

## A Theory of Fiduciary Liability

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Article abstract

The law of fiduciaries has been developed in an unprincipled manner. Consequently, the common law lacks a clear idea of the nature of the fiduciary relationship, the justification for fiduciary duties, and the purpose of fiduciary remedies. However, according to the author a principled theory of fiduciary liability may be derived from the common law. The focal point is the recent decision of the Supreme Court of Canada in *Galambos v. Perez*. The theory of liability suggested by Galambos and developed by the author is based on the conventional notion that fiduciary liability is premised upon the existence of a fiduciary relationship. The author argues that a clearer account of the nature and normative significance of the fiduciary relationship is critical to developing a sound understanding of the nature and scope of fiduciary duties. Under the theory developed by the author, the fiduciary relationship is treated as a distinctive kind of legal relationship. It is one in which one person (the fiduciary) wields discretionary power over the practical interests of another (the beneficiary). According to the author, fiduciary duties are explicable solely in terms of normatively salient qualities of the fiduciary relationship. The author explains these qualities and shows how they support and limit the incidence of fiduciary duties.

## A THEORY OF FIDUCIARY LIABILITY

*Paul B. Miller\**

The law of fiduciaries has been developed in an unprincipled manner. Consequently, the common law lacks a clear idea of the nature of the fiduciary relationship, the justification for fiduciary duties, and the purpose of fiduciary remedies. However, according to the author a principled theory of fiduciary liability may be derived from the common law. The focal point is the recent decision of the Supreme Court of Canada in *Galambos v. Perez*. The theory of liability suggested by Galambos and developed by the author is based on the conventional notion that fiduciary liability is premised upon the existence of a fiduciary relationship. The author argues that a clearer account of the nature and normative significance of the fiduciary relationship is critical to developing a sound understanding of the nature and scope of fiduciary duties. Under the theory developed by the author, the fiduciary relationship is treated as a distinctive kind of legal relationship. It is one in which one person (the fiduciary) wields discretionary power over the practical interests of another (the beneficiary). According to the author, fiduciary duties are explicable solely in terms of normatively salient qualities of the fiduciary relationship. The author explains these qualities and shows how they support and limit the incidence of fiduciary duties.

Le droit fiduciaire fut développé sans principe directeur. Par conséquent, la common law n'a pas d'idée claire de ce qu'est la nature de la relation fiduciaire, de la justification des obligations fiduciaires et de l'objectif des remèdes fiduciaires. Toutefois, selon l'auteur, le principe théorique de la responsabilité fiduciaire provient peut-être de la common law. L'élément principal est le jugement récemment rendu par la Cour suprême du Canada dans *Galambos c. Perez*. La théorie de la responsabilité suggérée par Galambos et développée par l'auteur est basée sur la notion conventionnelle selon laquelle la relation fiduciaire est la prémisse sur laquelle l'existence d'une responsabilité fiduciaire est établie. L'auteur tente de démontrer qu'une explication plus claire de la nature et de la signification normative de la relation fiduciaire est un élément essentiel au développement d'une compréhension informée de la nature et de la portée des obligations fiduciaires. Selon la théorie développée par l'auteur, la relation fiduciaire est traitée comme étant une relation légale distincte. Il s'agit d'une relation dans laquelle une personne (le fiduciaire) exerce un pouvoir discrétionnaire sur les intérêts d'une autre personne (le bénéficiaire). Selon l'auteur, les obligations fiduciaires dépendent principalement des qualités normatives saillantes de la relation fiduciaires. L'auteur explique ces qualités et démontre comment ces dernières supportent et limitent l'incidence des obligations fiduciaires.

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\* Assistant Professor, Faculty of Law, Queen's University. I am grateful to Joshua Getzler, Lionel Smith, and the *Journal's* anonymous reviewers for their helpful comments. I retain responsibility for any errors or omissions.

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## Introduction

Throughout the common law world, the law of fiduciaries has proven unusually vexing due to prevailing uncertainty on the essential elements of fiduciary liability. There is some consensus on the basic parameters of liability, including the kinds of relationships that are fiduciary, the duties that constrain the conduct of fiduciaries, and the remedies triggered by breach of fiduciary duty. Put simply, it is generally accepted that fiduciary relationships give rise to fiduciary duties owed by the fiduciary to the beneficiary, breach of which vests in the beneficiary remedial rights relative to the fiduciary.

There is agreement on little else. Thus, the law has evolved absent a general theory of liability. We lack a clear concept of the fiduciary relationship, the basis of fiduciary duties, or the purposes served by fiduciary remedies. This has meant considerable uncertainty and inconsistency in the authorities, as a result of which fiduciary liability has been condemned as incoherent. Some have suggested that the incoherence reflects a flawed fundamental premise in our thinking about the nature of fiduciary liability. We have been misled in assuming that fiduciary liability is a distinctive form of private liability; it might better be understood as an outgrowth of contract or unjust enrichment.<sup>1</sup>

The predicament facing fiduciary law is not simply the product of neglect. Several important theoretical analyses of fiduciary liability have been offered.<sup>2</sup> None of them has yet earned significant support. However, judges have generally been reluctant to address fundamental questions about fiduciary liability. The jurisprudence reveals a tendency to assert rather than explain the existence of fiduciary relationships and to assume rather than justify obligations attendant upon them.

The jurisprudence of the Supreme Court of Canada has departed from this tendency. The Court has shown rare sensitivity to conceptual problems and it has attempted to confront some of them. Its efforts have not been well-received. Indeed, the fiduciary jurisprudence of the Court has been roundly excoriated. Observers claim that fiduciary law in Canada is

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<sup>1</sup> Frank H Easterbrook & Daniel Fischel, "Contract and Fiduciary Duty" (1993) 36:1 *JL & Econ* 425; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *Law Q Rev* 472.

<sup>2</sup> See e.g. Peter Birks, "The Content of the Fiduciary Obligation" (2000) 34:1 *Isr LR* 3; Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 *Law Q Rev* 452; Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83:1 *Can Bar Rev* 35; D Gordon Smith, "The Critical Resource Theory of Fiduciary Duty" (2002) 55:5 *Vand L Rev* 1399 [Smith, "Resource Theory"]; and Lionel Smith, "The Motive, Not the Deed" in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: Butterworths, 2003) 53 [Smith, "Motive"].

particularly unprincipled and incoherent.<sup>3</sup> Some think that the parameters of fiduciary liability are so ill-defined that anyone might unwittingly become a fiduciary. In *A.(C.) v. Critchley*, the British Columbia Court of Appeal amplified a scathing indictment rendered by the Chief Justice of Australia, as he then was:

In a speech delivered in 1988 to a Canadian-Australian legal-judicial exchange in Canberra, Mason C.J.A. commented humorously, but with considerable accuracy, that: “All Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!”

Our Supreme Court of Canada has led the way in the common law world in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern.<sup>4</sup>

To an extent, the criticism is justified. The Court has not supplied a coherent theory of fiduciary liability. It has struggled to articulate the nature of the fiduciary relationship, the foundation of fiduciary duties, and the function of fiduciary remedies. The reasoning in many leading judgments seems ad hoc. Yet, the criticism is unfair given that these failings are universal. Fiduciary law everywhere has eluded a sound theory of liability.

It is to the credit of the Court that it has been willing to hazard answers to fundamental questions about fiduciary liability. Despite its failure to provide decisive answers, the Court has meaningfully contributed to collective efforts to clarify the foundation, nature, and scope of fiduciary liability. Perhaps chastened by criticism, the Court had not for a decade addressed these issues in broad terms.<sup>5</sup> That alone makes its recent decision in *Galambos v. Perez* momentous.<sup>6</sup>

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<sup>3</sup> See e.g. Laura Hoyano, “The Flight to Fiduciary Haven” in Peter Birks, ed, *Privacy and Loyalty* (Oxford: Oxford University Press, 1997) 169; Sarah Worthington, “Fiduciaries: When is Self-Denial Obligatory?” (1999) 58:3 Cambridge LJ 500 [Worthington, “Fiduciaries”].

<sup>4</sup> [1998] 166 DLR (4th) 475 at 496, 60 BCLR (3d) 92.

<sup>5</sup> Arguably, the last decision in which the Court paid broad consideration to these matters was *Soulos v Korkontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214. In more recent decisions, the Court focused on narrower questions, such as the content of particular fiduciary duties and the implications of fiduciary characterization of particular relationships. See e.g. *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177 (conflict

The history of the Court's entanglements in the fundamental questions of fiduciary liability, set off against its recent silence, might have generated expectations that it would shy away from broad pronouncements. Those expectations are not borne out. Indeed, *Galambos* offers an encompassing and generally salutatory reinterpretation and extension of the Court's fiduciary jurisprudence.

In what follows, I offer a contextual analysis of *Galambos* in light of the overriding problem of establishing the theoretical basis of fiduciary liability. In Part I, I argue that the Court's pre-*Galambos* jurisprudence yields approximate approaches to fiduciary liability. Determinations of liability are approximate in that they are premised not upon principles but rather upon inexact characterizations of the fiduciary relationship. Despite this, in Part II, I argue that selected elements of that jurisprudence, as interpreted in *Galambos*, are suggestive of a principled theory of liability. At the core of the theory lies a clear idea of the essential character of the fiduciary relationship. This idea is critical to the development of a more robust account of the foundation, nature, and scope of fiduciary obligation. In Part III, I highlight problems with residuum of the approximate approach and suggest how the emerging theory of fiduciary liability might be usefully emended, amplified, and extended.

## I. Approximate Approaches to Fiduciary Liability

Determinations of fiduciary liability are exercises in approximation. This is true of Canadian fiduciary law as well as that of the United States and Commonwealth countries. Nowhere is fiduciary liability principled. Everywhere, it turns on vague notions about the nature and salience of fiduciary relationships and the function of fiduciary duties. Nevertheless, conventional determinations of fiduciary liability are not random. Indeed, they are telling of the character of the fiduciary relationship as well as the nature, foundation, and scope of fiduciary duties.

Most significant is the revelation that the fiduciary relationship is the central organizational concept in fiduciary liability. In Canada and elsewhere, the conventional view is that fiduciary liability is founded upon the establishment of a fiduciary relationship between a fiduciary and benefi-

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of duties rule emanating from the duty of loyalty: *infra* note 74, and accompanying text); *KLB v British Columbia*, 2003 SCC 51, [2003] 2 SCR 403 (importance of distinguishing fiduciary from non-fiduciary duties in the parent/guardian-child relationship: *infra* note 45, and accompanying text)

<sup>6</sup> 2009 SCC 48, [2009] 3 SCR 247 [*Galambos*].

ciary.<sup>7</sup> On this view, fiduciary liability is determined by proceeding step-wise through two questions: First, was the relationship between the parties fiduciary in nature? Second, did the fiduciary breach a fiduciary duty?<sup>8</sup> The conventional view entails that something in the character of the fiduciary relationship is necessary and sufficient to explain and justify fiduciary liability.

While entrenched, the conventional approach to fiduciary liability has suffered because it lacks a clear account of the character of the fiduciary relationship and the connection between it and fiduciary duties. The Supreme Court of Canada has been especially sensitive to these deficits. Its protracted efforts at resolving them are at once illustrative of the problems endemic in fiduciary law in other jurisdictions and instructive of the possibilities for a principled theory of liability of general application.

### A. *The Nature of the Fiduciary Relationship*

The conventional view on fiduciary liability holds that liability turns upon breach of duties occasioned by fiduciary relationships. Yet the authorities reveal widespread uncertainty and confusion on three critical aspects of fiduciary relationships: their essential character, their formation, and their structural qualities subsequent to relationship formation. As Justice La Forest said in *Lac Minerals*, “There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.”<sup>9</sup>

Ultimately two approaches to the identification of fiduciary relationships have been adopted in the authorities. Under the first, status-based approach, new categories of relationship are deemed to have fiduciary

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<sup>7</sup> See *Guerin v Canada*, [1984] 2 SCR 335 at 384, 13 DLR (4th) 321, Dickson J, as he then was [*Guerin*]: “It is the nature of the relationship ... that gives rise to the fiduciary duty.” This view is also conventional elsewhere in the Commonwealth and in the United States. See e.g. *Restatement (Second) of Torts* § 874 (1977): “One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation”; Conaglen, *supra* note 2 at 454-55; Smith, “Resource Theory”, *supra* note 2 at 1432; John Glover, “The Identification of Fiduciaries” in Birks, *supra* note 3, 269.

<sup>8</sup> For an illustration, see *Hospital Products Ltd v United States Surgical Corp*, (1984) 156 CLR 41, 55 ALR 417 (HCA) [*Hospital Products* cited to CLR]. In separate judgments the justices each sought to determine first whether the relationship was fiduciary and then whether liability had been established for breach of fiduciary duty. See also *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81, Wilson J [*Frame* cited to SCR]; *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449, McLachlin J, as she then was, [*Norberg* cited to SCR]; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14, La Forest J [*Lac Minerals* cited to SCR].

<sup>9</sup> *Ibid* at 643-44.

status by virtue of their similarity to a category with established status. Under the second, fact-based approach, individual relationships are recognized as fiduciary on a case-by-case basis by virtue of their possession of certain indicia of fiduciary relationships.

### 1. Status-Based Fiduciary Relationships

The status-based approach is the longest-standing and most widely used method of identifying fiduciary relationships. Under this approach, status determines whether a relationship is to be recognized as fiduciary. Confronted with a given relationship, the court will categorize it (e.g., as debtor-creditor, trustee-*cestui que trust*, lawyer-client) and determine whether the category is conventionally recognized as fiduciary. If so, it is generally treated as fiduciary. If not, it falls to be considered whether the category ought to be recognized as having fiduciary status. Courts have proven highly reluctant to anoint new categories of fiduciary relationship given concerns over undue expansion of the scope of liability.

The status-based approach is not telling of the character of the fiduciary relationship. Indeed, it is said to have evolved from a line of English authorities in which the character of the relationship was considered unimportant to the determination of fiduciary liability. According to Len Sealy, centuries ago the practice was simply to determine whether a given kind of relationship was sufficiently similar to that between trustee and *cestui que trust* to be recognized as such. Over time, courts “spoke of a ‘quasi-trust,’ or said that the relationship was ‘in some respects’ or ‘for limited purposes’ one of trusteeship.”<sup>10</sup> No effort was made to articulate the general kind of legal relationship within which these particular kinds (trust, and quasi-trust) fell.

