

Veterans' Pensions and Fiduciary Duty

Investment and Interest in *Authorson*

by Albert S. Frank, LL.B.

Another Remembrance Day has passed, and I am still remembering the disabled veterans. They did their duty in times of war, and suffered harm as a result. The Court of Appeal for Ontario recently decided, unanimously, that the federal government owes a fiduciary duty to those veterans, and has failed in that duty.

Since the First World War the federal government has provided various pensions and allowances to its veterans who suffered harm as a result of their service to their country. Some of the veterans were, for various reasons, incapable of administering the funds to which they were entitled. So Parliament enacted legislation and legislation providing for the funds to be administered on their behalf.

Sometimes relatives, friends, or the Public Trustee provided the administration. Sometimes the federal government provided the administration. For decades much of the administration was handled by a federal government department, the Department of Veterans Affairs (the DVA).

The DVA administered about 10,000 special purpose accounts for such veterans in the 1970s and 1980s. As there was often money left over after payment was made from the accounts for the veterans' financial needs, many of the accounts eventually contained substantial funds, often in the range of \$50,000 to \$100,000. Unfortunately, while the

DVA administered these accounts the funds were neither invested nor credited with interest.

From the 1970s on, various federal bureaucrats recognized this as a problem that could lead to legal action. Then in 1990 the federal government decided to start paying interest. The government also decided to prohibit any claim for interest on such funds prior to January 1, 1990, enacting section 5.1(4) to the **Department of Veterans Affairs Act** for that purpose.

Mr. Authorson, born in Bancroft, Ontario on April 14, 1914, enlisted in the Canadian Armed Forces on September 18, 1939. While on active military service, he became disabled from combat-related mental illness. He was incapable of managing his financial affairs for decades thereafter. In 1991 his physician certified that he had become competent to manage his financial affairs.

The DVA then gave him the principal amount owing to him and interest for 1990, but nothing more. He sued as the representative of the class of disabled veterans whose funds were administered by the DVA without the DVA either investing the funds or paying interest on them.

Both sides brought Motions for Summary Judgment, arguing that the case was so clear that there should be a ruling in their favour without the need for a trial. On October 11, 2000, the motions judge dismissed the government's motion and granted judgment for the veterans.

The federal government appealed to the Court of Appeal for Ontario, which heard the appeal and later, on March 13, 2002, released its unanimous decision in favour of the veterans:

Authorson v. Canada (Attorney General)
(2002), 58 O.R. (3d) 417.

Jurisdiction

The federal government argued that only the Federal Court had jurisdiction to hear the case. The Court of Appeal, however, agreed with the original judge that a judge of the Superior Court of Justice had jurisdiction.

Fiduciary Duty

A fiduciary is a person who has the duty of acting primarily for another's benefit. A classic example is a trustee, who has the fiduciary duty to manage funds on behalf of the person who really owns them.

The motions judge decided that once a pension or allowance is awarded to a veteran, the resulting payments are the property of the veteran. This is so whether the cheques are payable to the veteran or to an administrator such as the DVA. The DVA had the fiduciary duty to invest the funds or to accrue interest on them.

The federal government argued, among other things, that at most there was a "political trust," as opposed to a regular trust. A political trust would be a nebulous duty enforceable only by the electorate, not by the courts.

The Court of Appeal agreed with the motions judge that there was a fiduciary duty.

Statutory Defences

The federal government also tried to defend based on statutory defences. The Court of Appeal decided that the ***Crown Liability and Proceedings Act*** did not apply to this

situation, so it provided no protection for the government.

Section 5.1(4) of the **Department of Veterans Affairs Act** would apply to bar the Authorson claim, but the section violated sections 1(a) and 2(e) of the **Canadian Bill of Rights**, which protect property and fair hearing rights. Accordingly, the Court of Appeal declared that section 5.1(4) was inoperative for the claims in the Authorson case.

Thanks to the **Canadian Bill of Rights** and the Court of Appeal for Ontario, the disabled veterans or their heirs could receive in the neighbourhood of \$1 billion.

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The above article first appeared in the December, 2002 issue of **The Bottom Line**. Since then, the Supreme Court of Canada has reversed the decision on the basis that Parliament has the power to expropriate without compensation and is not obliged to be fair. As stated in an earlier decision quoted by the Court, "The prohibition, "Thou shalt not steal," has no legal force upon the sovereign body. And there would be no necessity for compensation to be given."

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