

**BALANCING THE “SCALES OF JUSTICE”:
FIDUCIARY OBLIGATIONS AND
STEWART v. CBC**

Leonard I. Rotman*
Windsor

The Stewart case presents what appears, at first glance, to be a “traditional” form of fiduciary relationship – that between a lawyer and client. Yet, the case is anything but one concerned with the fiduciary obligations of a lawyer to a client in the traditional sense. Rather, its focus is the continuing obligations of a lawyer to a former client, specifically the breadth and temporal duration of those obligations. In dealing with these issues, the case touches upon key points in fiduciary jurisprudence, including how to properly characterize the obligations arising under a fiduciary relationship and the application of common law and equitable principles of causation in calculating compensation for a breach of fiduciary duty. This article uses the Stewart judgment as a benchmark against which to assess the doctrinally sound application of fiduciary principles and the manner of determining appropriate measures of relief for breaches of fiduciary duty.

L’affaire Stewart, à première vue, présente une forme “traditionnelle” de relation fiduciaire – celle entre un avocat et son client. Mais en réalité, l’affaire n’a rien à voir avec les obligations fiduciaires d’un avocat vis-à-vis son client, au sens traditionnel. Elle porte essentiellement sur les obligations continues d’un avocat envers son ancien client, plus particulièrement sur leur objet et leur durée. En traitant de ces questions, l’arrêt aborde des points cruciaux de la jurisprudence sur la fiducie – notamment comment qualifier correctement les obligations découlant d’une relation fiduciaire, et comment appliquer les principes de causalité de la common law et de l’équité au calcul de la compensation pour la violation du devoir de fiducie. Cet article utilise la décision Stewart comme un point de repère pour vérifier la juste application des principes de fiducie et la manière de déterminer les redressements appropriés en cas de violation du devoir de fiduciaire.

I.	Introduction	446
II.	The Incident	447
III.	The Criminal Trial and Greenspan’s Involvement	448
IV.	The “Regina v. Stewart” Episode	449
V.	Stewart’s Allegations Against Greenspan	450
VI.	The Depiction of the Criminal Trial	451
VII.	Greenspan’s Duties to his Former Client	452
	i. Breach of Fiduciary Duty	458
	ii. Greenspan’s Belief in his Client’s Innocence	461
	iii. Greenspan’s Duty Not to Publicize the Case	462

*Leonard I. Rotman, of the Faculty of Law, University of Windsor, Ontario.

iv.	Relevant Rules of Professional Conduct and Commentaries	464
v.	Conclusions Regarding the Rules of Professional Conduct and Commentaries	467
vi.	Greenspan's Obligation to Insulate Stewart from Future Harm	468
VIII.	Fiduciary Issues	468
i.	The Reverse Onus	470
ii.	Measure of Compensation	472
iii.	Common Law Considerations	474
iv.	The Application of Common Law Standards in <i>Stewart</i>	480
IX.	Conclusion	484

I. Introduction

Fiduciary law has been assuming an increasingly-prominent role in Canadian jurisprudence in recent years through its expansion into many traditional legal spheres. While fiduciary law is often associated with business law and the mutual obligations of partners or the duties of directors and officers to corporations or to shareholders, it may potentially apply to any relationship between two or more persons.¹ The general principles that underlie fiduciary relations apply equally to this vast range of situations.

The wide application of fiduciary law may be seen in its most recent application by the Supreme Court of Canada. That court has applied fiduciary law to a variety of disparate relations: stockbroker and client;² doctor and patient;³ abusive parent and abused child;⁴ and federal government and Indian band,⁵ to name but a few. What appears to have been lost in this recent juridical fixation upon the breadth of fiduciary law's application is how fiduciary law ought to be applied in individual situations, whether in regard to so-called "traditional" fiduciary relationships or more recent judicial characterizations.

This paper will examine the application of fiduciary law to a noteworthy case that fits within traditional categories of fiduciary relations, but is anything but traditional. The case in question is *Stewart v. Canadian Broadcasting Corporation*.⁶ At a basic level, it concerns the fiduciary obligations of a lawyer

¹ See L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding," (1996), 34 *Alta. L. Rev.* 821 at 830-2 [hereinafter "Fiduciary Doctrine"].

² *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

³ *McInerney v. McDonald* (1992), 93 D.L.R. (4th) 415 (S.C.C.); *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.).

⁴ *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.).

⁵ *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.); *R. v. Sparrow* (1990), 70 D.L.R. (4th) 390 (S.C.C.).

⁶ (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.).

to his client. However, its unique facts raise a number of key issues pertaining to the proper application of fiduciary law. In particular, the case prompts questions about the nature and duration of a lawyer's obligations to a client, as well as important considerations in the creation of fiduciary relationships and compensation for breaches of fiduciary duties.

By virtue of its facts and the characters involved, the *Stewart* case is no garden variety fiduciary proceeding. It involves the fiduciary obligations of noted Toronto criminal defense lawyer Edward Greenspan to a former client, Robert Stewart, and Greenspan's involvement in a re-creation of Stewart's trial broadcast to a national television audience. Stewart's trial for a hit-and-run causing death sat at the forefront of media and public scrutiny some twenty years ago. When it re-entered the public consciousness after its broadcast – and some 13 years after the incident that had resulted in the untimely death of a dance instructor on her way home from a dance class – the basis for the case in question was established.

The criminal aspect of the *Stewart* case was well publicized from late 1978, when the events in question occurred, through to 1981, when Stewart's appeal of his conviction for criminal negligence causing death was dismissed. Since the principles of fiduciary law are heavily reliant on specific facts, it is necessary to set out the factual background to Stewart's criminal trial in order to provide the context for understanding the nature of his civil claims against Greenspan for breach of fiduciary duty, as well as the courts' analysis of the duty owed by Greenspan to Stewart.

II. *The Incident*

Shortly before midnight on November 27, 1978, Judy Jordan was returning home from a dance class. As she walked near the front of her apartment building, she was struck by a vehicle driven by Stewart.

Stewart lived a short distance north of Jordan's apartment and was returning home after an evening during which he had consumed one or two beers at around 6 p.m. and drank a moderate amount of alcohol while having dinner with some co-workers at a restaurant. He left the restaurant at around 11:00 p.m. and took an indirect route home because of bad weather conditions and to avoid police spot-checks. He had been feeling ill while driving north on Bathurst Street. Being unable to contain a bowel movement, Stewart turned into Jordan's apartment building to avail himself of some trees that surrounded the building.

As Stewart turned into the circular driveway in front of the building, his vehicle struck Jordan, knocking her down. The vehicle continued its forward motion, driving over Jordan and entangling her in its undercarriage. Stewart did not stop his vehicle after hitting Jordan. He drove out of the driveway, stopped briefly, and headed west on a sidestreet. As he drove away from the building, he turned off his vehicle's headlights.

The evidence at trial established that Jordan screamed very loudly as she became entangled underneath Stewart's vehicle. Witnesses who lived in

Jordan's building and in surrounding apartment buildings testified to hearing her screams. Some of the witnesses lived as high as the 11th floor. Some had had their windows closed at the time of the accident.

There was conflicting evidence about the duration of Jordan's screams as she was caught underneath Stewart's vehicle. Her body eventually came loose from the car approximately one quarter mile from her building. She died of a fractured skull and a lacerated brain inflicted at the point where her screaming had stopped (which the trial judge found was either immediately after Stewart left the circular driveway or shortly thereafter). Blood of her rare type, skull fragments, and brain tissue were later found on the undercarriage of Stewart's car. Scalp hairs and other tissue were discovered wrapped around the car's drive shaft.

In convicting Stewart of criminal negligence causing death, the trial judge, Graburn J., made the following findings. He held that Stewart knew that he had struck Jordan with his car and that Stewart had heard Jordan's screams from underneath the car. Stewart was deemed to have turned off his car's headlights because he knew he had hit Jordan and that she was caught underneath his car. After driving over Jordan, Stewart had knowingly dragged her body underneath his car for approximately one quarter of a mile (although she had been dead for most of this time). Graburn J. also determined that Stewart had stopped his car again once he realized that the body had become disentangled, but sped off to avoid detection when an oncoming car approached. The trial judge's final conclusion was that there was no doubt that Jordan's death was a direct result of being dragged underneath Stewart's car.

III. The Criminal Trial and Greenspan's Involvement

At trial, Stewart was represented by counsel who, it was discovered later, was suffering from a degenerative brain disorder. The trial transcript revealed that there were instances in which Stewart's counsel suffered from lapses of judgment. Upon Stewart's conviction, he retained Greenspan to deal with the matter of sentencing.

One of Greenspan's primary concerns in addressing sentencing was the public's opinion of Stewart. Greenspan sought to shield Stewart from the effects of the tremendous publicity that surrounded the case. This publicity portrayed Stewart as a callous monster. Greenspan sought to demonstrate that Stewart acted out of panic rather than maliciousness. The purpose of this characterization was to attempt to reduce Stewart's prison sentence and to soften the damage done to Stewart's reputation caused by media portrayal of his involvement in the incident.

The trial judge sentenced Stewart to three years imprisonment and suspension of his driving privileges for five years. His appeal, in which Greenspan acted as counsel, was dismissed in January, 1981. Stewart began serving his sentence and was released on parole after 11 months.

IV. The "Regina v. Stewart" Episode

On November 17, 1991, more than ten years after Stewart began serving his sentence, Greenspan was involved in a dramatization of the *Stewart* case, broadcast as part of a Canadian Broadcasting Corporation ("CBC") series entitled "The Scales of Justice". This series was produced by the CBC and Scales of Justice Enterprises Inc., of which Greenspan had been a director and one of the incorporators.⁷ The episode in question, known as "*Regina v. Stewart*," was hosted and narrated by Greenspan. The "*Regina v. Stewart*" episode was watched by close to one million viewers.

The portions of the episode involving Greenspan were completed on June 21-3, 1991. Greenspan was paid \$2,000 for serving as host/narrator and \$8,000 for consulting work.

Stewart found out about the proposed broadcast of his crime when fliers explaining the filming in the area where the crime was committed came to his attention. He telephoned Greenspan on June 14, 1991 to discuss the project. On June 17, Stewart wrote a letter to Greenspan which included the following concerns:

Further to our telephone conversation of Friday, June 14, 1991, I feel compelled to go on record with some of my concerns regarding the television programme we discussed.

...

Obviously, my position is motivated by a desire that this case and all of its attendant horrors be left in the past. ... I'm worried about possibly losing my job, my new house, and my future, such as it is, as well as new friendships of people who know nothing of my past.

...

Regardless of the "sympathetic viewpoint" of the presentation, I will not tolerate being re-condemned on national television for the edification of the masses.

...

Please have the kindness to forward to me a copy of the script ...⁸

⁷ There were a number of issues pertaining to Greenspan's role in Scales of Justice Enterprises Inc. addressed in the trial, including whether Greenspan was a director of the corporation at the time it scripted, produced, and sold the episode in question. The basis of these issues was to determine whether Greenspan personally received any of the \$160,000 paid to the corporation by the CBC for the acquisition of the television rights to the Scales of Justice concept. However, since the evidence demonstrated that Greenspan had sold his interest in Scales of Justice Enterprises Inc. before the CBC exercised its option to acquire these rights, none of the \$160,000 was attributed to Greenspan. As discussed in the section on compensation, *infra*, Stewart was unsuccessful in attaching to any of this, or any other monies, against the CBC or Scales of Justice Enterprises Inc.

While the judgment does discuss Greenspan's involvement in Scales of Justice Enterprises Inc., this paper will focus on Greenspan's personal liability as a fiduciary to Stewart.

⁸ *Stewart*, *supra* note 6 at 77-8.

Shortly after the “*Regina v. Stewart*” episode was taped, Stewart was fired from his job as a partsman at a car dealership. He wrote again to Greenspan, attributing the loss of his job to the filming of the episode. Following an angry telephone message left by Stewart to one of Greenspan’s staff, there was no further correspondence between Greenspan and Stewart until the day the episode was broadcast, when Greenspan telephoned Stewart. At no point did Stewart receive a copy of the script for the episode. Stewart later commenced an action against Greenspan for the latter’s role in the television broadcast.

V. Stewart’s Allegations Against Greenspan

In his statement of claim, Stewart alleged that Greenspan had breached implied terms of the retainer under which Stewart had secured his services as counsel. These implied terms included: (i) keeping in confidence any information provided to him by Stewart and; (ii) that he would act in Stewart’s best interests in relation to any transaction touching on the subject of the sentencing or appeal for which he was retained. Stewart also alleged that Greenspan owed him a fiduciary duty of loyalty that obliged Greenspan to act in Stewart’s best interests in relation to anything affecting his sentencing or appeal. Stewart maintained that these implied terms and fiduciary duties survived the termination of the solicitor-client relationship between the parties. The breaches of these implied terms and fiduciary duty were set out as follows:

- (a) he [Greenspan] permitted or, alternatively, did not oppose the portrayal of a case in which he represented [the] accused as the subject of a “The Scales of Justice” episode;
- (b) he permitted the defendant production company, over which he had control, to participate in the production notwithstanding his role as the plaintiff’s counsel;
- (a) he failed to warn the plaintiff that the defendants contemplated making the production;
- (b) he provided resource material and other information for use in the preparation of the production;
- (c) he appeared in the production;
- (d) through his speech in the production, he identified himself as the plaintiff’s solicitor;
- (e) through his speech in the production, he endorsed the findings of fact made at the trial of the plaintiff;
- (f) he put his own financial interests before the interests of the plaintiff;
- (g) he put his own self-promotion or self-aggrandizement before the interests of the plaintiff;
- (h) through publicizing the plaintiff’s conviction ... he increased the adverse effect of that conviction on the plaintiff despite the fact that he had been specifically retained to minimize such an effect; and
- (i) he made his speech in the production without appreciation or control over the context in which it was to be used.

