CITATION: Authorson v. Canada (Attorney General) 2007 ONCA 501
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COURT OF APPEAL FOR ONTARIO

MOLDAVER, SHARPE and BLAIR JJ.A.

BETWEEN:

JOSEPH PATRICK AUTHORSON, deceased, by his Litigation Administrator, PETER MOUNTNEY and by his Litigation Guardian, LENORE MAJOROS

Plaintiff (Respondent/
Appellant by Cross-Appeal)

and

THE ATTORNEY GENERAL OF CANADA

Defendant (Appellant/
Respondent by Cross-Appeal)

Proceeding under the *Class Proceedings Act, 1992*

C. Scott Ritchie, Q.C., William Knights, Donald J. Rennie, John Spencer, and Christine Mohr for the appellant

Raymond G. Colautti, Peter Sengbusch and Michelle Packer for the respondent

Heard: April 16-19, 2007

On appeal from the judgments of Justice John H. Brockenshire of the Superior Court of Justice, dated December 22, 2003, December 31, 2004 and December 29, 2005.

BY THE COURT:

I. OVERVIEW

[1] This appeal has a long and unusual history. In 1999, a class action was certified on behalf of a large number of disabled World War I and II veterans whose pensions and allowances had been administered by the Department of Veterans Affairs ("DVA"). The representative plaintiff, Joseph Authorson, claimed that the Crown breached its fiduciary duty to him and to other veterans by failing to invest or pay interest on pension funds administered by the Crown for their benefit. The Crown argued that the action was barred by s. 5.1(4) of the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1, as am. 1990, c. 43 ("*DVA Act*"), which provides that no claim shall lie "for or on account of interest" on monies held by the Department of Veterans Affairs prior to 1990.

[2] The class action was bifurcated on the issues of liability and damages. The motion judge granted summary judgment in favour of the Class on the liability issue in 2000, declaring that the Crown had breached its fiduciary duty by failing to invest or pay interest on the funds, and that the statutory bar in s. 5.1(4) of the *DVA Act* was inoperative because it conflicted with the *Canadian Bill of Rights*, S.C. 1960, c. 44. This court affirmed that decision in 2002. The motion judge proceeded to hear the damages portion of the action, but reserved his decision pending the Crown's appeal to the Supreme Court of Canada from the liability judgment, which was heard in March 2003.

[3] Before the Supreme Court of Canada, the Crown conceded that it had breached its fiduciary duty, but submitted that s. 5.1(4) lawfully rendered the debt unenforceable. The Supreme Court agreed and found that s. 5.1(4) was valid legislation that was not inconsistent with the *Bill of Rights*. The Crown's appeal was allowed.

[4] One might have expected this to be the final word on the matter. However, shortly after the Supreme Court released its decision, in the fall of 2003 the Class moved before the motion judge for judgment on damages. The Class argued that the motion judge's initial declaration that the Crown had breached its fiduciary duty had not been disturbed, and that the reach of both s. 5.1(4) and the Supreme Court's decision were limited to "interest" as distinct from damages for failure to invest. The motion judge agreed. In doing so, he rejected the Crown's submissions that he was *functus officio*, that the Class's claim was barred by *res judicata* or issue estoppel, or that the claim was time-barred. The motion judge then directed further hearings to determine the quantum of damages for the failure to invest the funds. Those hearings were held over eight days in 2004 and 2005. At the end of 2005, the motion judge released the final damages decision, in which he assessed the Class's damages at more than $4.6 billion. The Crown now appeals to this court.

[5] As we will explain more fully below, we agree with the Crown's submission that the judgment of the Supreme Court was final and binding and that there was no basis in fact or law for the Class to pursue its claim, or any aspect of it, once that judgment had

been rendered. We also agree with the Crown's submissions that properly interpreted, s. 5.1(4) constitutes a complete bar to the claim, and that the motion judge erred by applying the doctrine of equitable fraud to overcome the Crown's limitations defence. Accordingly, we allow the appeal.

II. FACTS

Veterans' pensions and allowances

[6] Since World War I, the Government of Canada has provided pensions and other financial benefits to veterans who were injured in service to their country. These payments take a number of different forms, three of which are relevant to this appeal: (1) disability pensions for veterans who were physically or mentally disabled as a result of service, as authorized by the *Pension Act* R.S.C. 1985, c. P-6 and its predecessors beginning in 1915; (2) treatment allowances for veterans receiving active medical treatment, as authorized by the *DVA Act* and its predecessors beginning in 1918; and (3) income supplements to indigent veterans who were injured in the theatre of war, as authorized by the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3 and its predecessors beginning in 1930.

[7] For all three types of payments, legislation provided that when a veteran was deemed incapable of managing his own financial affairs, an administrator would be appointed to do so. Where possible, a relative or close friend of the veteran was selected as the administrator. If a suitable third-party administrator could not be found, the DVA assumed administration of the funds. The veteran could regain control of the funds at any time if he became capable of managing his own affairs.

[8] When the DVA was designated as the administrator of a veteran's funds, his cheques were made out to an official in the department and deposited in the Consolidated Revenue Fund. For accounting purposes, the funds were tracked as if they were in a special purpose account held in the veteran's name. Occasionally, funds from private sources, such as inheritances, were also deposited. The Crown acknowledged that in virtually all cases, DVA-administered funds were neither invested nor credited with interest until 1990, when the *DVA Act* was amended to authorize the payment of interest from that point forward.

[9] It was estimated that there were approximately 10,000 DVA-administered accounts in the 1970s and 1980s, but the number had dwindled to fewer than 1,000 by the time this litigation was commenced.

The representative plaintiff

[10] Joseph Authorson enlisted in the Canadian Forces in 1939 at the age of twenty-five. While on active service during World War II, he suffered a combat-related mental illness and spent most of the remainder of his life in a psychiatric hospital. Authorson received a regular pension beginning in 1944, except for the periods of time when he received a treatment allowance. The DVA held and administered both types of funds on his behalf. In 1991, Authorson was deemed competent to manage his affairs and the DVA ceased to administer his funds. The DVA's records indicated that during the time it administered his account, Authorson's accumulated pension and treatment allowance totalled $117,916 and his personal funds totalled $166,248. Such figures were not unusual for veterans who had spent substantial amounts of time in hospital, and therefore had not incurred many expenses.

[11] During the time the DVA administered Authorson's pension funds, the funds were held by the Crown in the Consolidated Revenue Fund. Prior to 1990, it did not invest or pay interest on those funds.

Department of Veterans Affairs Act, s. 5.1(4)

[12] In *Guerin v. Canada*, [1984] 2 S.C.R. 335, the Supreme Court of Canada held that the Crown could be liable for breach of fiduciary duty. This decision prompted the DVA to investigate the government's potential liability for failure to invest or pay interest on the accounts under the DVA's administration. The issue became more public in 1985 when the Auditor General warned in a report that the department was "vulnerable to legal action" by veterans to recover "the difference between the amounts accumulated in the trust accounts and what would have been produced if the money had been properly invested."

[13] In 1988, an internal government task force recommended that the government pay interest on administered accounts on a go-forward basis and set out a variety of options for dealing with any exposure to past liability. One of those options was to enact legislation to eliminate any risk of liability.

[14] The *Department of Veterans Affairs Act* implemented the task force's recommendation by amending the *DVA Act* to authorize the monthly payment of interest on veterans' accounts. However, s. 5.1(4) of that Act made it clear that the entitlement to interest was strictly prospective. That provision states:

> No claim shall be made after this subsection comes into force for or on account of interest on monies held or administered by the Minister during any period prior to January 1, 1990 pursuant to subsection 41(1) of the *Pension Act*, subsection

> 15(2) of the *War Veterans Allowance Act* or any regulations made under section 5 of this Act.

III. PROCEDURAL HISTORY

Certification of the class action (1999)

[15] In October 1999, the motion judge certified the action as a class proceeding on behalf of all veterans whose funds had not been invested or credited with interest while under the DVA's administration: *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [1999] O.J. No. 5557 (S.C.J.).

[16] The key common issues certified under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 for the purposes of this appeal were:

- Did the Crown breach its duty as trustee and/or as fiduciary by failing to invest or pay interest on the funds it administered?
- Do s. 5.1(4) of the *DVA Act*, or s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, retroactively bar or exempt the plaintiff's claims?
- If s. 5.1(4) of the *DVA Act* or s. 9 of the *Crown Liability and Proceedings Act* retroactively bar or exempt the plaintiff's claims, are they invalid and inoperative by reason of a conflict with ss. 1(a) or 2(e) of the *Canadian Bill of Rights* or ss. 7 or 15 of the *Charter*?
- If the answers to the above questions are decided in favour of the plaintiff, are the class members entitled individually to:
  - Damages for breach of trust and/or breach of fiduciary duty;
  - A constructive trust;
  - Restitution;
  - An accounting?

[17] The motion judge ordered that for case management purposes, the action be divided into four phases: (1) liability to living veterans; (2) liability to deceased veterans and their beneficiaries; (3) damages for living veterans; and (4) damages for deceased veterans and their beneficiaries.

Phase one: liability to living veterans

(a) ***Superior Court (2000)***

[18] In September 2000, the parties brought opposing motions for summary judgment before the motion judge. The Class sought summary judgment for a declaration that the Crown had become a trustee or a least a fiduciary of the pensions and allowances it had under administration, and so was bound in equity to invest the money, and pay or credit interest thereon. The Crown cross-moved for summary judgment dismissing the claim in its entirety on the grounds, *inter alia*, that it did not owe a fiduciary duty to the veterans, and that s. 5.1(4) completely barred the Class's claims. The Class responded that s. 5.1(4) was inoperative because it conflicted with ss. 1(a) and 2(e) of the *Bill of Rights*. The Class also submitted that s. 5.1(4) violated ss. 7 and 15 of the *Charter*.

[19] In October 2000, the motion judge granted judgment to the Class and dismissed the Crown's cross-motion: *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.) ("2000 liability decision"). He found, at para. 28, that by undertaking to administer the funds on the veterans' behalf, the Crown became "at least a fiduciary, subject to the obligations imposed on individuals in that capacity by the law of equity." The motion judge concluded that the Crown was obliged to invest or pay interest on the veterans' funds while they were under the DVA's administration.

[20] The motion judge found, at para. 43, that s. 5.1(4) "is on its face an absolute bar to this action", but accepted the Class's submission that s. 5.1(4) was inoperative because it was inconsistent with ss. 1(a) and 2(e) of the *Bill of Rights*. In so finding, at para. 98 the motion judge described s. 5.1(4) as a "pernicious subsection", the "only objective" of which is to "block legitimate potential claims by veterans".

