

THE BOUNDARIES OF FIDUCIARY ACCOUNTABILITY

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A conceptual fog has descended on the fiduciary jurisprudence of the Commonwealth. Judges and commentators in Canada, Australia and England have misunderstood or misdescribed the conventional boundaries. The confusion impairs the principled assignment of fiduciary responsibility. The solution is to refocus fiduciary analysis on its rightful singular concern with opportunism in limited access arrangements.

Un brouillard conceptuel enveloppe la jurisprudence du Commonwealth en matière de responsabilité fiduciaire. Des juges et des commentateurs du Canada, d'Australie et d'Angleterre ont mal interprété ou décrit ses limites conventionnelles. Cette confusion nuit à l'attribution motivée de la responsabilité fiduciaire. Pour remédier à cette situation, il faut remettre l'accent sur la préoccupation particulière et légitime de l'analyse fiduciaire : l'opportunisme dans les arrangements à accès limité.

I. Introduction	35
II. The Conventional Position	36
III. Contributions of the Academy	54
IV. The Aboriginal/Crown Cases	61
V. The General Canadian Jurisprudence	67
VI. The Australian Jurisprudence	76
VII. The English Jurisprudence	85
VIII. Conclusion	88

I. Introduction

The conventional function of fiduciary responsibility is to control opportunism in limited access arrangements. A monolithic social consensus supports this form of legal discipline. In the past few decades, however, the conceptual structure of fiduciary accountability

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has endured constant testing. Apparently the boundaries of this jurisdiction were thought to be uncertain, or malleable. The result has been analytical turmoil. While it is not clear the conventional boundaries *have changed*, there is now such a lack of clarity in the *exposition* of the jurisprudence that fiduciary breach is routinely pleaded as a matter of either hope or prudence.

There is a need to restate the conventional position in coherent terms. That exercise is required both to clarify certain aspects of the conventional position and to permit a full comprehension of recent developments. The starting point is necessarily the social function of fiduciary responsibility. The proper contours of regulation are determined by the nature of that function. The analysis that follows identifies limited access as the characteristic that marks the potential scope of the opportunism mischief and, consequently, represents the operational boundary for the application of fiduciary accountability. The discussion initially may appear provocative, partly because of the limited access abstraction, and partly because of the challenges to a number of popular assumptions and judicial pronouncements. The result is ultimately conservative, however, and the analysis serves only to tidy up the coherence of the conventional position. Turning to recent developments, the views of a number of commentators are examined and it is concluded that their analytical criteria are open to both restrictive and expansive interpretations that would alter the conventional boundaries. Several modern decisions are then analyzed and shown to be inconsistent with the conventional position in a number of respects. The divergent judicial views move in both directions, potentially contracting or expanding the traditional boundaries. The judges themselves do not generally concede, or perhaps appreciate, that they are probing and crossing established boundaries.

Given these developments, the question arises whether the conventional boundaries are unsatisfactory and require adjustment. The conventional policy is to strictly control the self-regarding instincts of those with limited access. The examination of the jurisprudence discloses no other policy consideration that would justify either an expansion or contraction of the conventional boundaries. The confusion, it would appear, is wholly attributable to failures to comprehend and describe the conventional scope of fiduciary accountability. The solution is to sweep away the deficient analysis and restore clarity to our suppression of the septic mischief of opportunism.

II. *The Conventional Position*

The physical arrangement that attracts fiduciary regulation is limited

access or, in traditional terms, the undertaking to act wholly or partly in the interest of another.¹ Those who are trusted for some defined purpose invariably acquire access to the assets (and opportunities) of their beneficiaries. The mischief associated with that access is that the value of the assets will be diverted or exploited for self-interested ends. We (the community) recognize that mischief and seek to control it through the default application of “fiduciary” responsibility.² We forbid the realization of any benefit from a limited access without the informed consent of the beneficiary. Our concern extends to any conflict that might operate, and we grant relief without proof of the actual influence of the conflict. Where there is no access, on the other hand, there can be no opportunistic diversion.³ Similarly, if the access is open, rather than limited, consumption or exploitation does not amount to objectionable self-regard.⁴ The potential for opportunism exists, accordingly, to the extent an actor has access for a defined or limited purpose. In such circumstances, we proscribe any conflict or action that is inconsistent with, or might compromise, an actor’s commitment to the defined purpose. We will not permit self-interest to impair the social utility of our limited access arrangements.

The limited access abstraction identifies the conventional boundary, or range of application, of fiduciary accountability. It is the conceptual representation of the characteristic that renders an arrangement susceptible to the mischief of opportunism. The analytical qualities of this abstraction have been addressed elsewhere.⁵ The main observation here is that the limited access test identifies the scope or breadth of the *capacity* for disloyalty. It is, in that respect, only a first step. While that first step determines the fundamental matter of the existence of fiduciary obligation (fiduciary *accountability*), it is necessary thereafter to determine whether the obligation has been breached (fiduciary *liability*). It is breached if there is an unauthorized conflict or benefit. This second step is of coordinate significance

¹ Most of us are accountable as fiduciaries in one or more respects most of the time. Others may dispute that view. Presumably they will advance a public policy that specifies or implies a boundary other than limited access.

² R. Flannigan, “The Fiduciary Obligation” (1989) 9 O.J.L.S. 285. Standard modern illustrations of conventional fiduciary analysis include *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.); *Reading v. Attorney-General*, [1951] A.C. 507; *Boardman v. Phipps*, [1967] 2 A.C. 46; *Attorney-General for Hong Kong v. Reid*, [1994] 1 All E.R. 1 (P.C.).

³ Access is broadly defined. See R. Flannigan, “Fiduciary Obligation in the Supreme Court” (1990) 54 Sask. L. Rev. 45 at 48-50.

⁴ See R. Flannigan, “Commercial Fiduciary Obligation” (1998) 36 Alta. L. Rev. 905 at 909-10.

⁵ See Flannigan, *supra* notes 2, 3, 4.

because it crystallizes the latent default liability. It represents the doctrinal implementation of the proposition that not all breaches committed by a fiduciary are fiduciary breaches. Fiduciaries may act inconsistently with their limited access in a number of ways. They might, for example, refuse to perform all or part of a negotiated undertaking. That would be a breach of contract. They might perform their undertaking negligently. That, today, would normally be addressed by the general law of tort.⁶ Fiduciaries are only liable for a *fiduciary* breach where their inconsistent action is to prefer their own interests within the ambit or confines of their limited access. Other general liability regimes (e.g. contract, tort) may concurrently apply, but unlike fiduciary responsibility, their own scope of operation is not restricted to limited access arrangements.⁷

An unconditional gift is an example of unlimited or *open* access. The gift becomes the property of the recipient and may be exploited without restriction. It is the same for most contractual exchanges of goods. Freedom to exploit is constrained, however, where access is limited. To appreciate the scope of this constraint, the scope of the mischief must be understood. Consider, for example, the broker/investor relation. A broker who serves as an advisor to an investor is engaged in a limited access function. It is sometimes assumed, however, that a broker who merely executes trades at the

⁶ R. Flannigan, "Fiduciary Regulation of Sexual Exploitation" (2000) 79 Can. Bar Rev. 301 at 305-306 and Flannigan, *supra* note 3 at 51 (observing that shirking is conceptually contiguous with disloyalty). There were indications in earlier cases of a *fiduciary* duty of *care*. It is now recognized in the Commonwealth that regulating the exercise of care by fiduciaries (as for all others) is a matter for the general law of negligence. See *Bristol and West Building Society v. Mothew*, [1996] 4 All E.R. 698 at 710-11 (C.A.); *Breen v. Williams* (1996), 186 C.L.R. 71 at 93 (H.C.A.); *K.L.B. v. British Columbia* (2003), 230 D.L.R. (4th) 513 (S.C.C.). Instances of the "fiduciary" regulation (of care) approach survive. American courts, for example, recognize the difference between the duties of care and loyalty but continue to formally identify each as a "fiduciary" duty.

⁷ *Ibid.* at 304-307. The taxonomic location of fiduciary accountability is a puzzle for some observers. Consider the undeveloped views of S. Waddams, *Dimensions of Private Law* (Cambridge: Cambridge University Press, 2003) at 73 ("The concept of fiduciary duty, though of pervasive and fundamental importance in Anglo-American private law, has usually, with notable exceptions, been omitted from conceptual maps and diagrams. Fiduciary relations cannot be allocated to the law of property to the exclusion of obligations, or vice-versa; nor can they be subordinated to contracts, wrongdoing, or unjust enrichment; nor can they be visualized as parallel to but separate from these concepts, for they have close affinities with all of them. As with other equitable concepts, their very function has been, in a sense, to subvert the categories established by the common law."). It will be apparent from the discussion herein that Waddams' assessment misses the mark.

command of an investor is not burdened by fiduciary accountability. That is an error. The broker remains in a position to act opportunistically by, for example, selling information about the impending trade (its source, size and timing), or trading in advance of the investor's trade (front running). The limited access in such an arrangement essentially produces fiduciary accountability for the whole of the nominate function. Other arrangements differ in that they involve access that is partially limited, or limited with respect to some part of the undertaking. A person who deposits funds in a standard savings account gives open access to those funds to the bank in return for a rent payment (interest). The bank is free to employ those funds as it sees fit subject only to its contractual duty to repay an equivalent amount on demand. At the same time, however, the depositor gives only limited access to the information associated with the account. The bank is not entitled to disclose transactions or amounts in the account in order to produce profits for itself. In these examples, fiduciary obligations arise because some facet or aspect of the arrangement involves a limited access that potentially may be exploited for self-regarding purposes.

Opportunism is a mischief that menaces all limited access arrangements. Self-regard, it will be appreciated, is not necessarily, or even usually, objectionable. It is objectionable in a fiduciary way, however, when one's access is qualified by a limited (other-regarding) purpose. The limited access abstraction identifies those arrangements where self-service will not be tolerated. At the same time, it is important to reiterate that limited access is the boundary for fiduciary *accountability* – not fiduciary *liability*. Those who are liable for a fiduciary breach (those with a conflict or benefit) are a small number of those who have fiduciary obligations (those with limited access).

There is no condition of liability that actors subjectively agree to this kind of legal responsibility. It is only necessary that their arrangements, however created, involve limited access. Actors, for example, may agree to negotiate contracts for their employers. Or they may agree to hold and manage property for aged beneficiaries. Or they may decide to have children. In each case, the access they acquire by taking on these functions or roles (agent, trustee, parent) is understood to be for the purpose of pursuing the interests of their beneficiaries. That understanding may arise either by agreement (agent, trustee) or by social convention (parent). Where that understanding exists, where access is limited (but only to the *extent* it is limited), we impose a duty to act without self-interest in the course of the nominate function. Fiduciary accountability, in that sense, is attached or appended to limited access arrangements, and actors assume or become subject to that form of accountability when they enter into arrangements of that kind.

