1

Introduction

*If you don’t know where you’re going, you might not get there.*

- Yogi Berra, baseball player, manager, announcer, and amateur philosopher in Y. Berra (with D. Kaplan), *When You Come to a Fork in the Road, Take It!*, (New York: Hyperion, 2001) at 53.

---

*A perfectly simple principle can never be applied to a state of things which is the reverse of simple.*


---

1. Introduction

The fiduciary concept is wonderfully enigmatic. A variety of terms have been used to describe this peculiar creature of English Equity: “aberrant,”¹ “amorphous,”² “elusive,”³ “ill-defined,”⁴ “indefinite,”⁵ “vague,”⁶ “peripatetic,”⁷ and

---

“trust-like” are but a few. The fiduciary concept has also been characterized as “a concept in search of a principle” and “equity’s blunt tool.” The consequences of its application have been referred to as “draconian.” Still more adjectives could easily be added to the mix: intriguing, confusing, complex, abstract, flexible, wide-ranging, and vexing. Certainly the fiduciary concept has aroused significant interest and concern among members of the legal community.

The interest and concern that the fiduciary concept has generated may be traced to the important purpose that it is designed to fulfill. “Fiduciary” is one of the means by which law transmits its ethical resolve to the spectrum of human interaction. Few legal purposes are simultaneously as vital and as broad. As a vehicle through which law imposes its standard of ethics on a potentially infinite variety of actors involved in an indefinite number of circumstances, the fiduciary concept cannot be defined with the explicitness generally desired by legal actors. Indeed, the concept’s protean quality makes even meaningful generalization difficult. The importance of the fiduciary concept, combined with its innate resistance to definition, renders it a subject of considerable confusion and consternation among jurists.

What adds to the vexing character of the fiduciary concept is that it is comprised of a variety of interrelated components that work together as part of a larger entity:

1. **Fiduciary doctrine**, which encompasses the historical and contemporary theories and precepts that underlie the concept;
2. **Fiduciary law**, or the jurisprudence that has developed around the concept;
3. **Fiduciary relations**, or the instances in which the concept applies;

---


12 This is consistent with the fiduciary concept’s equitable background, which is consonant with Lord Upjohn’s characterization of equitable principles in *Phipps v. Boardman* (1966), (sub nom. *Boardman v. Phipps*) [1967] 2 A.C. 46 (U.K. H.L.) at 123: “[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.”

13 While there are some conceptual difficulties in referring to the instances in which the fiduciary concept applies as “fiduciary relations” – insofar as it is more technically accurate to say that relationships, *per se*, are not fiduciary, but that a certain aspect, or aspects, of them are – the term is used as one of convenience that also reflects existing discussions of the circumstances in which the fiduciary concept is used.
(4) fiduciary actors, or the persons (fiduciaries and beneficiaries) who are directly affected by the application of the fiduciary concept to their relationship;

(5) fiduciary duties, which characterize the nature of the obligations imposed on fiduciaries and certain other parties to fiduciary relations, and;

(6) fiduciary measures of relief, or the manner in which the (actual or potential) harm or loss stemming from breaches of fiduciary duty is addressed in accordance with the foundational premises of the fiduciary concept.

The enigmatic character of the fiduciary concept is illustrated by some pervasive dichotomies. Fiduciary law is one of the most broadly based areas of law, in terms of its application to disparate relationships and fact situations; judges and commentators, however, constantly warn us that it is invoked too frequently and with regard to too many forms of interaction. The fiduciary concept enjoys widespread popular currency, but judges, practitioners and academics often decry the lack of any generally accepted definition of what a fiduciary relationship is. Certain relations have long been characterized as fiduciary, such as trustee-beneficiary and guardian-ward, but such characterizations are not, themselves, conclusive indications of whether an individual relationship of that ilk is fiduciary. Finally, even where fiduciary duties are said to apply to a given relationship, they

14 Only fiduciaries and certain outsiders, or strangers, to fiduciary relations who possess actual or effective power and control over the interests of the beneficiaries may have fiduciary duties imposed upon them. These notions will be more fully fleshed out in subsequent chapters of the book.

15 In this book, all of these terms will be used, where necessary, to distinguish between general and specific concepts, notions, or ideas.