[21] The motion judge dismissed the Class's *Charter* arguments, finding that s. 7 of the *Charter* does not protect property rights and that no persuasive argument had been made under s. 15.

[22] Accordingly, the motion judge made the following five declarations:

1. The class members had a property interest in their pensions and allowances paid to and administered by the DVA;

2. 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;

3. The Crown breached its duty as a fiduciary by failing to invest or pay interest on the funds under administration;

4. Section 9 of the *Crown Liability and Proceedings Act* does not bar or exempt the claims of the class members;

5. Section 5.1(4) of the *DVA Act* does not bar or exempt the claims of the class members as it is inoperative as against them by reason of its conflict with both s. 1(a) and s. 2(e) of the *Canadian Bill of Rights*.

(b) *Court of Appeal (2002)*

[23] The Crown appealed to this court arguing, *inter alia*, that the motion judge had erred by finding that the Crown owed a fiduciary duty to the class members and that s. 5.1(4) was inoperative by virtue of the *Bill of Rights*.

[24] This court dismissed the Crown's appeal: *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2002), 58 O.R. (3d) 417 (C.A.). The court held that the Crown was under a fiduciary duty to grow the veterans' funds by investing them or accruing interest on them, and that it had breached this duty by failing to invest or pay interest on the funds under its administration. This court also held, at para. 98, that "[s.] 5.1(4) purports to prohibit the bringing of this action" but that the section was inoperative because it deprived the veterans of their property without any process or hearing, contrary to ss. 1(a) and 2(e) of the *Bill of Rights*.

[25] Although the Class did not cross-appeal on the question of whether s. 5.1(4) violated the *Charter*, the court heard submissions from counsel on this issue. However, since the court ultimately decided the *Bill of Rights* issue in the Class's favour, it held that it was unnecessary to deal with the *Charter* argument.

(c) *Supreme Court of Canada (2003)*

[26] Before the Supreme Court of Canada, the Crown conceded that it owed a fiduciary duty to the class members, and that it had breached that duty by failing to invest or pay interest on their accounts. The Crown based its appeal exclusively on the argument that both the motion judge and this court had erred by ruling that the *Bill of Rights* rendered s. 5.1(4) inoperative.

[27] The Supreme Court of Canada allowed the Crown's appeal: *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40. Major J., writing for the court, noted that the *Bill of Rights* only protects those rights that existed at the time of its passage in 1960, and that then, as today, Parliament had the right to expropriate property if it made its intention clear. Major J. held, at paras. 56-57, that Parliament's intent to expropriate the veterans' property was "clear and unambiguous", and that s. 5.1(4), "leaves no doubt that the respondent has no claim for interest." Rather, at para. 62 he found that "Parliament has

chosen for undisclosed reasons to lawfully deny the veterans, to whom the Crown is owed a fiduciary duty, these benefits whether legal, equitable or fiduciary."

Phase two: liability to deceased veterans and their beneficiaries

(a) *Superior Court of Justice (2003)*

[28] Just days before the Supreme Court hearing on the liability appeal in March 2003, the motion judge ruled on the second phase of the action: *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2003), 63 O.R. (3d) 707 (S.C.J.). In that judgment, the motion judge upheld the constitutionality of "lapsing provisions" under the *Pension Act* and the *Veterans Treatment Regulations*, C.R.C., c. 1585 (SOR 78/1585), which provided, respectively, that pensions and treatment allowances did not form part of a veteran's estate upon his death. However, he noted that in 1986 the *Pension Act* was amended to allow veterans' pension funds to be paid to their estates. No parallel amendment was made to deal with treatment allowances under the *Veterans Treatment Regulations*. Accordingly, he concluded that s. 55 of the *Veterans Treatment Regulations* was *ultra vires* by virtue of its conflict with the enabling legislation, and ordered that the treatment allowances of all veterans who died after 1986 should devolve to their estates.

(b) *Court of Appeal (2004)*

[29] The Class appealed the motion judge's finding that the lapsing provisions were constitutional. The Crown cross-appealed his finding that s. 55 of the *Veterans Treatment Regulations* was *ultra vires* after 1986.

[30] This court dismissed the Class's appeal and allowed the Crown's cross-appeal: *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2004), 70 O.R. (3d) 451 (C.A.). It held that the motion judge erred by concluding that the 1986 regulation was *ultra vires*, with the result that the estates claim was dismissed.

[31] The Class's application for leave to appeal to the Supreme Court of Canada was dismissed: *Authorson Estate v. Canada (Attorney General)*, [2004] S.C.C.A. No. 235.

Phase three: damages for living veterans

[32] That brings us to the judgment awarding $4.6 billion to the Class. This was the ultimate result of a series of decisions made by the motion judge following the judgment of the Supreme Court, all of which are encompassed by the present appeal.

(a) ***The delivery decision (2003)***

[33] The Court of Appeal released its judgment upholding the liability decision in March 2002. The parties argued the damages issue before the motion judge over five days in March 2003. The motion judge reserved his decision pending the Crown's appeal to the Supreme Court, which was heard in April 2003. The Supreme Court released its judgment allowing the Crown's appeal in July 2003. In October of that year, the Class moved before the motion judge to have him "deliver" his judgment on the quantum of damages. The Crown opposed the motion and moved to quash the proceedings for want of jurisdiction, arguing that the Supreme Court's ruling had brought the matter to an end.

[34] The motion judge dismissed the Crown's motion to quash and granted the Class's motion that he deliver his judgment on damages: *Authorson v. Canada (Attorney General)* (2003), 69 O.R. (3d) 106 (S.C.J.) ("delivery decision"). He ruled that the Class's claim was always that the Crown failed to "invest or pay interest", and that any reference in his earlier reasons to shorten the description of the claim to "interest" only was not determinative. Rather, he explained, at para. 7, that references in the earlier judgments to "interest" rather than "damages" were a result of the "natural tendency to abbreviate", and that since the action had been bifurcated, no serious thought had been given to the possible make-up of damages during the liability phase. In the motion judge's view, at para. 18, it was not until the damages motion in March 2003 that the court or the parties turned their minds to "the difference, if any, between interest and damages, and the interesting development in the courts of the ideas of a plaintiff having to make an election as to whether to claim damages or interest, and of using interest as a convenient substitute for damages".

[35] The motion judge rejected the Crown's submission that the Class's *Bill of Rights* argument had been premised on the idea that s. 5.1(4) was an absolute bar to its claim for damages, on the theory that only a complete taking could amount to a deprivation of property sufficient to trigger the *Bill of Rights*. The motion judge acknowledged that he had previously described s. 5.1(4) as "on its face an absolute bar to this action" and had held that that the section, "which would appear to bar this action, cannot do so because it offends the *Bill of Rights*". However, the motion judge held that these earlier findings were not determinative, but were rather merely comments made in the context of the argument put before the court.

[36] The motion judge further ruled that the portion of the liability decision declaring that the Crown breached its fiduciary duty by failing to invest or pay interest had not been disturbed by the Supreme Court of Canada, and that this declaration continued to provide a basis for assessing and awarding damages. In so holding, the motion judge rejected the Crown's submission that the claim was barred by *res judicata* or issue estoppel, or that he was *functus* following the judgment of the Supreme Court of Canada.

[37] The motion judge also rejected the Crown's submission that s. 5.1(4) had to be interpreted as a complete bar to the Class's claim for damages. Instead, he accepted the Class's submission that s. 5.1(4) barred only a limited amount of interest, which would have to be deducted from the overall award of damages for failure to invest. To reach this conclusion, the motion judge applied the common law presumption that a statute should not be given a construction that impairs existing rights unless the language in which it is couched compels that result. He also applied the presumption that Parliament uses language consistently within a statute so that the same words must have the same meaning throughout. He noted that s. 5.1(2)(b), introduced at the same time as s. 5.1(4) but never proclaimed in force, provides that interest may be paid on DVA-administered accounts at the rate fixed by s. 21(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11("*FA Act*"), namely, 90% of the T-Bill rate. The motion judge applied this definition of "interest" to s. 5.1(4). This, he ruled, meant that s. 5.1(4) extinguished the claim for damages for breach of fiduciary duty, but only to the extent of the amount of interest as defined in s. 5.1(2)(b).

(b) ***The Damages Decisions (2003, 2004 and 2005)***

[38] On the same day he released the delivery decision, the motion judge released his first decision on damages: *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2003), 69 O.R. (3d) 129 (S.C.J.) ("2003 damages decision"). He ruled, first, that damages could be assessed by way of summary judgment. He further ruled that neither federal nor provincial limitations statutes operated to bar the Class's claims, and that any equitable limitations were not applicable by reason of equitable fraud. The motion judge then made a number of orders relating to the quantum of damages, including:

- Damages would be awarded on an aggregate basis pursuant to s. 24 of the *Class Proceedings Act*;
- For purposes of calculating damages, the rates of return on investment on the base amounts would be compounded annually to the date of computerization of the veterans' benefit accounts, with monthly compounding thereafter; and
- The investment criteria governing the determination of damages for failure to invest would be those criteria identified with the prudent man or best-efforts tests for trustee investment.

[39] The motion judge then ordered further hearings on a number of issues, including: the makeup of investment portfolios during the relevant time period; the calculation and deduction of interest; and the appropriate administrative process for the calculation and distribution of damage awards to individual class members.

[40] Four days of hearings were held in September 2004 to address these issues. In December of that year, the motion judge rendered a further decision: *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2004), 249 D.L.R. (4th) 214 (Ont. S.C.J.) ("2004 damages decision"). The 2004 damages decision determined that a number of principles would apply to the assessment of damages, including:

- The appropriate investment for administered balances during the entire period covered in the action was a mixed investment portfolio;
- The appropriate asset mix for the entire period was 60% bonds, 35% equities, and 5% cash;
- The proportion of bonds or equities within the portfolio could rise or fall by 10%, and cash could rise by 10% but never fall below 5%; and
- Where the asset mix was shifted away from the median percentages, the shift in asset allocations for any given year would be made with full benefit of hindsight.

[41] Another four days of hearings were held in May 2005 to determine the quantum of damages having regard to the principles articulated in the 2004 damages decision. In December 2005, the motion judge issued a judgment confirming his authority to take judicial notice of "the general acceptance in the financial community of the ability of portfolio managers to shift, within limits, the asset allocations within a portfolio": *Authorson Estate v. Canada (Attorney General)*, [2005] O.J. No. 5582 (S.C.J.) ("judicial notice decision"). This was an important finding because without the ability to vary the portfolio from the norms, the resulting damage award would have been substantially lower.