Stewart alleged that, in addition to Greenspan's personal liability, both Scales of Justice Enterprises Inc. and the CBC were liable because they knew, or ought to have known, that Greenspan was in breach of his duties to Stewart.

Under the terms of the retainer by which Stewart had engaged Greenspan's services, Greenspan was given absolute discretion to act as he saw fit in relation to his representation of Stewart for sentencing and the appeal of Stewart's conviction. This discretion covered Greenspan's actions on behalf of Stewart both in court and outside of it. There was no restriction in the retainer that prohibited Greenspan from publicizing Stewart's case in the future, nor any considerations as to Greenspan's actions following the appeal of the trial decision.

In his statement of defence, Greenspan made the following assertions:

- The script for and the enactment of the plaintiff's crime and trial were taken solely from the public record and not from any confidential information from Mr. Greenspan.
- Mr. Greenspan's participation in the programme was for the primary purpose of educating the public as to the judicial process.
- In his capacity as the plaintiff's former solicitor, Mr. Greenspan acted fairly, reasonably and properly and fulfilled his obligations to the plaintiff.
- Neither the rules of professional conduct of the Law Society of Upper Canada, nor any other professional ethical rules made it improper for Mr. Greenspan to appear in and take part in the broadcast.

VI. *The Depiction of the Criminal Trial*

Although Greenspan did not suggest the episode on the *Stewart* case, he was involved in the redrafting of the script that had been authored by others.⁹ Greenspan alleged that the case against Stewart was stronger than it had been depicted in the broadcast.¹⁰ Thus, he claimed that had actually insulated Stewart from negative effects of the broadcast.

The following statements were made by Greenspan at the beginning of the "*Regina v. Stewart*" episode:

... My name is Edward Greenspan and the story you are about to see has been re-created from trial documents. If some of the things during the next hour surprise you, remember, there is nothing more surprising than reality. ...

Judy Jordan was almost certainly the victim of a hit-and-run accident. What made the case unusual was that her fatal injuries were not caused by the initial impact. Her death seemed to be due to the callousness of a driver who dragged her screaming in agony for a quarter of a mile.¹¹

⁹ The trial judge, Macdonald J., held, *ibid.* at 67, that "there is compelling evidence which proves the assertions that Mr. Greenspan had substantial control over script contents."

¹⁰ *Ibid.*

¹¹ *Ibid.* at 69.

The judge of the civil trial, Macdonald J., found that Greenspan's narration exaggerated the distance that Jordan had been dragged screaming.¹² Greenspan was also found to have erroneously explained in his narration that Jordan had died in the hospital when, in fact, she had died before her body became disentangled from Stewart's vehicle.

Macdonald J. concluded that the broadcast's exaggeration of the nature of the accident made Stewart appear more callous than he had been represented as being during sentencing.¹³ This exaggeration was described by Macdonald J. as "substantial," insofar as "it was about an aspect of Mr. Stewart's crime which was and is likely to shock and disgust reasonable members of the public."¹⁴ He determined that Greenspan had made these statements despite knowing that they exaggerated Stewart's knowledge and personal culpability and that he was making a strong statement against the interests of his former client.¹⁵ He also found that Greenspan's testimony as to his attempts to make the broadcast as sympathetic to Stewart as possible was not credible.¹⁶

Macdonald J. concluded from the correspondence between Greenspan and Stewart that Stewart objected to *any* broadcast of his crime that did not suggest that his conviction was inconsistent with the evidence at trial or which cast doubt on the conviction. Justice Macdonald also found that Greenspan proceeded with his involvement in the broadcast despite his knowledge of his former client's objections.

VII. *Greenspan's Duties to his Former Client*

In the broadcast of the "*Regina v. Stewart*" episode, Greenspan had taken pains to insulate the reputation of Stewart's trial lawyer, hiding the fact that he had been suffering from the brain disorder that affected his judgment and handling of the case. This was done as a matter of professional courtesy to a former leading member of the criminal defence bar. The question asked by Macdonald J. was whether Greenspan had extended a similar courtesy to Stewart, his former client, to protect him from the effects of the broadcast.

Prior to ascertaining whether Greenspan had acted to protect Stewart's interests from the effects of the broadcast, it is necessary to ascertain what Greenspan's obligations to Stewart were. Had Greenspan been under no legal obligation to protect Stewart in this manner, any shortcomings on his part in this regard would be of no juristic consequence.

Although Macdonald J. dismissed Stewart's claims that Greenspan breached the implied terms of the retainer, he did consider whether Stewart was in a

¹² *Ibid.* at 74.

¹³ *Ibid.*

¹⁴ *Ibid.* at 76.

¹⁵ *Ibid.* at 77.

¹⁶ *Ibid.* at 138.

position to negotiate the scope of the retainer. Macdonald J. held that there was a substantial inequality in bargaining position between Greenspan and Stewart when the retainer was negotiated. This inequality prevented Stewart from being able to protect his own interests against those of his lawyer. Because of the nature of the crime he had committed and the publicity surrounding both it and the trial, Macdonald J. found that Stewart desperately required the services of experienced and skilful counsel to act on his behalf in the sentencing process. As Stewart had testified in the civil trial, "if anyone could perform the miracle I needed, it was Mr. Greenspan." Stewart had also explained that he looked at Greenspan as "the only chance I had."¹⁷

Because of the desperate straits he was in when the retainer was signed, Macdonald J. held that Stewart had no ability to influence the scope of the retainer. Moreover, given the combination of Greenspan's expertise, Stewart's need of it, and the imminency of sentencing, Macdonald J. deemed Stewart's actions in accepting Greenspan's standard form retainer as prudent. It was further held that there would have been no reason for Stewart to foresee the future broadcast of his case on television and its effects upon him at the time he agreed to the retainer. Consequently, Macdonald J. concluded that the absolute and unfettered discretion given to Greenspan in the retainer did not prevent the existence of a fiduciary duty of loyalty owed by Greenspan to Stewart.

While fiduciary duties may exist equally alongside contractual obligations or in the face of a explicit term in a contract or other binding document that ignores the existence of such obligations or expressly repudiates their existence,¹⁸ there must be some legitimate basis for imposing fiduciary principles upon any relationship. Fiduciary law was not designed to be used as a remedy for imprudent bargaining. Where, however, the background to a contract demonstrates that one of the parties misled the other or misrepresented the nature of the bargain, the use of fiduciary principles may be appropriate to remedy the unjust nature of the contract.

There are significant distinctions between contract law and fiduciary law, particularly with regard to their different points of emphasis. In contract law, the contract is the centre of judicial focus in determining the nature of the bargain made between the parties and the resultant obligations and benefits that flow therefrom. The parol evidence rule – which holds that where a written contract exists, it comprises the entirety of the agreement between parties – is a clear example of contract law's focus on the written contract as the means to

¹⁷ *Ibid.* at 126.

¹⁸ See *Re Poche* (1984), 6 D.L.R. (4th) 40 (Alta. Surr. Ct.); *Knox v. Mackinnon* (1888), 13 App. Cas. 753 (H.L.); *Rae v. Meek* (1889), 14 App. Cas. 558 (H.L.); *Wyman v. Patterson*, [1900] A.C. 271 (H.L.); L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) at 187-8 [hereinafter "*Parallel Paths*"]. See the further discussion of the separation of fiduciary law principles from those in contract law, *infra*.

demonstrate the parties' intentions.¹⁹ Oral agreements and the relationship between the parties are excluded from consideration.

With fiduciary law, judicial emphasis is placed upon a variety of factors, including: the relationship between the parties; their respective representations and undertakings; the degree of reliance by beneficiaries upon their fiduciaries, and; the fiduciaries' use of their discretion in a manner consistent with their obligations to act in their beneficiaries' best interests. Intention may be relevant, but is not required.²⁰ It is a fundamental premise of fiduciary law that fiduciaries are under a strict duty to act in the best interests of their beneficiaries. While acting in their fiduciary capacities, fiduciaries have an obligation to determine what actions are consistent with their beneficiaries' best interests and to act accordingly. Although fiduciaries possess the initial discretion to make decisions on behalf of their beneficiaries, the fiduciaries' actions remain subject to judicial review to ascertain whether they are consistent with fiduciary precepts. This latter determination is made by the courts in light of the general principles of fiduciary doctrine and the particular requirements of the relationship in question.²¹

Based on the above, the imposition of fiduciary principles to the *Stewart* case must focus on the nature of the relationship between Greenspan and Stewart, which was founded upon the signing of the retainer. In *Stewart*, the retainer was a fundamental part of the process by which Greenspan came to represent Stewart's legal interests. Had the retainer been restricted in a manner unacceptable to Greenspan, he would not have agreed to represent Stewart. Greenspan was under no obligation to represent Stewart on particular terms, nor to represent him at all. Prior to reaching agreement on the scope of the retainer, there had been no previous relationship between the parties. That being the case,

¹⁹ Although it is legitimately argued that the parol evidence rule's prioritization of written over oral terms potentially ignores the existence of factors that may clearly have been a part of the bargain between parties, but were somehow omitted from the final drafting of the contract, whether inadvertently or otherwise, thereby resulting in unfair assessment of what the bargain actually was. While not constituting contracts in law, treaties between the Crown and aboriginal peoples present precisely this situation. To combat the injustice that the strict application of a parol evidence-type rule would create vis-à-vis such treaties, special canons of aboriginal treaty interpretation were developed: see L.I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence," (1997), 46 U.N.B.L.J. 1. Adherence to the parol evidence rule is not always strict however, as exemplified in the recent S.C.C. decision in *R. v. Marshall*, file No. 26014, Sept. 17/99, where Binnie J.'s majority judgment held at para. 43 that "Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assume the efficacy of the contract, e.g., where it meets the "officious bystander test"...

²⁰ See T. Frankel, "Fiduciary Law," (1983), 71 Calif. L. Rev. 795 at 821: "The courts will look to whether the arrangement formed by the parties meets the criteria for classification as fiduciary, not whether the parties intended the legal consequences of such a relation."

²¹ See Rotman, *Parallel Paths*, supra 18 at 182; P.D. Finn, *Fiduciary Obligations*, (Sydney: Law Book Company, 1977) at 16; Frankel, supra note 20 at 821-4, 830-1.

would there have been an obligation on Greenspan's part to account for the inequality in bargaining power vis-à-vis the scope of the retainer?

When Macdonald J. suggested that the open-ended nature of the retainer did not prohibit the existence of a fiduciary duty of loyalty owed by Greenspan to Stewart, he was not suggesting that the retainer itself *created* a fiduciary obligation. Rather, he affirmed that, even though the retainer gave Greenspan unfettered discretion to act in whatever manner he saw fit, it did not *prohibit* the existence of fiduciary obligations owed by Greenspan to Stewart. The courts' equitable jurisdiction enables it to impose fiduciary obligations, where appropriate, on parties to contractual relationships, even in situations where one party appears to possess complete discretion over the other's interests with the latter's consent. The situation in *Stewart* is comparable to that in *Guerin v. R.*, in which the Musqueam band surrendered its interest in some of its reserve lands to the federal government so that those lands could be leased to a golf club.²²

In *Guerin*, the federal Crown engaged in discussions with the band as to the financial terms of the proposed lease, its duration and renewability, and other relevant considerations. It then had the band execute the following surrender:

TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conclusive to our Welfare and that of our people.

AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.

AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.²³

After the surrender was obtained, the Crown negotiated a lease which provided for less annual rent and longer lease periods than what had been agreed to by the band, ignored many of the concerns expressed by the band members, and included terms that had never been communicated to the band. The band only received a copy of the lease twelve years after its execution, after it had commenced an action against the federal Crown regarding its conduct in negotiating the lease on the band's behalf.

The Supreme Court of Canada found that the Crown's seemingly unfettered discretion to lease the land conferred by the surrender document was encumbered by the oral conditions communicated by the band to the Crown. The Court then held that it would be inequitable to allow the Crown to represent to the band that

²² *Supra* note 5. Under the terms of the federal *Indian Act*, R.S.C. 1985, c. I-5, Indian bands are prohibited from selling, leasing, or otherwise alienating title to their reserve lands to anyone other than the federal Crown. Surrenders may only be made to the federal Crown because of its exclusive jurisdiction over "Indians, and Lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867*. Once a surrender is obtained, the federal Crown may then alienate the land on the band's behalf.

