

# Fiduciary Obligation and Commercial Law : Four Sources of Complexity

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Over the past decade and a half, there has been a remarkable flowering in the Canadian jurisprudence of fiduciary obligation. In a series of decisions during that period,<sup>1</sup> the Supreme Court of Canada addressed a number of fundamental issues concerning the law of fiduciaries. The resulting doctrine creates both challenges for those who seek to understand and, I suspect, apply it, and opportunities for those who wish, on behalf of plaintiffs at least, to rely upon it. The richness of the analysis offered in these decisions coupled with the fact that the Court divided in many of these decisions, has made it somewhat difficult for Court watchers to confidently assess the evolving state of fiduciary law. From an academic perspective, of course, this is only to say that the study of fiduciary law in recent years has been one of considerable fascination and one which has attracted many avid students. From the perspective of plaintiffs' counsel, of course, the subject is not merely one of fascination but one whose apparently growing expansiveness requires careful consideration of the possible application of fiduciary law in what may appear to be unfamiliar contexts. From the point of view of the commercial lawyer, however, the richness of this analytical harvest may well appear to be a rather mixed blessing. To the extent that the evolving doctrine of fiduciary obligation may have rendered more difficult the task of giving advice with respect to potential litigation in the commercial setting, commercial lawyers may feel that this development has introduced an additional element of uncertainty into an already sufficiently uncertain legal world.

In this paper, I map out what I consider to be the four principal sources of complexity in fiduciary doctrine which will be thought by many to give rise to concerns relating to the stability of doctrine in commercial settings. The unsystematic evidence provided by my own contact with members of the profession suggests that many lawyers believe that the threshold question — the definition of fiduciary obligation — is perhaps the principal source of complexity and/or uncertainty in fiduciary law. Although it is true, in my view, that some uncertainty has been introduced into the analysis of this question, it is also my view that the doctrine relating to the definition of fiduciary obligation is much more "reckonable" than is widely believed, especially if emphasis is placed on the analysis offered in the majority opinions of the Court in the recent leading cases. Much greater sources of potential instability are to be found, I would suggest, in the second and third topics examined here — the expansive view apparently being taken with respect to the kinds of duties to be imposed on fiduciaries, and the Court's expansive view of the nature of the remedies available in fiduciary duty cases. In these contexts, however, I suggest, as well, that it is possible to exaggerate the destabilizing effect of recent doctrinal development.

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1. The leading cases include *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.]; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to S.C.R.]; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 [hereinafter *Canson* cited to S.C.R.]; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 [hereinafter *McInerney* cited to S.C.R.]; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 499 [hereinafter *Norberg* cited to S.C.R.]; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 [hereinafter *M.(K.)* cited to S.C.R.], and, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 [hereinafter *Hodgkinson* cited to S.C.R.].

The fourth source of complexity arises from the most recent decision in this line of jurisprudence, the decision of the Court in *Soulos v. Korkontzilas*<sup>2</sup> rendered in 1997. In *Soulos*, the Court divided over the question of the relevance of the unjust enrichment principle to the imposing of liability for breach of fiduciary duty. The majority held the view that liability could be imposed whether or not the defendant had been "unjustly enriched" by the defendant's breach of duty. The dissenting members of the Court on this occasion, however, offered the view that fiduciary duty was now rooted exclusively in notions of unjust enrichment and that in the absence of enrichment — on the facts, the property illicitly acquired by the fiduciary had dropped in value after the acquisition — no liability could be imposed. Thus, as we shall see, *Soulos* raises in a somewhat intriguing way issues relating to the significance of the unjust enrichment principle in the context of fiduciary analysis.

Although I propose to deal with each of these sources of complexity in turn, I will touch upon the first three sources in a somewhat cursory and conclusory fashion as these are matters that I have attempted to analyse at greater length elsewhere.<sup>3</sup>

## I. THE DEFINITION OF THE FIDUCIARY RELATIONSHIP

The main features of the law concerning the recognition of the existence of a fiduciary relationship are well established and widely understood. The legal definition of, or test for, the existence of a fiduciary relationship has two branches. The first consists of a list of prescribed relationships — principal and agent, solicitor and client, executor or administrator and beneficiary, director or officer in the corporation, promoter and investor, partners, joint venturers, doctor and patient, guardian and ward, and parent and child — which are defined by the law as being fiduciary in nature.<sup>4</sup> This branch of the rule is obviously easy to apply. For present purposes, we may note that a number of these relationships are commercial in nature and that it would be a fundamental misconception to suggest that fiduciary duties have no role to play in commercial life. We may note in passing that the addition of doctor and patient to the list of prescribed relations is a peculiarly North American phenomenon.<sup>5</sup> It is a view that has been flatly rejected in England.<sup>6</sup>

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2. [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 [hereinafter *Soulos* cited to S.C.R.].

3. J.D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 Can. Bus. L.J. 107 [hereinafter McCamus].

4. See P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990) at 577.

5. *McInerney*, *supra* note 1; *Norberg*, *supra* note 1.

6. See *Sideway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, [1985] 1 A.C. 871 at 884, 1 All E.R. 643, Lord Scarman. See also, R.E. Megarry, "Historical Development" in Special Lectures of the Law Society of Upper Canada, *Fiduciary Duties*, (Toronto: R. de Boo, 1991) 1 at 6-7. See also *Breen v. Williams* (1995), 196 C.L.R. 71 (H.C.), (rejecting application of *McInerney*, *supra* note 1, in Australian law). For discussion of American developments, see T. Frankel, "Fiduciary Relationship in the United States Today" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts*, (Toronto: Carswell, 1993) 173.

The second branch of the definition is a source of greater controversy. One of the features of the recent Supreme Court jurisprudence is that it contains much discussion concerning the proper formulation and application of the second branch of the test. This branch identifies as fiduciary those relationships which, on their particular facts, are appropriately so categorized.

The traditional formulation of this second or "open textured" branch of the definition begins with a requirement that the fiduciary is someone who has undertaken to act in the interests of another person. As Professor A.W. Scott, the author of *Scott on Trusts*<sup>7</sup> stated :

*A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.*<sup>8</sup>

The existence of the undertaking will be assessed on the basis of an objective test. It will be no defence to the claim of breach of fiduciary duty that the alleged fiduciary did not understand himself to have such an obligation. The question, as formulated by LaForest J. in *Hodgkinson v. Simms*, is whether "one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter in issue."<sup>9</sup>

In addition to this threshold requirement, however, many judges and scholars have attempted to identify lists of indicia or criteria that may assist in isolating the fiduciary relationship from relationships we might characterize as being more "arms' length" in nature. In *Hodgkinson*, for example, LaForest J. identified discretion, influence, vulnerability, and trust "as non-exhaustive examples of evidential factors to be considered in making for this determination (of the existence of the fiduciary relationship)."<sup>10</sup> Professor Finn, as he then was, suggests that "ascendancy, influence, vulnerability, trust, confidence and dependence" are relevant factors.<sup>11</sup> Peter Maddaugh and I have suggested that the fact that the individual holds property of the other or holds a position which facilitates profit-taking are also important considerations.<sup>12</sup>

At the time of the Court's decision in *Lac Minerals* in 1989,<sup>13</sup> there appeared to be some possibility that the Supreme Court's formulation of this second branch of the definition was drifting away from its moorings in the idea that a fiduciary relationship is

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7. A.W. Scott & W.F. Fratcher, *The Law of Trusts*, 6 vols., 4th ed. (Boston : Little, Brown, 1987-93).

