

*LAC MINERALS LTD. v.
INTERNATIONAL CORONA RESOURCES LTD.*

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Fiduciary relationship in commercial dealings was the expected highlight of LAC Mineral Ltd. v. International Corona Resources Limited, and many awaiting the decision were disappointed by division in the Supreme Court of Canada and the uncertainty as to the consequent outcome. Breach of confidence was why Lac lost, and compelling Lac to hand over the gold mine to Corona met Corona's "reasonable expectations". The remedy was something new. A bare majority found no fiduciary relationship on the facts, but a minority member delved into theory—such a relationship exists when "reasonable expectations" of a party to dealings are not met. What the court decides as a whole on the subject of this relationship can and ought to be made clear, but in view of the recent thinking of the British Columbia Court of Appeal as to the proper applicability of the fiduciary relationship there is more debate yet to come.

On s'attendait à ce que la décision rendue par la Cour suprême du Canada dans l'affaire LAC Minerals Ltd. v. International Corona Resources Limited traite surtout des rapports fiduciaires dans les transactions commerciales et ceux qui comptaient sur cette décision pour clarifier la situation ont été déçus de voir la cour divisée et, par conséquent, le résultat peu sûr. C'est pour abus de confiance que Lac a perdu et en forçant Lac à rendre la mine d'or à Corona, la cour répondait aux "attentes raisonnables" de Corona. Ce genre de recours était nouveau. Il a été décidé à une faible majorité que les faits ne présentaient pas de rapports fiduciaires, mais un représentant de la minorité s'est lancé dans une longue analyse théorique suivant laquelle de tels rapports existent quand la transaction ne répond pas aux "attentes raisonnables" d'une des parties. La décision générale du tribunal sur les rapports fiduciaires dans cette affaire peut et devrait être éclaircie, mais étant donné la façon dont la Cour d'appel de Colombie-Britannique a considéré récemment l'application des rapports fiduciaires, la discussion est loin d'être close.

Introduction

A. The Backcloth

The decision in *LAC Minerals Ltd. v. International Corona Resources Ltd.*¹ had the promise of being something of a milestone in the doctrinal development of the area of private law with which it appeared to be principally concerned, namely, fiduciary relationships. The law on this

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¹[1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14, 69 O.R. (2d) 287, 36 O.A.C. 57, 44 B.L.R. 1, 26 C.P.R. (3d) 97. Subsequent page references will be to the Supreme Court Reports and the Dominion Law Reports only.

subject in Canada has been expanding at an almost incredible rate within recent years, and before the enthusiasm of the litigators for a newly-found clutch of consequent remedies and the compliance of the courts caused the concept of fiduciary relationship and fiduciary duty to become something of a catch-all of liability, it seemed essential that the Supreme Court of Canada put the whole thing into perspective. At least a steady hand on the tiller was needed, both to give direction and to elucidate the meaning of "fiduciary". The court had not previously had reason to give judgment on this equitable notion, and on this occasion both the trial court and the appeal court below had declared a fiduciary relationship and consequent fiduciary duty to have arisen between two parties in a commercial setting. Few would have argued that a fiduciary relationship cannot exist between two parties in a commercial setting—the High Court of Australia had discussed that matter very fully only six years before in *Hospital Products Ltd. v. U.S. Surgical Corporation*,² carrying its thinking further a year later in *United Dominions Corporation Ltd. v. Brian Proprietary Ltd.*³—but no one knew what the Supreme Court would describe as the properly conceived character and role of the fiduciary relationship, nor how it would define the duties to which such a relationship will give rise.

Lower courts in Canada had already generalized the applicability of the fiduciary relationship and duties considerably beyond what had been the point condoned in English, Australian and New Zealand courts. Some overseas commentators⁴ had suggested that Canadians appear to be using the fiduciary relationship as a means of enforcing good faith in contract, and they hint obliquely that, instead of the fiduciary relationship remaining something which occurs between those parties only who are in a trustee/beneficiary type alliance (the justification for the associated proprietary remedy of constructive trust), it is losing doctrinal shape in Canada as it is pressed into service to provide remedies, without considered thought for what "fiduciary relationship" historically has meant. *Standard Investments Ltd. v. C.I.B.C.*⁵ was considered to have been wrongly decided because, instead of one party having undertaken to act, within a certain circumference of activities, solely for the benefit of another and *thereby* becoming subject to the duty of loyalty (or selfless service) within that circumference, the

² (1984), 156 C.L.R. 41, 55 A.L.R. 417, 58 A.L.J.R. 587. R.P. Austin, *Commerce and Equity—Fiduciary Duty and Constructive Trust* (1986), 6 Oxford J. Legal Studies 444; D.S.K. Ong, *Fiduciaries: Identification and Remedies* (1986), 8 U. of Tasmania L. Rev. 311.

³ (1985), 157 C.L.R. 1, 59 A.L.J.R. 676.

⁴ P.D. Finn, *The Fiduciary Principle*, in T.G. Youdan (ed.), *Equity, Fiduciaries and Trust* (1989), p. 1; R.P. Austin, *The Corporate Fiduciary: Standard Investments Ltd. v. C.I.B.C.* (1986-87), 12 Can. Bus. L.J. 96. See also, P.D. Finn, *Good Faith, Fair Dealing and Fiduciary Law in Canada*, in *The Continuing Legal Education Society of B.C., Fiduciary Obligations* (19 April, 1989).

⁵ (1985), 22 D.L.R. (4th) 410, 52 O.R. (2d) 473 (Ont. C.A.).

Nova Scotia take-over investors on the one side and the bank on the other each had competing commercial interests. Each was pursuing personal commercial goals. The bank may have acted in a manner other than with good faith, but this did not make the bank—so it was said—a party who owed to the other the fiduciary duty of loyalty. Neither the trial court nor the appeal court had suggested that, while the relationship in general of the parties was that of non-fiduciaries each legitimately contemplating self-interest, there lay within that generality a discrete and circumscribed area where a fiduciary duty of loyalty could and did arise. That was not, therefore, an explanation of why the fiduciary rule was considered appropriately applied in this case. Nor were the bank and the would-be take-over investors engaged in a recognizable joint venture.

The Ontario Court of Appeal in *Standard Investments* took an all or nothing approach⁶ towards the question whether a fiduciary relationship arose, and this seemed to have occurred again when the Court of Appeal gave judgment in *Lac Minerals*. Not only had the parties in the latter case competing commercial interests, but, though combined efforts in pursuit of a common goal had been proposed, no scheme of proposed joint venture activities had emerged when talks broke down. What, then, determined the scope of the particular fiduciary relationship that was held to have existed between Lac and Corona? And how would the Court of Appeal judgment apply when others in a commercial setting are in the early stages of negotiations that are ultimately broken off? Was it the existence of a trade practice, so found, that made all the difference in the *Lac* case? Those were some of the questions that were posed. There was no doubt that the commercial world in common law Canada was anxiously awaiting the judgment of the Supreme Court of Canada. Fiduciary status was by no means principally an academic point. Commercial law judges in England, Lord Justice Scrutton and Lord Diplock among them, had long made it clear that in their view the constructive trust as part of the law of trusts had no place in the halls of trade and commerce, where business persons must know at once and with reliable certainty what are their rights and their duties. Otherwise, the judges had said, commerce cannot be sustained as we know it.

This was the backcloth to the *Lac* decision in the Supreme Court.

B. *The Facts*

The basic facts of this case are not only short to tell, they are surely well-known so high profile was the litigation.

Lac Minerals Ltd. is a senior mining company, and International Corona Resources Ltd., at the time of these events, was a junior listed only on the Vancouver Stock Exchange. As the result of a geological exploration

⁶ I.e., either the entire factual relationship is fiduciary, or there is no such relationship at all.

program carried out in 1980 by the company geologist on its existing land holding in the Hemlo area of northern Ontario, Corona obtained core which led the geologist to form the view after examining assay results that the neighbouring land, owned by a Mrs. Williams, should be obtained by Corona. It seemed very likely that the Williams property would be significantly gold bearing. Corona decided to acquire this property if it could, and requested a prospector who knew the Williams property well to act for Corona in acquiring it. However, Corona needed to attract a financial supporter, and it therefore released some news of the assay results and its research findings to the Vancouver Exchange which published this information in its newsletter. Senior Lac Minerals officers read the newsletter, and arranged with Corona to visit the Corona property. During this visit assay results, sections, maps, and a drill plan were shown to the visitors, and Corona's geologist told them of his theory as to the gold-bearing nature of the Williams property. On their return to Toronto the visitors at once began to assemble all the information available publicly and in the Lac files on the Williams property. Claims were staked by Lac in the neighbouring area. A further meeting between Lac and Corona followed, and Lac was told by Corona, though without details, that the latter was actively interested in staking claims in the Williams property. Lac proposed that the two companies work together, and alternative propositions as to the form this co-operation might take were put forward by Lac. Correspondence ensued as to how Lac might assist Corona to finance the acquisition, and at a further meeting, Lac having again urged action by Corona, the latter told Lac that it had somebody attempting to acquire the property. Confidentiality as to the assay and other information given to Lac was not discussed.