[42] At the same time as he released the judicial notice decision, the motion judge also issued his final judgment on quantum, which totalled $4.6 billion: *Authorson (Litigation Administrator of) v. Canada (Attorney General)* (2005), 263 D.L.R. (4th) 521 (Ont. S.C.J.) ("2005 damages decision"). The Crown was ordered to deposit this amount into a specially-designated trust account in the Consolidated Revenue Fund, and to invest the money in a portfolio with the asset mix identified in the 2004 damages decision.

IV. ISSUES

[43] In its appeal, the Crown raises a long list of issues which can be summarized as follows:

1. Did the motion judge err by failing to find that the Supreme Court of Canada's liability judgment finally ended the litigation?
2. Did the motion judge err in his interpretation of s. 5.1(4) of the *DVA Act*?

3. Did the motion judge err in finding that the Class's claim was not time-barred?

4. Did the motion judge err in using a summary judgment procedure to assess damages, and did he err in the measure of damages itself?

[44] The Class raises one ground of cross-appeal: Is s. 5.1(4) of the *DVA Act* contrary to ss. 7 and 15 of the *Charter*? In oral argument, we declined to hear the cross-appeal on the ground that the Class did not raise the *Charter* issue before the Supreme Court of Canada in 2003, despite ample opportunity to do so.

[45] For the following reasons, we allow the Crown's appeal, set aside the judgment for damages and dismiss the action.

V. ANALYSIS

Issue 1: Did the motion judge err by failing to find that the Supreme Court of Canada's liability judgment finally ended the litigation?

[46] The Crown has raised several issues in support of its contention that the Supreme Court's 2003 judgment put an end to any and all claims that the Class had, or may have had, for damages resulting from the Crown's failure to invest or pay interest on the funds it administered for the Class from 1915 until 1990. The various issues are identified in the Crown's factum under the broad heading "Jurisdictional Errors". They have been framed as follows:

> Error One: The Supreme Court of Canada's decision ended the litigation.
>
> Error Two: Brockenshire J. was *functus officio* and without jurisdiction to amend a final judgment [the 2000 liability decision] that decided s. 5.1(4) barred all claims for damages.
>
> Error Three: The plaintiff's cause merged in the judgment [the 2000 liability decision] and all claims for damages were *res judicata* (by virtue of issue estoppel and/or cause of action estoppel).

[47] We propose to address these jurisdictional problems not on an issue-by-issue basis but more by way of an historical overview of the case, with particular emphasis on the metamorphosis of the Class position. In the end, we agree with the Crown that the judgment of the Supreme Court was final and binding and that there was no basis for the Class to pursue its claim, in whole or in part, after that judgment had been rendered.

[48] Regrettably, the motion judge viewed the matter differently. Had he applied the correct principles of law to the irrefutable facts, he would, in our respectful view, have recognized the October 2003 Class motion for delivery of the judgment on its "outstanding quantum motion" as a blatant case of revisionism and dismissed it out of hand. As it is, that motion has resulted in four years of unnecessary litigation and an unfortunate drain on scarce judicial resources.

[49] In his 2003 delivery decision, in which he allowed the Class to proceed on its "outstanding quantum motion", the motion judge observed, at para. 2, that with the consent of the parties early on in the proceedings, he had "divided up" the many issues to be decided "under four headings: liability for failure to invest, liability for failure to pay out re deceased veterans, the assessment of damages for the failure to invest or pay interest, and the assessment of damages re the failure to pay out principal to the estates of deceased veterans". Of those, one and three are central to this appeal.

[50] The four-fold division of issues was not overlooked by the Supreme Court of Canada. As a prelude to identifying the single issue of contention on the Crown's appeal from this court's decision upholding the motion judge's 2000 liability decision, Major J. referred to the division of the proceedings at para. 25 as follows:

> Brockenshire J., the trial judge, divided the litigation into two separate proceedings. *One action was for interest on funds administered by the DVA*. The other was for principal unpaid when veterans died while their funds were still being administered by the DVA. *Each action had both a liability and a damages phase. This appeal is limited to the first action assessing the liability of the Crown for interest on the funds.* [Emphasis added.]

[51] In our view, the language used by Major J. in defining the scope of the appeal admits of only one interpretation. At issue was the liability of the Crown in the first action, which he comprehensively defined as "an action … for interest on funds administered by the DVA".

[52] In defining the first action that way, we are satisfied that Major J. was referring to the action in its entirety and not just a portion of it. Had he meant a portion of it, surely he would have said so. But he did not because the case had been fought out, from start to finish, on an all or nothing basis. Either s. 5.1(4) of the Act barred the first action in its entirety or it did not. There were no half measures here. Not once, during the lengthy and prolonged proceedings, from the motion to certify to the hearing before the Supreme Court, did the Class even suggest – let alone argue – that what was at issue was strictly the validity of s. 5.1(4), not its scope. Nor did the Class raise that issue anywhere in the mass of material filed in the Superior Court, this court or the Supreme Court.

[53] That everyone, including the Supreme Court, approached s. 5.1(4) as an "all or nothing" proposition is evident from the history of the proceedings. The record is replete with indicators that bear this out. They are far too many to list, let alone detail. We have chosen to outline some of the more cogent examples.

[54] First, in their statement of claim, issued in 1999, the Class sought:

> Damages for breach of fiduciary duty and/or breach of trust *equivalent to the difference between the accumulated principal amount of pension monies paid to the Department of Veterans Affairs for the benefit of the plaintiff and the amount which could have been realized if the plaintiff's pension monies had been invested*. [Emphasis added.]

[55] The wording used in the damage claim was, in our view, carefully selected. It tracked the language used by the Auditor General, at para. 13.44 of his 1985 report, which stated:

> As a trustee, the department has a responsibility to invest funds in approved instruments and to account to the beneficiary regularly. *The department is vulnerable to legal action by veterans to recover the difference between the amounts accumulated in the trust accounts and what would have been produced if the money had been properly invested.* Given the amounts involved and the length of time that many of these accounts have been in existence, this liability could be large. [Emphasis added.]

[56] That passage, along with others from the same report, is reproduced at para. 55 of the motion judge's 2000 liability decision. It exposes the problem that s. 5.1(4) was enacted to address. Certainly, the motion judge knew that to be the case. At para. 98 of the 2000 liability decision, he held:

> That subsection [s. 5.1(4)] does not, on its face, have anything to do with improving the benefits, or the benefit system, of veterans – on its face, *its only objective is to block legitimate potential claims by veterans. The Crown was well aware of those potential claims, both from its own studies and from the blunt reports of the Auditor General.* [Emphasis added.]

[57] In other words, s. 5.1(4) was enacted to prevent precisely the kind of damage claim that the Class was bringing and that the Auditor General had foreseen. And that is why everyone, throughout, including the Class, realized that if s. 5.1(4) was operational, it acted as a complete bar to the Class claim.

[58] Second, as is apparent from the certification decision, the motion judge understood only too well the nature, scope and breadth of the Class damage claim and the impact of s. 5.1(4) on it. At para. 5 of that ruling, he stated:

> The remedies being sought are firstly damages for breach of trust and/or breach of fiduciary duty, secondly a constructive trust; thirdly restitution, and fourthly an accounting. *Notably what is being claimed is not interest per se, but damages. A further issue which was alleged to be common to all is whether s. 5.1(4) of the Department of Veterans Affairs Act, which purports to take away the right of action for such damages accruing before 1990, is constitutionally valid*, or in the alternative invalid and inoperative by reason of conflict with the *Bill of Rights* or the *Charter*. [Emphasis added.]

[59] Third, in the certification order dated October 26, 1999, the effect of s. 5.1(4) on "the plaintiff's claims" was certified as two of the eight common issues. Paragraphs 6(e) and (f) of that order reflect those issues:

> (e) If s. 5.1(4) of the *Department of Veterans' Affairs Act*, or s. 9 of the *Crown Liabilities and Proceedings Act*, retroactively bar or exempt the plaintiff's claims are they invalid and inoperative by reason of a conflict with section 1(a) or s. 2(e) of the *Canadian Bill of Rights* or section 7 or 15 of the *Charter*?
>
> (f) If s. 5.1(4) of the *Department of Veterans' Affairs Act*, or s. 9 of the *Crown Liabilities and Proceedings Act*, retroactively bar or exempt the plaintiff's claims for damages and are invalid and inoperative by reason of a conflict with section 1(a) or s. 2(e) of the *Canadian Bill of Rights* or section 7 or 15 of the *Charter*, are same saved by s. 1 of the *Charter*?

[60] Fourth, in its pleadings, the Crown consistently maintained that s. 5.1(4) acted as a complete bar to the claims asserted by the class. Paragraph 14 of the Fresh as Amended Statement of Defence, dated July 14, 1999, is illustrative:

> The defendant states that claims by veterans of Canada's armed forces for or on account of interest on monies held or administered by the Crown during any period prior to January 1, 1990, pursuant to subsection 41(1) of the *Pension Act*, subsection 15(2) of the *War Veterans Allowance Act* or any regulations made under section 5 of the *Department of*

> *Veterans Affairs Act* have been barred by statute. The defendant pleads and relies upon subsection 5.1(4) of the *Department of Veterans Affairs Act*, which came into force on October 12, 1990.

[61] In its reply pleadings, the Class consistently maintained that s. 5.1(4) was constitutionally infirm. Hence, it was inoperative and could not be used to bar the claims being asserted. At no time did the Class ever assert that, if valid, s. 5.1(4) operated only as a partial bar to its claim. Paragraph 5(d) of the "Fresh as Amended Reply" dated October 22, 2001, is illustrative:

> 5. In response to paragraph 13 of the amended statement of defence and the defendant's allegation that subsection 5.1(4) of the *Department of Veterans Affairs Act* prohibits the Crown from paying interest to members of the armed forces on account of 'monies held and administered by the Crown for their benefit', the plaintiff says that that provision is unconstitutional, in that:
>
> …
>
> (d) in any event, the provision contravenes subsection 1(a) and 2(e) of the Canadian Bill of Rights by constituting, in form and substance, a deprivation of property belonging, or owing to, the plaintiff without due process of law, *or in the alternative, the deprivation of the fundamental right to a fair hearing for the determination of his rights*. [Emphasis in original.]

[62] Fifth, the 2000 liability decision granting judgment to the Class was the culmination of two motions for summary judgment, one by the Class seeking judgment on its action, the other by the Crown seeking that the class action be dismissed.

[63] In its motion, the Crown sought a determination before trial of various questions of law, including the following question identified at para. a (ix):

> (ix) is the plaintiff's action barred in whole *or in part* by reason of subsection 5.1(4) of the *Department of Veterans' Affairs Act*? [Emphasis added.]