8. A.W. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539 at 540.

9. *Supra* note 1 at 409.

10. *Ibid.*

11. P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto : Carswell, 1989) at 46.

12. Maddaugh and McCamus, *supra* note 4 at 577-78.

13. *Supra* note 1.

one in which one party has a reasonable expectation that the other party is acting in his or her best interests. The source of this view is the apparent influence of a definition of fiduciary relationships formulated by Wilson J. in her dissenting opinion in *Frame v. Smith*.<sup>14</sup> Wilson J.'s formulation of the definition reads as follows :

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

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

- (1) The fiduciary has scope for the exercise of some discretion or power.*
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.*
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.*<sup>15</sup>

The claim in *Frame v. Smith* was one brought by a non-custodial parent seeking access to the child from the defendant custodial parent. The majority of the Court rejected the plaintiff's argument that the defendant's refusal to facilitate reasonable access constituted a breach of fiduciary obligation. In dissent, however, applying the test set out above, Wilson J. concluded that the relationship was fiduciary in nature and that the defendant's lack of cooperation constituted a breach of fiduciary duty. It may be that this conclusion was facilitated by the absence in Wilson J.'s definition of any reference to the need to find that one party reasonably believes that the other is acting in the first party's interests.

Although Wilson J.'s definition did not attract the majority of the Court on that occasion, this definition has proven to be influential on subsequent occasions. Thus, in *Lac Minerals*,<sup>16</sup> both Sopinka J., who wrote for the majority on the issue of fiduciary relationship and LaForest J., who dissented on this point, quoted approvingly Wilson J.'s definition.

It is important to note, however, that in the later decision in *Hodgkinson*, LaForest J. makes abundantly clear, on behalf of the Court, the view that the existence of an undertaking or a reasonable belief that the other person is acting in the first party's interest constitutes an important element in the second branch of the definition of fiduciary relationship. Indeed, LaForest J. indicated that although Wilson J.'s test from *Frame v. Smith* is useful when attempting to identify types of relationships that might be added to

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14. *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 [hereinafter cited to S.C.R.].

15. *Ibid.* at 136.

16. *Supra* note 1.

the prescribed list, i.e. branch one of the test, LaForest J. went on to say that Wilson's test "encounters difficulties" in identifying fiduciary relationships which "arise as a matter of fact out of the specific circumstances of that particular relationship".<sup>17</sup>

While the point thus seems settled in favour of the traditional view that the existence of an undertaking to act on behalf of the other is central to the finding of a fiduciary relationship under branch two of the test, the existence of and approval of Wilson J.'s test leaves open some risk, I would suggest, of confusion on this point. A recent British Columbia decision may be thought to serve as an illustration. In *Dopf v. Royal Bank of Canada*,<sup>18</sup> the plaintiff, a former employee of the defendant bank, sought damages for wrongful dismissal and coupled this with a claim for damages for breach of fiduciary duty. The alleged breaches consisted, *inter alia*, of the wrongful dismissal and of a failed attempt on the part of the bank to extract security from the plaintiff, Dopf, concerning the indebtedness to the bank of her husband. At trial, though the jury was of the view that the plaintiff had been dismissed for cause, it nonetheless concluded that general, aggravated and punitive damages should be awarded for breach of fiduciary obligation. This verdict was upheld by a majority of the Court of Appeal on the ground that the question formulated for the jury on this point by the trial judge was acceptable in the particular circumstances of this case. Nonetheless, the conclusion is a somewhat surprising one and may rest on an assumption that the sort of power imbalance or dependency identified by Wilson J.'s test is sufficient, in itself, to establish a fiduciary relationship. It is difficult to discern what other reason there might be for concluding, on the basis of traditional principle, that an employer who is also a creditor owes fiduciary obligations to the employee to neither dismiss the employee nor to seek security for the indebtedness. It may well be, of course, that any agreement extracted with respect to the latter point may be vulnerable to attack on grounds of duress, undue influence or unconscionability.

To the extent that there may exist some risk that the central importance of the existence of an undertaking to act on another's behalf may be obscured by *Frame v. Smith*, the solution lies, presumably, in placing greater emphasis on the more traditional formulation advanced by the majority of the Court in the *Hodgkinson* case. In short, if the absence of any reference to the notion of an undertaking in Wilson J.'s test has been a source of complexity, it need not continue to be so.

The other area of debate that has attracted attention concerns the relevance of other factors in applying the second branch of the test. In *Lac Minerals*, Sopinka J. emphasized the importance of "vulnerability" and appeared to link vulnerability to some kind of "physical and psychological dependency."<sup>19</sup> After *Hodgkinson*, however, it is now clear that the Court does not view this type of vulnerability as an indispensable requisite in establishing the existence of a fiduciary relationship. Indeed, the majority view in *Hodgkinson*, which is the traditional view, is that the traditional lists of relevant factors

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17. *Hodgkinson*, *supra* note 1 at 409.

18. 156 D.L.R. (4th) 56 (B.C.C.A.) [1998] B.J.C. No. 87 (QL).

19. *Supra* note 1 at 606.

are just that and do not contain one or more factors which are indispensable to the making of such a finding.

In summary, though the second branch of the fiduciary test is obviously an open-textured one, and to this extent, like other such tests, must remain somewhat uncertain in its application, the recent Supreme Court jurisprudence should not be considered, in my view, to have unattractively aggravated that difficulty.

## **II. THE FIDUCIARY DUTY OF LOYALTY**

The traditional law concerning the nature of the duties imposed on fiduciaries is normally expressed as being captured by two rules, the "conflict" rule (to the effect that a fiduciary must not place himself or herself in a position where self-interest may conflict with the duty owed to the other) and the "profit" rule (to the effect that a fiduciary must not profit personally from the position held). The fiduciary duty of loyalty, then, prohibits the fiduciary from engaging in self-dealing with the person to whom the duty is owed and, generally, from profiting from the fiduciary position. When the traditional fiduciary case law is gathered up, then, it can be organized under the familiar headings of the rule against taking a bribe or secret commission, the rule against the selling of the fiduciary's own property without disclosure of his or her interest to the principal, and other rules prescribing similar exercises in self-dealing. In other words, the fiduciary duty of loyalty is one which requires the fiduciary to abstain from exploiting the fiduciary relationship and personally profiting from it.