This practice gave way to the modern convention of recognizing categories of relationship as imbued with fiduciary status. Accordingly, relationships deemed fiduciary are considered exemplars of a distinctive kind of legal relationship. The process of reasoning that generates status is purely analogical: new categories of relationship are recognized as fiduciary simply by virtue of having been found sufficiently similar to a paradigmatic category—typically, that between trustee and *cestui que trust*. As Worthington explains:

[F]iduciary law evolved from Equity’s regulation of the relationship between trustees and beneficiaries. Over time these rules were extended, with minor modifications, to cover other situations that seemed analogous. Now it is accepted that relationships between directors and their companies, agents and their principals, solicitors

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<sup>10</sup> LS Sealy, “Fiduciary Relationships” [1962]:1 Cambridge LJ 69 at 71.



and their clients, and partners and their co-partners are all fiduciary. These are all 'status-based' fiduciary relationships. The status itself inevitably attracts fiduciary impositions.<sup>11</sup>

Problems with the status-based approach have attracted judicial notice. In *Guerin*, Justice Dickson eschewed it:

[I]t is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.<sup>12</sup>

Justice Dickson further refused to countenance classificatory rigidity, emphasizing that "the categories of fiduciary, like those of negligence, should not be considered closed."<sup>13</sup> In her dissenting opinion in *Frame*, Justice Wilson echoed these points and suggested that they bespeak the need for renewed efforts at theorizing the fiduciary relationship:

In the past the question whether a particular relationship is subject to a fiduciary obligation has been approached by referring to categories of relationships in which a fiduciary obligation has already been held to be present ... As well, it has been frequently noted that the categories of fiduciary relationship are never closed ... An extension of fiduciary obligations to new 'categories' of relationship presupposes the existence of an underlying principle which governs the imposition of the fiduciary obligation.<sup>14</sup>

Justice Wilson recognized that a general theory of fiduciary liability has proven elusive:

[T]here has been a reluctance throughout the common law world to affirm the existence of and give content to a general fiduciary principle which can be applied in appropriate circumstances. Sir Anthony Mason ... is probably correct when he says that "the fiduciary relationship is a concept in search of a principle." As a result there is no definition of the concept "fiduciary" apart from the contexts in which it has been held to arise.<sup>15</sup>

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<sup>11</sup> Sarah Worthington, *Equity* (Oxford: Oxford University Press, 2003) at 129 [Worthington, *Equity*].

<sup>12</sup> *Supra* note 7 at 341.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra* note 8 at 134-35. She added: "The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationships is never closed" (*ibid.* at 135).

<sup>15</sup> *Ibid.*

Rather than hazard a theory of liability, or even a definition of the fiduciary relationship, Justice Wilson championed the fact-based approach to identifying fiduciary relationships.

## 2. Fact-Based Fiduciary Relationships

As might be expected, under the fact-based approach, facts rather than status drive the determination of the nature of the relationship. The analysis is, in principle, straightforward. A relationship may be identified as fiduciary by virtue of its possession of certain characteristics or indicia of recognized fiduciary relationships.<sup>16</sup> Stipulation of the indicia has been the central challenge faced by the Court in developing this approach. An initial foray is found in Justice Wilson's judgment in *Frame*:

[T]here are common features discernible in the contexts in which fiduciary duties [has] been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>17</sup>

In subsequent cases, the Supreme Court affirmed Justice Wilson's list and sought to refine and expand upon it. Its efforts did not prove terribly fruitful. In two landmark cases, the Court was deeply split on the salience, meaning, and relative priority of a range of indicia.

In the first, *Lac Minerals*, the Justices disagreed whether a fiduciary relationship had been established between mining companies negotiating towards a joint venture. The junior company, Corona, possessed commercially valuable information concerning the mining prospects of certain property. It needed to establish a joint venture with a senior mining company to develop it and commenced negotiations to that end with Lac Min-

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<sup>16</sup> As McCamus explained, "[F]iduciary relationships may also arise in relationships that do not come within the prescribed list, provided that, on its facts, the particular relationship possesses the requisite fiduciary character." John D McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28:1 Can Bus LJ 107 at 108.

<sup>17</sup> *Supra* note 8 at 136.

erals. Lac Minerals subsequently purchased and developed the property based on information disclosed to it in confidence by Corona during the negotiations. Lac Minerals was sued for breach of contract, confidence, and fiduciary duty. A majority of the Court agreed that breach of confidence had been proved. The question whether the relationship between the joint venturers was fiduciary, proved far more difficult and divisive.

Justice La Forest for the minority on the issue held that a fiduciary relationship had been established. In so doing, he identified a range of new indicia of fiduciary relationships, including influence, ascendancy, disclosure of confidential information, trust, and confidence.<sup>18</sup> He also emphasized the reasonable expectations of the parties as determined by industry custom.<sup>19</sup> Defining vulnerability as susceptibility to harm,<sup>20</sup> Justice La Forest de-emphasized it, saying “vulnerability is not ... a necessary ingredient in every fiduciary relationship ... when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation.”<sup>21</sup>

Justice Sopinka for the majority on the issue denied that the facts disclosed a fiduciary relationship. In reaching his conclusion, he rejected the extensive list of indicia proposed by Justice La Forest. Justice Sopinka endorsed Justice Wilson’s list from *Frame*.<sup>22</sup> He also insisted that “dependency or vulnerability” is the one “indispensable” characteristic of fiduciary relationships<sup>23</sup> and held that vulnerability must be “physical or psychological” in nature.<sup>24</sup>

The next and last significant effort by the Court to develop the fact-based approach came in *Hodgkinson v. Simms*.<sup>25</sup> Hodgkinson, an investment professional, sought and obtained the advice of Simms, a tax and investment advisor, on tax planning and tax-sheltered investments—matters foreign to his expertise. On the basis of that advice, he invested in a series of real estate developments. Unbeknownst to Hodgkinson, Simms received referral fees from the developers. The real estate market crashed and Hodgkinson lost his investment. Hodgkinson sued Simms for breach

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<sup>18</sup> *Lac Minerals*, *supra* note 8 at 648, 656-66.

<sup>19</sup> *Ibid* at 659-62.

<sup>20</sup> *Ibid* at 663.

<sup>21</sup> *Ibid* at 662.

<sup>22</sup> *Ibid* at 598.

<sup>23</sup> *Ibid* at 599.

<sup>24</sup> *Ibid* at 606.

<sup>25</sup> *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161 [*Hodgkinson* cited to SCR].

of fiduciary duty, claiming he would not have invested, and thus suffered the loss, had he known of Simms' interest.

The Court was again deeply divided. Justice La Forest, now writing for the majority, held that a fiduciary relationship had been established. In reaching that conclusion, he questioned the indicia emphasized by the dissent. First, Justice La Forest again resisted the claim that vulnerability is essential: “[V]ulnerability is not the hallmark of [the] fiduciary relationship though it is an important *indicium* of its existence.”<sup>26</sup> In his view, vulnerability is an insufficiently precise *indicium* of the fiduciary relationship because it is also characteristic of other relationships treated differently in law and equity. Second, Justice La Forest disputed the relevance of equality of bargaining power.<sup>27</sup> Lastly, he dismissed the idea that a contract between individuals is incompatible with the existence of a fiduciary relationship between them.<sup>28</sup>

Justice La Forest explained how, in his view, fact-based analysis ought to be undertaken. He identified several “non-exhaustive examples of evidential factors”, reaffirming the relevance of discretion, influence, reliance, and trust.<sup>29</sup> To this, he added confidentiality and the “complexity and importance of the subject matter”.<sup>30</sup> He also said that provision of advice is a critical characteristic of some (“advisory”) fiduciary relationships.<sup>31</sup> Justice La Forest intimated, but did not explain, a distinction between analyses appropriate respectively to commercial and advisory relationships,<sup>32</sup> suggesting it should be more difficult to establish the former as fiduciary.<sup>33</sup> Under the rubric of “community or industry standards”, he reaffirmed the relevance of industry and professional custom.<sup>34</sup> Finally, he

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<sup>26</sup> *Ibid* at 405.

<sup>27</sup> *Ibid* at 406.

<sup>28</sup> In his words, “[T]he existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty” (*ibid* at 407).

<sup>29</sup> *Ibid* at 409.

<sup>30</sup> *Ibid* at 410.

<sup>31</sup> He cited *Shepherd* approvingly: “It appears to be settled that any person can, by offering to give advice in a particular manner to another, create in himself fiduciary obligations stemming from the confidential nature of the relationship created” (*ibid* at 417, citing *JC Shepherd, The Law of Fiduciaries* (Toronto: Carswell, 1981) at 28). Neither *Shepherd* nor *La Forest J* clarified the “particular manner” in which the provision of advice generates fiduciary obligations or explained the “confidential nature” of relationships between advisor and advisee.

<sup>32</sup> *Hodgkinson, supra* note 25 at 417-20.

<sup>33</sup> *Ibid* at 414.

<sup>34</sup> *Ibid* at 411-13, 423-25.

again argued that determination of the “reasonable expectations of the parties” is essential.<sup>35</sup>

In a forceful dissent, Justices Sopinka and McLachlin, as she then was, denied that the relationship was fiduciary. They were critical of the ever-expanding list of indicia endorsed by the majority, fearing it would exacerbate uncertainty over the scope of liability. They rejected the idea that provision of advice is itself pertinent saying “the cases suggest that the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other.”<sup>36</sup> Justices Sopinka and McLachlin also dismissed the suggestion that any significance attaches to a distinction between commercial and advisory relationships.<sup>37</sup>

Justices Sopinka and McLachlin confined their analysis to commonly cited indicia. Justice Wilson’s list from *Frame* was again endorsed.<sup>38</sup> Also emphasized were trust, confidence, dependence and reliance.<sup>39</sup> Most significantly, they attempted to bring stability to the fact-based analysis by adding an assessment of magnitude. Speaking first of trust and confidence, Justices Sopinka and McLachlin said:

The difficulty lies in determining *what* measure of confidence and trust are sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty ... Accepting that a bright line may be elusive, is there some hallmark that provides a reliable indicator of the acceptance of a fiduciary obligation? The vast disparity between the remedies for negligence and breach of contract ... and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance to those concerned to stay in the former camp and not stray into the latter.<sup>40</sup>

Shifting focus to reliance, they essentially drew that bright line:

Phrases like “unilateral exercise of power”, “at the mercy of the other’s discretion” and “has given over that power” suggest a *total* reliance and dependence on the fiduciary by the beneficiary ... Reliance is not a simple thing. As Keenan J. notes in *Varcoe v. Sterling* at p.235, “[t]he circumstances can cover the whole spectrum from total

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<sup>35</sup> *Ibid* at 411-13.

<sup>36</sup> *Ibid* at 466.

<sup>37</sup> *Ibid* at 468-70.

<sup>38</sup> *Ibid* at 462, citing *Frame*, *supra* note 8 at 136.

<sup>39</sup> *Ibid* at 465.

<sup>40</sup> *Ibid* at 465-66.

reliance to total independence". To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.<sup>41</sup>

The last claim is questionable.<sup>42</sup> Clearly the dissenting justices recognized the need to add a measure of discipline to reasoning under the fact-based approach. Unfortunately it does not admit of discipline.

### 3. Problems with the Status- and Fact-Based Approaches

The Supreme Court of Canada is clearly aware of difficulties with the status- and fact-based approaches. However, it appears to have harboured hope that they might be resolved. In fact, neither approach is salvageable. Neither affords a principled basis for the ascription of liability. As such, neither affords the predictability and flexibility expected of liability rules at common law. Further, neither approach is capable of vindicating the idea that fiduciary liability is premised upon essential characteristics of the fiduciary relationship.

Consider first the status-based approach. As mentioned earlier, under this approach, status drives relationship characterization and is thus the basis for ascription of liability. The status-based approach is unprincipled for the simple reason that determinations of status are not conceptually disciplined. They lack reasoned justification. Courts have failed to say which similarities justify analogies drawn between a given category of relationship and a paradigmatic category.<sup>43</sup> Further, they have failed to explain the process of reasoning by which analogies are to be drawn.

Inconsistency is a predictable consequence of unprincipled mechanisms for the determination of liability. Inconsistencies of reasoning and result are found in cases decided under the status-based approach. Inconsistency of the former variety is found in disagreement over similarities that justify treating one category of relationship as analogous to another. In some cases, emphasis is laid upon the extent to which the categories of relationship invite or require trust and confidence.<sup>44</sup> In other cases, pri-

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<sup>41</sup> *Ibid* at 467-68 [emphasis added].

<sup>42</sup> As Flannigan points out, "Though the two judges purported to extract this test from the usual suspects (Dickson in *Guerin*, Wilson in *Frame*, Weinrib, Finn, Shepherd, Frankel), there is simply no jurisprudential or conceptual foundation for it" (*supra* note 2 at 73).

<sup>43</sup> The failure to supply even minimal criteria of relevance to constrain the analogical reasoning is problematic. As Glover recognized: "Analogical reasoning lies at [the] heart of equity's development. But we should pause ... Quite irrelevant likenesses can establish a common link between two things" (*supra* note 7 at 271).

<sup>44</sup> In arguing that the physician-patient relationship ought to be recognized as fiduciary, McLachlin J noted that "it is readily apparent that the doctor-patient relationship

mary weight is given to the degree to which the categories of relationship feature vulnerability, or engender reliance.<sup>45</sup> In yet others, the emphasis is on inequality of power.<sup>46</sup> Inconsistencies in result are most clearly reflected in significant cross-jurisdictional variation in lists of recognized categories of fiduciary relationship. For instance, Commonwealth courts have been divided on the question whether the physician-patient relationship should be considered fiduciary.<sup>47</sup>

These inconsistencies have troubling implications for the rule of law requirement that the common law provide a reliable guide to rightful conduct. Because the similarities motivating analogical reasoning have been left undefined, individuals in categories of relationship whose status is undetermined face uncertainty over the terms governing their relationship. Parties to a relationship of recognized fiduciary status are only slightly better off. Worthington overstates in saying that “status itself invariably attracts fiduciary impositions.”<sup>48</sup> The Supreme Court of Canada has repeatedly said that relationships will not always be treated as fiduciary in spite of their status.<sup>49</sup> This compounds existing uncertainty. But more importantly, it fundamentally undermines the status-based approach, raising the question: If status does not invariably make a relationship fiduciary, what does?

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shares the peculiar hallmark of the fiduciary relationship—trust” (*Norberg*, *supra* note 8 at 272).

<sup>45</sup> Vulnerability has been said to justify treating parent-child and guardian-ward relationships as akin to those of other status categories of fiduciary relationship. See e.g. *KLB*, *supra* note 5 at para 38.

<sup>46</sup> See *Guerin*, *supra* note 7. Dickson J argued that the discretionary power wielded by the Crown over property owned by an aboriginal band justified treating the Crown-aboriginal relationship as fiduciary in a manner akin to the relationship between trustee and *cestui que trust*.

<sup>47</sup> *Norberg*, *supra* note 8; *Sidaway v Bethlem Hospital Board of Governors*, [1984] 1 QB 493, 2 WLR 778 (CA), *aff'd* [1985] AC 871 (HL); *Breen v Williams*, [1996] HCA 57, 186 CLR 71.

<sup>48</sup> *Equity*, *supra* note 11 at 129.

<sup>49</sup> In *Lac Minerals*, after reviewing accepted categories of fiduciary relationship, Sopinka J stated, “[T]he nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not” (*supra* note 8 at 597). Glover echoes the point:

Fiduciaries of the familiar sort are *sometimes* said to be within “accepted categories” of fiduciary relationship ... Calling these relationships “accepted” means no more than that courts habitually invest them with a fiduciary consequence. Fiduciary characterisation is not presumed. ... Defendants are brought within the court’s range of reliable inference, subject to special circumstances obtaining (*supra* note 7 at 269).

