

# THE FIDUCIARY CONCEPT AND THE SUBJECTIVE NATURE OF LEGAL CERTAINTY

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# **THE FIDUCIARY CONCEPT AND THE SUBJECTIVE NATURE OF LEGAL CERTAINTY**

**Leonard I. ROTMAN\***

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While legal certainty is frequently regarded as axiomatic, greater emphasis is often placed upon its achievement than is necessarily warranted. Some legal constructs frustrate taxonomy, but nonetheless perform important functions. This is particularly true with regard to equitable constructs like the fiduciary concept which do not ascribe to hard and fast rules, but rely upon judicial discretion to facilitate their situationally-appropriate imposition.

The fiduciary concept is often criticized for its lack of certainty, but has nonetheless grown exponentially in the face of such criticism. Its growth demonstrates that absolute certainty is not a prerequisite to legal effectiveness. This paper will consider the role of certainty vis-à-vis the fiduciary concept and how the desire to achieve certainty can sometimes sterilize rather than invigorate legal concepts. It suggests that the value in achieving legal certainty ought not always overshadow the value that can exist in its absence.

## **I. INTRODUCTION**

The pursuit of legal certainty in law is almost universally accepted as a desirable objective. Yet, the pursuit of legal certainty can sometimes perform more harm than good, particularly when it is pursued blindly or where it is regarded as a goal unto itself.

In such circumstances, the desire for certainty may eliminate the flexibility required for the continued efficacy of legal doctrines. Thus, while achieving certainty in law may be desirable as an ideal, it is sometimes improperly perceived as an absolute good that is required in all circumstances for law to be effective.

Legal certainty is necessarily relative, both in its application and its value. What constitutes certainty to one person may not be similarly regarded by another. Further, although there is value in the ideal of legal certainty, or at least the endeavour to strive towards it, there is also significant value in what some may describe as legal uncertainty, specifically the maintenance of judicial flexibility through the discretionary application of articulated principles. This is particularly true with regard to equitable constructs like the fiduciary concept which do not ascribe to hard and fast rules, but rely

upon a measure of judicial discretion to facilitate their situationally-appropriate imposition.<sup>1</sup>

The fiduciary concept provides an ideal ground for a discussion of the role of certainty in law. The fiduciary concept has long been criticized for its lack of certainty.<sup>2</sup> While inadequate judicial reflection on the purpose and function of the fiduciary concept has caused considerable uncertainty and has resulted in a number of inconsistent, inopportune, and, in some instances, ideologically bankrupt fiduciary judgments, the fiduciary concept nonetheless enjoys widespread use. This seemingly dichotomous scenario is explained by the very structure of the fiduciary concept.

As the most doctrinally pure expression of Equity,<sup>3</sup> the fiduciary concept does not ascribe to hard and fast rules; it is governed, instead, by a series of principles that provide the parameters of the judicial discretion that lies at its foundation. While this discretion is often pointed to as a basis for describing the fiduciary concept as uncertain, it is consistent with the fiduciary concept's roots in broad, equitable notions of justice and conscience. Furthermore, this discretion is not unfettered, but is tempered by the presence of

1. While the fiduciary concept's application is dependent upon a measure of judicial discretion, that discretion is not unfettered, but is limited by the parameters of the fiduciary concept. These parameters, in turn, are established by general principles fashioned out of the broad postulates that provide the basis of its existence: see the discussion in L.I. ROTMAN, "The Fiduciary Concept, Contract Law, and Unjust Enrichment: A Functional Comparison," in P. GILKER, ed., *Re-examining Contract and Unjust Enrichment*, (Leiden, Martinus Nijhoff, 2007) 87.
2. In "The Content of Fiduciary Obligation," Peter Birks notes how difficult it is "to pin down fiduciary obligations with the precision demanded by the rule of law": P. BIRKS, "The Content of Fiduciary Obligation," (2000) 34 *Isr. L. Rev.* 3 at 5. In an earlier paper, Birks describes the fiduciary concept as "a blot on our law, and a taxonomic nightmare": P. BIRKS, "Equity in the Modern Law: An Exercise in Taxonomy," (1996) 26 *W. Aust. L. Rev.* 1 at 18. Less extreme is D.A. DE MOTT, "Beyond Metaphor: An Analysis of Fiduciary Obligation," (1988) 5 *Duke L.J.* 879 at 879: "Fiduciary obligation is one of the most elusive concepts in Anglo-American law." See also J.D. DAVIES, "Keeping Fiduciary Liability Within Acceptable Limits," (1998) *S.J.L.S.* 1.
3. See L.I. ROTMAN, *Fiduciary Law*, (Toronto: Thomson/Carswell, 2005) at 154, describing the fiduciary concept as "Equity's darling." See also G.E. DAL PONT and D.R.C. CHALMERS, *Equity and Trusts in Australia and New Zealand*, 2nd ed., (Sydney: LBC, 2000) at 71, who describe the fiduciary concept as "arguably the premier equitable concept which illustrates equity's jurisdiction." As stated in J.D. McCAMUS, "The Evolving Role of Fiduciary Obligation," in 1998-99 *Meredith Lectures*, Faculty of Law, McGill University, (Cowansville, Éditions Yvon Blais, 2000) at 205: "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."

foundational fiduciary principles such as the rules against fiduciary conflicts and profiteering. The fiduciary concept's use of discretion as a fundamental tool in its operation thus allows for the dispensing of relief in a situationally-appropriate manner. It also ensures fidelity to the fiduciary concept's foundational purpose of maintaining the integrity of socially and economically valuable, or necessary, relationships of high trust and confidence in which beneficiaries are implicitly dependent upon and peculiarly vulnerable to their fiduciaries' use or abuse of power over their interests.

There has been a rather dramatic increase in claims of breach of fiduciary duty in recent years. This is particularly true in Canada, which, as one commentator has suggested, has created a veritable "fiduciary relationships industry."<sup>4</sup> Indeed, Sir Anthony Mason, former Chief Justice of High Court of Australia once stated that Canadian fiduciary jurisprudence is divided into three parts: "[t]hose who owe fiduciary duties, those to whom fiduciary duties are owed and judges who keep creating new fiduciary duties."<sup>5</sup>

The expansion in use of the fiduciary concept in the face of sometimes-biting criticism of its uncertainty has not escaped judicial notice. In *LAC Minerals Ltd. v. International Corona Resources Ltd.*, La Forest J. said that "[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."<sup>6</sup> There are a number of potential implications stemming from the dichotomous situation recognized by Justice

4. P. FINN, "Equitable Doctrine and Discretion in Remedies," in W. CORNISH, R. NOLAN, J. O'SULLIVAN, and G. VIRGO, eds., *Restitution Past, Present and Future: Essays in Honour of Gareth Jones*, (Oxford: Hart, 1998) at 257.

5. As quoted in *A. (C.) v. Critchley* (1998), 166 D.L.R. (4th) 475 at para. 74 (B.C.C.A.). See also E. CHERNIAK, "Comment on paper by Professor Jeffrey G. MacIntosh," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991) at 275, who relates the story of how Mason told then-Chief Justice Brian Dickson of the Supreme Court of Canada that "he understood that in Canada there were only three classes of people; those who are fiduciaries; those who are about to become fiduciaries; and judges." Not all judges regard the increased use of the fiduciary concept in Canada as problematic. For example, speaking extra-curially, Linden J.A. once said:

I find it odd that so many of the speakers have been treating this terrible concept of fiduciary as a kind of "f" word. To me it's not an "f" word at all; it's a useful new idea that gives courts the capacity to achieve results that were difficult to reach before, but which are dictated by the needs of the case.

Linden J.A. in A. ROCK, Justice A.M. LINDEN, Sir R. MEGARRY, and M. ELLIS, "Panel Discussion: Where is the Law Going?," in *Fiduciary Duties*, *ibid.* at 131.

6. (1989), 61 D.L.R. (4th) 14 at 26 (S.C.C.).

La Forest in *LAC Minerals*. This paper focuses on the effect that a perceived lack of certainty may have on the practical application of the fiduciary concept and its nexus with fiduciary jurisprudential reality.

## II. THE PLACE OF CERTAINTY IN LAW

The absence of certainty in law, whether perceived or real, creates discomfort. While it may be desirable to seek out greater certainty in law, there is an important distinction between the *pursuit* of legal certainty and its attainment. While the former is desirable, the latter is unachievable.

Laws are human responses to the human condition. As such, they can be no more perfect or complete than their architects. Laws require development and refinement that occur with time and experience – they do not emerge fully formed and conceptually-impenetrable. This lack of absolute certainty is not necessarily problematic, though. There is an old Iranian proverb which maintains that “doubt is the key to knowledge.” It is doubt that drives our desire to seek answers to what concerns us. Yet, as the proverb intimates, it is the pursuit of answers as part of our quest for certainty rather than their attainment (assuming that such attainment is achievable), that ought to be our focus. Indeed, as Voltaire once said “doubt is not a pleasant condition, but certainty is absurd.”

