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Article abstract

How well do we truly understand the legal concepts we regularly use and discuss? Truly understanding a legal concept necessitates understanding why it exists, what it was constructed to accomplish, and the purpose or purposes it was intended to facilitate. A lack of attentiveness to that raison d'être results in the loss of connection between the concepts and their underlying rationales. The divorce between legal concepts and their philosophical foundations renders the former susceptible to manipulation and misuse as they lose their connection to their philosophical and doctrinal foundations and subsequently become more and more unintelligible.

As it presently sits, fiduciary jurisprudence is one of the most confused and least understood areas of contemporary law. This is not a new development, but one of long standing. Jurisprudence and legal commentary indicate that both lawyers and judges misuse fiduciary principles for reasons inconsistent with fiduciary law's conceptual foundation.

The primary purpose of this article is to enhance the understanding of fiduciary duties and relationship fiduciarity by promoting a more robust understanding of the fiduciary concept centred upon its foundational raison d'être. In the process of establishing a stronger philosophical and doctrinal base for the fiduciary concept, the article will also contemplate the contributions provided by of one of the more recent additions to fiduciary law scholarship, authored by Remus Valsan and published in a recent issue of this same law journal.

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UNDERSTANDING FIDUCIARY DUTIES AND RELATIONSHIP FIDUCIARITY

Leonard I. Rotman[*]

How well do we truly understand the legal concepts we regularly use and discuss? Truly understanding a legal concept necessitates understanding why it exists, what it was constructed to accomplish, and the purpose or purposes it was intended to facilitate. A lack of attentiveness to that raison d'être results in the loss of connection between the concepts and their underlying rationales. The divorce between legal concepts and their philosophical foundations renders the former susceptible to manipulation and misuse as they lose their connection to their philosophical and doctrinal foundations and subsequently become more and more unintelligible.

As it presently sits, fiduciary jurisprudence is one of the most confused and least understood areas of contemporary law. This is not a new development, but one of long standing. Jurisprudence and legal commentary indicate that both lawyers and judges misuse fiduciary principles for reasons inconsistent with fiduciary law's conceptual foundation.

The primary purpose of this article is to enhance the understanding of fiduciary duties and relationship fiduciarity by promoting a more robust understanding of the fiduciary concept centred upon its foundational raison d'être. In the process of establishing a stronger philosophical and doctrinal base for the fiduciary concept, the article will also contemplate the contributions provided by of one of the more recent additions to fiduciary law scholarship, authored by Remus Valsan and published in a recent issue of this same law journal.

Dans quelle mesure comprenons-nous réellement les concepts juridiques que nous utilisons et discutons régulièrement? Une réelle compréhension d'un concept juridique nécessite de savoir pourquoi il existe, quelle est la fonction pour laquelle il a été conçu, et le ou les buts qu'il visait à atteindre. Or, le manque d'attention octroyé à leur raison d'être a pour conséquence la perte du lien entre ces concepts et leurs logiques sous-jacentes. Le divorce entre les concepts juridiques et leurs fondements philosophiques rend les premiers susceptibles à la manipulation et à l'abus, perdant ainsi le lien avec leurs fondements philosophiques et doctrinaux, et devenant de plus en plus inintelligibles.

La jurisprudence du droit fiduciaire est présentement l'une des plus confuses et moins bien comprises du droit contemporain. Or, ceci n'est pas un nouveau développement, mais un problème de longue date. La jurisprudence et les commentaires juridiques indiquent tous deux que les avocats et les juges abusent des principes fiduciaires pour des raisons qui sont incompatibles avec le fondement conceptuel de ce droit.

L'objectif premier de cet article est d'améliorer notre compréhension des obligations fiduciaires et de la relation fiduciaire en favorisant une compréhension plus robuste du concept fiduciaire, centrée sur sa raison d'être fondamentale. En établissant une base philosophique et doctrinale plus solide pour le concept fiduciaire, l'article examinera également la contribution récente au droit fiduciaire de Remus Valsan, publiée sous la forme d'un article dans un numéro récent de cette même revue.

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* Purdy Crawford Chair in Business Law and Professor, Schulich School of Law Dalhousie University. Some of the theory and principles discussed in this article are influenced by or adapted from material first published or conceptualized in Mark R Gillen & Faye Woodman, eds, *The Law of Trusts: A Conceptual Approach*, 3rd ed (Toronto: Emond, 2015) 769; Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921; Leonard I Rotman, "Is Fiduciary Law Efficient? A Preliminary Analysis" in Russell Weaver & François Lichère, eds, *Remedies and Economics* (Aix-en-Provence: Presses Universitaires D'Aix-Marseille, 2011) 126; Leonard I Rotman, "The Fiduciary Concept and the Subjective Nature of Legal Certainty" (2008) 110 R du N 359; Dr Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005); Leonard I Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34:4 Alta L Rev 821. This article is written for my children Joey (z"l), Hal, and Caia.

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Introduction

Why is the fiduciary concept so difficult to understand? After all, its history in English law dates back more than three hundred years and its philosophical and doctrinal origins reach back even farther. Fiduciary principles in common law jurisprudence predate even the seminal case of *Keech v. Sandford*[1] (*Keech*) in 1726 that is generally referenced as the first to outline fiduciary principles in English law.[2] The fiduciary concept's civil law origins are even older, dating back to principles of Roman law,[3] while its foundational principles may be discovered in both ancient Greek thought and in the Old Testament.[4]

Published law reporters abound with cases that apply fiduciary principles in a variety of circumstances and discuss them in various levels of detail. The number of fiduciary law articles printed in law journals indicates that many authors have written about the fiduciary concept, particularly in the last half-century.[5] Most dedicate considerable space in their commentaries to the continuing issues that plague fiduciary jurisprudence. Despite all of the attention paid to the fiduciary concept, we seem no further ahead in our understanding of it. Curiously, this dilemma has not diminished the continuing use of fiduciary principles. Indeed, quite the opposite effect may be seen. Fiduciary principles have gained in popularity consistently over the past few decades and are now ubiquitous in contemporary jurisprudence. This reality raises significant questions about the continued use of misunderstood legal concepts in contemporary jurisprudence.

A number of difficulties and misunderstandings have arisen as a result of the misapplication of fiduciary law and its principles. These difficulties and misunderstandings provide a strong impetus to inspire more detailed examinations of fiduciary purpose and how fiduciary law func-

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1 [1726] EWHC Ch J76, Sel Ca t King 61, 25 ER 223 (Ch) [*Keech* cited to Sel Ca t King].

2 Despite being understood as the first case to express fiduciary principles in English law, *Keech* was not the first fiduciary law case decided in England. That honour goes to *Walley v Walley* (1687), 1 Vern 484, 23 ER 609 (Ch), which, like the situation in *Keech*, involved the profits from a lease that were devised to a trustee for the benefit of an infant. Both cases are discussed in detail in Dr Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 58–61, 220.

3 See Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts*, 3rd ed (Cambridge: Heffer & Sons, 1955) at 1–14; Rotman, *Fiduciary Law*, *supra* note 2 at 171–77. See also David Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988).

4 See the discussion in Rotman, *Fiduciary Law*, *supra* note 2 at 161–70.

5 One needs only reference the authors cited in the Annex for a small sampling of the number of authors who have written about various aspects of the fiduciary concept.

tions to achieve that purpose. It is axiomatic, however, to state that the problematic application of fiduciary principles may only be replaced with more doctrinally appropriate outcomes once the fiduciary concept is better understood and its principles more appropriately implemented. The knotty situation that exists as a result of the unreflective and unprincipled application of fiduciary law is not going to resolve itself—history has already demonstrated that. More proactive and purposeful initiatives aimed at clarifying the application of the fiduciary concept are required in order to straighten out the difficulties that continue to surround the institution of fiduciary principles and cloud fiduciary jurisprudence.

There is often a wide gulf between possessing knowledge of legal concepts and possessing a sophisticated appreciation of their historical and theoretical foundations. Truly understanding a legal concept necessitates understanding *why* it exists: this entails knowing what that concept was constructed to accomplish and the purpose or purposes it was intended to serve. Put more simply, we should strive toward knowing not only what a particular legal concept *is* (its function), but also what it is *for* (its purpose).

For the most part, it appears that practical applications of legal concepts do not mandate this depth of knowledge. In a great many situations, the law does not appear to suffer too greatly where the practical application of its concepts implements only a fragment of what the law in a particular area is actually comprised of. There are, however, some significant exceptions. It is suggested here that the fiduciary concept is one of those exceptions because of its complexity and the continuing uncertainty over when and where it ought to apply, caused by too many improper applications of fiduciary principles.

The continued application of fiduciary principles despite the notable absence of substantive articulation of the fiduciary concept is troubling. The use of fiduciary principles in this manner dates as far back as the first half of the nineteenth century.[6] The subsequent development of a far-reaching fiduciary jurisprudence, in the absence of substantive understanding of what the fiduciary concept both *is* and is *for*, is responsible for the reams of doctrinally incorrect or questionable applications of fiduciary principles.[7] The present article is unconcerned with the reason for this ju-

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6 See e.g. *Ex parte Lacey* (1802), 6 Ves Jr 625, 31 ER 1228 (Ch) [*Lacey* cited to Ves Jr]; *Ex parte James* (1803), 8 Ves Jr 337, 32 ER 385 (Ch) [*Ex parte James* cited to Ves Jr].

7 See e.g. *Chase Manhattan Bank v Israel-British Bank* (1979), [1981] 1 Ch 105, [1980] 2 WLR 202 [*Chase Manhattan Bank*]; *Goodbody v Bank of Montreal* (1974), 47 DLR (3d) 335, 4 OR (2d) 147 (Ont H Ct J) [*Goodbody*]; *Courtright v Canadian Pacific Ltd* (1983), 5 DLR (4th) 488, 45 OR (2d) 52 (Ont H Ct J), aff'd (1985), 18 DLR (4th) 639, 50 OR (2d) 560 (Ont CA) [*Courtright*].

risprudential development, which is the subject for another investigation. It is concerned, however, with the fact that it has happened. Both situations are problematic: the former is the subject of historical curiosity and jurisprudential development, while the latter is a fundamental legal problem that remains particularly relevant in the present day.

Judges and legal authors have taken ample opportunities to discuss the fiduciary concept and have engaged in numerous attempts to work out perceived difficulties in its application. One of the latest names to be added to this list is Remus Valsan, who published an article in a recent issue of this law journal,[8] which has provoked this response. Although Valsan makes positive contributions to the literature on the fiduciary concept and its understanding, it is unfortunate that he, like others before him, has left unaddressed the fundamental question of what the fiduciary concept is for. It may well be that this was simply not his purpose in writing his article. Indeed, his desire to alter and expand the existing understanding of conflicts of interest appears paramount in his analysis. While that particular contribution is an important one, I argue that more fundamental fiduciary matters require attention before refinements of the type proposed by Valsan ought to be addressed. Notwithstanding the eagerness of many judges and authors to resolve the confusion surrounding the fiduciary concept, the failure to focus on *why* the concept exists and what it is *for* continues to inhibit its more fulsome understanding and hinders its application within the many common law and civil law jurisdictions in which it exists.[9]

This article asks the twin questions “What is the fiduciary concept?” and “Why does it exist?” Understanding the fiduciary concept requires knowledge of fiduciary responsibility and the duties flowing from that responsibility. Without an understanding of how fiduciary duties reflect and reinforce fiduciary responsibility and relationships, one would also be wholly unaware, *inter alia*, of: why fiduciary relationships exist; when interactions should be described as fiduciary; what causes fiduciary respon-

8 See Remus Valsan, “Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment” (2016) 62:1 McGill LJ 1 [Valsan, “Conflict of Interest”].

9 Fiduciary jurisprudence exists in virtually all common law countries, as well as a number of civil law countries (in particular, France and Germany). While the understanding of fiduciary principles is fairly consistent throughout these jurisdictions, the application of those principles and the jurisprudence that has developed around them can vary widely. For this reason, despite the fact that all applications of fiduciary principles (in whichever jurisdiction they appear) emanate from a common historical foundation, their application within unique and diverse jurisdictions may have resulted in distinctions that have developed over the years and serve to distinguish them from others that have developed in different jurisdictions and been subjected to equally distinct points of emphasis.

sibility; what the duties owed pursuant to that responsibility constitute; and what constitutes a breach of fiduciary duties once they are found to exist.

This article seeks to accomplish what might appear to be discrete tasks. Primarily, it seeks to establish a functional basis for understanding the fiduciary concept and the resultant duties accompanying the relationships that may appropriately be described as fiduciary.[10] In order to establish this functional approach, it is first necessary to appreciate the uncertainty that presently surrounds the fiduciary concept (Part I-A)—in particular, the manner in which fiduciary principles have been misused and misunderstood—, as well as to gain a better understanding of the function and purpose of the fiduciary concept by examining its foundational precepts. These foundational precepts explain why the fiduciary concept exists and how it ought to be properly implemented in order to facilitate its raison d'être (Part I-B). In working toward this goal, the article considers Valsan's contribution to the literature on fiduciary duties (Part II-B)—regarding particularly his discussion of conflicts of interest and the exercise of fiduciary discretion—and assesses how his article fits within the larger goal of understanding what fiduciary duties are and why they exist (Part II-C). Part III-A is dedicated to exploring the broad, foundational issue of why fiduciary obligations exist. Without understanding the fundamental reason for creating the fiduciary concept and the purpose it was intended to accomplish, it is impossible to ascertain the range of interactions that contain fiduciary elements within them or why any particular aspects of those larger interactions are fiduciary. Part III-B provides context for the discussion that precedes it. It examines the classic case of *Meinhard v. Salmon*[11] (*Meinhard*) for its

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[10] It is widely acknowledged and accepted that there is no outermost limit on the number or type of relations that may be described as fiduciary: see *Cuthbertson v Rasouli*, 2013 SCC 53 at para 193, [2013] 3 SCR 341; *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 55, [2001] 2 SCR 534; *Pilmer v Duke Group Ltd,* [2001] HCA 31 at para 136, 207 CLR 165; *M(K) v M(H)*, [1992] 3 SCR 6 at 65–66, (1992), 96 DLR (4th) 289; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 596–97 (1989), 61 DLR (4th) 14 [*Lac Minerals*]; *Frame v Smith*, [1987] 2 SCR 99 at 134, 42 DLR (4th) 81 [*Frame*]; *Goldex Mines Ltd v Revill* (1974), 7 OR (2d) 216 at 224, 54 DLR (3d) 672 (CA); *Lloyd's Bank Ltd v Bundy* (1974), [1975] 1 QB 326 at 341, [1974] 3 WLR 501 (CA); *Laskin v Bache & Co* (1971), [1972] 1 OR 465 at 472, 23 DLR (3d) 385 (CA); *Tate v Williamson* (1866), 2 LR Ch App 55 at 60–61; *Hospital Products Limited v United States Surgical Corporation*, [1984] HCA 64, 156 CLR 41 at 68, 96, 102, 55 ALR 417; *Guerin v The Queen*, [1984] 2 SCR 335 at 384, 13 DLR (4th) 321 [*Guerin*]; Rotman, *Fiduciary Law*, *supra* note 2 at 283–86; Justice EW Thomas, "An Affirmation of the Fiduciary Principle" [1996] 11 NZLJ 405 at 407; Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25:1 UTLJ 1 at 7; LS Sealy, "Fiduciary Relationships" (1962) 20:1 Cambridge LJ 69 at 73.

[11] (1928), 164 NE 545, 249 NY 458 [*Meinhard*].

illustration of the fiduciary concept's principles and effects discussed and distilled earlier in the article.

I. The Problem of Definition

A. The Uncertainty of the Fiduciary Concept

Commentators in jurisdictions like Canada, the United States, England, Australia, and New Zealand routinely discuss the fiduciary concept in relation to a wide variety of scenarios.[12] Pleadings alleging breaches of fiduciary duty are commonplace in these jurisdictions and numerous judgments regularly find fiduciary obligations to exist. These situations suggest the existence of a vast knowledge of, and comfort with, the fiduciary concept and its attendant principles. Yet, quite the opposite is true. Fiduciary law is often characterized as one of the least understood legal constructs in the very jurisdictions in which it enjoys widespread use.[13] The commonplace discussion and implementation of fiduciary principles within those jurisdictions conceal the lingering uncertainty surrounding the fiduciary concept. I have previously described this phenomenon as the "fiduciary paradox".[14]

With the perception of uncertainty surrounding the fiduciary concept, it should hardly be surprising that fiduciary principles are often misapplied. What is surprising is that there have not been more inquiries into why this uncertainty still exists, particularly given the inappropriate results that have been generated in the jurisprudence. The unsophisticated

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12 Fiduciary law has been applied, *inter alia*, to the relations between: parent and child; guardian and ward; doctor and patient; director or officer and corporation; tax adviser and client; partners; joint venturers; friends; Aboriginal band and Crown; former spy and government; army officer and government; licensor and licensee; real estate agent and client; solicitor and client; a thief and his bank; banks; employer and employee; corporation and shareholder; corporation and creditors; senior mining company and junior mining company; abusive father and abused daughter; mayor and city; franchisor and franchisee; securities broker and client; friendships, and; pension administrators and beneficiaries.