The fact-based approach was borne of the recognition that the status-based approach is unprincipled and inflexible. Yet it has never supplanted the status-based approach. Rather, it has been relegated to use at the margins of status, in cases where courts prefer to make a one-off decision rather than rule on the broader-reaching question of status.<sup>50</sup> The fact-based approach is an important advance on the status-based approach inasmuch as it directs attention to general characteristics of fiduciary relationships. It marks significant progress on the idea that fiduciary liability is distinctive and coherent, being premised on essential characteristics of the fiduciary relationship. Nevertheless, the fact-based approach has foundered because it is inherently incapable of vindicating that idea. Efforts to identify and list characteristics of a thing, actual or conceptual, may be of little use in revealing its essential nature. Furthermore, a clear concept of a thing is a precondition to accurate evaluation of representations as to its qualities.

Like the status-based approach, then, the fact-based approach is unprincipled. It affords flexibility at the cost of predictability. The process of reasoning employed is direct rather than analogical, yet it remains undisciplined. Opacity on the character of the fiduciary relationship is at once a

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<sup>50</sup> The relationship between the approaches has never been well-articulated but in *Lac Minerals La Forest* and *Sopinka JJ* expressed similar views (*supra* note 8). *La Forest J* claims the law would be clearer were it recognized that *bona fide* fiduciary relationships are of two broad kinds. For relationships of the first kind (status-based fiduciary relationships),

[t]he focus is on the identification of relationships which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. ... The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present (*ibid* at 646-47).

Regarding relationships falling within the second (fact-based) kind, *La Forest J* commented:

The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such, it can arise between parties in a relationship in which fiduciary obligations would not normally be expected (*ibid* at 648).

According to *Sopinka J*:

When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the [status of the] relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? (*ibid* at 598).



cause and consequence of the indiscipline. As Worthington has said of the lists of indicia that guide the fact-based approach, “[T]he difficulty has always been that these descriptors, although apt to describe relationships where fiduciary obligations *are* imposed, are often equally apt when such obligations are absent. It follows that they cannot adequately and restrictively *define* the incidence of fiduciary obligations.”<sup>51</sup> Peter Birks expressed similar concerns:

The difficulty with “fiduciary” is that its meaning has been allowed to become completely uncertain. ... A fiduciary relationship is, or ought to be, a continuing event, like a marriage. It has a beginning, and a continuation; and a fiduciary is, or ought to be, a party to that relationship, just as a spouse is to a marriage. We know how to determine which relationships are marriages. But the same cannot be said of fiduciary relationships. It is manifestly impossible to predict whether a relationship will or will not be accounted fiduciary when a case comes to court. In many of the leading cases distinguished judges have been almost equally divided as to whether or not a relationship was fiduciary. The necessary elements can be spelled out. ... But it turns out that this has a very low predictive yield.<sup>52</sup>

As explained above, agreement on characterization of the fiduciary relationship proved elusive. Members of the Court failed to reach consensus on the identification, meaning and relative priority of indicia. Certain indicia were endorsed by some and disputed by others (e.g., equality of bargaining power). Others were endorsed by all, but accorded differing degrees of priority (e.g., vulnerability). Further, the meaning of the indicia was left unclear.<sup>53</sup>

As Birks noted, these failings have brought inconsistency in implementation. The authorities reveal considerable variation in the identification of particular indicia as pertinent to the determination whether a relationship is fiduciary on the facts.<sup>54</sup> With respect to the relative priority of

<sup>51</sup> Worthington, “Fiduciaries”, *supra* note 3 at 505 [emphasis in original, footnotes omitted].

<sup>52</sup> Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26:1 UWA L Rev 1 at 17-18 [footnotes omitted].

<sup>53</sup> For instance, it has remained unclear whether all forms of trust signal the establishment of a fiduciary relationship, and if not, which form(s) and why; whether all forms of inequality of power suggest that a given relationship is fiduciary, and if not, which form(s) and why; whether all forms of vulnerability suggest that a relationship is fiduciary, and if not, which form(s) and why; whether all transactions of confidential information suggest the establishment of a fiduciary relationship, and if not, what kind(s) and why.

<sup>54</sup> For instance, in *Frame*, Wilson J emphasized scope for discretion, impact upon the beneficiary’s practical interests, and vulnerability (*supra* note 8 at 136). In *Norberg*, McLachlin J focused upon trust, power, and vulnerability (*supra* note 8 at 271-73). In

indicia, some courts take proof of vulnerability to be dispositive, while others deem the presence of discretionary power decisive.<sup>55</sup> With respect to the meaning of indicia, some understand vulnerability as circumstantial in nature (i.e., as based on economic, social, or psychological factors), while others take it to be structural (i.e., as founded by the nature of the relationship).<sup>56</sup> Uncertainty over the scope of liability is again a predictable result of such inconsistency<sup>57</sup> and, as noted above, it is problematic in light of the demands of the rule of law.

The status- and fact-based approaches to the identification of fiduciary relationships reflect the entrenchment of the conventional position on fiduciary liability. Some method of identifying fiduciary relationships is necessitated by the view that fiduciary liability is premised upon the establishment of a fiduciary relationship. But neither method is capable of vindicating the implicit idea that the fiduciary relationship is a distinctive kind of legal relationship that founds a distinctive category of obligation. It is thus natural to question whether the conventional view rests upon a mistake. Is it possible that there is nothing distinctive about fiduciary relationships? Is it possible that the fiduciary relationship is not a legal *kind* but a mere saying, the product of careless imagination or unreflective customary expression?

This is the challenge put by conventional economic analysis of fiduciary obligation. According to economists, there is nothing distinctive about fiduciary obligation and talk of fiduciary relationships is nonsensical. Fiduciary duties are contractual in nature. The most insistent advocates of this view, Frank Easterbrook and Daniel Fischel, assert that there is nothing “special about fiduciary relations” and that “[s]earching for the right definition of a fiduciary duty is not a special puzzle ... there is no

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*Lac Minerals*, La Forest J considered vulnerability, trust and confidence, and industry practice (*supra* note 8 at 656-66).

<sup>55</sup> Compare the opinions of Sopinka J in *Lac Minerals* and Dickson J in *Guerin (Lac Minerals)*, *supra* note 8 at 606; *Guerin*, *supra* note 7 at 385). Sopinka J suggests that proof of vulnerability is of singular importance to the identification of fiduciary relationships. Dickson J argued that fiduciary relationships are centered on the exercise of discretionary power.

<sup>56</sup> Compare the statements of La Forest J in *Lac Minerals* to the effect that proof of vulnerability requires mere susceptibility to harm, with those of Dawson J in *Hospital Products*, who states that the relevant sort of vulnerability is that which inheres in the fiduciary relationship (*Lac Minerals*, *supra* note 8 at 663; *Hospital Products*, *supra* note 8).

<sup>57</sup> It is also bred by comments such as the following by Sopinka J in *Lac Minerals*: “It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship” (*supra* note 8 at 63 at 599).

subject here, and efforts to unify it on a ground that presumes its distinctiveness are doomed.”<sup>58</sup>

Easterbrook and Fischel’s assertion is just that, but it presents a bracing challenge. The conventional view has operated for too long upon approximation. For the challenge to be met, the jurisprudence must advance. The required advance is not the generation of a fixed, complete, and prioritized list of indicia. A perfect set of descriptors would still fail to supply a coherent idea of the fiduciary relationship. Among the indicia identified to date are the essential characteristics of the fiduciary relationship. What is required is an account of the fiduciary relationship in which these ingredients achieve clear significance. In Part II, I will argue that such an account is within reach and, in Part III, I shall explain how it might be elaborated.

### *B. The Foundation of Fiduciary Obligation*

The conventional view holds that fiduciary liability turns on breach of duties occasioned by the fiduciary relationship. Accordingly, a credible theory of liability requires not merely a clear idea of the fiduciary relationship, but also an account of relationship formation and an explanation of how fiduciary relationships found obligations conventionally attributed to them. These matters have attracted less attention in the authorities. Nevertheless, the Supreme Court of Canada has ventured opinions on them.

#### 1. The Formation of Fiduciary Relationships

Justice Dickson in *Guerin* said that a fiduciary relationship may be established “by statute, agreement, or perhaps by unilateral undertaking.”<sup>59</sup> He did not elaborate further. However, it was apparently contemplated that fiduciary relationships may be established by law (i.e., by legislative, perhaps judicial, decree); by mutual consent of the parties to the relationship; or by unilateral expression of will by the fiduciary. Each mode of relationship formation accords with a common sense view of the initiation of relationships of recognized fiduciary status. The relationship between birth parent and child must be fiduciary as a matter of right, for the parent need not positively assent to the relationship and the child is incapable of doing so. Relationships between professionals and clients (e.g., physician-patient and lawyer-client) are typically the product of mutual consent—signified by formal consent, contract, or retainer. Other relation-

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<sup>58</sup> Easterbrook & Fischel, *supra* note 1 at 438.

<sup>59</sup> *Supra* note 7 at 384.

ships (e.g., guardian and ward) are typically established by the unilateral initiative of the fiduciary.

Regrettably, this still leaves much unclear, including the conditions under which a given mode of formation will be effective. It must be rare indeed that a fiduciary relationship will be formed as a matter of right irrespective of the wishes of the parties to it. Likewise, unilateral establishment of the fiduciary relationship by the fiduciary must be exceptional. One would expect that in most cases fiduciary relationships must be established by mutual consent. In any case, it is important to know where mutual consent will be required, when an undertaking should suffice, and what justifies constructive recognition of a fiduciary relationship. Of course, definitive answers require clarity on the essential character of the fiduciary relationship. What is the substance of the agreement, undertaking, or decree that founds a fiduciary relationship? The authorities have not yet supplied a decisive answer.<sup>60</sup>

## 2. The Basis of Fiduciary Duties

Uncertainty over the essential character of the fiduciary relationship has also obscured the connection between the fiduciary relationship and fiduciary duties. The Supreme Court of Canada has variously said that fiduciary duties are founded upon inequality, dependence or vulnerability or both in fiduciary relationships. However, the meaning of these characteristics has remained unclear. It is also unclear whether these characteristics are extrinsic, circumstantial qualities of fiduciary relationships or intrinsic, structural qualities. On the latter view, the justification for fiduciary duties may be understood as inhering in the nature of the fiduciary relationship, and as such, stable and fixed. On the former view, the justification for fiduciary duties turns upon the exigencies of a given relationship, in which case it is contingent and variable.

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<sup>60</sup> Some authorities suggest that the substance lies in the representative character of fiduciary decision-making. The fiduciary, it is said, agrees, undertakes or is taken to act for or on behalf of the beneficiary. See the judgment of Mason J in *Hospital Products*, wherein it is stated that the fiduciary relationship arises where “the fiduciary undertakes or agrees to act for or on behalf of ... another person” (*supra* note 8 at 96-97). See also Austin W Scott, “The Fiduciary Principle” (1949) 37:4 Cal L Rev 539 at 540: “A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.” These statements raise questions about the character of the fiduciary relationship. Several recognized categories of fiduciary relationship do not implicate the fiduciary as representative of the beneficiary (e.g., some are advisory). Furthermore, the nature of representation contemplated is unclear. One can “act for or on behalf” of another individual in innumerable ways. It cannot be that any representative conduct attracts fiduciary strictures.

In *Norberg*, Justice McLachlin offered that fiduciary duties address inherent inequality of power in the fiduciary relationship. Distinguishing fiduciary liability from tort and contractual liability, she argued, “[T]he fiduciary approach, unlike those based on tort or contract, is founded on the recognition of the power imbalance inherent in the relationship between fiduciary and beneficiary.”<sup>61</sup> Later in *Norberg* she added, “[I]n the absence of ... a discretion or power and the possibility of abuse of power which it entails, ‘there is no need for a superadded obligation to restrict the damaging use of the discretion or power’.”<sup>62</sup> To much the same effect, in a minority opinion in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* she said: “Where a party is granted power over another’s interests, and where the other party is correspondingly deprived of power over them, or is ‘vulnerable’, then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other.”<sup>63</sup>

In other cases, emphasis has been laid upon the dependence of the beneficiary upon the fiduciary. Dependence is usually taken to mean that certain interests of the beneficiary are subject to influence by the fiduciary.<sup>64</sup> The idea is that fiduciary duties mitigate dependence by protecting the beneficiary from adverse influence. However, there is disagreement over the salience of varieties of dependence. Some authorities attribute dependence to circumstantial inequalities.<sup>65</sup> Others focus upon intrinsic dependence.<sup>66</sup>

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<sup>61</sup> *Norberg*, *supra* note 8 at 289.

<sup>62</sup> *Ibid* at 275-76, citing *Frame*, *supra* note 8 at 136, Wilson J.

<sup>63</sup> [1995] 4 SCR 344 at para 115, 130 DLR (4th) 193, McLachlin J, as she then was [*Blueberry River*].

<sup>64</sup> So, for instance, Wilson J stated that a would-be fiduciary must be able to “exercise ... power or discretion so as to affect the beneficiary’s legal or practical interests” (*Frame*, *supra* note 8 at 136). Likewise, La Forest J in *Hodgkinson* spoke of the fiduciary as one who enjoys “influence over interests” of the beneficiary (*supra* note 25 at 409). Similarly, Mason J in *Hospital Products* said, “It is partly because the fiduciary’s exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed” (*supra* note 8 at 97).

<sup>65</sup> For example, Sopinka J in *Lac Minerals* suggested that “a kind of physical or psychological dependency [attracts the imposition of] fiduciary duty” (*supra* note 8 at 606).

<sup>66</sup> See the opinion of Dawson J in *Hospital Products*, *supra* note 8 at 142 [emphasis added, references omitted]:

There is ... the notion underlying all the cases of fiduciary obligation that *inherent in the nature of the relationship itself is a position of disadvantage or vulnerability* on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the

It is most commonly said that fiduciary duties are founded upon the beneficiary's vulnerability to the fiduciary. The meaning of vulnerability, however, is unsettled. It has been equated with dependence,<sup>67</sup> weakness, and incapacity.<sup>68</sup> More commonly, it is said to mean susceptibility to harm.<sup>69</sup> Again, there is disagreement over salience. There is authority for the view that vulnerability is salient whatever its origin.<sup>70</sup> Some cases specifically indicate that circumstantial vulnerabilities are pertinent.<sup>71</sup> Other cases indicate that vulnerability is a structural quality of the fidu-

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conscience of that other ... *From that springs the requirement* that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position.

<sup>67</sup> See e.g. the judgment of Sopinka and McLachlin JJ in *Hodgkinson*, who define vulnerability as "implicit dependency" (*supra* note 25 at 467).

<sup>68</sup> Here there is apparent conflation of cause with meaning. See especially Wilson J's judgment in *Frame* where she said, "[V]ulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power" (*supra* note 8 at 137).