It might well be suggested, then, that the greatest barrier to achieving legal certainty is the illusion of its presence. Where one is under the impression that certainty has been achieved in a particular area, the need to continue to inquire within that realm is reduced and perhaps abandoned. As the noted American jurist Oliver Wendell Holmes once remarked in *Hyde v. United States*, “[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”<sup>7</sup>

There are definite benefits associated with the pursuit of legal certainty. In its ideal form, legal certainty allows for the generation of legitimate or reasonable expectation based upon an ascertainable standard. This standard provides a sound basis for assessing the various conditions imposed upon behaviour. Knowing what the law

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7. 225 U.S. 347 at 391 (1911).

demands enables the tailoring of behaviour to comply with those demands or, alternatively, to consciously choose to flout the law. Conversely, without knowing the law's demands, how may one's behaviour be appropriately shaped to avoid running afoul of the law?

Certainty applies not only to the laws governing individual behaviour, but also to the procedure by which those laws are applied. This certainty in procedure is well illustrated by the "rule of law", a foundational legal principle that, ironically, has no precise or uniform definition, but which contemplates stability, predictability, and reliability.<sup>8</sup> The rule of law is the antithesis of capriciousness and provides a solid foundation upon which any stable system of law necessarily resides, notwithstanding that it cannot be precisely defined. As the Supreme Court of Canada clearly enunciates in *Reference re Secession of Quebec*, "[t]he principles of constitutionalism and the rule of law lie at the root of our system of government. ... At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."<sup>9</sup>

While certainty is, therefore, necessary for the proper functioning of law, that certainty needs not be absolute, but merely sufficient. Too much certainty leaves little room for discretion and the unique circumstances of individual situations will suffer as a result. However, while the use of discretion is a necessary element of law, that does not entail that that discretion ought to be completely unfettered either. Thus, while law need not be entirely circumscribed by taxonomy, it must balance its need for certainty with an appropriate measure of flexibility and discretion. This is evidenced by the co-existence within numerous legal systems of positive laws of general application and equitable principles designed to mollify the former and fill in their gaps. The law maintains its appropriateness in a wide variety of circumstances by virtue of the co-existence of these distinct legal methodologies.

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8. As indicated in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 at 805-6: "[t]he rule of law is a highly textured expression, importing many things ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."

9. [1998] 2 S.C.R. 217, at par. 70.



Aristotle explains the nexus between laws of general application and principles of Equity, or *epieikeia*, in the *Nichomachean Ethics*.<sup>10</sup> He contends that the creation and application of general laws, while necessary, is imperfect. As Plato had previously suggested,<sup>11</sup> Aristotle maintains that while laws of general application are necessary to govern social interaction, their universal application sometimes leads to inequitable results. Equitable principles are, therefore, both necessary and appropriate where injustice is caused by the harsh or unbending application of law:

... all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.<sup>12</sup>

Although Aristotle clearly distinguishes *πείκεια* (Equity) from *δίκαιον* (law), he indicates that the two concepts must work together to achieve justice.<sup>13</sup> His statement, above, that Equity is “a correc-

10. Aristotle, *Nichomachean Ethics*, D. Ross, tr., (London: Oxford University Press, 1925).

11. See, for example, Plato, “Statesman,” in *The Dialogues of Plato*, Vol. II, B. JOWETT, tr., (New York: Random House, 1937) at 322; Plato, “Laws,” Bk. VI, *ibid.* at 530.

12. Aristotle, *Nichomachean Ethics*, *supra*, note 10, Bk. V, c. X, at 132-3.

13. C.G. HAINES, *The Revival of Natural Law Concepts* (Cambridge, Mass.: Harvard University Press, 1930) at 45 has made a similar argument respecting the use of dual terms in European legal systems to describe the ideas contained in the English word “law.” For example, he suggests that the Latin word “*lex*,” commonly designates written enactments or rules, while the word “*jus*” refers to rules “which are just or inherently right or equitable.” Similarly, he states, *ibid.* at 45-6, that the French word “*loi*” means “a declaration of the will of the sovereign upon an object of common interest,” while the term “*droit*” is “the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows, the observance of which it is possible, and at the same time useful, to assure by way (à suivre...)”

tion of law where it is defective owing to its universality” demonstrates the working relationship between law and Equity. Aristotle’s formulation of the interaction between law and Equity maintains the objectivity and legitimacy of law while retaining the necessary flexibility within its application to avoid inappropriate and excessive rigidity, which would detract from law’s legitimacy. This arrangement is also set out in the *Rhetoric*, where Aristotle states:

[i]t is equitable to excuse the common failings of mankind; to consider, not the law as it stands, down to the letter, but the legislator and his intention; not the action in itself, but the deliberate choice of the agent; not the part, but the whole; and not the momentary disposition of the agent, but his past character as invariably or usually displayed.<sup>14</sup>

Aristotle’s assessment of the interaction between law and Equity is echoed by the English jurist William Lambard in his sixteenth century<sup>15</sup> treatise *Archeion*:

For *written Lawes* must bee made in a generalitie, and be grounded upon that which happeneth for the most part, because no wisdom of man can fore-see every thing in particularitie, which Experience and Time doth beget.

And therefore, although the *written Law* be generally good, and just; yet in some speciall case, it may have need of Correction, by reason of some considerable Circumstance falling out afterwards, which at the time of the Law-making was not fore-seene: Whereas otherwise, to apply one generall Law to all particular cases, were to make all *Shooes* by one *Last*, or to cut one *Glove* for all *Hands*, which how unfit it would prove, every man may readily perceive. And hereof this *Equitie* hathe name in Greek *ἐπιεία*, of *ἐπὶ secundum*, and *ἐῖος conveniens*, *vel rationi consentaneum*; because it doth not onely weigh what is gene-

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(...suite)

of external coercion.” Analogous compartmentalizations are also said to occur in German (“recht” vs. “gesetz”), Italian (“diritto” vs. “legge”), and Spanish (“derecho” vs. “ley”).

14. Aristotle, *The Rhetoric of Aristotle*, L. Cooper, tr., (New York: D. Appleton-Century, 1932) at 77 (Bk. I. 13. b).
15. W. LAMBARDE, *Archeion*, C.H. McIlwain and P.L. Ward, eds., (Cambridge, Mass.: Harvard University Press, 1957) at 46. This treatise, while first released posthumously in 1635, was likely completed in its entirety during the sixteenth century. The bulk of the work was finished in 1591, whereupon a copy was presented to Sir Robert Cecil: “Introduction,” *ibid.* at vii. In June, 1592, Lambard became a Master in Chancery, at which time he made some changes and additions to his manuscript; other minor changes were, apparently, made after the death of Lord Keeper Puckering in May, 1596.

rally meet for the most part, but doth also consider, the person, time, place, and other circumstances in every singular case that commeth in question, and doth thereof frame such judgement as is convenient and agreeable to the same: So that in sum the *written Law* is like to a stiffe rule of *Steel*, or *Iron*, which will not be applied to the fashion of the *Stone* or *Timber* whereunto it is laid: And *Equitie* (as *Aristotle* saith well) is like to the leaden rule of the *Lesbian Artificers*, which they might at pleasure bend, and bow to every stone of whatsoever fashion.<sup>16</sup>

Equity's fact- and issue-specific attention compensates for those situations where broad and large notions of justice cannot be achieved through the rigid application of law.<sup>17</sup> This deficiency of law is endemic to every legal system which must, by its very nature, maintain a proper balance between principles of certainty and fairness.<sup>18</sup> As C.K. Allen aptly characterizes this conundrum:

... a legal rule, like every kind of rule, aims at establishing a generalization for an indefinite number of cases of a certain kind. Uniformity and universality are essential characteristics of it. ...

But no generalization can be completely general. The trite phrases that there are exceptions to every rule, or that the exception proves the rule, are only different ways of saying that human calculation is imperfect and human reason limited. ... But in the domain of law the effect of exceptions may be more detrimental. Law and justice exist for the regulation of actual rights and duties; and the incompleteness of

16. *Ibid.* at 43.

17. See F. TUDSBURY, "Equity and the Common Law," (1913) 29 *L.Q.R.* 154 at 157: It is not possible that the letter of the law can be so expressed as to provide for the infinite variety of circumstances which may qualify particular cases. The influence of equity must therefore have a twofold application in the administration of statute law; in the first place it should influence the general terms of the law in the light of reason and justice; and secondly, it should assist in the interpretation of the law in accordance with the particular demands of individual circumstances.

18. See H.G. HANBURY, *English Courts of Law*, 4th ed. by D.C.M. Yardley, (London: Oxford University Press, 1967) at 94: "Every legal system has had to face this problem: how, while preserving rigidity in the law, to prevent that rigidity from causing real suffering in individual cases. Few legal systems have succeeded in solving this problem without the aid of equity." See also S. AMOS, *The Science of Law*, (New York: D. Appleton and Co., 1894) at 35: "the method of supplementing the prevalent legal system by a subsidiary system of less rigidity, and of greater capacity for fine moral discrimination, is almost universal and indeed necessary in all advanced countries if law is in any measure to carry out the dictates of justice." For illustrations of how different legal systems have responded to this conundrum, see R.A. NEWMAN, ed., *Equity in the World's Legal Systems: A Comparative Study*, (Brussels: Établissements Émile Bruylant, 1973).

the generalization, which is certain to make itself felt at some point or other, may produce results which are antithetic to the very purpose of the generalization.