²³ *Ibid.* at 354.

it would follow its wishes in order to obtain the surrender and then ignore those wishes, to the band's detriment, once the surrender had been obtained. As Justice Dickson, as he then was, explained in *Guerin*, the seemingly unfettered discretion given to the Crown in the surrender document created a fiduciary obligation on the part of the Crown to exercise that discretion in the band's best interests.²⁴

As corroboration for finding that the open-ended nature of the retainer did not relieve Greenspan of his obligations to act in Stewart's best interests, Macdonald J. cited Sopinka J.'s majority judgment in *LAC Minerals Ltd. v. International Corona Resources Ltd.*²⁵ Macdonald J. contrasted the scenario in *Stewart*, where he found that Stewart was vulnerable to the actions of Greenspan because of the inequality in bargaining power between them, with the situation in *LAC Minerals*, which Sopinka J. characterized as an arm's length transaction between equally sophisticated business entities that did not result in the imposition of a fiduciary relationship between the parties. It is suggested that Macdonald J.'s reliance on this statement and his application of it to the facts in *Stewart* is inappropriate.

In *LAC Minerals*, LAC, a senior mining company, was given information by Corona, a junior mining company, about lands that Corona suspected were significantly gold-bearing. LAC proposed that the two companies enter into a joint venture agreement with respect to the properties. In the interim, LAC circumvented the negotiation process between the companies and acquired the properties for itself. Sopinka J.'s judgment held that LAC breached a duty not to use confidential information, thereby rendering it a constructive trustee of the properties in question, but that there were no fiduciary obligations owed by LAC to Corona since both companies were sophisticated business entities acting at arm's length.

Justice Sopinka's finding that LAC did not owe fiduciary obligations to Corona was premised upon his assertion that for a fiduciary relationship to arise, the parties had to be inherently unequal in bargaining power prior to the formation of their relationship.²⁶ This assertion is incorrect. Although beneficiaries' vulnerability to the action of their fiduciaries is an inherent element of fiduciary relations, Sopinka J.'s discussion of beneficiaries' vulnerability in *LAC Minerals* seriously mischaracterizes the role of vulnerability in those relations. While vulnerability is a notable characteristic of fiduciary relations, it is only one component of those relationships. When vulnerability is overemphasized, it becomes a hindrance to understanding the nature of fiduciary relations.²⁷

²⁴ *Ibid.* at 340. Note also the comments made by Justice Wilson, *ibid.* at 361: "... [T]he Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit. The Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied."

²⁵ (1989), 61 D.L.R. (4th) 14 (S.C.C.).

²⁶ He relied upon the judgment of Wilson J. in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 (S.C.C.) to support this proposition.

²⁷ See, generally, L.I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada," (1996), 24 Man. L.J. 60 [hereinafter "Vulnerable Position"].

Vulnerability is overemphasized when it ceases to be a characteristic endemic to fiduciary relationships and instead becomes a determining factor for their existence. When vulnerability is overemphasized, fiduciary relations are deemed to exist only where the parties occupy distinctively dominant and subordinate roles. While fiduciary relations may well exist between such parties, the fact that one person is inferior in power to another is not a sufficient basis, in and of itself, to find that a fiduciary relationship exists.²⁸ There is no requirement imposed by fiduciary doctrine that dictates that the parties to a fiduciary relationship be inherently unequal for their relationship to be characterized as fiduciary.

One example of a fiduciary relationship where the parties are not inherently unequal, but are vulnerable to the actions of each other within the confines of their fiduciary relations, is the relationship between partners in a professional services firm. Partner *A* and partner *B* share equally in the profits and losses of the firm and neither is, in any way, superior or inferior to the other in the firm's hierarchy. Because of their partnership, however, the actions of one partner bind the other even where the other is completely unaware of the former's actions.²⁹ Thus, if *A* signs an agreement on behalf of the partnership, *B* incurs liability under the agreement.³⁰ Consequently, *B*, while in all other respects equal to *A*, is nevertheless vulnerable to *A*'s actions. Meanwhile, *A* possesses the same vulnerability to *B*'s actions should *B* sign a contract on behalf of the partnership. The relationship between *A* and *B* is deemed to be fiduciary because of either party's ability to affect the other's interest and the other's resultant vulnerability to the exercise of that power.

In point of fact, then, fiduciary relationships *create* the vulnerability of beneficiaries at the hands of their fiduciaries; those who would be beneficiaries need not be vulnerable to those who would be their fiduciaries outside the confines of their fiduciary relationship, as Sopinka *J.* indicates in *LAC Minerals*. To put the matter another way, while a fiduciary relationship may result in an inequality in power between the fiduciary and beneficiary *within the scope of that relationship*, there is no requirement that an inequality in the parties must exist *outside of that relationship or prior to its formation*.³¹ For this reason, it was possible for the Supreme Court of Canada, in its decision in *Hodgkinson v. Simms*, to hold that a fiduciary relationship existed between a stockbroker and

²⁸ See *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 at 433 (H.C. Aust.); P.D. Finn, "The Fiduciary Principle," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, (Toronto: Carswell, 1989) at 46.

²⁹ Note, for example, sections 6, 7, 10, 11, 12, and 13 of the Ontario *Partnership Act*, R.S.O. 1990, c.P-5 which are standard considerations in provincial partnership statutes that account for the ability of partners to bind each other and the firm through their actions or omissions, as well as their joint and several liability for such acts/omissions.

³⁰ Unless, for example, partner *A* is not carrying on, in the usual way, business of the kind carried on by the firm – see *Partnership Act*, *ibid.* s. 6. It should also be noted that partnership statutes carry other, more fact specific, restrictions on the abilities of partners to bind each other and their firms.

³¹ See, generally, Rotman, "Vulnerable Position," *supra* note 27; also Frankel, *supra* note 20 at 810.

a chartered accountant he had hired to advise him in tax planning and sheltering through investment. As La Forest J. explained, fiduciary law is different in this regard than the law relating to unconscionability:

... [W]hile the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability ...³²

While *Hodgkinson* did not, technically speaking, overturn the precedent established in *LAC Minerals*,³³ it is suggested that the majority's judgment on vulnerability in *Hodgkinson* is more consistent with the understanding of vulnerability's proper function within the realm of fiduciary doctrine, as discussed above.³⁴

i. *Breach of Fiduciary Duty*

Because Greenspan's relationship with Stewart was a solicitor-client relationship, there would be a rebuttable presumption that the relationship was fiduciary in nature. Traditionally, the relationship between solicitor and client has been described as fiduciary.³⁵ However, the fact that a certain type of relationship has previously been described as fiduciary does not necessarily entail that every instance of that form of relationship is fiduciary.

Along this same line of reasoning, relationships are not properly described as fiduciary simply if they fit within already established categories of fiduciary relations.³⁶ This categorical approach to fiduciary relations ignores the public policy purpose underlying fiduciary doctrine, namely the desire to preserve the integrity of socially valuable or necessary relationships that arise as a result of human interdependency.³⁷ The application of fiduciary doctrine to these relationships

³² *Supra* note 2 at 174.

³³ In *Hodgkinson*, La Forest J.'s majority judgment was concurred with by L'Heureux-Dubé, Gonthier, and Iacobucci JJ., although Iacobucci J. dissented from that element of the judgment that overturned the precedent established in *LAC Minerals*. The dissenting judgment of Sopinka and McLachlin JJ., (with Major J. concurring), affirmed the findings of vulnerability found by the majority in *LAC Minerals*.

³⁴ See Rotman, "Vulnerable Position," *supra* note 27.

³⁵ See, for example, *Read v. Cole*, [1915] S.C.R. 176; *Parry-Jones v. Law Society*, [1969] 1 Ch. 1; *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (C.A.); *Re R. and Speid* (1983), 43 O.R. (2d) 596 (C.A.); *Jacks v. Davis*, [1983] 1 W.W.R. 327 (B.C.C.A.).

³⁶ See Rotman, "Fiduciary Doctrine," *supra* note 1; *LAC Minerals*, *supra* note 25 at 29, per La Forest J.:

The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.

³⁷ See *ibid.* at 826; Finn, "The Fiduciary Principle," *supra* note 28 at 26.

provides a check on the potential abuses of power that exist therein as a result of the unequal power relations created by such relationships.³⁸

Under a functional approach to fiduciary relations, a relationship is properly described as fiduciary only if the circumstances peculiar to it and the interaction of its participants warrant the application of fiduciary principles. This situation-specific nature of fiduciary relations is the most vital characteristic of fiduciary relationships and ought properly receive the bulk of judicial attention.³⁹ Consequently, reliance on so-called "traditional" categories of fiduciary relations or the "I know one when I see one" approach ought to be discarded in favour of this functional approach. The nature of clients' dependence upon the skill and expertise of their lawyers and the lawyers' concomitant ability to affect their clients' interests provides a functional basis for describing solicitor-client relations as fiduciary. It is this functional aspect of solicitor-client relations, rather than the categorical understanding of such relations as being fiduciary, that warrants their description as such. Under the terms of their solicitor-client relationship, Stewart had contracted with Greenspan to protect his legal interests. The nature of the sentence imposed upon Stewart would be significantly affected by Greenspan's skill and expertise as counsel. While Greenspan was obliged to act in his client's interests, he retained the discretion to act as he saw fit in the advocacy of those interests. The solicitor-client relationship between Greenspan and Stewart thus created a situation whereby Stewart's interests were inextricably tied with Greenspan's advocacy on behalf of those interests. As Macdonald J. explained it:

... In any trial, the client's dependency on counsel and jeopardy arising from the nature of the trial, and counsel's control of its conduct are relevant to the question of whether a particular counsel and client relationship, or some part of it, is a fiduciary relationship and if so, relevant also to the further question of the nature of any fiduciary duties owed by counsel to the client.⁴⁰

Since Stewart had reposed his trust and confidence in Greenspan to protect Stewart's legal interests and was entirely dependent upon Greenspan's discretionary use of his skill and expertise in doing so, there is a functional basis for describing their particular relationship as fiduciary. This finding, however, is only a first step. The next question that must be addressed is the nature of the obligations owed by Greenspan, as fiduciary, to Stewart.

As a fiduciary, Greenspan was obliged to act in the best interests of his client. Yet, where a relationship is found to be fiduciary in nature, that does not necessarily entail that every aspect of that relationship is fiduciary.⁴¹ Indeed, the nature of the fiduciary obligations owed by Greenspan to Stewart would have been restricted to the content of the matters entrusted to Greenspan in his

³⁸ As explained earlier, the inequality in power that exists within fiduciary relationships does not necessarily exist outside of those relationships nor is an inherent inequality in the parties a necessary precursor to a finding of a fiduciary relationship.

³⁹ See Rotman, *Parallel Paths*, *supra* note 18 at 155-7.

⁴⁰ *Stewart*, *supra* note 6 at 87-8.

⁴¹ See *ibid.* at 130; *McInerney v. MacDonald*, *supra* note 3 at 423; *New Zealand Netherlands Society 'Oranje' Inc. v. Kuys*, [1973] 2 All E.R. 1222 at 1225-6 (P.C.).

professional capacity. Therefore, there would be no question that, during the currency of the solicitor-client relationship between Greenspan and Stewart, Greenspan owed a duty to act in Stewart's best interests vis-à-vis the criminal charges against him. However, the solicitor-client relationship between Greenspan and Stewart was found by Macdonald J. to have extended beyond the normal realms of solicitor-client relationships to Greenspan's ability to control Stewart's case outside of the courtroom – namely, Greenspan's unfettered discretion to deal with the media as he saw fit and his actions in trying to insulate Stewart from the post-sentence effects of his crime.

Since Greenspan had been contracted to act as Stewart's counsel for the sentencing element of the trial and, later, on appeal, their solicitor-client relationship would appear to have terminated at the conclusion of the unsuccessful appeal of Stewart's conviction. At that point, the parties did go their separate ways. The pressing question before the court in the civil action was whether Greenspan had a continuing fiduciary duty of loyalty to Stewart that transcended the duration of their solicitor-client relationship as Stewart had alleged.

Where fiduciary relationships are found to exist, they do not necessarily continue indefinitely. Often, fiduciary relationships terminate upon the happening of a particular event or occurrence. For example, where a director of a corporation owes fiduciary obligations to the corporation, as extended both by common law and Canadian corporate law statutes,⁴² those obligations terminate once the director resigns or is relieved of duty. The fact that the director's obligations terminate at that point does not mean that the director is freed of liability the moment the director's office is vacated. While the director no longer continues to owe fiduciary obligations to the corporation relating to occurrences subsequent to vacating the position, the director retains fiduciary responsibility for matters that occurred while the director was a director of the corporation. This continuing fiduciary obligation remains indefinitely. Any breach of this obligation would potentially be actionable at any time, subject to the application of statutory limitation periods or the equitable doctrines of laches or acquiescence.⁴³

These same principles apply to the relationship between Greenspan and Stewart. Consequently, Greenspan ought to be understood as continuing to owe Stewart a duty of loyalty pertaining to their solicitor-client relationship beyond

⁴² Note, for example, section 134(1)(a) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, which states:

134. (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
- (a) act honestly and in good faith with a view to the best interests of the corporation ...