It is worth emphasizing that the traditional law of fiduciary obligation does not appear to impose a general duty of disclosure on fiduciaries. Rather, a duty to disclose is indirectly imposed by virtue of the nature of the duty to avoid secret profiteering. Disclosure to the principal of the proposed profit coupled with the principal's approval cleanses what would otherwise be a breach. In this sense, then, the traditional fiduciary duty of loyalty imposes a duty to either refrain from profit or conflict or to disclose such a situation in advance to the principal and seek approval.



Although the traditional law of fiduciary obligation was thus seen to be bounded by the profit and conflict rules, a Canadian observer, after 1973, would add, however, that in the decision of that year in *Canadian Aero Service Limited v. O'Malley*,<sup>20</sup> Laskin J., on behalf of the Supreme Court, expressed the view that neither the conflict rule nor the accountability for profits rule "should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting." In that case, senior executive officers of a company who attempted to develop an opportunity for the company then resigned from their positions and subsequently exploited the opportunity in question on their own behalf. The Court held them to have breached their fiduciary duty and imposed liability for the ill-gotten gains. The defendants had argued that there was no conflict as they had left the plaintiff's employ and had no profiting from the position since the profiting had occurred subsequently. It was in response to this line of argument that Laskin J. observed that liability could be imposed even if it were the case that the profit and conflict rules technically did not apply to this fact situation.

Although the Court in *Canaero* thus plainly indicated its view that fiduciary duties may extend beyond the profit and conflict rules, it may be noted that the extension proposed is indeed a rather modest one. It holds, in effect, that resigning your fiduciary position may not enable the fiduciary to ignore the fiduciary duty of loyalty. Indeed, it is not clear that an extension of prior law is required to capture the facts in this case as it does not seem artificial to suggest that the profits in question were acquired "by reason or by use of" the fiduciary position.<sup>21</sup> As of 1973, then, one would have stated with some confidence that the Canadian law on the nature of the fiduciary duty of loyalty had not extended significantly beyond the confines of the profit and conflict rules.

In the recent series of decisions, the Supreme Court appears to have significantly expanded the range of duties imposed on fiduciaries. Arguably, the following may be considered to be candidates for inclusion in a list of new fiduciary duties :

- In *Guerin*<sup>22</sup> the fiduciary was held to be subject to a fiduciary duty to follow the principal's instructions in the negotiation of a lease (the fiduciary was held liable to compensate the principal for the resulting lost value of the use of the land to be leased) notwithstanding the absence of any conflict of interest or personal profiteering.
- In *Canson*<sup>23</sup> the Court apparently adopted the view that a solicitor acting in a real estate transaction has a general fiduciary duty to disclose relevant information to the client whether or not a personal conflict or profit is involved.

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20. [1974] S.C.R. 592 at 609, (1973) 40 D.L.R. (3d) 371 [hereinafter *Canaero* cited to S.C.R.].

21. J. Glover, *Commercial Equity : Fiduciary Relationships* (Sydney : Butterworths, 1995) at 167-169.

22. *Supra* note 1.

23. *Supra* note 1.

- When *Norberg*<sup>24</sup> and *M.(K.) v. M.(H.)*<sup>25</sup> are considered together, it appears that the Court has imposed a fiduciary duty, in the case of a physician, to not engage in the sexual assault of a patient and, in the case of a parent, to not commit an act of incest with one's children.
- In *McInerney*<sup>26</sup> the Court held that a physician's failure to disclose to the patient the full contents of the patient's file — including opinions provided to the physician by other physicians — constituted a breach of fiduciary obligation.

Two different kinds of extensions appear to be occurring in the cases listed above. First, in *Guerin*, *Canson*, and *McInerney*, the Court recognized new types of fiduciary duties which do not appear to be linked with either the profit or conflict rule. The second change revisits the nature of the "conflict" required to produce fiduciary breach. In *M.(K.) v. M.(H.)*, the Court adopted the view that the conflict rule might extend beyond its traditional focus on financial conflicts and extend to conflicts between psychological interests such as the sexual aggressor's interest in sexual gratification and the principal's interests in physical and psychological integrity. Although, at first impression, it is the former extension that is of particular interest in the commercial context, I would suggest that both of these developments have, at least, the potential for engagement in a commercial setting.

I have argued elsewhere that once the fiduciary duty of loyalty is pried loose from the profit and conflict rules and further, from the traditional focus on legal and economic interests, the fiduciary duty of loyalty has the potential to swallow up significant portions of the law of contract and tort.<sup>27</sup> A failure to follow instructions (*Guerin*) would typically constitute a breach of contract, as would the solicitor's failure to provide adequate service (*Canson*). Sexual assault would normally constitute a tort (*Norberg*). It is not clear why other breaches of contract or tortious acts committed by fiduciaries would not similarly engage so expanded a version of the fiduciary duty of loyalty. Defamation, for example, could be characterized as a conflict between the psychological interests of the defamer and defamed, thus giving rise to the prospect of defamation actions being tried, in the alternative, as breaches of fiduciary obligation, provided, of course, that the parties have a pre-existing fiduciary relationship. Surely many breaches of duties imposed by contract and tort could be similarly characterized.

For present purposes, it is not necessary to offer predictions, confident or otherwise, as to possible extensions of the new fiduciary duties of loyalty into other factual circumstances. It is sufficient to note that the existence of a new range of duties, unconnected in some cases with the profit and conflict rules, has added an element of complexity to fiduciary law. This element of complexity is intensified, in my view, when coupled with the expansive view taken in this line of authorities with respect to the range of available remedies for breach of fiduciary obligation, a topic to which we now turn.

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24. *Supra* note 1.

25. *Supra* note 1.

26. *Supra* note 1.

27. McCamus, *supra* note 3 at 131-136.

### III. THE REMEDIES AVAILABLE FOR BREACH OF FIDUCIARY DUTY

As we have seen, the traditional law of fiduciary obligation sought to identify relationships in which one party had a reasonable expectation of loyal service on the part of the other and then imposed a duty of loyalty on the fiduciary party. The remedies which flowed from breach carried out the anti-profiteering policy of fiduciary law by requiring the fiduciary to disgorge the ill-gotten gains. The fiduciary in breach may be required to disgorge those gains either through the imposition of a constructive trust on them or through the remedy of an accounting of profits, the latter having a merely personal rather than a proprietary effect. In appropriate factual circumstances, the remedy of rescission may achieve a similar result.

Exceptionally, however, the 1914 decision of the House of Lords in *Nocton v. Ashburton (Lord)*<sup>28</sup> established that damages in the form of equitable compensation might be available in a fiduciary breach case. This relief appeared exceptional, indeed anomalous, as damages were essentially a remedy not known to the law of equity. In *Nocton*, however, a solicitor who failed to disclose a conflict to a client when providing advice, thereby causing him loss, was held to be liable to compensate the plaintiff for the loss flowing from the breach of fiduciary duty. The breach of duty in question was arguably also a breach of the solicitor's contract of service. The breach of contract claim was, however, statute-barred. The plaintiff also sued in deceit but failed to meet the fraud threshold set out some years earlier by the House of Lords in *Derry v. Peek*.<sup>29</sup> The *Nocton* case, then, appeared to carve out a special liability for careless misstatement by a service provider in the context of a fiduciary relationship, a development which was later overwhelmed by the more general recognition of liability in tort for negligent misstatement. Be that as it may, the *Nocton* case clearly establishes the possibility of a remedy in damages for breach of fiduciary obligation.