Shortly after this last meeting Corona's prospector, who had earlier made an oral offer, was told by Mrs. Williams that she had received another offer. This other offer was in fact from Lac, and it was successful. However, the first Corona learned of Lac being the other offeror was after Mrs. Williams' solicitor told Corona of the accepted offer. Corona asked Lac for the "return" of the Williams property, but no agreement was reached, and Corona then put the matter into the hands of a solicitor. Later it entered into a joint venture with Teck Corporation, wherein Teck effectively took Lac's place.

Contract, breach of confidence, and breach of fiduciary relationship were pleaded in the trial court, and the liability of Lac was founded on the last two heads.⁷ It was found as a fact that some of the information Lac obtained from Corona went beyond what had been made public by Corona in the attempt to obtain financial support, and that Lac was aware of a practice in the mining industry that when information of the kind given by Corona to Lac is released to another that other will not use

⁷ The claim in contract was dismissed because no contractual agreement had been concluded between the parties.

that information to the detriment of the confiding person or company. The credibility of Lac's central witness, as to the understanding with which the information was divulged and received, was not preferred to that of Corona's witnesses, and this was to undermine Lac's appeal in the Ontario Court of Appeal and in the Supreme Court of Canada.

The trial court⁸ ordered Lac as a constructive trustee to hand over the mine to Corona, and imposed a lien upon the mine to secure monetary reimbursement to Lac for the purchase payments made to Mrs. Williams and subsequent improvements on the property. Damages were calculated by the trial court in the event that the proprietary remedy was rejected on appeal. However, the Court of Appeal⁹ upheld the liability findings of the trial court, and the remedy imposed. The result of the further appeal by Lac to the Supreme Court was also unsuccessful.

I. The Decision of the Court

It has been said that the Supreme Court split in every direction, and that what the case decides will be the subject of debate for years to come. Some have said that the decision has given a further boost to the already significant growth of the law of fiduciary relationships, while others have said the only conclusion to be drawn from the case is that confidentiality agreements are essential in future commercial relationships. There is no doubt that there is justification in these and other remarks like them, but in the writer's opinion there is a good deal more agreement between the four judgments delivered in the five person court (McIntyre J. concurred in Sopinka J.'s opinion) than might at first appear, and it is possible to determine the *ratio decidendi* of the decision without too much difficulty.

We turn first to the ratio. All five members of the court (also sitting were Lamer, Wilson and La Forest JJ.) were in agreement that Lac had utilized the information obtained from Corona in determining to acquire the mine for its own exclusive benefit, and that, having so acquired it, Lac was subject to a court ordered remedy. Three members of the court agreed that Lac should make *in rem* restitution of the mine, and imposed a constructive trust obligation upon Lac, subject to its right to be reimbursed the purchase moneys paid to Mrs. Williams and the cost of the improvements it had introduced in the Williams property since acquisition. The minority (Sopinka and McIntyre JJ.) would have allowed Lac to keep the mine, but required it to pay Corona compensation, using the trial judge's figures for the assessment of damages, on the supposition that had the proposed collaboration gone forward to conclusion Lac and Corona would each have had a fifty per cent interest in the mine.

⁸ (1986), 25 D.L.R. (4th) 504, 53 O.R. (2d) 737 (Ont. H.C.).

⁹ (1987), 44 D.L.R. (4th) 592, 62 O.R. (2d) 1 (Ont. C.A.). The court sat five judges for this appeal.

The *ratio decidendi* of the case includes the express finding by a majority of the court (McIntyre, Lamer and Sopinka JJ.), thereby disagreeing with the trial judge and the Ontario Court of Appeal, that no fiduciary relationship between Lac and Corona came into existence. Though they do not appear to be in agreement as to when and why it arose, the minority (Wilson and La Forest JJ.) were of the opinion that such a relationship did come into existence, and they considered the appropriate remedy for Lac's breach of its consequent fiduciary duty was, again, *in rem* restitution. So the minority would have ordered Lac to hold the mine as a constructive trustee on this ground also.

Extensive judgments were given by La Forest J. and by Sopinka J., in the latter of which McIntyre J., as previously mentioned, concurred. Wilson J. gave a short judgment, principally in order to explain why she found there to be a fiduciary relationship as the prime basis of liability, and why a constructive trust remedy was appropriate for breach of confidence and of fiduciary duty, while Lamer J. announced with whom he was concurring on each of breach of confidence, fiduciary relationship, and appropriate remedy. He agreed there was breach of confidence, but associated himself with McIntyre and Sopinka JJ. on the absence of a fiduciary relationship, and with Wilson and La Forest JJ. on *in rem* restitution (constructive trust) as the appropriate remedy for the breach of confidence.

II. Breach of Confidence

It was on the ground of liability for breach of confidence that Lac's appeal failed. There was no disagreement between the members of the court as to the established law concerning breach of confidence. Both La Forest J. and Sopinka J. were agreed that, as Megarry J. had explained in *Coco v. A.N. Clark (Engineers) Ltd.*,¹⁰ when commercial information of a confidential nature is disclosed by one party to another in circumstances that would lead the reasonable business person to appreciate that the information is confidential and to expect that the recipient would respect that confidence, the confidant is precluded from using the information without the consent of the confider for the confidant's own benefit. When confidentiality and actual or constructive knowledge of the confidentiality by the recipient are established, the burden of proof is upon the confidant to show that he might nevertheless use the information for personal benefit, and the burden is a heavy one. It is no defence that the information employed was part available in the public arena and part confidential. If, as in *Seager v. Copydex Ltd.*,¹¹ the information used is mixed, the mixed source material will lead to the liability of the confidant just as if the information were entirely confidential. Equity takes the same approach to "mixed" information as it does to the fiduciary who argues that his gain at the expense of

¹⁰ [1969] R.P.C. 41 (Ch. D.).

¹¹ [1967] 1 W.L.R. 923, [1969] 2 All E.R. 718 (C.A.).

the beneficiary did not result from any abuse of the conflict situation in which he was then placed. Who knows the mind of man, says equity. Consequently mixed source material cannot be used; it is not to be used, for instance, so as to give a headstart over competitors to the confidant.

Lac argued essentially that the three-part test of breach of confidence (confidentiality, realization of that quality by the recipient, and not employing it to the detriment of the confider) was not met on the facts. Evidently the law was sufficiently settled as to be beyond dispute. Once the appellant's arguments on the facts were rejected, it remained only for the court to determine remedy.

III. Remedy: Constructive Trust

Both Sopinka J. and La Forest J. were agreed that in Canada a fiduciary relationship does not have to be established in order for the court to impose a constructive trust. The remedy is available in any appropriate circumstances when there has been unjust enrichment. But, though both members recognized that an *in rem* (or proprietary) remedy will be less often granted than an *in personam* (or personal) remedy, and that an award of damages is the available personal remedy, they differed on which was appropriate in the circumstances here.

A. Appropriate Remedy: Specific Restitution or Damages?

Sopinka J., giving a minority opinion on this question of remedy, was of the view that, since breach of confidence has no firm base in any one of contract, equity or property, it cannot be said that the confidant has acquired property belonging to the confider when he (the confidant) acquires confidential information. The judge considered this relevant in determining the appropriate remedy, because a "constructive trust is *ordinarily* reserved for those situations where a right of property is recognized".¹² These words do not deny, of course, that a constructive trust *can* be employed to create a proprietary right where no existing or enduring property right in the plaintiff is an established fact in the unjust enrichment situation,¹³ but in Sopinka J.'s opinion breach of confidence is not a head of liability where *in rem* remedy is invoked. Perhaps it is the lack of a firm "jurisdictional basis"¹⁴ for breach of confidence which has led, he suggests, to there being virtually no case support for a constructive

¹² *Supra*, footnote 1, at pp. 615 (S.C.R.), 75 (D.L.R.). (Emphasis added).

¹³ If, to the contrary, that was Sopinka J.'s view, it was entirely met by La Forest J. speaking for the majority on the remedy point. La Forest J. warns us (*ibid.*, at pp. 676-678 (S.C.R.), 50-52 (D.L.R.)) not to misread the statement that the constructive trust "recognizes a right of property", as the text writers have put it. The "recognition" may either be an acknowledgment of an existing or enduring property right in the victim of the unjust enrichment, or the creation of a property right as the appropriate remedy.