13 See e.g. *Lac Minerals*, *supra* note 10 at 643–44 ("[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship"). Peter Birks, meanwhile, has described the fiduciary concept as "a blot on our law, and a taxonomic nightmare" (Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UWA L Rev 1 at 18). Less extreme in her description of fiduciary uncertainty is Deborah A DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" [1988] 5 Duke LJ 879 [DeMott, "Beyond Metaphor"] (describing fiduciary obligation as "one of the most elusive concepts in Anglo-American law" at 879). See also JD Davies, "Keeping Fiduciary Liability Within Acceptable Limits" [1998] 1 Sing JLS 1.

14 Rotman, *Fiduciary Law*, *supra* note 2 at 17–52.

and often-improper understanding of the fiduciary concept not only results in the misapplication of its principles, but also allows for the purposeful misuse of its principles to generate particular results.[15] A more sophisticated vision and working knowledge of the fiduciary concept would prevent both of these occurrences.[16]

There are practical reasons why fiduciary principles continue to be utilized despite this lingering uncertainty. Unlike principles of contract or tort, fiduciary law looks not only to confirmed realities, like the existence of a conflict of interest, but also to possibilities or potential outcomes. Thus, it looks both to actual conflicts of interest as well as the possibility of conflicts of interest.[17] This expanded scope can create significant discomfort for those accustomed to absolutes. Because the same basis for employing fiduciary principles vis-à-vis actualities operates equally for potentialities, however, there is no difference in their mode of application. The difficulties in detecting breaches of fiduciaries' duties provide sufficient reason to sanction a greater degree of latitude in applying fiduciary principles to potentially problematic scenarios in order to "keep persons in a fiduciary capacity up to their duty."[18]

The lingering uncertainty surrounding the fiduciary concept has, however, led some to argue in favour of limiting the application of fiduciary principles[19] or even redefining the fiduciary concept altogether.[20] Indeed,

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15 As, for example, using the fiduciary concept to award relief to a party where broad principles of justice and fairness may dictate it, but when more established forms of civil obligation do not. The lack of judicial understanding of fiduciary law relative to contract or tort permits a purpose-minded judge to misapply fiduciary principles in order to award relief to a party when none of contract, tort, or unjust enrichment permit it, even if following a doctrinally-correct implementation of fiduciary principles would also not allow such an award. See e.g. *Chase Manhattan Bank, supra* note 7; *Goodbody, supra* note 7; *Courtright, supra* note 7.

16 Indeed, a purposive misapplication of fiduciary principles is far more obvious when their proper application is more generally known.

17 The mere possibility of a conflict of interest, as opposed to a demonstrated conflict, is a foundational principle of fiduciary liability that dates back as far as *Keech*.

18 *Nocton v Lord Ashburton*, [1914] AC 932 at 963, 30 TLR 602 (HL). See also *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 553, 85 DLR (4th) 129, McLachlin J (using a similar rationale to explain why equitable compensation for breach of fiduciary duty is not limited by common law principles of foreseeability or remoteness: "the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept 'up to their duty'").

19 See e.g. PD Finn, "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries, and Trusts* (Toronto: Carswell, 1989) 1 at 4; John D McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28:1 Can Bus LJ 107 at 136–40 [McCamus, "Prometheus Unbound"]; RP Austin, "Moulding the Content of

the continued misapplication of fiduciary principles and the failure to consider the broader implications of their application has curtailed fiduciary law's effectiveness in redressing civil claims in circumstances where the laws of contract, tort, and unjust enrichment are silent, insufficient, or ineffective.[21]

Numerous academics have attempted to address fiduciary uncertainty.[22] The desire to provide a sounder foundation for understanding the fiduciary concept has become a not-insignificant cottage industry among legal academics in recent years. There are a variety of legal academics who have sought, to varying degrees, to "define" the fiduciary concept, the relationships it creates, and the obligations it imposes. These initiatives are derived from and have involved a variety of legal areas in their attempts: corporate law, partnerships, family law, agency, law and economics, contract, tort, trusts, equity, property, constitutional law, and administrative law, among others. Yet, choose your favourite fiduciary law commentator and you can be certain that this person has, at some point, bemoaned fiduciary law's uncertain application and understanding.[23] Uncertain doc-

Fiduciary Duties" in AJ Oakley, ed, *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) 153 at 156.

20 See especially Birks, "Equity", *supra* note 13 at 18.

21 See e.g. Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921 at 936–45 [Rotman, "Holy Grail"] at 922.

22 For a comprehensive list of the more prominent or cited authors in fiduciary law and their major works, see the Annex.

23 See e.g. Birks, "Equity", *supra* note 13 at 17–18; Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121:3 Law Q Rev 452 at 452; Finn, "The Fiduciary Principle", *supra* note 19 at 3–4; John Glover, "Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology" (1995) 18:2 UNSWLJ 443 at 443; McCamus, "Prometheus Unbound", *supra* note 19 at 140; Paul B Miller, "A Theory of Fiduciary Liability" (2011) 56:2 McGill LJ 235 at 237; Leonard I Rotman, "The Fiduciary Concept, Contract Law, and Unjust Enrichment: A Functional Comparison" in Paula Giliker, ed, *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Leiden: Martinus Nijhoff, 2007) 87 at 88; D Gordon Smith, "The Critical Resource Theory of Fiduciary Duty" (2002) 55:5 Vand L Rev 1399 at 1423; Lionel D Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another" (2014) 130:4 Law Q Rev 608 at 608; Donovan WM Waters, "The Development of Fiduciary Obligations" in Rebecca Johnson et al, eds, *Gérard V. La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project for the Supreme Court of Canada Historical Society, 2000) 81 at 83–87; Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72:3 Cambridge LJ 720 at 720.

trines and principles run greater risk of producing or contributing to inefficient or incorrect outcomes.[24]

Rather than limiting the fiduciary concept's application or engaging in its fundamental redefinition, the problematic jurisprudential application of fiduciary principles demonstrates the need to fashion a more robust understanding of fiduciary law. Focusing on the reasons why fiduciary principles exist and what they are meant to accomplish will provide a far greater and more accurate measure of fiduciary certainty than trying to fashion definitive definitions or tests. The basic function of the fiduciary concept is known: fiduciaries are obliged to abnegate all self-interest, as well as those of third parties, and focus solely on the best interests of their beneficiaries. This requires that fiduciaries not benefit themselves or third parties, whether financially or otherwise, from their positions as fiduciaries, nor confer a benefit upon third parties at the expense of their beneficiaries' interests if the latter are tangibly related to the fiduciary nature of the parties' interaction. These prohibitions are enforced by the fiduciary rules against conflicts of interest. The rule against conflicts includes both conflicts of interest and conflicts of duty, such that any combination of these two can give rise to the prohibition. The correlation to the strict duties imposed on fiduciaries is that their beneficiaries are entitled to rely upon the fiduciaries' good faith in discharging their duties without the need for this performance to be monitored.

While there is likely to be more detail and sophistication in any specific fiduciary interaction than what is described above—particularly where the facts of an individual situation demand it—the above portrayal establishes the basic parameters of a finding of fiduciary obligation. What is conspicuously absent, however, is any rationale or explanation of why the fiduciary duties exist and why their strict observation is necessary. While it is one thing to understand the implications of a finding of fiduciary obligation, ascertaining whether or not an interaction or person ought to be described as fiduciary, with the concomitant obligations provided by that description, is wholly another matter. Understanding the fiduciary concept requires not simply knowing its function, but also its purpose; a distinction explained by Chief Justice Laskin as "between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to our social and economic conditions,

[24] That being said, a measure of vagueness and uncertainty can be useful in the application of fiduciary principles because of the latter's nature and origins (see Leonard I Rotman, "The Fiduciary Concept and the Subjective Nature of Legal Certainty" (2008) 110 R du N 359 at 391–93). See also Leonard I Rotman, "The 'Fusion' of Law and Equity? A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2:2 Can J Comparative & Contemporary L 497 at 500–01 [Rotman, "Fusion"].

and serving ends that express the character of our organized society."[25] Justice Frankfurter's judgment in *Securities & Exchange Commission v. Chenery Corporation* recognizes this when he insightfully explains: "[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligation does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"[26] The identification of relationship fiduciarity and the associated application of fiduciary duties are what cause the greatest confusion and uncertainty in fiduciary jurisprudence.

B. The Function and Purpose of the Fiduciary Concept

The mutability of fiduciary principles allows for their application to a wide variety of disparate fact situations and equally broad variety of interactions, but simultaneously renders the fiduciary concept inimical to precise definition. Many have attempted to define the fiduciary concept,[27] but capturing its true nature has remained elusive. The best explanation for the failure to formulate an adequate definition of the fiduciary concept rests, perhaps, in the recognition that the "fiduciary" concept is quite abstract and conceptual. As such, it is better understood through a functional description of its purpose (namely, what it does, why it does this, and how it does it), as well as the implications of its principles, rather than via traditional attempts at definition.

Fiduciary law facilitates a purposefully expansive understanding of the obligations existing between parties that is consistent with the importance of their interaction and transcends strict, common law limits. The fact that both the policy rationale underlying the fiduciary concept and the interests it protects are rather distinct from most of what exists under the common law helps to explain why the fiduciary concept cannot be conceptualized in the same manner as its common law counterparts.

Understanding the fiduciary concept, then, requires looking to the broad postulates that give it substance and the principles of equity from which they are derived. As the most doctrinally pure expression of equity,[28] the fiduciary concept's equitable origins ought to be front and centre

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25 Bora Laskin, "The Function of the Law" (1973) 11:1 Alta L Rev 118 at 119.

26 *Securities and Exchange Commission v Chenery Corporation*, 318 US 80 at 85–86, 63 S Ct 454 (1942).

27 See *supra*, note 23, Annex.

28 See Rotman, *Fiduciary Law*, *supra* note 2 at 154. See also GE Dal Pont & DRC Chalmers, *Equity and Trusts in Australia and New Zealand,* 2nd ed (Sydney: LBC Information Services, 2000) at 71 (describing the fiduciary relationship as "arguably the

in any substantive discussion or analysis of its purpose and principles. Fiduciary law protects only those vital interactions of high trust and confidence resulting in one party's implicit dependency upon and peculiar vulnerability to another within defined parameters.[29] It accomplishes this task by imposing strict duties on fiduciaries, including, importantly, requiring fiduciaries to act honestly, selflessly, with integrity, and in the best interests of their beneficiaries.[30] The standard of care required of fiduciaries is the utmost good faith. As a result of this high standard and fiduciaries' requirement of selflessness, fiduciaries may not benefit themselves or third parties at the expense of their beneficiaries' interests that are tangibly related to the fiduciary nature of the parties' interaction.[31] These prohibitions are enforced by the fiduciary rules against conflicts of interest.[32]

The fiduciary concept's foundation in broad and equitable notions of justice and conscience creates difficulty in defining "things fiduciary" with any degree of precision. Fiduciary law's protean quality, which allows for its adaptation to the specific requirements of individual scenarios, produces similar problems. While these open-ended characteristics admittedly pose challenges for maintaining a sufficient level of certainty and predictability for juristic actors, the doctrinally-guided exercise of judicial discretion provides for the principled application of fiduciary principles. This is consistent with the fiduciary concept's origins in equity.

Equity works alongside the law, supporting it where it is deficient and enabling the law to adequately respond to the individual requirements of particular circumstances. It occupies a supplementary jurisdiction to the common law that supports and improves the latter without being inferior to it or lesser in importance.[33] The development and situation-specific ap-

premier equitable concept which illustrates equity's jurisdiction"); John D McCamus, "The Evolving Role of Fiduciary Obligation" in *The Continued Relevance of the Law of Obligations: retour aux sources*, *Conférences Meredith Lectures 1998-1999*, McGill University (Cowansville, Que: Yvon Blais, 2000) 171 ("fiduciary obligation seems now to have assumed the traditional mantle and role of equity jurisprudence as a device for correcting defects in the common law" at 205).

[29] See Rotman, *Fiduciary Law*, *supra* note 2 at 250.

[30] See *ibid* at 255, 303.

[31] See *ibid* at 299, 303.

[32] This includes conflicts of interest, conflicts of duty, as well as conflicts of interest and duty.

[33] Acknowledging the supplementary jurisdiction of equity entails that it is not needed where the law is suitable or sufficient to address the issue in question, but it augments or replaces the law where the latter is silent or deficient. See e.g. *In re Vandervell's Trusts (No. 2)*, [1974] 1 Ch 269 at 322, [1974] 3 WLR 744 (CA); Sidney Smith, "The Stage of Equity" (1933) 11:5 Can Bar Rev 308 ("[e]quitable rights were not to supplant

plication of equitable principles humanizes and contextualizes the law's otherwise antiseptic nature, which makes the law more just. In accomplishing these diverse tasks, equity did not replace the common law, but maintained a conceptual separation from it, all the while harmonizing law with the needs and requirements of evolving social structures and relationships.

One of the primary ways in which the continued importance of equity is expressed in contemporary law is through the fiduciary concept. Fiduciary law's prescription of other-regarding behaviour allows certain individuals to trust that their interests will be cared for by others in various forms of fiduciary associations. However, trusting others leaves parties vulnerable to having their trust abused. Indeed, where one party holds power over another's interests, the latter may become vulnerable to the use, misuse, or abuse of that power. Fiduciary law's desire to promote interdependency and specialization consequently runs the risk of creating what Alison Grey Anderson has called "distorted incentives" that may arise when specialists realize the personal benefits they can reap from abusing others' trust.[34]

These "distorted incentives" are neutralized by the insertion of fiduciary principles that remove self-interest from its consideration. Relations appropriately characterized as fiduciary prevent those with power over others' interests from taking advantage of that power imbalance for self-benefit. Without the insertion of fiduciary principles, the trust that created the parties' interdependency would also be the likely cause of its destruction, as the failure to remove self-interest would see it abuse that trust.

It has often been suggested that fiduciary law exists to protect vulnerable beneficiaries from exploitation by their fiduciaries.[35] Although some may suppose that the fiduciary concept's purpose is to protect the interests of beneficiaries from harm by their fiduciaries, a possible reason for this misapprehension is that the fiduciary concept's protection of relationships has the incidental effect of protecting those parties whose interests are vulnerable to being abused by others. Thus, while it may appear that

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common law rights, and, in most cases, equitable rights were predicated upon the very existence of common law rights … Equity, as understood in English law, was not a self-sufficient system; at every point, it presupposed the existence of the common law" at 312–13).

34 Alison Grey Anderson, "Conflicts of Interest: Efficiency, Fairness and Corporate Structure" (1978) 25:4 UCLA L Rev 738 at 794.

35 This was suggested both by Justices Wilson and LaForest in *Frame*, *supra* note 10 at 136–38; *Lac Minerals, supra* note 10 at 662–63; *Hodgkinson v Simms*, [1994] 3 SCR 377 at 405, 117 DLR (4th) 161 [*Hodgkinson*].

the fiduciary concept exists to protect beneficiaries' interests, that effect is merely ancillary to its protection of fiduciary relationships.

While fiduciary norms furnish beneficiaries who entrust others within fiduciary interactions with the means to protect or abuse their interests, the fiduciaries entrusted by the beneficiaries are furnished with significant disincentives to abuse that trust.[36] Fiduciaries' duties and beneficiaries' benefits thus offset each other to create an equilibrium that maintains the parties' fiduciary interactions by removing the threats of self-interest and mistrust that might otherwise undermine or destroy the relationship.

These correlative[37] fiduciary duties and benefits exist because of the fiduciary concept's broader goal of preserving the integrity of the relationships in which these individuals participate (rather than protecting the individuals' rights). The fiduciary concept does not, however, protect all forms of interdependency. Where other means of civil obligation are both available and suitable to the task of regulating individual interactions, fiduciary law is not needed. It is only where the private law of contract, tort, or unjust enrichment is silent, inappropriate, or ineffective that fiduciary principles are used.

Fiduciary law protects important social and economic interactions of *high* trust and confidence that create an *implicit* dependency and *peculiar* vulnerability of beneficiaries to their fiduciaries.[38] While placing ordinary trust and confidence in others will create other forms of obligation, only high trust and confidence reposed within the context of the types of important social and economic relations contemplated above will give rise to fiduciary obligations.[39] Fiduciary interactions rank among the most valuable in society by enhancing productivity and knowledge, facilitating spe-

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36 These disincentives are captured by or encompassed within the onerous duties imposed upon fiduciaries to act with honesty, integrity, selflessness, and the utmost good faith in the best interests of their beneficiaries, as discussed above.