<sup>69</sup> See e.g. *Lac Minerals*, *supra* note 8 at 40, La Forest J, citing the *Oxford English Dictionary*, 2d ed, *sub verbo* "vulnerable": "Persons are vulnerable if they are susceptible to harm, or open to injury." He later reaffirmed his position in *Hodgkinson* saying: "Vulnerability is nothing more than the corollary of the ability to cause harm, viz., the *susceptibility to harm*" (*supra* note 25 at 430).

<sup>70</sup> See the judgment of La Forest J in *Hodgkinson*, in which it is said that vulnerability so understood underlies the law on undue influence, unconscionability, and negligent misstatement in addition to fiduciary liability (*supra* note 25 at 405).

<sup>71</sup> For example, in determining that a relationship between a physician and patient was fiduciary, McLachlin J in *Norberg* noted of the patient: "[H]er status as a patient rendered her vulnerable and at his mercy, particularly in light of her addiction" (*supra* note 8 at 275). Further on she added, "It is only where there is a material discrepancy, in the circumstances of the relationship in question, between the power of one person and the vulnerability of the other that the fiduciary relationship is recognized by the law" (*ibid* at 278). She later hedged this position:

[A] patient's vulnerability may be as much physical as emotional ... Whether physically vulnerable or not ... the patient, by reason of lesser expertise, the "submission" which is essential to the relationship, and sometimes, as in this case, by reason of the nature of the illness itself, is typically in a position of comparative powerlessness. The fact that society encourages us to trust our doctors, to believe that they will be persons worthy of our trust, cannot be ignored as a factor inducing a heightened degree of vulnerability (*ibid* at 278-79 [emphasis added]).

Elsewhere in her judgment, McLachlin J identifies other circumstantial origins of vulnerability, arguing that "[w]omen, who can so easily be exploited by physicians for sexual purposes, may find themselves particularly vulnerable" (*ibid* at 279) and that "the emotional fragility of many psychotherapy patients [makes] the argument for a fiduciary obligation resting on psychotherapists ... especially strong" (*ibid* at 280).

ciary relationship and that only when so understood is it salient for the purposes of fiduciary law.<sup>72</sup>

While inequality, dependence, and vulnerability are now routinely identified as qualities of fiduciary relationships that justify fiduciary duties, their meaning and salience have not been consistently stated or properly explained. Clarity on these points is essential to the development of a sound theory of fiduciary liability.

### C. *The Nature and Scope of Fiduciary Obligation*

The authorities are clearer on the nature and scope of fiduciary duties. The Supreme Court of Canada has hewed to the now-conventional view that fiduciary law is principally concerned with the faithfulness of fiduciaries to beneficiaries.<sup>73</sup> Faithfulness is exacted by the fiduciary duty of

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<sup>72</sup> Tamar Frankel has put this view particularly well:

It is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and fiduciary ... The relation may expose the entrustor to risk even if he is sophisticated, informed, and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation. The delegated power that enables the fiduciary to benefit the entrustor also enables him to injure the entrustor, because the purpose for which the fiduciary is allowed to use his delegated power is narrower than the purposes for which he is capable of using that power (Tamar Frankel, "Fiduciary Law" (1983) 71:3 Cal L Rev 795 at 810).

This point has been expressed in similar ways in several leading cases. In *Hospital Products*, three justices of the High Court of Australia were in agreement on this point (*supra* note 8). Gibbs CJA, as he then was, struggled to define the principles on which fiduciary obligations are to be imposed, and suggested in the end that "the reason for the principle lies in the *special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power*" (*ibid* at 68 [emphasis added]). Mason J explained that "The relationship between the parties is ... one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of [the beneficiary] who is accordingly vulnerable to abuse by the fiduciary of his position" (*ibid* at 97). Dawson J explained that "There is ... the notion underlying all the cases of fiduciary obligation that *inherent in the nature of the relationship itself* is a position of disadvantage or vulnerability on the part of one of the parties" (*ibid* at 142 [emphasis added]). In a statement affirmed by La Forest J for the majority in *Hodgkinson*, Lambert J explained that "the concept of vulnerability ... is nothing other than a description of the victim's situation when he is in a position where the fiduciary can exert influence over him by abusing his confidence in order to obtain an advantage": *Burns v Kelly Peters & Associates Ltd* (1987), 41 DLR (4th) 577 at 600, 6 WWR 1 (BCCA), cited in *Hodgkinson*, *supra* note 25 at 430.

<sup>73</sup> There is considerable debate over the content and function of the duty of loyalty. See generally Conaglen, *supra* note 2; Deborah A DeMott, "Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences" (2006) 48:4 Ariz L Rev 925; Arthur B Laby, "Resolving Conflicts of Duty in Fiduciary Relationships" (2004)

loyalty, which in turn consists of the two so-called conflict rules. First is the requirement that the fiduciary avoid conflicts between pursuit of his self-interest and fulfilment of his duty to act for the benefit of the beneficiary (the conflict of interest rule). Second is the requirement that the fiduciary avoid conflicts between this duty and the pursuit of others' interests (the conflict of duty rule).<sup>74</sup>

The Supreme Court of Canada has largely sidestepped the debate on whether there are additional fiduciary duties. It has regularly invoked the trite and analytically unhelpful maxim that not every obligation imposed upon a fiduciary is fiduciary in nature.<sup>75</sup> Contrary to the impression given by some canonical statements on fiduciary obligation, the Court has insisted that fiduciaries are not positively obligated to act in the best interests of beneficiaries.<sup>76</sup> It has rightly noted that fiduciaries have never been held accountable for the fate of the interests of beneficiaries.<sup>77</sup> More con-

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54:1 Am U L Rev 75; John H Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114:5 Yale L J 929.

<sup>74</sup> The conflict rules are encapsulated by Binnie J's formulation of the duty of loyalty as one which requires the fiduciary to "avoid situations where he has, or potentially may, develop a conflict": *Strother*, *supra* note 5 at para 51, citing *Ramrakha v Zimmer* (1994), 157 AR 279 (CA) at para 73. In *R v Neil*, the rules were delineated in the following statement, wherein it was held that lawyers, as fiduciaries, must avoid conflicts that generate a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person" (2002 SCC 70, [2002] 3 SCR 631 at para 31 [*Neil*], citing *Restatement (Third) of the Law Governing Lawyers* § 121 (2000)). To the same effect, see *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 223 at para 125, Rothstein J: "the duty of loyalty ... requires the trustee to avoid conflicts of interest. A fiduciary is required to avoid situations where its duty to act for the sole benefit of the trust and its beneficiaries conflicts with its own self-interest or its duties to another."

<sup>75</sup> See e.g. *Lac Minerals*, *supra* note 8 at 597. Sopinka J stated that "not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature." More recently, the point was reiterated in *Wewaykum Indian Band v Canada*, 2002 SCC 7, [2002] 4 SCR 245, Binnie J [*Wewaykum*].

<sup>76</sup> *Norberg*, *supra* note 8 at 288. McLachlin J casts the scope of fiduciary obligation in broad terms, stating, "The essence of trust and all fiduciary relationships is that the trustee, the person in power, *assumes responsibility for the welfare of the cestui que trust* for matters falling within the scope of the trust relationship"[emphasis added]. Compare *KLB*, *supra* note 5. The chief justice denies that parents as fiduciaries are obligated "to 'look after' the best interests of the child" (*ibid* at para 43), clarifying that while "[p]arents *should* try to act in the best interests of their children ... failure to meet this goal has not itself been elevated to an independent ground of liability at common law or equity" (*ibid* at para 44 [emphasis in original]).

<sup>77</sup> *Ibid*. As McLachlin CJC explained, this kind of accountability "would seem to be a form of result-based liability, rather than liability based on faulty actions and omissions. ... Breach of fiduciary duty, however, requires fault. It is not result-based liability" (*ibid* at para 45).



troversially, the Court has gradually come to deny that there is a fiduciary duty of care.<sup>78</sup>

Lest it be thought that the Court is of the settled view that fiduciary obligation is exhausted by the duty of loyalty, it should be noted that it has contemplated fiduciary duties of confidence and candour.<sup>79</sup> The denomination of a duty as fiduciary tends not to be supported by extensive reasoning. If the connection between fiduciary duties and the fiduciary relationship were made clearer, the justification for taxonomic decisions might be rendered cogent.

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<sup>78</sup> Division of opinion on this issue among members of the Court traces at least to *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129 [*Canson Enterprises* cited to SCR]. The Court—grappling with the implications of the House of Lords’ decision in *Nocton v Lord Ashburton* and the debate over the advisability of fusion of law and equity—was split on the relationship between legal and equitable principles governing liability and compensation for injury due to professional negligence ([1914] AC 932, 30 TLR 602). La Forest J for the majority spoke of a fiduciary duty of care and dismissed as “misguided” concerns about doctrinal orderliness (*Canson Enterprises*, *supra* note 78 at 570-89). McLachlin J, as she then was, in a minority opinion joined by two others demurred, raising concerns about preserving doctrinal boundaries between tort and fiduciary law and the distinctness of legal and equitable remedies (*ibid* at 542-58). Later, in *Hodgkinson*, La Forest J reiterated that “a fiduciary obligation carries with it a duty of skill and competence” (*supra* note 25 at 405). As chief justice, McLachlin has had the latest, if not necessarily the last, word. In *KLB*, a case involving fiduciary relationships between parents and children, the chief justice said that the “traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one’s own or others’ interests at the expense of the beneficiary’s interests” (*supra* note 5 at para 48), noting that “[d]ifferent legal and equitable duties may arise from the same relationship and circumstances” (*ibid*). Again caught up in the broader question of the relationship between law and equity, she expressed the view that “[e]quity does not *duplicate* the common law causes of action, but *supplements* them” (*ibid* [emphasis in original]). The chief justice concluded: “Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust” (*ibid* at para 49).

<sup>79</sup> On the duty of candour, see *Neil*, *supra* note 74 at para 19. See also Lawrence A Hamermesh, “Calling Off the *Lynch* Mob: The Corporate Director’s Fiduciary Disclosure Duty” (1996) 49:5 Vand L Rev 1087. On the duty of confidence, see *Lac Minerals*, *supra* note 8. La Forest J argued that fiduciary law originated in the equitable doctrine of breach of confidence and expressed the view that principles of liability operative in each are “intertwined”. Sopinka J dissented from that view and the Court has since preferred to say that liability for breach of confidence is not fiduciary in nature. In *Cadbury Schweppes Inc v FBI Foods Ltd*, Binnie J clarified that the action for breach of confidence is *sui generis* and emphasized that, while fiduciary duties and duties of confidence may coincide, they enjoy distinct bases ([1999] 1 SCR 142 at paras 31-32, 167 DLR (4th) 577). The duty of confidence is founded on a relationship of confidence generated by disclosure of confidential information. The relationship in which it arises need not at the same time be fiduciary.

It is often said that the duty of loyalty demands that the fiduciary act selflessly.<sup>80</sup> Whether self-abnegation or something less is required, it is plain that the law imposes a high standard of conduct upon fiduciaries. It is thus important that the ambit of fiduciary obligation be capable of principled delineation. The Court has indicated that the ambit of fiduciary obligation is defined by the parameters and tenure of the fiduciary relationship.<sup>81</sup> This is entirely reasonable, to the extent that the relationship founds the duties that constrain the conduct of the fiduciary. However, it entails that the scope of liability will be uncertain until the essential character of the fiduciary relationship is articulated in the authorities. If inequality, dependence, vulnerability, or some combination of these characteristics founds fiduciary obligation, the ambit of fiduciary liability may be ascertained only when it is made clear to what end and extent the fiduciary is answerable for these or other asymmetries generated by the fiduciary relationship.

## II. An Emerging Theory of Fiduciary Liability

*Galambos* finds the Supreme Court of Canada engaged in a momentous, if overdue, reassessment of its fiduciary jurisprudence. As I shall explain, the reassessment is significant as it offers a salutatory reinterpretation of that jurisprudence, one suggestive of a promising theory of fiduciary liability. However, it bears noting that the judgment stands out from the jurisprudence in at least two important respects. First, the reasons are conservative in scope. In previous cases, members of the Court tended to consider a range of issues *ex mero motu*, considering it necessary to address principles of fiduciary liability in the broadest possible terms, along with problems relating to the classification of obligations and the relationship between law and equity. The reasons of Justice Cromwell, for the Court, in *Galambos* are limited to the issues put before the Court. Thus, the reassessment of the jurisprudence, while significant, is not wholesale. Second, the decision was unanimous. Focused reasons likely helped to

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<sup>80</sup> Birks, *supra* note 2. See also *EDG v Hammer*, 2003 SCC 52, [2003] 2 SCR 459 at para 23; *Peoples Department Stores Inc v Wise*, 2004 SCC 68, [2004] 3 SCR 461 at para 35.

<sup>81</sup> On the connection between the ambit of fiduciary obligation and the scope of the fiduciary relationship, see *Peso Silver Mines Ltd (NPL) v Cropper* [1966] SCR 673 at 681-82, 58 DLR (2d) 1. See also *Strother*, *supra* note 5 at paras 39-44 (the ambit of fiduciary duties constraining the conduct of lawyers is to be determined by ascertaining the scope of the fiduciary relationship as defined by client retainers). As for the ambit of liability and the duration of fiduciary relationships, it should be noted that termination of the relationship will be ineffective in excluding fiduciary liability where the fiduciary has evidently ended the relationship to avoid duty or liability for breach. See *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 40 DLR (3d) 371. See also Smith, "Motive", *supra* note 2 at 78.

forestall the deep divisions of opinion that have marred the jurisprudence. However, the unanimity may also be attributable to the facts of the case. The facts are not especially compelling, revealing nothing of the dishonest, sharp, or exploitative conduct typical of leading fiduciary cases. Thus, they likely did little to excite the conscience of members of the Court. By contrast, earlier cases are marked by heightened awareness of the distinctively flexible and discretionary character of equitable intervention.<sup>82</sup>

While the facts in *Galambos* are not compelling, they are unusual. The appellant, Galambos, was the principal of a law firm. The respondent, Perez, was his bookkeeper. Over time, the firm came under increasing financial strain. To alleviate the strain, Perez made several cash advances to the firm from her personal accounts and credit facilities. The advances totalled approximately \$200,000. The advances were made voluntarily by Perez without the direction or consent of Galambos. Most were also made without his prior knowledge. Eventually, despite the advances, the firm went bankrupt without Perez having been repaid. She pursued redress against Galambos personally for negligence, breach of contract, and breach of fiduciary duty.

The fiduciary claim was advanced on two grounds. Perez argued that, apart from their employment relationship, she and Galambos were in an ongoing lawyer–client relationship. Galambos had provided legal services to Perez gratuitously on a few occasions on matters unrelated to the firm or her employment. On that basis, she claimed that their relationship was fiduciary as a matter of status. Perez also argued that the relationship was marked by inequality of power and dependence. Accordingly, the relationship was fiduciary on the facts irrespective of status. Perez argued breach of fiduciary duty not on the basis of any disloyalty but rather for want of reasonable care. She held the view that Galambos ought to have been more vigilant in supervising her management of firm finances and in protecting her from taking a personal financial interest in the firm.