16 Note, for example, Bristol & West Building Society v. Mothew (1996), [1998] Ch. 1 (Eng. C.A.) at 16 per Millett L.J.: “[t]he expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility;” R.P. Austin, “Moulding the Content of Fiduciary Duties,” in A.J. Oakley, ed., Trends in Contemporary Trust Law, (Oxford: Oxford University Press, 1996) at 156: “fiduciary duties relate to improper profits and the avoidance of conflict of interest, and we should no longer use fiduciary terminology to describe other duties to which fiduciaries and others may be subject.”

17 See, for example, Finn, “The Fiduciary Principle,” supra note 7 at 26: “[s]uch present uncertainty is thought to be exacerbated by the lack of a workable and unexceptionable definition of a fiduciary, We have no shortage of rival approaches, but none has carried the day.” See also R. Flannigan, “The Fiduciary Obligation,” (1989) 9 O.J.L.S. 285 at 321: “[t]here have been a number of attempts by commentators recently to explain the basis of the fiduciary obligation. . . . Unfortunately, there is no consensus.”

do not necessarily apply to all facets of that relationship. Remarkably, in spite of the confusion and contradiction that surrounds it, the fiduciary concept has continued to appear frequently and prominently in pleadings, judgments, and academic writings.

The goal of this book is to clarify and contextualize the fiduciary concept. It endeavours to do so by initially considering some of the difficulties that have beset fiduciary jurisprudence, some of which have led to the development of a profound fiduciary paradox. The book then undertakes to develop a greater understanding of the fiduciary concept by examining its ideological, historical, and jurisprudential foundations. This introductory examination will provide all-important context for Part II’s discussion of existing fiduciary theories. In addition, it will also uncover foundational fiduciary principles that will be developed into an operational vision of the fiduciary concept in Chapter 5. This operational vision, in turn, sets the stage for a functional approach to the fiduciary concept that provides the conceptual framework formulated in Chapter 5 with enhanced shape and substance.

The working theory developed in Chapters 5 and 6 serves as the backdrop against which specific instances of fiduciary interaction will be critically analysed in Part III. This analysis is followed by a discussion of how to ascertain whether a breach of fiduciary duty exists and the process of attributing responsibility for the actual or potential harm or loss flowing from such a breach. The book concludes with an examination of the measures of relief available for breaches of fiduciary duty and the exemplary nature of fiduciary relief generally.

In its forthcoming pages, this book suggests that the fiduciary concept can serve as an effective and appropriate vehicle for remedying situations that cannot be adequately or appropriately addressed by common law or other equitable causes of action. At the same time, it strongly emphasizes that the fiduciary concept ought to be implemented only where its application is warranted by the facts in question and in a manner consistent with fiduciary standards. More specifically, the fiduciary concept ought not be used as a substitute for reforming deficiencies in existing areas of law. It will also be argued that the uncertainty and confusion that the

---


20 This fiduciary paradox is the subject of Ch. 2.

21 This does not mean, however, that one may not properly resort to principles of fiduciary law where it is both applicable to the facts in question and provides a basis for relief that does not exist within the ambit of common law causes of action. Note, however, conflicting statements by La Forest J. in Canson Enterprises Ltd. v. Boughton & Co. (1991), 85 D.L.R. (4th) 129 (S.C.C.). Such an occurrence illustrates one of the important roles of equitable doctrines such as the fiduciary concept to supplement and assist the common law. See, for example, the comments of McLachlin J. in “The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective,” in D.W.M. Waters, ed., Equity, Fiduciaries and Trusts 1993, (Toronto:
fiduciary concept has generated is not endemic, but ensues from ill-informed uses of fiduciary principles or the unquestioned adherence to precedent without truly considering the appropriateness of its application to the situation at hand.

2. Difficulties Associated with the Fiduciary Concept

Much fiduciary commentary appears to support the proposition put forward by former Chief Justice Mason of the Australian High Court that “[t]he fiduciary relationship is a concept in search of a principle.”22 Indeed, his sentiments have been cited in significant fiduciary case law.23 However, his characterization is inaccurate. “Fiduciary” is not a concept in search of a principle, but a “vibrant and exciting facet of law whose potential is only beginning to be tapped.”24 For this reason, it ought to be regarded as a concept in need of understanding. The difficulties that continue to plague the fiduciary concept lie not with the concept itself, but with the curt and unreflective manner in which it has been applied.