In many legal systems, therefore, a discretionary or moderating influence has been superadded to the rigour of formulated law. It has assumed different names at different times, but we may consider it under the general description of equity. It has exhibited itself in two principal forms: (1) a liberal and humane interpretation of law in general, so far as that is possible without actual antagonism to the law itself – this we may call *equity in general*; (2) a liberal and humane modification of the law in exceptional cases not coming within the ambit of the general rule – this we may call *particular equity*.<sup>19</sup>

What these analyses demonstrate is that an equilibrium must be brought to bear upon the conflicting desires to achieve certainty through the establishment of strict rules and the maintenance of flexibility to ensure that the strictness of the positive law does not create manifest unfairness. This is the primary effect of Equity's application to the common law, as expressed particularly through its maxims and through vehicles such as the fiduciary concept. As Story has said, "equity must have a place in every rational system of jurisprudence, if not in name, at least in substance."<sup>20</sup>

### III. THE EFFECT OF PERCEIVED UNCERTAINTY ON THE FIDUCIARY CONCEPT

Although fiduciary jurisprudence admittedly contains a number of unreflective and unexplained applications of the fiduciary concept, to condemn the fiduciary concept as insufficiently certain is improper. While the fiduciary concept does suffer from a measure of uncertainty as a result of its unfortunate jurisprudential treatment, the greater obstacle it faces is the *perception* of uncertainty rather than any substantive uncertainty inherent in the concept

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19. C.K. ALLEN, *Law in the Making*, 7th ed., (Oxford: Clarendon Press, 1964) at 384-5.

20. J. STORY, *Commentaries on Equity Jurisprudence*, (London: Stevens & Haynes, 1884) at 5. See also S.E. SMITH, "The Stage of Equity," (1933) 11 *Can. Bar Rev.* 308 at 309: The word "equity" and its equivalents have throughout legal history been current terms of jurists and publicists. Whatever words are used, the general notion underlying them is that of a doctrine of authority capable of abrogating or ameliorating the hardship which otherwise would ensue either from the literal extension of positive rules of the period of strict law, or from the literal exclusion of cases from those rules notwithstanding that the cases fall within the true spirit of them.

itself.<sup>21</sup> Faulty applications of the fiduciary concept have exacerbated this sense of confusion. Although this has not inhibited the growth in breach of fiduciary duty claims, it has caused considerable judicial consternation. A notable example may be seen in McEachern C.J.B.C.'s judgment in *A. (C.) v. Critchley*, in which he criticizes the Supreme Court of Canada's extension of the fiduciary concept without providing more definite guidance as to its meaning and effect:

Our Supreme Court of Canada has led the way in the common law in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn.<sup>22</sup>

It is, indeed, difficult to pin down the fiduciary concept with sufficient certainty to satisfy critics of its current use. One reason for this is the broad spectrum of interactions to which the fiduciary concept may apply. Since the fiduciary concept is potentially applicable to an infinite variety of actors involved in an indefinite number of circumstances, it cannot be defined with the explicitness demanded by its critics. In fact, the fiduciary concept's protean quality makes even meaningful generalization difficult.<sup>23</sup>

The difficulty in defining the fiduciary concept has been recognized for quite some time in the jurisprudence. An early example may be seen in *Tate v. Williamson*, where it is said:

The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by

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21. See ROTMAN, *Fiduciary Law*, *supra*, note 3, at 39.

22. *Critchley*, *supra*, note 5, at par. 75.

23. This is consistent with the fiduciary concept's equitable background. The fiduciary concept adheres to Lord Upjohn's characterization of equitable principles in *Boardman v. Phipps*, [1967] 2 A.C. 46 at 123 (H.L.): "[r]ules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."

many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.<sup>24</sup>

Among commentators on the fiduciary concept, Beck has suggested that “[c]lear definition is simply not possible, or desirable, when one is dealing with the interaction of human conduct and an infinite variety ... of situations.”<sup>25</sup> De Mott, meanwhile, contends that the fiduciary concept is resistant to definition as a result of its equitable foundation:

[t]he evolution of fiduciary obligation ... owed much to the situation-specificity and flexibility that were Equity’s hallmarks. ... [A]s Equity developed to correct and supplement the common law, the interstitial nature of Equity’s doctrines and functions made these doctrines and functions resistant to precise definition.<sup>26</sup>

Whatever the cause, this lack of definition has resulted in a number of problematic and doctrinally unsupportable applications of the fiduciary concept. In some situations, the fiduciary concept has been applied without an adequate understanding of its underlying purpose.<sup>27</sup> On other occasions, it has been used solely to achieve a particular result.<sup>28</sup> Still, in other instances, incorrect points of emphasis have been used that have led to improper determinations of the fiduciary character of individuals or relationships.<sup>29</sup> Finally, the confusion surrounding the fiduciary concept has resulted in lawyers pleading the existence of fiduciary relations simply to facilitate the joinder of parties in questionable circumstances.<sup>30</sup> These misapplications of the fiduciary concept have all combined to create a profoundly confused jurisprudence.

24. (1866), 2 L.R. Ch. App. 55 at 60-1 (C.A.).

25. S.M. BECK, “The Quickening of Fiduciary Obligation: *Canadian Aero Services Ltd. v. O’Malley*,” (1975) 53 *Can. Bar Rev.* 771 at 781.

26. D.A. DE MOTT, “Beyond Metaphor: An Analysis of Fiduciary Obligation,” (1988) 5 *Duke L.J.* 879 at 881-2.

27. See, for example, *Courtright v. Canadian Pacific Ltd.* (1983), 5 D.L.R. (4th) 488 (Ont. H.C.), aff’d (1985), 18 D.L.R. (4th) 639n (Ont. C.A.).

28. As in *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335 (Ont. H.C.) and *Chase Manhattan Bank v. Israel-British Bank*, [1981] Ch. 105.

29. Note *English v. Dedham Vale Properties*, [1978] 1 All E.R. 382 (Ch.); *Follis v. Albe-marle Tp.*, [1941] 1 D.L.R. 178 (Ont. C.A.).

30. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.).

In response to these developments, many critics have rigorously maintained the need for a greater degree of certainty to be attached to the fiduciary concept.<sup>31</sup> In some circumstances, however, this desire for increased certainty has led to suggestions that are entirely antithetical to the fiduciary concept's purpose. For instance, as a result of his concern over the law's inability "to pin down fiduciary obligations with the precision demanded by the rule of law,"<sup>32</sup> Peter Birks has suggested that it may be necessary to devise new terminology to facilitate the achievement of fiduciary certainty:

... at this point, where neither the event nor its consequences appear to be capable of being stabilised, we ought to recognise that the language of fiduciary relationships and obligations is wholly unsatisfactory. It will be essential in the end to find other words to denote with precision the different things which in different contexts the overworked fiduciary language has been trying to denote.<sup>33</sup>

Creating new jargon that must, itself, be defined to provide a greater understanding of the fiduciary concept is neither a logical nor appropriate response. Birks' suggestion would merely add an additional layer to a confused area of law that needs some existing and inappropriate placed layers peeled away.

As flawed as Birks' approach might be, it is representative of the degree of discontent over jurisprudential extrapolations of the fiduciary concept beyond its doctrinal limits. His suggestion nicely illustrates, however, that the search for certainty may not always be beneficial, but may, in fact, frustrate the purpose or intent of particular legal doctrines through the imposition of overly harsh or unsuitably rigid rules. This frustration is most acute with regard to equitable constructs like the fiduciary concept, which arose specifically in response to the overly rigid application of the common law.

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31. This has occurred, for example, by attempting to analogize the fiduciary concept with contract law or tort: see, for example, A.W. SCOTT, "The Fiduciary Principle" (1949) 37 *Cal. L. Rev.* 539; F.H. EASTERBROOK and D.R. FISCHER, "Contract and Fiduciary Duty," (1993) 36 *J. Law & Econ.* 425; McCAMUS, *supra*, note 3.

32. BIRKS, "The Content of Fiduciary Obligation," *supra*, note 2, at 5.

33. P. BIRKS, "Equity in the Modern Law," *supra*, note 2, at 18. Note also D.W.M. WATERS, *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984) at 405, n. 24: "[i]t is undeniable that the concept of fiduciary relationship has been stretched in [certain] circumstances ...to a degree where it has become meaningless ..."



As indicated above, the use of equitable principles designed to supplement and mitigate the harshness and rigour of law is a practice of widespread application. Equitable doctrines like the fiduciary concept were designed specifically to supplement the common law where it was deficient or where its lack of flexibility resulted in the denial of appropriate legal responses. As a result, it should not be surprising that equitable doctrines do not ascribe to the more rigid and rule-oriented scheme of the common law nor are they appropriately conceptualized in quite the same way as their common law counterparts.

Achieving greater certainty for the fiduciary concept need not result in the creation of rigid or absolute rules to govern its use. Such a result would nullify the fundamental purpose and function of Equity as a means of supplementing the common law and filling in its gaps. Instead, deficiencies in existing fiduciary jurisprudence ought to be used as a basis to call for more detailed explorations of the fiduciary concept's historical and doctrinal foundations, with the goal of achieving a greater understanding of why it was created and how it ought to function.