¹⁴ *Ibid.*, at pp. 615 (S.C.R.), 75 (D.L.R.).

trust remedy when there has been such a breach. And he agrees with that state of the law.

To the present writer's mind, however, this line of reasoning is not particularly persuasive. It appears motivated by some other consideration, and indeed this other consideration later appears. With breach of confidence, the judge believes, "the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed",¹⁵ and this object is "generally achieved"¹⁶ by an award of damages rather than a restitutionary remedy, where the gain of the defendant, and not the loss of the plaintiff, is the concern.

Sopinka J. clearly would have preferred to have been able to consider an accounting of profits, that is an equitable personal remedy that *does* consider the gain the defendant has made, but he did not define why he thought an equitable accounting remedy preferable to an award of damages.¹⁷ La Forest J., however, noted that on the facts of this case restitution of gain and an accounting would produce the same result, and it may be that Sopinka J. was underlining that accounting would have allowed Lac's entire gain to be the subject of recovery. That is, regardless of the aborted collaboration between Lac and Corona, a factor which he considered relevant for the purposes of compensatory damages for loss, the court could still leave Lac with ownership of the mine, but require its entire value (not merely half the value) to be the subject of monetary recovery to Corona. However, as it was, Sopinka J. said that of the two remedies pleaded, *in rem* restitution and damages, he considered the latter more appropriate. He also thought it more fair than *in rem* restitution, because when there is no determination of just how much private information was mixed in with the public information, the far-reaching character of a proprietary remedy is an over-reaction.

It is a fact that, as part of the majority in the court on the fiduciary relationship point, Sopinka J. concluded that Lac was not a fiduciary *vis-à-vis* Corona. But to the writer's mind this was not a consideration in the judge's

¹⁵ *Ibid.*, at pp. 618 (S.C.R.), 76-77 (D.L.R.).

¹⁶ *Ibid.*

¹⁷ La Forest J. explained an accounting of profits this way: "usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense"; *ibid.*, at pp. 671 (S.C.R.), 46 (D.L.R.). The word "usually" should not be overlooked. The plaintiff in *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.), sued for an accounting of profits and succeeded, though the defendants' disputed acts had produced gain for themselves and also gain for the C.W. Phipps estate. No loss was sustained by the estate; for one thing it had no legal power to acquire the assets the defendants had acquired. The success of the plaintiff was due to the fact that the defendants' gain was nevertheless at the plaintiff's expense.

evaluation of whether the proprietary remedy was appropriate. There is no suggestion that only for breach of fiduciary duty is it appropriate that the unjustly enriched party hand over his improper gain, regardless of whether the claimant suffered loss. In the judge's opinion it is simply that precedent (English and Australian)¹⁸ establishes that breach of confidence has generally led to compensatory damages, and on the facts, speaking on this point for the minority, he considered that there was no justification for departing from that precedent here.

La Forest J., speaking for the majority on remedy,¹⁹ concluded that what was appropriate here was restitution to Corona of gain that Lac had acquired at Corona's expense, and not compensation of Corona for loss it had suffered. In his opinion, and there is no evidence Sopinka J. would have disagreed on this point, there is a range of remedies that may be applied for breach of confidence—injunction against continued improper use, accounting of profits (the defendant's gain in monetary terms), compensatory damages (rather than taking away the disputed property from the defendant),²⁰ and the constructive trust (for specific property obtained from misuse of the information). La Forest J. thought that the last was the most appropriate. Compensation for loss, certainly as Sopinka J. would have calculated damages, would merely put Corona in the position in which it would have been had the collaboration gone through to an intended joint venture agreement. Deterrence is required against the misuse for self-advantage of confidential information, said La Forest J., and no major player in the market would be deterred if he knew the alternative was simply the equal sharing joint venture which would have come about had he not breached the confidence.

Once the right to relief has been established, he says, "the focus of the enquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant".²¹ Deterrence of conduct which is in breach of "accepted business morality"²² and of "bargaining in good faith"²³ protects "the expectations of the parties",²⁴ and was one reason for recognizing such a right in Corona.

¹⁸ *Ibid.*, at pp. 618 (S.C.R.), 76-77 (D.L.R.); see *Dowson & Mason Ltd. v. Potter*, [1986] 1 W.L.R. 1419, [1986] 2 All E.R. 418 (C.A.); *Talbot v. General Television Corp. Pty. Ltd.*, [1980] V.R. 224 (S.C.).

¹⁹ Though Wilson J. added a paragraph of her own comment.

²⁰ *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, (1966), 57 D.L.R. (2d) 557, which imposed a constructive trust upon the profits of an employee who had gained from breach of confidence, was adopted by La Forest J. (*supra*, footnote 1, at pp. 675 (S.C.R.), 49 (D.L.R.)), but distinguished by Sopinka J. (*ibid.*, at pp. 617 (S.C.R.), 76 (D.L.R.)) as fraudulent conduct in breach of an employment contract term. This constituted "very special circumstances" (*ibid.*).

²¹ *Supra*, footnote 1, at pp. 678-679 (S.C.R.), 52 (D.L.R.).

²² *Ibid.*, at pp. 672 (S.C.R.), 47 (D.L.R.).

²³ *Ibid.*

²⁴ *Ibid.*

When in particular the conduct constitutes wrongdoing, the moral quality of the defendant's act is a legitimate concern of the court, even though in weighing this element the focus there is more upon denial of gain to the defendant than in recognizing a property right in the plaintiff.

However, in this case *La Forest J.* considered that there was yet another factor. This went beyond the fact that *Lac* was actively seeking to acquire the *Williams* land when it approached *Mrs. Williams* with its own secret offer, and that its own offer, if successful, would deprive *Corona* of the land. The mine in question was unique. It was that specific property—who was to own that mine and so be free to exploit the extent of its largely unknown and, given future currency fluctuations, inflation and world markets, incalculable potential—that was at issue. Monetary compensation did not meet the problem, however loss to *Corona* or gain to *Lac* was determined. Moreover, *in rem* restitution made such calculations unnecessary; the wealth of the mine, however extensive it was, became *Corona's* property, subject to adjustments for the price paid by *Lac* and the improvements.

Looking back over the differences between *Sopinka* and *La Forest JJ.*, therefore, it is evident that they are not in any real sense doctrinal, but concern the factual question of which remedy was appropriate in the circumstances. Where the doctrinal treatment may be said at some later date to have significance for the *ratio decidendi* of the case is in connection with *La Forest J.*'s opinion that a remedy may become appropriate where the unjustly enriched party has acted in breach of "accepted business morality", has not bargained "in good faith", and the court consequently seeks to protect "the expectations of the parties". As we shall see when considering fiduciary obligations, *La Forest J.* conceived that "the law of fiduciary obligations can operate to protect the reasonable expectations of the parties",²⁵ but he also considered that breach of confidence resulting in the confidant's improper gain, and breach of fiduciary obligation plus gain, are intertwined as related circumstances of unjust enrichment.

Here *La Forest J.*'s "reasonable expectations" analysis of the beneficiary's relationship with his fiduciary, on which the majority of the court is silent, appears to flow over into the choice of remedy issue, when *La Forest J.* is among the majority. Whether, in agreeing with *La Forest J.* on the remedy issue, *Wilson J.* and in particular *Lamer J.* intended to go this far, is very speculative.²⁶ In the present writer's view they did

²⁵ *Ibid.*, at pp. 665 (S.C.R.), 42 (D.L.R.). "The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences.", *ibid.*, at pp. 672 (S.C.R.), 47 (D.L.R.).

²⁶ *Lamer J.* joined with *Sopinka* and *McIntyre JJ.* on liability (breach of confidence, but an absence of fiduciary relationship), but crossed over for the purposes of remedy and joined *Wilson* and *La Forest JJ.* (breach of confidence *and*, in their view, of fiduciary relationship).

not intend to go so far. The ground of liability (including the nature of that liability) is an issue distinct from appropriate remedy. There is no reason to believe that either Wilson J. or Lamer J. intended to treat liability and remedy other than separately. However, what long-term significance this switch of opinion as between his colleagues' views by Lamer J. will have for Canadian jurisprudence of the future only time will tell. One senses that it may be the door through which lower courts that are so inclined will attempt to bring the reasonable expectations thinking of a minority judgment in *Lac Minerals* into the mainstream of Canadian fiduciary relationships theory.