⁴³ Although, technically, the application of statutory limitation periods, laches, or acquiescence would not result in a finding that the fiduciary obligations of the director no longer existed, but that they were barred by statute or Equity from being the basis of a permissible claim against the director. The application of statutory limitation periods to breaches of fiduciary duty is not straightforward: see Rotman, *Parallel Paths*, *supra* note 19 at 190-5.

the termination of that relationship.⁴⁴ Therefore, if it was demonstrated that Greenspan breached his fiduciary obligations to Stewart via his involvement in the broadcast of the "*Regina v. Stewart*" episode, he would be liable to Stewart for any breach incurred.

ii. *Greenspan's Belief in his Client's Innocence*

Stewart maintained that Greenspan's participation in the broadcast endorsed the findings of fact made at Stewart's criminal trial. Stewart claimed that when Greenspan represented him on the appeal of his conviction, Greenspan believed in the truth of his submission to the Ontario Court of Appeal that Stewart was not guilty of criminal negligence causing death. Because the broadcast made no mention of the appeal, or Greenspan's participation in it, Stewart alleged that Greenspan failed to inform the public that he had reason to believe that Stewart was innocent.

Macdonald J. held that this allegation was not a legal conclusion that could logically be drawn from the facts. As he explained:

In putting a client's case, it is beyond reasonable human capability for any counsel to know with certainty that another person's assertions are factual, as distinct from having the professional opinion that the other person's position is arguable. The former is beyond what courts require as proof, and cannot be expected of counsel as a condition precedent to appearing in court to tender the client's proof. The latter, a professional opinion that the client's position is arguable, is well within reach through reasonable diligence. It also does not impede counsel from appearing in court to assist a client when there is less than angelic certainty in the client's evidence.⁴⁵

Macdonald J. also concluded that Greenspan's representation of Stewart on appeal was not conclusive evidence of his personal belief in Stewart's innocence.⁴⁶ Since there was no reasonable basis for presuming that Greenspan personally believed in Stewart's innocence, as opposed to the arguable nature of the facts as he asserted them, this element of Stewart's claim was dismissed.

⁴⁴ Note the cases cited by Macdonald J. in *Stewart*, *supra* note 6 at 138-43 in support of the proposition that lawyers' fiduciary obligations to their clients continue beyond the termination of their solicitor-client relationships – in particular *Re R. and Speid*, *supra* note 35, cited in *Stewart*, *supra* note 6 at 142 – as well as his reference to the prominent fiduciary cases *Canadian Aero Service Ltd. v. O'Malley* (1973) 40 D.L.R. (3d) 371 (S.C.C.), *McLeod and More v. Sweezy* (1944), 2 D.L.R. 145 (S.C.C.), and *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551 in support of this same proposition.

⁴⁵ *Stewart*, *supra* note 6 at 92-3.

⁴⁶ As Macdonald J. explained, *ibid.* at 93:

If every counsel were required to adopt personally, or to accept as true everything which counsel needs to say in court for the protection of a client, counsel would have a personal stake in the way the case is presented. Counsel's loyalties would be divided, thereby creating for counsel a conflict between duty and interest which is intolerable in any lawyer and client relationship.

iii. *Greenspan's Duty Not to Publicize the Case*

Stewart alleged that Greenspan breached his fiduciary duty by publicizing the criminal trial to his detriment. Both Greenspan and Mark Sandler, an experienced criminal lawyer who was called upon as an expert witness on behalf of Greenspan, testified that counsel retain the discretion whether to publicize information in the public domain about former clients' cases in the absence of any contractual prohibition on such activity. Greenspan's retainer to act on Stewart's behalf contained no such prohibition.⁴⁷

Sandler – whose opinion was formed, in part, from literature compiled by Professor Martin Friedland of the Faculty of Law, University of Toronto, as well as from conversations with Friedland on the topic – testified that there is an important societal value in having lawyers publicly discuss cases they have handled. In particular, he explained that the public's appreciation of the justice system, as gained through discussion of legal and social issues raised by case law and the advocacy techniques used, enhanced public confidence in that system.

Macdonald J. accepted Sandler's testimony as to the benefits gained by society through the dissemination of information about cases tried before the courts. However, he rejected Sandler's contention that counsel have a right to decide, as a matter of personal choice, whether to publicize any non-confidential information pertaining to former clients and their cases.⁴⁸ He pointed, in particular, to the following exchange that occurred at the civil trial:

The court: If there is a recognition in the minds of counsel of a need not to injure a client and these counsel are, as I asked you to hypothesize, responsible, reasonable counsel, etc., why is that simply a matter of personal choice on the part of the lawyer rather than something which is an obligation to the client, given that acting in the best interests of the client was part of the retainer, and given that the vulnerability continues to exist if there is to be some injury as you mentioned, even though the retainer is over?

Mr. Sandler: While taking us away from the Stewart case for a moment, first of all one has to look at it from the overall perspective of the administration of justice. And that is, what would the overall effect be upon the administration of justice and the educational value inherent in talking about one's cases if one read into a lawyer's obligations in every case the obligation never to talk about, never to talk about those cases where there is a risk that the client could suffer some harm. Your Honour, that would require that that counsel consult with a former client for all time in relation to any public dissemination of information. And I would suggest that that perhaps would ultimately undermine the societal value that I have described. But I have to say that counsel might take those kinds of factors into consideration [and] may well exercise caution and not talk about the cases where there is a risk of doing

⁴⁷ The ability of counsel to publicize a former client's case would also be dependent upon the presence of confidential information that would be protected under solicitor-client privilege or the existence of non-publication orders attached to the cases in question.

⁴⁸ *Ibid.* at 96.

so. *The point that I have been making is that if one looks at the standards in the profession, there is no standard in the profession that compels counsel to do that. That seems to be clear. And in my view, there is no rule of professional conduct that compels counsel to do that.* [Parentheses and emphasis added.]⁴⁹

Macdonald J. concluded that careful, competent, and responsible criminal defence counsel should account for the risk of harm to a former client prior to deciding whether to speak publicly about the client or the client's case. He explained that while professional rules of conduct or the standards of the legal profession may not require such action on the part of counsel, the personal decisions of counsel in this regard are nevertheless subject to legal and equitable principles, such as fiduciary doctrine.⁵⁰

The existence of fiduciary obligations as an integral element of solicitor-client relationships provides for an extra level of scrutiny vis-à-vis the public disclosure of information about former clients or their cases in addition to that imposed by individual counsel's personal appraisal of the situation. Thus, counsel's personal belief that information about an ex-client may be publicized does not entail that such action does not amount to a breach of fiduciary obligation to act in that client's best interests. As mentioned earlier, a lawyer's fiduciary obligation to a client extends beyond the termination of the active solicitor-client relationship. Therefore, if counsel wishes to publicize information about an ex-client or that client's case that is prejudicial to that client's interests, counsel is under a duty either to refrain from publicizing the information or to obtain the prior consent of the client in order to avoid a breach of fiduciary obligation.

The fact that information about a client's trial is a part of the public domain does not absolve a lawyer from publicizing information about the trial in the media. While this information is within the public domain, the vast majority of the public is unaware of its contents, that they have access to such information, or where to obtain it. Therefore, when a lawyer publicizes such information in the media, the lawyer is bringing the information to the public's attention either for the first time or in a manner that disseminates that information well beyond ordinary means. Regardless of this fact, the issue in the *Stewart* case was not simply whether Greenspan could publicize information about Mr. Stewart that was already in the public domain in some capacity, but whether Greenspan had an obligation not to act in a manner contrary to his client's best interests.⁵¹ It is this latter concern that ought to have informed his decision whether to publicize the *Stewart* case.

In addition to considering Sandler's testimony, evidence was also led in the *Stewart* civil trial by Greenspan's counsel as to the practices of leading criminal defence counsel, such as J.J. Robinette, Q.C., F.R. Scott, Q.C., and Arthur Maloney, Q.C. It was argued that these prominent lawyers did not consult with former clients prior to publicizing them or their cases in the media. Aside from

⁴⁹ *Ibid.* at 97 (underlined passages my emphasis).

⁵⁰ *Ibid.* at 98.

⁵¹ See the discussion of Greenspan's fiduciary obligations, *infra*.

a lack of evidence to conclusively support this assertion, Macdonald J. concluded that the evidence presented was too general to support Greenspan's assertion that there were no fiduciary constraints upon the public use or discussion of information in the public domain about former clients.⁵² Perhaps more importantly, Macdonald J. held that the information from Mr. Robinette, which was obtained in 1984, "probably did not take into account the significant developments in this area and the ongoing evolution of fiduciary principles as of the broadcast in 1991."⁵³

It was discovered at the civil trial that Greenspan had had explicit communication from Stewart that he did not want Greenspan to publicize his case. The fact that Greenspan ignored express statements from his former client not to publicize the case – and that there was good reason for Stewart to be concerned about having the case publicized – certainly raised the spectre of a breach of fiduciary obligation by Greenspan. While the late Justice Sopinka explained in *MacDonald Estate v. Martin*⁵⁴ that lawyers' rules of professional conduct are to be understood as expressing the collective views of the legal profession about the standards that lawyers are bound to observe, as Macdonald J. explained, the fact that such matters were not addressed by the rules of conduct of the Law Society of Upper Canada, to which Mr. Greenspan belonged, does not entail that Greenspan's conduct was not also subject to principles of fiduciary law.⁵⁵

While the Law Society of Upper Canada's Rules of Professional Conduct, or those of any other provincial law society, are not determinative of the totality of obligations that solicitors owe to their clients, Rules 4, 5, and 21, which speak to issues of confidentiality of information, conflict of interest, and "Lawyers in their Public Appearances and Public Statements," respectively, are relevant to the issues at bar and were discussed at length in the trial judgment.⁵⁶

iv. *Relevant Rules of Professional Conduct and Commentaries*

Confidentiality of information is dealt with in Rule 4 of the Law Society of Upper Canada's Rules of Professional Conduct. It states that:

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship.

⁵² *Ibid.* at 100.

⁵³ *Ibid.* at 101.

⁵⁴ (1990), 77 D.L.R. (4th) 249 (S.C.C.).

⁵⁵ See *Stewart*, *supra* note 6 at 108.

⁵⁶ Rule 11, which states that "The lawyer should encourage public respect for and try to improve the administration of justice" was also referred to in the trial judgment, but was found to overlap with many of the principles contained within Rule 21. Rule 17 – which holds that lawyers who engage in another profession, business, or occupation concurrently with the practice of law are prohibited from allowing those outside interests to jeopardize their professional integrity, independence, or competence – was found not to be applicable to the issues in question, insofar as the broadcast did not result in any jeopardy to Greenspan's professional integrity, independence, or competence as contemplated by the rule.

and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

The most relevant of the commentaries to this rule for the facts in *Stewart* are Commentaries 2, 4, 5, and 8.⁵⁷ Commentary 2 holds that the rule against disclosing confidential information is broader in its application than the evidentiary rules pertaining to solicitor-client privilege and applies "without regard to the nature or source of the information or the fact that others may share the knowledge." While it might appear that commentary 2 extends to information that is part of the public domain, commentary 8 expressly states that the rule against disclosing confidential information "may not apply to facts which are public knowledge, but nevertheless the lawyer should guard against participating in or commenting upon speculation concerning the client's affairs or business."

Commentary 4 states that lawyers have a "duty of secrecy to every client without exception, and whether it be a continuing or casual client." This duty of secrecy "survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client ..." Thus, commentary 4 reinforces the principle of fiduciary law that fiduciary obligations are continuing obligations that remain in place after the active component of the relationship in question has come to a close.

Commentary 5 also touches upon some issues raised by the *Stewart* case. It states that:

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client. Should the lawyer engage in literary works such as an autobiography, memoirs and the like, the lawyer should avoid disclosure of confidential information.

This commentary, as Macdonald J. noted, is simply an affirmation of the existing principle of fiduciary law against conflict of interest, though restricted in scope to confidential information. It is, therefore, closely related to Rule 5, which deals directly with the issue of conflict of interest.

Rule 5 holds that lawyers must not act in conflict of interest and should not act on both sides of a transaction where there is a likelihood of conflict of interest.⁵⁸ The first component of the rule is stated in mandatory language: the lawyer "must not advise or represent both sides of a dispute ..." The second element is simply a direction which advises lawyers not to act in situations where a conflict of interest exists or is likely to exist, notwithstanding the consent of the parties involved.

⁵⁷ Commentaries to the Rules of Professional Conduct are interpretive aids intended to amplify or clarify the rules in question.