The fiduciary claim failed at trial. The trial judge rejected the argument that there was an ongoing lawyer–client relationship and that the facts otherwise compelled recognition of a fiduciary relationship. He explained that the legal services provided were in the nature of discrete transactions rather than an open-ended relationship. The judge also emphasized that Perez had not ceded any power to Galambos and was not vulnerable to him. Accordingly, there was not a fiduciary relationship upon which fiduciary liability might be founded. The Court of Appeal dis-

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<sup>82</sup> See e.g. *Lac Minerals*, *supra* note 8. Sopinka J excuses the Court's imprecision on the fiduciary relationship saying that "equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise" (*ibid* at 596-97). See also *Canson Enterprises*, *supra* note 78.

agreed. It accepted that there was no ongoing lawyer-client relationship but held that the relationship was fiduciary on the facts given evidence of asymmetries—inequality of power, dependence, and vulnerability—to the advantage of Galambos and detriment of Perez. The Court of Appeal found breach of fiduciary duty in the form of abuse of trust.

The Supreme Court of Canada reversed the Court of Appeal's judgment. Justice Cromwell agreed with the trial judge that there was no fiduciary relationship of status or in fact. Even supposing otherwise, there was no breach of a recognized fiduciary duty. These findings are unimpeachable on the facts. Of greater interest are the supporting reasons.

### *A. The Nature of the Fiduciary Relationship*

As explained in Part I, the Supreme Court of Canada's fiduciary jurisprudence has been dominated by its development of the fact-based approach to identifying fiduciary relationships as a complement to the status-based approach. However, the Court has gradually, if inconsistently, been moving toward an essentialist view of the fiduciary relationship. The realization of such a view would represent a remarkable advance, for it would make good the assumption implicit in the law that the fiduciary relationship is a distinctive kind of legal relationship and that fiduciary liability is a distinctive mode of private ordering. The reasoning in *Galambos* reveals the most significant steps taken by the Court toward essentialism to date.

#### 1. The Fiduciary Relationship Defined

Despite its commitment to the status- and fact-based approaches, the Supreme Court of Canada has repeatedly suggested that the essential characteristic of fiduciary relationships lies in the discretionary power wielded by fiduciaries over beneficiaries.<sup>83</sup> Thus, in *Norberg*, Justice McLachlin said that “the essence of a fiduciary relationship ... is that one party exercises power on behalf of another.”<sup>84</sup> In *Hodgkinson*, Justices Sopinka and McLachlin argued that “the distinguishing characteristic” of

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<sup>83</sup> Ernest Weinrib was amongst the first to argue that something akin to discretionary power is an essential characteristic of all fiduciary relationships: Ernest J Weinrib, “The Fiduciary Obligation” (1975) 25:1 UTLJ 1. He noted that the fiduciary relationship is one “in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him” (*ibid* at 4). He elaborated, “Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and second, this discretion must be capable of affecting the legal position of the principal” (*ibid* [footnotes omitted]).

<sup>84</sup> *Supra* note 8 at 272.

the fiduciary relationship “is the ceding by one party of effective power to the other.”<sup>85</sup> More recently, in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>86</sup> Chief Justice McLachlin sought to distinguish the concept of honour of the Crown from Crown-aboriginal fiduciary relationships. She concluded that it is only “where the Crown has assumed discretionary control over specific Aboriginal interests [that] the honour of the Crown gives rise to a fiduciary duty.”<sup>87</sup> In this, she relied upon Justice Binnie’s identification of “discretionary control” as the essential characteristic of the fiduciary relationship in *Wewaykum*. According to Justice Binnie, the relationship between the Crown and aboriginal peoples is recognized as fiduciary “to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.”<sup>88</sup>

In my view, a sound definition of the fiduciary relationship may be drawn from this line of jurisprudence: *a fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary)*.<sup>89</sup> In *Galambos*, the Supreme Court of Canada has committed itself more fulsomely to the essentialist view. When describing “basic principles” of fiduciary liability, Justice Cromwell explained the character of the fiduciary relationship as follows:

Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J. (as he then was) put it in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p.384: “It is the nature of the relationship ... that gives rise to the fiduciary duty ... .” ... The particular relation-

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<sup>85</sup> *Supra* note 25 at 466.

<sup>86</sup> 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*, cited to SCR].

<sup>87</sup> *Ibid* at para 18, citing *Wewaykum*, *supra* note 75 at para 79.

<sup>88</sup> *Wewaykum*, *supra* note 75 at para 79. Canadian courts have dominated the development of this view, but they have been joined sporadically by courts in other jurisdictions. Within weeks of *Guerin*, the High Court of Australia in *Hospital Products* suggested a similar approach (*supra* note 8 at 68, 96-97). In separate opinions, the justices recognized the problems associated with the status-based approach. Gibbs CJA recognized that, in overcoming them, “the difficulty is to suggest a test by which it may be determined whether a relationship ... is a fiduciary one” (*ibid* at 68). Mason J went further. Affirming Weinrib, he stated that “[t]he critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of ... another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense” (*ibid* at 96-97). Similarly, in the seminal decision by the Second Circuit in *United States v Chestman* the majority stated that a “fiduciary relationship involves discretionary authority and dependency” (947 F (2d) 551 at para 13 (2d Cir 1991)).

<sup>89</sup> I develop this argument further in Paul B Miller, *Essays Toward a Theory of Fiduciary Law* (PhD Thesis, University of Toronto Department of Philosophy, 2008) [unpublished].

ships on which fiduciary law focuses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other.<sup>90</sup>

Flatly rejecting the notion that fiduciary liability may be established where a would-be fiduciary lacks discretionary power, he elaborated:

It is fundamental to the existence of *any* fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" ...

... While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not.<sup>91</sup>

The determination that Galambos did not wield discretionary power over the practical interests of Perez was critical to Justice Cromwell's conclusion that there was no fiduciary relationship between them:

[T]he finding of the trial judge that Mr. Galambos had no discretionary power over Ms. Perez's interests that he was able to exercise unilaterally or otherwise is fatal to her claim that there was an *ad hoc* fiduciary duty on Mr. Galambos's part to act solely in her interests in relation to these cash advances.<sup>92</sup>

The Court in *Galambos* has thus clearly resolved that discretionary power is an essential characteristic of all fiduciary relationships.

## 2. Implications for the Status- and Fact-Based Approaches

If the essentialist view were taken to its logical conclusion, the Court would have defined the fiduciary relationship as indicated above and disavowed the status- and fact- based approaches. Unfortunately, Justice Cromwell retains the analytical structure of the status- and fact-based approaches (which he calls *per se* and *ad hoc* respectively). Of the former, Justice Cromwell says:

Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents ... These categories are sometimes called *per se* fiduciary relationships.<sup>93</sup>

Justice Cromwell does not explain what purposes or incidents a category of relationship must have to enjoy fiduciary status, though he evi-

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<sup>90</sup> *Galambos*, *supra* note 6 at para 70 [references omitted].

<sup>91</sup> *Ibid* at paras 83-84.

<sup>92</sup> *Ibid* at para 86 [emphasis in original].

<sup>93</sup> *Ibid* at para 36.

dently considers that in all categories the fiduciary will wield discretionary power over the practical interests of the beneficiary. He distinguishes the status- from the fact-based approach as follows:

[A]part from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship.<sup>94</sup>

Justice Cromwell does not elaborate upon the indicia to be considered in determining whether a fiduciary relationship exists on a case-by-case basis. However, he is plainly uncomfortable with ill-sorted lists of indicia. Indeed, he makes a point of questioning ill-defined *indicium*.

Of power and dependence, Justice Cromwell argues that “power-dependency relationships”—by which he appears to mean any relationship characterized by inequality of power and dependence—are not invariably fiduciary: “[T]his concept borrowed from academic writing may be useful to describe certain relationships, but it has not been and should not be used as a tool for categorization.”<sup>95</sup> He explains that “not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not.”<sup>96</sup>

Of vulnerability, Justice Cromwell says that “to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly.”<sup>97</sup> Citing the judgment of Justice La Forest in *Hodgkinson*, he explains, “The law’s approach to the situation of vulnerable people ‘gives rise to a variety of often overlapping duties’ and ‘the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship.’”<sup>98</sup>

Justice Cromwell’s concerns are well founded. The indicia are overbroad and imprecise. But these are problems endemic in the fact-based approach. The essential character of the fiduciary relationship will never be clarified through identification of isolated characteristics. One must discern how characteristics are joined in a clear, well-stipulated idea of the relationship. It is thus telling that Justice Cromwell did not attempt to sharpen or supplement existing lists of indicia. His judgment instead emphasizes that the essential character of the fiduciary relationship lies

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<sup>94</sup> *Ibid* at para 48.

<sup>95</sup> *Ibid* at para 73.

<sup>96</sup> *Ibid* at para 74.

<sup>97</sup> *Ibid* at para 67.

<sup>98</sup> *Ibid* at para 73, citing *Hodgkinson*, *supra* note 25 at 412-13.

in the exercise by one person of discretionary power over the practical interests of another.

### *B. The Foundation of Fiduciary Obligation*

The Court in *Galambos* devoted considerable attention to questions concerning the foundation of fiduciary duties, particularly those relating to relationship formation.

#### 1. The Formation of Fiduciary Relationships

It was submitted on behalf of Perez, and accepted by the Court of Appeal, that a fiduciary relationship may be established on the basis of the reasonable expectations of one person that another would act in his interests. This entails that a beneficiary may establish a fiduciary relationship unilaterally.<sup>99</sup> Given that fiduciary duties significantly constrain the freedom of fiduciaries, the Court understandably rejected this submission. Counsel for Galambos in turn submitted that fiduciary relationships may be established only upon mutual agreement by fiduciary and beneficiary. The Court was not willing to go that far, but it did state that a fiduciary relationship may be established only upon the free will of the fiduciary. Justice Cromwell explained:

[W]hile a mutual understanding may not always be necessary ... it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship.<sup>100</sup>

Justice Cromwell found support for this requirement in prior decisions of the Court:

[I]n *Hodgkinson*, this Court considered competing bases for the imposition of *ad hoc* fiduciary duties, opposing to a certain extent mutual understanding and reasonable expectations of the alleged beneficiary. While the seven judges sitting on the case were not fully unanimous in this respect, they all agreed that *ad hoc* fiduciary obligations may be imposed when there is a mutual understanding to this effect, and, following the example of Dickson J. in *Guerin*, at p. 384, left the door open to such an obligation arising from a unilateral

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<sup>99</sup> The unilateral establishment of the fiduciary relationship is subject to the requirement that expectations be proved reasonable in the circumstances—an amorphous but not insignificant requirement.

<sup>100</sup> *Galambos*, *supra* note 6 at para 66.



undertaking by the fiduciary ... Thus, *what is required in all cases of ad hoc fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party.*<sup>101</sup>

Justice Cromwell does not elaborate on the means by which a binding undertaking may be made. However, he suggests that it may be implicit in the nature of a relationship freely entered into, in the exercise of power within a relationship, in the terms of an agreement, or otherwise implicit in the conduct of the fiduciary.<sup>102</sup> Thus it seems that formal consent is not necessary. The subject matter of the undertaking is also left unclear. Need the fiduciary simply undertake to exercise discretionary power over the practical interests of another, or must the fiduciary specifically accept obligations impressed upon the exercise of such power? The former view seems right as a matter of authority, as I shall explain in Part III. But the latter view is the apparent implication of Justice Cromwell's approving reference to the learned works of Paul Finn and Lionel Smith. Finn claimed, "For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another."<sup>103</sup> Smith wrote, "The fiduciary must *relinquish* self-interest" for a fiduciary relationship to be established.<sup>104</sup>

Justice Cromwell does not directly consider whether a fiduciary relationship might be established by legislative or judicial decree. The possibility is excluded by the claim that a voluntary act is required of the fidu-

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<sup>101</sup> *Ibid* at para 76 [emphasis added].

<sup>102</sup> *Ibid* at para 77:

The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

See also *ibid* at para 79:

This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

<sup>103</sup> PD Finn, *Fiduciary Obligations* (Sydney: Law Book Company, 1977) at para 15.

<sup>104</sup> Lionel Smith, "Fiduciary Relationships—Arising in Commercial Contexts—Investment Advisors: *Hodgkinson v Simms*" (1995) 74:4 Can Bar Rev 714 at 717 [Smith, "Fiduciary Relationship"] [emphasis in original].

ciary. However, the exclusion makes it difficult to account for relationships established by decree customarily considered to be fiduciary.<sup>105</sup>

## 2. The Basis of Fiduciary Duties

The analytical power of the essentialist view of the fiduciary relationship is evident in the way it structures Justice Cromwell's analysis of the normative basis of fiduciary duties. Starting from the proposition that discretionary power is of the essence of the fiduciary relationship, he carefully stipulates the meaning of normatively salient qualities of the relationship. The Court had become mired in unhelpful generalities about the significance of inequality, dependence, and vulnerability in private law writ large. Justice Cromwell's analysis indicates *how* these concepts are characteristic of the fiduciary relationship and *why* they are salient for the purposes of fiduciary liability.

Justice Cromwell begins by reiterating the conventional view that fiduciary liability is founded upon breach of duties occasioned by the fiduciary relationship. In his words, "A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary."<sup>106</sup>

He proceeds to explain that the normatively salient qualities of the fiduciary relationship are inherent, essential features of *the relationship*, not extrinsic, accidental features of *particular relationships*:

[F]iduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship.<sup>107</sup>

The point that fiduciary law is concerned with structural features of the fiduciary relationship is critical. It means that fiduciary liability does not turn on how the parties happen to be situated relative to one another for whatever reason. Rather, fiduciary liability is rooted in the nature of the fiduciary relationship, understood as a distinctive kind of legal relationship. But what are the structural qualities of a fiduciary relationship, and why do they found liability? Justice Cromwell recognizes that the answer lies in the heretofore unrefined intuition that fiduciary relationships are marked by inequality, dependence, and vulnerability. Appreciation of the special significance of these qualities for the fiduciary relationship re-

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<sup>105</sup> See Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31:1 Queen's LJ 259 at 294-98.

<sup>106</sup> *Galambos*, *supra* note 6 at para 37.

<sup>107</sup> *Ibid* at para 68, citing approvingly Weinrib, *supra* note 83 at 6 [emphasis in original].

quires that one understand them as structural characteristics necessarily incidental to the idea of the fiduciary relationship itself. The fact that, by definition, a fiduciary relationship involves one person exercising discretionary power over the practical interests of another entails that the parties are unequally situated, with the beneficiary dependent upon, and vulnerable to, the fiduciary in the exercise of power by the fiduciary.