It is that isolated holding in the *Nocton* case that has provided the springboard for the recognition of the substantial possibilities for equitable compensation or damages for breach of fiduciary duty in the recent fiduciary cases of the Supreme Court.<sup>30</sup> Moreover, the Court has suggested that as the remedy of damages for breach of fiduciary duty is equitable in nature, the calculation of damages should essentially follow a trust model and thus not be restrained by common law doctrines such as those relating to remoteness and foreseeability.<sup>31</sup> In the *Guerin* case,<sup>32</sup> the plaintiff Musqueam Indian Band sought damages from the federal government on the basis that its officials failed to follow the Band's instructions in the negotiation of a lease of reserve lands with a golf club. The

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28. [1914] A.C. 932 (H.L.) [hereinafter *Nocton*].

29. [1889] 14 App. Cas. 337 (H.L.).

30. For more extensive treatment, see J.D. McCamus, "Equitable Compensation and Restitutory Remedies : Recent Developments" in Special Lectures of the Law Society of Upper Canada, *Law of Remedies: Principles and Proofs* (Toronto : Carswell, 1995) 295.

31. A view set out by Street J. in *Re Dawson* (1966) 84 W.N. (N.S.W.) 399 at 404-405 and adopted by the Supreme Court of Canada in *Guerin*, *supra* note 1.

32. *Supra* note 1.

terms of the lease were less advantageous to the band than it had wished. The failure of the officials to follow instructions was held to be a breach of fiduciary duty. If damages had been calculated on a contractual model, however, compensation would have been limited to the difference between the value of the lease as negotiated and the value of the lease which would have embodied the Band's instructions. Because the claim was one for breach of fiduciary duty, however, the calculation of damages, on equitable principles, was calculated in such manner as to place the plaintiff band in the best conceivable position it would have been in if the fiduciary had pursued the Band's interests in the most effective way possible. On the basis of that principle, it was hypothesized that the Band would have leased the land for long term residential leases and would have enjoyed a profit of ten million dollars. The availability of damages on this scale thus creates a powerful incentive for plaintiffs to attempt to characterise their claims as claims for breach of fiduciary obligation rather than as claims for damages for breach of contract or, indeed, tortious wrongdoing.

Other incentives are at work in cases where the new types of fiduciary duties have been coupled with claims for equitable compensation. Thus in *M.(K.) v. M.(H.)*,<sup>33</sup> for example, the plaintiff sought damages for battery and for breach of fiduciary duty arising from the defendant's infliction of an incestuous relationship. The claim was framed alternatively as a claim for breach of fiduciary duty in order to avoid the common law rule that might have barred the claim for lack of timeliness and, further, to attract more advantageous principles on which to calculate damages.

In cases such as these, there is some risk, in my view, that the law of fiduciary obligation may be utilized as a less than satisfactory device for reforming unattractive rules of contract and tort. Though I favour such reform in appropriate cases, of course, it may be questionable whether such reform is best achieved by the creation of revised tort law, for example, applicable only to fiduciaries. Thus if the battery rules relating to consent<sup>34</sup> or timeliness of claim are deficient in the context of sexual assault, more general reform of these principles may be preferable.<sup>35</sup> From this point of view, it is reassuring that in cases like *M.(K.) v. M.(H.)*, the majority of the Court fashioned a more general reform of tort doctrine and relied on fiduciary law only as an alternative explanation for the result.

There can be no doubt that the revitalized remedy of equitable compensation for breach of fiduciary duty is potentially available in commercial settings. What is less clear, however, is whether the courts will indeed disregard common law doctrines such as remoteness and foreseeability when calculating equitable compensation in the context of a commercial relationship between contracting parties.<sup>36</sup> Both the majority and minority

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33. *Supra* note 1.

34. The issue raised in *Norberg v. Wynrib*, *supra* note 1.

35. See, more generally, J.D. McCamus, *supra* note 3 at 131-136 ("Equitable Compensation as Law Reformer").

36. In *Canson*, the argument that common law principles of causation could be ignored was rejected by the Court. In *Hodgkinson*, a majority of the Court found it unnecessary to determine whether a different approach to questions of remoteness would be taken in equity on the facts

opinions in the *Canson*<sup>37</sup> case strongly suggest that similar results ought to prevail at both common law and in equity in the absence of a sufficient policy justification for distinguishing the type of relief made in the equitable context. Moreover, if one looks to the results of the decided cases, there appears to be no damages award in this line of Supreme Court cases, other than *Guerin*,<sup>38</sup> in which a result other than that obtainable on common law grounds is achieved.

Finally, it should be noted that the Court's expansive approach to remedial issues has not been limited to compensatory damages. In *M.(K.) v. M.(H.)* the Court awarded punitive damages for breach of fiduciary obligation. Though it may be that the novelty of this award was not fully appreciated by the Court, a jurisdiction to award punitive damages in such cases now appears to be clearly established.

#### IV. RESTITUTION, UNJUST ENRICHMENT, AND FIDUCIARY OBLIGATION

As indicated previously, the recent decision of the Supreme Court of Canada in *Soulos*<sup>39</sup> raises the issue of the relationship of the law of fiduciary obligation to the unjust enrichment principle. On its facts, the case involved a rather unobvious breach of fiduciary duty by a real estate broker. The defendant broker presented, on the plaintiff's behalf, an offer to purchase to a potential vendor. The offer was rejected. The broker then failed to deliver to the purchaser the vendor's counter-offer. Having developed an interest in the property, the broker arranged to purchase the property in his wife's name. Understandably, the purchaser sought the remedy of constructive trust for this breach of duty or, in the alternative, "damages." At trial,<sup>40</sup> the plaintiff's claim was rejected on the grounds that the subject property had declined in value and accordingly, it was said, there was no enrichment, unjust or otherwise. Inasmuch as the constructive trust is available, in the judge's view at least, only in cases of unjust enrichment, relief was to be denied. This decision was overturned by the Ontario Court of Appeal<sup>41</sup> on the grounds that the constructive trust remedy was not restricted in this way to cases of unjust enrichment and that in order to maintain the integrity of the relationship between real estate agents and their clients, a constructive trust would be imposed.

On further appeal to the Supreme Court of Canada, the Court divided on essentially similar lines. For the majority, McLachlin J. reasoned that the constructive trust was not limited to cases of unjust enrichment but that it extends more broadly to cases in which individuals are retaining property which they should not be permitted in "good conscience" to retain. As McLachlin J. explained,

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of this case.

37. *Supra* note 1 at 586-587 (LaForest J.) and at 543 (McLachlin J.).

38. *Supra* note 1.

39. *Supra* note 2.

40. (1991), 4 O.R. (3d) 51 (Gen. Div.), [1991] O.J. No 893 (QL).