⁵⁸ The complete text of Rule 5 reads as follows:

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

The only commentary to Rule 5 that is relevant to the relationship between Greenspan and Stewart is commentary 13, which states that a lawyer who has acted on a client's behalf should not thereafter act against the client in the same or any related matter, or when the lawyer has "obtained confidential information from the other party in the course of performing professional services." Commentary 13 does not, however, prohibit the lawyer from acting against former clients in new matters that are entirely unrelated to work previously done for those clients or where any confidential information that has been obtained is irrelevant to that matter.

Aside from acting against former clients in the same or any related matter, or when the lawyer has "obtained confidential information from the other party in the course of performing professional services," it is not entirely clear from Rule 5 what constitutes a conflict of interest on the part of the lawyer. Macdonald J. came to this same conclusion in *Stewart*.⁵⁹

Rule 21, which applies to "Lawyers in their Public Appearances and Public Statements," provides guidance for the conduct of lawyers outside of the courtroom when dealing with the media. The five sections of Rule 21 are:

- (1) Lawyers in their public appearances and dealings with the media are to conduct themselves according to the same standards of professional conduct as in their dealings with their clients, fellow practitioners, courts, and tribunals;
- (2) Lawyers' duties to their clients requires that they only make public statements about their clients' affairs that are (a) in the best interests of those clients; (b) within the scope of their retainers, and; (c) not in a manner which results a conflict of personal or other interests with those of their clients;
- (3) Lawyers are to refrain from expressing personal opinions as to the merits of clients' cases when acting as advocates;
- (4) Where possible, lawyers are (a) to encourage public respect for and attempt to improve the administration of justice, and; (b) to treat fellow practitioners, courts, and tribunals with respect, integrity, and courtesy. Lawyers are subject to a separate and higher standard of conduct than that which might incur the sanction of the court.
- (5) Lawyers' public communications should not be used for self-promotion or self-aggrandizement and ought to be free from any suggestion of such.

The obligations of lawyers in their public appearances and statements are, therefore, to assist the media in its understanding and appreciation of the judicial process and to restrict their discussion about clients' cases to matters that are within the clients' best interests. Lawyers are not to use the media for their own purposes, but only where they may further the interests of the administration of justice, which may include enhancing the public perception of their clients.

Interestingly, Rule 21 does not impose a requirement for lawyers to consult with their clients prior to engaging in the forms of activity sanctioned by the rule. In particular, paragraph 2 – which states that lawyers should only make public statements about their clients' affairs that are in the best interests of those clients,

⁵⁹ *Stewart*, *supra* note 6 at 115.

within the scope of their retainers, and not in a manner which results a conflict of personal or other interests with those of their clients – only contemplates lawyers satisfying *themselves* as to these requirements. This is indicated by the wording of paragraph 2, which states “The lawyer’s duty to the client demands that, before making a public statement concerning the client’s affairs, *the lawyer must first be satisfied* that any communication is in the best interests of the client and within the scope of the retainer. [Emphasis added].” In his book *The Case for the Defense*, Greenspan did deem it prudent to obtain the consent of former clients about whom he wrote, as indicated by his acknowledgements in the book.⁶⁰ Why he did not engage in a similar practice vis-à-vis Stewart is uncertain.

v. *Conclusions Regarding the Rules of Professional Conduct and Commentaries*

Macdonald J. found that Greenspan did not disclose confidential information, contrary to Rule 4, in conjunction with the broadcast of the “*Regina v. Stewart*” episode. The information used to script the program had been in the public domain for quite some time and, therefore, was an exception to the application of the rule against the use of confidential information, as stated in commentary 8.⁶¹ Greenspan’s exaggeration of the distance that Jordan was dragged screaming was described as “misinformation,” which was not addressed in the rules.⁶² Macdonald J. concluded that while Rule 4 may influence judicial considerations of a lawyer’s fiduciary obligations to a client, it did not exempt lawyers from the application of those principles.⁶³

Rule 5 against conflict of interest and the bulk of the commentaries which accompany it were held to not be directly relevant to the facts in *Stewart* because of the absence of confidential information involved in the broadcast. Macdonald J. found that Greenspan’s involvement in “The Scales of Justice” was consistent with the principles espoused in paragraph 4 of Rule 21 – encouraging respect for and attempting to improve the administration of justice. However, he found that that was not Greenspan’s sole purpose for his involvement in the broadcast of the “*Regina v. Stewart*” episode.

Greenspan’s involvement in the production and broadcast of the episode was deemed by the trial judge to have resulted in self-promotion contrary to Rule 21, paragraph 5. Greenspan’s role as host and narrator of the episode represented him to the public as a prominent member of the bar and a legal expert. In the broadcast, Greenspan also referred indirectly to his success in having Stewart sentenced to only three years’ imprisonment, whereas another

⁶⁰ E.L. Greenspan and G. Jonas, *The Case for the Defence*, (Toronto: Macmillan, 1987) at xii. I thank Kevin Barr, University of Alberta Law ’99, for bringing this to my attention.

⁶¹ *Ibid.* at 112-13.

⁶² *Ibid.*

⁶³ *Ibid.* at 113.

person convicted of the same offense by the same judge was sentenced to five years' incarceration. From these factors, Macdonald J. concluded that "Mr. Greenspan's primary purpose in involving himself in this production and broadcast, in which educational content was otherwise assured, was to publicize himself and his services as counsel to a national audience."⁶⁴ Macdonald J. did not find, however, that Greenspan had engaged in self-aggrandizement. Rather, it was determined that Greenspan had minimized his accomplishments for Stewart in obtaining a reduced sentence for him.

vi. *Greenspan's Obligation to Insulate Stewart from Future Harm*

In his pleadings, Stewart claimed that Greenspan had an obligation to insulate him from future harm caused by re-publicizing his case. Although the primary basis of these claims were fiduciary in nature, there were also allegations that raised confidentiality concerns.⁶⁵ Macdonald J. held that since Stewart had not established his contractual claims pertaining to the retainer nor were confidentiality considerations relevant to the determination of Greenspan's fiduciary obligations in the case, the confidentiality issues set forth ought to be dismissed.

As for Stewart's claim that Greenspan had an obligation to insulate him from future harm caused by re-publicizing his case, Macdonald J. properly explained that Stewart had no free-standing right to preserve any decreased public awareness of what he had done to Judy Jordan that arose from the passage of time.⁶⁶ However, the legitimacy of this statement does not mean that Greenspan was under no obligation to refrain from publicizing these events if, in doing so, he acted in a manner that was contrary to Stewart's best interests which resulted in a breach of Greenspan's fiduciary obligations. Macdonald J. proceeded to focus attention on whether Greenspan owed Stewart a fiduciary duty of loyalty vis-à-vis the facts of his case and, if so, whether this duty ought to have prevented Greenspan from participating in the broadcast.

VII. *Fiduciary Issues*

Macdonald J. held that while the relationship between solicitor and client is a traditional form of fiduciary relation, the relationship between solicitor and former client is not.⁶⁷ Nevertheless, as discussed earlier, the fact that a relationship may not fit within traditional categories of fiduciary relations does not prevent a finding that it is fiduciary in nature.

⁶⁴ *Ibid.* at 121.

⁶⁵ While the tort of breach of confidence was not pleaded, the statement of claim maintained that confidentiality considerations existed both as an implied contractual term vis-à-vis the retainer as well as in relation to his claim of a breach of fiduciary obligation. Both of these claims were dismissed by Macdonald J.

⁶⁶ *Ibid.* at 128.

⁶⁷ *Ibid.* at 130.

Macdonald J. found that since the relationship between Greenspan and Stewart was properly characterized as a "power-dependency relationship," it was fiduciary in nature when the "*Regina v. Stewart*" episode was broadcast in 1991. The fiduciary nature of the relationship in 1991 stemmed from Greenspan's involvement in the public aspects of Stewart's crime when he participated in the broadcast, Stewart's objection to it, and Greenspan's choice to proceed with his involvement in the show. Macdonald J. held that the fiduciary nature of their relationship in 1991 was simply a continuation of the fiduciary relationship that had existed between them previously. This finding is entirely consistent with the notion that fiduciary obligations continue after the active fiduciary element of a particular relationship has come to a close.

Although Macdonald J. held that the fiduciary relationship between Greenspan and Stewart in 1991 was a continuation of their earlier relationship, there was one significant difference. During their solicitor-client relationship, Greenspan had acted with Stewart's interests foremost in his thoughts. However, in 1991, Greenspan's involvement was found to be purely for personal benefit and without consideration as to its effect on Stewart or Stewart's objections. As Macdonald J. explained, "For close to one million viewers across the nation, Mr. Greenspan gave the aging issues of Mr. Stewart's crime, trial and sentence a new immediacy and in doing so, he exaggerated the distance Mr. Stewart had dragged Mrs. Jordan screaming in agony."⁶⁸ Greenspan's role in the broadcast was therefore held to be inconsistent with the steps he had taken to immunize Stewart from the post-sentence effects of his crime:

... [D]uring the retainer Mr. Greenspan's counsel work on Mr. Stewart's behalf was directed in part to benefiting and protecting Mr. Stewart's interests in the future, regardless of when the retainer would end. The future benefit and protection which Mr. Greenspan worked to provide was not limited by some intrinsic finite element, or directed to some foreseeable and finite period of time. On the evidence, these future benefits and protections were not time limited. They were intended to be, and were for Mr. Stewart's indefinite advantage.⁶⁹

By appearing in the broadcast of "*Regina v. Stewart*" in 1991, Greenspan was deemed to have unravelled much, if not all, of the benefit of his positive actions to protect Stewart.⁷⁰ Macdonald J. accepted the testimony of George Jonas, who had been integrally involved in the creation and production of "The Scales of Justice," that the *Stewart* case was broadcast because "the human and legal issues involved in Mr. Stewart's crime, trial and sentencing continued to be significant, and capable of attracting significant public attention."⁷¹ Macdonald J. also found that the future benefits and protections provided by Greenspan

⁶⁸ *Ibid.* at 134.

⁶⁹ *Ibid.* at 135.

⁷⁰ By appearing on the broadcast of "*Regina v. Stewart*," Macdonald J. held that Greenspan "not only revisited the future benefits and protections he had worked to provide to Mr. Stewart as his counsel, he undermined them.": see *Ibid.* at 137.

⁷¹ *Ibid.* at 136.

during his solicitor-client relationship with Stewart were to benefit Stewart in precisely these circumstances.

At this point, Stewart had demonstrated a *prima facie* case that Greenspan had breached his fiduciary duty. Under fiduciary law's reverse onus, the burden of proof then shifted to Greenspan to demonstrate that there was no breach of duty.

i. *The Reverse Onus*

Because of the relative positions of beneficiaries vis-à-vis their fiduciaries and the latter's ability to conceal the existence of a breach of duty by virtue of their significant control over their beneficiaries' affairs, fiduciary doctrine has eased the burden of proof required of beneficiaries who allege a breach of fiduciary duty. A beneficiary who brings a claim for breach of fiduciary obligation must establish that the relationship in question is fiduciary and that a *prima facie* breach of duty by the fiduciary has occurred. If this threshold is satisfied, the burden of proof shifts to the fiduciary, who must demonstrate that no breach occurred. The basis for this reverse onus was described by Lord Penzance in *Erlanger v. New Sombrero Phosphates Ltd.*:

The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relationship and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.⁷²

This same proposition was stated in the context of solicitor-client relations in *Biggs v. London Loan & Savings Co.*; *London Loan & Savings Co. v. Brickenden*, where Crocket J. explained that:

... [I]t must now be taken as an established rule of law that when a solicitor acts for a client in a matter in which he is himself financially interested the onus rests upon him, if the propriety of the transaction is called into question, to show that the transaction was fair and just and in no way disadvantageous to his client.⁷³

A *prima facie* breach of duty may be established by juxtaposing the nature of the fiduciary's obligations under the relationship in question against the fiduciary's actions that are claimed to constitute a breach of duty. In the *Stewart* scenario, this was done by demonstrating that Greenspan, as a fiduciary, owed a duty of loyalty to act in Stewart's best interests and that Greenspan's republicizing of Stewart's case on television was inconsistent with those interests. Once a *prima facie* inference of breach has been established and the burden shifts to the fiduciary to disprove the allegation of breach, the fiduciary

⁷² [1877-78] 3 App. Cas. 1218 at 1230 (H.L.). See also *Allcard v. Skimmer*, [1886-90] All. E.R. Rep. 90 at 93 (C.A.); *Zamet v. Hyman*, [1961] 3 All E.R. 933 at 938 (C.A.).

⁷³ [1933] 3 D.L.R. 161 at 164 (S.C.C.), *aff'd (sub. nom. Brickenden v. London Loan & Savings Co.)*, [1934] 3 D.L.R. 465 (P.C.).

may only rebuff the allegation by demonstrating that no fiduciary relationship existed or that no breach of duty actually occurred.