37 On the idea of correlative rights and duties, see Wesley N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 30.

38 See Rotman, *Fiduciary Law*, *supra* note 2 at 259–60.

39 See Leonard I Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34:4 Alta L Rev 821 ("[t]he policy underlying the law of fiduciaries is focused upon a desire to preserve and protect the integrity of socially valuable or necessary relationships which arise from human interdependency" at 826); *2475813 Nova Scotia Ltd v Rodgers*, 2001 NSCA 12 at para 58, 189 NSR (2d) 363:

> In considering whether a fiduciary relationship exists, the fundamental purpose of this equitable concept must be kept in mind. These purposes, which have been expressed in both scholarly and judicial writing, are to protect and foster the integrity of important social relationships and institutions where one party is given power to affect the important interests of another.

cialization, and creating fiscal and informational wealth.[40] To protect them, fiduciary law subordinates individual interests to its broader social and economic goals. Relationships, rather than individuals, are the primary concern of the fiduciary concept.[41]

To paraphrase George Keeton, the distinction between the common law and equity is not just historical, but attitudinal.[42] Like the equitable principles that created it, the fiduciary concept is premised upon broader principles of fairness and justice than the common law and "supplement[s] the general law with broader and theoretically based principles that more readily account for the idiosyncrasies of individual human interactions."[43] Equity exists alongside the common law and informs and modifies it where necessary, yet maintains a conceptual separation from it. Equity extrapolates beyond the common law by instituting principles designed to provide context to judicial decision making. This facilitates law's ability to respond to disparate situations by emphasizing its spirit and intent.

I have previously described the core understanding of the fiduciary concept and the duties formulated around it as fiduciary law's "holy grail".[44] These foundational fiduciary values include modes of behaviour

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40 See Rotman, *Fiduciary Law, supra* note 2 at 259, 302.

41 See Paul Finn, "Contract and the Fiduciary Principle" (1989) 12:1 UNSWLJ 76 ("[t]he true nature of the fiduciary principle ... originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service" at 84); JK Maxton, "Contract and Fiduciary Obligation" (1997) 11:3 J Contract L 222 ("fiduciary law aims to maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other" at 225 [footnote omitted]); Peter D Maddaugh, "Definition of Fiduciary Duty" in Law Society of Upper Canada, ed, *Special Lectures of the Law Society of Upper Canada, 1990: Fiduciary Duties* (Scarborough: DeBoo, 1991) 15 [*Special Lectures 1990: Fiduciary Duties*] ("[t]hus, by gaining clarity as to the essential purpose underlying the fiduciary concept—namely, to maintain the integrity of trust and trust-like relationships—we are able to identify with some precision the particular duty that is owed by one who occupies a fiduciary position: it is the duty of loyalty" at 26–27).

42 See GW Keeton, *An Introduction to Equity*, 6th ed (London: Pitman & Sons, 1965) at 43–44 [Keeton, *Introduction to Equity*]:

> The common law was concerned with the establishment and enforcement of rights. Equity looked farther, and sought to make the parties conform to a standard of social conduct prescribed by itself. It operated upon the "conscience of the wrongdoer." The Chancery is a Court of Conscience, and to purge a guilty conscience it was first necessary that the wrongdoer should redress the harm done, as far as that was possible and compellable (*ibid* at 22).

43 Rotman, *Fiduciary Law*, *supra* note 2 at 238.

44 See Rotman, "Holy Grail" *supra* note 21.

that must be ascribed to by those holding power over the interests of others in certain socially- or economically-necessary or important interactions of high trust and confidence. The contents of the fiduciary "holy grail" also contemplate the unique space inside which the fiduciary concept operates within the law of civil obligations, as well as the foundational goals that the fiduciary concept is designed to accomplish.

II. The Animating Forces of Fiduciary Duties

The section that follows outlines the "essential fiduciary points of emphasis" that illustrate what is necessary to the practical implementation of the fiduciary concept and what ultimately separates it from other legal doctrines (Part II-A). This section seeks to render more concrete the more philosophical discussion of the fiduciary concept that preceded it. It does this by rooting the broad understanding outlined earlier in means and methodologies intended to provide substance to the fiduciary theory espoused, as explained through the principles applied to both fiduciaries and beneficiaries. This part then discusses the recent article by Remus Valsan on this topic (II-B) and questions whether perhaps the distinction brought by that article is one without a difference (II-C).

A. Essential Fiduciary Points of Emphasis

The overriding principle of the fiduciary concept is that fiduciaries must act in the best interests of their beneficiaries. Consequently, they must abnegate all self-interest, as well as the interests of third parties that interfere with their fiduciary obligations to their beneficiaries. Beneficiaries need not monitor their fiduciaries' performance of these duties.

Fiduciary law counterbalances individualistic ideas founded in contract, such as the "reasonable expectations of the parties" and private ordering, by emphasizing broader social and economic goals that are consistent with the construction and preservation of interdependency. The fiduciary nature of a relationship describes both the law governing its existence as well as the bundle of rights and duties that stem from it. Fiduciary relationships are comprised of a series of associated duties and benefits. As indicated above, these relations only exist in a meaningful way because the parties' respective entitlements are enforced through fiduciary norms that create a rights-obligations "equilibrium". Thus, as with Wesley Hohfeld's jural correlatives,[45] when fiduciaries have duties to act with honesty, integrity, fidelity, and in the utmost good faith toward their beneficiaries' best interests, beneficiaries have correlative rights to rely upon

[45] See Hohfeld, *supra* note 37 at 30.

their fiduciaries' fulfilment of these duties without having to inquire into or otherwise monitor the fiduciaries' activities. The integrity of the interaction is maintained by the fiduciaries' fidelity to their obligations. Beneficiaries have no obligations towards their fiduciaries in fiduciary interactions.

Fiduciaries' duties of integrity, loyalty, and selflessness require, *inter alia*, that they act with the utmost good faith, make full and complete disclosure of relevant information affecting their beneficiaries' interests, avoid conflicts of interest, and not profit from information or opportunities gained while serving as fiduciaries. The latter prohibitions have traditionally been described as the "no-conflict" and "no-profit" rules. All of these duties attach to beneficiary interests that are tangibly related to the fiduciary interaction. This explains why fiduciaries must eschew *any* correlative personal[46] or third-party interests within the context of their fiduciary associations, regardless of whether those interests are complementary or antagonistic to their beneficiaries' interests.[47] Any actions outside of those fiduciary interactions are not subject to fiduciary duties, even if they involve the same parties.[48]

Where a person possesses power over another, it is only a fiduciary power if it can be unilaterally exercised. Fiduciaries do not require permission to exercise fiduciary powers, nor are they under the authority of others with greater power absent a situation of permissible delegation. As with principal-agent relations, fiduciaries' authority is complete unless it has been restricted in some manner. Beneficiaries are, therefore, implicitly dependent upon and peculiarly vulnerable to their fiduciaries' use, misuse, or abuse of power over their interests. The unmitigated range of actions fiduciaries may undertake in exercising their powers and the potential for harm to their beneficiaries are what necessitated the creation and imposition of fiduciary obligations. The potential implications for beneficiaries explain why the fiduciary concept focuses exclusively upon fiduciaries' behaviour. The fiduciaries' use of their power, rather than anything their beneficiaries may do, dictates whether the integrity of the interaction in question is maintained.

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46 See *Rosenfeld v Black*, 445 F (2d) 1337 at 1342, Fed Sec L Rep P93093 (2d Cir 1971) ("no matter how high-minded a particular fiduciary may be, the only certain way to insure full compliance with that duty is to eliminate any possibility of personal gain").

47 An exception to this rule may prevail, however, with the voluntary, independent, and informed consent of beneficiaries (see Rotman, *Fiduciary Law*, *supra* note 2 at 374–94).

48 See e.g. *Noranda Australia Ltd v Lachlan Resources NL* (1988), 14 NSWLR 1 at 15, 1 ARLR 30 ("a person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from the obligation in all other respects").

The harsh sanctions levied against fiduciaries for failing to conform to the fiduciary concept's high standards may include, *inter alia*, the disgorgement of profits or amounts equal to losses avoided, equitable compensation, a constructive trust, or the presumption of most advantageous use in calculating lost opportunities by a beneficiary wrongfully deprived of property.[49] Fiduciary sanctions have a strong, exemplary quality to them, designed to deter fiduciaries from breaching their duties. Fiduciary relief is not necessarily punitive in nature, although it can be in appropriate circumstances. Its severity, however, facilitates beneficiaries' ability to rely upon their fiduciaries' good faith actions. This explains why the fiduciary concept prescribes other-regarding behaviour that looks beyond the limitations and immediacy of self-interest.[50]

Moreover, the fiduciary concept does not apply to all forms of interaction. Rather, it is needed only where there are compelling policy reasons, rooted in equity or statute, to preserve and reinforce the integrity, vitality, and value of certain forms of relationships.[51] The strict duties imposed upon fiduciaries are substituted for the rules and mores of the marketplace. These strict standards—including the reverse onus which causes fiduciaries to bear the burden of disproving prima facie demonstrations of fiduciary obligations and their breach[52] and the notion that fiduciary obligations, once established, may transcend the active duration of fiduciary

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[49] This presumption holds that beneficiaries who have been wrongfully deprived of assets by a breach of fiduciary duty will be presumed to have put those assets to their most advantageous use had they retained possession of them: *Armory v Delamirie*, [1722] EWHC KB J94, 93 ER 664 at 664, 1 Strange 505 (KB); *McNeil v Fultz* (1906), 38 SCR 198 at 205 (available on CanLII); *Huff v Price* (1990), 76 DLR (4th) 138 at 148, 51 BCLR (2d) 282 (CA); *Guerin*, *supra* note 10 at 362; *Maguire v Makaronis*, [1997] HCA 23, 188 CLR 449, 71 ALJR 781 at 791; Walter Ashburner, *Principles of Equity* (London: Butterworth, 1902) at 52–54; John D McCamus, "Equitable Compensation and Restitutionary Remedies: Recent Developments" in Law Society of Upper Canada, ed, *Special lectures of the Law Society of Upper Canada, 1995: Law of Remedies* (Scarborough: Carswell, 1995) 295 at 299; Jeff Berryman, "Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" (1999) 37:1 Alta L Rev 95 at 108–11.

[50] Self-interested behaviour is purely a means unto itself and concentrates upon the immediate benefits to be obtained from a particular interaction. It is difficult to sustain on a long-term basis, insofar as those who practice self-interest will not generate the loyalty of others and will not benefit from continued associations with those others (or, for that matter, persons associated with those others).

[51] This is emphasized as well in Thomas, *supra* note 10 at 406.

[52] See the discussion on the reverse onus in Rotman, *Fiduciary Law*, *supra* note 2 at 614–19.

interactions[53]—are similarly designed to enforce the integrity of the fiduciary office.

In summary, the fiduciary concept applies to significant (i.e., more than fleeting), socially and economically important or necessary interactions of high trust and confidence to maintain the integrity and vitality of those associations. The fiduciary concept is used vis-à-vis these forms of interaction to preserve the interdependency necessary for the specialization that generates fiscal and informational wealth.[54] The fiduciary concept applies only where fiduciaries possess power over their beneficiaries' interests that is materially related to the fiduciary element of their interaction and may exercise those powers without the beneficiaries' consent or the permission of others. In these circumstances, the beneficiaries become implicitly dependent upon or peculiarly vulnerable to the fiduciaries' use, non-use, or misuse of those powers.

B. Valsan's Emphasis: A Primary Focus on Conflicts of Interest

In his recent contribution to the literature on fiduciary obligation, Remus Valsan focuses his attention primarily on fiduciaries' conflict of interest as the key to facilitating a better understanding of the fiduciary concept.[55] While Valsan is neither the first nor the only commentator to focus on the importance of avoiding fiduciaries' conflicts of interest in order to maintain the integrity of fiduciary interactions and the proper discharging of fiduciaries' obligations thereunder, his discussion of fiduciary conflicts proposes a different point of emphasis than previous authors'. In the discussion that follows, the parameters of Valsan's thesis are outlined and his discussion of conflict of interest is examined for its uniqueness and distinct approach from what has often been focused upon by others. The distinction between Valsan's suggested and more expansive approach to conflicts of interest is contrasted with more traditional attitudes toward both understanding and responding to fiduciaries' conflict. It is also examined with respect to its relationship to private law generally.

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53 See the discussion on the duration of fiduciary accountability in *ibid* at 394–409.

54 As stressed above, its single-minded focus is to preserve the vitality of those relations; any benefit to the beneficiaries thereto is incidental to this purpose.

55 See Valsan, "Conflict of Interest", *supra* note 8 at 4.

1. Establishing the Parameters of Valsan's Thesis[56]

Valsan's characterization of what he describes as the "dominant view" of fiduciary duties suggests that fiduciary duties are designed to prevent fiduciaries from acting in self-interest in situations where they are obliged to facilitate their beneficiaries' best interests.[57] This view creates problems, says Valsan, because he contends that discouraging fiduciaries' temptation to act in self-interest becomes enmeshed with the concepts of deterrence and vulnerability, both of which he maintains are "too broad and too vague to be effective hallmarks of the fiduciary relationship."[58]

He then identifies what he describes as the two core elements of fiduciary relations found in recent fiduciary law jurisprudence: undertakings and discretion.[59] The notion of requiring an undertakings in order to found a fiduciary relationship was recently sanctioned by the Supreme Court of Canada in two judgments: *Galambos v. Perez*[60] and *Alberta v. Elder Advocates of Alberta Society*.[61] These judgments entrenched the idea that fiduciary relations cannot exist without would-be fiduciaries' express or implied undertaking to act in another's best interests.[62]

Arguments in favour of the necessity of an undertaking to found fiduciary relationships have a relatively long history in academic analyses of the fiduciary concept.[63] Nonetheless, the idea of requiring an undertaking

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56 This article does not intend to canvass every aspect of Valsan's thesis, but focuses on select ones for examination.

57 See *ibid* at 6.

58 *Ibid*.

59 See *ibid* at 7.

60 2009 SCC 48, [2009] 3 SCR 247 [*Galambos*].

61 2011 SCC 24, [2011] 2 SCR 261 [*Elder Advocates*].

62 See e.g. *Galambos*, *supra* note 60 at para 77 ("[t]he 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. ... [I]n both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty"). These statements were cited with approval in *Elder Advocates*, *supra* note 61 at para 32.

63 See e.g. 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"); PD Finn, *Fiduciary Obligations* (Sydney: Law Book, 1977) at 9:

> 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. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's

remains controversial, particularly the idea of an "implied undertaking", which is an oxymoron. The reason for requiring an undertaking, presumably, is to clarify when fiduciary relations exist and to ensure that fiduciaries are fully aware of their obligations as fiduciaries. That rationale, however, would seem to require a more positive action and understanding on the part of a would-be fiduciary than an "implied undertaking" could possibly provide, given the constructive nature of implying an undertaking.[64]

Aside from the issue of undertaking, Valsan focuses on the importance of fiduciaries' discretionary power to affect their beneficiaries' interests. While most commentators agree on the necessity of such discretion,[65] Valsan properly recognizes that "discretion" is not interpreted consistently or uniformly. This discrepancy in interpretation applies both to the meaning and content of discretion, as well as how fiduciaries control it.[66]

As Valsan explains, "Some scholars equate discretion with opportunities to cheat or to exploit other people's vulnerability, or with enlarged scope for fiduciaries to breach non-fiduciary duties."[67] However, he regards these situations as being limited to removing fiduciaries' tempta-

> interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter.

See also McCamus, "Prometheus Unbound", *supra* note 19 (describing the existence of an undertaking as "[t]he starting point for the identification of fiduciary obligation" at 122).

64 The very idea of an "undertaking" is a positive action adopted or sanctioned by an individual. It is, therefore, the exact opposite of a judicially-constructed scenario in which judicial analysis of an individual's actions after the fact provides the basis for suggesting that an individual "undertook" fiduciary obligations toward another.

65 See e.g. Lionel D Smith, "Can We Be Obliged to Be Selfless?" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) 141 ("[f]iduciary relationships are those where one person holds authority to make discretionary decisions that will affect another person's situation" at 158); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart, 2010) ("[i]t is difficult to imagine fiduciary relationships that do not involve some element of discretion on the fiduciary's part, and that discretion will inevitably be capable of affecting the legal position of the fiduciary's principal" at 247); D Smith, *supra* note 23 ("fiduciary relationships form when one party (the 'fiduciary') acts *on behalf of* another party (the 'beneficiary') while exercising *discretion* with respect to a *critical resource* belonging to the beneficiary" at 1402 [emphasis in original]); Weinrib, *supra* note 10 ("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" at 4); *Lac Minerals*, *supra* note 10 at 599; *Hodgkinson*, *supra* note 35 at 407; Rotman, "Holy Grail," *supra* note 21 at 941–42; Tamar Frankel, "Fiduciary Law" (1983) 71:3 Cal L Rev 795 at 809–10.