41. (1995), 126 D.L.R. (4th) 637, 25 O.R. (3d) 257, [1995] O.J. No 2488 (Q.L.) (Ont. C.A.).

*Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised.*<sup>42</sup>

In short, "good conscience" was set forward as a principle which could unify or explain the various instances in which a constructive trust can be made available, including those resting on the unjust enrichment principle but not restricted thereto. Like the Court of Appeal, the majority also reasoned that the constructive trust should be imposed in a case of this kind so as to ensure that agents and others in similar positions of trust will remain faithful to their duty of loyalty.

In dissent, Sopinka J., with whom Iacobucci J. concurred, affirmed the view held by the trial judge that constructive trusts should be made available only in cases of unjust enrichment. As the defendant in *Soulos* had sustained a loss, the relief was therefore unavailable. In reaching this conclusion, the dissenters placed emphasis on the opinion of Chief Justice Dickson in *Pettkus v. Becker*<sup>43</sup> in which he stated that "the principle of unjust enrichment lies at the heart of the constructive trust." The inference drawn from this statement by the minority was that a constructive trust could therefore not be imposed in any other circumstances and accordingly, could not be imposed on the present facts.

Some measure of the increasing complexity of our fiduciary law evidenced in the *Soulos* case may be gained by comparing it with the much earlier leading decision of the English Court of Chancery in *Keech v. Sandford*.<sup>44</sup> This case, decided in 1726, is often relied upon as an important illustration of the strictness of the duties imposed on fiduciaries. It has been cited numerous times in subsequent cases. In *Keech*, a trustee for an infant lessee had applied on the infant's behalf to the landlord for renewal of the lease. The application was refused by the landlord. The trustee then obtained a new lease for his own benefit. The Court held that the lease should be held by the trustee on the infant's behalf. The report of this case occupies less than half a page in the English Reports. Lord Chancellor King's explanation for the result is as follows :

*I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease for himself, few trust estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease, on refusal to renew to cestui que use.*<sup>45</sup>

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42. *Soulos*, *supra* note 2 at 235.

43. [1980] 2 S.C.R. 834 at 847, 117 D.L.R. (3d) 257 [hereinafter *Pettkus* cited to S.C.R.].

44. *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223 [hereinafter *Keech*].

45. *Ibid.*

One suspects that Lord Chancellor King might find the forty-two page report of *Soulos* in the Supreme Court Reports a somewhat bewildering affair. Though it is perhaps not at all surprising that our law is more complicated than that of our ancestors some two centuries and more ago, I suspect that many contemporary lawyers would find that the discussion in *Soulos* takes them to the limit of their understanding of the unjust enrichment phenomenon in Canadian law. Before attempting to make some assessment of the contribution that the *Soulos* decision makes to the Canadian law of fiduciary obligation, it may therefore be useful to provide a brief account of the structure of the Canadian law of restitution, its relationship to the unjust enrichment principle and, in turn, to the law of fiduciary obligation.

#### A. Restitution : A New Legal Subject

The emergence of the law of restitution in the first half of this century in the United States, more recently in Canadian common law, and more recently still in England and Australia, represents nothing less than (and one should add, perhaps nothing more than) the recognition of a new legal subject. Accustomed as we are to organizing our thoughts about private law in terms of contract and tort doctrine, we often forget that these subjects were first adopted in England in the 19th century as devices for organizing bodies of legal doctrine which were previously organized in what we now would consider to be a less convenient form. The law of restitution was a much later invention of the American Law Institute (and its reporters on this subject, Professors A.W. Scott and W. Seavey) which published the *Restatement of the Law of Restitution*<sup>46</sup> as one of a series of restatements on the private law of obligations including the familiar restatements on contract, tort and property law.

The basic organisational premise of the *Restatement of Restitution* was that there were large bodies of the private law of obligations which fell outside the domains of contract and tort and which had not been reorganized into the form of a modern legal subject. It was the view of Scott and Seavey that the old doctrines of the common law often referred to as the law of quasi-contract together with doctrines emanating from the Court of Chancery involving mainly, but not exclusively, application of the doctrine of constructive trust could be reorganized and reshaped into a new legal subject. The justification for so organizing them was that, despite their disparate origins, these materials dealt with similar problems. Reorganizing the materials into a new subject would thus provide a convenience to the profession and, at the same time, might illuminate the contours of these otherwise neglected doctrinal materials. The name selected for the subject was restitution.

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46. American Law Institute, *Restatement of the Law of Restitution : Quasi-Contracts and Constructive Trusts* (St. Paul, Minn. : American Law Institute Publishers, 1937) [hereinafter *Restatement of Restitution*].

The central idea running through the common law and equitable materials to be reassembled under this banner was said to be the principle against unjust enrichment. Thus the opening article of the *Restatement of the Law of Restitution* states as follows :<sup>47</sup>

*A person who has been unjustly enriched at the expense of another is required to make restitution to the other.*

The body of the *Restatement* is then taken up with a restatement, in the usual propositional form of the restatements, of the various rules of quasi-contract and equity which the authors and the Institute considered to be cases of unjust enrichment. From the law of quasi-contract, for example, we find restatements of the doctrines relating to the recovery of monies paid under mistake, under duress, as a result of fraud, in an emergency and under contracts ineffective by virtue of various doctrines of the common law. Similarly, the rules of quasi-contract relating to the recovery of other benefits such as goods, services or the discharge of another's liability conferred in similar circumstances find their new home in the *Restatement of Restitution*. From equitable origins, the *Restatement* adds equitable doctrines relating to equitable relief from mistake, fiduciary duty, rescission and restitution of benefits conferred under transactions ineffective for equitable reasons.

Under the *Restatement* plan, the private law of obligations is restated in the form of three separate subjects, contracts, torts and restitution. The unifying feature of contract law is that it deals with the enforcement of promises. It provides remedies in the expectancy or promise fulfilment measure. The unifying feature of the law of torts is that it imposes on wrongdoers a duty to compensate their victims for losses sustained as a result of the wrongdoing. Relief is offered in a compensatory measure which differs from that of contract. Restitution rests on the unjust enrichment principle and offers the different relief of ordering the defendant to restore or disgorge benefits obtained to the plaintiff.

As a matter of interest, we may note that the subject of equity is more or less made to disappear by a move of this kind. The law of trusts (and the *Restatement of Trusts*), of course, remains as a distinct subject. Equity doctrine continues to make notable contributions to a range of legal subjects. But there is no restatement of equity and equity is no longer studied or written about as a separate discipline in the United States. This is also essentially true in common law in Canada. It is not true, however, in England and Australia where textbooks on equity continue to flourish.

Although the *Restatement of Restitution* is thus essentially an exercise in reorganizing legal doctrine, Scott and Seavey certainly believed that the very act of bringing this material together and revealing its fundamental similarities would also have the effect of revealing inconsistencies and anomalies which would likely be adjusted through the traditional common law process over time.<sup>48</sup> Without elaborating on the evidence in detail, this prophecy has proven to be sound. In their view, quasi-contract had

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47. *Ibid.* at s. 1.