[64] In framing the matter that way, i.e. whether s. 5.1(4) might only be a "partial" bar to the "plaintiff's action", the Crown raised the very issue that the Class now claims has been its position throughout. Surely, if that were so, the Class would have made this clear in the materials it filed in response to the Crown's summary judgment motion. And

yet, in the 800-page factum filed on behalf of the Class on the original summary judgment proceedings, not one word to that effect can be found.

[65] On the contrary, numerous passages in that document show that the Class viewed the entire action as one for damages for "lost interest" due to the Crown's failure to "pay interest" or "to invest or otherwise accrue interest" on the trust funds it was administering. It also viewed s. 5.1(4) as a complete bar to its "damages" claim. For example, in para. 1, we see the following:

> As administrator of these funds, the Crown through the DVA or CPC [Canadian Pension Commission] had a fiduciary or trust duty towards the disabled veterans to act in the best interests of that veteran and to avoid any conflict of interest. *These fiduciary or trust duties included the duty to prudently invest the funds to realize a reasonable rate of return on the veterans' administered funds. The Crown has failed to properly invest those funds or to pay interest in lieu of investment. Documents show that for many years, the DVA and CPC have or ought to have known that it was liable to compensate these disabled veterans for their failure to invest or pay interest.* They knew that, by their failure to do this in a timely manner, that they had created a huge liability in respect of interest owing. *In order to eliminate the liability for the DVA on CPC's inaction, the Government of Canada procured an act of Parliament enacting section 5.1(4) of the Department of Veterans' Affairs Act, which purports to confiscate the disabled veteran's right to recover interest owing to them prior to 1990.* This enactment contravenes the *Canadian Bill of Rights* and should be declared inoperative. [Emphasis added.]

And at para. 80:

> *Calculations have been prepared to quantify the global damages for failure to invest or otherwise accrue interest on the aforesaid trust funds.* [Emphasis added.]

And at para. 81(g):

> That the enactment of section 5.1 was an attempt to eliminate the government's exposure to liability it created by its failure

> to *invest or pay interest on administered trust accounts*. [Emphasis added.]

And finally at paras. 272 to 274:

> *The clear wording of this section clearly purports to take away any right of action, in respect of any claim of interest, for any period prior to January 1, 1990.*
>
> *This section was proclaimed in force in 1990, and purports, by its clear wording, to bar any retroactive claim for interest, such as the claims being advanced by the plaintiff in the present case.* The plaintiff, however, submits that this section is inoperative by reason of conflict with the *Bill of Rights* and the *Charter*.
>
> *It is respectfully submitted that, on the overwhelming preponderance of evidence, a review of all of the background factual matters discussed above, dictates that the Crown, at all times, knew it had a serious liability for unpaid interest,* but made a conscious decision in the 1970s, again in the early 1980s, and finally in 1990, that it would not pay interest on administered funds. In 1990, the Crown decided to change its policy with a simple procedure of having the Minister of Finance agree to pay interest on administered accounts, but only from January 1, 1990. Commensurate with the change in policy, the *Department of Veterans Affairs Act* was amended to prohibit claims for past interest. *It is clear that section 5.1(4) of the Department of Veterans Act was intended to prevent severely, profoundly disabled veterans, otherwise unable to manage their own affairs, from recovering interest as damages arising out of the Crown's failure to properly invest those funds or provide a reasonable rate of return thereon.* It is respectfully submitted that the passage of section 5.1(4) was a naked attempt to confiscate a property right, otherwise accruing to the severely disabled veterans. It is therefore respectfully submitted that this provision constitutes, in form and substance, a confiscation of property belonging to, or owing to, the plaintiff without due process, and thus contravene section 1(a) of the *Canadian Bill of Rights.* [Emphasis added.]

[66] These passages show that in referring to the word "interest", the Class was using it to encompass its entire claim for damages. They also reaffirm that the Class fully understood the scope of s. 5.1(4), and knew that it had been enacted to eliminate precisely the kind of damage claim that it was asserting. As such, they expose its present position, adopted only after the Supreme Court's decision, as a clear case of constructive revisionism.

[67] Sixth, the position taken by the Class in its factum on the original summary judgment motion is precisely the same position it took on the Crown's appeal to this court in 2001 and the Crown's further appeal to the Supreme Court in 2003.

[68] For example, in its factum filed before this court, the following passages at paras. 60(g) and 263 state:

> *The enactment of section 5.1(4) was an attempt to eliminate the government's exposure to liability it created by its failure to invest or pay interest on administered trust accounts.*
>
> …
>
> *… It is clear that section 5.1(4) of the Department of Veterans Affairs Act was intended to prevent profoundly disabled veterans, otherwise unable to manage their own affairs, from recovering interest as damages arising out of the Crown's failure to properly invest those funds or provide a reasonable rate of return thereon.* It is respectfully submitted that the passage of section 5.1(4) was a naked attempt to confiscate a property right. It is therefore respectfully submitted that this provision constitutes, in form and substance, a confiscation of property belonging to, or owing to, the respondent without due process, and thus contravene section 1(a) of the *Canadian Bill of Rights*. [Emphasis added.]

[69] Seventh, in this court, on appeal by the Crown from the 2000 liability decision, Austin and Goudge JJ.A. defined the pivotal issue at para. 11 as follows:

> The issue in these proceedings is whether the federal government is liable to the respondent *for its failure to invest or pay interest* on the respondent's money in the government's hands for administration. [Emphasis added.]

[70] Following their conclusion at para. 81 that the motion judge was correct in declaring that the Crown owed a fiduciary duty to the Class and that it breached that duty

"by failing to invest or pay interest on the funds under its administration", Austin and Goudge JJ.A. continued at para. 98:

> Section 5.1(4) purports to prohibit the bringing of *this action*. [Emphasis added.]

[71] After analyzing s. 5.1(4) and determining that the motion judge was correct in concluding that it was inoperative because it contravened the *Bill of Rights*, Austin and Goudge JJ.A. summarized their findings and conclusions at para. 133 as follows:

> For these reasons, we agree with the conclusions and dispositions that the motions judge made on each of the issues in appeal. In particular, we agree that the Crown was a fiduciary to the class members while their funds were being administered by the DVA *and that the Crown breached its fiduciary duty by failing to invest or pay interest on these funds. In addition, s. 9 of the CLPA is not a bar to this action. Nor is section 5.4(1) of the Department of Veterans Affairs Act a bar* [to this action] because it is rendered inoperative as against these claims by the *Canadian Bill of Rights*.

[72] In our view, the implication stemming from this court's reasoning could not be clearer. If s. 5.1(4) were operative, it would be a bar to the action – not just a portion of it, but the entire action. That message could not have been lost on the Class. It knew, or should have known, that its entire action hinged on the inoperability of s. 5.1(4). That is how the Crown presented its case to the Supreme Court, and that is how the Class responded. Indeed, in oral argument before the Supreme Court, Class counsel described s. 5.1(4) as "an absolute bar". Only after the adverse ruling from the Supreme Court did the Class change its stance and adopt the revisionist position it is now asserting.

[73] Eighth, cogent evidence that exposes the present position of the Class as "revisionist" is found in its "Factum on Quantum" filed with the motion judge in February 2001, more than two years before the decision of the Supreme Court. In it, the Class seeks aggregate damages "in the amount of $1,617,403,686" or in the alternative, "that a reference be directed … to take accounts". The aggregate figure is described as a "lump sum as interest" owing to the Class.

[74] Throughout the document, the damage claim is referred to as monies owing for "interest" and specifically, the amount of accrued interest that would have been earned had the funds been invested in a mixed investment portfolio. At para. 16, the Class compares the differential in the amount of interest that would have been earned depending on the investment vehicle chosen. The pertinent part reads as follows:

> … For example, if the entire amount of the trust funds had been invested in Government of Canada long term bonds,

> with interest compounded annually, for the entire period then, reading from Table 1, the accrued earnings of the funds would be $810,177,342. Alternatively, if the entire amount of the trust funds had been invested in TSE composite equities for the entire period then, reading from Table 1, the accrued earnings of the funds would be $3,282,781,050.

[75] At para. 17 of the Class factum, a chart is produced setting out the "accrued interest calculation" that could "be used to estimate the accrued earnings associated with a wide range of trust portfolios". Based on a "middle of the road" rate of return, the accrued earnings, as of December 31, 2000, "would be $1,617,403,686".

[76] At paras. 63 to 65 and 73 to 77, the factum sets outs the rates and kinds of interest that are available, in law, when a fiduciary has either misappropriated funds or failed to invest them. Paragraphs 73 and 75 are particularly instructive. The pertinent passages are set out below:

> There are various justifications for an *award of compound interest*: the beneficiary is deprived of money which it needs. The person who misappropriates the money has made a profit on it, and should give up that profit. The assumption is that if the claimant beneficiary had not been deprived of the money, then the claimant would have invested it advantageously. A person who has misappropriated properties is considered as having committed a species of fraud and will not be allowed to profit in any way either directly or indirectly from his action. *Interest from the profits realized* is imposed in equity in order to prevent the unjust enrichment of the defendant who retains and thus is deemed to benefit from the profits gained from his misappropriation.
>
> …
>
> *Compound interest* is awarded by courts of equity as damages by reason of a wrongful detention of money which ought to have been paid. *In equity interest is awarded* whenever a wrongdoer deprives a beneficiary of money which it needs for its own use and benefit. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. *The beneficiary should be compensated by the award of interest. On general principles it should be presumed that the beneficiary (had it not been deprived of the money) would have made the most beneficial*

> *use open to it. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. In order to give adequate compensation, the money should be replaced at interest with yearly rests. (i.e. compound interest).* [Emphasis added.]

And at para. 87, we find the following:

> If the Public Accounts constitute the principal amount in the trust funds, on an aggregate basis from year to year, it then becomes possible, through straightforward mathematical calculation, to *determine the aggregate amount of damages for interest owed to the class.* It is therefore respectfully submitted that the aggregate class damages therefore approximate $1,617,403,686 as calculated by Dr. Charette, the Plaintiff's Economist. [Emphasis added.]

[77] Two critical conclusions can be drawn from that factum.

[78] First, the damage claim was framed in terms of "loss of interest" and the quantum was to be calculated by figuring out the amount of interest that would have accrued, on a compound basis, had the Crown invested the funds it was administering in a mixed investment portfolio.

[79] Second, the factum contains no hint that the damage award would be reduced if s. 5.1(4) were found to be valid. The reason for that, in our view, is clear. The entire claim was premised on the assumption that s. 5.1(4) would be declared inoperable. When it was not, the Class went back to the drawing board and came up with a new theory which it attempted to disguise as a damages issue. The motion judge unfortunately gave effect to it. He should not have.

