

Fiduciary Principles and Their Impact in Commercial Disputes

The Honourable Mr. Justice Michel BASTARACHE*

Last year, I read a comment on the decision of the Supreme Court of Canada in *Hodgkinson v. Simms*¹ in which the commentator suggested that all litigators should consider widening the scope of their actions in commercial disputes to include the possibility of obtaining equitable compensation. He noted that in many instances, this approach would now be successful because there is no prior need to establish a fiduciary relationship.²

These comments are reminiscent of the call of some legal scholars for the formal recognition of an independent doctrine of good faith in contract twelve years ago. I am reminded here of Edward P. Belobaba's "Good Faith in Canadian Contract Law"³ and Don Clark's "Some Recent Developments in the Canadian Law of Contracts".⁴

The great interest in avoiding contractual claims is easily understood. It permits a party to avoid limitation defences and to obtain larger awards by by-passing the restrictions of causality, foreseeability and remoteness. The expansion contemplated here could be very important. Consider negligence in negotiations, or conspiracy for instance, giving rise to equitable compensation.

Not everyone agrees that the expansion of the concept of fiduciary obligation is so far reaching that it will absorb part of tort law and part of contract law. Professor McCamus has argued that it is desirable to take a less expansive view of fiduciary obligation in the commercial context, noting the distorting effect that remedial concerns may have on the definition of the substantive right. He suggests that there is need for a solid policy foundation for the imposition of the fiduciary obligation, if something other than the traditional fiduciary doctrine is accepted. He points to the existing overlap of tort law and fiduciary law, noting that what is really new is the expansion of the remedies.

* Supreme Court of Canada, Ottawa, Ontario.

1. [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161.
2. L.D. Roebuck, "Prometheus Unbound : A Practitioner's Perspective" (1997) 28 Can. Bus. L. J. 155.
3. E.P. Belobaba, "Good Faith in Canadian Contract Law" in Special Lectures of the Law Society of Upper Canada, ed., *Commercial Law : Recent Developments and Emerging Trends* (Don Mills, Ontario : De Boo, 1985) 73.
4. D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993) 14 Advocates' Q. 435.

Does that really pose a problem? Professor McCamus favours reform, but doubts that creative application of fiduciary law is better than the creative adjustment of tort law or contract law. Professor Albert Osterhoff agrees and suggests that courts now tend to apply the fiduciary label too readily, both in the traditional and non-traditional cases.

The major difficulty, as noted previously, is in the determination of the proper remedy. Are compensatory damages appropriate in a non-trustee fiduciary case? Will draconian remedies bring about a shrinking of the notion of fiduciary relationship? Should there be different rules of causation and quantification of loss applied to equitable remedies in these cases? These are some of the questions we will be dealing with today.

Mr. McCauley, our second speaker, explains that the new *Civil Code of Quebec* has codified in part the law of fiduciary obligation, where unjust enrichment and restitution provisions have been adopted. He suggests that the concept of constructive trust as a device to effect *in rem* restitution can also be adopted in Quebec, under the law of "obligations".