B. *The Theory of this Trust*

In the judgment of Sopinka J. the theory of constructive trust (the majority's chosen remedy) is only touched upon. He notes that this device has been "sporadically employed"²⁷ in Canada to remedy unjust enrichment "in the context of a pre-existing special relationship between the parties",²⁸ but what he means to imply by this is not clear. In the preceding paragraph he mentions that in Canada the constructive trust has been acknowledged as a possible remedy in unjust enrichment situations where no relationship of a fiduciary nature exists, and he does not go on to suggest that without at least a "special relationship" the constructive trust cannot be invoked.²⁹ So it would seem that he is merely drawing attention to the fact that between Lac and Corona there was in his analysis no fiduciary or special relationship, and that in his opinion this is another strike against the appropriateness of constructive trust remedy. Earlier the writer observed that Sopinka J. also said that "ordinarily" the proprietary remedy is imposed where the claimant has an existing or enduring property right in the disputed asset, but again it is not likely that the judge is doing anything else than demonstrating how out of the ordinary would be the imposition of such a remedy here. Corona, of course, had never had a proprietary interest in the goldmine when it sued to have the mine transferred to its ownership.

In short, Sopinka J. neither advances nor retards the theory of constructive trust. His purpose, in discussing the matter at all, seems to be to drag his foot as to the suitability of a constructive trust remedy in the particular circumstances. His prime concern, as he makes clear at the commencement of his judgment in citing Dawson J. in *Hospital Products Ltd. v. U.S. Surgical Corporation*,³⁰ is that proprietary remedies not be

²⁷ *Supra*, footnote 1, at pp. 616 (S.C.R.), 75 (D.L.R.).

²⁸ *Ibid.*

²⁹ He may in part have been led to this comment by footnote 41 of the present writer's work on *The Law of Trusts in Canada* (2nd ed., 1984), p. 387, and the supporting text.

³⁰ *Supra*, footnote 2. Cited by Sopinka J., *supra*, footnote 1, at pp. 596 (S.C.R.), 61 (D.L.R.).

too readily employed in commercial disputes. Effectively, he is taking a neutral stand on any theoretical discussion.

La Forest J., on the other hand, is in full-cry in responding to what he sees as Sopinka J.'s implied limitations upon the constructive trust. First, the constructive trust remedy does not require any "special relationship"³¹ between the parties, and *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*³² he continues, shows how fictional indeed is the requirement of a fiduciary relationship. Secondly, with the constructive trust, he says, the court can both acknowledge an existing or enduring property right of the claimant, or create a property right. The present writer has alluded earlier to this argument of La Forest J.; let it be added to those remarks that the Supreme Court must now be taken to have confirmed the adoption by Bayda J.A. for the Saskatchewan Court of Appeal in *Re Kenron Homes*³³ of the distinction made by Goff and Jones³⁴ between the pure proprietary remedy and the restitutionary proprietary remedy. In the writer's opinion both of La Forest J.'s points—no fiduciary or special relationship is required, nor need there be any existing or previous property right of the plaintiff—must from henceforth be regarded as the law of common law Canada. The doubts surrounding *Pettikus v. Becker*³⁵ on the first point, and *Re Kenron Homes* on the second are surely put to rest.

Thirdly, La Forest J. underlines that in "the vast majority of cases"³⁶ to award a proprietary remedy is inappropriate. There has to be a justification for granting the victim of unjust enrichment "the additional rights that flow from recognition of a right of property".³⁷ Such rights are well-known, of course; priority of the claimant in the bankruptcy of the enriched party, and the recovery of increased value in the disputed asset or of the specific asset itself when it is unique of its kind. What that justification, for the conferment of those extra rights, might be depends obviously on the facts of the particular case, and La Forest J. found no occasion for discussing justification other than in the context of the *Lac Minerals* facts. But at least the stress in this judgment is upon the infrequency of the circumstances in which the constructive trust can properly be imposed. This underlines that such a trust is a remedy (as opposed to a type of trust) and that it is proprietary (as opposed to a synonym for the obligation to account).

³¹ *Ibid.*, at p. 675 (S.C.R.), 49 (D.L.R.).

³² [1981] Ch. 105, [1979] 3 All E.R. 1025 (Ch. D.). Discussed by La Forest J., *ibid.*, at pp. 649-652 (S.C.R.), 30-32 (D.L.R.).

³³ (1985), 37 Sask. R. 205, *sub nom. Taypotat v. Surgeon*, 18 E.T.R. 195 (Sask. C.A.).

³⁴ *The Law of Restitution* (3d ed., 1986), ch. 1, section 5 (pp. 55 *et seq.*).

³⁵ [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257.

³⁶ *Supra*, footnote 1, at pp. 678 (S.C.R.), 51 (D.L.R.).

³⁷ *Ibid.*

IV. A Rejected Ground of Liability: Fiduciary Obligation

It was of course this subject which led to the considerable interest in the litigation. A struggle for possession of a goldmine is news enough, but here was a finding by the trial judge after a five-month hearing, confirmed in ringing tones by a unanimous five-person Court of Appeal, that a fiduciary duty was owed in the pre-contractual stage of undefined negotiations. Those negotiations were between two parties who had obvious competing commercial interests, and who might be expected at that early stage each to be jostling for the position and the terms it desired for itself in any future collaboration. If this was fiduciary, it was asked by many, what other commercial bargaining situations would be held to be fiduciary also? In trade and commerce the race goes to the swiftest. Was this now to change so that each bargaining party must to some unknown extent be responsible for the other party's welfare in the negotiations? And, if contract ensues between parties, was a disappointed party now invited to avoid the limited opportunity to argue at law for implied terms, and to seek to establish in equity a fiduciary relationship? Take out the elements that constituted breach of confidence, and what was left that made the relationship between Lac and Corona fiduciary?

Others were concerned as to the relationship between the various heads of liability in equity. For instance, where did the doctrine of unconscionable bargains end and the doctrine of fiduciary relationship begin. An unconscionable bargain can be set aside,³⁸ or in Canada give rise to a successful claim for damages,³⁹ but judicial intervention is traditionally limited to those circumstances where one party by reason of age, infirmity, lack of education, physical impairment, language comprehension, or a factor of that kind, is at an obvious disadvantage *vis-à-vis* the other. Mere inequality of bargaining power on its own does not justify rescission for alleged undue influence or for unconscionability. The question now was whether the fiduciary relationship, implying as it does the imposition of fiduciary duties associated with the express trustee, was to be yet further extended, as the Court of Appeal judgment would suggest, and the courts in future would apply freely the test of unconscionability to any bargaining or ultimate contractual relationship. Even newspaper columns and feature articles, aimed at the person in the street, asked how the fiduciary duty of loyalty—as the Americans describe the duty of the fiduciary to act in a totally selfless manner for the benefit of his beneficiary—is compatible with commercial bargaining and contracts.

³⁸ The classic Canadian authority is *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257 (B.C.C.A.). More recent instances of its invocation are *Harry v. Kreutziger* (1979), 9 B.C.L.R. 166 (B.C.C.A.), and *Stephenson v. Hilli (Canada) Ltd.* (1990), 63 D.L.R. (4th) 573 (N.S.C.A.).

³⁹ *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (B.C.C.A.).

A. *The Fiduciary Duties (or Obligations)*

This branch of the law is entirely equitable in origin. The quintessential fiduciary is the express trustee, and the task of this person is to administer and distribute the trust property, as stipulated, for the sole and exclusive benefit of the trust beneficiary or beneficiaries. Consequently, he must discharge his task with honesty and care, he must perform the task himself delegating only those ministrations which a reasonable person of business would delegate, he must maintain an even hand between the beneficiaries on behalf of whose several interests he is acting, and he must act with complete loyalty, which means—to quote La Forest J. in *Lac Minerals*—“the avoidance of a conflict of duty and interest, and a duty not to profit at the expense of the beneficiary”.⁴⁰ As the judge points out, in most cases of dispute involving the duty of loyalty the issue concerns both aspects of the duty.

Since the mid-nineteenth century courts of equity have gradually extended the list of officeholders and persons performing services for others upon whom these duties, and in particular the duty of loyalty, have been imposed. The emphasis in fact has been upon the fiduciary obligations, just described. The question asks which actors on behalf of another are subject to those obligations, and especially, as previously noted, to the duty of selfless service. The parallel was always with the trustee, who within the scope of his trustee duties must think only of the person for whose benefit he is acting, unless either the trust instrument or all the trust beneficiaries, being capacitated and fully informed, approve his having a particular self-interest. Fiduciary relationship is therefore, like contract, tort and unjust enrichment,⁴¹ a basis or ground of liability as between parties, because the beneficiary of the fiduciary relationship can bring action in equity if the fiduciary breaches any one of his duties that stem from the existence of the relationship.