#### IV. PROBLEMS WITH THE PURSUIT OF LEGAL CERTAINTY

While there is a need to clarify the principles underlying the fiduciary concept in order to create a more coherent jurisprudence than what presently exists, there is always the danger that the quest for greater certainty can take on a life of its own and create more problems than it resolves.<sup>34</sup> Birks' approach, described above, falls into this category. The desire to achieve certainty, when taken out of context, can easily degenerate into a rule-making enterprise that emphasizes procedure over purpose. Too great a focus on rules can easily overshadow the spirit and intent of the legal concept that those rules were supposed to assist. This idea is reflected in a concept from the Old Testament called *לפנים משרת הדן* ("*lifnim mishurat hadin*"), which means "going beyond the line of the law."<sup>35</sup>

34. The result may be seen to parallel Captain Ahab's obsession with pursuing the whale that dismembered him in Herman Melville's novel *Moby Dick*, where Ahab's fixation on killing the whale ultimately fails and destroys both him and his ship.

35. Sometimes *lifnim mishurat hadin* is described as meaning "inside" or "within" the scope of the law, to designate that the observance of the law requires more than the minimum required by strict law, but to encompass its spirit and intent as (à suivre...)



Much like what is described above by Aristotle, the Old Testament illustrates the existence of two distinct methods of law: one is the strict halachic, or levitical law<sup>36</sup> and the second is the doctrine of *lifnim mishurat hadin*. As with later notions of common law and Equity, these two concepts form a symbiotic relationship. Accordingly, Jews who observe the halachic law are obliged to do more than to follow the mere or ritualistic observance required by the halacha. They are, instead, required to follow it in spirit as well as to the letter. This is revealed in the direction in *Deuteronomy* 6:18: "Do what is right and good in the sight of the Lord, that it may go well with you ..."<sup>37</sup> Out of what appears to be a redundancy springs the essence of *lifnim mishurat hadin*: it is insufficient for one to simply *do right*; one is also obliged to *do good*. These are advanced as different entities for a specific purpose. In one commentary, it is said:

It is not enough to do *that which is right*; i.e. to act according to the strict letter of the law; as such action often involves hardship and harshness, and the truly pious avoid taking advantage of the letter of strict legality. There is a higher justice, which is equity, and this bids man to be true to something more than the mere letter of his bond.<sup>38</sup>

An often-cited example of going beyond the line of the law is the story of Rabba, the son of Bar Chana, who had hired porters to transport some jugs of wine on his behalf. The porters performed their duties negligently and broke the jugs. As compensation for his loss, Rabba seized the porters' clothing. The porters appealed their case to Rab, the illustrious Babylonian teacher, who ordered Rabba to return the garments to the porters. The porters then pleaded to Rab that they were poor and had laboured an entire day without

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(...suite)

well. I prefer to use the phrase "going beyond the line of the law," insofar as it more accurately demonstrates the distinction between mere observance and a more holistic and encompassing form that incorporates the spirit and intent of the positive law and gives rise to greater obligation than a plain reading of the positive law might otherwise suggest.

36. These are derived from the Book of Leviticus, the 3rd book of Moses, which establishes positive laws and customs.

37. *The Torah: The Five Books of Moses*, 2nd ed., (Philadelphia: Jewish Publication Society of America, 1974) at 337 ["Torah"].

38. *The Pentateuch and Haftorahs*, Rabbi Dr. J.H. HERTZ, ed., (London: Soncino Press, 1956) at 772. See also S. SHILO, "On One Aspect of Law and Morals in Jewish Law: *Lifnim Mishurat Hadin*," (1978) 13 *Isr. L. Rev.* 359 at 361: "[i]n its human, legal context, the phrase *lifnim mishurat hadin* undoubtedly refers to action above and beyond what one is expected to do according to strict legal rights and duties."

payment. Rab decreed that Rabba was obliged to pay the porters their wages, notwithstanding their negligence and destruction of Rabba's property.

Rabba protested Rab's judgment, arguing that his actions in seizing the porters' garments and not paying them for their labour were in accordance with the existing law. Rab agreed that Rabba's actions were lawful, but referred Rabba to the Scripture, which said "Thou shalt observe the path of the upright," or, in other words, those who act beyond the mere letter of the law.<sup>39</sup> Thus, while Rabba was within his right to deny payment to the porters and to retain their clothing under the positive law, the requirement that he act *lifnim mishurat hadin* entailed that he should not only act lawfully, but compassionately in order to facilitate a higher level of justice.<sup>40</sup> These considerations are what formed the basis of Rab's pronouncement, which was based not on what Rabba *could* lawfully do, but what he *should* do as a righteous man acting in accordance with the dictates of *lifnim mishurat hadin*.

The idea that *lifnim mishurat hadin* entails an observance of both the strict application of law as well as its more nebulous spirit and intent may be most prominently observed through the views of the noted Spanish Torah commentator Nachmanides on the commandment contained in *Leviticus* 19:2: "You shall be holy, for I, the Lord your God, am holy."<sup>41</sup> The Torah, which provides the precepts of Jewish doctrine and law,<sup>42</sup> contains 613 commandments, or "mitzvot." All of these commandments are directed to the objective of being holy. Why, it may legitimately be asked, if there are 612 specific commandments to be holy, is it necessary to include a 613th commandment to be holy? What greater purpose can such a generalized statement accomplish in the face of 612 specific commandments pointed towards the same end?

39. This story may be found in a variety of sources. This version is from HERTZ, *supra*, note 38, at 773.

40. A similar sentiment may be found in Aristotle, *Nichomachean Ethics*, *supra*, note 10, Bk. V, c. X, at 134, where the philosopher says that the equitable man, "though he has the law on his side is equitable." Thus, as with acting *lifnim mishurat hadin*, doing equity means going beyond the strict requirements of law, although not beyond the bounds of its spirit.

41. *Torah*, *supra*, note 37, at 216.

42. While the Hebrew word "Torah," generally denotes the precepts of Jewish religious doctrine and law, it does not actually mean "law," but "teaching."

Nachmanides asserts that this generalised directive to “be holy” is not redundant in the face of the 612 more specific commandments directed at being holy. He states that although the Torah both prescribes and forbids many things, it is not sufficient to merely do what is prescribed and avoid what is forbidden to be holy. Following the 612 specific commandments still enables one to act in an unholy manner with regard to issues not covered by those commandments. Consequently, the 613th generalized commandment to “be holy” is properly understood as an overarching edict intended to guard against observance of the letter of the law while disregarding its intent.<sup>43</sup> It, thus, both supports and reinforces the other 612 commandments.

Another illustration of the problems associated with too great an emphasis on achieving legal certainty may be reflected by relating a conversation I had at a law conference in the summer of 2007.<sup>44</sup> At that conference, I had the pleasure of listening to a presentation by Professor Andrew Kull, the Reporter for the American Law Institute’s (ALI) Third Restatement of Restitution and Unjust Enrichment, regarding the status of his work on the project [hereinafter “Restatement (Third)”. It is first useful to explain the purpose of the ALI, which is, itself, dedicated to the advancement of legal certainty. The ALI’s purpose is indicated on its website, which states:

The American Law Institute was organized in 1923 following a study conducted by a group of prominent American judges, lawyers, and teachers known as “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” The Committee had reported that the two chief defects in American law, its uncer-

43. D. PRAGER and J. TELUSHKIN, *Eight Questions People Ask About Judaism*, (Sun Valley, CA: Tze Ulmad Press, 1979) at 56. Note also Jeremiah 7:28, as referenced in Hertz, *supra*, note 38 at 440, where the prophet condemns the mechanical observance of laws as betraying a lack of concern for their underlying ethical principles. As Hertz explains in his commentary, *ibid.*: “So hardened have they become that faithfulness not only is dead in their hearts, but they do not even make pretence to it in their speech (Kimchi). Hypocrisy is the tribute of vice to virtue; they do not recognize the necessity of even lip-homage to truth.” Note also A. KIRSCHENBAUM, *Equity in Jewish Law, Vol. II – Beyond Equity: Halakhic Aspirationism in Jewish Civil Law*, (Hoboken, N.J.: Ktav Publishing, 1991) at 120: ‘[a]mong some Ashkenazim [Jews of central and eastern Europe and their descendants, as opposed to Sephardim, the Jews of Spain and Portugal and their descendants], *lifnim mishurat hadin* actually became one of the “official” 613 commandments given to Moses for all of Israel.’

44. The Southeastern Association of Law Schools (SEALS) 2007 conference held July 29 – August 4, 2007, Amelia Island, FL.

tainty and its complexity, had produced a "general dissatisfaction with the administration of justice."

According to the Committee, part of the uncertainty of the law, as it then existed, was due to the lack of agreement among members of the profession on the fundamental principles of the common law. Other causes of uncertainty were reported as "lack of precision in the use of legal terms," "conflicting and badly drawn statutory provisions," "the great volume of recorded decisions," and "the number and nature of novel legal questions." The law's complexity, on the other hand, was attributed in significant part to its "lack of systematic development" and to its numerous variations within the different jurisdictions of the United States.

The Committee's recommendation that a lawyers' organization be formed to improve the law and its administration led to the creation of The American Law Institute. The Institute's charter stated its purpose to be "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." Its incorporators included Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root; Judges Benjamin N. Cardozo and Learned Hand were among its early leaders.<sup>45</sup>

The initial purpose of the ALI's Restatement series, as the initial task of the ALI, was to "address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was."<sup>46</sup> The anticipated status of the ALI's Restatements was expressed by Justice Cardozo in a speech delivered at Yale Law School in 1923:

When, finally, it goes out under the name and with the sanction of the Institute, after all this testing and retesting, it will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. I have great faith in the power of such a restatement to unify our law.<sup>47</sup>

Professor Kull spoke about the purpose of the Restatement (Third) as the desire to codify, or restate, the diffuse area of Restitu-

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45. "About the American Law Institute": online: <<http://www.ali.org/ali/thisali.htm>> (last accessed 15 Mar. 2008).