66 See Valsan, "Conflict of Interest", *supra* note 8 at 7.

67 *Ibid* at 7 [footnotes omitted].

tions to use their powers to obtain improper benefits. He suggests this purpose is incorrect, insofar as deciding whether or not to misappropriate property, or opportunities belonging to another, is not the exercise of discretion contemplated by fiduciary law. Rather, he states that fiduciaries exercising discretion refers to their abilities to make decisions on their beneficiaries' behalves, which includes the ability to decide from among a range of permissible options.[68] Thus, fiduciary discretion, in Valsan's conceptualization, entails the authority to exercise decision-making power only to promote a beneficiary's interest. As he states, "[T]he requirement of power is best understood as decision-making authority."[69]

While Valsan makes some important points, his focus only on positive actions undertaken by fiduciaries renders his characterization too restrictive, and inaccurately so. The use of fiduciaries' discretion, where it exists, is not restricted only to one element of that discretion. Discretion may exist regarding a wide variety of issues or it may not exist at all. Moreover, while a fiduciary's exercise of discretion is important, it is not at all necessary for a fiduciary to possess discretion over a beneficiary's interests for that person to be a fiduciary vis-à-vis the beneficiary.[70] The example of a bare trustee is, perhaps, the most obvious example of a situation in which a fiduciary has power, but no discretion, over a beneficiary's interests.[71] The bare trustee is, however, undeniably still a fiduciary and remains subject to fiduciary obligations.

What is the purpose of providing fiduciaries with discretion? Fiduciaries' discretion gives them the ability to determine how, when, and whether to exercise their powers, both for good and ill.[72] Consequently, where it exists, this discretion is not limited to the exploitation of vulnerability. Where a fiduciary's discretion is limited, it is limited in respect of the fi-

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68 See *ibid* at 8.

69 *Ibid*.

70 See the discussion in Rotman, *Fiduciary Law*, *supra* note 2 at 145–47.

71 A bare trustee possesses power to execute the terms of a trust, but possesses no discretion over the exercise of that power, regarding either *whether* to use it or *when* to use it. The bare trustee *must* exercise the power in the manner determined by the creator of the trust. See e.g. *Peragrine v The Queen*, 2012 TCC 348, 2012 DTC 1287; *Trident Holdings Ltd v Danand Investments Ltd* (1988), 49 DLR (4th) 1, 64 OR (2d) 65 (CA). See also Maurice C Cullity, "Liability of Beneficiaries: A Rejoinder" (1985) 7 E & TQ 35 at 36:

> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals—the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee.

72 Of course, as with the bare trustee, it is possible to limit the scope of a fiduciary's power, whether in a trust instrument, by statute, or otherwise.

duciaries' powers, such as having the discretionary power to invest, not vis-à-vis the effects of using that power. Meanwhile, the exploitation of vulnerability is not the same thing as the exercise of a fiduciary's discretion. The exploitation of a beneficiary's vulnerability is a consequence of the fiduciary's exercise of a particular power or the manner in which the fiduciary chooses to implement, or not, the power in question. In other words, a beneficiary's vulnerability may be exploited by the fiduciary's non-use, or non-consideration, of fiduciary powers just as it may be by the misuse or abuse of those powers. For these reasons, the distinction Valsan draws is an artificial one the purpose of which is uncertain.

Fiduciaries' power over the beneficiaries' interests, not their discretion, is what creates the latter's implicit dependency upon and peculiar vulnerability to the former.[73] That vulnerability is not absolute, however, in the sense that it does not exist vis-à-vis all elements of the interaction between fiduciary and beneficiary, but only within the fiduciary elements of their interaction. It is well understood that not all aspects of a fiduciary relationship are, themselves, fiduciary.[74] For example, while a physician may hold fiduciary duties regarding a patient's health and well-being, the physician does not owe fiduciary duties regarding any stock tips given to a patient or may bill the patient for health services rendered in circumstances where such is permitted, notwithstanding that the patient's best interests would be to receive the services free of charge.

In describing the content of fiduciary duties, Valsan separates them into narrow and broad conceptualizations found in jurisprudential and academic analyses.[75] In their narrow conceptualization, he suggests that fiduciary duties are restricted to the prophylactic duties forbidding fiduciaries from profiting from their positions as fiduciaries or where their personal interests or those of a third-party conflict, or potentially conflict,

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73 In many circumstances, fiduciaries will have both power and discretion over their beneficiaries' interests. The greater the extent of the fiduciaries' power, the more opportunities for affecting their beneficiaries' interests. Greater or lesser discretion does not affect the extent of beneficiaries' vulnerability; rather, it simply provides fiduciaries with greater choice over the manner in which beneficiaries may be made vulnerable.

74 The fact that not all aspects of an interaction may be fiduciary in nature is most famously stated in *New Zealand Netherlands Society "Oranje" Incorporated v Kuys*, [1973] 1 WLR 1126 at 1130, [1973] 2 NZLR 163 (PC): "A person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at".

75 In his discussion, Valsan separates duties into "prescriptive" and "proscriptive" duties. My use and understanding of those duties differs from those used by Valsan; as such, I will omit any discussion of "prescriptive" and "proscriptive" duties herein, primarily to avoid confusion, but also to obviate the need to engage in a thorough discussion of these distinctions that are not key to either the primary purpose of this article or that of Valsan's.

with their duty to their beneficiaries. These circumstances comprise what is commonly known as the no-profit rule and the no-conflict rule. No other forms of fiduciary duties exist in this conceptualization.[76]

Under the broad conceptualization of fiduciary duty content, the no-profit rule and the no-conflict rule are joined by other obligations, like the duty to act in good faith—which some describe as the "duty of loyalty"[77]—and the duty to maintain confidences. Valsan rejects this broader conceptualization of fiduciary duty as inappropriate, insofar as "it fails to identify a core feature or duty that applies only to fiduciary positions."[78] While fiduciaries possess a variety of duties, some are unique or peculiar to the fiduciary position while others are more generic (and, hence, not "fiduciary duties" even though they are performed by a fiduciary).[79] However, the duty of good faith that Valsan mentions may or may not be properly classified as a fiduciary duty.

In the context of fiduciary law, fiduciaries do not owe duties of good faith, but, rather, have duties to act with the *utmost* good faith in the best interests of beneficiaries.[80] Ordinary duties of good faith exist in many areas of the law, although they are particularly associated with contracts. The Supreme Court of Canada has clarified that contract law contains a foundational duty of good faith that applies to all contracting parties in *Bhasin v. Hrynew*[81] (*Bhasin*). If Valsan meant to reference utmost good faith, however, it is a proper characterization of the nature and scope of fiduciaries' duties, but it does not create a special duty in and of itself. The duty of utmost good faith must be articulated in respect of a particular action, like investment, or fetching an appropriately high price for the sale of an asset.

Valsan rejects the narrow and broad approaches in favour of a middle ground he identifies that separates fiduciaries' duties into two groups: the traditional duties comprised of the no-conflict and no-profit rules and a core fiduciary duty of loyalty. The latter is said to be distinct from the no-conflict and no-profit rules and justifies their existence, but connects those

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76 See Valsan, "Conflict of Interest", *supra* note 8 at 9.

77 The phrase "duty of loyalty" is primarily used by American scholars and in the jurisprudence of the United States to describe fiduciary duties, more particularly in the corporate law realm and especially in Delaware.

78 *Ibid* at 10.

79 See *supra* note 74 and accompanying text.

80 See Rotman, *Fiduciary Law*, *supra* note 2 at 306; Joseph Story, *Commentaries on Equity Jurisprudence,* 1st English ed by WE Grisby (London: Stevens & Haynes, 1884) at 135.

81 2014 SCC 71 at paras 62–63, [2014] 3 SCR 494 [*Bhasin*].

negative rules by putting them to use to prevent violations of fiduciaries' fundamental duties.[82] The core fiduciary duty is purpose-driven and exists to ensure fiduciaries act appropriately in discharging their traditional duties. While Valsan asserts that this middle-ground approach is "the only approach that can provide a cogent understanding of fiduciary relationships," he also indicates that existing theories of this core fiduciary duty "fall outside of the dominant understanding of the content of fiduciary duties" which is why the idea of a connecting core fiduciary duty is generally not as accepted a part of fiduciary duties as the no-conflict and no-profit rules.[83] This is where he views his article's primary contribution to the fiduciary law literature.

Valsan contends that fiduciaries' duties to "exercise judgment based on relevant considerations" ought to be regarded as the core fiduciary duty. By exercising judgment based solely on relevant considerations, Valsan maintains that fiduciaries will ensure their ability to properly discharge the traditional no-conflict and no-profit rules that protect their beneficiaries' interests. His article attempts to demonstrate the wisdom of his conceptualization of fiduciary duty by "[r]elying on an interdisciplinary view of conflicts of interest ... [to] show that the … no-conflict and no-profit duties protect the duty to exercise judgment based on relevant considerations."[84] Where his approach differs from existing theories is that rather than having the core fiduciary duty facilitate the traditional no-conflict and no-profit rules, Valsan turns that approach on its head and suggests that the no-conflict and no-profit rules facilitate the core fiduciary duty to exercise judgment based on relevant considerations.[85]

One cannot help but feel that, despite his best intentions, Valsan ends up obfuscating rather than clarifying the understanding of fiduciaries' duties by introducing, as the "core" fiduciary duty, a concept that is not necessarily fiduciary at all. Indeed, fiduciaries are not the only individuals obliged to exercise judgment based on relevant considerations: principles of adjudication and administrative fairness also require judges and other adjudicators to render decisions solely on the basis of relevant considerations. Moreover, not all of the situations in which individuals have such a duty are, or necessarily have to be, fiduciary. This analysis causes Valsan's assertion of the core fiduciary centrality of the duty to exercise judgment based on relevant considerations to fall into the same trap that he criticizes the broad approach to fiduciary duties for not avoiding. De-

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82 See Valsan, "Conflict of Interest", *supra* note 8 at 10.

83 *Ibid*.

84 *Ibid* at 11.

85 See *ibid*.

scribing the process of exercising judgment based on relevant considerations as a "duty" rather than seeing it as basic common sense does not somehow elevate it to something unique or peculiar to the fiduciary concept. Consequently, based on his own reasoning, it is difficult to see how the duty to exercise judgment based on relevant considerations can be the core feature of fiduciary interactions.

There also appears to be a circularity to Valsan's argument regarding the core duty. Initially, he states the need to better demonstrate why the traditional and strict no-conflict and no-profit rules connect with the core fiduciary duty of loyalty to prevent violations of that core duty. He suggests that the reason for this connection is the duty to exercise judgment based on relevant considerations. He then, however, states that this duty is, itself, the core fiduciary duty. If the duty to exercise judgment based on relevant considerations is the basis for connecting the no-conflict and no-profit rules to the core fiduciary duty, how can it also be that core duty? In other words, how can the duty to exercise judgment based on relevant considerations be both the tool that connects the no-conflict and no-profit rules with the core fiduciary duty, but also be that core duty?

Additionally, what is the difference between having the no-conflict and no-profit rules facilitate the core fiduciary duty, as he suggests, rather than having the core duty ensure the discharging of the no-conflict and no-profit rules? The end result, certainly, is the same. The primary difference, it would appear, is what gets characterized as the "core" fiduciary duty. Insofar as it does not appear that these differences in characterization lead to different outcomes, it may well be that Valsan's argument over what lies at the core of fiduciary duties is a distinction without a difference.

2. Conflicts of Interest

Rather than focusing on the conflict between fiduciaries' self-interest, their duties to their beneficiaries' best interests, and how to address or avoid these situations, Valsan contends that fiduciary conflicts of interest need to be wholly reimagined so they are understood for what fiduciary law ought truly to be concerned with. This is where he indicates his departure from traditional emphases on fiduciary conflicts of interest and the strict adherence to the no-conflict and no-profit rules that, he maintains, do not properly capture where fiduciaries' conflicts of interest lie.

Valsan defines a conflict of interest as "a situation in which a person, who has a duty to exercise judgment for the benefit of another, has an interest that tends to interfere with the proper exercise of her discretion."[86] Valsan emphasizes the impairment of fiduciaries' ability to properly exercise discretion on behalf of their beneficiaries. He suggests that this impairment of fiduciaries' judgment and discretion is the real reason why conflicts of interest need to be prevented. The difficulty with conflicts of interest, however, is that they "affect the reliability of the decision maker's judgment in ways that cannot be measured or corrected adequately."[87] In this way, their impact on decision makers are not always known to decision makers to allow them the opportunity to step down or away from a situation of conflict. Even if the existence of conflicts is known, Valsan stresses that the manner in which conflicts operate may prevent decision makers from making appropriate decisions as to their conflict.

Valsan argues that in relations where one party has discretionary power or authority over another's interests, the strict proscriptive duties are necessary to ensure that the exercise of discretion is not influenced, whether directly or subconsciously, by the prospect of self-interest. Further, fiduciary duties against conflicts must be strict in order "to prevent self-interest or other-regarding interests from interfering with the fiduciary's core duty to exercise judgment based on relevant considerations."[88] Thus he suggests that the existence of proscriptive fiduciary duties "protect[s] the beneficiary's right to the fiduciary's best judgment by preventing self-interest or other-regarding interests from interfering with the fiduciary's proper exercise of judgment."[89]

Valsan states that the conflict of interest formulation he establishes in his article provides a "sound explanation for the peculiar harshness of fiduciary duties."[90] Meanwhile, he stresses that his argument in favour of the need for strict application of fiduciary duties is premised upon a more precise understanding of "conflict of interest" than traditional formulations of conflicts are.[91] In his view, the understanding of fiduciary conflicts of interest he promotes also justifies the strict enforcement preventing fiduciaries' conflicts of interest. These are the reasons why conflicts of interest comprise the major focus in his article.

Valsan's discussion of conflicts of interest provides important context and perspective to conceptualizing a fiduciary's obligations while addressing one of the vital considerations of relationship fiduciarity. It provides

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86 *Ibid* at 4.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

access to specific examples of interdisciplinary literature on conflicts of interest that have generally not made their way into mainstream fiduciary law discussions. This is a definite contribution to any serious examination of the fiduciary concept and clarifies some long-held misconceptions about conflicts of interest, not solely in the fiduciary context.

Yet, focusing on conflicts of interest provides only a partial glimpse of the fiduciary picture. An article purporting to provide "a more persuasive rationale for the strictness of fiduciary liability,"[92] needs to be more ambitious and cannot focus solely on conflicts of interest. There are far more fundamental, and foundational, reasons why the fiduciary concept was created by equity; these are revealed by an examination of the relevant jurisprudence. In limiting the scope of his examination to conflicts, Valsan inhibits his ability to provide the greater-reaching impact for his article that he, himself, suggests. That is neither a fault of his research, nor is it because conflicts of interest are not prominent in discussions of fiduciary liability. Rather, it is because conflicts are merely an effect, rather than a cause, of fiduciary liability.

Conflicts of interest are one of the primary outcomes of relationship fiduciarity that fiduciary law attempts to both address and avoid. However, there are more substantial—and foundational—reasons why fiduciary liability is as strict as it is. Indeed, discussing the strictness and severity of fiduciaries' liability necessitates a discussion of the unique purpose and function of the fiduciary concept. Liability does not exist in a vacuum and differs according to the theoretical basis upon which it is initially established. Remedies properly flow from and have a direct correlation with the rights from which they originate.[93] For this reason, there are different remedial considerations for different forms of obligations. A prime example of this may be seen in the distinction between common law and equitable remedies, which are often just as distinct from one another as common law causes of action are from equitable causes of action.[94]

Without understanding why the fiduciary concept exists, the rationale underlying the strict application of its principles or the breadth of its ex-

92 *Ibid* at 1.

93 See Rotman, *Fiduciary Law*, *supra* note 2 at 686–88.

94 This distinction helps to explain why the common law and equity ought to be seen to maintain a conceptual separation to the present day, notwithstanding their procedural merger creating common courts and judiciaries. The remedies, or measures of relief, that arose under each of those jurisdictions provide a means to resolve the disruption of the rights that exist under their respective causes of action and cannot be automatically imposed vis-à-vis the other such that a common law cause of action gives rise to a claim of equitable measures of relief. For further discussion, see generally Rotman, "Fusion", *supra* note 24.

pansive modes of relief lacks a context in which to make sense of them. The uniqueness of the fiduciary concept stems from its equally unique focus on considerations that are not part of the vision of other bases of civil liability. Yet, Valsan does not engage in a discussion of this important distinction.

What is also noteworthy about Valsan's approach to fiduciaries' conflicts of interest is his insistence that the strictness with which the no-conflict and no-profit rules have traditionally been applied to deter fiduciaries is "counterintuitive" and may not be reconciled "within many influential frameworks of private law."[95] The basis for this contention is uncertain. Yet, it is quite relevant to assessing the veracity of his overall approach and argument, insofar as it ignores the unique status of the fiduciary concept vis-à-vis other forms of private law.

3. Reconciliation with Private Law

What is the reason why Valsan claims that traditional formulations of conflicts of interest are irreconcilable with many influential frameworks of private law? Does it add anything to our understanding of the between the fiduciary concept and conflicts of interest? Valsan's claim is troubling because it attempts to draw an analogy between things that are not properly analogous. As discussed in Part I, the fiduciary concept is not at all like other elements of private law: it has an entirely distinct and broader function than other spheres of private law. The fiduciary concept exists to maintain the integrity of socially and economically important or necessary interactions of high trust and confidence. This purpose is far more ambitious than other elements of private law, which are primarily focused on promoting justice between individual parties. The fiduciary concept's more broad-based purpose provides ample justification for the strict rules imposed on fiduciaries to maintain the integrity of fiduciary interactions.[96] Such strict rules are not required of less ambitious motivations. Consequently, to state that most existing theories of fiduciary interaction "do not offer persuasive explanations as to *why* the core fiduci-

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95 Valsan, "Conflict of Interest", *supra* note 8 at 4. See also *ibid* at 13 ("the idea that fiduciary law aims at disciplining legal actors by deterring temptation sits ill with many influential private law theories" [footnote omitted]).