Conventional fiduciary regulation operates independently as a general regime of obligation. It is distinguishable from idiosyncratic nominate regulation.⁸ Legislatures and courts have, over time, attached a nomenclature, and discrete legal characteristics (rules), to numerous different physical arrangements. The categories of trustee/beneficiary, agent/principal and partner/partner are examples of relations subject to distinct nominate sets of legal rules.⁹ The legal content of each category is shaped by the unique nature and function of the physical arrangement. These distinct categories of arrangements are also simultaneously governed by a number of overlapping general liability regimes, primarily the contract, tort, criminal and fiduciary liability regimes.¹⁰ The performance of the particular nominate function may, for example, involve the commission of a tort. The tort regime operates on a general default basis to regulate that tortious conduct. Notwithstanding the idiosyncratic nature of a particular nominate category, the generic tort rules produce a standard tort liability across nominate categories. Fiduciary responsibility operates in the same way. The opportunism mischief may arise wherever there is a limited access arrangement. Fiduciary regulation is applied to all such arrangements to control that one generic mischief. Fiduciary accountability seeks to ensure that the performance of the nominate function is not compromised by the self-regarding impulse. It is a default regulation running parallel to the idiosyncratic nominate regulation of the distinct categories. Its function is to *support* nominate performance by controlling opportunism. Consider, for example, the trust structure. That physical arrangement often involves a grant of discretion to the trustee. The exercise of that discretion is governed by a number of trust law default rules. Trustees may not delegate their discretion, they must not fetter their discretion and they must act with an even hand. Those rules are part of the *trust* dimension of the relation. At the same time, because the arrangement is one of limited access, it also attracts *fiduciary* regulation. Trustees may not exercise their discretion to serve their own interests. Trustees therefore have duties imposed by the

⁸ The distinction between nominate and fiduciary regulation is rarely articulated in the fiduciary cases. Often the two dimensions are conflated. I conflated them in an earlier article (*supra* note 2) when I characterized “partiality” and “avoidance” components as fiduciary duties. They are instead nominate duties.

⁹ For a discussion of the parallel application of nominate and fiduciary regulation in the specific context of political corruption, see R. Flannigan, *Fiduciary Control of Political Corruption*, (2002) 26 *Advocates’ Q.* 252 at 253-58.

¹⁰ The term “nominate” is employed in this article to reference only idiosyncratic regulation, fully recognizing that the general obligations that apply to nominate arrangements are themselves *nominate* categories of obligation. The usage is adopted for analytical economy. It is a terminological convenience only, and has no substantive implication.

default application of *trust* law, and separate duties imposed by the default application of *fiduciary* law. A breach of trust may occur without there being a fiduciary breach, and vice versa. Trustees might fetter their discretion or fail to act with an even hand without any conflict or personal benefit. In such cases, there is no fiduciary breach. If, on the other hand, the same actions secured a personal benefit, the trustees would be concurrently liable for breaches of both trust and fiduciary duties. Fiduciary regulation, in this way, operates independently of nominate regulation.

There are two main components to the idiosyncratic regulation of particular physical arrangements. One is the set of specific mandatory and default rules associated with a particular relation.¹¹ The rules mentioned above regulating the exercise of trustee discretion represent part of the trust law array of rules. In the partnership context, the rules include majority control, mutual agency, and equal sharing of profits and losses. These rules are found in the statutes and cases in the particular nominate area. The other component of idiosyncratic regulation is the set of terms the parties negotiate for themselves, including those that displace the default rules that are inconvenient or unacceptable to them. Partners, for example, may agree to distribute profits unequally. Or trustees may have the authority to act severally, rather than jointly. That negotiated component (partnership agreement, trust deed, agency contract, etc.), where it exists, becomes enforceable between the parties as a set of self-imposed rules. The negotiated, mandatory and unmodified default terms together constitute the whole of the idiosyncratic regulation that governs a particular physical arrangement.

Some nominate designations are contingent in the sense that a sufficient or specific modification of the definitive physical characteristics of a desired legal status will result in a different nominate designation. An example of this is the redesignation of an intended trust relation as an agency relation if the “beneficiaries” have control rights over the trustees or trust assets.¹² While the terms negotiated by the parties will continue to govern their relation *inter se*,

¹¹ Most rules in most nominate categories may be wholly or partially modified by the relevant parties. There are relatively few common law or equitable rules that are truly mandatory. The function of a default rule is to regulate behaviour in a standard fashion up to the point where the parties assert their autonomy to govern themselves in a different fashion.

¹² *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 49 D.L.R. (4th) 1 (Ont. C.A.). See R. Flannigan, “Trust or Agency: Beneficiary Liability and the Wise Old Birds,” c. 9 in S. Goldstein, ed., *Equity and Contemporary Legal Developments* (Jerusalem: Maccabi Press, 1990). Another example is the redesignation of “independent contractor” to “employee” status.

the unmodified rules of the new nominate designation will otherwise apply.¹³ In the example, “beneficiaries” will be converted into “principals,” and their intended limited liability will be replaced by open liability to third parties. Such consequences, it should be understood, are a feature of the idiosyncratic nominate regulation of the physical arrangement. The general liability regimes will continue to apply in their standard way to support the altered idiosyncratic regulation. Specifically, in the example, because agency is invariably a limited access arrangement, fiduciary responsibility will attach to ensure the coincident regulation of the potential opportunistic performance of that nominate function.

Fiduciary accountability is generic in the sense that the same proscriptions apply, for the most part, to all fiduciary relations.¹⁴ The fiduciary rules that constrain agents are essentially the same rules that constrain trustees, partners, solicitors, and other fiduciaries. It is therefore somewhat inaccurate to assert that fiduciary responsibility varies according to the nature of the relations involved. Yet that is a popular assertion. Fiduciary responsibility is largely constant because it has been constructed in response to a generic mischief. There is a measure of contextual variation, but it is the exception rather than the rule.¹⁵ The proper view is that all limited access arrangements are regulated by the full expanse of fiduciary accountability (i.e. the full collection of fiduciary rules), but only that specific rule that addresses the particular instance of conflict or profit need be enlisted in a given case.¹⁶ Generally, the judges will do whatever is necessary, in a consistent way, to respond to any particular manifestation of the opportunism mischief.

Conventional fiduciary responsibility is also a strict liability.¹⁷ A breach is established by proving, without more, either a conflict or a benefit (the “conflict” and “profit” rules) in the course of the undertaking. The courts will not suspend the assignment of fiduciary

¹³ See generally R. Flannigan, “The Limits of Status Assertion” (1999) 21 *Advocates’ Q.* 397.

¹⁴ Flannigan, *supra* note 9 at 254-55, 283-84. See *Attorney-General for Hong Kong v. Reid*, [1994] 1 All E.R. 1 at 5 (P.C.) (“The trustee is only one example of a fiduciary and the same rule applies to all other fiduciaries who accept bribes”).

¹⁵ Perhaps the most significant departure from the principle of generic regulation is found in the corporate context. The divergence cannot be justified. See R. Flannigan, “Fiduciary Duties of Shareholders and Directors” [2004] J.B.L. 277.

¹⁶ Flannigan, *supra* note 2 at 320. Content may vary with structure in the sense that different limited access arrangements may attract different components of the overall generic content. That is only an illustration of the general proposition that a particular manifestation of the mischief will engage or trigger the appropriate rule.

¹⁷ *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378 at 392 (H.L.).

liability for any reason save consent. Thus, for example, it is of no consequence that fiduciaries act in good faith, that beneficiaries themselves could not secure the benefit or that beneficiaries will receive a windfall gain. Strict liability is justified by the detection and evidentiary difficulties that would otherwise confront beneficiaries. Many fiduciaries are unmonitored and unsupervised. We trust them. In many cases, we *must* trust them. Some beneficiaries (e.g. infants, patients, clients) are incapable of effective monitoring. Others (e.g. settlors, principals, partners), for reasons of efficiency, economy or necessity, rely on the invitation to trust as a substitute or proxy for monitoring and supervision. Even where monitoring occurs, many beneficiaries will not appreciate how otherwise reasonable and rational actions may be opportunistic. Disloyal fiduciaries will invariably be able to fabricate plausible explanations for their self-serving actions or transactions. The nature of their access both elevates the risk of opportunism and facilitates its concealment. Judges, for the most part, understand the impossibility of deciphering infidelity. With rare exception, they have conceded the prudence of a strict ethic for those who might profit from a limited access.¹⁸

This strict ethic, predictably, is occasionally assailed as being productive of harsh, punitive or draconian results.¹⁹ That is an unconvincing, even nonsensical, objection, given that fiduciaries can do *any* act, satisfy *any* appetite, yield to *any* conflict, receive *any* benefit or defeat *any* fiduciary claim through the one expedient of ex ante or ex post consent. A failure to seek that consent is a telling fact. Moreover, were we to dilute this strict ethic, we would invite the cosmetic and instrumental structuring of transactions and relations to sanitize their appearance (by simulating “acceptable” arrangements) and thereby erect a facade of propriety for self-serving motives.²⁰ That would be wholly dismissive of the acute concerns that underlie the

¹⁸ Explicit rejection of the strict standard is rare. Consider *Holder v. Holder*, [1968] Ch. 353 (C.A.).

¹⁹ The bases for this criticism are never developed. It appears to flow from some sort of inchoate subjective affront. There is certainly no punitive element involved in the sense that an additional payment is extracted for the specific purpose of censure. Flannigan, *supra* note 3 at 70-71. The concern expressed by Justice Deane in *Chan v. Zacharia* (1984), 154 C.L.R. 178 at 205 (H.C.A.) was that the inflexible approach “will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases.” That appeal to do what is “just” according to the circumstances represents a direct rejection of the original premises for the strict standard (the difficulties of comprehending, detecting and proving the mechanisms of opportunism) and, if taken seriously, would eviscerate the conventional jurisdiction.

²⁰ Flannigan, *supra* note 3 at 46-47.

conventional position. We deprecate the opportunistic actions of those with limited access. The visceral intuition is that the disloyal impulse must be intercepted at the earliest point and condemned unconditionally without apology. Honest fiduciaries understand that this strict operation is designed to preserve the integrity of their undertakings.

In declaring that a fiduciary cannot harbour a conflict or entertain a benefit, the conflict and profit rules seek to remove any incentive to act opportunistically. In that respect, their function is mechanistic and derivative relative to the primary function of regulating opportunism. Nevertheless, at times, the conflict and profit rules are wrongly elevated to ostensibly normative conceptual bases for fiduciary accountability. Unable to recognize or articulate the operative policy, some judges and commentators retreat to mechanical structure for justification (or to avoid the question of justification). The two rules, however, provide no direct justification for fiduciary accountability. Neither indicates which actors must suspend their self-interest. The rules are only legal artifacts produced by our prior decision to construct a strict responsibility. That decision to install a strict standard was itself secondary to our decision to regulate opportunism for reasons of general social welfare. Thus, we initially resolved to protect limited access arrangements, and we then resolved to do so on a strict basis. The latter decision produced the existing shape of the conflict and profit rules. Accordingly, the two rules, as such, tell us nothing about the scope of the fiduciary jurisdiction. They may appear to some to have an implicit justificatory content, but that content could only represent antecedent policy conclusions.

Another measure that supports our policy of protecting limited access arrangements is the extension of fiduciary responsibility beyond the formal temporal boundaries of a relation. Those who are negotiating a limited access arrangement, or who have exited from such an arrangement, may incur a fiduciary liability if their actions are opportunistic. For example, it would be a fiduciary breach to fashion, in anticipation of a formal partnership, an agreement that will produce a special benefit for one partner.²¹ Similarly, after the formal termination of a fiduciary relation, it may be a fiduciary breach for actors to exploit an opportunity connected to their former employment.²² The temporal extension of liability before and after the

²¹ *United Dominions Corporation v. Brian Pty. Ltd.* (1985), 157 C.L.R. 1 (H.C.A.). See also *Re Canadian Oil Works Corporation* (1875), L.R. 10 Ch. App. 593.