46. *Ibid.*

47. See Benjamin N. CARDOZO, *The Growth of the Law*, (New Haven: Yale University Press, 1924) at 9.

tion and Unjust Enrichment based on the original groupings created by Warren Seavey and Austin Scott for the First Restatement of Restitution in 1937. Professors Seavey and Scott had themselves sought to promote certainty for the then-new area of Restitution, which combined principles that had been culled together from the previously disparate areas of quasi-contract, constructive trust, and equitable remedies. Kull sought to further this goal through the Restatement (Third).

What became striking as Professor Kull spoke about his work for the Restatement (Third) was that there was no mention of Equity in his discussion. Further, he indicated in his presentation that there would not be any discussion of it in the Restatement (Third). When I spoke with Professor Kull following his presentation, I indicated my concern about what I viewed as a serious omission from a project designed to clarify and provide greater certainty to the area of Restitution and Unjust Enrichment. Professor Kull sympathized with my concern and, in what I later learned to be a characteristic diplomatic manner,<sup>48</sup> explained that the avoidance of any reference to Equity in the Restatement (Third) was purposeful, since most law schools in the United States no longer taught courses on Equity nor engaged the subject substantively in their regular course offerings. As a result, he suggested that more recent generations of lawyers and law students who had not been meaningfully exposed to Equity were rather confused by it, at least compared with the knowledge of Equity possessed by previous generations of lawyers. Thus, he concluded that it was best to leave Equity out of the Restatement (Third) entirely, lest it muddy the attempt to clarify the field of Restitution and Unjust Enrichment.

While I must acknowledge sympathy for the logic behind this argument, as unfortunately true as the basis for it might be, there are more than a few problems associated with the decision to omit Equity from the Restatement (Third). While Restitution is, as noted earlier, a part of the common law of civil obligation, it is heavily influenced by Equity. In particular, Restitution's focus on conscience as a guiding principle of unjust enrichment speaks purely in equitable terms. Indeed, the history of unjust enrichment may be traced to the

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48. I later had the distinct pleasure of participating in a roundtable on Restitution with Professor Kull, who served effectively as moderator, at the Washington and Lee University School of Law in December, 2007, where he demonstrated his diplomacy even with regard to overt criticism of his approach to the Restatement (Third).

ancient Roman maxim, attributed to Pomponius, which states “For this by nature is equitable, that no one be made richer through another’s loss.”<sup>49</sup> However, there is a far more fundamental problem related to the absence of Equity from the Restatement (Third) which ties in with the focus of the discussion herein relating to legal certainty.

It is true that the ALI’s primary purpose is to enhance certainty in particular areas of law. This is a noble and worthwhile endeavour. However, when the desire to enhance certainty can only be achieved by omitting discussion of an important aspect of the area being restated – in the present example, the Restatement (Third) on Restitution and Unjust Enrichment omitting any discussion of Equity or equitable principles – what type of certainty is being achieved and what is its value?

As a result of their distinct function from that of the common law, equitable doctrines such as the fiduciary concept are not to be conceptualized in quite the same way as common law doctrines are. In a manner consistent with how Aristotle had characterized the role of Equity, equitable doctrines are designed to *supplement* the common law where it is deficient. Thus, they do not *supplant* common law rules, but work alongside them.<sup>50</sup> Equity takes a more individu-

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49. As cited in J.P. DAWSON, *Unjust Enrichment*, (Boston: Little, Brown, 1951) at 3. This maxim has also been translated as “It is by nature fair that nobody should enrich himself at the expense of another”: Dig. 12.6. 14 (Pomponius, Sabinus 21) (A. Watson, ed., P. Birks trans., 1998), as cited in H. DAGAN, *The Law and Ethics of Restitution*, (Cambridge: Cambridge University Press, 2004) at 17. See also D.J. IBBETSON, “Unjust Enrichment in English Law,” in E.J.H. SCHRAGE, ed., *Unjust Enrichment and the Law of Contract*, (The Hague: Kluwer, 2001) at 35. Most commentators, however, found the modern common law origins of unjust enrichment in Lord Mansfield’s judgment in the eighteenth century case of *Moses v. Macferlan* (1760), 2 Burr. 1005 at 1012, 97 E.R. 676 (K.B.), which also evidences significant reliance on equitable principles:

If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff’s case, as it were upon a contract (“*quasi ex contractu*” as the Roman law expresses it) ... This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund ... In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

50. See *Re Vandervell’s Trusts (No. 2)*, [1974] 1 Ch. 269 at 322 (C.A.). See also SMITH, *supra*, note 20 at 312: “Equitable rights were not to supplant common law rights, (à suivre...)”

alized approach to particular cases than the common law, meting out justice that is appropriate to the specific needs of individual circumstances that the common law, bound up in taxonomy, cannot adequately respond to.<sup>51</sup> Philosopher Stephen Toulmin describes this distinction in Equity's approach as follows:

... [E]quity requires not the imposition of uniformity or equality on all relevant cases, but rather reasonableness or responsiveness in the application of general rules to individual cases. Equity means doing justice with discretion; around, in the interstices of, and in the areas of conflict between our laws, rules, principles and other general formulae. It means being responsive to the limits of all such formulae, to the special circumstances in which one can properly make exceptions, and to the trade-offs required where different formulae conflict.<sup>52</sup>

This understanding of the relationship between law and Equity led Lambarde to state of the jurisdiction of the Lord Chancellor that "in his *Court of Equitie* he doth (when the Case requireth) so *cancel* and *shut up* the *rigour* of the generall *Law* ..." <sup>53</sup> This idea, as well as

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and, in most cases, equitable rights were predicated upon the very existence of common law rights."; *ibid.* at 313: "Equity, as understood in English law, was not a self-sufficient system; at every point, it presupposed the existence of the common law." Cf. D.E.C. YALE, "Introduction," in YALE, ed., *Lord Nottingham's Chancery Cases*, Vol. I, (London: Selden Society, 1957) at xxxvii, where he states that the use of conscience in early English Equity:

... is not thought of as complementary with the common law but is rather set over in opposition to it. Fitzherbert, in his Abridgment gives a case where the legal analogy is being pressed in the Court of Chancery. To this argument Fortescue, C.J., responds abruptly: "nous sumus a arguer la consciens icy et nemy la ley ..."

51. See TUDSBERRY, *supra*, note 17, at 157:

It is not possible that the letter of the law can be so expressed as to provide for the infinite variety of circumstances which may qualify particular cases. The influence of equity must therefore have a twofold application in the administration of statute law; in the first place it should influence the general terms of the law in the light of reason and justice; and secondly, it should assist in the interpretation of the law in accordance with the particular demands of individual circumstances. *Supra*, note 17, 51.

52. S. TOULMIN, "Equity and Principles," (1982), 20 *Osgoode Hall L.J.* 1 at 8-9. See also 16 *Halsbury's Laws of England*, 4th ed. (reissue), (London: Butterworths, 1995) at para. 654, which states that Equity "implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of persons living in a civilised society."

53. LAMBARDE, *supra*, note 15, at 31-2. See also the translated quote of Lord Bacon, elaborated upon in E.H.T. SNELL, *The Principles of Equity*, 11th ed. by A. BROWN, (London: Stevens & Haynes, 1894) at 3: " 'In the like manner, let the  
(à suivre...)



the function of Equity to provide contextually specific and appropriate relief, is reflected in *Dudley v. Dudley*, where it is said:

[n]ow 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 [*sic*], 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.<sup>54</sup>

## V. ESTABLISHING PARAMETERS FOR THE FIDUCIARY CONCEPT

While there are a variety of theories about the purpose and function of the fiduciary concept,<sup>55</sup> one of the few points of agree-

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courts of the Lord Chancellor have the power both of relieving against the rigour, and of *supplying* the defects, of the common law' the Chancery being ordained to *supply*, not to *subvert*, the law"; see also SNELL, *ibid.* at 21: "The common law ... represented our first great effort to state the principles of social obligation in terms of enforceable rules. ... Afterwards equity developed to fill in the outline, and to supply the omissions"; F.W. MAITLAND, *Equity: A Course of Lectures*, rev. ed. by J. Brunyate, (Cambridge: Cambridge University Press, 1936) at 153: "... 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"; G.W. KEETON, *An Introduction to Equity*, 6th ed., (London: Pitman, 1965) at 22: "The builders of the common law *created*; the builders of equity *supplemented*"; W.H. BRYSON, "Introduction," in Bryson, ed., *Cases Concerning Equity and the Courts of Equity 1550-1660*, (London: Selden Society, 2001) Vol. I at xli: "Equity does not compete with the common law but tunes it more finely."

54. (1705), 24 E.R. 118 at 119 (Ch.). Note also *Cowper v. Earl Cowper* (1734), 2 P. Wms. 720 at 753; T.F.T. PLUCKNETT and J.L. BARTON, eds., *St. German's Doctor and Student*, Publications of the Selden Society, vol. 91, (London: Selden Society, 1974), First Dialogue at 95: "Equytye is a [ryghtwysenes] that consideryth all the pertyculer cyrcumstaunces of the dede the whiche also is temperyd with the swetnes of mercye."

