOH.

[48] I would therefore find that the motion judge did not err in finding that there can be no private law duty of care claim against either the CMOH or the MOH on the basis of the statutory language of the *LTCHA*. Because he had already found that no such private law duty of care could arise on the basis of "specific interactions" between these officers and the residents of the LTC homes, the motion judge correctly struck the negligence claim against the CMOH and the MOH.

(3) The Motion Judge Did Not Err in Certifying the Negligence Claim Against the MLTC on the basis that It Was Not "Certain to Fail"

(a) The Respondent's Cross-Appeal

[49] In its cross-appeal, the respondent submits that the motion judge erred in certifying the appellants' alleged negligence claim against Ontario in relation to the MLTC. Specifically, the respondent argues that the motion judge erred in his duty of care analysis in three major respects:

(i) the wording of the preamble has "no enacting force",[2] and "is not a source of positive law and cannot independently protect a right";[3]

(ii) s. 174.1 of the *LTCHA* provides that the MLTC may issue directives only where the minister "considers it in the public interest to do so", which

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[2] See *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("*Patriation Reference*"), at p. 805.
[3] *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, 2019 BCCA 168, 22 B.C.L.R. (6th) 307, at para. 67.

precludes the existence of a private law duty of care in favour of residents of LTC homes; and

(iii) the negligence claim is barred by policy immunity, as well as by s. 181 of the *LTCHA*, which confers an immunity for good faith acts and omissions.

[50] For the reasons set out below, I would not give effect to any of these objections.

(b) The preamble to the LTCHA can be used to interpret the MLTC's powers under the Act

[51] The motion judge did not err by using the *LTCHA's* preamble to interpret the MLTC's powers.

[52] While it is true that the Supreme Court in the *Patriation Reference* stated that a preamble has "no enacting force", the Court went on (in the same sentence) to add that "[a preamble] can be called in aid to illuminate provisions of the statute in which it appears." Courts have in more than one occasion utilized a preamble in this manner: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly*, [1993] 1 S.C.R. 319, at pp. 374-75, (preamble to the *Constitution Act, 1867* entitles the Nova Scotia House of Assembly to exclude strangers from the Assembly); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at pp. 68-75 (preamble to the *Constitution Act, 1867* entails recognition of the principle of judicial

independence as a fundamental constitutional principle). Moreover, s. 69 of the *Legislation Act, 2006*, S. O. 2006, c. 21, Sched. F., provides that a preamble may be used to determine an Act's purpose.

[53] Based on the above noted jurisprudence, I see nothing particularly novel in the motion judge's finding that the preamble to the *LTCHA* can be utilized in the interpretation of the MLTC's statutory powers and, in particular, in determining whether the MLTC is subject to a duty of care in favour of residents of LTC homes when exercising those powers.

[54] In my view, the motion judge correctly recited and applied the appropriate statutory interpretation principles regarding the MLTC's powers pursuant to the *LTCHA*. Given the wording of the preamble and s. 1 of the *LTCHA*, the motion judge properly found that it is at least arguable that the statute, either expressly or by necessary implication, gives rise to a duty of care on the part of the MLTC.

(c) It is not plain and obvious that the "public interest" wording in s. 174.1 of the *LTCHA* precludes a finding of a duty of care on the part of the MLTC

[55] The fact that the MLTC's power to issue directives under s. 174.1 must be in "the public interest" is certainly a significant hurdle that the appellants will have to overcome if they are to ultimately succeed in establishing a private law duty of

care on the part of the MLTC. But, at this stage, the relevant question is whether the appellants are "certain to fail" in making such an argument.

[56] As the motion judge observed, s. 174.1(2)(c) defines "public interest" as including "the quality of care and treatment of residents within long-term care homes generally". This is reinforced by the "fundamental principle" set out in s. 1 of the *LTCHA*, which states that anything required or permitted to be done under the Act should be interpreted so that residents of long-term care homes may live with "dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met."

[57] Moreover, it is at least arguable that the statutory mandate of the MLTC is distinguishable from that of the MOH and the CMOH. In *Eliopoulos* and *Williams*, this court emphasized that the statutory mandate of the MOH and the CMOH is to act in the general public interest and is not aimed at or geared to the protection of the interests of specific individuals: *Eliopoulos* at para. 17; *Williams* at para. 25. In contrast, the preamble to the *LTCHA* and, indeed, the entire statute, is arguably aimed at the protection of an identifiable class of persons, namely, the residents of LTC homes.