The lack of reflection which has resulted in inconsistent, inopportune, and sometimes ideologically bankrupt fiduciary decisions has generated significant and unnecessary confusion and uncertainty that have obscured the fiduciary concept’s raison d’être. In other situations, apparent judicial disinterest in the fiduciary concept’s purpose – which is suggested by the scant space dedicated to the discussion or analysis of its principles – implies that some judges are more concerned with what the fiduciary concept might accomplish in a particular situation or how it may be used to evade difficulties inherent in bringing other claims than in ensuring doctrinally sound applications of fiduciary principles. Lawyers are equally to blame for this development. This purpose-driven methodology is a clear example of being too busy learning the tricks of the fiduciary “trade” to ply its fundamentals or ensure its ideologically appropriate application.

If the problems surrounding the fiduciary concept lie not within the concept itself but in its implementation, then it is possible to reform fiduciary jurisprudence by fostering a principled approach to the fiduciary concept that is rooted in its foundational precepts. This remedial objective highlights the discussion in this chapter and, indeed, much of this book.

Although one may find it difficult to obtain a clear understanding of the fiduciary concept from much of the existing case law and commentaries on the topic, greater certainty can be achieved through an analysis of the fiduciary con-

---

23 As, for example, in Lac Minerals, supra note 10 at 26.
24 Rotman, “Fiduciary Doctrine,” supra note 3 at 852.
cept’s history and purpose. Such an historical and doctrinal examination also enables one to isolate the various principles that govern the fiduciary concept’s application to contemporary relationships. This, in turn, provides the basis for the operational vision and functional approach to the fiduciary concept that offset the lack of conceptual certainty decried by many judges, scholars, and practitioners.

In the process of providing greater conceptual certainty to the fiduciary concept, one must be careful that one’s zeal to infuse it with enhanced understanding and predictability does not rob it of its necessary flexibility. This malleability allows the fiduciary concept to be adapted to the specific requirements of individual situations. Indeed, the flexibility of the fiduciary concept is vital to its usefulness. However, it also creates a considerable challenge: how to preserve the necessary elasticity of the fiduciary concept to allow for its application to numerous and diverse scenarios while maintaining a sufficient level of certainty and predictability for juristic actors.

Although retaining the fiduciary concept’s flexibility leaves a certain measure of uncertainty in fiduciary applications, this uncertainty is tempered in individual cases through the doctrinally guided exercise of judicial discretion pursuant to the fiduciary concept’s governing principles. While leaving discretion in the hands of judges may make some uncomfortable, as C.K. Allen states, “[a]n element of discretionary justice is and always has been essential to the efficient interpretation and application of law.” This is particularly true of equitable doctrines, such as the fiduciary concept, which are more flexible and wide-ranging in their application than their common law counterparts.

The reliance upon judicial discretion in fiduciary applications need not invariably lead to chaos. The degree of discretion held by judges implementing the fiduciary concept is commensurate with the fiduciary concept’s basis in broad and equitable notions of justice and conscience, which eliminates the possibility of applied fixity. This discretion is not uncontrolled, but is regulated by the principles which embody the fundamental premises of the fiduciary concept. Further, where the exercise of this discretion is inconsistent with the underlying precepts of the fiduciary concept, a decision of the offending judge may properly be set aside, upon appeal, as an error in law. Thus, the appeal process provides a secondary safety net for the indiscriminate or improper use of judicial discretion in the application of fiduciary principles. Further, as Sir John Balcombe has suggested, “just as considerations of public policy may dictate its expansion, so too will they guard against extending the law of fiduciary obligations too wide.”