[80] Our conclusion that the Class adopted a new theory of the case only after the Supreme Court had ruled on the validity of s. 5.1(4) is further strengthened by a review of the transcript of oral argument before the Supreme Court in 2003. That record indicates that when Binnie J. asked counsel for the Class whether he wished to keep the motion judge's first four declarations in place (for our purposes, that the Crown owed a fiduciary duty to the Class and that it breached its duty by failing to pay interest or invest the funds it was administering), even if the Crown were to succeed on the fifth (that s. 5.1(4) was operative), counsel for the Class stated as follows:

> Mr. Colautti: Yes. And they – they're not directly under appeal here and they – they should remain in place, and it – if – *if the Crown succeeds on section – on the on the fifth*

> *section, then of course, these veterans get nothing*. And – and, in order to succeed, though, they have to pass the hurdle of both s. 1(a) and s. 2(e), and the fast [*sic*] that section –
>
> Binnie J.: That all relates to the fifth declaration –
>
> Mr. Colautti: Yes.
>
> Binnie J.: – at the time. Because you're dwelling on the merits of the fiduciary, and so on, I am just curious as to whether –
>
> Mr. Colautti: Yes.
>
> Binnie J.: – *you're asking that the first four declarations be maintained even if the fifth –*
>
> Mr. Colautti: Yes. *The reason why I'm dwelling on the – on the fiduciary duties is that it is vital to the argument on due process*, and it is vital because the Crown freely entered into this fiduciary duty to protect these veterans, but then, when it became inconvenient because there had been a mismanagement of their property, they sought to bar the claims. And the essence of this case is whether that kind of action passes muster under the *Bill of Rights*. [Emphasis added.]

[81] Counsel's response is instructive for two reasons. First, it is an unqualified admission on behalf of the Class that if the *Bill of Rights* argument were to fail and s. 5.1(4) were to be found operational, then "these veterans get nothing". Second, his reason for wanting to keep the first four declarations in place, particularly the one declaring that the Crown owed a fiduciary duty to the Class, is illuminating. Far from advising the court that it was important to keep that declaration in place so that the Class could proceed with its "outstanding quantum" motion, Mr. Colautti responded that the "fiduciary declaration" was "vital to the argument on due process" and that "the essence" of the case was whether, having failed in its duty to protect the veterans, it was constitutionally permissible for the Crown to pass legislation designed "to bar the claims".

[82] In his 2003 delivery decision allowing the Class to proceed in respect of the "outstanding quantum" motion, the motion judge considered Mr. Colautti's remark – "then of course these veterans get nothing" – and rejected the Crown's submission that it

should be treated "as a considered admission against interest of the class members". Instead, he characterized it (at para. 26) as:

> … *an off-hand statement by counsel*, who had just completed oral argument on the constitutional question as to the applicability of the *Bill of Rights*, during which, incidentally, as both counsel had done throughout this litigation, he referred to the claim of the class members as one for interest. *The issue of the interpretation of s. 5.1(4) and its effect on the damage claim of the class members had not been researched and argued, and no considered position on that issue had ever been put forth by class counsel*. The interests of justice would not be served if a *chance remark* such as this could be taken to forever bar the rights of the class members to have the issue fully heard and adjudicated by the courts. I do not accept that an *unfortunate remark* by counsel can remove the jurisdiction of this court. [Emphasis added.]

[83] With respect, we do not know how or on what basis the motion judge came to characterize counsel's remark as "off-hand", "chance" and "unfortunate". Before us, the same counsel has submitted something very different. At para. 69 of the Class factum, he states that his remark:

> … that the Class members 'would receive nothing' is taken entirely out of context. The discussion before the court was about 'interest' in s. 5.1(4). At no time was any concession made that the Class plaintiffs would be entirely without remedy, whether for damages, disgorgement or other equitable remedy arising from the Crown's admitted breach of fiduciary duty.

[84] Taken at face value, counsel is now saying that his so-called "chance" remark to the Supreme Court was both calculated and considered. It was meant to relate only to "interest", presumably because he had considered the scope of s. 5.1(4) and felt that it only addressed "interest" and not any other head of damages that the Class could pursue by virtue of the Crown's breach of its fiduciary duty.

[85] If that is so, it calls into question, as well, the motion judge's second reason for not taking counsel's remark at face value, namely, that "the issue of the interpretation of s. 5.1(4) and its effect on the damages claim of the Class members had not been researched".

[86] Again, we do not know how or from whom the motion judge obtained that information. But, as indicated, it cannot be correct if, as counsel now submits, his

remarks were considered and calculated and meant only to address the validity of s. 5.1(4), not its scope. Accepting that to be the case, it is obvious that counsel must, at the very least, have considered the scope of s. 5.1(4) and its effect on the damage claim, even if he had not argued it to that point.

[87] If that is so, we are left to wonder why counsel did not explain to the Supreme Court that his reason for wanting to preserve the "fiduciary finding" was so that he could continue the damage claim on behalf of the Class, even if the claim for interest was found to be barred by s. 5.1(4).

[88] Where the truth lies in all of this is difficult to discern. On balance, our review of the record leads us to conclude that counsel's remark – "then these veterans will get nothing" – reflects the view he held at the time and that it encompassed not just the claim for interest but the claim for damages as a whole.

[89] To be sure, in the context of the *Bill of Rights* argument, it served counsel's purpose to have the Supreme Court consider s. 5.1(4) on an "all or nothing" basis. The more "pernicious" it appeared to be, the better the chance of having it declared inoperative under the *Bill of Rights*. Looked at differently, if s. 5.1(4) related only to interest and not damages as a whole, it could hardly be described as "pernicious", especially when, as here, on the motion judge's analysis, the interest component proved to be but a pittance of the damages owing to the Class by reason of the Crown's failure to invest and accrue interest on their funds.

[90] Just as counsel believed that s. 5.1(4) was an "all or nothing" provision, so too, in our view, did the motion judge, at least until the Supreme Court declared s. 5.1(4) to be valid. Were it otherwise, surely he would have had no reason to describe s. 5.1(4) as a "pernicious subsection". And yet, as discussed above, that is precisely how he characterized it in the 2000 liability decision when he concluded that s. 5.1(4) violated the *Bill of Rights*. His remarks in that regard, found at para. 98, along with his concluding remarks at para. 101, provide a window into the motion judge's understanding of the purpose and scope of the impugned provision. As such, they bear repetition:

> Relating those principles to this case, I conclude that the *Bill of Rights* provides an effective remedy in this case. The general right to property is specifically recognized in s. 1(a) of the *Bill of Rights*. The right to require a trustee or fiduciary to invest funds on hand, and/or pay interest, has existed since the 1700s. The omnibus Bill was certainly passed in pursuit of a valid federal legislative objective, but the Bill as a whole is not impugned – just s. 5.1(4). *That subsection does not, on its face, have anything to do with improving the benefits, or the benefit system, of veterans – on*

> *its face, its only objective is to block legitimate potential claims by veterans. The Crown was well aware of those potential claims, both from its own studies and from the blunt reports of the Auditor General. No evidence at all of any higher purpose for this pernicious subsection*, buried in the Bill, that could come even close to objectives of general good for veterans, or for the country, as a whole, has been put before this court, nor has any indication been given that s. 5.1(4) was necessary for, or even related to, the objectives of the Bill.
>
> …
>
> I declare that s. 5.1(4) of the Department of Veterans Affairs Act is inoperative in *barring the claims* raised by the plaintiff class in this action. [Emphasis added.]

[91] In our respectful view, these passages make it abundantly clear that the motion judge viewed s. 5.1(4) as a complete bar to the "claims raised by the plaintiff class in this action". To repeat, that is why he called the provision "pernicious". Had he believed otherwise (i.e., that the Class could nonetheless pursue its damage claim and ultimately receive an award of $4.6 billion), surely he would have found a more charitable adjective to describe it. Of equal significance is his reference to s. 5.1(4)'s objective being "to block legitimate potential claims" that "the Crown was well aware of … from the blunt reports of the Auditor General". As we saw at paras. 54 and 55, *supra*, the claim as pleaded by the Class was precisely the kind of damage claim that the Auditor General had foreseen, and that s. 5.1(4) was enacted to "block".

[92] More to the point, it is apparent to us that the Supreme Court also viewed s. 5.1(4) as an "all or nothing" provision. Otherwise, we see no reason why this country's highest court would have granted leave to appeal on what, in the end, according to the Class and the motion judge, turned out to be nothing more than an interlocutory ruling on one aspect (and a minor one at that) of the overall damage claim. In any event, even if the Supreme Court was somehow alive to the fact that the constitutionality of s. 5.1(4) was just a small piece of the puzzle, it is inconceivable that the court would have evaluated its constitutionality without first ascertaining its purpose, meaning and scope.

[93] The Class relies on a different exchange between the Supreme Court and counsel during the 2003 liability hearing in support of its position that the Supreme Court was aware it was only dealing with a portion of the Class's overall claim. In oral argument before the Supreme Court, Crown counsel advised that he could not ask the court to dismiss the case in its entirety "in view of the subsequent expansion of the claim." He therefore asked the court to dismiss the claim "for interest."

[94] Before us, the Crown explained that the "expansion" to which counsel referred was a result of the motion judge's ruling that the Crown was liable not just to living veterans, but also to deceased veterans who died after 1986. As we explained above, this "phase two" decision was handed down just days before the Supreme Court hearing on the first phase of the action. The Crown could no longer ask the Supreme Court to dismiss the *entire* action, since the litigation now encompassed the motion judge's most recent ruling, and that ruling had to first be appealed to this court. That appeal has now been heard and the remaining claim has been dismissed. Accordingly, we are not persuaded that Crown counsel's answer before the Supreme Court has any bearing on the situation as it now stands.

[95] In sum, the Class knew (or at the very least should have known) that its entire claim hinged on the applicability of s. 5.1(4). If that section was operable, it barred the action in its entirety. The Supreme Court found that it was operable. That should have been the end of the matter.

Issue 2: Did the motion judge err in his interpretation of s. 5.1(4) of the *DVA Act*?

[96] Our conclusion that the entire action ended with the judgment of the Supreme Court of Canada is reinforced by our interpretation of s. 5.1(4). For the reasons that follow, we conclude that by enacting s. 5.1(4), Parliament clearly intended to bar any and all claims against the Crown for breach of its fiduciary duty to invest or pay interest on DVA-administered funds. We therefore agree with the Crown's submission that the motion judge erred in his interpretation that s. 5.1(4) is only a partial bar to the Class's claim.

[97] The Supreme Court of Canada has adopted and consistently applied Elmer Driedger's definitive formulation of how statutes are to be interpreted. See *Bell Expressvu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[98] Legislative intent is to be gleaned through a contextual and purposive approach that determines the meaning of the words used in a statute with reference to the context in which the statute was enacted, the problem it was intended to address and its overall purpose: see *Bell ExpressVu* at paras. 26-27. Other principles of interpretation, such as the presumption applied by the motion judge that a statute should not be interpreted as impairing existing rights unless its language clearly compels that result, come into play only where there is ambiguity as to meaning of the provision: *Bell ExpressVu* at para. 28.