55. See, for example, T. FRANKEL, "Fiduciary Law," (1983) *Calif. L. Rev.* 795; P.D. FINN, "The Fiduciary Principle," in T.G. YODAN, ed., *Equity, Fiduciaries and Trusts*, (Toronto: De Boo, 1989); De MOTT, "Beyond Metaphor," *supra*, note 26; Hon. J.R.M. GAUTREAU, "Demystifying the Fiduciary Mystique," (1989) 68 *Can. Bar Rev.* 1; R. COOTER and B.J. FREEDMAN, "The Fiduciary Relationship: Its Economic Character and Legal Consequences," (1991) 66 *N.Y.U. L. Rev.* 1045; E.A. SCALLEN, "Promises Broken vs. Promises Betrayed: Metaphor, Analogy, (à suivre...)"



ment among commentators is that no universally accepted theory exists.<sup>56</sup>

Historically, judges were relatively unconcerned with developing a sound working theory of the fiduciary concept. They were quite content to issue judgments without providing substantive guidelines for the fiduciary concept's use or for identifying when and to what forms of interactions it ought to apply. The jurisprudential reality was that judges either found fiduciary duties to exist, or not, according to the facts of individual cases and rarely offered any insight into how they arrived at their conclusions.<sup>57</sup> This historical judicial reticence to establish parameters for the fiduciary concept's use is largely responsible for the uncertainty that continues to surround it.

The fiduciary concept was never intended to apply to the garden variety of scenarios. Other heads of civil obligation – contract, tort, and unjust enrichment – serve this purpose. Rather, the fiduciary concept, as a supplement to these traditional bases of civil obligation, properly applies only where the interaction in question is one of sufficient social and/or economic importance or necessity resulting in an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary. The fiduciary concept is a tool that facilitates the construction and preservation of social and economic interdependency. It is, therefore, unlike traditional bases of civil obligation. Its function is to maintain the integrity of the interactions that fall within its mandate rather than imposing liability upon individuals or awarding relief to aggrieved persons. Central to this conceptualization of the fiduciary concept is the protection of trust and how the reposing of and caring for that trust affects human interaction.

The fiduciary concept maintains the viability of interdependent society by preserving the integrity of its key interactions that facili-

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and the New Fiduciary Principle," (1993) *U. Ill. L. Rev.* 897; G.S. ALEXANDER, "A Cognitive Theory of Fiduciary Relationships," (2000) 85 *Cornell L. Rev.* 767; D.G. SMITH, "The Critical Resource Theory of Fiduciary Duty," (2002) 55 *Vand. L. Rev.* 1399.

56. See, for example, FINN, "The Fiduciary Principle," *supra*, note 55, at 26.

57. See L.S. SEALY, "Fiduciary Relationships," (1962) *Cambridge L.J.* 69 at 73-4.

tate specialization and lead to fiscal and informational wealth.<sup>58</sup> Relations that are appropriately subject to fiduciary scrutiny are readily identified by their important social or economic character and the high trust and confidence that exists within them. They are also conspicuous by the power held by one party over the interests of another that results in the latter's implicit dependency upon and peculiar vulnerability to the former within the fiduciary element(s) of their interaction.<sup>59</sup>

Social and economic efficiency and growth are predicated upon the maintenance of a vast web of interdependent relationships that allow for the specializations of knowledge and tasks. By relying upon others to perform certain functions, we may devote more time and energy to gain special knowledge and skills that would otherwise be impossible to acquire. However, the interdependency that allows for such specialization is, itself, dependent upon the trust of its participants. An interdependent society transforms its participants from generalists to specialists by fostering their trust in and reliance upon others with different knowledge and skill sets. This specialization increases overall knowledge and productivity, which enhance fiscal and informational wealth. Yet, the existence of such an inter-

58. See also on this point FINN, "The Fiduciary Principle," *supra*, note 55, at 26, who states that fiduciary law:

... has been used, and is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.

See also L.I. ROTMAN, "Fiduciary Doctrine: A Concept in Need of Understanding," (1996) 34 *Alta. L. Rev.* 821 at 826: "[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."

59. It is axiomatic that not every incident of a relationship with fiduciary components is, itself fiduciary: see, for example, the statements made in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183 regarding the fiduciary obligations of the federal Crown to Aboriginal peoples: It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.

See also *New Zealand Netherlands Society 'Oranje' Inc. v. Kuys*, [1973] 2 All E.R. 1222 at 1225-6 (J.C.P.C.): "[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."

woven and specialized society has its negative effects as well. For instances, it runs the risk of creating what Anderson calls “distorted incentives,” which arise when specialists recognize their ability to benefit themselves by taking advantage of others’ trust.<sup>60</sup>

Where this trust is abused, the interdependency premised upon it is jeopardized. Protecting the trust that gives rise to social and economic interdependency is not a task for which the common law is properly equipped. Common law principles generally have much more modest goals that focus on individual rights and their enforcement by establishing individuals’ permissible actions. This proscriptive focus is classically illustrated by Holmes’ “bad man” approach to law described in “The Path of the Law”:

[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>61</sup>

Approaching law from the perspective of the “bad man” allows individuals to evaluate the law’s constraints on particular courses of action. The “bad man” obeys the law only to avoid punishment. If that punishment is insufficiently severe vis-à-vis the potential advantages to be had by engaging in the offending behaviour, the “bad man” is content to pay damages in order to do what “he” wants.<sup>62</sup> This result still promotes case-specific justice under the common law, insofar as the wronged party is compensated for any loss suffered by the bad man’s actions.

Holmes’ “bad man” approach is antagonistic to the prescriptivism of Equity, which stresses modes of behaviour that are to be aspired to as a result of Equity’s focus on conscience and its empha-

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60. A.G. ANDERSON, “Conflicts of Interest: Efficiency, Fairness and Corporate Structure,” (1977-78) 25 *U.C.L.A. L. Rev.* 738 at 794.

61. O.W. HOLMES Jr., “The Path of the Law,” (1897) 10 *Harv. L. Rev.* 457, as reproduced in HOLMES, *Collected Legal Papers*, (New York: Peter Smith, 1952) 167 at 171.

62. In this sense, the “bad man” approach is consistent with the notion of efficient breach from contract law – which entitles a person to breach a contract and pay damages simply in order to free up capital that can be put to better use elsewhere – insofar as the moral/ethical element of breaching a contractual obligation is ignored in favour of abstract notions of efficiency to justify behaviour that is considered morally and ethically wrong.

sis on substance rather than form. Equity's approach is more ideologically suited to the task of maintaining the trust needed for the type of interdependency described above than the common law's narrower focus on individual justice. As indicated by Meagher and Maroya, "when one has regard to the particular interests that fiduciary duties traditionally have protected – control over the property, the interests, the confidences, even, perhaps, the person, of another – one realises that these are different interests to those secured by the law of tort or contract."<sup>63</sup>

As the most doctrinally-pure expression of English Equity, the fiduciary concept preserves the existence of the reciprocal trust described above by prescribing acceptable standards of conduct for those parties who hold power over others in fiduciary interactions. The fiduciary concept's equitable foundation allows it to focus on the "spirit and intent" of relations, much like the doctrine of *lifnim mishurat hadin* discussed above.<sup>64</sup> The policy underlying the fiduciary concept and the interests it protects are rather distinct from what exists under the common law; unlike common law goals, they are premised upon the preservation of interactions rather than the interests of the parties to those relations.<sup>65</sup>

63. Mr. Justice R.P. MEAGHER and A. MAROYA, "Crypto-Fiduciary Duties," (2003) 26 *U.N.S.W.L.J.* 348 at 353; see also A. Hudson, *Equity & Trusts*, 3rd ed., (London: Cavendish, 2003) at 401; S. WORTHINGTON, "Fiduciaries: When Is Self-Denial Obligatory?" (1999) 58 *Camb. L.J.* 500 at 504. This is not to suggest that the common law, at least from a functional standpoint, does not also seek to promote broad-based social and economic goals. Rather, the manner in which the common law promotes these goals – by focussing primarily upon doing justice between the parties to individual interactions in order to satisfy their reasonable or legitimate expectations – differs significantly from the fiduciary concept's broader emphasis on maintaining the integrity of the interactions themselves rather than the interests of the parties involved in them.

64. This is what enabled the Supreme Court of Canada in *McLeod and More v. Sweezey*, [1944] 2 D.L.R. 145 (S.C.C.) to find a fiduciary obligation to exist where Sweezey, an experienced prospector, who had been engaged as a partner by three amateur prospectors to stake out certain "asbestos mineral claims," truthfully reported the absence of asbestos, but failed to disclose that he had found chromium deposits which he later exploited for personal profit. Sweezey was required to disgorge part of his profit made in breach of the spirit and intent of the parties' agreement, owing to the fiduciary nature of their interaction, rather than being allowed to rely upon the strict letter of his duty to escape liability for his actions.

65. The interests of the parties to fiduciary interactions are affected only as an incident of the fiduciary concept's larger focus. See the discussion in ROTMAN, *Fiduciary Law*, *supra*, note 3, ch. 5.