25 This process, which is seen in Part 2, will look at existing fiduciary approaches, definitions, and theories (Ch. 3) and the history and purpose of Equity (Ch. 4) to provide a foundation for the operational vision of the fiduciary concept articulated in Ch. 5 and the resultant functional approach developed in Ch. 6.
27 This will be discussed in Ch. 4.
28 Sir J. Balcombe, “Fiduciary Relationships: Litigator’s Dream or Nightmare?” [1996] N.Z.L.J. 402 at 406. Of course, whenever one raises the issue of public policy, it is impossible not to recall the
INTRODUCTION

While certainty is desirable in law for litigants, lawyers, and judges, the absence of precision is not peculiar to equitable constructs such as the fiduciary concept; it is a fundamental element of common law doctrines as well. Thus, the common law often faces the same challenge as that posed by fiduciary applications. The lack of absolute codification within common law systems reflects an inherent flexibility that distinguishes it from the legislative process. The common law’s growth as a result of its own pronouncements and the ability of judges to depart from the principle of *stare decisis* where necessary – such as by distinguishing precedent to account for unique facts or circumstances – demonstrates that the common law has generally been influenced by at least some measure of judicial discretion and flexibility. In this sense, the underlying basis of contemporary common law is at least similar to the practice which arose in English Equity, although the extent to which the former makes use of this discretion and flexibility does differ from that observed in the latter.

3. Some Common Law and Statutory Comparisons

It is not necessary to wade into the recesses of the common law or statute to discover imprecise legal concepts that neither prove to be obstacles to achieving certainty nor create insurmountable instability within the areas of law to which they pertain. In many situations, these hazy notions are central to entire areas, or subsets, of legal jurisdiction.

It may be said, for instance, that the idea of the “best interests of the child” in family law is as conceptually abstract as the fiduciary concept, yet it remains the paramount consideration in child custody and access matters. Although there

---

comments of Burrough J. in *Richardson v. Mellish* (1824), 130 E.R. 294 (Eng. C.P.) at 303 stating that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead from the sound law. It is never argued at all but when other points fail.” In spite of the cynicism underlying this sentiment, the fact of the matter is that many of law’s most ancient and time-proven rules are premised upon public policy arguments that have been tried and tested in numerous cases over the centuries.

A noteworthy exception to this assertion may be seen in the rigidity that was characteristic of the common law during the reign of the writ system, which is what created the need for the genesis of English Equity as a separate jurisdiction. See the discussion in Ch. 4.


Note Bala, “The best interests of the child in post-modern era,” supra note 30 at 1:

There are few legal doctrines that have come to so completely dominate an area of law as the rule that governs disputes related to children – the best interests of the child principle. Leading Canadian precedents, federal and provincial statutes and international treaties are all
have been attempts to codify the considerations that ought to be regarded in individual applications of the “best interest of the child,”32 these are not designed to be universally applicable. Indeed, “best interests” can vary tremendously according to the facts at hand. The practical application of the concept is particularly dependent upon the needs and desires of the individual child concerned, for what is “best” for one child may not be equally suitable for another. For this reason, as the Ontario Child and Family Services Act explicitly states in s. 37(3) before listing the various considerations that ought to be adopted, “[w]here a person is directed . . . to make an Order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant . . .”33 Although the “best interests of the child” cannot be determined in the absence of specific facts,34 this has not hampered its situationally appropriate entrenchment in cases concerning child custody and access.35

Another example of common law imprecision is the notion of the “reasonable person,” which occupies a central position in the area of negligence.36 In order to provide a general standard of care,37 the law of negligence formulated this fictitious character as a yardstick against which the actions of individuals may be weighed. This generalized statement is a necessarily relative concept; it may only be assessed

---

32 Note, for example, the Child and Family Services Act, R.S.O. 1990, c. C-11, s. 37(3), which provides 13 criteria for consideration in individual cases. For a history of the development of the “best interests” test in legislation, see Bala, “The best interests of the child in the post-modern era,” supra note 30 at 12-18.

33 Ibid.

34 Note, for example, the statement by Wilson J.A. in Cooney v. Cooney (1982), 36 O.R. (2d) 137 (Ont. C.A.) at 146, “[t]o make a determination of the custody issue in the absence of an adequate evidentiary foundation on which to apply the ‘best interests’ test must surely constitute palpable error.”

35 Note, however, Bala, “The best interests of the child in the post-modern era,” supra note 30 at 63: “Canada has so completely adopted the best interests of the child principle that it is almost possible to forget that there are other approaches to decision-making about children.”