The specific provision at issue is to be considered in the light of, and harmoniously with, the overall scheme of the Act.

[99] There is no dispute as to the context and the mischief that s. 5.1(4) was designed to address. As discussed above, in the late 1980s, following the *Guerin* decision and the Auditor General's report warning that the DVA was vulnerable to legal action, Parliament was confronted with the problem of what to do about a potentially large claim against the Crown for the failure to invest or pay interest on DVA-administered funds. Parliament enacted a package of amendments to the *DVA Act* intended to solve that problem by providing for the payment of interest prospectively from 1990, and barring any payment of interest or claim "for or on account of interest" that accrued prior to 1990.

[100] Section 5.1(4) addresses the problem of liability for the pre-1990 period and it is in the light of that problem that s. 5.1(4) must be interpreted: see *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 at para. 36: "the notion that a statute is to be interpreted in light of the problem it was intended to address is as old at least as the 16th century."

[101] The Class submits that s. 5.1(4) deals only with claims for interest and that the claim for failure to invest is not barred. We disagree. In our view, Parliament's silence as to liability for failure to invest the funds does not undermine or limit the legal scope of s. 5.1(4) as a complete bar on all claims for failure to invest or pay interest pre-1990.

[102] The intention of Parliament in enacting s. 5.1(4) and using the words "claim…for or on account of interest" must be interpreted in light of the general legislative framework that governed the Crown and the DVA in relation to the administration of the funds of disabled veterans. There are clear legislative limitations imposed on the Crown in the administration of the Consolidated Revenue Fund, where the DVA-administered funds were required by law to be held. As we explain below, the governing legislative framework prevented the Crown from investing in external markets or from paying anything but interest as an investment return. The Crown, even when acting as a fiduciary, cannot act contrary to the law. Interest was the only form of investment return for which the government could in law have been liable during the relevant time period. When Parliament barred all claims "for or on account of interest" in s. 5.1(4), it intended to eliminate the only liability that could be imposed: to invest in interest-bearing assets such as savings bonds, and to pay interest on the veterans' accounts.

[103] The DVA-administered funds were properly held by the Crown in the Consolidated Revenue Fund. Section 102 of the *Constitution Act, 1867* provides that public money "shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada" and s. 2 of the *FA Act* defines the Consolidated Revenue Fund as "the aggregate of all public moneys that are on deposit at the credit of the Receiver General". Section 15 of the *FA Act* provides that the Minister of Finance is given the

"supervision, control and direction of all matters relating to the financial affairs of Canada", including the "management of the Consolidated Revenue Fund".

[104] Section 2(1)(d) of the *FA Act* defines "public money" as including "all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract". In our view, the DVA-administered funds at issue here fall squarely within the definition of "public money". The DVA-administered funds were "money that is paid to or received or collected by a public officer under … [a] trust … to be disbursed for a purpose specified in or pursuant to that … trust".

[105] Section 21 of the *FA Act* deals with public money received for a specific purpose:

> 21(1) Money referred to in paragraph (d) of the definition "public money" in section 2 that is received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to any statute applicable thereto.
>
> (2) Subject to any other Act of Parliament, interest may be allowed and paid from the Consolidated Revenue Fund in respect of money to which subsection (1) applies, in accordance with and at rates fixed by the Minister with the approval of the Governor in Council.

[106] Again, this provision embraces the DVA-administered funds at issue in this appeal.

[107] From the enactment of the *FA Act* to the end of the class period, by virtue of *FA Act*, s. 18(2) (Repealed, 1999, c. 26, s. 20), the Finance Minister was authorized to purchase, hold and sell federal debt securities "for the sound and efficient management of public money and the public debt". "Securities" is defined in s. 2 to mean federal debt securities:

> 'securities' means securities of Canada in certificated form or non-certificated securities of Canada, and includes bonds, notes, deposit certificates, non-interest bearing certificates, debentures, treasury bills, treasury notes and any other security representing part of the public debt of Canada.

[108] The Minister of Finance, accordingly, had no legislative authority to invest public money, including the DVA-administered funds, in equity markets. Section 90 of the *FA Act* expressly prohibits any person, unless authorized by an Act of Parliament, to acquire

shares of a corporation that would be held by or on behalf of or in trust for the Crown. Where Parliament has authorized external investment, it has done so expressly through complex statutory regimes: see, for example, *Canada Pension Plan Act*, R.S.C. 1985, c. C-8 and *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34. There is no specific regime applicable to DVA-administered funds.

[109] We agree with the Crown's submission that in the light of this legislative framework and in the absence of any specific legislation providing otherwise, the DVA-administered funds at issue on this appeal fall within the definition of "public money" to be held in the Consolidated Revenue Fund pursuant to the powers and limitations imposed by the *FA Act*, and accordingly could not be invested in external markets.

[110] When Parliament enacted s. 5.1(4), it did so against the background of the *FA Act* and the restrictions it imposed upon the use or investment of public money. As the DVA-administered funds could only be invested in certain interest-bearing securities, the words "for or on account of interest" were all that was required to achieve a complete bar to any claim for failure to invest or pay interest.

[111] In this regard, the motion judge correctly interpreted s. 5.1(4) in the 2000 liability decision when he found, at para. 43 that s. 5.1(4) "is on its face an absolute bar to this action." Regrettably, when faced with the adverse decision from the Supreme Court of Canada on the validity of s. 5.1(4), the motion judge adopted a different interpretation. No doubt motivated by a desire to right what he perceived to be a wrong to the disabled veterans, the motion judge's re-interpretation of s. 5.1(4) appears to us to be an untenable attempt to overcome the statutory hurdle that the Supreme Court had held was a valid bar to the veterans' claims.

[112] We reject the argument that s. 5.1(4) should be interpreted on the assumption that the DVA was obliged to manage the veterans' money without regard to the statutory framework governing public funds or, as the motion judge put it, that the Crown somehow failed "to grasp" the nature of its fiduciary duty. The issue of liability for failure to invest or pay interest in relation to the DVA-administered funds was placed squarely before Parliament, and the proposition that legislation should be interpreted on the basis that Parliament was ignorant of the law cannot be accepted.

[113] The Crown could not escape the legal framework imposed upon it as a public entity simply because it had undertaken a private law duty to the veterans. Fiduciary duties, absent some constitutional underpinning, do not trump legislation that expressly dictates the scope of the Crown's duties in relation to public funds. The Crown's fiduciary duty required the DVA to manage the veterans' funds as a reasonably prudent trustee, and a prudent trustee cannot ignore the law governing the investment of trust funds. In the case of the Crown, the *FA Act* prevented it from investing money held in the Consolidated Revenue Fund in external markets, and from paying anything but interest as an investment return.

[114] The suggestion in the motion judge's delivery decision that liability could be imposed for failure to enact legislation that fully met the Crown's fiduciary obligation is, with respect, unsupported by authority and entirely without merit. There is no constitutional impediment to preclude the application of the limitations imposed by the *FA Act* on the investment of public money, and a private law fiduciary duty does not trigger a duty to enact legislation. Similarly, the motion judge's assertion in the delivery decision, at para. 35, that "having undertaken a fiduciary obligation, [the bureaucracy] should change the rules relating to the Government banking system, or if that was impossible, bank elsewhere" is fundamentally flawed. The DVA did not have a "choice" of banking systems but was required by law to put the veterans' funds in the Consolidated Revenue Fund and to comply with the *FA Act*.

[115] The motion judge reasoned that as there was no definition of "interest" for the purposes of s. 5.1(4), it was appropriate to adopt the definition of interest used in s. 5.1(2)(d). As explained above, that subsection, which was never proclaimed in force, provides for the payment of interest fixed by s. 21 of the *FA Act*, namely 90% of the T-Bill rate. This rate of interest amounts to approximately ten percent of the damages assessed by the motion judge.

[116] Respectfully, we do not accept this interpretation. We disagree with the motion judge's view, expressed at para. 39, that "there is a symmetry and logic to treating the interest referred to in s. 5.1(4) as the same as the interest referred to, and specifically defined, in s. 5.1(2)(d)." We see no logic whatsoever in paying a very low defined rate of interest post-1990 but leaving the pre-1990 claim at large, limited only by the rate of interest to be paid in the future. Why would Parliament provide for the payment of a very modest rate of interest post-1990, but allow veterans to claim massive damages for the pre-1990 period? If Parliament intended to leave itself exposed to the pre-1990 claim, why would it limit the pre-1990 claim by the modest rate it was prepared to have the Crown pay post-1990? We agree with the Crown's submission that the Class has provided no credible explanation as to why Parliament would intend to prohibit the payment of $450 million of public money as interest, but willingly permit the payment of damages in a sum that is ten times larger. The interpretation, in our view, is so completely implausible that it must be rejected.

[117] In our view, the indicia of legislative intent lead to the inescapable conclusion that by enacting s. 5.1(4) of the *DVA Act*, Parliament intended to eliminate the Crown's liability for failure to invest or pay interest on the veterans' accounts before 1990 and that the effect of s. 5.1(4), now as before the Supreme Court of Canada, is to completely bar the Class's claims.

Issue 3: Did the motion judge err in finding that the Class's claim was not time-barred?

[118] As noted above, when the Class first brought its claim in 1999, one of the defences raised by the Crown was that the action was time-barred. The Crown argued that the claim of each member of the Class was governed by the particular limitation period prescribed by statute in the province where the individual resided and the cause of action arose. At worst – as the motion judge found to be the case – the Crown argued that the six-year limitation period provided for in s. 32 of the *CLPA* applied. It submitted that the cause of action underlying the class proceeding was discoverable at least by 1985 with the release of the Auditor General's report, and, at the latest, by 1990 with the passage of the *DVA Act* and specifically s. 5.1(4).

[119] In response, the Class argued that the Crown is precluded from relying on any limitation period on two principal grounds: "equitable fraud" and "discoverability".

[120] The principle of "equitable fraud" is aimed at preventing a limitation period from operating "as an instrument of injustice": *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at para. 66. It has been described in many ways. Essentially, it involves some form of unconscionable conduct on the part of a wrongdoer who stands in a special relationship with another party, where the conduct conceals the existence of a claim by that party against the wrongdoer and is considered by equity to be sufficient to preclude the wrongdoer from relying on a limitation period defence. See *Guerin, supra* at 390; *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563 at 573.

[121] In *Guerin*, Dickson J. described the concept in this fashion (at 390):

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the Statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563 [at p. 573], as, 'conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other', is sufficient.