Until the early 1970s Canadian courts, like those of England, Australia and New Zealand, applied the designation of fiduciary (involving as it did the fiduciary obligations) to those persons who were truly in a comparable position to that of a trustee, who puts his service within the scope of his commissioned task to the exclusive benefit of his beneficiary. About 1975, however, apparently inspired by Lord Denning's decision in *Lloyds Bank v. Bundy*,⁴² the scene in Canada began to change. Commercial relationships of various kinds, whether involving agency, the professions, trade, the discharge of office, or *ad hoc* relationships, had long since been

⁴⁰ *Supra*, footnote 1, at pp. 646-647 (S.C.R.), 28 (D.L.R.).

⁴¹ An unjust enrichment situation will occur when a fiduciary breaches his duty of loyalty, and makes an unapproved profit for himself while acting within the scope of his fiduciary task. See, further, the Hon. J.R.M. Gauthier, *Demystifying the Fiduciary Mystique* (1989), 68 Can. Bar Rev. 1.

⁴² [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.).

designated fiduciary, thus triggering the duties not to profit and to avoid conflict. But now something new began happening. The fiduciary relationship was increasingly conceived as arising when parties were simply not of equivalent bargaining power. These were situations that traditionally had not given rise to what might be called unconscionable bargains, but where one party had access to knowledge or he reputedly possessed skills that gave that party a power over the other which the other did not comprehend or the acts resulting from which he was unable to question. The concept of fiduciary was loosening or expanding, whichever way one wants to look at it, but at the same time it continued to involve equity's draconian formulation of the fiduciary's duty that profit or gain must be surrendered even if no loss or injury of any kind had occurred to the beneficiary. *Standard Investments Ltd. v. C.I.B.C.*,⁴³ as we have seen, was a situation where a bank and two investors, each side with its own commercial interests advanced by the bargain, were held to be in a fiduciary relationship, so that the bank owed the duty of loyalty to the investors.

The next development was the realisation by litigants that the fiduciary relationship potentially brought into play a range of equitable remedies (rescission, injunction, equitable damages, and *in rem* restitution), not to mention liability on the grounds of negligence, fraud, coercion, undue influence, or profiteering. Economic duress could be reached with the fiduciary concept (*Nocton v. Lord Ashburton*),⁴⁴ and negligent misrepresentation liability in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,⁴⁵ or third party liability under the *Barnes v. Addy*⁴⁶ doctrine could be presented as a direct fiduciary relationship between the injured party and the third party. Implied term in contract, as previously mentioned, could be bypassed with fiduciary relationship and consequent fiduciary duties.

It was while the commercial world and its legal advisers sought to digest the Court of Appeal decision in *Lac Minerals* that Professor Finn⁴⁷ underlined how from the Australian perspective Canadian courts appear to be moving in the direction of turning the fiduciary relationship and its duty of loyalty into a medium for securing good faith in contract. He also drew attention to Lambert J.A.'s summing up in *Harry v. Kreutziger*⁴⁸ of the issue in an unconscionable transaction case as "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".

⁴³ *Supra*, footnote 5.

⁴⁴ [1914] A.C. 932 (H.L.). The relationship between law and equity in this connection is noted in (1989), 63 A.L.J. 504.

⁴⁵ [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

⁴⁶ (1874), L.R. 9 Ch. App. 244.

⁴⁷ *Supra*, footnote 4.

⁴⁸ *Supra*, footnote 38, at p. 177.

In the present writer's opinion it is the same notion of "community standards of commercial morality" in bargaining towards contract, in interpreting contracts (implied terms), and in performing them, that is now generally felt by the courts to be the desirable and essential criterion. All forms of equity's constructive fraud concept,⁴⁹ the product of the system's sense of conscience, and in particular equity's fiduciary relationship, are increasingly being seen in Canada as the instrument through which to achieve that general criterion. Seen from this standpoint, of course, the fiduciary relationship has the potential to embrace all types of conduct, from the procurement of unconscionable bargains to profit-making by the fraudulent express trustee.

On the other hand there is resistance to this all-enveloping fiduciary relationship, with its range of available remedies and its rule that the defendant's gain and not the plaintiff's loss, should be the measure of the defendant's obligation. As Lambert J.A. himself pointed out in his dissenting judgment in *Burns v. Kelly Peters & Associates*,⁵⁰ litigation where investors sued their financial consultants when losses were experienced through investment in foreign real estate, and there was an accompanying non-disclosure by the consulting firm of a personal interest through commissions received, the fiduciary relationship must not be too readily applied to commercial dealings. The investors in that case were professional people at arm's length from the consultants, and that the consultants were receiving a financial return for disposing of the real estate was in his view an extraneous element to the investment advice. The investors, as Lambert J.A. saw it, had simply suffered losses, and were seeking to pass on the investors' market risk to their consultants. To impose fiduciary standards in this instance, he said, would be to impose upon financial advisers and dealers in financial instruments a higher standard of behaviour than is applied to the rest of the financial and commercial community.

In *Litwin Construction (1973) Ltd. v. Kiss*,⁵¹ speaking for the court, Lambert J.A. adopted Professor Finn's thesis that fiduciary relationships represent only the highest in a graduated series of extra honesty standards over and above the universal duty of honesty. This leaves the duty of loyalty together with its demanding requirement of restitution, should there be breach, in its original and correct perspective as the duty of selfless service demanded of those who put themselves exclusively at the service of others. It is interesting to note that subsequently Macdonald J. seized on this idea of a graduated scale of standards of extra honesty as exactly

⁴⁹ For a short summary, see, P.V. Baker and P. St. J. Langan, *Snell's Principles of Equity* (1982, 28th ed.), pp. 538-553.

⁵⁰ (1987), 41 D.L.R. (4th) 577, 16 B.C.L.R. (2d) 1 (B.C.C.A.).

⁵¹ (1988), 29 B.C.L.R. (2) 88, at p. 105 (B.C.C.A.).

applicable to what he sought in setting out a required standard in *Revell v. O'Brian Financial Corporation*.⁵²

These then were the two views of how the law of fiduciary relationships, especially in the commercial setting, should develop, when the Supreme Court of Canada came to hear the *Lac Minerals* case in October 1988. The question was whether relationships of an ever wider range are to be designated fiduciary so that fiduciary obligations and the associated equitable remedies have a generalized application, or the fiduciary obligation is to be imposed on that defendant only whose relationship involves trust-like trust and confidence. It was also a question as to whether that trust-like role could only be relevant in a setting where the fiduciary dedicates himself to acting solely for the benefit of another, or of the joint venture or partnership to which he and another are party.

B. *What Lac Minerals Decides*

On the facts of the case, as earlier mentioned, the majority of the court, in a judgment delivered by Sopinka J. for McIntyre J., Lamer J. and himself, found there was at no time a fiduciary relationship between Lac and Corona, and the decision of the Supreme Court on this point therefore overrules the trial court and the Court of Appeal. Of the two dissenting judges, again on this point, each found there was a fiduciary relationship, but for different reasons. Wilson J. expressly agreed with La Forest J. as to remedy (the constructive trust), but is silent as to whether she agreed with La Forest J.'s extended judgment concerning the heads of liability, namely, breach of confidence and fiduciary relationship, in particular the latter.

C. "Fiduciary Relationship" as it Emerges from *Lac Minerals*

The majority judgment, given by Sopinka J., adopts Wilson J.'s three elements of the fiduciary relationship, as described by her in *Frame v. Smith*,⁵³ and then applies that test to the facts of the Lac and Corona association. In their view the test is not met as to any one of the three elements. However, there is no discussion in this judgment as to the theory of the nature of a fiduciary relationship, and no attempt to formulate a verbal expression of the principle inherent within it. This is not to say there should be either of these things. It is merely saying they are not present. One has the impression that the majority think it more valuable

⁵² (1989), 30 B.C.L.R. (2d) 330 (B.C.S.C.). See also, *Trimac Ltd. v. C.I.L. Inc.* (1990), 99 A.R. 30, at p. 55 (Alta. S.C.), for an apparent approval by an Alberta court of Professor Finn's graduated steps of extra honesty. The question in this quartet of cases is whether the contracting party who supplies advice or proposes a business proposition to another has a duty of disclosure of related information, when the circumstances do not constitute misrepresentation.

⁵³ [1987] 2 S.C.R. 99, (1987), 42 D.L.R. (4th) 81, in a judgment which on the applicability to the facts of the fiduciary rule was a dissent.

to set out the test as to whether the relationship between the particular parties gives rise to fiduciary obligation, and then, since the remaining issue is essentially one of fact, to get on with the job of applying the test to the facts. "Let that speak for itself; otherwise the less said the better", as it were.