²² *Canadian Aero Service Limited v. O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.); *Natural Extracts Pty. Ltd. v. Stotter* (1997), 24 A.C.S.R. 110 (F.C.A.); *Discronics Ltd. & Ors. v. Edmonds & Ors.*, [2002] V.C.S. 454 (Vic. S.C.).

formal duration of the relation provides collateral support for the primary fiduciary function by removing (or at least restricting) the scope for exploitation through structuring or manipulation of the temporal realization of a benefit.²³ The precise operation of this penumbral liability remains unclear, but there is no doubt over its necessary application in many circumstances.

The analysis of the conventional position to this point reveals a strict generic regulation operating in combination with other standard forms of nominate and general regulation. A given physical arrangement will be governed both by idiosyncratic rules (negotiated, mandatory and default) and general liability rules. This schema or picture of the overall regulation furnishes a rough quantitative sense of the relative significance of the fiduciary jurisdiction. It constitutes a fundamental, but confined, part of the total applicable regulation. The bulk of the regulation associated with a given limited access arrangement will be its idiosyncratic nominate regulation and the additional regulation represented by the other general liability regimes. Fiduciary responsibility is but one particularized general regime of accountability operating within a polyfunctional framework of legal facilitation and legal liability.

With this picture in mind, it might be asked whether it is necessary or useful to maintain the distinction between the nominate and fiduciary dimensions. The answer, if not apparent, is that nominate regulation is concerned with disparate specific functions, while fiduciary regulation addresses one generic social mischief. Idiosyncratic functions and generic mischiefs require, respectively, idiosyncratic and generic regulation. Nominate regulation permits accommodation of the idiosyncrasy of different limited access arrangements. Fiduciary regulation, on the other hand, is not sensitive to context in the same way. It controls opportunism in whatever form it manifests itself, but not differently for different nominate categories. This analytical clarity is more difficult to achieve if the distinction is denied. A second consideration is that the strict quality of fiduciary

²³ For some, this would appear not to be a *fiduciary* liability because ostensibly the actor is not a fiduciary at the time of the objectionable action. However, the negotiation for, or recent completion of, a fiduciary relation may in many cases be a sufficient connection to establish conventional fiduciary accountability (e.g. where the real breach was committed while the actor had limited access – such as appropriating or withholding information to exploit post-termination). Another view is that the temporal extension is fiduciary in the sense that it is a necessary conceptual adjunct to facilitate the effective control of opportunism. There is some accommodation for those in the penumbral region in that the standard is apparently less strict, presumably to recognize the relevance at that time of the policy of employment mobility. See *Canadian Aero, ibid.*

responsibility may not be appropriate for the positive regulation of many nominate functions. A third consideration is that the remedies available for breach of fiduciary obligation may not be suitable for breaches of nominate duties. These kinds of considerations reflect the fact that different social norms are operating in the two dimensions, and therefore require analytical distinction.

Distinguishing between the nominate and fiduciary dimensions produces other significant analytical insights. It has been assumed, for example, that fiduciary accountability represents part of the “core” of the trust relation.²⁴ The substantive difference between the nominate and fiduciary dimensions, however, indicates that this is a mistaken proposition. Fiduciary accountability is the “core” of the *fiduciary* dimension. Whatever the core or essential character of the trust might be, it will not be found in the fiduciary dimension.²⁵ The *fiduciary* character of the trust, conventionally understood, is a *generic* characteristic *shared* with all limited access arrangements. Accordingly, the trust cannot be fundamentally distinguished from other relations by its fiduciary character. A comparable analysis leads to rejection of the argument that full exculpation of fiduciary obligation prevents the valid creation of a trust. As explained elsewhere, trust obligations exist and are enforceable despite the absence of fiduciary accountability.²⁶ These insights are less accessible if the nominate and fiduciary dimensions are conflated.

The fiduciary jurisdiction, traditionally understood, is a relatively narrow form of regulation. It is represented by three main doctrinal subjects, the general law of fiduciary obligation, and the companion subjects of presumed undue influence and breach of confidence.²⁷ It is concerned exclusively, in each area, with the narrow mischief of opportunism on the part of those with limited access. The jurisdiction is not concerned with lack of care, unjust enrichment, bad judgment, duress, unconscionability, mistake, uneven treatment, unequal power or

²⁴ See D. Hayton, “The Irreducible Core Content of Trusteeship,” c. 3 in A.J. Oakley, ed., *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996).

²⁵ The essence or core of the trust is substituted principal status. Trustees who are not controlled by others have full principal status relative to the world in substitution for their settlors and beneficiaries. Agency is a different kind of substitution. Agents are treated as intermediaries, rather than principals. Query the implication of the undisclosed principal doctrine in this analytical context.

²⁶ Flannigan, *supra* note 9 at 255-56.

²⁷ P.J. Millett, “Equity’s Place in the Law of Commerce” (1998) 114 L.Q.R. 214 at 219-222; Flannigan, *supra* note 2 at 286-97 and note 6 at 302-304. Others reject any connection between the doctrines. They fail, however, to identify different substantive functions for the three doctrines. There is one common function – to control the opportunism of those with limited access.

general exploitive conduct. However, because the potential for the mischief of opportunism is *pervasive*, because so many relations in our society involve limited access arrangements, the fiduciary jurisdiction may *appear* to constitute a conceptually broad basis for personal liability. But that is appearance only. Appearance yields to exegesis. Fiduciary responsibility is a specific kind of regulation, not a general tool for the correction of all forms of injustice. We need to understand the singular nature of its function, not indiscriminately project our ruth and indignation. We may then comprehend its application to such seemingly diverse phenomena as commercial relations, non-profit organizations, sexual exploitation and political corruption.²⁸

Conventional fiduciary accountability is also narrow in the sense that it has only a negative operation. In the usual terminology, it is proscriptive rather than prescriptive.²⁹ The duty is abnegation – a duty to not engage one’s self-interest. There is no positive quality to the jurisdiction. There is no fiduciary duty to pursue or further the interests of beneficiaries except in the sense of putting aside one’s own interest. Any enforceable positive duty would be a feature of the specific nominate dimension. Thus, for example, the duty of trustees to invest prudently (whether arising by contract or default imposition) is a positive trust law duty, not a fiduciary duty. There is, however, a *fiduciary* duty that *supports* this trust function. Trustees remain untouched by fiduciary liability until they use their investment powers to serve themselves. Thus, trustee investment decisions are concurrently regulated by both trust law, in a prescriptive (and proscriptive) way, and fiduciary law, in (only) a proscriptive way. It is the same for all limited access arrangements.

The conclusion that there is a clear basis for conventional fiduciary accountability is disputed by some. There have been confident assertions that the traditional fiduciary jurisprudence has yet to develop a unifying principle. That continuing search for basic principle is quite inexplicable. There is no empty vessel here. It is implausible, on the face of it, that the powerful regulation we label “fiduciary” could have arisen and survived without a firm foundation in visible social policy. From the beginning, in fact, the judges have openly declared the animating policy to be the control of opportunism. In many cases, they moved from the acknowledgement of that policy directly to the assignment of liability. No intermediate step or test was required because the policy itself identified the subject (those with limited access) and object (controlling opportunism) of regulation. Limited

²⁸ Flannigan, *supra* notes 4, 6, 9 and “The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments” (1998) 77 Can. Bar Rev. 73.

²⁹ *Breen v. Williams* (1996), 186 C.L.R. 71 at 113 (H.C.A.).

access arrangements raise the prospect of opportunism and, consequently, we designate them as fiduciary – in addition to whatever idiosyncratic nominate designation they might attract. The mere designation of fiduciary status, of course, does not create fiduciary *liability*. It is only upon a breach (an unauthorized conflict or profit) that liability crystallizes. That is the conventional position. The claim that fiduciary regulation lacks an observable coherence must be dismissed.

A number of observations about conceptual technique may further illuminate the nature of conventional fiduciary accountability. Three techniques are commonly employed in this area. One is to find fiduciary status by analogy to established fiduciary relations.³⁰ The analogy technique, however, only produces correct results where the analogy is to the proper characteristic (the *fiduciary* characteristic) of the established relation. More importantly, the use of the technique implies that there is no definitive abstract criterion for identifying the valid imposition of fiduciary responsibility. The analogy technique impedes analytical abstraction. It also obscures the general and generic quality of the fiduciary jurisdiction. The analogy approach is necessarily displaced by the recognition and direct application of the limited access principle.

Categorization of fiduciary relations is a second unhelpful technique. It perpetuates confusion. It is certainly analytically acceptable to sort different physical arrangements into separate nominate categories defined by rules that reflect their idiosyncratic character. As observed earlier, however, that utility of categorization is not replicated in the fiduciary dimension. Categorization of *fiduciary* relations implies difference where there is none. The mischief, and its regulation, are generic. The mischief is not tied to particular actors or particular functions in unique ways. The various fiduciary rules are merely specific responses to specific manifestations of the singular mischief of opportunism, and are applied across categories as required.³¹

A third unhelpful analytical technique is to approach the question of fiduciary responsibility in terms of *relationships*, rather than *obligations*. There are no fiduciary “relationships” as such. Rather, there are nominate idiosyncratic arrangements that attract generic fiduciary obligations if, and to the extent, they involve limited access.

³⁰ The analogy is often to the trust relationship. That is to be expected given that the trust is a model limited access arrangement. It must be understood, however, that the trust has no special status in so far as its fiduciary dimension is concerned. It is merely another limited access arrangement requiring the control of opportunism.

³¹ Flannigan, *supra* note 2 at 320.

Fiduciary responsibility is a dimension of a relationship, it is not *the* relationship. Trustees have trust duties that are augmented by fiduciary duties, agents have agency duties that are also augmented by fiduciary duties, and so on, for all limited access arrangements. The nominate regulation in each case, rather than the generic fiduciary regulation, represents the essential or unique legal character of the different arrangements. Fiduciary accountability imposes a singular *obligation* to conduct ourselves in a certain way (without self-interest) in the context of a limited access relationship. We tend to lose these rudimentary insights when we fixate on the nature of “relationships.” A natural reaction to different relations is to accord significance to idiosyncrasy, rather than common singularity, and then to assume [wrongly] that idiosyncrasy extends to the fiduciary dimension. That reaction must be inverted when assessing fiduciary responsibility. Having said that, as long as we understand the *way* in which an arrangement is fiduciary, it is perfectly acceptable to identify a relationship as a “fiduciary” one. To say that a principal and agent are in a fiduciary relationship is simply to say that the agency function is supported by coincident fiduciary accountability.