[122] The motion judge determined that the Crown was prevented from relying upon a limitation period defence, in the circumstances of this case, by operation of the doctrine of equitable fraud. He further found that the cause of action was not discovered by the

Class until just prior to the commencement of the action in 1999. Respectfully, he erred in doing so.

[123] In paras. 24-27 of the 2003 damages decision the motion judge wrote:

> Was there, in the terms of the definition from *Kitchen v. Royal Air Force Association* adopted by *Guerin*, conduct by the Crown through the DVA towards the disabled veterans which, having regard to their special relationship, was 'a non-conscionable thing' for the one to do towards the other? In my view, the special relationship between the DVA and the disabled veterans has to be seen as encompassing not only the duty to invest, but generally the duty to act with the [utmost] good faith on behalf of the veterans, the duty to avoid any conflict with its obligations to the veterans, the prohibition against using the position for personal gain and the obligation on the DVA to disclose to the disabled veterans any material information.
>
> In supplementary reasons relating to costs, released in this case by the Court of Appeal on June 5, 2002, Austin J.A. listed a number of facts, which he gleaned from the materials, which list is directly relevant to the present case. The list is as follows:
>
> (a) From the very beginning, the legislative scheme in question authorized the payment of interest on treatment allowances administered by DVA;
>
> (b) From 1951 on, the *Financial Administration Act* explicitly allowed the payment of interest in respect of monies held in any special purpose account in the Consolidated Revenue Fund;
>
> (c) There was some evidence that interest would be paid if demanded;
>
> (d) For some time interest was credited on accounts of all the veterans at St. Anne de Bellevue Hospital near Montreal;
>
> (e) On the other hand, where veterans raised the matter of interest, they were told by department officials that such arrangements were not possible;

> (f) From at least the early 1970's on, DVA and others were aware of their duty to invest funds under their administration;
>
> (g) Amongst the proposed 'solutions' to the 'problem' of not paying interest or investing were 'keeping quiet' and 'eliminating the old liability';
>
> (h) The 'solution' chosen was to prohibit actions; and
>
> (i) On the evidence, neither the 'problem' nor the 'solution' was drawn to the attention of Parliament.
>
> In my view, this short list, drawn from the mass of materials produced by the Crown, is more than sufficient to meet the definition of 'equitable fraud' adopted for Canada in *Guerin* as stopping the limitation period from running until the fraud was discovered by the class.
>
> Although the 'problem' had been under discussion for years at the senior levels of the DVA, these discussions were confidential, and I saw no evidence that this information reached the front line workers that dealt with the disabled veterans and their families. This information all came to light after the commencement of this action, and the demands for production commenced…

[124] The motion judge went on to conclude, in relation to discoverability, that there was a reverse onus on the Crown as a result of its fiduciary position and that it was incumbent on the Crown to demonstrate "that the suspicions of each class member [were] aroused and that he or she determined not to investigate". The Crown had produced no such evidence.

[125] There are several difficulties with the foregoing reasoning.

[126] First, equitable fraud was not pleaded, in spite of several amendments to the pleadings. Consequently, although the issue was argued, the Crown was deprived of the opportunity to challenge the allegations of equitable fraud or fraudulent concealment "in the evidence [on the motion]": see *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528 (C.A.) at 534. Parties are entitled to have their issues resolved on the basis of the issues joined in the pleadings. See also *Oniel v. Metro Toronto Police Force* (2001), 195 D.L.R. (4th) 59 (Ont. C.A.) at paras. 87-88, and cases cited therein. This has significance as well for the reverse onus point, to which we will turn shortly.

[127] Second, the motion judge erred in law in relying upon the evidence which he noted that Austin J.A. had "gleaned" from the mass of materials before this court at the time of its 2002 liability decision in this action. Many of those facts – outlined in subparagraphs (e) through (i) cited in para. 123 above – were taken from sources that were admitted into evidence as "legislative facts" or "constitutional evidence" in relation to the argument respecting the validity of s. 5.1(4) of the *DVA Act*. They were not admitted as evidence for "adjudicative" purposes, and yet they were used by the motion judge to underpin a finding of unconscionable conduct on the part of unnamed servants of the Crown.

[128] Judges should be cautious about the use to which they put evidence admitted as legislative or constitutional fact, directed toward the validity or purpose of a legislative scheme (as here) or introduced in relation to a constitutional or *Charter* challenge.

[129] "Legislative facts," as Sopinka J. noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099:

> …are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements.

[130] The Supreme Court of Canada has commented, however, that "courts should nevertheless proceed cautiously to take judicial notice even as 'legislative facts' of matters that are reasonably open to dispute, *particularly where they relate to an issue that could be dispositive*" [emphasis added]: *R v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 28. In a wide-ranging discussion of the distinction between "adjudicative facts", "legislative facts" and "social facts" in *R v. Spence*, [2005] 3 S.C.R. 458, Binnie J. emphasized at paras. 60-61 that the closer the facts in question approach the "dispositive issue" or "the centre of controversy between the parties (whether social, legislative or adjudicative) as distinguished from background facts at or near the periphery", the more stringent the proof that may be called for.

[131] Here, the motion judge resorted to evidence that had been filed for the purpose of providing background with respect to the issue of the validity of s. 5.1(4), and used it to make findings on a central issue where the *lis* was directly between the Class and the Crown. He should not have done so.

[132] Third, there was no conduct on the part of the Crown that could be said to amount to "concealment" of the veterans' rights to assert their fiduciary claim for failure to pay interest on or invest the funds under administration. Parliament has been open in dealing with veterans' pensions and benefits since 1916. Departmental reports are recorded each year in the Public Accounts and are tabled in Parliament. The fact that the Crown did not generally pay interest on the veterans' funds, but did so in some cases, was a matter of

public record. Certainly, by 1985 – when the Report of the Auditor General specifically raised the issue of non-payment of interest and the Crown's potential liability in that regard – the facts necessary to underpin the claims of the class members were openly in the public domain. The Crown did nothing to hide these Reports or their implications. At the very latest, the enactment of legislation in 1990 providing for the payment of interest on such funds from that point on, and including the s. 5.1(4) amendment barring claims for prior interest, was sufficient public notice of the basis for the claim.

[133] The Class relies – as did the motion judge – on certain policy discussions that took place at senior levels of government, following release of the *Guerin* decision, regarding the various options open to the Crown for addressing its potential liability as evidence of fraudulent concealment. These discussions were not made public. They included the consideration of options such as not saying anything about the problem and eliminating the old liability. The Class also relies on the fact that the Minister of Justice made no specific reference to s. 5.1(4) – barring claims for or on account of retroactive interest – when he introduced the amending legislation providing for the payment of future interest in Parliament in 1990.

[134] In our view none of this amounts to concealment of the sort that would give rise to the operation of the equitable fraud exception in the circumstances. Public policy can only be set effectively if government officials are free to consider all lawful options in the course of wide-ranging and unrestricted discussion. Courts should not infer impropriety on the part of government simply from the ebb and flow of legitimate policy discussions amongst public servants.

[135] Finally, the motion judge erred in imposing a reverse onus on the Crown, particularly where, as here, equitable fraud had not been pleaded and the Crown had no opportunity to meet the claim at the evidentiary level. In concluding there is a reverse onus on discoverability where a fiduciary relationship exists, he relied upon the following passage from Michael Franks, *Limitation of Actions* (London: Sweet & Maxwell, 1959) at 237, cited by Southey J. in *Public Trustee v. Mortimer* (1985), 49 O.R. (2d) 741 (H.C.J.) at 755:

> This principle that ignorance negatives laches underlies the rules governing fraud and mistake. Thus where the plaintiff's claim to relief rests upon the defendant's fraud or where, being non-fraudulent, its existence has been fraudulently concealed from the plaintiff by the defendant, lapse of time cannot prejudice the plaintiff until he discovers the true situation or could, with the exercise of reasonable diligence, have discovered it. *Where the parties stand in a fiduciary relationship to each other, it is insufficient for the defendant to show simply that the plaintiff had the means of discovering the fraud: he must prove that the plaintiff's suspicions were*

> *aroused and that he determined not to investigate*. This general rule that time does not count against the plaintiff until the fraud is or could be discovered applies, not only where the doctrine of laches is alone applicable, but also where the Statute is applied by analogy; and *semble* where it applies directly as well. [Emphasis added.]

[136] Based on this passage, the motion judge concluded at para. 32 of the 2003 damages decision that "instead of … all the class members having to show that they exercised reasonable diligence, in inquiring why the were not receiving interest … the obligation would be on the Crown to prove that the suspicions of each class member [were] aroused and that he or she determined not to investigate".

[137] In general, those who assert a proposition have the burden of establishing it and, in the context of the discoverability principle, the plaintiff bears the burden of demonstrating that the cause of action was not discoverable: *Mikisew Cree First Nation v. Canada*, [2002] A.J. No. 596 (C.A.) at para. 83. We are not aware of any authority for the proposition that the onus is reversed where the discoverability issue arises within the framework of a fiduciary relationship. To say that the standard of diligence required of a "defrauded" person may be attenuated in situations where that person is entitled to rely upon the other party – as Southey J. did in *Public Trustee v. Mortimer* – is not the same thing. While it may make sense to be attuned to the level of proof that a plaintiff needs to put forward, depending on the circumstances, to meet the burden of discoverability, reversing the onus of proof is not justified. On an issue like discoverability (what did the plaintiff know about the claim, and when, and what steps did the plaintiff take to pursue it) it would be at best difficult for the party who is the target of the reverse onus to establish these factors, and at worst unlikely that the party could do so. The fact that a fiduciary has an obligation to keep the beneficiary of the relationship informed does not bear on this issue.

[138] In a class proceeding, such as this one, the burden imposed on the Crown "to prove that the suspicions of each class member [were] aroused and that he or she determined not to investigate" is an impossible one. Here, it would be particularly unfair to saddle the Crown with a reverse onus when equitable fraud was not pleaded and the Crown therefore had no opportunity to lead any evidence on the issue.

[139] The Class argues that the Crown's persistent denial of its fiduciary obligations to the veterans over the years, together with its failure to inform the veterans of their right to sue, constitutes equitable fraud. We do not agree. *Concealment* not *denial* is the gravamen of equitable fraud, and breach of the fiduciary obligation itself is not sufficient to trigger its application.

[140] Accordingly, for the foregoing reasons, we would give effect to this ground of appeal and hold that the Crown is entitled to rely upon at least the six-year limitation

period set out in s. 32 of the *CLPA*, and that the Class's cause of action was discoverable at least since the legislative amendments enacted in 1990.

Issue 4: Did the motion judge err in using a summary judgment procedure to assess damages, and did he err in the measure of damages itself?