48. W.A. Seavey and A.W. Scott, "Restitution" (1938) 54 L.Q.R. 29.



suffered by its association with contract. It was often understood to be a doctrine that rested on the implication of contractual obligations. In their view, this "implied contract" foundation for quasi-contractual obligation was a pure fiction which had served as a source of confusion. A similar fate had befallen constructive trust. Its association with the law of trusts had led the profession to regard it essentially as an implied trust. For Scott and Seavey, this was also a fiction and masked the remedial nature of the constructive trust which was simply a remedy imposed in circumstances to be referred to by the *Restatement*, at least, as instances of unjust enrichment. The *Restatement of Restitution* was quickly absorbed into the fabric of American private law.

## B. Canadian Reception

To the extent that the *Restatement of the Law of Restitution* is an exercise in reorganising legal doctrine, it is not obvious, of course, that the exercise requires some sort of judicial *imprimatur*. Thus, the first edition of the influential English textbook on the law of restitution by Goff and Jones<sup>49</sup> enjoyed justifiable success and influence even though it could not be said at that time that the English judiciary accepted or adopted the American unjust enrichment analysis of quasi-contract and constructive trust. Indeed, although the English courts have, more recently, embraced the unjust enrichment analysis, it would be wrong to conclude that the American view of the remedial nature of the constructive trust has taken root in English doctrinal soil. If a judicial *imprimatur* is not required for an exercise of this kind to be of great assistance to the profession, it is nonetheless true that judicial acceptance of the unjust enrichment analysis would not only be gratifying to its supporters but would likely also hasten the kind of rethinking of restitutionary doctrine envisioned by Scott and Seavey. This has indeed been the experience in common law in Canada where the unjust enrichment analysis was first adopted by the Supreme Court of Canada in the context of quasi-contract in *Deglman v. Constantineau*.<sup>50</sup> In this case, the Court explicitly rejected an implied contract analysis which would have precluded relief and awarded relief on the basis of unjust enrichment analysis.

Although many Canadian decisions subsequent to *Deglman* referred to and relied upon the unjust enrichment analysis, there was little evidence in the next few decades of judicial acceptance of this analysis with respect to the equity side of the ledger. To be sure, in *Canadian Aero Service Limited v. O'Malley*,<sup>51</sup> Laskin J. referred to the remedy of an accounting for profits for breach of fiduciary duty as "based on unjust enrichment;" but there was no more explicit judicial recognition of unjust enrichment analysis on the equity side and no explicit adoption of the remedial theory of the constructive trust. These issues surfaced for judicial consideration in the contentious context of the matrimonial property cases in the 1970s, culminating in the decision of the Supreme Court of Canada

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49. R. Goff & G. Jones, *The Law of Restitution* (London : Sweet & Maxwell, 1966) [hereinafter Goff & Jones], the fifth edition of which was published in 1998.

50. [1954] S.C.R. 725, 3 D.L.R. 785 [hereinafter *Delgman*].

51. *Supra* note 20 at 622.

in *Pettkus v. Becker*<sup>52</sup> in 1980. As has been alluded to above, it was in this case that Chief Justice Dickson plainly adopted, on behalf of the Court, the American theory of remedial constructive trust as a basis for distinguishing English law which restricted the application of the resulting trust in the matrimonial property context to situations in which the parties shared an intention that the titled spouse would hold the matrimonial property to some extent on behalf of the non-titled spouse. Such intentions were unnecessary to find, in the Supreme Court's view, in order to impose the remedial constructive trust in the matrimonial property context.

In his opinion in *Pettkus*, it should be remembered, Chief Justice Dickson also offered his own restatement of the unjust enrichment principle. Referring back to a similar passage in his opinion in *Rathwell v. Rathwell*,<sup>53</sup> Chief Justice Dickson ventured to suggest that :

*[...] there are three requirements to be satisfied before unjust enrichment can be said to exist : an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.*<sup>54</sup>

The Chief Justice went on to state that :

*this approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.*<sup>55</sup>

If we may conclude that the unjust enrichment analysis of restitutionary claims has been absorbed into Canadian jurisprudence, it may reasonably be asked what the significance of this recognition might be. What is the relationship between the unjust enrichment principle and the law of restitution? Alas, this is not a question that yields to an easy answer. Is the principle simply a label that identifies a type of case to be found in the law reports going back over the centuries which is now being reorganised, essentially for reasons of professional convenience, into a new legal subject? Or is the principle of some more profound significance in the sense that it identifies a theory of liability or, perhaps, a cause of action which has now, in some sense, been recognized as a part of Canadian legal doctrine? I have argued elsewhere<sup>56</sup> that the unjust enrichment principle appears to perform four functions with respect to the law of restitution. It provides an organizing framework for a new legal subject. It provides, perhaps, a convenient shorthand reference to the kinds of policy considerations that appear to justify recovery in restitution cases. In this sense, it provides a theory of liability. It has served as an analytical device that has facilitated judicial reform of restitution doctrine. Arguably, at

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52. *Supra* note 43.

53. [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.

54. *Pettkus*, *supra* note 43 at 848.

55. *Ibid.* at 848.

56. J.D. McCamus "Unjust Enrichment, Its Role and Its Limits" in D.M.W. Waters, ed., *supra* note 6 at 129.

least, it has also come to be recognized as a convenient reference to the elements of a generic cause of action in restitution. But these are controversial questions and they spawn other controversial questions in their wake. What is the role of legal principle in private law more generally? What is a "subject" of the law? Is there one single legal principle which unifies or provides a theoretical justification for all the decisions considered to be part of the law of contract? Are there contract cases in the law reports which fail to adhere to that principle which should now be considered to be inconsistent with the principle and therefore considered as wrongly decided? Is there a similar single defining principle of the law of torts which performs a similar function? If not, why not?

A careful examination of questions such as these would take us well beyond the confines of the present paper. For present purposes it is sufficient to note that the relationship of the unjust enrichment principle to the law of restitution and its status or role as a component of current Canadian legal doctrine is a matter of some subtlety and, perhaps, some ambiguity. The relationship of the unjust relationship principle to the traditional English case law on constructive trust is also a matter of some controversy and subtlety. I am not aware, for example, that any scholar in the field claims that all of the historical uses of the constructive trust in English legal doctrine can now properly be explained as instances of unjust enrichment.<sup>57</sup> Thus, only some of those cases or doctrines are reflected and recaptured in the *Restatement of Restitution* and in modern textbooks on the law of restitution. Accordingly, the view attributed to Chief Justice Dickson by the minority in *Soulos* that it was the Chief Justice's view that the constructive trust can only be awarded in cases of unjust enrichment seems an unlikely view for him to have held. Indeed, it appears rather unlikely that the entire catalogue of historical uses of the constructive trust was present to the minds of the Supreme Court judges when the decision in *Pettkus v. Becker* was rendered.<sup>58</sup>