Wilson J. in a very short judgment on this point similarly did not probe abstract theory, or search for a verbal formulation—after all she had already formulated a test in her dissenting judgment in *Frame v. Smith*. She appears to agree with the majority when she says that no fiduciary relationship "arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine".⁵⁴ But when in that factual context confidential information was supplied by one party to the other, the recipient thereupon became subject to the fiduciary duty not to use that information for its own use or benefit.

La Forest J., however, considers at length the nature of a fiduciary relationship, and the categories of origin of such relationships, delivers a point-by-point response on the facts to the majority judgment, and concludes with a discussion on the essential object of this concept. The judgment starts with the published literature on the subject, and reviews the entire gamut of the subject, in response it would seem to argument in each of the factums and before the court. Though it is the voice of only one member of the court, one senses that it is the theoretical thinking of this judgment that is going to ring down through the years, rather as Laskin J.'s dissent in *Murdoch v. Murdoch*⁵⁵ was to catch the imagination of the second half of the 1970s.

For this reason perhaps one has to pause a little and ask where the judgment is aiming to take the law. Not everyone will be comfortable with the implied thesis that fiduciary relationship law, like proprietary estoppel, unconscionable bargain, and in England the "common intention" constructive trust, is part of the law concerning the enforcement of parties' reasonable expectations. Conceptually "reasonable expectations" may well be a defensible rationale, given the case precedents, but the apprehensions reflected in the British Columbia cases earlier mentioned, in this respect distinct from the general approach in the Ontario courts which do not share those hesitations, are not met by La Forest J.'s *tour de force*. How "fiduciary" in character has a relationship to be before the far-reaching obligations associated with that concept can be imposed? Would the approach of La Forest J.'s judgment (acknowledging as it does that the trial court has a discretion, and the appeal court another) potentially reach into every contractual, pre-contractual, and non-contractual relationship in order to achieve for an aggrieved party protection of what he is able

⁵⁴ *Supra*, footnote 1, at pp. 630 (S.C.R.), 16 (D.L.R.).

⁵⁵ [1975] S.C.R. 423, (1973), 41 D.L.R. (3d) 367.

to convince the court are his community-determined reasonable expectations?

It will be apparent to the reader that it is not difficult for anyone writing in this area to sound the alarm, and to point to the disappearance of certainty and predictability for which commercial law judges of the past have striven. It can also be said that for the courts to allow vague standards of required conduct to be introduced into commerce suggests that they underappreciate the speed of market decision-making, the "judgment calls" that must be made, the inherent risk assumption, and the need every participant has to know reliance can be placed in the finality of the processes of the market place. But rather than pursue this line of criticism, a preferable approach to the judgments of this court may be to ask where they agree, and what impact that area of agreement is likely to have on the law as it was when the judgments in August 1989 were handed down.

(1) *The Scope of Agreement Between the Members of the Court*

Though there appears to be a good deal of difference of opinion between the judgments, this very largely stems not from doctrinal disagreement concerning fiduciary relationship, as previously observed, but from differences of interpretation of the character and significance of the facts of the case. The initial problem of the nature of the relationship between breach of confidence (in origin a part-legal, part-equitable concept) and the law of fiduciary relationships is a case in point. The majority state that the obtaining and misuse of confidential information does not itself create a fiduciary obligation. But for *La Forest J.* also the receipt and misuse of confidential information was not a constituent element in the creation of a fiduciary relation. In his interpretation the fiduciary relationship was already in existence—the product of serious negotiations towards a joint venture of some kind—when the "fiduciary" breached the confidence. Only *Wilson J.* appears to say that breach of the confidence owed by *Lac* to *Corona* was the very thing which transformed a non-fiduciary⁵⁶ into a fiduciary relationship. In the writer's opinion there is here no real or significant difference of opinion as to concept. The confidential relationship that is abused by misuse of the information received may or may not coincide with a fiduciary relationship, and it is conceivable that the receipt of confidences, secrets the confidant is not to employ but as agreed with the confider, may be a fact which is enough to turn into an actual fiduciary relationship an association that without it is borderline. There are few facts which cannot contribute anything towards the finding of a fiduciary relationship, and each available fact must be weighed. In the three judgments delivered the perception of, and the giving of weight to, facts simply differed.

⁵⁶ Perhaps near-fiduciary.

Where the three judgments are obviously in agreement is as to the appropriate nature of Wilson J.'s three-part test in *Frame v. Smith* for determining whether there is a fiduciary relationship. It is a rough and ready guide. There has to be a discretion or power in the alleged fiduciary, an ability on that person's part to exercise that discretion or power as and how he chooses so as to affect the other person's legal or practical interests, and a particular vulnerability of that other to the alleged fiduciary who holds the discretion or power.

As to the significance of the element of vulnerability, however, Sopinka J. and La Forest J. seem at first sight to possess diametrically opposed views. Sopinka J. says that dependency or vulnerability is indispensable to the existence of the relationship; La Forest J. is of the opinion that in some circumstances, where the particular relationship has already been established by the courts to be fiduciary, it need not exist at all. As instances of the latter La Forest J. cites *Keech v. Sandford*,⁵⁷ and classes of persons (beneficiaries of express trusts, and corporations *vis-à-vis* their directors) who are "susceptible to harm"⁵⁸ but need not have been actually harmed. To put things another way, it could be said that Sopinka J. regards vulnerability as an element which is always present where fiduciary obligation in any circumstances is imposed. La Forest J. on the other hand distinguishes between (a) the recognition of a new fiduciary relationship (for instance, business persons negotiating towards partnership), where vulnerability is "relevant", and (b) the imposition of fiduciary obligation in subsequent circumstances where the relationship already exists. Where it already exists, vulnerability is irrelevant.

The key to understanding this difference of approach seems to be that Sopinka J. interprets the *Lac Minerals* facts as creating the circumstance where the court must decide whether a fiduciary relationship exists. It is not a question of whether an established fiduciary in *Keech v. Sandford* circumstances is subject to a fiduciary obligation and, if it were, he would evidently regard that question as concerning the *scope* of the existing fiduciary relationship (and obligation). La Forest J., however, regards it as effectively established by the *United Dominions Corporation Ltd. v. Brian Proprietary Ltd.*⁵⁹ decision in Australia that Lac was already a fiduciary by reason of the serious negotiating towards a joint venture of some kind; the breach of confidence was merely the conduct that breached that fiduciary relationship. And for La Forest J. it is the conduct of Lac, not the vulnerability of Corona, that is at the heart of the matter. So far as Corona was concerned, he said, it could reasonably expect that Lac, with the acquired information, would not act or refrain from acting in a way contrary to the interests of Corona.

⁵⁷ (1726), Sel. Cas. Ch. 61, 25 E.R. 223 (L.C.).

⁵⁸ *Supra*, footnote 1, at pp. 663 (S.C.R.), 40 (D.L.R.).

⁵⁹ *Supra*, footnote 3.

Are these opinions to any degree reconcilable, so that *Lac Minerals* as an authority says something on vulnerability for lower courts? Of course, Sopinka J.'s opinion is the opinion of the majority on the subject of fiduciary relationship, but it may be possible to say more than that the majority binds.

For a start Sopinka J. and La Forest J. are in agreement that vulnerability is a relevant consideration, an appropriate element, when the question is whether the parties were in a relationship that could be regarded as fiduciary. So the two members of the court appear to be in line with the Wilson J. test in *Frame v. Smith*⁶⁰ and with the judgments in *Hospital Products Ltd. v. U.S. Surgical Corporation*.⁶¹ The debate therefore concerns whether the liability of a person who is in an existing fiduciary position, but in new circumstances,⁶² can be expressed in terms of power holding, reliance and breach only, or vulnerability also has to be established. Sopinka J. was not discussing this question; indeed, for him it was not relevant, so only La Forest J.'s opinion is under consideration here.

It seems to the present writer that that opinion is difficult to support. Not only is the liability of the established fiduciary always discussed in terms of the scope of the fiduciary relationship, but it may even be misleading to speak of vulnerability in terms of harm. In the first place it is not clear that vulnerability is a distinct element at all. *Hospital Products* points out that vulnerability is not so much a third element, as a consequence. It is the result of the existence of a power or discretion whereby the holder can benefit or harm the legitimate interests of another at will. But in any event, the vulnerability is not so much to the infliction of harm, something which indeed strictly could not have occurred on the facts of *Keech v. Sandford*⁶³ or of *Boardman v. Phipps*,⁶⁴ but to the abuse of the power or discretion. It is this formulation—abuse of power—which Gibbs C.J. and Mason J. adopt in *Hospital Products*; “abuse of power” is wider and more embracing than “harm”. A corporation is vulnerable to such abuse by the director acting singly (the issue in *Peso Silver Mines Ltd. v. Cropper*)⁶⁵ or by all its directors, as a class, acting together. The beneficiary of an express trust, and the principal to self-appointed agents, are always vulnerable to abuse of power and discretion; Equity therefore deters the fiduciary from such conduct even when loss has not and could not result from the conduct.