A fiduciary may not rebut an allegation of breach simply by showing that the beneficiary also benefited from the transaction in question. Similarly, a fiduciary will not be alleviated from liability for breaching a fiduciary duty by showing that any actions taken were entered into in good faith; rather, liability arises as a result of the fact of breach itself. As Lord Russell of Killowen explained in *Regal (Hastings) Ltd. v. Gulliver*:

The rule of equity, which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*: or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.⁷⁴

In accordance with this understanding of fiduciary relations, it has also been held that a fiduciary may not refute a *prima facie* inference of breach by demonstrating that the beneficiary's loss would have occurred notwithstanding the breach of duty by the fiduciary (which is often described in fiduciary parlance as "inevitability of loss").⁷⁵

The bottom line respecting fiduciaries' duties to their beneficiaries is that fiduciaries are under duties of utmost good faith, or *uberrima fides*, to act in their beneficiaries' best interests. Any deviation from that duty, or any conduct that might bring into question the selflessness of the fiduciaries' actions pursuant to that duty, will be held to constitute a *prima facie* breach of fiduciary obligation.

In his defence of Stewart's allegation of breach of fiduciary duty, Greenspan put forward the public benefit derived from the broadcast of the "*Regina v. Stewart*" episode, his involvement in it specifically, and, more generally, in developing "The Scales of Justice" and bringing it to fruition. Greenspan also advanced the argument that individual lawyers and the legal profession as a whole benefit by learning from lawyers discussing their professional experiences, as he had done via with the broadcast. Thus, the essence of Greenspan's defence was his claim that there were significant benefits to his actions, notwithstanding the loss suffered by Stewart.

As the above discussion of the reverse onus indicates, these arguments do not satisfy fiduciary law's requirements to rebut an allegation of breach. While the benefits claimed by Greenspan may well be positive effects resulting from his involvement in the broadcast, they do not insulate him from liability for

⁷⁴ [1942] 1 All E.R. 378 at 386 (H.L.); see also *ibid.* at 381, per Viscount Sankey. See the discussion of *Regal (Hastings)*, *infra*.

⁷⁵ See *British American Elevator Co. v. Bank of British North America* (1914), 20 D.L.R. 944 (Man. K.B.); *Brickenden v. London Loan & Savings Co.*, *supra* note 73 at 469; *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56 at 64 (B.C.S.C.).

breaching his fiduciary duty to Stewart. However, Macdonald J. did not apply the reverse onus principle of fiduciary doctrine to the matter before him. Rather, the trial judge considered public policy arguments in cases such as *Edmonton Journal v. Alberta (Attorney General)*,⁷⁶ in which a newspaper publisher had argued that the *Alberta Judicature Act*, which prohibited publication of certain information about matrimonial proceedings, not only violated the freedom of expression guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*, but also restricted the benefit to the public of knowing information pertaining to matters before the courts. In that case, the Supreme Court of Canada held that the freedom of expression and the right of the public to receive information was of great significance in Canadian society and outweighed the impugned provisions of the *Judicature Act*.

Macdonald J. agreed with Greenspan's submission that the public and the legal profession benefited from the broadcast of "*Regina v. Stewart*" and of "The Scales of Justice." However, these benefits were held to have existed even without Greenspan's involvement.⁷⁷ Thus, Macdonald J. concluded that, in light of the circumstances, the public policy issues raised by Greenspan in his defence neither materially altered his duty of loyalty to Stewart nor dissolved that duty. Macdonald J. concluded that while Greenspan had raised some valid points about his participation in the broadcast, he had failed to rebut the presumption that he had breached his duty to Stewart.

Macdonald J. also found that since Greenspan's involvement in the broadcast of "*Regina v. Stewart*" was motivated by self-interest – and was pursued despite Stewart's pleas to abstain from republicizing his case – Greenspan's appearance on the broadcast was in breach of his duty to Stewart. In particular, Macdonald J. held that Greenspan breached his fiduciary duty to Stewart by: favouring his own financial interests over Stewart's interests; giving his self-promotion priority over Stewart's interests; and undercutting the benefits and protections he had provided to Stewart while acting as his counsel through his participation in the broadcast (which had the result of increasing the adverse public effect on Stewart of his crime, trial, and sentencing).

ii. *Measure of Compensation*

Stewart claimed damages for emotional harm caused by: the initial broadcast of "*Regina v. Stewart*" and the nature of its content; the continuing risk of rebroadcast; acquaintances' and co-workers' reactions to his criminal conviction; his children becoming aware of his background, and; the impairment of his future earnings. He also claimed special damages for loss of income stemming from his job loss, punitive damages, a permanent injunction against the rebroadcast of the episode, and the disgorgement of monies received by Greenspan or his law firm relating to the broadcast. He also claimed damages

⁷⁶ (1989), 64 D.L.R. (4th) 577 (S.C.C.).

⁷⁷ *Stewart*, *supra* note 6 at 159.

and compensation against CBC and Scales of Justice Enterprises Inc. for knowledge they possessed, or ought to have possessed, that Greenspan was in breach of his duties to Stewart.

Macdonald J. differentiated between the harm to Stewart from the broadcast of the episode and the harm to Stewart from his own actions on the night of November 27, 1978, the way he was defended, and the public's reaction to those matters. Compensatory considerations were held to be restricted to the former, since Greenspan was not responsible for the emotional harm caused to Stewart by the latter, nor could he be made legally responsible for such matters.

Macdonald J. inquired whether the emotional harm to Stewart had subsided after his sentence was served and was re-invigorated by the broadcast, or whether it was continually present notwithstanding the broadcast. The trial judge determined that Stewart's feelings of responsibility for the accident and its consequences were significant in 1991, even before he became aware of the broadcast. These feelings were described as "an active and on-going cause of emotional upset" and would have persisted without the broadcast.⁷⁸ However, Macdonald J. found that the broadcast, and Greenspan's involvement in it, aggravated this persistent problem by causing an additional emotional upset to Stewart.

It was determined that Stewart felt betrayed by Greenspan's participation in the episode, as indicated by evidence led by Stewart's wife as to his emotional and physical state after speaking to Greenspan.⁷⁹ However, since Stewart testified that he did not require counselling to deal with this upset, nor did it affect his physical person, Macdonald J. found that his emotional upset caused by Greenspan's participation in the broadcast was "minor and transitory."⁸⁰

Although Greenspan's involvement in the broadcast was held to have resulted only in a minor emotional upset to Stewart, that emotional upset was determined to have been reasonably foreseeable by Greenspan. Greenspan knew about the public's reaction to the crime and trial and had taken steps to insulate Stewart from these harmful effects, such as by having Stewart publicly apologize to the Jordan family. He also knew that Stewart was upset about the potential impact of the broadcast based on the communication between them in June, 1991. For these reasons, Stewart was awarded \$2,500 for his "minor and transitory" emotional upset.

As for Stewart's other claims, Macdonald J. held that Stewart was not entitled to damages. He had not demonstrated any loss suffered by the effects of the broadcast on his acquaintances or co-workers. He had not demonstrated that it was a foreseeable consequence of Greenspan's breach that Stewart would suffer emotional harm stemming from his children becoming aware of his background. Macdonald J. also held that Stewart had not substantiated his claim

⁷⁸ *Ibid.* at 167.

⁷⁹ *Ibid.* at 168.

⁸⁰ *Ibid.* at 168-9. Indeed, as Macdonald J. found that there was not physical manifestations stemming from this emotional upset, since Stewart ate normally, and did not lose sleep due to his concerns.

that he was fired from his parts-time job with Towne & Country Motors in July, 1991 and, in October, 1991, from a sales job he had obtained at Dave Wood Mazda because his employers found out about the impending broadcast.⁸¹

The punitive damage claim brought by Stewart was also dismissed. Macdonald J. held that Greenspan's breach of fiduciary duty was not motivated by *mala fides*, but upon a mistaken assumption about the extent of his obligations. Greenspan's mistake was in not believing that he had any continuing obligation to Stewart. For this reason, even though Greenspan's breach of duty was deemed to be flagrant, no award of punitive damages was made.⁸² Relying upon the principles established by the Supreme Court of Canada in *Vorvis v. Insurance Corp. of British Columbia*,⁸³ Macdonald J. held that Greenspan's conduct was neither extreme, nor deserving of full condemnation and punishment.⁸⁴

While Stewart's attempt to obtain a permanent injunction was dismissed because the rights to the "*Regina v. Stewart*" episode had been sold to a non-party to the suit, the court did order Greenspan to disgorge the profit he had personally made from the episode. This order, in the amount of \$3,250, was based on Macdonald J.'s calculation of Greenspan's net profit⁸⁵ from the \$10,000 that was paid to his law firm for his consulting work, hosting, and narration of the episode. There was held to be no other evidence of financial benefit to Greenspan or his firm from the broadcast. Stewart's claims for damages and compensation from the CBC and Scales of Justice Enterprises Inc. were dismissed.

iii. *Common Law Considerations*

In addressing the measure of compensation to be awarded to Stewart, Macdonald J. raised the issue of foreseeability. Traditionally, fiduciary law and other equitable doctrines were unconcerned with notions of foreseeability, remoteness, causation, mitigation of damages, and other considerations that have long affected the quantum of remedy under the common law.⁸⁶ Fiduciary law's concern was restitutionary – to restore wronged beneficiaries to the position that they would have been in had the wrong not occurred.⁸⁷ At the same time, the harshness of fiduciary remedies had the effect of deterring other

⁸¹ See the discussion on this point, *infra*.

⁸² Although, as discussed previously, while a breach of fiduciary duty is not defended by demonstrating the absence of *mala fides*, a finding of punitive damages is not properly made in the absence of such a finding.

⁸³ (1989), 58 D.L.R. (4th) 193 (S.C.C.).

⁸⁴ *Ibid.* at 208.

⁸⁵ In calculating this amount, Macdonald J. deducted office overhead, although he offered no calculation of how this factored into his equation.

⁸⁶ See I.E. Davidson, "The Equitable Remedy of Compensation," (1982), 13 *Melbourne Univ. L. Rev.* 349 at 352.

⁸⁷ Indeed, this principle was emphasized by *La Forest J.* in the Supreme Court of Canada's most recent pronouncement on fiduciary law in *Hodgkinson v. Simms*, *supra* note 2 at 199.

fiduciaries from acting against their beneficiaries' interests by taking away any possible benefit that the fiduciaries may have obtained through the breach, sometimes appearing to overcompensate a wronged beneficiary.⁸⁸

Although fiduciary law did not mirror the common law's approach to ascertaining remedies, to say that fiduciary doctrine did not consider issues such as causation is inaccurate. While fiduciary doctrine did not make use of the common law's conception of causation, it nevertheless did account for the connection between a breach of fiduciary duty and the loss incurred. Traditionally, fiduciary law implemented a "but for" test of causation – but for the breach of fiduciary duty, the beneficiary would not have suffered the loss. This may be contrasted with the common law test of causation – whether the loss was caused by or reasonably flowed from the breach.

An illustration will demonstrate the differences in the application of these standards of causation. Imagine a situation where there is a fiduciary relationship between an investment advisor and a client. The advisor recommends that the client invest in particular real estate properties. However, in making this recommendation, the advisor does not inform the client of a self-interest in those same properties. The client invests in the properties and a substantial loss occurs because of a downturn in the economy. Is the advisor, as a fiduciary, liable for the loss resulting from the breach of duty stemming from the conflict of interest and the advisor's failure to inform the client about the conflict?⁸⁹

If common law principles were applied to this scenario, the advisor/fiduciary could be relieved of liability by demonstrating that the client/beneficiary's loss was caused by the economic slump and that the advisor/fiduciary had insufficient control over the economy to have the loss be attributed back. Alternatively, the advisor/fiduciary could argue that it was foreseeable to the client/beneficiary that investing in real estate involved risk and that accepting that risk was as much a part of the decision to invest as the taking of profits. Using the fiduciary "but for" standard, the client/beneficiary would be entitled to relief by demonstrating that, but for the advisor/fiduciary's advice, the client/beneficiary would not have invested in the properties in question and suffered the loss. Foreseeability would not be a relevant consideration.

If the advisor/fiduciary could demonstrate that the client/beneficiary would have invested in the real estate even if the former's personal interest had been divulged – and, therefore, the client/beneficiary would have still suffered a loss

⁸⁸ This is why in a case where a fiduciary accepts a secret commission from a third party to act in a manner contrary to the beneficiary's best interests, such as selling the beneficiary's property to the third party at undervalue, the defaulting fiduciary will be forced to disgorge the secret commission plus pay the beneficiary the difference between the actual value of the property and what was obtained for it (thereby resulting in the beneficiary making a profit on the transaction by being reimbursed for the loss, plus obtaining the secret commission). See *Lavigne v. Robern* (1984), 51 O.R. (2d) 60 (C.A.); *Olson v. Gullo* (1994), 17 O.R. (3d) 790 (C.A.). For further commentary on this issue, see Rotman, *Parallel Paths*, *supra* note 18 at 197-8.

⁸⁹ This is precisely the situation in *Hodgkinson*, *supra* note 2.