### C. The Relationship of Restitution/Unjust Enrichment to Fiduciary Law

For the restitution scholar, the law of fiduciary obligation is plainly one of those areas of English legal doctrine which came to be considered within the rubric based upon the unjust enrichment principle. Thus, the rules relating to the recovery of profits secured by breach of fiduciary obligation are restated in a chapter of the *Restatement of Restitution*. The modern American, Canadian, English, and Australian textbooks on

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57. The most recent attempt to rationalize constructive trust doctrine suggests that there are three principles or aims at work in the constructive trust case law, only one of which is restitutionary in nature. See G. Elias, *Explaining Constructive Trusts* (Oxford : Clarendon Press, 1990). Greater support for the dominance of unjust enrichment as a rationalizing principle is to be found in D.W.M. Waters, *The Constructive Trust : The Case for a New Approach in English Law* (London : University of London, Athlone Press, 1964). See also A.J. Oakley, *Constructive Trusts* 3d ed. (London : Sweet & Maxwell, 1997); M. Cope, *Constructive Trusts* (Sydney : Law Book, 1992).

58. *Soulos*, *supra* note 2 at 230 per McLachlin J. :

*This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as Pettkus v. Becker should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized.*

restitution include extensive treatment of fiduciary law. At the same time, of course, those sources point out that it is not necessary for the plaintiff who is seeking to obtain the unjust enrichment remedies for fiduciary breach to demonstrate that the plaintiff has suffered harm. Typically, as well, they note that the *Keech v. Sandford* line of authority demonstrates that the rule imposing liability is a strict one for the policy reasons advanced in cases like *Keech* and *Soulos* and that it is not necessary for the plaintiff to demonstrate that the defendant has enjoyed a profit in order to secure imposition of the constructive trust remedy.<sup>59</sup>

In Canada, treatment of fiduciary obligation in restitution textbooks must now obviously include some discussion of the prospect of compensatory damages as an available form of relief even though damages in equitable compensation may be said to be not truly a form of restitutionary relief. The reader of a restitution text seeking to understand the law of fiduciary obligation needs to be pointed in this direction. It may be, however, that over time it will become desirable or necessary for writers of textbooks on tort law to include chapters on fiduciary obligation if, as may well be the case, fiduciary law begins to occupy a larger portion of the domain now occupied by the law of torts. If fiduciary obligation begins to function like tort, offering compensation for injuries sustained as a result of wrongful activity, its addition to the canon of tort law would be useful for two reasons. The busy practitioner attempting to become informed with respect to the range of interests protected and the remedies available in circumstances where individuals have been injured by the wrongful conduct of others would find all of the law relating to these issues within the confines of the torts book. Second, to the extent that fiduciary obligation trenches more on tort law, it would be useful to have these developments discussed by experts on compensation for wrongfully inflicted injuries and subjected to the discipline of being compared to the previously established principles dealing with these issues. I have argued elsewhere that reforming tort law through the growth of fiduciary doctrine is not likely to be the most satisfactory means for reforming tort law.<sup>60</sup> If it nonetheless is to occur, I would suggest that it is likely to occur in a more satisfactory fashion if it is considered more openly as a device for reforming tort law and assessed in the context of a treatment of tort principles. Similar considerations would apply to major incursions on the domain of contract law by an expansive law of fiduciary obligation.

#### **D. *Soulos v. Korkontzilas* Reconsidered**

Against this background, it is possible to make a number of points concerning the decision of the Court in the *Soulos* case. Of particular interest in the commercial context, is the question of whether in this case the Court can be said to have adopted a new cause of action — the "good conscience" constructive trust — upon which a new host of unprecedented claims for access to the constructive trust can be successfully launched. As

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59. See, e.g., Maddaugh & McCamus, *supra* note 4 at 594; Goff & Jones, *supra* note 50 at 645; K.Mason & J.W. Carter, *Restitution Law in Australia* (Sydney : Butterworths, 1995) at 665-666.

60. McCamus, *supra* note 3.

will be seen, it is my view that this is not very likely to be the proper interpretation of what the Court has attempted to accomplish in the *Soulos* decision.

First, it may be suggested that the result in *Soulos* does not appear to be inconsistent with earlier authority. Indeed, in *Keech v. Sandford*,<sup>61</sup> the strict rule applied was to the effect that the trustee for the infant was the only person in the world who could not renew the lease. No suggestion was made by the court that subjecting the trustee to the remedy of constructive trust was in any way contingent on a demonstration that the trustee had renewed the lease at the market rate or less. In other words, there does not appear to be any historic basis for suggesting that the *Keech v. Sandford* principle would apply only in a case where the rental paid by trustee appeared to be an advantageous one. As well, we may note that the reasoning of the majority in *Soulos* with respect to the policy considerations for imposing liability is similar to that advanced more briefly and cynically by Lord Chancellor King. The remedy is imposed to remove temptation from the trustee and ensure integrity in relationships of this kind.

To be sure, however, the fact situation in *Soulos* is unusual. In the normal case, the plaintiff is surely not likely to seek constructive trust where the target property has declined in value and will be worth significantly less than the plaintiff will be required to pay for it as a condition of obtaining relief. On the other hand, if such a case were to occur, it is not very likely that the defendant would resist such a claim, when thus afforded an opportunity to recoup the losses sustained in acquiring the asset. Thus, it is not surprising that there does not appear to a body of authority plainly indicating on the facts of *Soulos* that the constructive remedy is available. The decision in *Soulos* thus has the virtue of making clear what might be said to be implicit in the *Keech v. Sandford* line of authority.<sup>62</sup>

Second, it seems possible that *Soulos* could simply have been resolved on the basis of an unjust enrichment analysis. As indicated, the defendant in *Soulos* adopted the somewhat surprising position that he did not wish to yield up the property he had acquired — notwithstanding its decline in market value — in return for the plaintiff's payment of the initial purchase price. It appears obvious that the defendant thought the asset had some value which was not reflected in the then current and declined market value of the property. In other words, on the facts of *Soulos* itself, it seems very likely that the defendant considered himself to have acquired a valuable asset. Surely, on that view, the defendant had been enriched by virtue of his breach of fiduciary obligation and his obligation to disgorge that enrichment flows straightforwardly from the unjust enrichment analysis.

Third, it may be useful to speculate on the significance that should be attributed to the suggestion by the majority of the Court that a principle of "good conscience" has some role to play in our understanding of the availability of the constructive trust remedy. Although, for the reasons just advanced, it is not obvious to me that it was necessary to adopt an additional overarching principle to accommodate the result in *Soulos* itself, there

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61. *Supra* note 44.

62. For a listing of the authorities dealing with the improper purchase of property by the intending purchaser's agent, see Maddaugh & McCamus, *supra* note 4 at 597.

are doubtless historical uses of constructive trust doctrine that many would feel fall outside a strict unjust enrichment analysis. Is the new "good conscience" principle then to be a principle of the same kind as the unjust enrichment principle? Will it serve as a new rationalizing force in non-unjust enrichment fiduciary duty cases? More particularly, are Canadian courts likely to take the view that constructive trust can now be applied in any circumstance that "good conscience" so requires?