Further, unlike the common law and its conceptualization by Holmes, the fiduciary concept presupposes the goodness of conscience and seeks to maintain or restore that goodness. Where individuals stray from their otherwise intrinsically good nature, Equity intervenes to purge their consciences of the effects of their bad behaviour.<sup>66</sup> The fiduciary concept, therefore, looks to law as a good person does, with a concomitant emphasis upon the larger social or economic benefits that may be enjoyed by society as a whole by following certain prescriptions designed to foster and enhance interdependency.<sup>67</sup>

The distinction between the prescriptive function of the fiduciary concept and the proscriptive emphasis of the common law is readily observable in Cardozo C.J.'s judgment in *Meinhard v. Salmon*:

[m]any 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 honour 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" or particular exceptions. ... Only thus has the level of conduct 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.<sup>68</sup>

Similar ideals are expressed by La Forest J. in his majority judgment 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

66. As a court of conscience, the primary object of the Court of Chancery was to "purge the corrupt conscience of the defendant" not to redress the wrong done to the plaintiff: W. ASHBURNER, *Principles of Equity*, (London: Butterworth & Co. 1902) at 38. See also YALE, *supra*, note 50, at cvi-cvii: "Equity is concerned not to enforce or even primarily assist legal rights but is rather concerned to prevent their abuse." In spite of its different focus than the common law, Chancery's cleansing of a wrongdoer's conscience did generally carry the ancillary effect of redressing wrongs perpetrated against the complainants.

67. See D. HAYTON, "Fiduciaries in Context: An Overview," in P. BIRKS, ed., *Privacy and Loyalty*, (Oxford: Clarendon, 1997) at 306: "Equity, with its 'good man' philosophy, prevents a defendant subjected to the fiduciary duty of loyalty from denying that he was a good man and did what he did in the interests of his beneficiaries."

68. 164 N.E. 545 at 546 (N.Y.C.A. 1928).

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.<sup>69</sup>

This discussion indicates that the distinction between the common law and Equity is, to paraphrase Keeton, not just one of history, but one of attitude.<sup>70</sup> As he explains:

[t]he 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, so far as that was possible and compellable.<sup>71</sup>

This idea is also illustrated by Loughlan to support the continued separation of common law and equitable jurisdictions:

[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.<sup>72</sup>

Unlike the common law's emphasis on promoting case-specific justice, the fiduciary concept subordinates individual interests to the broader social and economic goals of facilitating interdependency by protecting important forms of interaction. The fiduciary concept looks beyond the limitations and immediacy of self-interest to enable individuals to trust that their interests will be cared for by others in fiduciary interactions. The fiduciary concept accomplishes this by regulating the source of power in fiduciary interactions.

69. (1994), 117 D.L.R. (4th) 161 at 186 (S.C.C.).

70. G.W. KEETON, *An Introduction to Equity*, 6th ed., (London: Pitman, 1965) at 43-4.

71. See *ibid.* at 22.

72. P. LOUGHLAN, "The Historical Role of the Equitable Jurisdiction," in P. PARKINSON, ed., *The Principles of Equity*, (Sydney: Law Book Co., 1996) at 23-4, citing, with approval, McLachlin J.'s minority judgment in *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.).

While fiduciaries possess the power to positively or negatively affect their beneficiaries' interests, they are impressed with the responsibility to use that power solely in the latter's interests. Beneficiaries, meanwhile, possess neither power over nor responsibility for their fiduciaries' interests. This proposition holds true even in situations of reciprocal fiduciary duties, such as partnerships and some joint ventures, where the parties are both fiduciaries and beneficiaries. Where reciprocal fiduciary duties exist, the parties each occupy two distinct roles within their partnership or joint venture. While these roles exist simultaneously, power and responsibility attach only to the fiduciary office; meanwhile, the benefits stemming from that power and responsibility flow solely to the beneficiary. Thus, although partner *A* will hold power over the interests of partner *B* and have corresponding duties to facilitate the latter's interests, partner *A* only holds this power while acting in a fiduciary capacity. Partner *B* receives benefits from partner *A*'s holding of fiduciary office, but *B*, as beneficiary, holds no fiduciary power over *A*. When these roles are reversed, the positions of power holder and benefit recipient also reverses, thereby entailing that partner *B* holds power over the interests of partner *A* and partner *A* receives benefits from partner *B*'s holding of fiduciary office.

The integrity of fiduciary relationships is maintained through the imposition of an onerous standard of conduct on the fiduciaries in those relationships. This standard regulates fiduciaries' use, misuse, or non-use of power over their beneficiaries' interests. Insofar as the power in fiduciary interactions resides exclusively with the fiduciaries in both unidirectional and reciprocal fiduciary associations, there is no need to look beyond the fiduciaries' conduct in order to ensure the integrity of fiduciary relations. Accordingly, beneficiaries need not monitor their fiduciaries' activities, since such a requirement would largely eliminate the benefit of entrusting others that is foundational to the fiduciary concept.<sup>73</sup> Whether the fiducia-

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73. See for example, *The Directors &c of the Shropshire Union Railways and Canal Company v. The Queen* (1875), L.R. 7 H.L. 496 at 507-8, per Lord Cairns L.C.: "... the arguments at your Lordships' Bar on behalf of the Respondent appeared to me to go almost to this, that ... the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."

See also *ibid.* at 515, per Lord O'HAGAN: "an individual *cestui que trust* ... is held warranted in reposing full confidence in the trustee to whom he commits a power (à suivre...)"



ries have fulfilled their obligations is an objective assessment that measures fiduciaries' actions against the standards imposed by the fiduciary concept.<sup>74</sup>

(...suite)

which may be used to his own great detriment"; *In re Vernon, Ewens & Co.*, (1886), 33 Ch.D. 402 at 410 (C.A.): "the *cestui que trust* is entitled to trust in and place reliance upon his trustee, and is not bound to inquire whether he has committed a fraud against him unless there is something to raise his suspicion"; *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 8 E.T.R. 219 at 227-8 (S.C.C.); HAYTON, *supra*, note 67, at 284: "[a] beneficiary is entitled to expect his trustees to act loyally in his interests so as to be under no duty to check up on them"; FRANKEL, "Fiduciary Law," *supra*, note 55, at 824; J.D. DAVIES, "Equitable Compensation: Causation, Foreseeability and Remoteness," in D.W.M. WATERS, ed., *Equity, Fiduciaries and Trusts 1993*, (Toronto: Carswell, 1993) at 317 ["Equitable Compensation"]: "[a] party to whom fiduciary obligations are owed will not ordinarily be expected to check on what the fiduciary is doing. It is his privilege to be able to rely"; M.V. ELLIS, *Fiduciary Duties in Canada* (Toronto: Carswell, 2002) looseleaf, at 2.4(4) (2-22 to 2-23); *Nationwide v. Balmer Radmore (a firm) and ors.*, [1999] Lloyd's Rep. PN 241 at 281-2 (Ch.):

... where, in order to establish a breach of fiduciary duty, it is necessary to find that the fiduciary was consciously disloyal to the person to whom his duty was owed, the fiduciary is disabled from asserting that the other contributed, by his own want of care for his own interests, to the loss which he suffered flowing from the breach. To do otherwise, as Gummow J. pointed out in his article in "Equity, Fiduciaries and Trusts," risks subverting the fundamental principle of undivided and unremitting loyalty which is at the core of the fiduciary's obligations. An obvious exception to this statement exists in the context of determining the validity of a defence of laches or acquiescence, which necessarily requires an examination into the actions or motivations of the beneficiary of a fiduciary relationship.

Relieving beneficiaries of the need to inquire into their fiduciaries' activities also compensates for the power imbalance that exists within fiduciary associations that allows fiduciaries to conceal the existence of fraud or other improper activities from their beneficiaries.

74. Cf. the dictum of the Supreme Court of Canada in *Peoples Department Stores Ltd. v. Wise*, [2004] 3 S.C.R. 461 at par. 63, where it was erroneously said that "the subjective motivation of the director or officer ... is the central focus of the statutory fiduciary duty of s. 122(1)(a) of the CBCA." This statement incorrectly characterizes the law of fiduciary obligation, insofar as the fiduciary concept has no interest in the subjective motivations of fiduciaries, but, rather, whether they have departed from the standard of conduct required, which is objectively determined: see ROTMAN, *Fiduciary Law*, *supra*, note 3, at 502-610. This proposition is well established in the jurisprudence and in academic commentary, as indicated, for example, in *Keech v. Sandford*, (1726), Sel. Cas. T. King 61, 25 E.R. 223 (Ch.); *Furs Ltd. v. Tomkies* (1936), 54 C.L.R. 583 at 592 (H.C. Aust.); *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 at 381, 386 (H.L.); *Boardman v. Phipps*, *supra*, note 23; E.R. SUNDERLAND, "An Inroad Upon Fiduciary Integrity," (1905-6) 4 *Mich. L. Rev.* 349 at 349; R.A. CLAPP, "A Fiduciary's Duty of Loyalty," (1939) 3 *Maryland L. Rev.* 221; DE MOTT, "Beyond Metaphor," *supra*, note 26, at 900; DE MOTT, "Fiduciary Obligation Under Intellectual Siege: (à suivre...)"