96 This understanding of the foundational purpose of the fiduciary concept does, indeed, answer the foundational question that Valsan poses as unanswered when he asks: "[W]hat is so unique in the position of a fiduciary, that the law is concerned with removing the temptation of self-interest and with preserving the appearance of correctness?" (*ibid* at 15).

ary duty requires the special protection of the prophylactic duties"[97] is incorrect.

Valsan expressly acknowledges that "[p]rivate law focuses primarily on the bilateral relationship between two legal subjects." He suggests, however, that it does not concern itself with "the interests of the community as a whole."[98] For the most part, this assertion is correct, as most elements of private law do not focus on community interests. The fiduciary concept, however, differs from other private law concepts *precisely because it does focus* on these broader community interests rather than concerning itself with the interests of individual parties. Thus, while under Valsan's conceptualization it makes sense to treat fiduciary duties no differently than other private law duties—because he asserts that there is no fundamental distinction in purpose between them—that vision is premised upon a misunderstanding of the foundational purpose of the fiduciary concept as being individually-based rather than community-based or relationship-based.

While not all theories of the fiduciary concept regard it as being premised on this larger societal motivation,[99] most fiduciary commentators understand the fiduciary concept to be unlike other forms of private law. If such is the case and the fiduciary concept's function is so unlike other forms of private law, there would appear to be no reason to suggest, as Valsan does, that the fiduciary concept ought to be reconcilable with influential frameworks of private law that concentrate primarily on doing justice between individual parties and have no larger societal function. If anything, it would be logical to assume that the fiduciary concept would *not be reconcilable* with the private law theories he references precisely because the latter focus on areas of law that have a fundamentally distinct focus from that of the fiduciary concept.

4. Linking Traditional Approaches to Conflict of Interest and the Fiduciary Concept's Raison d'Être

Valsan spends considerable time in his article demonstrating how early fiduciary jurisprudence from the time of *Keech* established the prophylactic rules against conflicts of interest and prohibited inquiries into fiduciaries' motivations in favour of the blanket rule forbidding conflicts.

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[97] *Ibid* at 10 [emphasis in original].

[98] *Ibid* at 13.

[99] Other fiduciary law theorists who regard the fiduciary concept as having this same, broad societal ambition include Tamar Frankel and Deborah DeMott, two of the earliest, and most influential, commentators on fiduciary law (see e.g. Frankel, *supra* note 65; DeMott, "Beyond Metaphor" *supra* note 13).

While part of the initial motivation for the blanket prohibition on inquiring into fiduciaries' motivations for acting in conflict of interest was based on the perceived difficulty of ascertaining fiduciaries' motivations, which is a notion I have previously criticized,[100] the true basis for the rule is the need to enforce the strictness of fiduciaries' duties to maintain the integrity of the important relationships the fiduciary concept was designed to protect.[101] The prophylactic rule against conflicts accomplishes this task by outright prohibiting fiduciaries from attempting to finesse characterization of their questionable actions or justifying conduct that departs from the fiduciary standard.

The prophylactic rule against conflicts informs fiduciaries that only actions that are clearly in the best interests of their beneficiaries will be acceptable. It serves as a warning to fiduciaries that they must ascribe to onerous standard of selflessness. The strictness of the rule also ensures that beneficiaries can comfortably rely on their fiduciaries' fidelity to their interests as beneficiaries. The combination of these assurances maintains the integrity of the important relationships that the fiduciary concept was designed to protect.

Early fiduciary jurisprudence, dating all the way back to *Walley v. Walley*[102] (*Walley*) and *Keech* indicates that judicial investigations into allegations of the breach of fiduciary duty should look both to *actual and potential* harm and abuse of beneficiaries' interests.

In *Keech*, the lessee of the rights to a market in Rumford, a town a dozen miles east of London, died and left those rights in trust for an infant. Before the lease came up for renewal, the trustee of the lease sought to renew it in favour of the infant, but the lessor refused these overtures.[103] When the lease subsequently expired, the trustee obtained a new

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[100] See Rotman, *Fiduciary Law*, *supra* note 2 at 61–65, 343–44.

[101] This is consistent with the exhortation of Lord Chancellor King in *Keech, supra* note 1, in which he specifically warns of the need for such a strict, prophylactic approach, although he does not indicate the same reasoning as provided here. That reasoning is based on the operational vision of the fiduciary concept put forward in Rotman, *Fiduciary Law*, *supra* note 2 at 238–39 and with the discussion in Rotman, "Holy Grail', *supra* note 21.

[102] *Supra* note 2.

[103] See *Keech*, *supra* note 1 at 61. As the Right Honourable Sir Robert E Megarry explains, at the time in question "there was a general belief that a lessee was morally entitled to a renewal," which had financial value (The Right Honourable Sir Robert E Megarry, "Historical Development" in *Special Lectures 1990: Fiduciary Duties*, *supra* note 41, 1 at 1 [footnote omitted]). The difficulty in *Keech* arose because the lease in question was "not of corporeal land but merely of the market rights, and so there was nothing on which the lessor could distrain if the rent was not paid; and there was little comfort in a mere covenant to pay rent given by an infant" (*ibid*). Thus, while the action

lease of the market for himself. An action was subsequently brought on behalf of the infant against the trustee for an assignment of the lease and an accounting of profits obtained by the trustee from the lease.

In his defence, the trustee testified that he took up the lease for himself only because the lessor had refused to renew it for the infant's benefit. In finding that the trustee held the renewal of the lease for the infant and that any profits earned from the trustee's possession of the lease be disgorged, Lord Chancellor King determined that the nature of the trustee's position prohibited him from personally obtaining the benefit of the lease, notwithstanding the lessor's refusal to renew it for the infant's benefit. As he explained:

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use.[104]

The decision in *Keech* is not premised upon the demonstration of actual fraud, or even wrongful activity, but simply on the potential for such actions. As the Lord Chancellor indicated: "[I]f a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out, than to have had the lease to himself."[105]

Joseph Story cites *Walley*, a case with essentially similar facts to those of *Keech* and decided on the same basis, although not nearly as eloquently, by Lord Chancellor Jeffreys,[106] as an example of a situation where equity will grant relief where a bargain is flagrantly against conscience or equally unreasonable and oppressive. Equity grants this relief even in situations where actual fraud is not proven, but where the nature of the parties' relationship places it under the law's protection. As Lord Chancellor Jeffreys states:

> ... the proper jurisdiction of courts of equity is to take every one's act, according to conscience, and not to suffer undue advantage to be

of the lessor in refusing the renewal was contrary to common beliefs and practice, it was not entirely unjustified in the circumstances.

104 *Keech*, *supra* note 1 at 62.

105 *Ibid*.

106 Although the reported case describes Jeffreys as "Lord Keeper," he was in fact Lord Chancellor (see GW Keeton, *Lord Chancellor Jeffreys and the Stuart Cause* (London: Macdonald, 1965) at 384, n 1). This distinction is unimportant procedurally, insofar as the Lord Keeper possessed the same authority as the Chancellor (see *Lord Keeper Act, 1562* (UK), 5 Eliz I, c 18).

> taken of the strict forms of law, or of positive rules. Hence it is, that, even if there be no proof of fraud or imposition; yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief; although they certainly are very cautious of interfering, unless upon very strong circumstances. ... And indeed it will be found that there are very few cases not infected with positive or actual fraud, in which they do interfere, except where the parties stand in some very peculiar predicament, and in some sort, under the protection of the law, from age, or character, or relationship.[107]

The idea of stringently prohibiting both actual and potential conflicts of interests, while quite strict, is necessary to maintain the integrity and viability of fiduciary interactions. By virtue of their relative positions of power vis-à-vis their beneficiaries and control of information related thereto, fiduciaries possess a particular ability to conceal improper or fraudulent activity that is contrary to their fiduciary duties of selflessness and utmost good faith. No less prophylactic a sanction than prohibiting actual and potential conflicts of interest outright may provide as immutable and appropriate protection for the type of intimate and trusting relations that exist in fiduciary interactions. This proposition helps to explain why Lord Chancellor King's judgment in *Keech* renders the trustee "the only person of all mankind who might not have the lease,"[108] notwithstanding the absence of proof of fraud or bad faith. For a judgment to make this kind of strict decree, yet maintain a lasting effect for almost four hundred years, it is safe to presume that Lord Chancellor King's prescription is not only correct, but necessary, and beyond questioning.

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107 Story, *supra* note 80 at 215–16 [footnotes omitted]. Curiously, nowhere in his text does Story make reference to *Keech*, notwithstanding that it is, by far, the more well-known example of fiduciary obligations and the basis of the prophylactic rule against conflicts of interest.

108 *Keech*, *supra* note 1 at 62. The very same sentiment is expressed quite some time later in *Bray v Ford*, [1896] AC 44 at 51, 12 TLR 119 (HL), where it is said that: "human nature being what it is, there is a danger ... of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those to whom he was bound to protect." See also *Hoffman Steam Coal Company v Cumberland Coal & Iron Company*, 16 Md 456 at 507, 1860 Md Lexis 80 (QL) (App Ct 1860) ("[r]emembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin, a strict observance of the divine precept: 'Lead us not into temptation'" at 507); *Guth v Loft Incorporated*, 5 A (2d) 503 at 510, 23 Del Ch 255 (Del Sup Ct 1939) [*Guth*]:

> The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage ... resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

Because of the necessity of so strictly prohibiting conflicts of interest in both *Walley* and *Keech*, the presence of *mala fide* activity is irrelevant. Fiduciaries vested with authority over the interests of their beneficiaries are prohibited from taking advantage of their positions[109] to further interests belonging to anyone other than their beneficiaries. This proposition holds true regardless of fiduciaries' intent and even where those other interests are congruent with, or at least not antagonistic to, the beneficiaries' interests. The rationale for this strict prohibition stems from the danger inherent in allowing fiduciaries to contemplate interests other than those of their beneficiaries for any reason.

Some years after *Walley* and *Keech*, Lord Eldon attempts to explain the rationale underlying the strict prohibition of actual and potential conflicts of interest in his notable judgment in *Ex parte Lacey*, where he states that this reasoning:

> is founded upon this; that, though you may see in a particular case, that [the trustee] has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.[110]

Lord Eldon reiterates this sentiment in *Ex parte James* by stating "no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."[111] In addition to illustrating the strictness of the no-conflict rule, these statements also indicate that courts will not inquire into the subjective motivations of fiduciaries, but focus only on the existence of a breach of duty.

A similar result may be found in *Parker v. McKenna*[112] (*Parker*), a case concerning profits made by directors of a joint-stock bank from shares issued under a scheme alleged to have been perpetrated for their personal benefit rather than the bank's. In his judgment, Lord Cairns states that, "The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors."[113] Similarly, as

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109 This would include using the position itself to gain advantage or using knowledge gained from holding such a position for personal benefit.

110 *Lacey*, *supra* note 6 at 627.

111 *Ex parte James*, *supra* note 6 at 345. Note also the similar statements of Justice Duff in the Supreme Court of Canada's judgment in *Coy v Pommerenke*, a case concerned with the purchase by a real estate agent of the property of his principal: "Transactions of that sort are so dangerous—it is so often impossible to ascertain the real truth of the circumstances which surround them, that the prohibition of them by courts of equity is absolute" (44 SCR 543 at 574, 1911 CarswellSask 90 (WL Can)).

112 (1874), LR 10 Ch 96, 31 LT 739 (CA) [cited to LR].

113 *Ibid* at 118.

Lord Justice James emphasizes in the same case, "[T]he safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."[114] Many years later, an analogous sentiment may be found in the Australian High Court's judgment in *Furs Ltd v. Tomkies*:

> ... the inflexible rule [is] that, except under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so, or all the shareholders acquiesce. An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation.[115]

From these cases, the strict prohibition against conflicts of interest is explained by the courts' inability to ascertain the precise nature of the breach and the factors involved. Although the prophylactic rule against a fiduciary' conflict of interest importantly remains in effect, subject to very limited exceptions, the rationale for its existence expressed in *Ex parte Lacey*, *Ex parte James*, and *Parker* inaccurately explains the underlying basis for the rule. The motivation for the prophylactic rule is not the result of judges being unable to meet the evidentiary challenge of making determinations where the facts are often prohibitively difficult to ascertain—i.e., ascertaining the subjective knowledge of a fiduciary. As seen in Lord Justice Bowen's graphic portrayal of the issue in *Edgington v. Fitzmaurice*, "The state of a man's mind is as much a fact as the state of his digestion."[116]

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114 *Ibid* at 125.

115 *Furs Ltd v Tomkies*, [1936] HCA 3, 54 CLR 583 at 592 (available on AustLII) [*Furs*].

116 *Edgington v Fitzmaurice* (1884), 29 CHD 459 at 483, 1 TLR 326. It should be noted, though, that debate on this point continued into the twentieth century. See e.g. *In Re Cutts (A Bankrupt),* (12 December 1955), England (Ch DC), Harman J, cited in Megarry, *supra* note 103 at 3 (where Justice Harman, referring to Lord Justice Bowen's comment, offered the observation that "[t]he doctors know precious little about the one;

Indeed, there are many situations in which the law must make findings of fact or intent where those are not expressly known from the facts or witnesses and the person or persons with express knowledge of the circumstances are either unavailable or not talking. A classic example exists in criminal law, where a court, based on the evidence offered up by the prosecution, must establish that an accused possesses the requisite *mens rea* to commit a serious crime such as murder without necessarily being able to hear directly from the accused. Indeed, that system has managed to maintain itself on this basis for a significant period of time, which demonstrates that law is capable of ascertaining the state of a person's mind if it needs to do so. So, if the reason for the strict, prophylactic rule against conflict of interest does not exist because of an inability to determine the state of a person's mind, why does it exist?

The rationale behind the strict rule against fiduciaries' conflicts stems from the fact that the potential for fiduciaries' self-interested or opportunistic behaviour at the direct expense of their beneficiaries is so great that it must be prohibited regardless of fiduciaries' good faith, lack of bad faith, or other reasons that might serve to excuse the behaviour in question. As Lord Justice Russell explains in the English Court of Appeal's judgment in *Phipps v. Boardman*, the rigidity of the no-conflict rule "is necessary if cases deserving of no sympathy are not to escape."[117]

A good summary of the dictates of the strict fiduciary standard of conduct may be seen in the United States Supreme Court's judgment in *Pepper v. Litton*. That case concerns the duties owed by the manager of an insolvent corporation to its creditors. In it, the Supreme Court reiterates many of the principles discussed above:

> He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own prefer-

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and the judges know nothing about the other"). Similarly, in *Holder v Holder*, [1968] 1 Ch 353 at 398, [1967] EWCA Civ 2, Lord Justice Danckwerts points out that it is "the almost daily experience" of judges to determine the subjective knowledge of the parties to proceedings, while Lord Justice Sachs states that "the rigidity of the shackles imposed by the rule on the discretion of the court may perhaps before long be reconsidered as the courts tend to lean more and more against such rigidity of rules as can cause patent injustice" (*ibid* at 402–03).

117 *Phipps v Boardman*, [1965] 1 Ch 992 at 1032, [1965] 1 All ER 849 (CA), aff'd [1966] UKHL 2, [1967] 2 AC 46 (HL), [1966] 3 All ER 721 [*Boardman* cited to AC]. See also *In re Biss*, [1903] 2 Ch 40 at 47, [1900–03] All ER 406 (CA).

> ment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.[118]

What these judicial affirmations of the strictness of the prohibition against fiduciaries' conflict of interest demonstrate is that the idea of enshrining a prophylactic rule was not without constant scrutiny over more than two hundred years. It was intentionally designed as a necessary means of ensuring the fiduciary concept's ability to maintain the integrity of the relationships of high trust and confidence it was designed to protect and that are essential to the effective interdependent operation of post-industrial society.[119] Removing the fruit rather than simply placing it on a higher shelf has long been seen to be necessary to fully eliminate fiduciaries' temptation to contravene their duties to their beneficiaries;[120] this, in turn, ensures beneficiaries' continued ability to rely upon their fiduciaries' good faith actions. As Justice Johnson indicates to this effect in *Wormley v. Wormley*, "There are canons of the Court of equity which have their

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118 *Pepper v Litton*, 308 US 295 at 311 (1939), 60 S Ct 238 [footnote omitted].

119 See e.g. Weinrib, *supra* note 10 at 11("[a] sophisticated industrial and commercial society requires that its members be integrated rather than autonomously self-sufficient, and through the concepts of commercial and property law provides mechanisms of interaction and interdependence. The fiduciary obligation ... constitutes a means by which those mechanisms are protected"); Frankel, *supra* note 65 at 836 ("[a]s members in our society become increasingly interdependent, fiduciary relations become predominant and fiduciary law increasingly important").