Certainly, "good conscience" is not likely to be considered to be the kind of principle that "unjust enrichment" is in the sense that it provides a principle that will be useful in organising a body of doctrine into a new subject of the law. Further, it seems unlikely that courts will find it very helpful to rely on as abstract a principle as "good conscience" in fashioning new applications of constructive trust doctrine. Thus in *Soulos* itself, the majority explains quite carefully and, in my view, convincingly, why it is that constructive trust relief should be made available in the factual circumstances of this case. Those policy reasons — promoting the integrity of fiduciary relations — are indeed quite consistent with those advanced in *Keech v. Sandford*. It seems rather more likely, therefore, that the good conscience principle advanced by the Court in *Soulos* is intended as a reminder that there may well be uses of the constructive trust that fall outside the unjust enrichment principle, at least if that principle is narrowly construed, and that the unifying thread of those instances can be captured by this notion of "good conscience." In determining whether the constructive trust should be available in a particular non-unjust enrichment case, however, courts are surely likely to rely either on precedent or, as was the case in *Soulos*, on a principled analysis at a somewhat lower level of abstraction than that captured by the notion of "good conscience."<sup>63</sup> No doubt, scholars will continue to differ on the question of whether this category of non-unjust enrichment constructive trust cases is a large or a rather small one.<sup>64</sup>

A fourth point relates to what I fear might be a potential for misunderstanding of the discussion in the majority opinion pertaining to guidelines for the imposition of the constructive trust. In the course of discussing the availability of the constructive trust, the majority opinion notes that "in England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction"<sup>65</sup> and contrasts this approach to that adopted in American and Canadian doctrine in which the remedial nature of the constructive trust has been recognized. One cannot be confident, however, that the reader of the majority opinion will keep this difference of approach in mind when the majority shifts attention to non-unjust enrichment cases and goes on to quote from an essay by Professor Roy Goode<sup>66</sup> in which he set out an elegant analysis of the elements of the institutional

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63. The integrity of trust-like relationships rationale would not so obviously apply to the use of constructive trust in vendor-purchaser situations, for example. This is not to say, however, that there may not be other policy considerations that support this established use of the constructive trust. See also *supra* note 57 and accompanying text.

64. *Ibid.*

65. *Soulos*, *supra* note 2 at 237.

66. R. Goode, "Property and Unjust Enrichment" in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford : Clarendon Press, 1991).

constructive trust available in English law. Although Professor Goode's analysis provides an illuminating analysis of current English doctrine, neither that doctrine nor his article purports to embrace the American and Canadian remedial constructive trust approach. On the contrary, both are quite rooted in the still persistent English institutional trust model. Thus, for example, the application of Professor Goode's analysis would not seem to account for the results in cases such as *Pettkus v. Becker*<sup>67</sup> or *Lac Minerals v. International Corona Resources Ltd.*<sup>68</sup> For Canadian purposes, then, when analyzing the availability of the remedial constructive trust in an unjust enrichment case, a more relevant statement of the factors that might be taken into account is likely to be that set out in the opinion of LaForest J. in the *Lac Minerals* case.<sup>69</sup> What appears clearly to be intended by the majority, however, is that when contemplating the imposition of constructive trust outside of the unjust enrichment context, principles extracted from the English institutional approach will provide useful guidance. In applying the *Soulos* analysis in future cases, then, it will be quite important to distinguish between unjust enrichment cases where the remedial constructive trust is available and non-unjust enrichment cases where, it appears, the more traditional English view may prevail. It should be added that the typical fiduciary duty case, in which the fiduciary profits from breach, will normally fall into the former category and be subject to the possible availability of the remedial constructive trust. It thus seems likely, then, that the *Soulos* analysis will be relevant to a fiduciary duty case only in rather unusual circumstances. In any event, what is abundantly clear from the majority opinion in *Soulos* is that the Court has again reaffirmed that the remedial constructive trust concept has been adopted as a prominent feature of Canadian restitutionary law.

In summary, then, the decision in *Soulos* provides an opportunity to focus attention on the relationship between fiduciary law and the principle of unjust enrichment. In my view, although *Soulos* itself deals with an aberrant fact situation in an interesting way, the thrust of the decision does not undermine the importance of the relationship between fiduciary law and the law of restitution or unjust enrichment. The traditional remedies for breach of fiduciary duty are restitutionary in nature and usefully considered to be an important part of the modern law of restitution in Canada and elsewhere. As the invention of the law of restitution and the adoption of the unjust enrichment principle as a basis for analysis appears to have been intended, in part at least, to be an exercise in simplification, there is some irony in the fact that this approach appears to have created some confusion on the unusual facts of the *Soulos* case. As I have indicated above, a satisfactory way out of the confusion, in my view, would have been to simply conclude that the defendant, who resisted disgorging his ill-gotten asset all the way to the Supreme Court of Canada, must be considered to have obtained an enrichment even if the current market value of the asset can be demonstrated to have declined. Taking the narrow view of enrichment adopted both by the majority and the minority in *Soulos*, however, a result which requires the fiduciary to disgorge the asset acquired through breach appears both sound as a matter of principle and consistent with the traditional strict view of the *Keech v. Sandford* principle. Thus, while the analysis in *Soulos* case may make for challenging

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67. *Supra* note 43.

68. *Supra* note 1.

69. *Ibid.* at 675-679.

reading for those who are not familiar with the debates surrounding modern restitutionary analysis, I would conclude that the analysis in that case should not be considered to have the effect of adding a new destabilizing influence into the analysis of fiduciary doctrine.

## CONCLUSION

The exercise of charting recent developments in the evolution of modern Canadian fiduciary law provides a fascinating feast for a scholar of private law. As I have attempted to demonstrate, it is possible to exaggerate the degree to which fiduciary law has been destabilized or rendered uncertain by these recent developments. At the same time, however, it must be noted that the recent jurisprudence demonstrates a willingness on the part of the Supreme Court of Canada to make adjustments to the law of fiduciary obligation and to engage in what McLachlin J. has referred to as a "reasoned, incremental development of the law on a case-by-case basis."<sup>70</sup> As fiduciary law has evolved, it has undeniably become somewhat more complex. As I have attempted to indicate, however, it is not my view that the definition of fiduciary relationship has become unattractively unstable. Nor is it my view that the recent and most interesting decision in *Soulos* signals a marked departure from the traditional law concerning the availability of the constructive trust for breach of fiduciary obligation. On the other hand, the Court's apparent willingness to take an expansive approach to the definition of the duties to be imposed on fiduciaries and on the remedies to be made available for breach does carry within it the seeds of a more dramatic expansion of fiduciary obligation. If this is to occur, it is likely to have a significant impact on the law of commerce for it is in the context of commercial settings that many of the important principles of fiduciary law have been forged.

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70. *Soulos*, *supra* note 2 at 237.