37 This is consistent with the approach taken by law generally. Note the statement by Oliver Wendell Holmes in The Common Law, (Boston: Little, Brown, 1881) at 108: The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. . . . The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.
in connection to something. It, therefore, requires both standards of measurement and specific circumstances in which those standards may be properly assessed. Absent these, it is of little value. As Green observes:

The man of ordinary prudence can only serve his function as an abstraction. In this way he is a mere caution pointing the jury in as dramatic a way as possible in the direction their deliberations should take. . . . It does exactly what any good ritual is designed to do; its function is psychological. It serves as a prophylaxis. Nothing more should be expected of it.

Notwithstanding these apparent limitations, the “reasonable person” has been of particular assistance to determinations of liability in a wide variety of scenarios. As Fleming notes, “[t]he “reasonable man of ordinary prudence” is the central figure in the formula traditionally employed in passing the negligence issue for adjudication to the jury.” Indeed, the reasonable person’s sustained centrality to the law of negligence exists precisely because of the concept’s generality and conceptual abstraction, not in spite of it.

Imprecision of this type also exists in statutory creations. In the area of corporate law, one can look to the oppression remedy that exists in most Canadian

---

38 This statement is particularly apt in the fiduciary context regarding the “reasonable expectations” criterion of ascertaining the existence of fiduciary relations formulated by La Forest J. in his judgments in Lac Minerals, supra note 10 at 35-36, 39 and Hodgkinson, supra note 11 at 178. This criterion also plays a fundamental role in the New Zealand Court of Appeal’s judgment in DHL International (NZ) Ltd. v. Richmond Ltd., [1993] 3 N.Z.L.R. 10 (New Zealand C.A.) at 23. The standard against which this reasonableness is to be measured is described by Laidlaw J.A. in Arland v. Taylor, [1955] O.R. 131 (Ont. C.A.), leave to appeal refused [1955] O.W.N. 135 (Ont. C.A.) at 141-42 (O.R.):

The standard of care by which a jury is to judge the conduct of parties in a case of the kind under consideration is that care that would have been taken in the circumstances by “a reasonable and prudent man”. . . . [H]e is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. . . . His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence.”

40 L. Green, Judge and Jury, (Kansas City: Vernon Law Book, 1930) at 174.
42 See ibid.: “. . . the judge is obliged, in formulating his instruction to the jury, to convert the problem of conduct into an abstraction sufficiently intelligible to guide them on the legal considerations which they ought to apply in assessing the quality of the defendant’s conduct.”

The generality and conceptual abstraction of the “reasonable person” has also proved useful in Canadian constitutional law, as seen in the test formulated in Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497 (S.C.C.), applicable to equality rights under s. 15(1) of the Canadian Charter of Rights and Freedoms, being Schedule B to the Canada Act, 1982 (U.K.) 1982, c. 11.
43 While the concept of the “best interests of the child” is now reflected in statute – see, for example, the Child and Family Services Act, supra note 32 – it was derived from the common law: see Bala, “The best interests of the child in the post-modern era,” supra note 30 at 8-12.
FIDUCIARY LAW

business corporations acts for the statutory implementation of a broad and unarticulated standard.\textsuperscript{44} Using the definition of oppression from s. 241 of the Canada Business Corporations Act,\textsuperscript{45} which contains virtually the same wording as other Canadian business corporations statutes containing an oppression provision, it may be seen that oppression exists in the following circumstances:

(1) **Application to court re oppression** – A complainant\textsuperscript{46} may apply to a court for an order under this section.

(2) **Grounds** – If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

The CBCA describes who may be oppressed and provides basic *indicia* of oppression, but does not define what it means to be oppressed. Rather, this determination is left to the courts,\textsuperscript{47} which have developed a variety of criteria to assist them in

\textsuperscript{44} For a discussion of the elements of oppression and excerpts from case law, see B. Welling, L. Smith, R. Gold & L.I. Rotman, eds., Canadian Corporate Law: Cases, Notes & Materials, 2nd ed., (Toronto: Butterworths, 2001) at Ch. 8.