120 See *Midcon Oil & Gas Limited v New British Dominion Oil Company Limited*, [1958] SCR 314 at 341, 12 DLR (2d) 705, Rand J (stating that equity "by an absolute interdiction ... puts temptation beyond the reach of the fiduciary by appropriating its fruits"). See also Edson R Sunderland, "An Inroad Upon Fiduciary Integrity" (1905-6) 4:5 Mich L Rev 349 at 349:

> the temptations to dishonesty are necessarily so great ... that the law will not even permit the trustee to be placed in a situation which has an intrinsic tendency to encourage unfaithfulness. ... Public policy demands that the temptation itself be removed so far as possible, in order to throw an additional and needed safeguard about the performance of trust duties. ... The law looks deeper than the immediate results of the particular case; it looks to the underlying tendencies of the situation and pronounces them dangerous and fraught with evil consequences. Therefore it prohibits the situation itself.

foundation not in the actual commission of fraud, but in that hallowed orison, 'lead us not into temptation.'"[121]

Prior to the judgments referenced above, beneficiaries had reason for concern that the fiduciaries they relied upon to facilitate their best interests could succumb to temptations to utilize their authority and power for improper purposes. The harshness of the prophylactic rule against conflicts of interest that was devised to protect against this possibility was thus a necessary evil; it was determined that any lesser standard would be inadequate to provide the level of protection necessary to ensure the continuation of such important interactions and reassure beneficiaries that their interests were being taken care of. The importance of this judicial supervision of fiduciary interactions is referenced in *Billage v. Southee*, where it is said that, "No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other."[122]

The prohibition on inquiring into the reason for fiduciaries' actual or potential conflicts of interest is not unique to the context of fiduciary law. Fiduciary law does not necessitate either that courts inquire into the reason for fiduciaries' conflicts of interest to determine whether a fiduciary relationship exists or to uphold fiduciaries' duties toward their beneficiaries. While the fiduciary concept places particular importance on the specific facts of individual situations and the precise nature of the interaction between the parties, assessments of important matters—such as whether a fiduciary relationship exists or if there has been a conflict of interest—are premised entirely on objective standards that generally have few, if any, exceptions. This objective standard of assessment explains why fiduciary law does not concern itself with fiduciaries' subjective motivations for their actions; whether they have acted in good or bad faith; if beneficiaries have suffered actual harm or loss, or; whether the fiduciaries or beneficiaries have earned profit from the actions in question.[123]

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121 *Wormley v Wormley* (1823), 21 US (8 Wheat) 421 at 463. See also *Guth*, *supra* note 108 at 510.

122 *Billage v Southee* (1852), 9 Hare 534 at 540, 68 ER 623 (Ch).

123 See e.g. *Keech*, *supra* note 1; *Furs*, *supra* note 115 at 592; *Regal (Hastings) Ltd v Gulliver*, [1942] UKHL 1, [1967] 2 AC 134 at 137, 144, [1942] 1 All ER 378; *Boardman*, *supra* note 117 at 69–70; Sunderland, *supra* note 120 at 349; DeMott, "Beyond Metaphor", *supra* note 13 at 900; Deborah A DeMott, "Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) 30:2 Osgoode Hall LJ 471 at 488; Steven B Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67:1 Mod L Rev 16 at 31.

The focus in these inquiries, then, revolves solely around what actually occurs in the relationship between fiduciary and beneficiary rather than the reason or reasons why it occurred. A breach of fiduciary duty is a breach of fiduciary duty, regardless of why it occurred or whether there are subjective reasons for this breach that are alleged to justify it or mitigate its severity. Breaching a fiduciary duty is not a question of degree: it is a binary definition[124]—either a breach has occurred or it has not.[125] The following illustration of a breach of ethics demonstrates the impact of this analysis.

In the movie *Wall Street*,[126] aspiring junior stock broker Bud Fox seeks to make his fortune and is willing to subordinate his morality to do so. He relentlessly pursues and ultimately meets and falls under the influence of corporate raider Gordon Gekko. Under a direction from Gekko, he pushes stocks in a company called Anacott Steel; Gekko hopes to manipulate the company's share price by orchestrating a "pump and dump".[127] When Bud informs his senior broker, Lou Mannheim, to have his clients purchase shares in Anacott Steel to commence the "pump and dump", he receives a lecture from Lou about the impact of taking shortcuts:

> **Bud**: Lou, I got a sure thing. Anacott Steel.
>
> **Mannheim**: No such thing except death and taxes. No fundamentals, not a good company any more. What's going on, Bud? You know something? Remember there are no shortcuts, son. Quick buck artists come and go with every bull market, but the steady players make it through the bear market. You're a part of something here, Bud. The money you make for people creates science and research jobs. Don't sell that out.
>
> **Bud**: You're right, Lou, you're right. But you gotta make it to the big time first, then you can be a pillar and do good things.

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124 The idea of a breach of fiduciary duty being a binary definition is, in this respect, no different than the situation surrounding bankruptcy or pregnancy (see *infra*, notes 129–30 and accompanying text).

125 Ascertaining whether a breach of duty has occurred is not the same, however, as determining the severity of a breach.

126 *Wall Street*, directed by Oliver Stone (1987).

127 A "pump and dump" exists where a sudden purchase of a considerable number of shares in a company to cause the share price to rise is rapidly followed by a consequent sale of those same shares, resulting in a crashing of the share prices, at which time the orchestrator of the manoeuvre swoops in to purchase the shares at rock-bottom prices. See also "Pump and Dump Schemes", *U.S. Securities and Exchange Commission*, online: <https://www.investor.gov/protect-your-investments/fraud/types-fraud/pump-dump-schemes>; Joe Goldman, "How Does a Classic Pump and Dump Actually Work?" (05 August 2014), *Equities*, online: <https://www.equities.com/news/how-does-a-classic-pump-and-dump-actually-work>.

> **Mannheim**: You can't get a little bit pregnant, son.
>
> **Bud**: Lou, trust me, it's a winner. Buy it.[128]

Just as Lou tells Bud "You can't get a little bit pregnant," a fiduciary's actions either cause a breach of fiduciary duty or they do not. There is no such thing as a partial breach of fiduciary duty.[129]

Determining the existence of a breach of duty is what generates fiduciaries' liability. Assuming the fiduciary is unable to successfully defend against an allegation of breach of duty,[130] any subjective motivations or justifications for the act deemed to constitute a breach may only come into play in determining appropriate measures of relief for the breach of duty.

Valsan's contention that there is no valid justification for fiduciary law's prophylactic rule against conflicts of interest[131] is, therefore, inaccurate. The strength of his assertion that no justifiable reason exists for the strictness of the rule is disproportionate to his own analysis of what might justify the imposition of such a rule in the first place, and to the analysis here. He acknowledges that "some landmark decisions referred to the importance of precluding a conflict between interest and duty,"[132] but concludes that even that limited jurisprudential reference has been overshadowed by the desire to control the tendency of human nature to favour self-interest over selflessness.[133] Curiously, his analysis does not inquire into why the prophylactic rule was established in the first place. That information is not necessarily forthcoming directly from the jurisprudence, but requires an extrapolation from the rationalization behind the creation of the fiduciary concept, the function of equity, and the existence of the fiduciary concept as an expression of equitable principles.

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128 *Wall Street*, *supra* note 126.

129 That does not suggest, however, that all breaches of fiduciary duty are the same, which would be a different argument if made.

130 Defending against a *prima facie* case of fiduciary breach is profoundly difficult because of the potential harm caused by breaches of fiduciary duty and the need to hold fiduciaries to their duties for the reasons discussed herein. See Rotman, *Fiduciary Law*, *supra* note 2 at 616, where it is explained that, to defend against a *prima facie* claim of breach of fiduciary duty, an alleged fiduciary must demonstrate either: (1) that no fiduciary duty existed; (2) that a fiduciary duty did exist, but it was not breached, or; (3) the claim of breach is barred by the expiration of a statutory limitation period or the effect of the equitable principles of *laches* or acquiescence.

131 See Valsan, "Conflict of Interest", *supra* note 8 at 4.

132 *Ibid* at 23.

133 See *ibid* at 23–24 ("[t]he idea that the proscriptive rules are the expression of a policy aimed at preventing fiduciaries from being tempted to act self-interestedly has survived to the present day as the most conspicuous explanation of the strictness of fiduciary duties" at 24).

C. A Distinction Without a Difference?

Valsan's emphasis on conflicts of interest and distinguishing traditional formulations or understandings of such conflicts within the confines of fiduciary interactions provides an important point of emphasis that is worthy of further consideration for its potential to enhance the understanding of conflicts of interest within fiduciary relationships. The risk of flawed or faulty judgment because of fiduciaries' introduction of extraneous interests or considerations into their duty to exercise judgment in their beneficiaries' interests is a serious concern. As Valsan suggests, it "could undermine the decision-making process by reducing the reliability of the decision maker's judgment, without rendering it incompetent."[134] This threat exists because of the revelation from the interdisciplinary view that personal interests cloud individuals' judgment in ways they may not be conscious of. This inhibiting of judgment detrimentally affects those who rely upon that exercise of judgment or discretion, as in the case of beneficiaries who rely upon their fiduciaries to make decisions and exercise discretion over the former's interests.

Without the ability to manage these corrupting influences on fiduciaries' exercise of discretion, the conflict of interest control mechanism that ensures that fiduciaries act solely in their beneficiaries' interests cannot function effectively. Valsan illustrates how the interdisciplinary view addresses such occurrences:

> The interdisciplinary view overcomes this flaw by recognizing that a person is in a conflict of interest on the basis of being in a conflicted situation, irrespective of the person's belief that she is capable of resisting the temptation or corrupting influence of the interest that could interfere with her judgment.[135]

As Valsan acknowledges, traditional formulations of conflict of interest within the context of fiduciary law have focused on the conflict between fiduciaries' self-interest and their duties to their beneficiaries (conflict of interest and duty). As discussed above, Valsan has suggested that fiduciary law ought to consider the core obligations arising under the conflicts issue as ensuring fiduciaries' "duty to exercise judgment based on relevant considerations." He maintains that the latter is the core fiduciary duty that requires the special protection of the prophylactic no-conflict and no-profit rules. However, his argument is not convincing and appears rather circular.

Valsan correctly asserts that fiduciaries' discretion cannot be left unchecked in the face of a conflict of interest. That fact is fundamental to the

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134 *Ibid* at 26.

135 *Ibid* at 27 [footnote omitted].

existence of the prophylactic rule against conflicts. The interdisciplinary view of conflicts Valsan references indicates that fiduciaries are incapable of recognizing their own bias or impaired judgment when confronted with a conflict of interest. For this reason, he contends that their discretion must be controlled to ensure that fiduciaries comply with their duty.[136]

There are a few questions raised, however, by Valsan's analysis. The initial question is how fiduciaries' discretion is to be controlled. Recognizing the need to control fiduciaries' discretion is important, yet, Valsan does not offer suggestions or answers to control fiduciaries' discretion, or limit the problems created from the lack of control over that discretion. What is lacking from his article, and what fiduciary law desperately is crying out for, are solutions. It is one thing to recognize the need to control discretion, but quite another to demonstrate how to address or, better yet, solve that problem. On this score, Valsan's article falls short.

In the particular example of Valsan's article, the duty to exercise judgment based on relevant considerations sticks out as a primary example of this shortcoming. Valsan's article asserts the need to comply with this core duty, which he argues is absolutely necessary to eliminate fiduciaries' conflicts of interests. Nowhere does it indicate precisely, however, how this will be done or even provide a roadmap that establishes some possibilities of how this may be accomplished. If, indeed, the theory behind the core duty is correct, should the discussion of it not also encompass how it ought to be implemented? This shortcoming is common to many fiduciary law commentaries: it is more common to find fiduciary commentaries that make suggestions of how to improve the understanding or application of fiduciary principles, yet fail to provide a practical application of the proposition raised, than those that provide equal attention to both parts of the process. This deficiency reduces the usefulness of any suggestions that are made precisely because the authors do not attend to the all-important practical application of the theories they have espoused.

If fiduciaries are incapable of complying with the core fiduciary duty themselves, as the interdisciplinary theory indicates,[137] they will, subsequently, require active assistance to make decisions when faced with conflicts of interest. Where will this assistance come from? Indeed, who will become responsible for flagging when fiduciaries need to obtain assistance? It cannot be the fiduciaries themselves, as their judgment has al-

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136 See *ibid* at 33–37.

137 Note, for example, Valsan's comments that "[t]he interdisciplinary view on conflicts of interest shows that, when a decision maker has an actual or potential interest in the outcome of her decision, her ability to evaluate the relevant considerations is impaired in ways that cannot be measured or corrected appropriately" (*ibid* at 35).

ready been impaired as a result of the conflict. Indeed, they may well be tempted not to report the existence of the conflict based on the same considerations that the interdisciplinary theory put forward to support the idea of when fiduciaries' judgment is impaired.

Beneficiaries cannot be the ones who identify this conflict either, since in most situations of breach of fiduciary duty, beneficiaries are not in a position to assess the exercise of fiduciaries' discretion. Moreover, one of the primary reasons why fiduciary responsibility exists is precisely to obviate beneficiaries' need to monitor their fiduciaries' activities. If beneficiaries suddenly need to actively monitor their fiduciaries' activities, they may as well do the work themselves; conversely, if they handed over responsibility to their fiduciaries because they did not possess adequate knowledge or skill to discharge the functions in question, it would appear axiomatic that they would not possess the ability to properly monitor the fiduciaries' exercise of the powers transferred. Thus, it cannot be the beneficiaries who monitor fiduciaries' activities either.

The judiciary also cannot serve in this role of monitoring fiduciaries' exercise of discretion, since it is unreasonable to have judges monitor fiduciaries' actions during the active phase of fiduciary relationships and before any problematic behaviour arises. Where would their jurisdiction to monitor fiduciaries' discretion come from? Equally, what would provide the basis for beneficiaries to make an application to court to have it monitor fiduciaries' actions?

As in all situations involving private law relief, judges assess fiduciaries' actions after the fact, not beforehand. Indeed, the law does not allow for pre-emptive findings of fiduciary breaches, or breach of relationship fiduciarity by anticipation, but instead requires some wrongdoing to have occurred before making a finding of a breach of fiduciary duty.[138] If judges can only make their assessments after the fact, their assessment of the appropriateness of fiduciaries' decisions whether to seek assistance or not when faced with a conflict of interest scenario cannot prevent the exercise of poor discretion or the failure to comply with the duty to exercise judgment based on relevant considerations should the fiduciaries exercise judgment rather than seek what effectively amounts to a judicial reference to determine whether they may act before acting. All that judges could do, then, is provide relief for the failure to comply with the core fiduciary duty, which is providing a remedy after the fact, not preventing the exercise of discretion for improper purposes. That is no different than what judges currently do and what the law allows them to do.

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[138] See e.g. *Rogers Communications Inc v Maclean Hunter Ltd* (1994), 2 CCLS 233, 45 ACWS (3d) 1215(Ont Gen Div); Rotman, *Fiduciary Law*, *supra* note 2 at 612–13.

From the conclusions above, if neither fiduciaries, beneficiaries, nor the judiciary are adequate or competent to serve in a monitoring role to ensure fiduciaries do not attempt to exercise discretion while their judgment is impaired from a conflict of interest, who, then, is available and appropriate to assume this role? Would it become necessary to appoint some kind of fiduciary ombudsman to assume this role? Certainly, overseeing fiduciaries to ensure that they do not exercise discretion for improper purposes would be a massive undertaking, given the number of existing fiduciaries that possess discretionary power over their beneficiaries' interests. Presumably, those fiduciaries would also have to register with the fiduciary ombudsman so that their actions can be monitored. A legislative scheme would need to be crafted to create the office of fiduciary ombudsman and provide the office with enforcement powers. This would need to be done in each province and federally as well. This would be quite the undertaking. Valsan does not provide any suggestions, however, as to how the core fiduciary duty would be monitored to avoid fiduciaries' conflicts of interest.

An alternative option would be to relax the stringency of the duties against conflicts of interest. Valsan rejects arguments that favour this option, specifically those proposed by J.C. Shepherd,[139] John Langbein,[140] Charles Mitchell,[141] and in the case of *Murad v. Al-Saraj*.[142] He reasons that, as the interdisciplinary view of conflicts of interest profoundly demonstrates, the proscription against conflicts of interest cannot be diminished because even potential conflicts affect how fiduciaries exercise judgment over their beneficiaries' interests.[143] In his view, arguments in favour of relaxing the strictness of the duty "are premised on a superficial understanding of the notion of conflict of interest and of the main role that the proscriptive duties serve."[144]

Unfortunately, the interdisciplinary view of conflicts of interest "does not prescribe a single optimal response to a conflict situation."[145] Rather, it simply demonstrates the shortcomings of the two most frequently used

[139] See especially JC Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 148–49.