This view is implicit in Justice Cromwell's analysis of the significance of vulnerability to fiduciary liability. Upon rejecting the notion that fiduciary liability is responsive to brute vulnerability, he indicates that fiduciary duties are founded upon the inherent vulnerability of the beneficiary to the fiduciary: "[W]hile vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship."<sup>108</sup> Vulnerability in this sense follows from the dependence of the beneficiary on the fiduciary in the exercise of discretionary power. As Weinrib explained, as a result of the fiduciary relationship, "the principal's interests can be affected by, and are therefore dependent upon, the manner in which the fiduciary uses the discretion which has been delegated to him."<sup>109</sup>

This interpretation was integral to Justice Cromwell's finding that Galambos did not owe a fiduciary duty to Perez. Distinguishing *Mustaji v. Tjin*,<sup>110</sup> he said:

*Mustaji* involved a claim by a nanny brought to Canada under the Foreign Domestic Movement Program. There were findings of fact that the defendants had taken over her affairs concerning her immigration and employment in Canada, that they had the opportunity to exercise power or discretion over her, were capable of using that power or discretion without her knowledge or consent so as to affect her legal and practical interests and that she was especially vulnerable to that exercise of discretion and control ... The trial judge in the present case found nothing of this sort.<sup>111</sup>

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<sup>108</sup> *Ibid* at para 68.

<sup>109</sup> *Supra* note 83 at 4, cited with approval in *Galambos*, *supra* note 6 at para 83.

<sup>110</sup> (1995), 224 CCLT (2d) 191 (BCSC) (available on QL), *aff'd* (1996), 25 BCLR (3d) 220 (CA) (available on QL) [*Mustaji*].

<sup>111</sup> *Galambos*, *supra* note 6 at para 56. One could quibble with the relevance of some of the findings of fact in *Mastaji* (*supra* note 110). For instance, knowledge or consent of the beneficiary to exercise of power by the fiduciary is irrelevant, save where it is such as to erode the discretionary nature of the power. Further, to the extent that vulnerability is an inherent structural characteristic of the fiduciary relationship, the suggestion that one must inquire into the degree of vulnerability is misleading.

The implication is that the vulnerability which matters for the purposes of fiduciary liability is that occasioned by and inherent in the fiduciary relationship itself.

### *C. The Nature and Scope of Fiduciary Obligation*

*Galambos* contributes less to the jurisprudence on the nature and scope of fiduciary obligation. Justice Cromwell repeats the truism that the facts of a given relationship may mean the coincidence of fiduciary and non-fiduciary duties.<sup>112</sup> He emphasizes that the core fiduciary duty is that of loyalty. He also indicates that the content of the duty of loyalty is explicable in terms of the beneficiary's structural vulnerability to exploitative misuse of power by the fiduciary. Noting that an "important focus of fiduciary law is the protection of one party against abuse of power by another," Justice Cromwell explained that the fiduciary is considered to have undertaken discretionary power on the understanding that it is to be exercised only in the interests of the beneficiary.<sup>113</sup> Power is exercised exploitatively where it is instead used to advance the interests of the fiduciary or a third party.

The Court was required to consider the scope of fiduciary obligation in addressing Perez's claim that Galambos owed her ongoing fiduciary duties by virtue of prior provision of legal services. It proceeded on the footing that the scope of fiduciary obligation is determined by the ambit and tenure of the fiduciary relationship. Thus, the obligations imposed upon a fiduciary arise within and are contained by the fiduciary relationship. Unless a fiduciary has an open mandate, or retains discretionary power in respect of interests connected with a closed one, the obligations generated by the relationship terminate with it. Justice Cromwell does not explain how this analysis is to be carried out. But he was not required to, for the conduct in question was clearly beyond the scope of the mandates under which Galambos acted. The mandates did not encompass Perez's employment for the firm, let alone her self-directed efforts at ameliorating its financial position.<sup>114</sup> The subject matter was remote, and the mandates themselves had long been moribund.

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<sup>112</sup> *Ibid* at para 37.

<sup>113</sup> *Ibid* at para 67. Cromwell J states that "a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party" (*ibid* at para 69). This is true inasmuch as it is a comment on the status of the power wielded by the fiduciary—the power may be exercised only in the interests of the beneficiary. However, it is misleading if taken to imply a requirement that a would-be fiduciary have notice of the nature of the obligations that constrain the exercise of discretionary power.

<sup>114</sup> *Ibid* at paras 38-39.

### III. Emendations and Amplification

*Galambos* represents a commendable advance. Decades ago, the Supreme Court of Canada established itself as an innovator through its critical engagement with fundamental questions about fiduciary liability. It failed to develop a coherent theory of liability, but that failure has been universal. In *Galambos*, Justice Cromwell has integrated scattered insights from the existing jurisprudence into a more cohesive approach. The Court is on the brink of a principled theory of fiduciary liability.

The emerging theory promises vindication of the conventional view that fiduciary liability is premised upon the fiduciary relationship, understood as a distinctive kind of legal relationship. It clarifies the essential character of the fiduciary relationship and explains the foundation, nature, and scope of fiduciary obligation. The essential character of the fiduciary relationship lies in the discretionary power wielded by the fiduciary over the practical interests of the beneficiary. The power wielded by the fiduciary is properly understood as a means belonging rightfully to the beneficiary, to be exercised in his interests. The cardinal fiduciary duty of loyalty arises from the beneficiary's inherent vulnerability to exploitive misuse of power by the fiduciary. This vulnerability is inherent in the sense that it is a structural feature consequent upon the establishment of the fiduciary relationship. The scope of fiduciary obligation is defined by the ambit and duration of the fiduciary relationship.

While the emerging theory of fiduciary liability is promising it, needs refinement. In what follows, I confine my attention to the most significant challenges. Wherever possible, I suggest how they might be resolved.

#### A. *The Nature of the Fiduciary Relationship*

##### 1. Moving Beyond the Status- and Fact-Based Approaches

The essential character of the fiduciary relationship having been identified, the status- and fact-based approaches to the identification of fiduciary relationships ought to be abandoned. If it is true that fiduciary relationships are a distinctive kind of legal relationship, there is no meaningful distinction to be drawn between per se and ad hoc fiduciary relationships. Either a given relationship will satisfy the definition of the legal kind or it will not.

As explained in Part I, the status-based approach suffers the obvious shortcoming that status has been accorded through undisciplined analogical reasoning. The comfort drawn from the relative stability of the approach is false, as the fixity of status is illusory. It has repeatedly been emphasized that a relationship with fiduciary status may be fiduciary for

some intents and purposes and not for others.<sup>115</sup> This implies that fiduciary status is at most presumptive.

The status-based approach is not for that reason entirely misguided. It may be that certain social categories of relationship of recognized fiduciary status (e.g., doctor-patient, lawyer-client) will ordinarily be properly considered fiduciary because they implicate the exercise of discretionary power by one person over the practical interests of another. But there is nothing inevitable in the social categories themselves such that social categorization may be substituted for legal categorization. Legal categories of relationship (e.g., director-corporation, trustee-beneficiary) are different in that a capacity for the exercise of discretionary power over the practical interests of another may be partly constitutive of the category. In these circumstances, fiduciary power inheres in the legal category of relationship. But even here, there is nothing in the categorization that compels recognition of fiduciary status. After all, a given relationship may enjoy merely notional membership in a legal category of which fiduciary power is a constitutive characteristic. Membership will be notional where, for instance, power has been withdrawn, limited, or subject to direction, such that it is no longer substantially discretionary. Even legal categorization may generate faulty inferences about the actual legal nature of a relationship. Again, recognizing that status is an imperfect proxy, proper characterization requires a definition of the fiduciary relationship as a kind unto itself.

Given that such a definition is at hand, there is no merit in continued reliance upon the fact-based approach either. The fact-based approach usefully encouraged reflection upon characteristics of fiduciary relationships. But it has proven conceptually bankrupt. The approach has yielded contested lists of descriptors that are individually ill-defined and together amount to little more than a jumble of words and phrases. In law, where concepts are the object of description, efforts at characterization find mature expression in definition.

A looser sort of characterization is not necessarily fruitless. It is thus unsurprising that the fact-based approach informs the emerging essentialist view of the fiduciary relationship. Indeed, many of the most cited characteristics of the fiduciary relationship are reinterpreted in *Galam-bos*. Discretion, power, practical interests, inequality, dependence, and vulnerability each serve an important part in the Court's articulation of the nature of the fiduciary relationship. Discretion, power, and practical interests are reflected in the definition of the fiduciary relationship as that in which one person exercises discretionary power over the practical

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<sup>115</sup> *Lac Minerals*, *supra* note 8 at 597. See also note 49, above.

interests of another. Inequality, dependence, and vulnerability are understood as giving manifold expression to the structure of established fiduciary relationships. They reveal asymmetries inherent in a relationship in which one person enjoys discretionary power over the practical interests of another.

Supposing that the status- and fact-based approaches are abandoned, the definition of the fiduciary relationship ought to serve as the sole criterion for identifying fiduciary relationships. Wherever fiduciary liability is asserted, courts ought to focus solely upon the question whether the alleged fiduciary has wielded discretionary power over practical interests of the person on whose behalf liability is alleged.

## 2. Amplifying the Definition of the Fiduciary Relationship

Identification of fiduciary relationships on the basis of a definition will help to ensure that fiduciary liability is principled. However, the definition set forth in Part II requires elaboration. In particular, more must be said about the relative positioning of fiduciary and beneficiary. It is understood that fiduciaries exercise discretionary power over practical interests of beneficiaries. But the meaning of “discretionary power” and “practical interests” must be clarified.

Common usage and scholarship indicate that fiduciary power may be understood in at least three ways. First, power may be understood as access. So understood, one enjoys fiduciary power whenever one has access to the practical interests of another.<sup>116</sup> Second, power may be taken to connote influence.<sup>117</sup> If fiduciary power is understood in this way, one enjoys it wherever one has the capacity to affect the practical interests of another. Third, power may be understood to mean authority.<sup>118</sup> So understood, one has fiduciary power when one has authority to act relative to the practical interests of another. Notice that these interpretations are mutually consistent and successively narrower. Influence (at least of a direct sort) is usually conditioned upon access. Authority in turn implies influence and access. Notice as well that the breadth of the definition of the

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<sup>116</sup> See Flannigan, *supra* note 2. It is sometimes said that the access must be limited, special, or extraordinary, but it is not clear what distinguishes ordinary from extraordinary access. The quality of access could turn on its scope or the conditions upon which access was granted.

<sup>117</sup> For instance, Robert Muir has stated that a fiduciary relationship is established “where one party has dominance or influence over another party” (Robert C Muir, “Duties Arising Outside of the Fiduciary Relationship” (1964) 3:3 *Alta L Rev* 359 at 360).

<sup>118</sup> See Fox-Decent, *supra* note 105.

fiduciary relationship—and thus the scope of liability—is contingent upon the meaning assigned to the concept of power.

Unsurprisingly, given the unsettled state of fiduciary doctrine, one can find support for each interpretation in the authorities. Nevertheless, reason and the balance of authority favour the third, and narrowest, interpretation. To have fiduciary power is to enjoy authority over the practical interests of another. The difficulty with the other interpretations lies in overbreadth, generating inconsistency between the concept of power and key elements of the conceptual structure of fiduciary liability.

One point of inconsistency arises in respect of the formation of fiduciary relationships. The law is clear that, whether established by agreement, undertaking, or decree, fiduciary relationships are initiated purposively. They do not arise by chance. One might readily chance to have access to or influence over the practical interests of another. However, authority over the practical interests of another does not subsist at large. It must be reposed, undertaken, or prescribed. In short, authority is conveyed or accepted intentionally. The idea of power as authority is alone consistent with the law on the means by which fiduciary relationships may be established.

Another point of inconsistency lies in the qualification—now entrenched in the authorities—that the power wielded by a fiduciary must be discretionary in nature. This means that the fiduciary must have scope for judgment in the exercise of power. It makes little sense to speak of discretion in respect of access to or influence over the practical interests of another. One either has access or influence or one does not. Access and influence are actual capacities susceptible to exercise at will, not legal capacities that may be subject to terms. Authority, by contrast, is a legal capacity and it may be subject to terms. Authority may be bare or discretionary depending on the terms upon which it was granted or undertaken. Thus, the idea of power as authority is alone consistent with the stipulation that fiduciary powers are discretionary.

A further point of inconsistency lies in the lack of fit between these senses of power and the emerging theory of fiduciary liability, according to which fiduciary duties are rooted in structural qualities of the fiduciary relationship. If access to or influence over the practical interests of another might arise purely as a matter of luck, then it follows that any inequality, dependence, or vulnerability thereby occasioned will pre-exist rather than arise from the fiduciary relationship. The relationship between power and these qualities will be contingent on the circumstances. So understood, inequality, dependence, and vulnerability would reveal nothing of the distinctive bilateral character of fiduciary relationships. They would thus be incapable of explaining why, purely as a result of it having been established, the fiduciary relationship is such that one person



ought to be deemed particularly responsible for the interests of another. It may happen that several people have access to and influence over the practical interests of another, and yet there is nothing in that alone to justify considering them especially responsible for the fate of the interests of that person.

By contrast, interpreting fiduciary power as authority fits with the conventional view that fiduciary liability responds to something distinctive about fiduciary relationships. It also clarifies the normative salience of inequality, dependence, and vulnerability for fiduciary liability. When fiduciary power is understood as authority, it may be recognized that these characteristics are salient in that they express the distinctive bilateral nature of established fiduciary relationships. Wherever one person enjoys discretionary authority over the practical interests of another, their relationship will be asymmetrical when considered in light of the power vested or undertaken. The salient form of inequality of power lies in enjoyment by the fiduciary of authority that the beneficiary lacks (it is immaterial for present purposes whether it has been ceded or may be annulled or reclaimed). The salient forms of dependence and vulnerability reflect this inequality. If effective,<sup>119</sup> authority entails influence and the risk of abusive exercise.

Accepting that fiduciary power is best understood as authority, a further explanation of the nature of the authority wielded by fiduciaries would be helpful. In this context as in others, most abstractly, authority goes to the rightful character of conduct. Rightfulness is at stake wherever one is acting in a manner potentially inconsistent with the legal status or rights of another. Authority can render conduct rightful that would otherwise be wrongful. Thus we may say authority enables fiduciaries to act rightfully, where otherwise they would act wrongfully. As I shall explain shortly, this affords an important perspective on the position held by fiduciaries, but it fails to distinguish the fiduciary from other agents whose legal status is characterized by possession of authority.

The jurisprudence suggests several refinements. The first is supplied by the usual qualification that the authority wielded by fiduciaries is *discretionary*. The discretionary character of authority means that the fiduciary has scope for judgment in determining how to act under authority.

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<sup>119</sup> If not effective, the authority wielded is arguably not fiduciary because ineffective authority undermines the purposive character of the fiduciary relationship. The fiduciary cannot further the ends of the beneficiary if her authority is ineffective. Furthermore, a beneficiary is not dependent upon or vulnerable to a fiduciary whose authority is ineffective. Nevertheless, recognizing that effectiveness may be contingent, waxing and waning with changing circumstances, it may be inappropriate to consider it determinative.