\textsuperscript{45} Canada Business Corporations Act, R.S.C. 1985, c. C-44 [“CBCA”].

\textsuperscript{46} A “complainant” is defined in s. 238 of the CBCA, as follows:

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner,

(b) a director or an officer or a former director or officer or a corporation or of any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.


this task, including the “reasonable” and “legitimate” expectations of the allegedly oppressed party.\textsuperscript{48}

Not only is “oppression” as apparently vague as the fiduciary concept, but it also makes use of general precepts which are no clearer than those used in fiduciary law. Moreover, as with fiduciary law, these precepts are only given shape and meaning by the facts of specific cases.\textsuperscript{49} Those same cases also define the scope of the oppression remedy, which has been described by Beck as “beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world... unprecedented in its scope.”\textsuperscript{50} Indeed, the range of remedies that may be imposed where oppression is found is wider\textsuperscript{51} than the expansive measures of relief available for a breach of fiduciary duty, which is one of the chief bases of criticism of the fiduciary concept and one of its primary attractions to lawyers. Curiously, despite its equally broad application and more extensive remedial component, the oppression remedy remains far less maligned than the fiduciary concept.

The point of these illustrations is not to bring the concepts discussed into disrepute. They each perform useful and important functions in their respective spheres of influence. Indeed, jurisprudence in the areas in which they exist would appear rather different had they been infused with uncompromising definitions. Yet, despite the lack of rigidity within each of these concepts, the law has managed not only to use them, but also to build up a body of jurisprudence around them so that the present understanding of what is meant by the “best interests of the child,” the “reasonable person,”\textsuperscript{52} or the “oppression remedy” is better understood today than when these concepts originated.


\textsuperscript{49} The fact-specific nature of the oppression remedy is explicitly noted by Kerans J.A. in \textit{Westfair, supra} note 48 at 38 and in \textit{Ferguson v. Imax Systems Corp.} (1983), 43 O.R. (2d) 128 (Ont. C.A.), leave to appeal refused (1983), 2 O.A.C. 158 (note) (S.C.C.) at 137 [O.R.], where Brooke J.A. states: “[e]ach case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another.”


\textsuperscript{51} Under s. 241(3) of the \textit{CBCA, supra} note 45, the court possesses the discretion to “[m]ake any interim or final order it thinks fit,” with a variety of possibilities listed as being included within this broad mandate.

\textsuperscript{52} Note the comments by Broussard J. in \textit{Foley v. Interactive Datas Corp.}, 765 P.2d 373 (Cal. S.C., 1988) at 410, n. 10: “the concept of reasonableness, like that of bad faith, is one familiar to tort law, and not generally considered so unpredictable or subjective as to justify denial of relief for injuries suffered.”
From these examples, it may be seen that the uncertainty surrounding the use of vague or fluid concepts may be dissipated by the facts relevant to the particular case under consideration. The successful judicial use of these broad concepts also demonstrates that the absence of precise definitions or tests is not fatal to the continuation of an effective legal regime where a legitimate framework exists for arriving at a determination in conjunction with the facts in issue. Nevertheless, criticism surrounding such methodology appears to be much more severe in the fiduciary context than in family law, tort law, or corporate law. Shepherd has stated that “[e]ndemic non-definition of the concept would not be a problem if, like many other broad legal concepts, the fiduciary relationship were understood in some unexpressed, but still exact way.”53 While the lack of definition is not an insurmountable impediment to the use of the fiduciary concept, the ability to understand “fiduciary” as a broad, theoretical, or conceptual construct, which enables it to remain a workable and productive entity, does not lend itself to understanding in an “exact way.” Such an “exactness of understanding” is antithetical to the innate and necessary abstraction of the fiduciary concept.