The foregoing observations raise the question whether there is any advantage or utility in distinguishing between status and fact-based fiduciary obligation. The argument would be that, while it may perform a modest signaling function, status fiduciary responsibility is over-inclusive and should be cast from the jurisprudence. Instead, fiduciary accountability would be entirely fact-based. Actors would be subjected to fiduciary regulation if their actual physical arrangement was one of limited access. It is a factual question whether an actor has a nominate status that is deemed to be fiduciary. That factual finding, however, is not equivalent to a determination that the actor actually has limited access. The utility of status-based characterization, then, is that the aggrieved party has a different, usually more favourable, evidentiary burden. Aggrieved parties must prove only nominate status, not limited access. That, however, is likely a tiny advantage, if it is any advantage at all, because each established status category would on a factual analysis invariably be identified as a limited access arrangement in significant respects relative to the mischief of opportunism. Indeed, that is the reason those categories acquired their default status.³² On the whole, it might seem that our continuing dependence on status-based fiduciary categories is largely benign. The existence of such categories does not formally block recognition of the general application of the fiduciary regime because it is understood that the categories do not exhaust the scope of fiduciary accountability. It is not at all clear,

³² *Ibid.* at 294 (fn. 45).

however, that everyone does appreciate the general exposure of all actors to fact-based liability. Status categories may also foster the confusion that every objectionable action of a status fiduciary is a fiduciary breach. It therefore may be preferable to detach ourselves from our remaining dependence on the status ascription of fiduciary responsibility, and move to a fact-based limited access test for all cases.³³

The nature of conventional fiduciary accountability may also be clarified by challenging a number of judicial assertions or pronouncements that have been weaved, uncritically, into the jurisprudence. One of the more popular references is to Justice Frankfurter in *S.E.C. v. Chenery Corporation*: “[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?”³⁴ If intended as a methodology, Justice Frankfurter’s suggested analysis is confusing because it appears to partially reverse the conventional analysis. Actors do not become fiduciaries by spontaneous conception. It is not possible to characterize a relation as fiduciary until identified parties are shown to be in a limited access arrangement relative to each other. Accordingly, the first question proposed by Justice Frankfurter must be answered *before* it is possible to come to a conclusion as to fiduciary status. As well, the answer to his second question follows automatically from the fiduciary characterization. The singular obligation is to suspend one’s self-interest. In these respects, the largest part of a fiduciary analysis *will* have been completed where it is appropriate to “say that a man is a fiduciary.”³⁵ The source of the difficulty, it should be evident, is that Justice Frankfurter’s comments were framed as a response to a bare assertion of status. As such, he was only declaring that we must not accept assertion as a substitute for analysis. His comments were not intended as a definitive statement of analytical technique or methodology. It is also important to guard against interpreting Justice Frankfurter’s remarks as suggesting that the word “fiduciary,” as such, is meaningless. The word operates as a signal of a particular kind of claim. We have assigned to it a standard default

³³ Because status categories are such a convenience for judges (and the rest of us), it is unlikely they will be discarded easily. Status accountability, and analogy to it, currently dominate the field.

³⁴ 318 U.S. 80 at 85-86 (S.C. 1943).

³⁵ The third question listed by Justice Frankfurter is conceptually straightforward and requires little additional analysis. Fiduciaries fail to discharge their obligation when their actions are conflicted, or calculated to produce a personal benefit. That leaves only the fourth question, the issue of remedy, for any significant “further inquiry.”

content and therefore enabled the transmission of information in compressed form. Thus, when met with an assertion that a person is a “fiduciary,” we are directed to a defined area of doctrine to assess the validity of that claim. Labels have functions because they have constructed meaning. Accordingly, without development or qualification, Justice Frankfurter’s remarks have little utility beyond the admonition to unpack assertion.

Another popular reference is to Fletcher-Moulton L.J. in *Re Coomber*: “[I]n some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interferences is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.”³⁶ In an important sense, however, this “idea” is not at all absurd. Where a nominate function involves limited access, actors are in a position to serve themselves. Accordingly, to the extent of the access, the nominate function attracts the full range of fiduciary “interference.” Actors with limited access may act opportunistically in multiple ways. The various kinds of fiduciary interference (fiduciary rules) are merely specific legal responses to specific means or mechanisms by which actors may divert value to themselves or their associates. For example, if partners use their powers to purchase their own property for the partnership, the transaction is voidable. If instead the particular mischief is that they compete with the partnership, they must account for their profit. A third action for which they will also be called to account is the sale of confidential partnership information. These different means of actual or potential exploitation, and others, all arise from the one limited access. Accordingly, in that sense, it is actually correct (rather than absurd) to “conclude that every kind of fiduciary relation justifies every kind of interference.” Every limited access relation is fiduciary by reason of the one opportunism concern, and that one concern justifies whatever rule or judicial action is responsive to the specific act or conflict of the fiduciary. It is therefore unhelpful to conclude, as Lord Justice Fletcher-Moulton does, that “the nature of the fiduciary relation must be such that it justifies the interference.” That conclusion ignores the generic quality of both the mischief and its regulation. A less problematic observation would be that the nature of the fiduciary *breach* must be such that it justifies the interference. The particular means or mechanism of self-regard will attract the application of the appropriate corrective rule. Even that, however, may be unduly narrow and categorical. The proper observation, in practical terms, is that opportunism in limited access arrangements will be controlled by a

³⁶ [1911] 1 Ch. 723 at 729.

strict interference, whatever shape that interference assumes in a particular instance.³⁷

A third common reference is to Megarry V-C in *Tito v. Waddell* (No. 2): “If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.”³⁸ These critical remarks appear to be predicated on an analytical, perhaps semantic, contradiction. Confusion is created here by the usage of the term “self-dealing.” The usual connotation of self-dealing is that it is an improper dealing, a dealing that involves a breach of duty to another. In that sense, self-dealing, or the potential for self-dealing, *does* subject an actor to fiduciary responsibility. The preferable way to frame this, however, is to begin with the physical characteristic that animates the regulation. Arrangements that give actors limited access raise the potential mischief that those actors will act opportunistically, or self-deal. To deter that mischief, we impose fiduciary accountability. When self-dealing thereafter occurs, “the equitable rules about self-dealing apply.” The obvious difficulty with the Megarry analysis is that if one concludes that an actor self-deals, it cannot be said that such a person is one “who is subject to no pre-existing fiduciary duty.” The preliminary assumption of law (no pre-existing duty) is necessarily contradicted by the subsequent assumption of legal fact (that the person self-deals).

Comprehension of the fiduciary idea may also be furthered by the correction of a number of misconceptions that can be found in the jurisprudence. It seems to be a commonly held view that fiduciary accountability generally requires or implies a higher standard of conduct on the part of fiduciaries.³⁹ The question that immediately arises, however, is relative to what? In fact, there is no “higher” standard, there is only *the* standard of fiduciary responsibility. The mischief is self-interest, and the standard is to forgo self-interest. That one standard applies to all aspects of a given limited access. Other

³⁷ E.g. *Attorney-General for Hong Kong v. Reid*, [1994] 1 All E.R. 1 (P.C.).

³⁸ [1977] Ch. 106 at 230.

³⁹ One source for that view is Justice Cardozo in *Meinhard v. Salmon* (164 N.E. 545 at 546 (1928)): “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour.” It seems clear, however, that Justice Cardozo was commenting on the strict application of fiduciary responsibility, and not describing a difference of degree or gradation. Actors are either subject to the one standard, or they are not.

standards that may have concurrent application address other mischiefs. There may be gradations of standards for tort or criminal liability, but those gradations have no application or relevance in the fiduciary dimension. A related misconception is that there is a lower or modified standard for commercial or business matters.⁴⁰ The suggestion seems to be that fiduciary responsibility would choke risk-taking. That, it should now be apparent, misconceives the scope and function of conventional fiduciary responsibility. Controlling the opportunism of actors with limited access in fact *facilitates* risk-taking and commercial activity in general. The suspicion some commercial actors have of fiduciary obligation is likely due to ignorance on their part or that of their legal advisors. They lose their suspicion when told that fiduciary responsibility is essentially only the rough equivalent of the commandment: Thou shall not steal (divert value). Another misconception is that fiduciary obligations do not arise in arm's length relations. As explained elsewhere, that is not a useful observation.⁴¹ Where opportunism is the issue, the relevant question is whether the parties are in a limited access arrangement. Lastly, it is regularly asserted that relationships vary in the "intensity" of their fiduciary character. The whole of the foregoing analysis indicates that simplistic unqualified proposition is altogether unhelpful.

Lastly, it is important to understand that conventional fiduciary responsibility has application in both the private and public spheres. A few judges and commentators have expressed the view that fiduciary accountability is restricted to the private sphere. They have offered no justification for this view, however, and the jurisprudence indicates otherwise. Fiduciary obligations are imposed on political representatives, Crown agents and servants, and other actors exercising public functions in a variety of respects.⁴² This application of fiduciary accountability in the public sphere is conceptually sound. The criminal, contract and tort liability regimes all have public application, and so it is with fiduciary liability. There is no credible basis for excluding fiduciary responsibility from the public sphere once it is understood that the jurisdiction is concerned exclusively with the control of opportunism. Self-serving action, whether in the private or public sphere, is private by definition. The complementary public rationale is that the fiduciary jurisdiction, through its control of private opportunism, is generally pursuing the public function of maintaining the integrity and social utility of our

⁴⁰ Flannigan, *supra* note 4 at 912-15.

⁴¹ *Ibid.* at 915-17.

⁴² *Reading v. Attorney-General*, [1951] A.C. 507; *Sumitomo Bank Ltd. v. Kartika Ratna Thahir & Ors.*, [1993] 1 Sing. L.R. 735 (H.C. Sing.); *Attorney-General for Hong Kong v. Reid*, [1994] 1 All E.R. 1 (P.C.). See the authorities collected in Flannigan, *supra* note 9.

limited access arrangements. Either way, fiduciary responsibility admits no public restriction.⁴³

Before turning to the academic contributions on the question of boundaries, it may be observed that we are free as a community to alter the conventional conception of fiduciary accountability. We could revisit the current policy we implement with this jurisdiction and then, after agreeing on a new policy, craft a legal regime that implemented the new policy. That, however, is not what has been happening in this area of the law. With the odd exception, judges and commentators insist they are investigating and clarifying the basis for *conventional* fiduciary responsibility. In some instances, however, it is plain that the traditional jurisprudence has largely been ignored, rather than interpreted or applied. If, of course, we were to propose some new policy that we intended to implement in a manner comparable to the fiduciary jurisdiction, we would have to justify that policy in terms of the public good. The difficulty that would arise is that a new or different public policy may not command the same social consensus that supports the regulation of opportunism in limited access arrangements. Controlling exploitation generally, for example, is controversial relative to the policy of controlling exploitation on the part of those with limited access. Once we move away from, or expand beyond, the policy of controlling opportunism in the narrow conceptual band of limited access, we lose the firm foundation of uniform social agreement. To include that new or expanded regulation under the rubric of “fiduciary” regulation would ultimately work to discount the efficacy of the conventional social control.

III. *Contributions of the Academy*

The onset of the current confusion in the fiduciary context is due in no small measure to the interventions of commentators seeking to organize what they perceived to be a haphazard or unfinished jurisprudence. The difficulty is that the criteria they have offered are both under and over-inclusive. The criteria are insufficiently delimited at the conceptual level and therefore do not accurately describe the conventional boundaries.

The general fiduciary jurisprudence attracted little attention from commentators until relatively recently. The initial modern contributions from Austin Scott in 1949⁴⁴ and Len Sealy in 1962⁴⁵ simply confirmed the conventional position. Scott summarized the fiduciary rules and

⁴³ See Flannigan, *supra* note 9.

⁴⁴ A. Scott, “The Fiduciary Principle” (1949) 37 Calif. L.Rev. 539.

⁴⁵ L. Sealy, “Fiduciary Relationships” [1962] Cambridge L.J. 69.

Sealy fashioned a catalogue of four fiduciary classes. Sealy, however, in explaining his catalogue, offered remarks that identify him as one of the provocateurs for those subsequently searching for principle. He argued that: "The word 'fiduciary'... is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply It is obvious that we cannot proceed any further in our search for a *general* definition of fiduciary relationships. We must define them class by class, and find out the rules which govern each class."⁴⁶ These remarks suggest a failure to appreciate the singularity of fiduciary responsibility and the general application of generic fiduciary rules. It is clear, in any event, that Sealy's four classes merely represent different instances of the one function of controlling opportunism. His separate classes evaporate or collapse because, in functional terms, they are indistinguishable. His catalogue therefore confirms the conventional policy.