⁶⁰ *Supra*, footnote 53.

⁶¹ *Supra*, footnote 2.

⁶² Such as *Keech v. Sandford*, *supra*, footnote 57, where an existing trustee found himself with the opportunity to acquire personally a lease of trust property, and the landlord unwilling to renew the lease to the trustee as trustee.

⁶³ *Ibid.*

⁶⁴ *Supra*, footnote 17.

⁶⁵ [1966] S.C.R. 673, (1966), 58 D.L.R. (2d) 1.

However, again La Forest J. explains his position in terms of the facts: "...this case does not require a new class of relationships to be identified, but requires instead an examination of the specific facts of this case."⁶⁶ The background could perhaps be seen as this: if as a business person at arm's length in a commercial transaction I am exposed through the terms of the contract to such benefit or harm as the other contractor chooses to confer or to impose upon me, I am the author of my entire exposed position. Should I, being careless of my own protection, be in a position to ask the courts to protect my reasonable expectations? And the issue for each member of the *Lac Minerals* court could be put as follows: if there is yet no contract between us, but I could have protected my commercial interests meanwhile, am I in any better position in my request of the courts to protect my expectations?⁶⁷ Clearly, in the light of *Lac Minerals*, it all depends on the perception the court has of the nature of the circumstances and the gravity of conduct of the person who took advantage of the superior position he occupied. Sopinka J. saw the breach of confidence, whatever its gravity, as a ground of liability that was independent of, and distinct from, the elements that lead to a finding of fiduciary status. Had that breach of confidence been absent, Wilson J. too would have found no fiduciary status, but she saw it as a manifest factor in the coming about of a fiduciary relationship on these facts. The perception of La Forest J., however, was of serious commercial negotiations towards joint venture in a climate of trade-approved reliance upon mutual integrity. There for La Forest J. were the makings of the fiduciary relationship. For him the breach of confidence was a particularly cynical breach of that relationship, against which any obligation of the injured party to protect its self-interest paled into insignificance.

At the end of the debate in *Lac Minerals* concerning vulnerability it is difficult to believe that there is any serious doctrinal dispute. Vulnerability is a third element, but in the sense of being a consequence of power or discretion in one party, and the unavoidable reliance of the other party upon the integrity of the exercise of that power or discretion.

That leads to another area of what the present writer suggests is agreement. All three judgments (Sopinka, La Forest and Wilson JJ.) explicitly recognize that in the great majority of cases where parties are engaged in commercial dealings the fiduciary relationship will not come into existence. The parties are at arm's length, and are able through the terms of their contract to tailor to choice the opportunities and the protections they each seek. No one, however, could seriously assert that a fiduciary relationship can never arise in a commercial setting. Clearly it can, and indeed it is even presumed to exist between principal and agent, company

⁶⁶ *Supra*, footnote 1, at pp. 662 (S.C.R.), 40 (D.L.R.).

⁶⁷ A relevant issue, says La Forest J., "if the parties would realistically have been expected to contemplate" such protective cover; *supra*, footnote 1, at pp. 664-665 (S.C.R.), 41 (D.L.R.).

and director, and partners, to take a few instances, but usually—as in *Jirna Ltd. v. Mister Donut of Canada Ltd.*⁶⁸—the parties will establish in the contract their respective expectations. It is also possible, but rare, that parties are in a relationship which in the special circumstances is fiduciary even during pre-contract negotiations, whether or not a contract ever results. Normally, if this is to happen, the nature and scope of the eventual terms of the contract will already be known when the relationship comes into existence. It can then reasonably be said to be fiduciary, with all that that entails in terms of available remedies for the breach. That was the position in *United Dominions Corporation Ltd. v. Brian Proprietary Ltd.*,⁶⁹ but one can envisage circumstances where the required nature and scope will still exist, though no contract ultimately results. In *United Dominions* the contract did result; but that was not relevant. What did prove relevant was that the nature and scope of the association were determined, and the parties had begun *inter se* to prejudice themselves financially, in expectation of a formal documentation of the agreement.

Otherwise, in the writer's opinion, the authors of these judgments are saying no more than has already been reviewed here, or are pursuing different lines of enquiry from each other. The analysis and significance of factual detail seem important to Sopinka J., no doubt because he, with his two colleagues, is reversing the lower court's unanimous finding on this point. Wilson J. is content to make her central point about breach of confidence tipping the scales, and La Forest J.'s attention is absorbed with two topics in particular—the three types of fiduciary relationship, and the definition and purpose of fiduciary relationship. In other words, there are no apparent doctrinal differences of opinion; there are merely different conclusions as to what aspects of the subject should be included in judgment writing in response to counsels' arguments.

(2) *La Forest J. and "Reasonable Expectations"*

At the end of the day, however, an academic, like a moth to a lamp, is drawn to La Forest J.'s discussion of the definition and purpose of the fiduciary relationship. The description of presumed, *ad hoc* and fictional fiduciary relationships is now well established in Canada, one would have thought, though certainly it does no harm to have the three forms of "fiduciary" so clearly defined in a Supreme Court judgment. That is a useful bonus. But it is the definition and purpose discussion which is intriguing. It is not so much that it is new because in fact some lower courts and some writers in Canada have already been following similar lines of thought, but it is the approval which this judgment—albeit the sole voice in the court—confers upon that thought which is noteworthy.

⁶⁸ (1972), 40 D.L.R. (3d) 303, 12 C.P.R. (2d) 1 (S.C.C.).

⁶⁹ *Supra*, footnote 3. For a further instance of intended business collaboration held to be fiduciary, see *Marr v. Arabco Traders Ltd.* (1987), 1 N.Z.B.L.C. 102, at p. 732, discussed by P.L. Loughlan (1989), 7 Otago L. Rev. 179.

La Forest J. suggests several slightly varied modes of expression throughout his judgment, but the description of fiduciary relationship that he appears to prefer is this: such a relationship will exist when, "having regard to all the facts and circumstances, one party [A] stands in relation to another [B] such that it could reasonably be expected that that other [B] would act or refrain from acting in a way contrary to the interests of that other [A]".⁷⁰ The crucial question now is which "reasonable expectations" will give rise (a) to B's personal liability for breach, where loss has been the result of the abuse of power, and the calculation of compensation is to be in accordance with Wilson J.'s judgment in *Guerin v. The Queen*,⁷¹ and (b) to proprietary remedies that both strip gain from B, whether or not A has been caused harm, and also give A absolute priority over B's general creditors. "It is a question to be determined on the facts", says the judge, "whether the parties have reached a stage in their relationship where their expectations should be protected."⁷² This, however, is not a response to quite the question we have put. So one turns to the purpose of the fiduciary concept. The purpose of fiduciary obligations, says La Forest J., is "the promotion and preservation of desired social behaviour and institutions".⁷³ And finally he mentions good faith—good faith between partners in their dealings with one another, and good faith in pre-contract bargaining. Each is "worthy of protection in those circumstances where that protection accords with the expectations of the parties".⁷⁴ So presumably of equal worth is good faith in the performance of contract, as was noted in *Hospital Products Ltd. v. U.S. Surgical Corporation*,⁷⁵ and a liability for good faith in the performance of contract is obviously the ultimate goal of this line of thinking.⁷⁶

Traditionally, so far as it is recognized on a generalized basis at all in common law Canada, good faith is reflected in the contract law of implied terms,⁷⁷ and the reflective question left in the reader's mind by La Forest J.'s judgment is how far this good faith goal can be and ought

⁷⁰ *Supra*, footnote 1, at pp. 663 (S.C.R.), 40 (D.L.R.).

⁷¹ [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321.

⁷² *Supra*, footnote 1, at pp. 668 (S.C.R.), 43 (D.L.R.).

⁷³ *Ibid.*, at pp. 672 (S.C.R.), 47 (D.L.R.). "... the law of fiduciary obligations can operate to protect the reasonable expectations of the parties"; *ibid.*, at pp. 665 (S.C.R.), 42 (D.L.R.).

⁷⁴ *Ibid.*, at pp. 672 (S.C.R.), 47 (D.L.R.).

⁷⁵ *Supra*, footnote 2.