Practically speaking, it means that the scope of authority, and thus the ambit of rightful conduct, is broader than would be the case if authority were fixed. A second refinement lies in the strictly *relational* character of fiduciary authority. Fiduciaries do not enjoy authority at large akin to that of a sovereign. Rather, they enjoy authority in relation to a specific individual or class of beneficiaries. Authority renders rightful conduct of the fiduciary *toward the beneficiary* that would otherwise be wrongful (e.g., consent authorizes a physician to perform interventions on a patient; the *Canada Business Corporations Act*<sup>120</sup> authorizes a corporate director to manage the affairs of the corporate person created under the *CBCA*). A third refinement lies in the *specific* character of fiduciary authority. Fiduciaries do not enjoy unspecified authority relative to beneficiaries.<sup>121</sup> Rather, their authority is specified in the grant or undertaking of authority or otherwise by law.<sup>122</sup> In this way, the scope of rightful conduct is at once open and bounded. Fiduciaries have discretion within the limits of authority reposed in them or undertaken by them.

With this refined concept of fiduciary power as authority in mind, we have a clearer sense for the position of the fiduciary. But a more precise understanding of the fiduciary relationship requires explanation of the position of the beneficiary as well. I have argued that the authority wielded by the fiduciary founds the distinctive asymmetrical character of established fiduciary relationships, but this is merely to gesture at the position of the beneficiary.

The jurisprudence is comparatively clearer on the position of the beneficiary. It is commonly said that fiduciaries wield discretionary power *over* practical interests of beneficiaries. But that yields little in itself. More must be said about what makes an interest “practical” and about the ends for which fiduciary power may be exercised.

Canadian fiduciary jurisprudence is admirably capacious in its recognition of the kinds of interests that may be subject to the exercise of fiduciary power. Elsewhere, it has been said that fiduciary liability requires engagement of some proprietary or economic interest of the beneficiary. For instance, Gordon Smith argues that fiduciary duties protect “critical

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<sup>120</sup> RSC 1985, c C-44, s 115(3) [*CBCA*].

<sup>121</sup> Though their authority may be broad, as is true of the authority parents have over their children. Broad or poorly-defined authority will still be subject to limits specified by law even where none are specified in the granting or undertaking of authority.

<sup>122</sup> For instance, medical consent authorizes a physician to perform specific interventions on a patient and the *CBCA* expressly limits the authority of directors to delegate functions to officers.

resources” owned by beneficiaries from misappropriation by fiduciaries.<sup>123</sup> Australian jurisprudence has restricted fiduciary liability to claims involving the exercise of power in relation to economic interests.<sup>124</sup> These positions reflect a valid concern over the limits of fiduciary liability. But the proposed limits are arbitrary.<sup>125</sup> To be sound, categorization of recognizable interests must accord with underlying principles of fiduciary liability. Nothing in the nature of fiduciary power suggests that it may be exercised only in relation to proprietary or economic interests, or that these interests are more significant or susceptible than others.

The preferable view, entrenched in the Canadian jurisprudence, is that broadly *practical* interests may ground the exercise of fiduciary power. The jurisprudence has not yet articulated criteria by which to identify practical interests as such. However, I suggest that one might distinguish practical from other interests on the basis of the character of the interest and its susceptibility to influence under authority. An interest is practical where it connotes a real, ascertainable matter of personality, welfare, or right in relation to which one person may be uniquely and materially susceptible to the exercise of authority by another. Consistent with the authorities, matters of personality include aspects of the actual and legal personality of incapable and artificial persons, including the determination of the ends or interests of persons as such. Matters of welfare include decisions bearing upon specific aspects of the personal integrity and well-being of natural persons, including their physical and mental health. Matters of right include decisions relating to the legal rights, obligations, powers and liabilities of natural and artificial persons, including those in relation to contract and property. This typology is capable of accommodating and explaining the protection afforded by fiduciary law to a variety of interests of a range of beneficiaries, from children and patients to corporations and *cestui que trusts*.

It remains to be considered how the law specifies the ends governing the exercise of fiduciary power. The jurisprudence is inconsistent on this point. Fiduciaries have variously been deemed to hold power to *serve*, to *protect*, or to *promote* or *advance* the practical interests of beneficiaries, or to exercise them *for* or *on behalf of* beneficiaries. Indeed, these formula-

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<sup>123</sup> Smith, “Resource Theory”, *supra* note 2. For a similar view, *c.f.* Larry E Ribstein, “Are Partners Fiduciaries?” [2005]:1 U Ill L Rev 209.

<sup>124</sup> See e.g. *Paramasivam v Flynn*, [1998] FCA 1711, [1998] 90 FCR 489.

<sup>125</sup> For a criticism of the Australian jurisprudence, see Richard Joyce, “Fiduciary Law and Non-Economic Interests” (2002) 28:2 Monash UL Rev 239; Lisa Zhou, “Fiduciary Law, Non-Economic Interests and *Amici Curiae*” (2008) 32:3 Melbourne UL Rev 1158.

tions were used interchangeably in *Galambos*.<sup>126</sup> All of these expressions get at something fundamental, namely, that fiduciary power is understood in law as a means belonging rightfully to the beneficiary, to be exercised in service of his ends.<sup>127</sup> Nevertheless, the common formulae distort the manner in which fiduciary power is exercised in service of the ends of beneficiaries. Formulations of the first variety risk mistaking the ends for which fiduciary power may be exercised with normative implications for the conduct of fiduciaries (i.e., they are falsely suggestive of outcome-oriented fiduciary duties). Formulations of the second variety risk confusing the general concept of fiduciary power with a variety of such power (i.e., they falsely suggest that all fiduciary powers are representative in character).

It would, in my view, be better to focus on the ways fiduciary power may be exercised as a means to the ends of beneficiaries. It may be exercised as such in two ways: First, the fiduciary may exercise power in *pursuing* specific ends of the beneficiary that engage his practical interests (e.g., a corporate board of directors may approve a strategic business plan for realization of stipulated business objectives of a corporation). Second, the fiduciary may exercise power to *set* or *determine* ends of the beneficiary in a manner that engages his practical interests (e.g., parents will determine ends for their children in relation to schooling, medical care, and so forth). In short, fiduciary powers are exercised in pursuit or in determination of ends of a beneficiary that engage their practical interests. Typically, the terms upon which power is reposed or undertaken will be such that the fiduciary is permitted only to pursue specific ends of the beneficiary (e.g., a patient may specify that medical treatment options be

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<sup>126</sup> *Supra* note 6, Cromwell J, citing Finn, *supra* note 103. (the proposition that fiduciaries undertake “to protect and/or to advance the interests of another” at para 78). The trial judge is also cited with approval in interpreting *Hodgkinson* as requiring an undertaking “to act solely on behalf of the beneficiary” (*ibid* at para 64). Cromwell J also states that there must be an undertaking “that the fiduciary will act in the best interests of the other party” (*ibid* at para 66). To the same effect, see *ibid* at paras 76-81.

<sup>127</sup> As McLachlin J explains in *Norberg*:

The duties of trust are special, confined to the exceptional case where one person assumes the *power which would normally reside with the other* and undertakes to exercise that power solely for the other’s benefit. It is as though the fiduciary has taken the *power which rightfully belongs to the beneficiary* on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary (*supra* note 8 at 292 [emphasis added]).

This view is also implicit in comments on “ceding” or “transferring” power: see e.g. *Blueberry River*, *supra* note 63 (McLachlin J noted for the minority that the fiduciary relationship arises where “[a] person cedes (or ... finds himself in the situation where someone else has ceded for him) *his power* over a matter to another person” at para 38 [emphasis added]).

limited to those with palliative purpose). However, particularly where the authority relates to matters of personality, the fiduciary may be authorized to determine the ends of the beneficiary.

Drawing back from the detailed analysis of the relative positioning of fiduciary and beneficiary, a more focused picture of the fiduciary relationship emerges. Our starting position was that the fiduciary relationship involves one person exercising discretionary power over the practical interests of another. The more focused view sees it as that in which one person exercises discretionary authority to set or pursue practical interests (including matters of personality, welfare or right) of another.

### ***B. The Foundation of Fiduciary Obligation***

#### 1. The Formation of Fiduciary Relationships: Emendations

*Galambos* resolves an important question about the formation of fiduciary relationships. It rightly rejects the notion that a would-be beneficiary may establish a fiduciary relationship unilaterally. The faithfulness exacted of fiduciaries ought not to be capable of being commanded upon the whim, or even upon the reasonably founded trust, of beneficiaries. The idea of equal freedom that underlies private right entails that one cannot compel another to serve his ends.<sup>128</sup>

Nevertheless, the circumstances through which one may be deemed to have undertaken to serve the ends of another are less clear. *Galambos* suggests that a would-be fiduciary must be cognizant of the nature of the obligations attendant upon the fiduciary relationship. Lionel Smith is cited for the proposition that, in doing so, the “fiduciary must *relinquish* self-interest.”<sup>129</sup> It may be doubted that positive renunciation of self-interest is required because the duty of loyalty does not compel self-abnegation.<sup>130</sup> It is doubtful even that cognizance of the lesser fidelity expected of fiduciaries should be required. Alternatively, one might say that discretionary power over the practical interests of another must be freely

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<sup>128</sup> See generally Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009).

<sup>129</sup> Smith, “Fiduciary Relationship”, *supra* note 104 at 717, cited in *Galambos*, *supra* note 6 at para 78 [emphasis in original].

<sup>130</sup> As Smith himself has made clear elsewhere, “We know that the duty of loyalty owed by a director is not a duty of absolute selflessness: rather, it is accepted that being a director is not a full-time job, and the director may lawfully devote the bulk of his energy and ingenuity to other affairs, including the affairs of other companies” (“Motive”, *supra* note 2 at 57).

undertaken in circumstances where one knew or ought to have known that it is a means belonging rightfully to that person.

Accepting that fiduciary relationships are rarely established absent an undertaking or agreement, it does not follow that they may never be established constructively. To recognize a capacity in one individual to unilaterally impose fiduciary terms upon another is an affront to the idea of equal freedom. But it does not follow that such terms may never justifiably be imposed upon a relationship. Exceptionally, the nature of a relationship justifies fiduciary denomination by legislative or judicial decree. Consider the unwitting or unwilling birth parent who is a fiduciary to a child as a matter of right (subject to waiver or assignment of parental authority). Here, the fiduciary does not undertake discretionary power over the practical interests of the beneficiary. Rather, a subsisting power is declared fiduciary.

## 2. Revisiting the Basis of Fiduciary Duties

As I explained in Part II, the Supreme Court of Canada has gradually developed a promising view on fiduciary liability, whereby the justification for fiduciary duties is understood to turn on structural qualities of the fiduciary relationship. From the vague claim that fiduciary duties respond to inequality, dependence, or vulnerability at large, there has emerged the more potent claim that fiduciary duties are occasioned by vulnerability *inherent* in the fiduciary relationship.

The nascent theory is compelling but the Supreme Court of Canada has not properly committed itself to it. The Court has repeatedly suggested that circumstantial vulnerabilities might occasion fiduciary duties.<sup>131</sup> In *Galambos*, Justice Cromwell distanced himself from this view but did not repudiate it.<sup>132</sup> Clear repudiation is required for realization of gains in coherence as well as explanatory and justificatory power. One of the advantages of the emerging theory is that liability will be confined to relationships that are demonstrably fiduciary as judged by a definition of the fiduciary relationship as a distinctive category of juridical relationship. A further advantage is that this determination itself grounds liability, given that fiduciary liability is premised upon breach of a duty occasioned by the relationship as such. The nascent theory thus promises

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<sup>131</sup> *Norberg*, *supra* note 71 and accompanying text.

<sup>132</sup> *Supra* note 6 at para 68 (it is suggested that circumstantial vulnerabilities are “relevant” if less important than structural vulnerability).

principled circumscription of the scope of fiduciary liability, a point of pre-occupation in the jurisprudence and scholarship.<sup>133</sup>

These advantages are undermined by the suggestion that fiduciary duties may be based upon circumstantial vulnerabilities. Justice Cromwell was, in *Galambos*, evidently concerned that fiduciary liability *not* be considered a blunt instrument with which to deal with problems of vulnerability at large. That concern is well founded. The mere fact of vulnerability bears no necessary relationship to established parameters of fiduciary liability. The conventional view is that fiduciary liability is occasioned by the fiduciary relationship. The implication is that liability must be understood in light of characteristics of the fiduciary relationship. But vulnerability at large is not distinctively characteristic of the fiduciary relationship. Vulnerabilities arise for many reasons. They may arise due to personal characteristics of individuals or their circumstances as much as they may be occasioned by accidental or essential qualities of interpersonal relationships.

The conventional view implies that fiduciary liability turns on essential qualities of the fiduciary relationship. The distinctive content of the fiduciary duty of loyalty is in turn suggestive of the uniqueness of those qualities. The duty of loyalty conditions the exercise of discretionary power, requiring it not to be exercised other than for the benefit of the beneficiary. It responds to and reflects a *kind of vulnerability* peculiar to the fiduciary relationship; namely, the inherent susceptibility of the beneficiary to exploitative exercise of discretionary power by the fiduciary.

There is no compelling reason to think that fiduciary liability ought also or instead to turn on circumstantial vulnerability. One who undertakes discretionary power over the practical interests of another assumes responsibility for that person in the exercise of power, so far as it may happen to reach. But there is no reason to suppose that the undertaking contemplates assumption of responsibility for vulnerabilities that subsist independently of the fiduciary relationship. To hold otherwise would be to cast the scope of liability in incredibly broad terms, without apparent purpose or logic.

### *C. The Nature and Scope of Fiduciary Obligation*

Some of the Court's positions on the nature and scope of fiduciary duties merit reconsideration.

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<sup>133</sup> See Smith, "Motive", *supra* note 2 at 57.

### 1. Distinguishing Fiduciary from Non-Fiduciary Duties

As to the nature of fiduciary duties, a significant analytical challenge has been that of distinguishing fiduciary from non-fiduciary duties. The Supreme Court of Canada has suggested that fiduciary obligation is exhausted by the duty of loyalty. It has not consistently adopted this view. Nevertheless, it has come to deny that there is a fiduciary duty of care, placing it out of step with other jurisdictions.<sup>134</sup> Here and elsewhere debates over the range of fiduciary obligation have had an artificial ring given the lack of a principled basis upon which to distinguish fiduciary from non-fiduciary duties. The emerging theory of fiduciary liability resolves that difficulty.

The theory reveals that fiduciary duties are founded upon inherent, structural qualities of the fiduciary relationship. By way of illustration, I have explained that the fiduciary duty of loyalty is best understood as founded upon the beneficiary's inherent vulnerability to exploitative exercise of discretionary power by the fiduciary.

Under the emerging theory of fiduciary liability, the determination of whether an obligation is fiduciary depends on the connection between it and structural characteristics of the fiduciary relationship. If the content of the obligation is explicable on the basis of vulnerability that inheres in the fiduciary relationship, it is properly considered fiduciary. So understood, the vulnerabilities that found fiduciary duties will arise in every relationship correctly identified as fiduciary. Truly fiduciary obligations thus apply universally to fiduciary relationships. The universality of fiduciary obligation is reflected in consistent application of the duty of loyalty to fiduciaries exercising power under substantively diverse mandates.