The first noteworthy departure from conceptual orthodoxy appeared in 1968, when Gareth Jones essayed "to isolate the part that unjust enrichment does and should play in determining the scope of equity's inflexible rule".⁴⁷ His view was that fiduciary responsibility was designed "to achieve two objects: the prevention of unjust enrichment *and* the prevention of the mere possibility of a conflict between self-interest and duty".⁴⁸ It does not appear that Jones was intending necessarily to redefine the conventional boundaries of fiduciary liability. His purpose was instead to add content to the law of restitution through linkage to, or capture of, the fiduciary jurisdiction. Given the apparent failure of that enterprise, the potential blurring of the function of fiduciary responsibility from this source is now less likely. Unjust enrichment, as such, would have offered a broad conceptual base for asserting a fiduciary claim. Anything that could be characterized by an aggrieved party as an "unjust" enrichment could found a claim for fiduciary breach. That is a concept that would dismantle entirely the conventional boundaries of fiduciary responsibility.

The 1975 contribution of Ernest Weinrib represented an attempt to clarify and justify the conventional view.⁴⁹ Weinrib saw two policies at work: (1) the control of discretion and (2) protecting the integrity of commercial organizations. He associated those two policies, respectively, with the "conflict" and "profit" rules, and thereby

⁴⁶ *Ibid.* at 73.

⁴⁷ G. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472 at 473.

⁴⁸ *Ibid.* at 477-78.

⁴⁹ E. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1.

identified fiduciary accountability as exclusively concerned with the control of opportunism. In fact, he contemplated an even narrower jurisdiction with his limitation to “commercial” organizations. His view is also narrow in the sense that it does not appear to accommodate those clear fiduciary breaches that do not involve the exercise of discretion. As it is, Weinrib’s analysis is of considerable interest because his “discretion” argument was explicitly adopted by Justice Dickson in *Guerin v. The Queen*,⁵⁰ a case that has had a profound, and problematic, significance in the Canadian jurisprudence. The main concern with Weinrib’s analysis is that it can be interpreted as *extending* fiduciary regulation into the nominate dimension. The “control of discretion” can be understood to mean control of the merits or outcome of an exercise of discretion, without limitation to opportunistic conduct. If generally understood in this way, beneficiaries could assert a “fiduciary” basis for challenging the exercise of nominate duties. For example, with respect to discretionary distributions proposed by trustees, beneficiaries might insist that a different allocation of monies is justified given the circumstances of the parties. The conventional operation of the fiduciary principle, in contrast, would produce a “fiduciary” claim only where the trustees receive a direct or indirect personal benefit from the distribution, or are in a conflict position when they exercise their discretion. Thus, Weinrib’s discretion analysis is initially too narrow, and, potentially, too expansive. He correctly identifies the mischief as opportunism, but offers a test (the presence of discretion) that does not, as an abstract concept, correspond with the scope of that mischief.

The monograph Paul Finn published in 1977 was an attempt to produce a comprehensive treatment of fiduciary accountability.⁵¹ Subsequently, much of the analysis therein has been qualified or displaced by Finn’s own revised views. Still, the book is often cited and considered authoritative in some courts, even though Finn himself conceded that “others may see it [the existing law] differently”.⁵² Finn viewed the fiduciary jurisdiction as comprising eight “quite specific duties under the umbrella of the general obligation [to act in the interests of beneficiaries]”,⁵³ and a further eight duties of “good faith,” each of the latter definitive of its own fiduciary class.⁵⁴ This diversity in Finn’s analysis is regarded by some as sophistication and contextual sensitivity. The opposed view is that his analysis tends to submerge the essential simplicity of application of the fiduciary proscription.

⁵⁰ (1984), 13 D.L.R. (4th) 321 (S.C.C.).

⁵¹ P. Finn, *Fiduciary Obligations* (Sydney: Law Book Company, 1977).

⁵² *Ibid.* (Preface).

⁵³ *Ibid.* at 15.

⁵⁴ *Ibid.* at 78.

It is reasonably clear that Finn understood the fiduciary regime to be primarily concerned with controlling opportunism. Even so, several of his sixteen duties are matters within the nominate, rather than the fiduciary, dimension of the relations considered. Additionally, like Weinrib, Finn attached considerable importance to the role of fiduciary duties in controlling discretion (as opposed to opportunism). As noted, that may lead to confusion of the nominate and fiduciary dimensions, where the former is subsumed within the latter. Finn contributed to that kind of interpretation when, for example, he insisted that: "The duties define the points at which a court will be prepared to say that, whatever else the fiduciary might have tried to do, he has *not* acted in the beneficiaries' interest".⁵⁵ While it is for fiduciaries to determine what actions are in the interests of their beneficiaries, it is, according to Finn, "the province of the courts to determine what actions are *not in the beneficiaries' interest*".⁵⁶ To the extent this implies that courts do or should review the merits or quality of the discretionary choices of fiduciaries, as distinct from the question of the opportunistic (or conflicted) exercise of discretion, the analysis moves from the fiduciary dimension into the nominate dimension.

We will return shortly to consider Finn's subsequent reworking of his views. First, however, it is convenient to review the intervening contributions of J.C. Shepherd and Tamar Frankel. In 1981, in a book⁵⁷ and an article,⁵⁸ Shepherd culled from the literature eight "theories" of fiduciary responsibility. His project was to distill from them (rather than the underlying cases) the defining elements of fiduciary liability, and use those elements to posit his own "unified theory." His conclusion was that a fiduciary relation "exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power".⁵⁹ This "encumbered power" formulation is self-evidently susceptible to the same expansive interpretation discussed above. On the face of it, any trust, agency or other nominate power would be open to the complaint that it had not been exercised in the best interests of a beneficiary, even where there was no suggestion of opportunism. Two years after Shepherd's contribution, Tamar Frankel asserted that "all fiduciary relations give rise to the problem of abuse of power, and that the purpose of fiduciary law should be to solve this

⁵⁵ *Ibid.* at 16.

⁵⁶ *Ibid.*

⁵⁷ J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981).

⁵⁸ J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51.

⁵⁹ *Ibid.* at 75.

problem”.⁶⁰ Once again, it is apparent that this “abuse of power” terminology is amenable to the idea of fiduciary regulation of nominate performance. Framing the mischief as simply the abuse of power appears to contemplate relief for any abuse of power, notwithstanding that traditionally the kind of abuse that attracted fiduciary liability was confined to disloyalty or opportunism in the course of acting for another. At the same time, both the Shepherd and Frankel “power” formulations are formally narrower than conventional fiduciary accountability because the latter is simply not restricted to regulating the exercise of power. Accordingly, a power criterion is capable of being interpreted in ways that would either expand or contract the conventional boundaries.

One begins to see the problem with the contributions from the academy. Commentators boldly set out to identify the organizing or unifying principle, but produced abstractions that could be understood in ways that did not correspond with the conventional boundaries. Jones proposed the prevention of unjust enrichment; Weinrib and Finn, the control of discretion; and Shepherd and Frankel, the regulation of power. Each of these formulations, while narrow in certain respects, can be interpreted in such a way as to apply *fiduciary* regulation to positive duties conventionally regulated by specific nominate regimes. In that regard, it is largely irrelevant whether these commentators themselves believed their criteria accurately traced the conventional boundaries. The difficulty is that their formulations can be, and have been, *interpreted* in ways that depart from the traditional view. It is therefore no surprise, with all of these conceptions (and others still to be discussed) competing for ascendancy, that advisors and adjudicators have been frustrated in their comprehension of fiduciary accountability.

Consider the second contribution of Finn. In a conference presentation in 1988, Finn recognized that fiduciary responsibility was premised on the control of opportunism (the conventional view).⁶¹ He argued, however, that the fiduciary regime was but one tier in a hierarchy of three tiers of “protective responsibility.” The three tiers were unconscionability, good faith and fiduciary obligation. According to Finn: “What is being suggested, though, is that the fiduciary position should not be considered as something separate, complete and whole; that it belongs most likely, to a family of doctrines; that these may well be found in time to be informed by a common principle; and that to the extent that these make available a range of behavioural standards of

⁶⁰ T. Frankel, “Fiduciary Law” (1983) 71 Calif. L. Rev. 795 at 807.

⁶¹ P. Finn, “The Fiduciary Principle,” c. 1 in T. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989). See also P. Finn, “Contract and the Fiduciary Principle” (1989) 12 U.N.S.W.L.J. 76.

varying intensity, there is the need to identify the factors which determine the appropriateness of one rather than another to a given relationship.”⁶² Finn’s common principle, or tool of distinction, was the reasonable expectation of the parties. His view was that “reasonable expectations — an amalgam of actual expectations and judicial prescription — are a potent factor in the identification of the standard appropriate to a given situation”.⁶³

Finn’s new thesis, he conceded, was speculative. Today it must be regarded as defeated. It has not been embraced by the judges. The enthusiasm of some for a general duty of good faith (framed as something other than an alternative description of fiduciary duty) has been waning.⁶⁴ Moreover, it should now be clear that fiduciary accountability does stand apart as a distinctive general regime of obligation (contrary to Finn’s view, it *is* “something separate, complete and whole”). It has a specific conventional function that shares no discernible family trait with the indefinite general notions of good faith or unconscionability. It is certainly not tied to the unconscionability doctrine any more intimately than any other form of general regulation. We are left, however, with the novel proposal that reasonable expectation is the test for conventional fiduciary accountability.

Finn does appear at various points to appreciate, if rather vaguely, the difference between the nominate and fiduciary dimensions: “If no issue of disloyalty is involved, such matters will be actionable through those primary bodies of law which constitute or govern the ordinary incidents of the relationship in question ? negligence, breach of contract or breach of trust.”⁶⁵ Nevertheless, his assertion of a reasonable expectation test is a concern. As Finn sees it: “What must be shown, in the writer’s view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship.”⁶⁶ Without more, however, this merely begs the question. What “actual circumstances” create that entitlement, and so produce fiduciary status? Apart from that, we see here the same potential for conflation of the nominate and fiduciary dimensions. Employing a reasonable expectation test as an

⁶² *Ibid.* at 55-56.

⁶³ *Ibid.* at 6. A reasonable (or legitimate) expectation test is found in other areas (e.g. contract, administrative law). While the test has the appearance of definitional coherence, it may be understood, or applied, in a variety of ways.

⁶⁴ Consider *Walford v. Miles*, [1992] 2 A.C. 128; *Martel Building Ltd. v. Canada* (2000), 193 D.L.R. (4th) 1 (S.C.C.); *Wellington City Council v. Body Corporate 51702 (Wellington)*, [2002] 3 N.Z.L.R. 486 (C.A.); *Royal Botanic Gardens and Domain Trust v. South Sydney Council* (2002), 186 A.L.R. 289 (H.C.A.).

⁶⁵ Finn, *supra* note 61 at 28.

⁶⁶ *Ibid.* at 46 (also at 54).

abstraction, without expressly limiting it to disloyalty, will foster expansive interpretation. Beneficiaries will claim “fiduciary” breach whenever they are convinced the fiduciary has not acted in their interests, even when opportunism or disloyalty is not an issue, because they “reasonably expected” a different outcome. There are other conceptual concerns with a reasonable expectation test.⁶⁷ As we will see, however, it has its proponents in the judiciary.