⁷⁶ "Any employee owes a general duty of good faith to his employer"; *Vertlieb Anderson v. Nelford* (1990), 40 B.C.L.R. (2d) 379, at p. 382 (B.C. Co. Ct.), citing 57134 *Man. Ltd. v. Palmer* (1989), 37 B.C.L.R. (2d) 50 (B.C.C.A.).

⁷⁷ "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract", per Griffith C.J. in *Butt v. McDonald* (1896), 7 Q.L.J. 68, at pp. 70-71, cited by the High Court of Australia in *Secured Income Real Estate (Australia)*

to be achieved by the fiduciary concept alone. We have an array of legal and equitable heads of liability. Is the fiduciary concept to do the work of all of them, available to remedy unconscionable behaviour however and wherever that conduct occurs? One answer that La Forest J. provides is that implied term can offer relief only when there is a contract between the parties. This, of course, is of importance. If there was no contract in place when the self-serving act occurred, as in the *United Dominions* case, or there was no contract at any time, as in the present case, then fiduciary obligation *may* be the only way in which the self-serving act can remedially be reached. Moreover, once it is agreed—as it was agreed by the High Court in *Hospital Products*—that within contract the courts should not impose a fiduciary obligation where it would not imply a term, it is reasonable to say that apprehension as to the reach of the fiduciary relationship with regard to contractual relations is no longer justified. The courts would merely be introducing through case law for the measuring of contract performance criteria that are already familiar in statute elsewhere, notably in the United States Commercial Code, section 1-203, and already found in the contract case law of some thirty-two of the states of the Union.⁷⁸ Perhaps this is the way to go, and the Australian courts and writers are merely keeping in place, for reasons of their own, the historically individual equitable heads of liability that are to be found in fiduciary relationship and the notion of constructive fraud. Canadians, on the other hand, are doing something different; they are on a path towards reclassifying right and remedy within a new, very much broader concept of the fiduciary relationship, which embraces all the factual circumstances where power, reliance, and detriment or unjust enrichment exist. The remedies for breach of this broad concept of liability must ultimately come to include also equitable estoppel.

But are Canadian courts, which favour this approach, on the right path? Is the cautious gradualism of *Muschinsky v. Dodds*⁷⁹ and *Hospital Products Ltd.* in Australia preferable? The historic justification for the Chancellor's intervention in the work of the common law courts was to assist the process in the procurement of fairness and justice in the individual case. With such a *raison d'être* of what was to become a body of law it is not surprising that for the past two hundred years there has been

Ltd. v. St. Martin's Investments Pty. Ltd. (1979), 144 C.L.R. 596, at p. 607, 26 A.L.R. 567, at p. 577, 53 A.L.J.R. 745, at p. 749, and by Dawson J. in *Hospital Products*, *supra*, footnote 2, at pp. 138 (C.L.R.), 485 (A.L.R.), 626 (A.L.J.R.).

⁷⁸ E.P. Belobaba, *Good Faith in Canadian Contract Law*, Law Society of Upper Canada Special Lectures (1985), Commercial Law, p. 73 at p. 74. See also Dawson J. in *Hospital Products*, *ibid.*, at pp. 137 (C.L.R.), 485 (A.L.R.), 626 (A.L.J.R.). Under the law of New York and of Connecticut "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement", Restatement of Contracts (2d), s. 205. That is, neither party may do anything to impede the performance of the agreement or injure the right of the other party to receive the proposed benefit.

⁷⁹ (1985), 160 C.L.R. 583, 62 A.L.R. 429, 60 A.L.J.R. 52.

a consequent and inevitable tension between the statement of equity that is in terms of conscience, which highlights general principles, and that which is in terms of rules, where the emphasis is upon the systematic application of principles. From the end of the eighteenth century until the 1960s most equity lawyers preferred to put the stress upon equity as rules, but since that time, particularly and increasingly so in Canada it seems, the professional preference has been for equity as conscience. The manner of development of the remedial constructive trust is the pre-eminent example. It was principally during the period after 1800 that fiduciary abuse of confidence,⁸⁰ undue influence, and unconscionable bargain, as well as innocent misrepresentation, the circumstances justifying equitable estoppel, and relief against penalty and forfeiture clauses were developed as discrete grounds of equitable intervention. Equity's remedies for these transgressions were various; conduct was enjoined or compelled and past conduct gave rise to estoppel, contracts were rescinded and gifts set aside, perpetrators were required to undergo an accounting and fiduciaries to hand over specific property. Compensatory damages could also be awarded to the injured party. More to the point in the present context, the remedy given was always acutely appropriate to the kind and gravity of the distinct type of equitable offence.

The judgment of the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Kiss*⁸¹ maintains this notion of distinct equitable grounds of liability. The graduated steps of increased obligation reflect those discrete grounds; superior to the basic obligation of due care and simple honesty there is the condemnation of unconscionable behaviour in contract as the bottom step, then above it is good faith and fair dealing (probably the true place for the enforcement of "reasonable expectations" in contract and serious negotiations towards collaborative association), *uberrima fides* (as in insurance contracts) is the next step, and at the top there is the duty of selfless loyalty (the fiduciary's duty).

This British Columbia approach suggests that not all Canadian courts would welcome, in lieu of these distinct equitable grounds of liability, the development of a broad field of judicial discretion, further to which, "fiduciary relationship" having been pleaded, the appropriate obligation and remedy in any particular situation of advantage-taking will be determined by the court. Others, especially, it seems, those engaged in litigation, are fascinated by the thought of some such development, and the Ontario Court of Appeal in *Lac Minerals* may have shared that excitement.

Nor would such an excitement necessarily be misplaced. Good faith is required in the exercise of his powers and discretion by a fiduciary, but the fact remains that the equity jurisdiction had, and has, no such distinct ground of general liability as failure of a party in contract or serious

⁸⁰ Other than by trustees. See *Nocton v. Lord Ashburton*, *supra*, footnote 44.

⁸¹ *Supra*, footnote 51.

negotiations towards contract to demonstrate "good faith and fair dealing". The age of freedom of contract apparently persuaded equity also that the adult and capacitated at arm's length did not need and should not have equity's assistance. In England since the late nineteenth century even unconscionable bargain has largely died on the vine. No wonder courts in Canada today, reflecting as they do contemporary society's concern with "community standards of commercial morality", are turning to the fiduciary concept. The law of trusts offers carefully delineated obligations and a panoply of remedies. Unlike the House of Lords,⁸² Canadian courts are not prepared to accept that community standards are for the legislature, not for the courts, to adopt.

Yet, strangely, though we are now once more in an age of confident equity inventiveness, the dissenting judgment stays its hand. If the compelling of good faith in contract negotiations and performance is to be a policy endorsed by the Supreme Court of Canada, could it not be stated overtly by the court that, as a means of upholding community standards, equity *does* require "good faith and fair dealing"? The missing step would then have been added. There is surely sufficient material in the law reports that can be gathered together with which to support the principle, and at least in North America, not to mention Australia and New Zealand legislation, the times are evidently in favour of such an obligation. Is it still too much of a leap,⁸³ or, looked at from another perspective, is it really a satisfactory alternative that our courts change the whole shape and hitherto understood role of the fiduciary concept, to which other Commonwealth jurisdictions still adhere? Approached from yet another perspective, is it advisable that we make all obligation that is to be greater than simple honesty and due care the most demanding obligation that equity imposes?

There, it may be thought, are the issues that lie ahead of us. The English seem a long way from a move of this kind, and the Australians are already facing the meaning of "good faith" through the necessity of statutory interpretation. The road may be open in Canada for the type of pioneering that led to the remedial constructive trust; instead of burning up energy in demonstrating how the particular fact situation can be fitted into the fiduciary shoe, the courts would spell out the approach they will take and the criteria that they will apply in deciding in each instance whether "good faith and fair dealing" has been violated.

⁸² *National Westminster Bank plc. v. Morgan*, [1985] A.C. 686, [1985] 1 All E.R. 821 (H.L.).

⁸³ Professor Waddams, *Law of Contracts* (1984, 2nd ed.), on several occasions refers to the issue and the problems, especially as to good faith in performance of contract, pp. 404-405. It seems to the present writer that in Canada we may be moving the amorphous "good faith" concept under the umbrella of the fiduciary concept, and proclaiming that sufficient certainty of meaning has now been found.

One point of view concerning “reasonable expectations” is certainly canvassed in the *Lac Minerals* decision, but a single judgment expressing a minority opinion can only at best be seen as a beginning. Taking all the judgments into account, it seems that, so far as the role of the fiduciary concept is concerned, for all the eloquence nothing very much has changed. Yet there is consolidation here, and otherwise the scene is set for the next stage, a stage which now seems likely to occur in the provincial appeal courts.