– the principle of inevitability of loss would still hold the advisor/fiduciary responsible for the damage for not disclosing the existence of the self-interest.⁹⁰ The fiduciary principle of inevitability of loss, discussed earlier, is consistent with the “but for” standard. By holding that a fiduciary in breach of duty may not escape liability for the breach even if the loss would have occurred notwithstanding the breach, fiduciary doctrine maintains that there need not be proof of an absolute or direct link between the breach and the loss. The breach of duty needs only be “a” cause of loss, not “the” cause of it.⁹¹

Since the principle of inevitability of loss holds that if a breach of fiduciary duty occurs, any loss that stems from that breach under the “but for” test is the responsibility of the defaulting fiduciary, the only way for a fiduciary to avoid liability under this principle is to demonstrate that no breach occurred.⁹² Thus, the defence to inevitability of loss is no different than what is required for a fiduciary to rebut fiduciary law’s reverse onus relating to the existence of a breach. For these reasons, the fiduciary principle of inevitability of loss and the common law notions of causation and remoteness may be seen to be at cross-purposes. What this discussion demonstrates is that if the fiduciary principle of inevitability of loss governs fiduciary relations, then common law concepts of causation and remoteness cannot apply in their traditional fashion.⁹³

Both the “but for” standard of causation and the principle of inevitability of loss focus on the existence of the breach and the fact that it touched off a chain of events that resulted in a breach. However, unlike their common law counterparts, neither of these require (a) that the parties foresaw the existence of the loss, or; (b) that the breach be the only possible cause of the loss. The theoretical foundation underlying the principle of inevitability of loss is thus related to other fundamental principles of fiduciary doctrine, such as the inability to benefit, as expressed in cases such as *Regal (Hastings) Ltd. v. Gulliver*.⁹⁴

In *Regal (Hastings)*, directors of a corporation who used their positions as fiduciaries for personal gain were forced to disgorge the entirety of their profits made to the corporation even though the corporation was unable to reap such profits itself.⁹⁵ The directors of *Regal (Hastings)* and the corporation’s lawyer had personally invested money in shares of a subsidiary corporation,

⁹⁰ The fiduciaries would still be held liable for the loss under this principle because, even though the loss may well have occurred in the absence of the breach, the breach did occur and is to be remedied.

⁹¹ J.D. Davies, ‘Equitable Compensation: Causation, Foreseeability and Remoteness,’ in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993*, (Toronto: Carswell, 1993) 297 at 304.

⁹² Or, perhaps that the breach was permissible in the circumstances, thereby relieving the breaching party from liability. This causes potential problems by creating a scenario whereby a fiduciary in breach of duty may be seen to become an insurer of all subsequent losses suffered by a beneficiary. This possibility is considered, *infra*.

⁹³ See the further discussion of this point, *infra*.

⁹⁴ *Supra* note 74.

⁹⁵ *Ibid*.

Amalgamated, formed by Regal (Hastings) to take advantage of certain theatre leases. These personal investments were made after it was determined that the parent corporation was incapable of funding the entirety of Amalgamated's required capitalization of £5000 (5,000 shares at £1 each). Consequently, Regal (Hastings) put up £2000 of its own money and the directors and the corporation's lawyer personally financed the remaining £3000. Later, the parent and subsidiary corporations were sold to common purchasers, resulting in personal profit accruing to the directors from the sale of their shares in Amalgamated. An action was then commenced by the new directors of Regal (Hastings) on behalf of the corporation against those who had obtained personal benefit from the sale.

The former directors were found by the House of Lords to have breached their fiduciary duties to Regal (Hastings) because, as directors of the corporation, they made personal profits from their positions as fiduciaries. The fact that Regal (Hastings) could not have realized the profit itself was held to be inconsequential to the breach of duty. As the quote from Lord Russell of Killowen, *supra*, indicates, liability fell upon the directors because fiduciaries are strictly prohibited from enjoying personal gain earned by virtue of their positions as fiduciaries, regardless of the *bonafides* of their actions or whether the beneficiary – in this instance, the corporation – could have itself earned the profit.

The decision in *Regal (Hastings)* was based on the seminal case in fiduciary law, *Keech v. Sandford*, decided in 1726.⁹⁶ In this case, an infant was the beneficiary of a lease held in trust. When the lease came to be renewed, the lessor refused to renew for the benefit of the infant. The trustee took up the lease for his personal benefit, but was forced to disgorge the profit to the infant/beneficiary, notwithstanding the fact that the infant was unable to receive the benefit of the lease (since he was incapable of renewing the lease on his own behalf and the lessor had refused to renew the lease for the infant's benefit). The principle espoused in both *Keech v. Sandford* and *Regal (Hastings)* maintains that fiduciaries may not use information or opportunities gained in their fiduciary capacities for personal benefit or the benefit of third parties. Canadian courts have adopted this principle in cases such as *Canadian Aero Services Ltd. v. O'Malley* (hereinafter "*CanAero*").⁹⁷

The basis for the decisions in cases such as *Keech v. Sandford*, *Regal (Hastings)*, and *CanAero* is that even though self-interested fiduciary transactions might be on the level, the potential for abuse in these situations is so high that it is deemed necessary to prohibit fiduciaries from obtaining any benefit derived from information obtained in their fiduciary capacities. Therefore, the prohibition against personal gain or the gain of third parties does not require an *actual* gain, but applies equally to the *opportunity* for personal gain or third party gain.

The focus of these principles of "inevitable loss" and "inability to gain" is on prohibiting the act of breach. The imposition of harsh and wide-ranging penalties is designed to protect the integrity of fiduciary relations. This is

⁹⁶ (1726), 25 E.R. 223 (Ch.).

⁹⁷ *Supra* note 44.

accomplished in two ways: firstly, by imposing harsh consequences for breaching fiduciary duties, fiduciaries are deterred from engaging in breaches; secondly, by showing would-be beneficiaries that their interests will be vigorously protected against defaulting fiduciaries in a wide range of situations, they will be less reluctant to entrust their affairs to another's discretion.

Following the Supreme Court of Canada's decision in *Canson Enterprises v. Boughton & Co.*, however, the way was paved for the application of common law principles of causation and remoteness to breaches of fiduciary duty.⁹⁸ In that case, a lawyer, Wollen, acted on both sides of a real estate transaction without disclosing that fact to the ultimate purchasers – the appellants Canson Enterprises Ltd. ("Canson") and Fealty Enterprises Ltd. ("Fealty") and the respondent Peregrine Ventures Inc. ("Peregrine"). The purchasers had agreed to purchase a property and develop it as a joint venture on the recommendation of the respondent, Treit. Treit was to be paid a 15% commission on any profit from the property's resale.

The land in question was owned by the Hendersons, who sold it to Sun-Mark Development Corporation ("Sun-Mark") for \$410,000. Unknown to Canson and Fealty, but known to Peregrine, Treit had negotiated an arrangement with Sun-Mark that he and Sun-Mark would share equally in the profit from the sale of the Henderson property to the joint venturers. Sun-Mark then sold the land to Canson, Fealty, and Peregrine for \$525,000. Wollen acted as solicitor on all these transactions, including the final transaction from Sun-Mark to Canson, Fealty, and Peregrine (which was documented by Wollen as a transfer from the Hendersons directly to the joint venturers). Thus, the joint venturers thought they were purchasing the land directly from the Hendersons, when, in fact, they were purchasing it from Sun-Mark at an additional cost of \$115,000.⁹⁹

Following the appellants' purchase of the land, they developed it by constructing a warehouse. Because of negligence by soil engineers and contractors they hired, the warehouse development sank, resulting in a significant loss. The appellants initially tried to recoup the loss by obtaining judgments against the soil engineers and contractor, but they had insufficient assets. The appellants then commenced their action against Wollen, using a "but for" standard to link Wollen's breach to the losses caused by the sinking warehouse. They argued that, had they known of the existence of the flip, they would not have purchased the property and would not have suffered the losses that resulted from their subsequent development of it.

As La Forest J. explained in *Canson*, "barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress."¹⁰⁰

⁹⁸ (1991), 85 D.L.R. (4th) 129 (S.C.C.).

⁹⁹ In addition to this deceit, Wollen charged the fees on both land transactions to the appellants.

¹⁰⁰ *Ibid.* at 148.

McLachlin J. also supported the use of common law principles of causation, where appropriate in assessing penalties for breaches of fiduciary duties based on what she described as "a common sense view of causation."¹⁰¹ However, as La Forest J. expressly noted, the maxims of Equity "are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice."¹⁰² The Court determined that, while Wollen was liable to Canson and Fealty for his failure to disclose the real estate "flip," he was not liable for any losses arising out of their subsequent development of the property.

In the aftermath of *Canson*, it was unclear whether the Supreme Court of Canada was saying that common law principles *should* be used in assessing remedies for breaches of fiduciary obligations or only that they *may* be used. Academic commentary on this point illustrates this uncertainty.¹⁰³ The Supreme Court's subsequent decision in *Hodgkinson* sheds light on the appropriate interpretation of *Canson* vis-à-vis the use of these common law principles. As La Forest J. explained for the majority in *Hodgkinson*:

Canson held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate ...¹⁰⁴

From this passage, the Supreme Court appears to be advocating the use of common law principles such as causation and remoteness only in situations where they may be used to assist the court in arriving at an equitable disposition of the matter in issue. *Hodgkinson* does not endorse or require the mandatory application of such principles. Yet, in permitting the use of common law principles, the Supreme Court has not addressed the inherent conflict between them and the fiduciary principle of inevitability of loss.¹⁰⁵ Thus, through its decisions in *Canson* and *Hodgkinson*, the Supreme Court has paved the way for an inevitable clash of equitable and common law principles to be waged on the battlefield of breach of fiduciary obligation.¹⁰⁶

¹⁰¹ *Ibid.* at 163.

¹⁰² *Ibid.* at 151.

¹⁰³ See, for example, J.D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada," (1997), 28 C.B.L.J. 107 at 112 and, generally, Davies, *supra* note 91.

¹⁰⁴ *Hodgkinson*, *supra* note 2 at 201.

¹⁰⁵ In the process of sanctioning the use of common law principles in the remedying of a breach of fiduciary duty in *Canson*, the Court ought to have been aware that its judgment would have an effect on existing principles of fiduciary law, such as inevitability of loss.

¹⁰⁶ The potential effect of this clash and how the courts may choose to resolve it is beyond the scope of this paper.

iv. *The Application of Common Law Standards in Stewart*

Macdonald J.'s finding that Greenspan was liable for Stewart's "minor and transitory" emotional upset based on the foreseeability of the effect of Greenspan's participation in the broadcast upon Stewart brings an irrelevant consideration into the discussion of a remedy for breach of fiduciary obligation. The basis for finding Greenspan liable in the circumstances of the *Stewart* case should not have been because he could foresee the negative effects on Stewart, but because his actions were inconsistent with his fiduciary obligation to act in Stewart's best interests. The only question that ought to have been relevant here was whether there was a causal link between Greenspan's actions and Stewart's emotional upset. Under either the "but for" test or the common law standard of causation, the answer would be that such a link did exist. In this situation, however, Macdonald J. found that Stewart was already suffering emotional distress and had been suffering continuously since the accident. This factor was properly relevant in assessing compensation for this particular loss.

The other situation in which foreseeability was raised by Macdonald J. was in relation to Stewart's claim of loss from having his children find out about his conviction. Macdonald J. held that it was not a foreseeable consequence of Greenspan's breach that Stewart would suffer emotional harm stemming from his children becoming aware of his background. Again, what is relevant here is not whether such harm was foreseeable, but whether the harm occurred because of Greenspan's breach. Since any harm that would have occurred would have occurred because of the breach, it ought to have been compensated for if harm or loss was demonstrated.

In dismissing Stewart's claim that he had lost his jobs because of the impending broadcast, Macdonald J. did not divulge the principles he applied to come to this conclusion. He explained, *vis-à-vis* the Towne & Country Motors job, that Stewart was terminated because of a significant reduction in business. Macdonald J. did not specify in his judgment why Stewart was dismissed from Dave Wood Mazda. However, he did indicate that there was insufficient evidence adduced by Stewart to demonstrate that the loss of these jobs was related to Greenspan's breach of duty. If Stewart had been able to establish a *prima facie* case that he had lost his jobs because of Greenspan's breach of duty, fiduciary law's reverse onus would have required Greenspan to rebut this presumption by demonstrating his lack of breach. Yet again, the causal connection between this allegation of breach and Stewart's job losses would be a relevant consideration, thereby bringing the implications of the *Canson* and *Hodgkinson* decisions into play. Would the proper standard to be imposed in this situation be the "but for" standard, common law standards, or some hybrid of the two?

This situation is similar to that argued for by the plaintiff in *Canson*. Had the Supreme Court adopted the plaintiff's "but for" causation argument, Wollen would have been found liable for the entirety of the damages suffered by *Canson* and *Fealty* – both the increased amount of the purchase price of the property

caused by the flip and the losses from the development of the land – because Canson and Fealty would neither have purchased the property nor developed it had Wollen divulged the existence of the flip. Therefore, while Wollen was not directly responsible for the negligence of the soil engineers or the contractor, under a strict “but for” test, he was responsible for setting into motion the chain of events that gave rise to the appellant’s loss.