The duty of loyalty is the only obligation considered fiduciary as a matter of general consensus. However, conventional wisdom ought to be tested. Some have already sought to broaden it.<sup>135</sup> I have argued that the duty of loyalty is founded upon the beneficiary's inherent vulnerability to exploitative exercise of discretionary power by the fiduciary. Might other duties said to be fiduciary likewise be understood as rooted in vulnerability inherent in the fiduciary relationship? The question is beyond the scope of the present inquiry. But a cursory analysis suggests a plausible case for recognition of a fiduciary duty of care. The argument for other duties commonly denoted fiduciary is less compelling.

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<sup>134</sup> In the United States in particular, it is commonplace to speak of fiduciary duties of loyalty and care. For a criticism, see William A Gregory, "The Fiduciary Duty of Care: A Perversion of Words" (2005) 38:1 Akron L Rev 181.

<sup>135</sup> See Birks, *supra* note 2.



The notion that there is a fiduciary duty of care is sometimes challenged on the basis that there could be nothing distinctive about such a duty. The “fiduciary” duty of care is said to be indistinguishable in substance from the tort duty. Thus, the jurisprudence reveals oft-repeated worries about replication of duties and the integrity of boundaries between categories of juridical obligations.<sup>136</sup>

However, the notion that there is nothing distinctive about the duty is wrong. There is, arguably, a duty of care owed by fiduciaries that is distinctive in origin, orientation and content.<sup>137</sup> As for origin, the duty of care in tort is a general norm of conduct. It requires that each person take due care to avoid conduct that poses a reasonably foreseeable risk of injury to another. The duty in tort does not suppose, nor does it establish, a distinctive kind of legal relationship between the duty- and right-holder respectively. By contrast, the duty in fiduciary law arises as a matter of course upon establishment of the fiduciary relationship. Ordinary tort principles governing recognition of a duty of care do not apply. Of course, so understood, the duty supposes that a distinctive kind of legal relationship subsists between duty- and right-holder. The fact that the duty arises in fiduciary law automatically upon the establishment of the fiduciary relationship suggests that it is rooted in the distinctive character of that relationship rather than upon contingent conduct or circumstances of the parties.

As for orientation, in contrast to the duty in tort, which constrains conduct at large, the duty in fiduciary law operates only to constrain the exercise of discretionary power. In other words, the duty is focused upon a particular form of conduct engaged in by fiduciaries as a matter of course given the nature of the fiduciary relationship. Thus it is that we say that directors are accountable *as fiduciaries* to the corporation not for negligence at large but rather for negligent exercise of discretionary power over the business and affairs of the corporation.

In terms of content, the duties differ in two significant respects. First, the duty in fiduciary law is broader in scope. Where the tort duty demands reasonable *care*, the fiduciary duty typically also requires reasonable *diligence* and *skill*. The broader scope of the duty makes sense given its orientation. The diligence requirement reflects the fact that the duty of care in fiduciary law conditions a positive obligation of fiduciaries;

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<sup>136</sup> *Canson Enterprises*, *supra* note 78.

<sup>137</sup> There are still other differences. Legal historian Joshua Getzler has canvassed many in the course of analyzing the English trend toward fusion of legal and equitable duties of care. Among the differences is the fact that fiduciary duties of care have not been subject to limitations on the tort duty, including contributory negligence. See Joshua Getzler, “Duty of Care” in Peter Birks & Arianna Pretto, eds, *Breach of Trust* (Oxford: Hart, 2002) 41.

namely, that they exercise judgment in determining whether and how to act upon authority. The skill requirement reflects the fact that fiduciaries are typically vested with authority because they possess certain skill, knowledge, training, or expertise. There is thus typically an implicit expectation that authority will be exercised skilfully or knowledgeably. Often, it would make no sense to invest a fiduciary with authority absent such an expectation (for instance, it would be folly to grant someone without medical training and licensure authority to perform an invasive medical intervention).

Second, the duty of care in fiduciary law is subject to a different standard of care. The authorities are admittedly inconsistent on this point.<sup>138</sup> However, the standard of care is rarely expressed in terms identical to that of ordinary negligence law. Fiduciaries are sometimes held to subjective standards of care. This may mean an elevated standard, as where fiduciaries are required to show a level of care, diligence, and skill when acting in interests of a beneficiary that they would show when acting in self-interest. Sometimes it means a lower standard, as when the level of care, skill, or diligence expected turns on the circumstances or capabilities of the fiduciary. Fiduciaries have also been held to objective and mixed standards. But even where the standard is objective, it is oriented to the character of the fiduciary relationship and the role of the fiduciary within it. For instance, fiduciaries are sometimes required to exercise the degree of care, diligence, and skill that a reasonable fiduciary would in the circumstances.

It is plain that the authorities have not settled upon a universal standard of care for fiduciaries. This indecision may reflect the difficulty of balancing recognition of the variable capabilities and functions of fiduciaries against the fact that all fiduciaries have assumed special responsibility for the interests of beneficiaries. In any event, fiduciary law clearly contemplates standards of care different from that of ordinary negligence law.

Accepting that the content of the duty of care in fiduciary law remains unsettled, it may nevertheless best be understood as a distinctive duty occasioned by the fiduciary relationship. Like the duty of loyalty, it arises as a matter of course upon the formation of a fiduciary relationship. Similarly, the orientation of the duty is explicable in terms of defining characteristics of the fiduciary relationship. The fiduciary duties of loyalty and care condition the exercise of discretionary power in specific ways, each of which makes sense where fiduciary power is understood as a means belonging rightfully to the beneficiary. The duty of loyalty does not compel a

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<sup>138</sup> See *ibid.*

total or encompassing fidelity. Rather, it compels faithful exercise of discretionary power in relation to specific practical interests of the beneficiary. Similarly, the fiduciary duty of care does not issue in the form of a general edict calling for reasonable care to be observed in one's conduct toward others. Rather, it requires that fiduciaries exercise discretionary power over the practical interests of beneficiaries with due care, diligence, and skill.

Most significantly, like the duty of loyalty, the content of the duty of care may be understood in light of vulnerability inherent in the fiduciary relationship. By virtue of the discretionary power enjoyed by the fiduciary over the practical interests of the beneficiary, the beneficiary is especially susceptible to having these interests compromised by careless, inept, or inattentive conduct by the fiduciary. The distinctive quality of the vulnerability is a matter of degree, not kind. Ineptitude and inattentiveness may be understood, together with carelessness, as varieties of negligence. As such, the character of the wrongful conduct constitutive of breach of the fiduciary duty of care is arguably indistinguishable from that of the tortious wrong of negligence. Nevertheless, the extent of susceptibility to the wrongful conduct and the nature of the normative loss occasioned by it are distinct.

The beneficiary of a fiduciary relationship is extraordinarily vulnerable to negligent conduct by the fiduciary because the relationship entails that interests of the beneficiary are directly and unusually exposed to decisions made by the fiduciary. For the exercise of discretionary power to be effective, fiduciaries must have proximity and access to, as well as immediate influence over, interests of the beneficiary. The level and character of influence mean that the beneficiary faces increased risk of injury negligently caused by the fiduciary.<sup>139</sup>

The nature of the normative loss suffered by the beneficiary also differs from that of an ordinary victim of tortious negligence. Tort law is famously unfriendly to claims for recovery of economic losses or unrealized benefits. The limitation on recovery for economic loss has been premised upon concern over limitation of liability, while the refusal of recovery for unrealized benefits has been justified on the basis that tort law addresses wrongs of misfeasance, not nonfeasance. Whatever the justification may be for these limitations on the kinds of losses that may found liability in tort, they are notable for their absence in fiduciary law. Fiduciaries may be held accountable for economic losses incurred through negligent exercise of discretionary power in relation to intangible economic or proprie-

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<sup>139</sup> The increased risk is, of course, circumscribed. It is risk relating to the exercise of discretionary power over specific practical interests.

tary interests. To hold otherwise would effectively foreclose liability for negligently caused injury to interests subject to fiduciary power in certain fiduciary relationships (e.g., between fund managers and investors). Fiduciary accountability is fault-based, not outcome dependent. As such, fiduciaries are not liable merely for failure to provide an expected benefit. Nevertheless, they may be liable for unrealized benefits where the disappointed expectation of benefit is attributable to negligence (e.g., trustees may be liable for failing to exercise stock options that, if exercised, would increase investment yield).

The significant inconsistencies and prevailing uncertainty in the law make it somewhat artificial to speak of a fiduciary duty of care of general application. Nevertheless, the jurisprudence is suggestive of such a duty and—*notwithstanding its unsettled doctrinal evolution*—there is reason to consider it explicable on the basis of essential characteristics of the fiduciary relationship.

The same cannot be said of other duties commonly identified as fiduciary. Consider the purported fiduciary duty of confidence. Fiduciary relationships are routinely loosely called relationships of “trust and confidence.” Undoubtedly fiduciaries are often entrusted with confidential information to facilitate exercise of discretionary power. Nor can it be doubted that fiduciaries may be liable for improper use or disclosure of such information. Fiduciaries may thus be subject to a duty of confidence. On that footing, it has been supposed that there is a fiduciary duty of confidence.<sup>140</sup>

The suggestion that it is proper to speak of a fiduciary duty of confidence has been roundly criticized.<sup>141</sup> However, the suggestion is difficult to fault absent a principled basis for distinguishing fiduciary from non-fiduciary duties. I have suggested that the emerging theory of fiduciary liability fills this void. And just as the theory provides structured support for recognition of a fiduciary duty of care so it is capable of explaining why the duty of confidence is not fiduciary. In short, in light of the theory one can see that the duty of confidence enjoys no necessary connection with the fiduciary relationship. More particularly, it cannot be attributed to any inherent vulnerability of the beneficiary to the fiduciary. The duty of confidence constrains the use and disclosure of confidential information, not the exercise of discretionary power. Furthermore, the possession of

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<sup>140</sup> See Dennis Klinck, “Things of Confidence: Loyalty, Secrecy and Fiduciary Obligation” (1990) 54:1 Sask L Rev 73; John Glover, “Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-Made Law” (2001) 21:4 LS 594; and Daniel Bayliss, “Breach of Confidence as a Breach of Fiduciary Obligations: A Theory” (2000-2003) 9 Auck UL Rev 702.

<sup>141</sup> See generally Klinck, *supra* note 140; Glover, *supra* note 140; Bayliss, *supra* note 140.

discretionary power does not of itself attract disclosure of confidential information. Yet, susceptibility to breach of confidence is contingent on that. The justification for the duty of confidence is best understood as lying in the disclosure and knowing receipt of confidential information.<sup>142</sup> The transaction of information requisite to liability is a contingent circumstance that attends some, but not all, fiduciary relationships. Thus, the duty of confidence to which *some* fiduciaries are subjected is properly understood as arising from the general equitable doctrine of breach of confidence. The duty is not fiduciary.<sup>143</sup>

## 2. Determining the Scope of Fiduciary Obligation

One advantage of the emerging theory of fiduciary liability is that it provides a principled basis upon which to test assertions about the nature of obligations. But a theory of liability should be capable of explaining the scope as well as the basis of liability. Quite apart from the problem of determining why fiduciaries are subject to the duty of loyalty and whether other duties are properly considered fiduciary, there is the problem of determining how far the conduct of fiduciaries is—or should be—constrained by fiduciary duties. This problem has been especially acute in cases where disloyalty is claimed on the basis that a fiduciary has taken profits or an opportunity for the same belonging to the beneficiary. For the beneficiary, it is sometimes argued that the duty of loyalty commands selflessness of the fiduciary in serving the interests of the beneficiary. Profits realized by the fiduciary thus belong rightfully to the beneficiary. Against this, it is argued that the law demands a lesser form of loyalty, preserving some latitude for self-interested conduct by fiduciaries.

The authorities do not reveal a consistent strategy for arbitrating such claims. One approach is to say that the duty of loyalty applies only to conduct taken in a fiduciary capacity or office. But this merely begs the question of the nature and scope of the fiduciary relationship. Another involves determining whether the beneficiary may have passed on the opportunity or consented to receipt of profits by the fiduciary. This approach simply avoids the problem of determining the scope of liability by asking when it may be waived or excluded.

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<sup>142</sup> Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984).

<sup>143</sup> See *Lac Minerals*, *supra* note 8. As Sopinka J recognized, “[T]he fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty” (*ibid* at 600-601).

The emerging theory of fiduciary liability offers a solution. It permits the scope of liability to be determined through delineation of the ambit of the fiduciary relationship. Specifically, it suggests that the scope of liability may be ascertained through fact-driven construction of positioning of beneficiary and fiduciary respectively within the relationship. Understood in light of the definition of the fiduciary relationship, the position of the fiduciary is marked by discretionary power while that of the beneficiary is denoted by his having practical interests subject to such power. Determination of the ambit of liability thus requires fact-driven construction of the discretionary powers wielded by the fiduciary and the practical interests of the beneficiary. In every case, it is necessary to clearly identify the specific power(s) wielded by the fiduciary (nature and scope of authority, as well as the terms, if any, expressly or impliedly attached) and the specific practical interest(s) of the beneficiary (the particular matters of welfare, personality or right that ground the exercise of power). Careful construction will permit delineation of the boundaries of a given fiduciary relationship.

The exercise should be undertaken with mind to the terms of power-conferring instruments (contractual, statutory, or otherwise) as well as the circumstances in which power was reposed or undertaken, including representations made by or on behalf of fiduciary and beneficiary respectively. The challenge in each case will be to develop an accurate representation of the sphere of authority accorded to the fiduciary relative to the beneficiary, recognizing that fiduciary liability constrains the conduct of the fiduciary only in respect of conduct within that sphere.

## Conclusion

Fiduciary jurisprudence throughout the common law world has struggled in the absence of a coherent general theory of fiduciary liability. It is everywhere supposed that fiduciary liability is premised upon the existence of a fiduciary relationship. However, the jurisprudence has not, to date, adequately developed this conventional view. Disagreement over the character of fiduciary relationships has generated deep uncertainty about the nature of fiduciary liability and concern over its scope. It has also fostered skepticism of the implicit assumption that fiduciary liability is distinctive.

The conventional view on fiduciary liability has thus required vindication. Of particular importance to successful vindication are a clear concept of the fiduciary relationship and an explanation of the nexus between it and the content of fiduciary duties. The Supreme Court of Canada, to its credit, has shown extraordinary willingness to engage questions central to the vitality of the conventional view. Recently, and particularly in *Galam-bos*, it has begun to make meaningful progress on these questions. I have

argued that a promising theory of fiduciary liability is emerging in the jurisprudence. The theory suggests that fiduciary liability is based upon inherent characteristics of the fiduciary relationship. The theory remains in some measure incomplete and unfocused. However, I have suggested ways in which it might be amplified and elaborated in the hope of strengthening its explanatory and justificatory power. The result, I believe, is a theory of liability that vindicates and thus makes good the assumptions implicit in practice.

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