The commentators identified above have been influential in the development [deterioration] of the jurisprudence over the past three decades. That influence was due in part to first-mover and path dependence effects. Their works were the only current general commentaries available when judges began to search for abstract criteria to define the scope of fiduciary accountability. The ideas advanced were also analytically accessible in a broad sense [deceptively meaningful], largely because of their interpretive elasticity. The influence of these commentators in the courts, however, has not been replicated in the academy. Subsequently, there has been a stream of contributions offering formally different criteria to define the nature and application of fiduciary responsibility. The criteria include efficiency, cognitive processes, critical resources, altruism and others.⁶⁸ There is now a sort of conceptual free-for-all, and this has further contributed to the sense of confusion in the area. Paradoxically, though predictably, this appears to have enhanced the influence of the first-movers, an effect quite distinct from the attractiveness (to judges) of vague or incomplete (discretion enhancing) criteria. The uncertainty implied by the state of the literature is regrettable because it is quite unwarranted. There is no discernible policy confusion to explain this ostensible conceptual diversity. The function of fiduciary accountability, despite appearances, is not an open question. Indeed, a critical assessment of the literature suggests a significant consensus that belies the formal diversity.⁶⁹

⁶⁷ See text at notes 132-40 *infra* and Flannigan, *supra* note 3 at 67.

⁶⁸ As to altruism, see Flannigan, *supra* note 4 at 906-907. See R. Cooter & B.J. Freedman, “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66 N.Y.U.L. Rev. 1045; F.H. Easterbrook & D.R. Fischel, “Contract and Fiduciary Duty” (1993) 36 J. L. Econ. 425; J. Glover, “Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology” (1995) 18 U.N.S.W.L.J. 443; G.S. Alexander, “A Cognitive Theory of Fiduciary Relationships” (2000) 85 Cornell L. Rev. 767; P. Birks, “The Content of Fiduciary Obligation” (2000) 34 Isr. L.R. 3; D.G. Smith, “The Critical Resource Theory of Fiduciary Duty” (2002) 55 Vand. L. Rev. 1399.

⁶⁹ Details matter, of course, and that is why superior courts must choose criteria that best implement the policy. They must first identify the function – and then carefully construct the indicated boundaries.

We are now in a position to review how the senior courts in Canada, Australia and England have contributed to the boundary confusion. As noted, the judges have relied in part on the conceptions offered by a number of commentators. The effect of that reliance, in some cases, is exactly what an analysis of the academic contributions would predict. The judges have applied fiduciary regulation to the performance of the nominate function, thereby passing over the conventional boundaries. That kind of departure from the traditional position is best illustrated by a number of cases in the Supreme Court of Canada.

IV. *The Aboriginal/Crown Cases*

We begin with the 1984 decision of the Supreme Court in *Guerin v. The Queen*, where Justice Dickson introduced an expansive view of fiduciary responsibility into the Canadian jurisprudence.⁷⁰ The case concerned an Indian band that sought to profit from its reserve lands by leasing a parcel to a golf club. To arrange the lease, it was first necessary for the band to surrender the land to the Crown. Along with the surrender, the band authorized the Crown to negotiate a specific set of lease terms. The Crown subsequently concluded that it could not obtain those terms and, without consulting the band, agreed to lease the land to the golf club on less favourable terms. The band sued the Crown for breach of trust. Speaking for the majority, Justice Dickson rejected the trust claim.⁷¹ He concluded, however, that the Crown breached an independent fiduciary obligation that arose from the discretion it exercised upon the surrender of the land.

Justice Dickson based the fiduciary obligation of the Crown on the original purpose of the surrender procedure. That purpose was to protect the Indians from exploitation by third parties. The Crown would achieve that end by acting for the Indians in dealings with third parties. According to Justice Dickson: “The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and

⁷⁰ (1984), 13 D.L.R. (4th) 321 (S.C.C.).

⁷¹ The contrary view is that an express trust (in favor of the band as beneficiary) was created requiring the Crown, as trustee for the band, to enter into the lease with the third party golf club on the terms specified by the band (as settlor) and accepted by the Crown. The trust obligation had two parts, one to create the lease obligation, and the other to perform the obligations of lessor. This was an ordinary trust. There was nothing peculiar or defective about it. The arrangement was structured so as to comply with the surrender provisions of the Indian Act, but that did not affect its standard trust nature. The wrong was simply a failure by the trustee to act according to the terms of the trust. There was only a trust law (nominate) issue. That issue had nothing to do with the nature of Indian title, unconscionability or, indeed, the fiduciary responsibility of the Crown.

prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.”⁷² In creating the surrender process, Parliament had conferred on the Crown “a discretion to decide for itself where the Indians’ best interests really lie”.⁷³ In Justice Dickson’s view, that discretion had the effect of “transforming the Crown’s obligation into a fiduciary one”.⁷⁴ He relied on Weinrib’s statements that the “fiduciary obligation is the law’s blunt tool for the control of this discretion” and that “the hallmark of a fiduciary relation is that ... one party is at the mercy of the other’s discretion”.⁷⁵ Justice Dickson determined that, upon surrender, “a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians’ behalf”.⁷⁶ He went on to explain the effect of the lease terms the band wished to have included in the lease. He stated that those terms “inform and confine the field of discretion within which the Crown was free to act”.⁷⁷ He concluded that “it would be unconscionable to permit the Crown simply to ignore those terms” and that “such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty”.⁷⁸

This analysis departs radically from the conventional jurisprudence in a number of respects. A first observation relates to the purpose of the surrender requirement. According to Justice Dickson, the purpose was to protect the Indians from exploitation *by third parties*. That, it will be appreciated, is not the purpose of fiduciary accountability. The fiduciary jurisdiction seeks to control the opportunism *of the fiduciary*. It is not concerned with exploitation by third parties unless, of course, the fiduciary is complicit with the third party. The duty on the Crown to use its discretion to protect the Indians against third party exploitation is an aspect of the *nominate* dimension of the Crown/Indian relation. It is a positive obligation for the Crown “to act on behalf of the Indians so as to protect their interests in transactions with third parties”.⁷⁹ That is the same nominate obligation that agents owe to their principals, that trustees owe to their beneficiaries, that solicitors owe to their clients and that guardians owe to their wards. It is not a fiduciary duty in any of those cases. A failure by the Crown to meet its duty to protect the band from exploitation by third parties would be a failure to perform its nominate function and would amount

⁷² *Supra* note 70 at 340.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 341-42.

⁷⁷ *Ibid.* at 344.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 340.

to negligence, or a breach of trust or some other nominate duty. Obviously, with this analysis, Justice Dickson moved well into the nominate dimension. He applied *fiduciary* regulation to what was properly a matter of nominate regulation. He confirmed that he passed beyond the conventional boundary when he observed that there was no issue of enrichment, dishonesty or improper motive on the part of the Crown.

Justice Dickson, it was noted, found support for his views in Weinrib's analysis of the function of fiduciary accountability. It is clear, however, that Weinrib understood the fiduciary jurisdiction to be concerned with controlling the opportunism *of the fiduciary*. Further, as discussed earlier, both Weinrib and Finn identified discretion as a primary indicator of fiduciary status. It was observed there that, although ostensibly a narrow test, discretion is an abstraction that can be interpreted expansively in the sense of accommodating fiduciary regulation of the merits of an exercise of discretion, without limitation to instances of opportunism.⁸⁰ That is the interpretation Justice Dickson adopted in his judgment. It was a conceptual error.

Another concern is that Justice Dickson identified unconscionability as the key factor establishing the breach. That curious appeal to the unconscionability standard is unexpected, never developed, and is quite inapposite in the circumstances of the case. The actual misconduct on the part of the Crown was its failure to follow instructions or to seek new instructions. That would not constitute unconscionable behaviour under any traditional view of the unconscionability standard. Unconscionability, in any event, has no place in a conventional fiduciary analysis. Its incorporation into the analysis only indicates how far Justice Dickson departed from the conventional position.

Another apparently significant factor in Justice Dickson's analysis was his assertion that the Indian/Crown relation was *sui generis*.⁸¹ In his view, that required him to construct a new legal category of status-based fiduciary obligation. He proceeded to introduce a new "fiduciary" category, akin to the trust and agency categories, but different from them.⁸² He did not produce, as he might have, a new or

⁸⁰ See text at notes 49-56 *supra*.

⁸¹ There is a measure of uncertainty on this point. Justice Dickson uses the phrase "*sui generis*" three times, first in relation to the Indian interest "in the land" (at 339), then the "relationship" (at 341) and then the "fiduciary obligation" (at 343). Taken literally, he has characterized as *sui generis* both the Indian/Crown relation and the fiduciary obligation that governs the relation. The latter, however, does not necessarily follow from the former.

⁸² *Supra* note 70 at 342-43.

refurbished *nominate* category. His analysis implies that the fiduciary obligation of the Crown is itself unique or idiosyncratic relative to the fiduciary obligations of other actors. It would seem, in these respects, that he did not appreciate that fiduciary responsibility is generic, or that it is a general regime of obligation running parallel to the idiosyncratic nominate regulation of all limited access arrangements. He apparently believed the content of fiduciary accountability could be freshly minted on each occasion of its extension to a new category or physical arrangement. Those analytical initiatives are attributable to misinterpretation, conflation, and a focus on irrelevant idiosyncrasy.

None of this is intended to suggest that the surrender requirement did not attract fiduciary regulation. There was plainly a conventional fiduciary obligation on the Crown to the extent it exercised a discretion on behalf of the band. It was not, however, the kind of positive obligation described by Justice Dickson. Traditional fiduciary responsibility applies generally across all nominate relations to support those relations in one fundamental respect – to control the opportunism of actors with limited access. There was a nominate obligation on the Crown to exercise its discretion within the confines of the band terms, and there was a *parallel* conventional fiduciary obligation on the Crown to do so without regard to its own self-interest. There was a breach of the nominate obligation in this case, but no breach of the fiduciary obligation. The Crown was not in a conflict position, nor did it benefit from the exercise of its discretion. It was liable in an ordinary nominate way because it did not comply with the terms of its undertaking.

The conceptual move across the conventional fiduciary boundary that occurred in *Guerin* was confirmed and further developed in *R. v. Sparrow*.⁸³ The Supreme Court stated that the *Guerin* obligation represented a “general guiding principle” for the recognition of aboriginal rights. The court observed that the “relationship between the government and aboriginals is trust-like, rather than adversarial, and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship”.⁸⁴ That fiduciary relationship imported “some restraint on the exercise of government power” and necessarily entitled the court to “assess the legitimacy of any government legislation”.⁸⁵

⁸³ (1990), 70 D.L.R. (4th) 385. See also *Blueberry River Indian Band v. Canada* (1995), 130 D.L.R. (4th) 193 (S.C.C.) where the Supreme Court of Canada treated Crown “inadvertence” as a fiduciary breach. That analysis would appear to be inconsistent with the views expressed subsequently in *K.L.B. v. British Columbia* (2003), 230 D.L.R. (4th) 513 (S.C.C.)

⁸⁴ *Ibid.* at 408.

⁸⁵ *Ibid.* at 409.

The notion of generally constraining sovereign power through the application of fiduciary responsibility is another radical step. It has no support or foundation of any kind in the conventional fiduciary jurisprudence. Public power is controlled by fiduciary responsibility, but only to regulate opportunism or corruption.⁸⁶ Regulating substantive executive or legislative outcomes forms no part of the conventional function. The court, because it nevertheless took this step, had to address the obvious potential for conflict between the Crown's fiduciary obligation so defined and general government regulation. The court offered a "justification" test: "In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."⁸⁷ To satisfy the justification test, the way in which the government secured its objectives "must uphold the honour of the Crown".⁸⁸ This novel justification approach to adjusting aboriginal claims relative to other claims confirmed that the court had moved deeply into the nominate dimension of the aboriginal/Crown relation.