Rather than applying the “but for” test, both La Forest and McLachlin JJ. argued in favour of a hybrid test that merged equitable and common law principles. La Forest J. held that while Wollen’s failure to disclose the flip may have initiated the chain of events culminating in the sinking of the warehouse, the plaintiffs could not properly recover the full amount of the losses sustained solely from him. As he explained, “It would be wholly inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results.”¹⁰⁷ In reaching the same conclusion, McLachlin J. held that compensation for a breach of fiduciary duty must be restricted to “loss flowing from the trustee’s acts in relation to the interests he undertook to protect.”¹⁰⁸ In ascertaining the quantum of compensation for a breach of fiduciary duty, she limited a beneficiary’s ability to recovery by stating that “the losses made good are only those which, on a common sense view of causation, were caused by the breach.”¹⁰⁹ Since Wollen had no control over the actions of the soil engineers and contractor, nor had he contracted them to do the work, she found that he could not be held responsible for their negligence.

The obvious concern of both La Forest and McLachlin JJ. in *Canson* was in extending fiduciaries’ liability beyond matters within their personal control. Consequently, Wollen was found not to be responsible for the losses flowing from the negligence of third parties that he neither had control over nor had authorized to do the work. Indeed, one of the dangers of the “but for” test of causation is that it could insulate third parties from their own improper conduct where a prior breach of fiduciary duty occurred. The third parties in such a situation are protected at the expense of the breaching fiduciary, who becomes an insurer of all post-breach damages suffered by the beneficiary. In such a situation, the wronged beneficiary would appear to be insured against all future perils that may be connected to the initial breach of duty so long as the beneficiary is not personally responsible for any subsequent loss.¹¹⁰ This scenario is sometimes claimed to be the result of the Supreme Court’s judgment in *Hodgkinson*.

¹⁰⁷ *Canson*, *supra* note 98 at 153.

¹⁰⁸ *Ibid.* at 160.

¹⁰⁹ *Ibid.* at 163.

¹¹⁰ Although mitigation of losses is not generally a concern of fiduciary law, it would be inappropriate for a beneficiary to initiate losses by his or her own actions and have those losses be attributed to the fiduciary in situations where the beneficiary had direct control over whether a loss would occur.

In *Hodgkinson*, the plaintiff, Hodgkinson, a stockbroker, sought advice from the defendant, Simms, a chartered accountant who specialized in tax planning and tax sheltering. Hodgkinson wanted to defer tax, but also acquire stable, long-term investments. Simms advised him to invest in multi-unit residential buildings, or MURBs, real estate investment projects that conventional wisdom at the time considered safe and conservative. Hodgkinson purchased 4 MURBs recommended by Simms. He later lost virtually all of his investment when the MURBs plummeted in value because of a decline in the real estate market. As Hodgkinson later discovered, Simms was acting for the developers of the MURBs in question at the time that Simms had advised him to invest in them. Hodgkinson commenced an action against Simms for breach of fiduciary duty, breach of contract, and negligence.

At trial, it was revealed that Hodgkinson relied heavily upon Simms' advice and believed him to be a trustworthy advisor. Hodgkinson claimed that, but for Simms failure to disclose his conflict of interest, he would not have invested in the MURBs and subsequently suffered any loss. La Forest J.'s majority judgment in *Hodgkinson* accepted Hodgkinson's claim and held Simms liable to make good Hodgkinson's losses. The inherent risks of investment that Hodgkinson implicitly agreed to by investing in the MURBs was not held to have mitigated Simms' duty to make good the losses suffered by Hodgkinson as a result of a downturn in the market. In effect, Simms, because of his breach, was forced to absorb the risks associated with real estate investment that would normally have accrued to Hodgkinson. The case is a classic example of the use of the "but for" standard of causation.

The basis for La Forest J.'s majority judgment in *Hodgkinson* was that relationships of trust and confidence, such as that between Hodgkinson and Simms, ought not be left to the morality of the marketplace. For that reason, where the confidence reposed by one person in another is betrayed, even in the context of a commercial transaction, La Forest J. held that the betrayer of that confidence was liable to restore the person who suffered loss as a result of the betrayal to the position that he or she would have been in had no betrayal occurred. The fact that the parties in *Hodgkinson* were both sophisticated businesspeople was immaterial because, within the scope of their relationship, Hodgkinson became vulnerable to Simms as a consequence of his dependency on the latter's advice and judgment. While this situation essentially resulted in Simms insuring Hodgkinson against the volatility of the real estate market, the purpose for such a finding was to maintain the integrity of financial advisor-client relations by protecting the latter's reliance on the former.

In considering the application of common law standards to fiduciary claims, as seen in cases such as *Canson* and *Hodgkinson*, it is curious to note that there was no mention in *Stewart* about the effects of the broadcast on Stewart's future earning prospects, for which Stewart had claimed general damages. Although foreseeability is irrelevant in determining the remedy for a breach of fiduciary duty, it is reasonable to ask why Macdonald J. raised the issue of foreseeability in relation to the effect of Greenspan's participation in the

broadcast upon Stewart and whether Stewart would suffer emotion harm stemming from his children becoming aware of his background, but not in relation to Stewart's future job prospects. If, according to Justice Macdonald, it was relevant to ascertain whether Greenspan ought to have foreseen that his participation in the broadcast would have resulted in emotional upset to Stewart, should the trial judge not have also deemed it appropriate to inquire whether Greenspan had foreseen that the broadcast, which would have made Stewart a public spectacle yet again, would reasonably have affected his job prospects – especially in light of the fact that his last job was as a salesman for an auto dealer. There would seem to be a direct causal link between one's public perception as a callous monster who drove over a woman and dragged her, screaming to her death and that person's ability to secure a job. The dramatization of these events on a television show watched by almost one million viewers only enhances the effect of this connection. Thus, it would appear that a *prima facie* inference of an impairment of future job prospects could be made out by Stewart. Under fiduciary law's reverse onus, Greenspan would be forced to demonstrate a lack of breach to avoid liability rather than disproving this causal connection. The primary obstacle with this claim would be in the quantification of compensation.

The dismissal of Stewart's claim for punitive damages because Greenspan "was not alone in not keeping up with the wave of changes in fiduciary principles" is curious.¹¹¹ The reasonability of an "ignorance of the law" argument on behalf of a prominent member of the criminal defence bar whose profession imposes fiduciary obligations upon his relations with his clients is certainly questionable. Ignorance of the law, after all, is no excuse. At the very least, if Greenspan was unsure as to whether he had any continuing obligations to Stewart, he ought to have made reasonable inquiries.¹¹²

Finally, the disgorgement order, under which Greenspan had to turn over his profit – estimated at \$3,250 – from his participation in the broadcast is problematic, in that it only accounted for part of Greenspan's benefit flowing from the broadcast. Macdonald J. had held that Greenspan's prime motivation for his involvement in the episode was self-promotion. Since Greenspan was found to have engaged in self-promotion by his appearance on the broadcast, he ought to have been made to disgorge the benefit he obtained from that self-promotion at Stewart's expense, in a manner consistent with *Keech v. Sandford*, *Regal (Hastings)* and *CanAero*. While it may be difficult to quantify the actual benefit to Greenspan from this self-promotion, an attempt ought to have been made. To not attribute any money to Greenspan's self-promotion in the broadcast is not only tantamount to holding that Greenspan derived no benefit from appearing in the episode aside from the money he was paid to consult, host, and narrate, but contradicts the trial judge's findings.

¹¹¹Stewart, *supra* note 6 at 171.

¹¹²At the very least, he should have consulted the Law Society of Upper Canada's Practice Advisory Committee, which is suggested by the Law Society to be a starting point in determining lawyers' fulfilment of their responsibilities to their clients.

IX. Conclusion

As the *Stewart* case indicates, fiduciary law imposes onerous duties upon fiduciaries in order to protect the interests of beneficiaries and the integrity of fiduciary relations generally. These onerous obligations have resulted in fiduciary law being described as “law’s blunt tool” for the control of fiduciaries’ discretion.¹¹³ While Greenspan may have been fortunate to have been found liable for only \$5,750, the potential liability of fiduciaries for a breach of duty, as seen in *Canson*, is far greater. This is why the Supreme Court in *Canson* saw fit to sanction the use of common law principles of causation in claims for breaches of fiduciary duty. The difficulty with the Supreme Court’s approach is that in providing a potential solution to one problem, it has, perhaps unwittingly, created another. *Stewart* failed to address this concern.

So, where does the *Stewart* situation leave us? We know from the case that “ignorance of the law” is no excuse, even for a lawyer. Thus, Greenspan was held liable for failing to live up to his continuing obligations to Stewart. Although ignorance of the law may not have been an excuse, it was certainly used as a mitigating factor. While the court found that Greenspan’s mistake as to his obligations was reasonable, since he “was not alone in keeping up with the wave of changes in fiduciary principles,” it could be reasonably suggested, based on the misconceptions about fiduciary law exhibited by Macdonald J. in the case, that the court’s sympathy for Greenspan’s confusion about fiduciary law was premised not solely on empathy, but on first-hand knowledge.

Justice Macdonald is not the only Canadian judge who has contemplated the confusion created by the “wave of changes in fiduciary principles” of late. In the recently-released British Columbia Court of Appeal decision in *C.A. v. Critchley*,¹¹⁴ McEachern C.J.B.C. gave the following appraisal of the status of fiduciary law in Canada:

Our Supreme Court of Canada has led the way in the common law in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn.¹¹⁵

¹¹³E.J. Weinrib, “The Fiduciary Obligation,” (1975), 25 U.T.L.J. 1 at 4; see also *LAC Minerals*, *supra* note 25 at 64.

¹¹⁴[1998] B.C.J. No. 2587 (B.C.C.A.).

¹¹⁵*Ibid.* at para. 75. Interestingly, Chief Justice McEachern’s comments about the expansion of fiduciary law appear to have overlooked his own judgment in *Delgamuukw v. B.C.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), in which he fashioned a fiduciary obligation on the part of the British Columbia government to allow aboriginal peoples to use unoccupied or vacant Crown lands in the province for subsistence purposes until those lands were dedicated to another use; see *ibid.* at 482. This “obligation” is not of a fiduciary nature – since it could be legislated away by the province, without repercussion, at any time

He then stated, referring to the case of *Girardet v. Crease & Co.*,¹¹⁶ that "cases in the Supreme Court of Canada before and after *Girardet* have failed to make the law as clear as it should be."¹¹⁷ The Chief Justice also referred to comments made by Sir Anthony Mason, Chief Justice of the Australian High Court, who once said that Canadian fiduciary jurisprudence is divided into three parts: "Those who owe fiduciary duties, those to whom fiduciary duties are owed and judges who keep creating new fiduciary duties."¹¹⁸

If the courts have failed to provide sufficient guidance about fiduciary law to enable fiduciaries to properly discharge their duties, should fiduciaries be held responsible for knowing that which the courts either do not or cannot articulate? Perhaps this is a situation where fault and responsibility ought to be apportioned equally. While defaulting fiduciaries ought to continue to be liable for their breaches of duty, should the courts not also bear responsibility for clarifying the law to enable fiduciaries to properly perform their duties? While this is not to suggest making the courts jointly liable with fiduciaries in breach of their duties, judges do possess a positive obligation to ensure that they are "up to speed" on new developments in law. Assistance may be had in this regard through the provision of continuing legal education to judges that accounts for significant legal developments, including "keeping up with the wave of changes in fiduciary principles." Alternatively, recourse can always be had to the academic literature on the topic.

It should be remembered though, that clarifying the law in this area does not mean that fiduciary law ought to be reigned in by the application of rigid formulaic equations or arbitrarily restricting its scope. In fact, the rigidity of such rules and tests is what generated the need for the creation of Equity as a separate jurisdiction from the common law in the first place.¹¹⁹ Instead, a principled approach to fiduciary doctrine is required so that this emerging area of law may be better understood, and consequently better used, by lawyers, academics, and judges alike.¹²⁰

simply by dedicating the land to another use. Moreover, it fails to understand that the stringent duties of a fiduciary cannot be abandoned at will by incompatible actions or a simple change of desire by a fiduciary. See the discussion of this point in Rotman, *Parallel Paths*, *supra* note 18 at 137-8.

¹¹⁶(1987), 11 B.C.L.R. (2d) 361 (S.C.). In that case, Southin J., as she then was, warned of the misuse, or overuse, of claims of breach of fiduciary duty by stating that:

The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. ... [A]n allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not of deceit then of constructive fraud.

¹¹⁷*Critchley*, *supra* note 114 at para. 79.

¹¹⁸Sir A. Mason, as quoted, *ibid.* at para. 74.

¹¹⁹For further discussion of this point, and the problems of keeping equitable notions distinct from their common law counterparts more generally, see L.I. Rotman, "Deconstructing the Constructive Trust," (1998), 37 *Alta. L. Rev.* 133.

¹²⁰In the sense of being applied in a manner more consistent with its philosophical basis rather than being used more often than it is presently.