[140] See especially John H Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114:5 Yale LJ 929.

[141] See especially Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17:2 KCLJ 325 at 339.

[142] [2005] EWCA Civ 959, [2005] All ER (D) 503.

[143] See Valsan, "Conflict of Interest", *supra* note 8 at 37.

[144] *Ibid*.

[145] *Ibid* at 37–38.

responses to conflict of interest scenarios: resisting the temptation of self-interest and disclosing the conflict.[146]

The identification of some of the problems surrounding the pre-emptive monitoring of fiduciaries' duty to exercise judgment based on relevant considerations provides reason for pause. If, as discussed above, fiduciaries, beneficiaries, and the judiciary are all incompetent to serve in a monitoring role to ensure that fiduciaries do not attempt to exercise discretion while their judgment is impaired from a conflict of interest; relaxing the strictness of the duty against conflicts is improper, and; the options of fiduciaries either resisting the temptation of self-interest or disclosing the conflict to their beneficiaries are inadequate, what, then, can be done to address this problem?

Without even attempting to answer this question, the situation already appears more unwieldy than the problems of the existing fiduciary law regime. Common sense suggests that a solution that is more complex than the problem it is attempting to address cannot be adequate. While there are, admittedly, problems with the existing fiduciary regime, those problems appear to be more easily solvable through further examination and elucidation of the problems that exist and education for fiduciaries, beneficiaries, and the judiciary than finding a solution to the dilemma established by Valsan's proposal. From this analysis, it certainly appears that Valsan's proposed solution to the existing difficulties surrounding the fiduciary concept is no easy fix. It creates problems of application and enforcement insofar as it remains unclear who or what would provide the monitoring and protection that Valsan's solution demands. Further, Valsan does not provide a roadmap for how to approach this dilemma, much less propose a solution.

By suggesting that "[t]he current emphasis that fiduciary law scholarship places on resisting the temptation of self-interest and on disciplining the fiduciary market should be replaced with a focus on recognizing and managing conflicts of interest,"[147] it appears that Valsan is simply replacing one problem with another, more complex one that he offers no solutions for. At the same time, a major part of his proposal requires altering the trajectory of fiduciary scholarship. While Valsan makes some cogent points in his analysis and focus on the duty to exercise judgment based on relevant considerations, when considering the implications of his conclusions one finds his analysis is not simply a distinction without a difference, as suggested above; rather, it is a distinction that appears to create a worse situation than that which existed previously.

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[146] *See ibid* at 38.

[147] *Ibid* at 39.

Beyond these matters, as important as they are, a more fundamental question remains from Valsan's analysis. That question is whether looking at the issues of fiduciary conflicts of interest in the manner Valsan does assists us in discerning the raison d'être of fiduciary obligation. This is an important consideration for any analysis of the fiduciary concept, given the jurisprudential problems that exist in applying fiduciary principles and the concomitant uncertainty that exists for fiduciaries and beneficiaries alike.

While conflicts of interest are certainly important considerations within the scope of fiduciary law, the manner in which they are addressed in Valsan's article does not help to explain why fiduciary obligations exist. Conflicts of interest result from the fiduciary obligations that exist within fiduciary relationships; they do not create those obligations or relationships. Nor, for that matter, does their method of characterization—whether under traditional methods or the interdisciplinary method favoured by Valsan—assist us in identifying what relations are appropriately characterized as fiduciary and those that are not. Valsan's core fiduciary duty of duty to exercise judgment based on relevant considerations explains only how certain circumstances within the scope of a defined fiduciary relationship ought to be resolved. In the process, the core duty creates its own problems of enforcement that remain unaddressed.

When examining the larger question of why fiduciary obligations exist—which ought to be foundational to any substantive examination of the fiduciary concept since there is no single agreed-upon answer—conflicts of interest are a distinctly secondary consideration. For this reason, the distinction drawn by Valsan between traditional formulations of conflicts of interest and his interdisciplinary-inspired theory provides for a different characterization of conflicts, but indicates the same need to control them, albeit in a somewhat different fashion. It is not, however, a solution to the difficulties he establishes.

Much like Valsan's criticism of previous efforts to explain the fiduciary concept, his own attempt fails to provide an answer to the fundamental question of why the fiduciary concept exists. One thing is for certain: it is not, for reasons already stated, to ensure fiduciaries' compliance with duty to exercise judgment based on relevant considerations. The prevention or regulation of conflicts of interest, regardless of whether they ought to focus on this duty, is not the reason why fiduciary law exists, as conflicts of interest clearly flow *from* fiduciary relationships rather than create them. They are, therefore, a consequence rather than a catalyst of relationship fiduciarity.

Suggesting here that the prevention or regulation of conflicts of interest is not the raison d'être of the fiduciary concept does not mean that preventing or regulating such conflicts is not an important function of fiduciary law. On the contrary, conflicts of interest pose a significant problem for the successful existence and proliferation of fiduciary interactions. For this reason, fiduciary law must actively address conflicts of interest if the integrity of the interactions that properly fall under its rubric is to remain intact. Whether the duty to exercise judgment based on relevant considerations is a fundamental element of how conflicts of interest are to be addressed remains to be seen. Until such time, however, as the problems associated with this core fiduciary duty are solved, it will likely languish as yet another unproven or abandoned theory whose promise remains unfulfilled. This is unfortunate, given the promise that Valsan has suggested resides with it.

While Valsan admittedly spends considerable time and effort examining and illustrating the distinction between traditional understandings of conflicts of interest and conflicting interests understood through an interdisciplinary lens, which is an important contribution to fiduciary literature, it remains distinctly secondary to the primary goal to provide a greater understanding of the purpose and function of the fiduciary concept. It is towards that primary goal that this article now turns.

III. Understanding the Purpose of the Fiduciary Concept

A. Focusing on the "Big Picture"

As has previously been suggested, the fiduciary concept is the purest doctrinal expression of equity. It proudly exhibits a strong ethical focus that draws from its historical connection to Canon law as well as its roots in traditional notions of conscience.[148]

Unlike the traditional bases of civil obligations, which exist primarily to foist liability upon wrongdoers and award relief to aggrieved persons, the fiduciary concept facilitates the construction and preservation of social and economic interdependency. The protection of trust, and how the reposing of and caring for that trust affects human interaction, is central to this conceptualization of fiduciary law.

Fiduciary law's prescription of other-regarding behaviour looks beyond the limitations and immediacy of the self-interest that governs much of private law. It ensures fiduciaries' complete fidelity to their beneficiaries' interests. It does this by requiring fiduciaries to abnegate all self-interest or the interests of third parties that may conflict with their beneficiaries' interests. Further, it removes the need for beneficiaries to monitor their fiduciaries' actions. Fiduciary law facilitates relations of dependence by

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[148] See Rotman, *Fiduciary Law*, *supra* note 2 at 176–80.

placing the burden of compliance on those parties holding the power in fiduciary interactions. This is something that contract law, being premised upon self-interested behaviour and the need to engage in self-help, cannot do.[149]

As with equity generally, the fiduciary concept brings law closer to the human condition by anticipating potential problems that exist in certain forms of interaction characterized by power imbalances and vulnerability and prohibiting their development through the entrenchment of strict principles on fiduciaries.[150] These strict principles allow vulnerable beneficiaries to fully trust in the honesty, integrity, and selflessness of their fiduciaries. A meaningful or substantive relationship between parties is required, however, before an interaction may be appropriately characterized as fiduciary: mere acquaintances or fleeting interactions will not suffice.

When regarded in this manner, it may be readily observed that fiduciary law facilitates justice in the broadest sense of the term.[151] It facilitates justice in ways that are inconceivable and unattainable by the usual heads of civil obligation, while providing sound parameters for the exercise of judicial discretion.

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149 See *ibid* at 113–14.

150 See Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart, 2009) ("[e]quity is not Utopian, it simply reaches beyond the routines of law towards the particularities of the human condition" at 243). See also Philip A Ryan, "Equity: System or Process?" (1956) 45:2 Geo LJ 213 ("[e]quity is a process, but it is a process of a far broader and more important kind than procedure, even when this is taken in its widest possible sense. Equity viewed as a process accomplished the conversion of morality into law; procedure is merely the means of recognizing the conversion in a particular case" at 222).

151 See *Burke v Lfot Pty Limited,* [2002] HCA 17 at para 115, 209 CLR 282, Kirby J (stating that the "business" of equity is "the attainment of justice"). See also Robert H Rogers, "A Lesson in Equity" (1915) 49:4 American L Rev 510 ("[l]egal justice is the law's attempt at approximate justice from the standpoint of social expediency. ... But the justice of equity, as originally intended and administered, was man's best attempt to arrive at real justice regardless of law or rule" at 535); Albert S Thayer, "Equity" (1922) 38:1 Law Q Rev 92 at 96, (describing equity as "the imposition of duty on the power of right"); William F Walsh, "Is Equity Decadent?" (1938) 22:4 Minn L Rev 479 at 483 ("[t]he latent power of equity [is] to shape and develop new law on a higher plane of reason and conscience, and with an increased effectiveness to meet human needs" at 494); Howard L Oleck, "Historical Nature of Equity Jurisprudence" (1951) 20:1 Fordham L Rev 23 ("[e]quity, certainly in its historical moral sense, and hopefully in its administrative sense, is the principal technique thus far developed to make certain that law always will be readily adaptable for, and directed toward, the achievement of justice" at 44); Ryan, *supra* note 150 ("[w]hat is necessary is to have some adequate grasp of Equity as a built-in dynamism necessary for progress in any system which purports to administer justice" at 217); Watt, *supra* note 150 ("[w]ithout equity, the law's story becomes all rules and no justice" at 45; "[e]quity does not set out to produce an ideally righteous system ... but it sets out to make the system of regular law more just" at 102–03).

As indicated above, the fiduciary concept stresses modes of behaviour that must be ascribed to by those holding power over the interests of others in certain socially and economically necessary or important interactions of high trust and confidence. These foundational fiduciary values—which I have previously described in an earlier article as the "holy grail" of fiduciary law[152]—differ significantly from those existing within contract, tort, and unjust enrichment. Unlike the fiduciary concept, these latter forms of civil obligation, "although substantively attentive to fairness, are not associated with any similar emblematic reference to what is just."[153] Warren Seavey and Austin Scott similarly state that while contract and tort focus on "wrong and harm", restitution is premised upon the goal of achieving justice.[154] Although they indicate that the fiduciary concept is also predicated upon achieving justice, they stress that the forms of justice sought by the fiduciary concept differ significantly from those pursued by restitution.[155]

Fiduciary law is also able to supplement or fill gaps within the law of civil obligation where necessary; thus, it is able to supplement the common law where it is deficient or where its lack of flexibility may result in the denial of justice.[156]

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[152] See Rotman, "Holy Grail", *supra* note 21.

[153] Emily Sherwin, "Reparations and Unjust Enrichment" (2004) 84:5 BUL Rev 1443 at 1448.

[154] See Warren A Seavey & Austin W Scott, "Restitution" (1938) 54:1 Law Q Rev 29 at 32.

[155] See *ibid* at 31–32.

[156] See *supra* note 33 and accompanying text. See also *Dudley v Dudley* (1705), Prec Ch 241, 24 ER 118 at 119:

> Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.

See also *Cowper v Cowper (Earl)* (1734), 2 P Wms 720, 24 ER 930 at 941. Many of the most significant discussions of the relationship between the common law and equity adhere to this same conceptual separation. See e.g. FW Maitland, *Equity: A Course of Lectures*, revised by John Brunyate (Cambridge: Cambridge University Press, 1936) ("we ought to think of the relation between common law and equity not as that between two conflicting systems, but as that between code and supplement, that between text and gloss" at 153); Keeton, *Introduction to Equity, supra* note 42 ("[t]he builders of the common law *created*; the builders of equity *supplemented*" at 22 [emphasis in the original]); A Scope, "Introduction" in WH Bryson, ed, *Cases Concerning Equity and the*

Notwithstanding the Supreme Court of Canada's acceptance of the principle of good faith as a foundational feature of contract law in *Bhasin*,[157] there is a solid underlying rationale why the fiduciary concept *expects more* than what contract law or the ethics of ordinary business practices might dictate, as Chief Justice Cardozo explains in *Meinhard*, which is discussed below.

Indeed, equitable concepts like fiduciary law reach further than the common law because of their willingness to extrapolate beyond the common law through principles designed to place judicial decision making more solidly in context. This objective is accomplished, at least in part, through equity's emphasis on the human element of interactions and the particular facts of individual interactions rather than simply their legal component. This emphasis facilitates equity's ability to respond to disparate situations by emphasizing the law's spirit and intent, not merely its strict or restrictive application.

The spirit and intent of the fiduciary concept become clearer when examining how this spirit and intent are brought to life through its application in specific cases where it takes centre stage. *Meinhard* is one of the more notable of these cases.

B. Meinhard v. Salmon*: Illustrating Fiduciary Purpose*

The landmark case of *Meinhard* is likely the most famous case involving the application of fiduciary principles, surpassing even the seminal case of *Keech*. It is also one of the leading business law cases in American law. Beyond a doubt, it is the most often quoted and eloquent exposition of fiduciary law's foundational purpose.

In the case, Chief Justice Cardozo makes full use of equity's unique methodology to fashion a situationally-appropriate result that is consistent with fiduciary law's mandate and the equities dictated by the circumstances, notwithstanding the existence of barriers that may have otherwise inhibited such a result.

In 1902, joint venturers Morton Meinhard and Walter J. Salmon engaged in a business proposition to develop a property in New York City. Salmon held a twenty-year lease on the Bristol Hotel and subsequently entered into an agreement with Meinhard to fund its renovation. Under the terms of their agreement, Salmon had the sole power to "manage,

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Courts of Equity, 1550-1660, vol 1 (London: Selden Society, 2001) xiii ("[e]quity does not compete with the common law but tunes it more finely" at xli).

[157] See *Bhasin*, *supra* note 81 at paras 62–63.

lease, underlet and operate" the property.[158] When the lease drew near its end, Elbridge Gerry, the owner of the hotel, planned to enter into a long-term lease covering the Bristol Hotel and some adjoining properties. He intended to demolish the existing buildings and redevelop the entire site. Salmon was not Gerry's first choice for this project, but he was unable to find a willing partner. Less than four months before the end of the Bristol Hotel lease, Gerry approached Salmon with a proposal for the redevelopment. Ultimately, a twenty-year lease for the entire tract (with potential renewals for a further eighty years) was granted to the Midpoint Realty Company, an entity controlled by Salmon. The value of the new lease ranged between $350,000 and $475,000 (as compared to a value of $55,000 under the Bristol Hotel lease signed in 1902).[159]

Salmon chose not to inform Meinhard about the new lease arrangements with Gerry until after it had been concluded. By this time, relations between the co-venturers had turned sour and they did not communicate much. When Meinhard learned of the changed circumstances, he demanded that the new lease be held in trust as an asset belonging to the joint venture. Meinhard offered to share the financial burdens of the new arrangement with Salmon, but Salmon refused. Meinhard then commenced legal action against Salmon to obtain an interest in the new lease. Meinhard was successful at first instance, obtaining a twenty-five per cent interest in the new lease. However, following cross-appeals of this judgment, Meinhard was awarded a fifty per cent interest in the new lease. Salmon appealed the matter to the New York Court of Appeals.[160]

Chief Justice Cardozo's majority judgment in the case determines that joint adventurers, like partners, owe each other "the duty of the finest loyalty" while their enterprise continued.[161] Then, in one of the most celebrated statements in fiduciary jurisprudence and business law generally, he emphasizes that:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a condition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct

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158 *Meinhard*, *supra* note 11 at 546.

159 See *ibid*.

160 See *ibid*.

161 *Ibid*.

> for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[162]

Chief Justice Cardozo further explains that although "[t]o the eye of an observer, Salmon held the lease as owner in his own right, for himself and no one else," in point of fact "he held it as a fiduciary, for himself and another, sharers in a common venture."[163] He then indicates that, had property owner Gerry known that the lease was held on behalf of a joint venture, it ought to be assumed that he would have presented his proposal to both Meinhard and Salmon, not merely to Salmon.[164]

In not sharing information about the new lease with Meinhard, Chief Justice Cardozo indicates that Salmon's conduct "excluded his coadventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency."[165] Consequently, Salmon was bound, at a minimum, to disclose this chance to Meinhard.[166] The fact that the chance would have been of little value was deemed to be immaterial. Further, since Salmon was responsible for operating the hotel under the terms of their agreement, Meinhard was held entitled to assume that Gerry was willing to extend the lease or let it stand at will, absent any indication to the contrary from Salmon. Indeed, as Chief Judge Cardozo stated in his judgment, "there was nothing in the situation to give warning to any one that while the lease was still in being, there had come to the manager an offer of extension which he had locked within his breast to be utilized by himself alone."[167]

Chief Justice Cardozo determined that the new lease between Gerry and Salmon was not, strictly speaking, a renewal because of the many changes from the old lease, most importantly the significant expansion of the properties included under it. Nonetheless, he concluded that Salmon's obligations to Meinhard remained the same under the new agreement as under the old one, insofar as "the standard of loyalty for those in trust re-

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[162] *Ibid* [reference omitted]. Note the similar language used by Cardozo J, as he then was, in *Wendt v Fischer*, 154 NE 303 at 304, 243 NY 439 (App Ct 926) ("[o]nly by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion").