It should be observed at this juncture that nothing in this criticism implies that legal obligations of the sort addressed in *Guerin* and *Sparrow* are inappropriate or unsupported by past relations. That is a matter for others to examine. The point, rather, is that the fiduciary jurisdiction has been hijacked to provide the conceptual foundation for the positive regulation of aboriginal/Crown relations. The main substantive concern with that analytical move is that the fiduciary concept per se has no developed capacity to resolve conflict or adjust political claims. Its function is robustly unilateral – to discipline those who exploit their limited access for personal gain. Furthermore, the effect of the move is to privilege, by the extension of fiduciary status, one political claim over others. Whether such a political privilege is warranted, it is not usefully framed as an issue of fiduciary responsibility. There is no connection with conventional fiduciary policy. The incorporation of the justification test (which is really only an invitation to justify) starkly evidences that fact. What remains is a fiduciary analysis in name only.⁸⁹

⁸⁶ Flannigan, *supra* note 9.

⁸⁷ *Supra* note 83 at 409.

⁸⁸ *Ibid.* at 410.

⁸⁹ Consider *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.) (asserting a *fiduciary* duty to consult). See, most recently, *K.L.B. v. British Columbia* (2003), 230 D.L.R. (4th) 513 at 531 (S.C.C.), where Justice McLachlin stated that the *fiduciary* obligations of the Crown "have been held to include a requirement of using due diligence in advancing particular interests of aboriginal peoples." Courts elsewhere have resisted the fiduciary characterization of aboriginal/Crown relations. See *Bodney v. Westralia Airports Corporation Pty. Ltd.* (2000), 180 A.L.R. 91 (F.C.A.).

There exists today a discernible nominate regulation of the aboriginal/Crown relation. It is found in convention, treaty, legislation and case law. Part of this nominate regulation has now been labeled “fiduciary.” Presumably, however, the conventional form of fiduciary obligation continues to apply to augment the nominate obligations. That means certain “fiduciary” obligations of the Crown (the nominate kind) will be suspended if the Crown is able to satisfy the justification test. Other fiduciary obligations (conventional fiduciary obligations), however, are strict, and no justification will be permitted. That will plainly exacerbate the confusion. In the end, it is unclear how all of this can amount to a tractable regulation.

The recent decision in *Wewaykum Indian Band v. Canada* appears to represent somewhat of a minor retrenchment by the Supreme Court in this area.⁹⁰ The court, it may first be observed, did not recoil from its incursion into the nominate dimension. According to Justice Binnie, the fiduciary obligation “is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples”.⁹¹ That, it will be appreciated, still contemplates or accommodates regulation of the substantive merits of government action. Justice Binnie goes on, however, to assert that “there are limits” to this jurisdiction.⁹² Fiduciary obligation, he stated, was not “a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship”.⁹³ Following other authorities in the fiduciary jurisprudence, he observed “that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature”.⁹⁴ Although an established fiduciary principle, its affirmation in this context represented a practical retrenchment [as a rather vague guideline or direction to lower courts] given the suspect “fiduciary” aboriginal claims that had been addressed in the courts in the past several years.⁹⁵

Apart from the limited retrenchment, the significance of the *Wewaykum* decision is that it represents further confirmation of the commitment of the Supreme Court to new boundaries for “fiduciary” responsibility in the aboriginal/Crown context. Whether or not that reformation of boundaries was conscious, it seems unlikely the court would now consider reinstating the conventional boundaries. The Supreme Court appears to have a distinct agenda in this context. It

⁹⁰ (2002), 220 D.L.R. (4th) 1 (S.C.C.).

⁹¹ *Ibid.* at 35.

⁹² *Ibid.* at 36.

⁹³ *Ibid.*

⁹⁴ *Ibid.* at 37.

⁹⁵ *Ibid.* at 36-37.

intends to control more than opportunism, it intends to control the discretion of the Crown generally. It appears determined to do so with the aid of the powerful symbolism of the fiduciary ethic.⁹⁶ The main concern with that usage of fiduciary accountability, quite apart from the naked assertion of judicial power over political matters, is that it will contaminate the general jurisprudence. Accordingly, it may be time to openly declare that the fiduciary obligation of the Crown, to the extent it involves the advancement and protection of aboriginal interests, is unquestionably *sui generis* and should now be formally disconnected from the general jurisprudence.⁹⁷ That would allow the regulation of the aboriginal/Crown relation to develop on its own terms, free of the narrow conceptual structure of the conventional jurisdiction.⁹⁸ We would decline the invitation to disconnect, of course, if we thought this kind of expansion of fiduciary boundaries was generally a positive development of the law and should extend to all limited access arrangements. In that event, we will have engineered a fundamental transformation of the idea of fiduciary accountability.

V. The General Canadian Jurisprudence

Outside the aboriginal/Crown context, the Supreme Court has generally not imposed fiduciary liability for breach of nominate duties. The one clear exception is the decision in *McInerney v. MacDonald*.⁹⁹ The case involved a demand for medical records. The patient argued that her doctor was subject to a fiduciary duty to provide them to her. There was, however, no allegation of opportunistic conduct of any kind, or any conflict or benefit, on the part of the doctor. Accordingly, on a conventional analysis, there could be no fiduciary breach. Justice La Forest, however, saw it differently. He concluded that the doctor was under “a fiduciary duty to inform” her patient. It should now be apparent that this represents nominate regulation of the doctor/patient relationship dressed up as fiduciary regulation. Justice La Forest

⁹⁶ The court could instead install a comparable nominate regulation predicated on the unique character of the Indian/Crown relation. That would more precisely focus the analysis on the nature of the relation. It is not useful, in any event, to prioritize political claims through the importation by assertion of an extensive regulation designed to perform a different specialized function.

⁹⁷ Arguably, with the assertion in *Guerin* that the obligation is *sui generis*, that has already occurred. The specific detachment from the general jurisprudence may, however, require explicit confirmation.

⁹⁸ The point is fundamental. The conventional fiduciary regime has no demonstrated capacity (or credibility) to serve as a framework for political exchange and compromise.

⁹⁹ (1992), 93 D.L.R. (4th) 415 (S.C.C.).

premised his conclusion on his findings that the doctor exercised “discretionary power” and that the patient had a “legitimate expectation.” Those concepts were sufficiently capacious to accommodate his move into the nominate dimension. That, of course, is the problem with formal concepts that are not congruent with, or tied to, the conventional policy of controlling opportunism. Justice La Forest could have produced the same result by framing the duty to inform as a nominate duty flowing from the idiosyncratic character of the doctor/patient relation. That approach would have been preferable because it would avoid the prospect that other judges might conclude that a positive duty to inform is a generic fiduciary duty potentially available to apply to other fiduciary relations.¹⁰⁰ As it is, the case is regarded with suspicion and, as we see next, was openly censured in Australia.

In *Breen v. Williams*, the High Court rejected the analysis in *McInerney*.¹⁰¹ Breen had requested medical records from her doctor. When he refused, she claimed breach of fiduciary obligation. In their joint judgment, Justices Dawson and Toohey warned against conflating fiduciary obligations with other general obligations (e.g. contract, tort). They initially stated that: “Whilst duties of a fiduciary nature may be imposed upon a doctor, they are confined and do not cover the entire doctor-patient relationship.”¹⁰² They explained as follows:

It has been observed that what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that. The concern of the law in a fiduciary relationship is not negligence or breach of contract. Yet it is the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations. Of course, fiduciary duties may be superimposed upon contractual obligations and it is conceivable that a doctor may place himself in a position with potential for a conflict of interest – if, for example, the doctor has a financial interest in a hospital or a pathology laboratory – so as to give rise to fiduciary obligations. But that is not this case.¹⁰³

The two judges regarded *McInerney* as illustrative of a tendency in North America “to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing

¹⁰⁰ There is no conventional “fiduciary duty” to inform beneficiaries of a benefit or conflict. There is only a requirement to give full disclosure *if seeking consent* to take a benefit or to act notwithstanding a conflict. See Flannigan, *supra* note 15, for a discussion of a supposed fiduciary duty of disclosure in the corporate context.

¹⁰¹ (1996), 186 C.L.R. 71 (H.C.A.).

¹⁰² *Ibid.* at 92.

¹⁰³ *Ibid.* at 93-94.

the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong".¹⁰⁴ They characterized the source of that view as "assertion rather than analysis".¹⁰⁵ The bluntness of this latter remark suggests that the Australian judges were confident the *McInerney* court had moved well beyond the conventional boundary. On that point, their confidence was justified. As will appear shortly, however, the *Breen* judgments are afflicted with their own analytical weaknesses.¹⁰⁶

It is possible to treat *McInerney* as anomalous in so far as it crafted a *fiduciary* duty to inform. Unfortunately, there remains a considerable risk that judges will fail to recognize the conventional boundary at the interface of the nominate and fiduciary dimensions. In Canada, the risk is significant because of the introduction of an assortment of imprecise fiduciary criteria. It should be emphasized at this point that, outside the aboriginal/Crown context, and with the exception of *McInerney*, the Supreme Court has not produced radical results. Its decisions have been relatively conservative, even restrictive, to the present day. The difficulty is that the court has done this conventional work with unconventional conceptual tools. The concern, once again, is that the criteria it has introduced will be misinterpreted. Consider the criteria that various members of the court have advanced.

In the three decades preceding the *Guerin* decision, most of the decisions of the Supreme Court employed a restrictive approach to imposing fiduciary liability.¹⁰⁷ Only one case, the decision in *Canadian Aero v. O'Malley*, offered a full analysis that reflected the conventional approach of doing whatever was necessary to control the self-regarding impulse.¹⁰⁸ Justice Laskin's judgment also illustrates the direct appeal to public policy that is characteristic of conventional analyses. In this area, for a long time, the judges felt little pressure to explicitly craft abstract criteria. The mischief was clear (opportunism), the duty was clear (forgo self-interest), and no excuse for either a conflict or a benefit was acceptable (the duty was strict). After *Guerin*, in contrast, the judges became pre-occupied with fashioning abstract criteria. The post-*Guerin* jurisprudence even suggests a sort of competition amongst the judges to produce a workable test for the fact-based application of

¹⁰⁴ *Ibid.* at 95.

¹⁰⁵ *Ibid.*

¹⁰⁶ See text at notes 160-174 *infra*.

¹⁰⁷ *Midcon Oil & Gas Limited v. New British Dominion Oil Company Limited*, [1958] S.C.R. 314; *Peso Silver Mines Limited (N.P.L.) v. Cropper*, [1966] S.C.R. 673; *Jirna Limited v. Mister Donut of Canada Ltd.*, [1975] 1 S.C.R. 2., *Hawrelak v. City of Edmonton*, [1976] 1 S.C.R. 387. See Flannigan, *supra* note 3.

¹⁰⁸ (1973), 40 D.L.R. (3d) 371 (S.C.C.). See Flannigan, *supra* note 3 at 55-57. See also the judgment of Justice Rand in *Midcon*, *ibid.*

fiduciary responsibility.

The effort to define abstract criteria began with the discretion test in *Guerin*. A few years later, in her dissenting judgment in *Frame v. Smith*, Justice Wilson introduced a “rough and ready guide” comprised of a number of elements she extracted from the work of commentators.¹⁰⁹ As she saw it, the physical arrangements that attracted fiduciary responsibility “seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power”.¹¹⁰ This formulation bears the imprint of Weinrib, Finn, Shepherd and Frankel. Apart from that (or because of that), it is a test that is potentially either expansive or restrictive. It is capable of producing any desired conclusion merely through the instrumental interpretation of the open-ended notions of power and vulnerability.