[58] To be sure, the appellants' attempt to distinguish the mandate of the MLTC in this manner, and thereby establish a duty of care in favour of the residents of LTC homes, may well not prevail at an adjudication on the merits. But in my view,

it would be inappropriate at this stage to definitively conclude that the appellants' argument is certain to fail. This is particularly the case given that the government only recently created the office of MLTC through the 2019 Orders in Council. Accordingly, there is yet to be any authoritative judicial pronouncement on whether this recent bifurcation of ministerial responsibilities, and the appointment of a minister whose exclusive focus is LTC homes and their residents, alters in any way the duty of care analysis applicable to the MOH and the CMOH.

[59] I am therefore of the view that the motion judge correctly found that the appellants' claim that the MLTC owes a duty of care to LTC home residents when exercising statutory powers is not certain to fail, notwithstanding the MLTC's responsibility to act in the general public interest when issuing directives under s. 174.1 of the *LTCHA*.

(d) The negligence claim against the MLTC is not barred by Crown immunity for policy decisions, nor by the statutory immunity in s. 181 of the LTCHA for decisions taken in good faith

[60] The respondent acknowledges that the Crown's immunity for policy decisions, as well as the statutory immunity in s. 181 of the *LTCHA*, only extends to acts or omissions done in good faith. But, says the respondent, the appellants have not properly pleaded bad faith, instead merely alleging conduct that was "grossly negligent", "reckless" or "arbitrary". Hence, even if true, the actions alleged

fall short of “bad faith” conduct, which requires that a public official act in a manner that he or she knows to be inconsistent with the obligations of the office.[4]

[61] At the same time, while reckless conduct, in itself, falls short of “bad faith”, reckless conduct can provide circumstantial evidence from which the absence of good faith can be deduced and bad faith inferred: *Hinse v. Canada (Attorney General),* 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 53.

[62] This is essentially what the appellants plead here. The statement of claim alleges that as a result of various reports documenting the failed government response to the SARS epidemic, the government had knowledge of the deplorable conditions facing residents of LTC homes, and of the fact that the homes were ripe for disease outbreaks. The appellants says that despite having nearly two decades to prepare, the government inexplicably and recklessly failed to ensure that an appropriate pandemic plan was in place to respond to a deadly and foreseeable pandemic like COVID-19.

[63] The appellants further plead that, when COVID-19 emerged in late January 2020, it was starkly evident that the vulnerable residents of LTC homes would be at the greatest risk from the virus. Yet the government blatantly ignored and downplayed the risk, in complete disregard of their duties to take action to protect the residents of LTC homes. Ontario’s conduct, according to the appellants, was

[4] *Odahavji Estate*, at para. 28.

"high-handed and callous, demonstrating a wanton and reckless disregard for the safety of residents of LTC homes". It resulted in thousands of deaths and serious illnesses, most of which could have been prevented. Such conduct, say the appellants, cannot be explained as anything other than bad faith.

[64] The motion judge found that the appellants have sufficiently pleaded the absence of good faith, such that the claim should not be struck at the pleading stage on account of the Crown's immunity for policy decisions or on the basis of the statutory immunity in s. 181 of the *LTCHA*. I agree. Regardless of whether the appellants are able to establish the absence of good faith at an adjudication on the merits, their pleadings are sufficient to justify allowing the claim to proceed.

[65] In conclusion on this issue, the motion judge correctly applied the relevant legal principles in his analysis of this cause of action. Specifically, I see no reversible error in his finding that the negligence claim against the MLTC is at least arguable, and therefore should not be struck on the basis of the "cause of action" requirement in s. 5(1)(a) of the *CPA*. I would therefore dismiss the respondents cross-appeal of this aspect of the motion judge's order.

(4) The Motion Judge Did Not Err in Striking the Fiduciary Duty Claim

[66] The motion judge struck the appellants' fiduciary duty claim in its entirety, finding that the Supreme Court's decision in *Elder Advocates*, which also involved

elderly residents of LTC facilities, compelled the conclusion that the claim had no reasonable prospect of success.

[67] The motion judge pointed out that in order to establish that a public authority owes a fiduciary duty to a specific class of persons, there must be an undertaking by the alleged fiduciary to act solely and in the best interests of the alleged beneficiaries. The motion judge found that the duty of care language in the preamble to the *LTCHA* did not support an arguable fiduciary duty to act solely in the interests of the LTC residents, to the exclusion of all others. In fact, s. 174.1 expressly provides that in issuing directives under the Act, the MLTC may take into account interests other than those of the LTC residents. This negated the possibility of any fiduciary duty to act solely in the interests of the residents of LTC homes.

[68] The appellants claim that there is no evidence of an actual conflict between the alleged fiduciary duty and the government's obligation to act in the public interest. Relying on this court's decision in *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, at paras. 81-82, they argue that the motion judge erred in striking the fiduciary duty claim in the absence of such evidence.