4. Of Taxonomy, Practicality, and Functionality

The effective and non-controversial use of legal concepts such as the “best interests of the child,” the “reasonable person,” and the “oppression remedy” suggests that the concern surrounding the fiduciary concept’s lack of certainty is premised largely upon its resistance to taxonomy rather than as a result of any problems inherent in the concept itself.54 Birks, for one, has described the fiduciary concept as “a blot on our law, and a taxonomic nightmare.”55 Rather than asking why the fiduciary concept is not as predictable as other legal constructs – and then criticizing it for its lack of certainty – perhaps it should be asked whether it is necessary to supplant existing fiduciary analysis with a fiduciary taxonomy.56 Is Birks correct when he states “[w]ithout good taxonomy and a vigorous taxonomic

55 Ibid. at 18.
56 Note the comments made in D.A. De Mott, “Fiduciary Obligation Under Intellectual Siege,” supra note 1 at 497:

Used to resolve difficult questions, argument-by-taxonomy seems an example of legal formalism at its worst. That is, taxonomic arguments are mechanistic, in that the result follows inexorably from the initial classification, follows as inexorably as the ticking of a mechanical clock that is wound at regular intervals. Taxonomic argument presupposes, additionally, a closed system of argument that forecloses reference to any factors external to the scheme of categorization. . . . Taxonomy furnishes starting points but not answers. The evaluation of fiduciary norms requires much more than simple taxonomy can provide.
debate the law loses its rational integrity.”  

Perhaps we should heed instead the words of E.W. Thomas J., who says that the problem with fiduciary law “lies not in the concept of the fiduciary relationship itself, but in the quest of judges, lawyers and academics for a precision which the law is incapable of delivering.” The fact that the quest for a fiduciary taxonomy continues more than 300 years after the initial appearance of the fiduciary concept in English law should send a message to those who seek this alleged Holy Grail. If we are willing to step back from this seemingly insatiable legal thirst for taxonomy, we can discover that much is already known about the fiduciary concept. To appreciate this, we need to take time to contemplate what is known rather than engaging in superficial criticisms that offer no substantive assistance to fleshing out what the fiduciary concept entails.

Fiduciary principles, where they appear, govern the judicial decision-making process much like principles of contract or tort, but with greater elasticity and dependency on the facts. Uncovering the governing principles of fiduciary law provides it with greater conceptual certainty and, hence, predictability. Engaging in this process also serves to quell existing criticism while retaining the fiduciary concept’s inherent flexibility. The flexibility of fiduciary principles is one of the fiduciary concept’s most positive attributes. Thus, rather than being an impediment, the flexibility of fiduciary principles is largely responsible for the fiduciary concept’s significant social and legal utility.

This significant social and legal utility has sometimes served as a lightning rod for extending the use of the fiduciary concept beyond its conceptual limits. It cannot be overemphasized that fiduciary principles should only be used where their application is consistent with the fiduciary concept’s underlying purpose: to maintain the integrity of socially and economically valuable or necessary relationships of high trust and confidence that are essential to the effective interdependent functioning of society. Restricting the fiduciary concept’s application is doubly important because of what Sopinka and McLachlin JJ. refer to in Hodgkinson v. Simms as “the Draconian consequences of the imposition of a fiduciary obligation.” Simply put, not every relationship is fiduciary and not every element of a fiduciary relationship is necessarily fiduciary. Particular attention must be paid to avoiding unreflective or mechanical applications of fiduciary precedents that fail to account for distinctions that may exist between the respective facts in issue.

---

59 Note Walley v. Walley (1687), 1 Vern. 484, 23 E.R. 609 (Ch.), which is discussed in Ch. 3.
60 This is discussed further in articulation of the operational vision of the fiduciary concept in Ch. 5.
61 Hodgkinson, supra note 11 at 219.
62 Ibid.
5. Conclusion

This book’s purpose is to clarify and contextualize the fiduciary concept, which is rather ironic in light of the fact that pleadings alleging breaches of fiduciary duty are now rather commonplace. Judgments routinely make pronouncements on the existence of fiduciary relationships, and judges, practitioners, and academics regularly speak of the fiduciary concept. Absent from these pleadings and judgments, however, is an operational vision of the fiduciary concept that draws upon its historical and theoretical foundations and a functional approach that implements such a vision. These omissions often leave judicial discussion of things fiduciary wanting.

To remain effective and viable, the fiduciary concept needs to be freed from the constraints of unprincipled and arbitrary precedents that have hampered its development. In order to foster an appreciation of the fiduciary concept befitting the needs of contemporary law and social policy, it is necessary to uncover its basic principles. These may then be fleshed out to reveal the cornerstones of an operational vision of the fiduciary concept and to subsequently establish a doctrinally sound and functional approach upon which judicial decision-making and academic commentary may appropriately rely.