[163] *Meinhard*, *supra* note 11 at 547.

[164] See *ibid.*

[165] *Ibid.*

[166] See *ibid* (insofar as Salmon was actively operating the hotel for the joint adventurers, he had a duty to disclose the existence of the new opportunity to Meinhard "since only through disclosure could opportunity be equalized").

[167] *Ibid.*

lations is without the fixed divisions of a graduated scale."[168] Chief Justice Cardozo recognized that Salmon may not have intended to take advantage of Meinhard, but simply took up an offer that was made to him directly. His lack of mala fides, however, was inconsequential, since "Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation."[169] For this reason, Chief Justice Cardozo concludes that as a "managing coadventurer" who appropriated for himself the benefit of a new lease that was an extension of an existing lease, Salmon should have "fairly expect[ed] to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument. Conduct subject to that reproach does not receive from equity a healing benediction."[170] Chief Justice Cardozo's majority judgment affirms the judgment below, but alters the award to Meinhard by reducing his share of the new lease to fifty per cent less one share to preserve and recognize Salmon's control and management of the new venture.[171]

Although Meinhard is awarded a significant interest in the new lease, the primary purpose of Chief Justice Cardozo's judgment in *Meinhard* is not primarily to protect Meinard's interests or to punish Salmon for his bad behaviour. The effects of his judgment may do precisely that, but those are not the primary reasons why the judgment reads as it does. Rather, as the language of the judgment clearly indicates, it is primarily directed at preserving the integrity of the relationship between joint venturers who rely upon and can become vulnerable to each other. Conferring benefit upon Meinhard is necessary to achieve this larger purpose. The language used by Chief Justice Cardozo and the emphasis he provides supports this conclusion. Indeed, not finding in favour of Meinhard's interests would have made a strong negative statement about the law's willingness to protect business relations where one party is vulnerable to the actions of another.[172] That is why Chief Justice Cardozo's judgment emphasized that without obliging Salmon to disclose the existence of the opportunity to his co-adventurer and, subsequently, to turn over almost ex-

168 *Ibid*.

169 *Ibid* at 548.

170 *Ibid*.

171 See *ibid* at 549.

172 Meinhard's vulnerability is created as a result of the particular nature of the joint venture arrangement, which provided Salmon with exclusive control over the business arrangement. Meinhard was, effectively, a silent partner and financier in the arrangement with Salmon, who was the operator and front man. Thus, when Gerry came to Salmon with his proposal, Meinhard could only have come to know of it if Salmon had voluntarily disclosed it.

actly half of the economic interest in it, the integrity of joint venture agreements would be jeopardized.[173]

There is a lot of similarity between the judgments of Chief Justice Cardozo in *Meinhard* and Lord Chancellor King in *Keech*. Both judgments are primarily directed at making pronouncements intended to extend well beyond their impact on the individuals whose interests were directly affected by the matters at bar. As illustrated above, Chief Justice Cardozo's rhetoric indicates his judgment is not predicated primarily upon benefiting Meinhard or punishing Salmon, but ensuring that "the rule of undivided loyalty," which exists to reinforce the integrity of trusting relations, remains "relentless and supreme".[174] Meanwhile, Lord Chancellor King's conclusion in *Keech* is also directed more generally than merely vis-à-vis the parties directly affected by his judgment.[175]

Both of the judgments in *Keech* and *Meinhard* reinforce that in situations where the fiduciary concept applies, there necessarily are different results than under contract, tort, or even unjust enrichment. The practical effect of this distinction is described more specifically by Andrew Burrows:

> [W]hat may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary. Hence undue influence or non-disclosure, while not in themselves wrongs, may be wrongs where committed by a fiduciary because they may then constitute a breach of the duty to look after another's interests. This explains why compensation was awarded for a fiduciary's—a solicitor's—negligent misrepresentation in *Nocton* v *Lord Ashburton* 50 years before the development of the tort of negligent misstatement, outside a fiduciary relationship, in *Hedley Byrne & Co. Ltd* v *Heller and Partners Ltd.*[176]

Burrows' indication that applying fiduciary and non-fiduciary legal principles to the same interaction will invariably result in different outcomes demonstrates that the fiduciary concept has both distinct methodologies

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173 See also Weinrib, *supra* note 10 ("the majority felt that the integrity of the commercial arrangements between the litigants required a holding for the plaintiff" at 17).

174 *Meinhard*, *supra* note 11 at 548.

175 See *Keech*, *supra* note 1 at 62.

176 Andrew Burrows, "We Do This at Common Law but That in Equity" (2002) 22:1 Oxford J Leg Stud 1 at 9 [footnotes omitted]. See also Patricia Loughlan, "The Historical Role of the Equitable Jurisdiction" in Patrick Parkinson, ed, *The Principles Of Equity* (Sydney: LBC Information Services, 1996) 3 [footnotes omitted] ("[s]ince equitable principles such as those applicable to fiduciaries fulfil a different social purpose from the law of contract and of tort, imposing, as they do, a strong duty to act only in the interests of the other, it is by no means clear that principles developed in respect to common law obligations should be utilised in the equitable jurisdiction" at 23–24).

and equally distinct goals from non-fiduciary law principles. This is especially true vis-à-vis common law principles of civil obligation.

Indeed, from the results in *Meinhard*, it may be seen that the fiduciary concept imposes far more onerous duties on fiduciaries than what the common law of contract, for example, imposes on the parties to a contractual agreement. Had the facts in the case been determined on the basis of contract, it may well have been determined that the initial arrangement that existed between Meinhard and Salmon terminated upon its conclusion. Indeed, it was recognized by Cardozo CJ that the second, larger contract Salmon signed with Gerry was of far greater magnitude than the initial one under which Meinhard and Salmon were co-adventurers.[177] Further, contracts of a particular duration may be presumptively regarded as not providing any further obligations between the contracting parties, save for where a second contract is actually or effectively a renewal of the pre-existing contract.

On this same basis, a partnership for a particular purpose is deemed to end upon the achievement of that purpose. Similarly, a partnership of a specified duration of time exists only for that duration, unless it may be extended or renewed. Joint ventures may be said to follow essentially similar, if not identical, terms as these.[178] Why, then, does the judgment in *Meinhard* seek to extend the initial, limited arrangement between Meinhard and Salmon pertaining to the management of a hotel to the second, much larger development agreement with Gerry that was far broader in scope? Explaining why this was done and how it differs from the application of ordinary contractual principles helps to explain the basis of the fiduciary concept and how it differs from those same principles.

The implementation of the fiduciary concept in *Meinhard* extends the application of obligations between Meinhard and Salmon because of its broad function of maintaining socially and economically beneficial interactions that facilitate the specialization of knowledge and tasks and enhance fiscal and informational wealth.[179] This purpose is broader than

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[177] See *ibid* at 545–48

[178] For most purposes, joint ventures are treated in much the same way as partnerships, notwithstanding that they may not necessarily meet the criteria to be partnerships. See Walter HE Jaeger, "Partnership or Joint Venture?" (1961) 37:2 Notre Dame L Rev 138 ("[o]riginally, the joint venture was assimilated to the partnership and, in many cases, they are treated as more or less synonymous" at 141 [footnote omitted]).

[179] See also Anderson, *supra* note 34 at 739:

> In order to be efficient, our society must rely on the specialized production of goods and services and on an extensive system of exchange to make such goods and services available to those who need them. Both specialization and exchange enormously increase the total value of resources produced and con-

contract law's more limited goal of protecting the parties' respective interests in their agreements. Fiduciary law puts into place, in appropriate situations, mechanisms to both foster and protect trusting relationships that create an implicit dependency and peculiar vulnerability of one party to another. Contract law, meanwhile, has little direct regard for such a broad purpose, focusing more particularly on doing justice between individuals. Neither tort nor unjust enrichment have as grand aspirations as the fiduciary concept either.

In short, fiduciary law plays a significant role in ensuring the continued efficacy of the web of human interdependency by governing the conduct of fiduciaries holding power over others.[180] This enables beneficiaries to rely upon their fiduciaries' actions in the former's best interests which, consequently, maintains the viability and efficiency of human interactions of high trust and confidence that foster fiscal and informational wealth. Nowhere is the broad purpose underlying this important impact expressed more clearly than in Justice La Forest's judgment in the Supreme Court of Canada's decision in *Hodgkinson v. Simms*:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.[181]

Justice LaForest is quite definite in promoting the integrity of important relationships in contemporary society in the above statement. In both the words he uses and the purpose he fosters, he may be seen to channel Chief Justice Cardozo's famous judgment in *Meinhard*, if not in its eloquence, at least in its effect.

The fiduciary concept's emphasis on selfless behaviour, utmost good faith, and conscience distinguish it fundamentally from the laws of contract, tort, or unjust enrichment; so, too, does its focus on relationships ra-

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sumed in our society. All of us share, to a greater or lesser extent, in that increased value.

[180] In the corporate context, note the similar sentiments expressed in Lawrence A Hamermesh, "Calling off the *Lynch* Mob: The Corporate Director's Fiduciary Disclosure Duty" (1996) 49:5 Vand L Rev 1087 at 1145: "fiduciary law helps preserve the socially efficient relationship of specialization that exists when directors are entrusted with authority to manage the resources of others."

[181] *Hodgkinson*, *supra* note 35 at 422.

ther than individuals. Fiduciary law's more onerous duties and its rigorous promotion of fiduciaries' selfless behaviour ensures the integrity of the important social and economic interactions of high trust and confidence it oversees. Maintaining the integrity of these interactions, in turn, facilitates meaningful and substantive social and economic interdependency.

The central focus of the fiduciary concept, then, is much broader than the goals of contract, tort, and unjust enrichment, which are premised on much smaller and more immediate goals of facilitating justice between parties. It is also broader than Valsan's conclusion that the fiduciary concept exists to ensure fiduciaries' use of duty to exercise judgment based on relevant considerations. For a legal concept like fiduciary law that epitomizes the essence of equity, this core duty is far too trivial to be its core function.

Conclusion

This article has sought to provide a context in which to appreciate the operation of the fiduciary concept and the purpose it is intended to fulfill. In the process of gaining a greater contextual appreciation of the fiduciary concept and its purpose, this article has elucidated the fiduciary concept's reason for being, a brief description of the duties and correlative benefits that exist under its mandate, and, finally, an illumination of how this broad fiduciary mandate, and the duties and benefits its prescribes, function together through their illustration in one of its most notable judicial applications in *Meinhard*. It is difficult, if not impossible, to find a more eloquent description of the salutary effects of imposing fiduciary principles on a business interaction, or any interaction for that matter, than what Chief Justice Cardozo elucidates in that case.

In addition to its attempt to foster a greater understanding of the purpose and function of the fiduciary concept, this article has attempted to reduce the gap in the understanding of the four distinct bases of civil obligation by promoting a more robust understanding of the fiduciary concept and to bring its level of comprehension closer to the level of knowledge of the law pertaining to contract, tort, and unjust enrichment.

In the process of describing the necessary incidents of fiduciary interactions in this article, Valsan's recent entry into fiduciary scholarship has been examined for its contributions to fiduciary literature.

The primary concern expressed with Valsan's approach to the fiduciary concept is that it does not accomplish the broad purpose of explaining the fiduciary concept that he articulates. While his introduction of interdisciplinary accounts of conflicts of interest expand the horizon of what has traditionally been contemplated when assessing the existence and implications of conflicts of interest, his contention that conflicts of interest are the keystone for the application of the fiduciary concept and the core concept he develops are less certain and, ultimately, lead to a far-too-limited and unnecessarily restrictive characterization of fiduciary law that is inconsistent with its raison d'être. As this article has attempted to demonstrate, there is far more to the fiduciary concept than Valsan's analysis suggests.

We have seen that what distinguishes the fiduciary concept from other bases of civil obligation is that it protects relationships rather than individuals and looks to larger social and economic goals rather than seeking to resolve the conflict between parties. Since its purpose is much more ambitious than other avenues of civil obligation, its principles are more intricate and complex than those belonging to the fiduciary concept's common law counterparts. More attention needs to be paid to this broader function than what has generally been seen in existing discussions of fiduciary law.

As a result of its reliance on broad principles rather than strict rules, the fiduciary concept has proven to be more difficult to articulate than its common law cousins. The inherent malleability of fiduciary principles is thus both a blessing and a curse. Their innate flexibility allows for their application to multifarious interactions regardless of how odd or unique they might be; at the same time, however, their lack of fixedness also renders the detailed understanding of the fiduciary concept's unique principles and their onerous functions challenging to jurists of all stripes.

There have been a variety of theories that have attempted to explain the basis of fiduciary obligations. This article has illustrated two rather distinct types that sit at different places along the fiduciary law continuum.

At the broad end of the spectrum lies the type of theory of fiduciary purpose that emphasizes the need to understand the fiduciary concept by reference to the broad postulates that give it substance and the principles of equity from which it is derived and which provide it with philosophical and doctrinal history and context. An example of this is the theory of fiduciary purpose articulated here, which puts forward the proposition that the fiduciary concept's purpose is to protect important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary.

At the narrow end of that spectrum sits Valsan's articulation of fiduciary purpose, which is premised upon an interdisciplinary understanding of conflicts of interest. His theory, which initially relies upon the notion of an undertaking of fiduciary responsibility and fiduciaries' exercise of discretion to found the existence of fiduciary obligations, imports the interdisciplinary notion of conflicts of interests to protect the core concept of fiduciary law he puts foward, namely the duty to exercise judgment based on relevant considerations.

The distinction between these two types of theories encapsulates the main distinctions in process and understanding when taking a microscopic approach to a particular fiduciary issue rather than adopting a macroscopic approach to the fiduciary concept as a whole. The microscopic approach, such as that represented in Valsan's article, tends to focus on issues or characteristics of fiduciary relations like conflicts of interest or loyalty. Traditionally, fiduciary law commentators have largely ascribed to this approach at the expense of attention paid to the fiduciary concept as a whole. The major shortcoming of this approach is that it does not provide an understanding of the purpose and function of the fiduciary concept. Insofar as the predominant number of articles examining fiduciary law ascribes almost exclusively to the microscopic approach, these analyses have no context within which to understand how, or whether, their individual examinations fit within an appropriate understanding of the fiduciary concept.

What is advocated here is the need for fiduciary law commentators to step back from the particulars of individual fiduciary interactions and pay more attention to the broader, foundational issues that animate the fiduciary concept as a whole. A greater focus on the macroscopic understanding of the fiduciary concept and the issues germinating from that examination can provide a more solid foundation from which the examinations of particular incidents of fiduciary relations, like conflicts of interest, might arise. Linking these microscopic examinations of the incidents of fiduciary interactions back to a firmer understanding of the fiduciary concept as a whole can unify the work being done more than can the existing patchwork of articles focusing on self-contained issues. This proposal is not meant to suggest that considerations of individual issues arising within the scope of the fiduciary concept are unimportant. Their relevance would be that much more impactful, however, if they drew from a more fulsome understanding of the fiduciary concept as a whole and the purpose it serves within the framework of civil obligations.

In concluding this examination, it is important to reiterate that while the fiduciary concept still suffers from a degree of uncertainty among lawyers, judges, and academic commentators, it is nowhere near as uncertain as it is often portrayed to be. As I suggest above, the *perception* of uncertainty surrounding the fiduciary concept is far greater than any substantive uncertainty that might still exist. Recognizing the distinctiveness of the fiduciary concept vis-à-vis its civil obligation cousins and its foundational status within the sphere of influence belonging to equity is the first step to its broader acceptance across juridical boundaries.

Rather than looking to the fiduciary's "duty to exercise judgment based on relevant considerations," this article suggests that the core concept of fiduciary law is its purpose of (a) maintaining the integrity of socially and economically important or necessary relationships of high trust and confidence that (b) create beneficiaries' implicit dependency and particular vulnerability to (c) fiduciaries' duties of honesty, integrity, fairness, and utmost good faith that (d) establish the parameters of fiduciaries' acceptable conduct toward their beneficiaries (e) within the fiduciary elements of their interaction. Fiduciary duties govern the relationship between fiduciaries and beneficiaries and establish the parameters of the former's acceptable conduct toward the latter within the fiduciary elements of their interaction.

The fiduciary concept was never intended to apply to the garden variety of interactions creating civil obligations. It is only properly used after investigating the appropriateness of the more traditional bases of civil obligation to the issue in question. Consequently, only once the common law of civil obligation is deemed to be inadequate may the fiduciary concept step into the void.

This article has attempted to set out the unique legal space within which the fiduciary concept functions, as well as the foundational goals that it is designed to accomplish. In the process of fleshing out these ideas, the fiduciary concept's "holy grail" has, hopefully, been demonstrated to not be as elusive as the legendary chalice that provides the basis for this analogy.

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