[69] I would not give effect to this ground of appeal. As the motion judge appropriately noted, recognition of a fiduciary duty in this case is plainly inconsistent with the wording of s. 174.1 of the *LTCHA*, which expressly authorizes

the MLTC to consider, in addition to the interests of LTC residents, factors that include “the availability of financial resources for the management and operation of the long-term care home system…” As the Supreme Court in *Elder Advocates* made plain (at paras. 43-45), a statutory discretion to spread limited resources among competing groups is inherently inconsistent with the recognition of a fiduciary duty, which requires utmost loyalty to the beneficiaries’ interest above all others.

[70] In my view, the motion judge therefore correctly struck the fiduciary duty claim.

(5) The Motion Judge Did Not Err in Striking the Appellant’s *Charter* Section 7 Claim

[71] The motion judge struck the s. 7 *Charter* claim on the basis that it failed to allege any state-imposed deprivation of a right protected under that provision. The motion judge identified the appellants’ core allegation as being that the respondent failed to take potentially life-saving action in a timely manner. Relying on *Leroux 2021*, the motion judge found that mere inaction or delay does not engage s. 7 of the *Charter*.

[72] The appellants point out that the Divisional Court’s ruling in *Leroux 2021* was overturned on further appeal to this Court: *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502, (“*Leroux 2023”*). In any event, they argue that the motion

judge mischaracterized their claim as one involving mere delay, since the statement of claim also impugned the manner in which Ontario responded to COVID-19 in LTC homes.

[73] The respondent argues that the motion judge correctly characterized the appellants' claim as one alleging government delay in responding to COVID-19, and that mere delay cannot amount to a state-imposed deprivation sufficient to engage s. 7 of the *Charter*. The respondent also points out that the s. 7 claim must also be struck because the appellants have not pleaded that any deprivation of a protected s.7 right is contrary to a principle of fundamental justice.

[74] I see no reversible error in the motion judge's finding that the appellants' "core allegation" is that the Crown Officers failed to respond to the threat of COVID-19 in LTC homes in a timely manner. While it is true that the Claims impugn the manner in which Ontario responded to COVID-19 in the LTC homes, the repeated complaint is that the measures adopted were delayed, vague and inadequate. In other words, as described by the motion judge, the appellants' claim is that the government response was "too little, too late."

[75] Section 7 of the *Charter* does not create a positive obligation on the state to take measures to ensure that each person enjoys life, liberty, or security of the person: *Gosselin v. Québec*, 2002 SCC 84, [2002] 4 S.C.R. 429, at paras. 81-82. This court's decision in *Leroux 2023* affirmed that proposition (at para. 77) but held

that, on the facts in that case, the government had prevented claimants from obtaining benefits to which they were legally entitled, thereby depriving them of security of the person. In *Leroux 2023*, the proposed representative plaintiff, who had a developmental disability, was assessed and approved for supports but did not receive any of them. The s.7 *Charter* claim in that case did not arise from mere state inaction, but stemmed from the manner in which the province administered the Developmental Services waitlists: *Leroux 2023*, at para. 81. *Leroux 2023* is therefore distinguishable from this case, where the appellants allege that the government's ***inaction*** and delay risked the health, safety and lives of LTC residents.

[76] I further find that the s. 7 *Charter* claim should also be struck since the appellants have failed to plead that any deprivation they may have experienced is contrary to the principles of fundamental justice. It is true that the appellants' statement of claim in this case pleads that the respondent's response to COVID-19 in LTC homes was "arbitrary", and an arbitrary law may violate principles of fundamental justice. However, "arbitrariness" in the context of s. 7 has a narrow and specific meaning, namely, that the impugned measure bears no relation to the objective that lies behind the enactment: *Abarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414, at para. 49.

[77] To properly plead arbitrariness sufficiently to ground a s. 7 claim, the appellants would have to have pled that the impugned measures bore no

relationship with the goal of suppressing COVID-19. But as noted above, their core allegation is that the measures implemented in LTC homes did not go far enough or should have been adopted earlier. There is no allegation that the measures adopted were wholly unrelated to the goal of suppressing COVID-19.

[78] I therefore conclude that the motion judge did not err in striking the appellants' s. 7 *Charter* claim and would dismiss this ground of appeal.

E. DISPOSITION

[79] For the reasons set out above, I would dismiss both the appeal and cross-appeal.

[80] As success was divided, I would not make any order as to costs.

Released: February 6, 2024 "D.B."

"P.J. Monahan J.A."
"I agree David Brown J.A."
"I agree J. George J.A."