With an effective working theory of the fiduciary concept, separating the fiduciary “wheat” from the non-fiduciary “chaff” should no longer be the bewildering task it sometimes appears to be. Certainly, a continuation of the status quo is neither sufficient to accomplish this task nor meet the needs of an increasingly sophisticated and complex web of fiduciary jurisprudence. Abandoning existing practices respecting implementation of the fiduciary concept has been articulated by Sealy, one of the early commentators on the subject, who has said that “[n]either the ossification of principle endemic in the English approach nor the seeming abandonment of principle seen in the rulings of courts elsewhere appears to be an ideal starting point for the development that the twenty-first century will need.”

Developing an operational vision of the fiduciary concept and a functional approach for its implementation should do for the fiduciary concept what Thomas Wood sought to accomplish in 1722 for what he regarded as the unorganized state of English law, namely “to Sort, or put in some Order, this Heap of Good Learning.”

The primary focus of this book is the impact of fiduciary law in Canada, a jurisdiction where the fiduciary concept is most strongly and broadly construed. Indeed, in the last 30 years the Supreme Court of Canada has considered the application of the fiduciary concept to such diverse contexts as the interactions

---

64 T. Wood, An Institute of the Laws of England, 3rd ed., (London: Nutt and Gosling, 1722, reprinted, New York: Garland, 1979) Preface, at i. It should be emphasized, however, that it is not necessary to create a taxonomy to sort out the fiduciary concept or to put it into order, but only to elucidate the principles and parameters of the fiduciary concept that allow for its fact- and situation-specific application.
between a corporation and its directors and senior officers;\(^\text{65}\) franchisor and franchisee;\(^\text{66}\) mayor and city;\(^\text{67}\) federal government and Indian band;\(^\text{68}\) custodial parent and non-custodial parent;\(^\text{69}\) limited partners;\(^\text{70}\) senior mining company and junior mining company;\(^\text{71}\) solicitor and client;\(^\text{72}\) doctor and patient;\(^\text{73}\) abusive father and abused daughter;\(^\text{74}\) and financial advisor and client.\(^\text{75}\)

Although Canada may be poised at the forefront of fiduciary jurisprudence,\(^\text{76}\) all fiduciary cases share a common ideological and historical base. Accordingly, case law from Australia, England, New Zealand, and the United States will also be examined for its important contributions to the understanding of the fiduciary concept. As will become evident, not all of these jurisdictions share common views of the function or application of the fiduciary concept, either generally or with respect to particular forms of interaction. Looking to these jurisdictions, however, provides important points of comparison and contrast – as well as valuable commentaries by judges, academics, and practitioners – from which to gather further information about the fiduciary concept. All of these elements – case law, commentaries, and comparisons – combine to form the pool of knowledge on which the commentary herein is constructed.

The operational vision of the fiduciary concept established in Chapter 5 and its functional implementation in Chapter 6 provide concrete answers to many of the questions that continue to surround the fiduciary concept. Thus, they provide a solid basis for the better informed and doctrinally valid application of the fiduciary concept. The book links together the fiduciary concept’s theoretical and practical elements in a manner that is largely absent from existing fiduciary jurisprudence. Additional focus on the fiduciary concept’s practical implementation – including its application to two distinct forms of fiduciary interaction, the nature of a plaintiff’s burden of proof, the defences available to putative fiduciaries, and some of the measures of relief available once a breach of fiduciary duty is found to exist – makes the book a useful reference even if the theory articulated does not entirely

\(^{65}\) CanAero, supra note 18.


\(^{71}\) Lac Minerals, supra note 10.

\(^{72}\) Canson, supra note 21.


\(^{74}\) M. (K.), supra note 18.

\(^{75}\) Hodgkinson, supra note 11.

\(^{76}\) For either positive or negative reasons, depending on one’s perspective, or simply from the sheer volume of fiduciary applications evident in Canadian jurisdictions.
meet with favour. For this reason, this book will be of benefit to those in any jurisdiction where the fiduciary concept is used.