While any given fiduciary interaction will necessarily result in an inequality in power between the fiduciary and beneficiary within its confines, there does not need to be an inherent inequality in the parties' power relative to each other for a fiduciary relationship to arise between them. To put the matter another way, there is no requirement that power relations between the parties to fiduciary interaction be inherently unequal outside of the fiduciary elements of their interaction.<sup>75</sup> Thus, fiduciary relations may exist as easily between parties on an equal footing, such as partners or joint venturers,<sup>76</sup> as among parties in an inherently unequal relationship, such as parent and child or guardian and ward. Indeed, the idea that inequality between the parties is a characteristic endemic to fiduciary relationships rather than a determining factor for their existence is well recognized in judicial and academic commentary.<sup>77</sup>

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(...suite)

Contemporary Challenges to the Duty to be Loyal," (1992) 30 *Osgoode Hall L.J.* 471 at 488; S.B. ELLIOTT and C. MITCHELL, "Remedies for Dishonest Assistance," (2004) 67 *Mod. L. Rev.* 16 at 31; M.V. ELLIS, *Fiduciary Duties in Canada* (Toronto: Carswell, 2002) looseleaf, at 1.4(1)(b) (1-3).

75. E.J. WEINRIB, "The Fiduciary Obligation," (1975) 25 *U.T.L.J.* 1 at 6; Gautreau, *supra*, note 55, at 5; *LAC Minerals*, *supra*, note 6, at 39-40 (S.C.C.), per J. La Forest; *Hospital Products Ltd. v. United States Surgical Corp.*, (1984), 55 *A.L.R.* 417 at 433 (H.C. Aust.), per Gibbs C.J.
76. The fiduciary nature of relations between partners *inter se* is an inherent aspect of partnership law: see, for example, the Ontario *Partnerships Act*, R.S.O. 1990, c. P-5, ss. 28-30. Note also the decision in *News Ltd. & Ors. v. Australian Rugby Football League Ltd. & Ors.* (1996), 139 *A.L.R.* 193 at 312 (F.C. Aust.), where the court distinguishes between so-called "vertical" relationships (such as trustee-beneficiary or guardian-ward relations) and "horizontal" relationships (such as that existing between partners or joint venturers). Because of the nature of partnerships, the actions of one partner may bind the other even where the other is unaware of the former's actions. Therefore, if A signs an agreement on behalf of the partnership, as a general matter B incurs responsibility and liability under the agreement (subject, of course, to any limitations upon A's ability to bind the partnership contained in their partnership agreement and the awareness of this limitation on A's power by the party contracting with A. Otherwise, the party contracting with A may hold the partnership liable for the obligation if there was no knowledge of A's restricted power and the contract fit within the ordinary scope of the partnership business.). Thus, even if B is an equal partner to A in all respects of the partnership, B is nonetheless vulnerable to A's actions and vice versa. See the discussion of partnerships in B. WELLING, L. SMITH, and L.I. ROTMAN, eds., *Canadian Corporate Law: Cases, Notes & Materials*, 3rd ed., (Toronto: Butterworths/LexisNexis, 2006) ch. 1.
77. See *Norberg v. Wynrib* (1992), 92 *D.L.R.* (4th) 449 at 491 (S.C.C.), per J. McLachlin, dissenting: "[i]t is only where there is a material discrepancy, in the circumstances of the relationship in question, between the power of one person (à suivre...)

The fiduciary concept protects the interactions that fall within its mandate by imposing strict duties upon fiduciaries, including, *inter alia*, duties of utmost good faith, full and complete disclosure, the avoidance of conflicts, and the inability to profit.<sup>78</sup> Fiduciaries are compelled to single-mindedly serve those beneficiary interests that are materially related to their fiduciary interaction and are burdened with onerous duties relating to this compulsion. Fiduciaries must, therefore, eschew any correlative personal or third party interests, regardless of whether the fiduciaries' personal interests or the interests of third parties are complementary or antagonistic to the beneficiaries' interests,<sup>79</sup> within the context of their fiduciary associations absent the voluntary, independent, and informed consent of beneficiaries to the contrary.

It may be seen from the discussion above that while the fiduciary concept's broad purpose and the wide range of potential interactions that it may apply to renders it particularly resistant to precise definition, it is not difficult to ascertain the fiduciary concept's purpose or to pinpoint key characteristics of fiduciary interactions that provide appropriate guidelines for its use. As Mitchell has observed:

[i]t may be that fiduciary doctrine is not crystal clear, in the sense of a rule requiring traffic to stop at red lights. But the argument from certainty can be overblown. [...] For lawyers to argue that fiduciary duty

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(...suite)

and the vulnerability of the other that the fiduciary relationship is recognized by law." (emphasis added) GAUTREAU, *supra*, note 55, at 5, says that vulnerability: ... is not an element leading to a fiduciary relationship, but rather, it is a characteristic of the result of the relationship. In other words, the vulnerability is the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power.

See also WEINRIB, *supra*, note 75, at 6: "the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement."; FRANKEL, "Fiduciary Law," *supra*, note 55, at 810: "the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. ... Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation." T. FRANKEL, "Fiduciary Duties as Default Rules," (1995) 74 *Ore. L. Rev.* 1209 at 1216: "[e]ven entrustors who are in a strong bargaining position before they enter the relationship become vulnerable immediately after they entrust power or property to their fiduciaries."

78. These are discussed more fully in ROTMAN, *Fiduciary Law*, *supra*, note 3, at ch. 6.

79. As stated in *Rosenfeld v. Black*, 445 F.2d 1337 at 1342 (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."

creates significant uncertainty is specious. Anybody reading the cases soon develops a sense of what is and what is not allowed.<sup>80</sup>

While there are advantages to having the fiduciary concept's protean quality and non-circumscribed boundaries allow for its potential application to any interaction between parties, disadvantages also exist. The very flexibility that is of such benefit to the fiduciary concept's use can just as easily result in it being abused for inappropriate purposes.<sup>81</sup> There are limits to the appropriate use of the fiduciary concept. Fiduciary principles were never intended to be applied to the garden variety of scenarios; the laws of contract, tort, and unjust enrichment are perfectly capable of handling these. As Sir Robert Megarry once said, "[t]he traditional beauty of a land flowing with milk and honey is marred by the realisation that it would be very sticky. What of a land awash with fiduciary relationships?"<sup>82</sup>

## VI. CONCLUSION

Attempts to achieve absolute certainty in law are not always desirable, nor do they necessarily facilitate the achievement of justice. The blind pursuit of legal certainty overlooks the inevitable limitations of law as a human construct and, with it, the important and necessary benefits to be obtained from the creation of equitable principles that supplement and enhance law's functionality. This paper has attempted to articulate some of the benefits associated with the maintenance of flexibility and discretion in the application of law through its examination of the fiduciary concept and how it enhances rather than supplants traditional bases of civil obligation.

While there are some difficulties associated with more fluid legal doctrines such as the fiduciary concept, there are also significant benefits to be achieved from them. In particular, they facilitate the dispensing of situationally-appropriate justice in ways that the common law cannot, yet still provide sufficient parameters for their application to avoid the problems associated with what is often described as "palm-tree justice."<sup>83</sup>

80. L.E. MITCHELL, "The Naked Emperor: A Corporate Lawyers Looks at RUPA's Fiduciary Provisions," (1997) 54 *Wash. & Lee L. Rev.* 464 at 485-6.

81. Refer back to notes 27-30, *supra*.

82. The Rt. Hon. Sir R.E. MEGARRY, "Historical Development," in *Fiduciary Duties*, *supra*, note 5, at 11.

83. In *The Law of Trusts*, (London: Sweet & Maxwell, 1989) at 151, D.J. Hayton describes palm tree justice as "justice disposed by wise men, 'cadi,' sitting under palm trees acting according to their notions of justice and fairness." Objections (à suivre...)

The fiduciary concept arose in response to the need to protect certain forms of vital human interaction and has developed in response to this fundamental purpose. Yet, while the underlying purpose of the fiduciary concept is to protect important relationships of high trust and confidence, the manner in which it facilitates this function is not absolute, but requires the maintenance of a delicate balancing of disparate interests. This is not achieved through the exercise of unfettered discretion. Rather, application of the fiduciary concept is controlled by limits imposed by its general principles, which provide the parameters for the exercise of judicial discretion.<sup>84</sup>

Although the fiduciary concept is not as precisely articulated as other legal constructs, it remains rooted in the foundational principles distilled in seminal cases such as *Keech v. Sandford*<sup>85</sup> almost three centuries ago. So, while it may not be possible to provide as precise a definition of a fiduciary relationship as the relationship between contracting parties, there are enough signposts along the way to assist us in figuring out what we need to know. In this way, the fiduciary concept is no different than the rule of law, discussed above, which is no more susceptible to precise definition, but which nonetheless provides a sound conceptual framework for law's proper application.

While clarifying the law of fiduciaries is a useful task, this paper has sought to emphasize that the process of clarification ought not entail that the fiduciary concept be reigned in by the application of rigid formulaic equations or the arbitrary restriction of its scope of influence. The development of a principled understanding of the fiduciary concept must remain consistent with its historical and theoretical underpinnings. This emerging area of law may be better understood, and more effectively used, by lawyers, academics, and judges alike when its governing principles are uncovered and elucidated in this manner. Otherwise, the same question that was posed in relation to the Restatement (Third), above, regarding its omission of Equity in the attempt to promote greater certainty for its subject matter – namely, what type of certainty is being achieved and what is its value – may be asked of the fiduciary concept and of attempts to provide it with greater certainty without reference to or substantive discussion of its fundamental purpose.

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(...suite)

to the disposition of this form of justice stem from its lack of guidelines or articulation of governing principles, which provide the impression of arbitrariness.

84. Refer back to the point emphasized in note 1, *supra*.

85. *Supra*, note 74.