[141] The Crown raises numerous other grounds of appeal, particularly with respect to the use of the Rule 20 summary judgment procedure and the measure of damages. While we do not wish to be taken to have approved of the motion judge's resort to Rule 20 in circumstances such as this, or to have approved of his approach to the measure of damages, it is unnecessary to deal with most of these issues for purposes of disposing of the appeal.

[142] The Crown submits, for instance, that the motion judge erred (amongst other ways) in the procedure adopted to assess damages by:

(a) resorting to the Rule 20 summary judgment process in a case such as this where complex and conflicting facts and complicated legal issues are in dispute;

(b) engaging in "litigation by instalment", seeking, on his own initiative, the filing of further evidence and argument on issues not raised by the respondent on the summary judgment record in the first instance;

(c) improperly striking the affidavit of one of the Crown experts;

(d) sitting on appeal of his own initial decision to take judicial notice of the propriety of providing for a basic asset allocation mix with a provision for variation from the norms within those fixed limits by subsequently conducting the trial of an issue on that very question; and

(e) repeatedly making findings of fact and resolving genuine issues requiring a trial for their determination based on conflicting expert testimony on several issues, including: (i) the criteria and standards of investment advisors and the application of those standards to the determination of an appropriate asset mix; (ii) the need to determine appropriate levels of risk tolerances; (iii) the determination of applicable administrative fees and expenses over the years since 1916; (iv) whether an interest-based model is more appropriate than a mixed, equity-based portfolio; (v) whether the mixed portfolio adopted by the motion judge is the

most appropriate; (vi) whether there exists a practice of rebalancing portfolios and the purposes for which re-balancing is effected; (vii) whether tactical asset allocation is a common practice within the investment industry; and (viii) whether the annual shifts within the specified limits as permitted by the motion judge can be equated to or justified as annual policy reviews.

[143] The Crown further submits that the motion judge erred in the measure of damages by:

(f) ignoring the legislative scheme that would have governed the conduct of the Crown had it invested the veterans' funds over the years in fulfilment of its fiduciary obligation;

(g) applying a "hindsight" principle that put the Class members in a better position than they could ever have been had they or any fiduciary been investing their funds;

(h) taking judicial notice as outlined above;

(i) ignoring limits on investment to which even private trustees would have been subject; and

(j) applying today's investment concepts and practices to past conduct over a period of seventy-four years (including a modern theory of portfolio investment that was not even used by Canadian investment managers until the mid-1980s).

[144] We have already commented on the effect of the legislative scheme that would have governed the Crown's conduct throughout the relative time period, and on the limits on investment to which it would have been subject. Although there is substance in the remainder of the Crown's submissions, we wish to comment briefly on only two: judicial notice and the hindsight principle.

(a) ***Judicial Notice***

[145] As we explained above, in his 2004 damages decision the motion judge found that the Crown acted as a trustee for the veterans' funds, and that it did so without any statutory parameters on what it could or should do in that role. He held that from 1916 forward the Crown should have invested the funds in a mixed portfolio of 60% bonds, 35% equity, and 5% cash. In addition, in order to provide for flexibility in responding to changing market conditions, and in order to maximize the annual returns, he directed that

variations be permitted in moving assets between categories, namely, 10% either way in both the bond and the equity portfolios and an upward variation of 15% in the cash portfolio. In other words, the percentage of bonds in the mixed portfolio could vary from 70% to 50%, the percentage of equity from 25% to 45%, and the cash from 5% to 20%.

[146] The motion judge's finding with respect to the asset mix variations was based on judicial notice. At para. 147 the 2004 damages decision, he wrote:

> This approach of providing a basic asset allocation mix, but with the provision for variance from the norms within fixed limits, is so common in the mutual fund industry, and other financial fields, and so well publicized, that I take judicial notice of it.

[147] This exercise in the taking of judicial notice resulted in an increase of $2.9 billion in the damage award to the Class.

[148] Later, during another hearing in the ongoing summary judgment saga concerning the assessment of damages in this matter – after Crown counsel objected to the taking of judicial notice on the basis that there was conflicting evidence on the subject – the motion judge directed the trial of an issue to determine whether it was open to him to have done so. In his decision 2005 judicial notice decision, he concluded that it was.

[149] We disagree.

[150] McLachlin J. (as she then was) summarized the concept of judicial notice in this fashion in *R v. Williams*, [1998] 1 S.C.R. 1128 at para. 54:

> The law of evidence recognizes two ways in which facts can be established in the trial process. The first is by evidence. The second is by judicial notice. … Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976.

[151] As the motion judge noted, judicial notice may be taken of facts that are common knowledge within a community or a particular class of the community: *R v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.) at 228.

[152] While a judge has jurisdiction to do so (see *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.) at 150, citing *McQuaker v. Goddard*, [1940] 1 K.B. 687 (C.A.)), there is at least something slightly incongruous about having the trial of an issue to determine

whether judicial notice can be taken of a fact. If a matter is "so notorious as not to be the subject of dispute among reasonable persons" or is readily ascertainable by resort to reliable sources, one may be forgiven for asking why a trial is necessary.

[153] In any event, we are not persuaded that the question of whether investment portfolio managers make use of asset-class swings in situations analogous to the administration of veterans' pensions and allowances is so notorious as to be beyond dispute amongst reasonable persons. Crown experts testified that such an investment strategy was not common in the industry and, in particular, that tactical asset allocation – varying asset mixes with a view to maximizing market return in a given time – was inappropriate for the veterans as it is an aggressive and risky investment strategy. Experts called on behalf of the Class took a different view. In short, there were differences of opinion. The judicial notice issue cannot be resolved by choosing, and making findings, as between those differing opinions.

[154] We note that even the motion judge did not conclude that the fact that portfolio managers had the ability to shift asset allocations in a portfolio, within limits, met the *Williams* test. Instead, he held that there was a "general acceptance", although not a "universal acceptance" in the investment community of such a practice. "General acceptance" will not suffice to ground judicial notice where, as here, there still remains a dispute amongst reasonable persons on the subject.

[155] The motion judge concluded his reasons in this regard by holding (at para. 62):

> While the general issue of judicial notice has been resolved in the affirmative, evidence and argument before me indicated more fully than the evidence and argument before my previous decision of December 31st, 2004, that *there are very real differences of opinion, and very real and cogent arguments over both the limits within which portfolio managers should be allowed to shift asset allocations*, and the reasons that a portfolio manager may validly have for making such shifts. Underlying all of this is the obvious complete unfamiliarity in the financial community with the concept of applying hindsight to investment decisions, because of the obvious impossibility of being able to do so under the normal circumstances of financial decision making. [Emphasis added.]

[156] This leads us to another equally troubling problem in this case, and ultimately to the issue of the motion judge's application of the hindsight principle to the assessment of damages.

[157] The troubling problem is that it is not easy to determine where the taking of judicial notice ends and the resort to evidence before the motion judge on the issue of asset mix allocation begins. If there is evidence it is not necessary to take judicial notice, which involves a judge relying upon his or her own knowledge or research. Moreover, the range of permissible variations is as pivotal as the initial premise that such variations are allowed in the first place. As the motion judge noted, "there are very real differences of opinion, and very real and cogent arguments over both the limits within which portfolio managers should be allowed to shift asset allocations and the reasons that a portfolio manager may validly have for making such shifts." But did he take judicial notice of these factors as well, since he had already decided upon the permissible range of asset mix variations before directing the trial of the issue? Or, if not, did he adopt the permissible ranges from conflicting evidence before him on the summary judgment motion? In either case, the procedure was flawed.

[158] The motion judge's resort to judicial notice was unwarranted in the circumstances of this case. And it made an enormous difference – $2.9 billion – in the damages assessed.

(b) ***The hindsight principle***

[159] The motion judge's central thesis on the assessment of damages was that the Crown ought to have invested the veterans' funds in his model of a mixed portfolio, with a limited power to alter the asset mix, and with the full benefit of hindsight. He pushed his hindsight analysis too far, however. In effect, he imposed a standard of optimum maximization of gains on an annual basis for the entire period from 1916 to 1990. No fiduciary or investment manager has ever achieved such perfection, and none ever will. Even if the motion judge were correct in adopting his mixed asset portfolio theory, the Class was not entitled to expect such a high standard from the Crown.

[160] The Supreme Court of Canada has sanctioned the view that losses for breach of fiduciary duty may be assessed at the time of trial with the full benefit of hindsight: see *Guerin, supra* at 362; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 554-55. However, the measure of damages for breach of fiduciary duty is *restitutionary*. Plaintiffs are entitled to be placed in as good a position as they would have been in had the breach not occurred: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 440. But they are not entitled to be placed in a *better* position, as the motion judge did here. No authority has suggested that the hindsight principle may be used for such a purpose, and it would make no sense to do so because it would be inconsistent with the basis for recovery in a fiduciary obligation case.

[161] Yet that is precisely what the motion judge did. Based on the model he outlined, the Class had its expert, Professor Charette, formulate an algorithm to deal with the permitted swings as follows:

(i) Pursuant to the simple terms of the algorithm, if an any given year:

(b) The return on bonds is greater than the return on equity and if the return on bonds is greater than the return on cash, then the asset mix would be 70% bonds, 25% equities and 5% cash;

(ii) If the return on equity is greater than the return on bonds, and the return on equity is greater than the return on cash, then the asset mix would be 50% bonds, 45% equities and 5% cash;

(iii) If the return on cash is greater than the return on bonds, and the return of bonds is greater than the return on equities, then the asset mix would be 55% bonds, 25% equities and 20% cash;

(iv) If the return on cash is greater than the return on equity, and the return on equity is greater than the return of bonds, then the asset mix would be 50% bonds, 30% equities, and 20% cash.

[162] The Crown led evidence to show the probabilities of any investment manager generating the perfect hindsight returns envisaged by the motion judge. The probability of doing so over a 10-year period was 1 in 595,000; over a 25-year period, 1 in 273 trillion; and over an 85-year period, 1 in 12 followed by 48 zeros.

[163] The motion judge's approach to hindsight fails the reality test. It is inconsistent with the restitutionary principle on which damages are awarded in fiduciary cases. He should not have adopted it.

VI. CONCLUSION

[164] For these reasons, we allow the Crown's appeal and dismiss the Class's cross-appeal. If the parties cannot agree, they may make written submissions on the issue of costs not exceeding ten double-spaced pages. The Crown's submission shall be filed within fifteen days of the release of this judgment, and the Class's submission shall be filed ten days thereafter.

Signed: "M.J. Moldaver J.A."
"Robert J. Sharpe J.A."
"R.A. Blair J.A."

RELEASED: “MJM” July 4, 2007