Two years later, in his minority judgment in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, Justice La Forest concluded that “at a more fundamental level, the principle on which [fiduciary] obligation is based is unclear”.¹¹¹ Then, after citing *Guerin*, *Frame*, Finn, Weinrib, Shepherd and Frankel, and others, he agreed with Finn that the existence of fact-based fiduciary responsibility depended on establishing “that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship”.¹¹² This reasonable expectation test was entirely novel (the case preceded *McInerney*), and seriously problematic. Although not accepted by the majority, we will see that years later Justice La Forest was able to install the test, at least temporarily, as the majority view of the court.

The majority in *LAC Minerals* applied Justice Wilson’s test in *Frame*. Justice Sopinka emphasized the need under Justice Wilson’s test to establish vulnerability: “The one feature...considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability.”¹¹³ Apparently, for Justice Sopinka, the vulnerability criterion contemplated a substantive condition of relative disadvantage, rather than simply the *exposure* to opportunism that arises from limited

¹⁰⁹ (1987), 42 D.L.R. (4th) 81 (S.C.C.).

¹¹⁰ *Ibid.* at 99.

¹¹¹ (1989), 61 D.L.R. (4th) 14 at 26 (S.C.C.).

¹¹² *Ibid.* at 29.

¹¹³ *Ibid.* at 63.

access.¹¹⁴ After examining the relations of the parties, and seeing only arm's length negotiations between commercial actors, Justice Sopinka found no vulnerability. Essentially, Justice Sopinka reworked the *Frame* test into a narrow vulnerability test.

LAC Minerals is of some additional interest on another boundary issue. Justice Sopinka denied that breaches of confidence were properly regulated by fiduciary responsibility. He did not, however, offer any analysis that supported his view. The same may be said of the more recent decision in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, where the Supreme Court again found a breach of confidence, but no fiduciary liability.¹¹⁵ According to Justice Binnie, "there is nothing special in this case to elevate the breached duty to one of a fiduciary character".¹¹⁶ There is no indication in the case of what would suffice for that "elevation." These two decisions suppose or erect a boundary that is not sustainable. Fiduciary obligation, breach of confidence and presumed undue influence are indistinguishable at the foundational level of function. There may be some utility in separating them for certain purposes (as for different types of contracts or torts), but their common function of controlling opportunism in limited access arrangements cannot be denied. The two cases themselves recognize that singular function for the breach of confidence doctrine, and implicitly demonstrate the operation of the limited access test. Access to the information in each case was for a limited purpose. That attracted fiduciary responsibility. The obligation was then breached by the self-interested exploitation of the information. This is all quite straightforward. It appears, however, that the Supreme Court has chosen to pursue a more convoluted conceptual approach.

Another ostensible boundary, that between economic and non-economic loss, was addressed by the Supreme Court in two cases in 1992. In *Norberg v. Wynrib*, the majority engaged the doctrine of unconscionability to address the issue of consent in the context of sexual assaults by a doctor.¹¹⁷ In her minority judgment, in contrast, Justice McLachlin was of the view that only fiduciary accountability "encompasses the true relationship between the parties and the gravity of the wrong done by the defendant".¹¹⁸ There is a conceptual difficulty

¹¹⁴ See Flannigan, *supra* note 3 at 63-66. In a subsequent case, Justice Sopinka appears to distance himself from the "disadvantage" conception. See *Hodgkinson v. Simms*, *infra* note 129 at 218 ("Vulnerability does not mean merely 'weak' or 'weaker'. It connotes a relationship of dependency...")

¹¹⁵ (1999), 167 D.L.R. (4th) 577 (S.C.C.).

¹¹⁶ *Ibid.* at 593.

¹¹⁷ (1992), 92 D.L.R. (4th) 449 (S.C.C.).

¹¹⁸ *Ibid.* at 484. Justice McLachlin's view that fiduciary accountability, rather than

with her judgment, however, in that she resorted to a power differential test to establish fiduciary responsibility. After referring to Frankel's analysis, and applying Justice Wilson's test in *Frame*, she stated that: "It is only where there is a material discrepancy, in the circumstances of the relationship in question, between the power of one person and the vulnerability of the other that the fiduciary relationship is recognized by the law."¹¹⁹ That is a novel proposition. There is no basis in the Commonwealth jurisprudence, or in Frankel's analysis, for the general (apparently exclusive) application of a power differential test.

The view that fiduciary accountability extended to non-economic injury was subsequently adopted by the Supreme Court in *M.(K.) v. M.(H.)*.¹²⁰ No new fiduciary criteria were proposed on this occasion. The analysis of fiduciary accountability was in fact relatively thin. According to Justice La Forest, the fiduciary status of the parent was "intuitively apparent," as was the opportunistic (incestuous) assault.¹²¹ It was enough for Justice La Forest to assert the existence of what he characterized as a "well-defined method" for applying the fiduciary principle.¹²² That method was supposedly established by Justice Dickson's analysis in *Guerin* and Justice Wilson's analysis in *Frame*. Justice La Forest did not explain or develop the "method" beyond citing portions of those judgments. He concluded that a status fiduciary obligation existed between parent and child and, consequently, no further analysis on that issue was required.

Although the delineation of criteria is problematic in *Norberg* and *M.(K.) v. M.(H.)*, the conclusion that fiduciary accountability extends to non-economic injury is conceptually sound. It is easily demonstrated, for example, that it represents a proper concurrent regulation for sexual exploitation.¹²³ The Australian Federal Court of Appeal, however, has expressed a different view. In *Paramasivam v. Flynn*, the injury was childhood sexual assault.¹²⁴ Although the court conceded that the actions of the respondent could "readily be described in terms of abuse of a position of trust or confidence," that was not a sufficient basis for

contract or tort liability, better reflected the nature of the wrong amounts only to a recognition that fiduciary regulation is a narrower jurisdiction focused on breaches of "trust." The wrong in the case was of such a character that it properly attracted the concurrent application of other more broadly framed general liabilities.

¹¹⁹ *Ibid.* at 491.

¹²⁰ (1992), 96 D.L.R. (4th) 289 (S.C.C.).

¹²¹ *Ibid.* at 323.

¹²² *Ibid.*

¹²³ Flannigan, *supra* note 6.

¹²⁴ (1998), 160 A.L.R. 203 (F.C.A.). See also *Cubillo v. Commonwealth of Australia* (2000), 174 A.L.R. 97 (F.C.A.). Consider *Attorney-General v. Goddard* (1929), 98 K.B. 743; *Gonsalves v. Debreczeni*, [1998] N.S.W.S.C. 588.

liability.¹²⁵ Fiduciary responsibility for that kind of loss would be a novelty in Australia and had to be “justifiable in principle”.¹²⁶ It was not justifiable, in the court’s view, because the conduct was already regulated by tort law and there was no obvious need or advantage for equitable regulation. The court believed such an extension would be a “radical” departure and “involve a leap not easily to be justified in terms of conventional legal reasoning”.¹²⁷ The short answer to that analysis (which never actually addressed principle) is that no radical departure or leap is involved. The conventional position does accommodate regulation of sexual exploitation.¹²⁸ Sexual exploitation is in fact a quintessential instance of the fiduciary mischief. The concurrent application of tort law (and criminal law) only indicates that such behaviour offends every standard of human conduct.

Returning to Canada, the Supreme Court next addressed the issue of fiduciary criteria in *Hodgkinson v. Simms*.¹²⁹ Another new test was offered by the dissenting judges. Justices Sopinka and McLachlin introduced the restrictive view that it was necessary to show “total reliance and dependence on the fiduciary by the beneficiary”.¹³⁰ The “critical question,” as they saw it, was “whether there is total assumption of power by the fiduciary, coupled with total reliance by the beneficiary”.¹³¹ Though the two judges purported to extract this test from the usual suspects (Dickson in *Guerin*, Wilson in *Frame*, Weinrib, Finn, Shepherd, Frankel), there is simply no jurisprudential or conceptual foundation for it.

The majority judgment in *Hodgkinson* was authored by Justice La Forest. In his judgment in *LAC Minerals* years earlier, the same commentators had indicated to him that the fiduciary principle was “unclear”.¹³² Reiterating his view expressed in *M.(K.) v. M.(H.)*, he now insisted that “over the past 10 years or so this court [had developed] a ‘fiduciary principle’ which can be defined and applied with some precision”.¹³³ He made the obligatory references to *Guerin* and *Frame* and then reasserted his *LAC Minerals* reasonable expectation test: “The question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected

¹²⁵ *Ibid.* at 219.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Because physical contact is involved, consent will often be an issue. Flannigan, *supra* note 6.

¹²⁹ (1994), 117 D.L.R. (4th) 161 (S.C.C.).

¹³⁰ *Ibid.* at 219.

¹³¹ *Ibid.* at 222.

¹³² *Supra* note 111 at 26.

¹³³ *Supra* note 129 at 175.

that the other party would act in the former's best interests with respect to the subject matter at issue."¹³⁴ The ostensible precision of that test, however, was belied by Justice La Forest's simultaneous references to a basket of other criteria and "evidential factors" including power-dependency, reliance, discretion, influence, vulnerability, trust and others. As well, the supposed linkages between *Guerin*, *Frame* and reasonable expectation remained undeveloped.

A reasonable expectation test confers an uncontrolled discretion that courts may employ to find fiduciary responsibility wherever they please. It is subject to neither internal nor external discipline. At a conceptual level, it begs the question. What circumstances produce an expectation that is reasonable? At a practical level, it would be impossible to challenge the factual determinations of trial judges as to the expectations of the parties. A reasonable expectation test also implies jettisoning the strict quality of fiduciary responsibility. The invitation to ascertain the expectations of the parties would presumably be construed by judges as a license to have regard to the situational considerations they may not consider or entertain under the conventional strict standard. Reasonable expectation is also a test that is particularly susceptible to mistaken conclusions as a result of the cosmetic structuring of transactions and relations. There is also the question whether reasonable expectation is anything more than a primitive estoppel argument or a disguised ad hoc "fairness" test. None of that is addressed by Justice La Forest.

It may of course be necessary to assess "reasonable expectation" in a fiduciary analysis if *intention* is an issue. There are two main ways in which a question of intention may arise. First, there may be a question whether access was understood to be open, rather than limited. That does not mean, however, that the test for fiduciary obligation becomes reasonable expectation. It only means the application of the general test (limited access) may involve ascertaining intention. Secondly, there may be a question whether a fiduciary breach was excused. Even where the limited access test is satisfied, the parties may have unambiguously expressed their intention to modify the consequences of the application of the associated default rules. It is in these senses that intention (reasonable expectation) is relevant. While the test is limited access, its application depends in certain respects on the intentions of the specific parties (not, it should be noted, their intentions as to the legal characterization of their relation). We as a community determine the criteria for fiduciary responsibility. The particular physical arrangement of specific parties is then subjected to that general regulation depending on whether those parties intended to establish a limited access arrangement.

¹³⁴ *Ibid.* at 176.

The Supreme Court appears to be stepping back from the reasonable expectation test. In three subsequent cases, *Soulos v. Korkontzilas*,¹³⁵ *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,¹³⁶ and *K.L.B. v. British Columbia*,¹³⁷ where the court might have confirmed the reasonable expectation test, it cannot be found. In the *Cadbury Schweppes* case, for example, Justice Binnie offered only an unclear reference to *Hodgkinson's* "ingredients giving rise to a fiduciary duty".¹³⁸ He looked instead to *M.(K.) v. M.(H.)* for his test and his conclusion: "The overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power...does not operate here."¹³⁹ In *K.L.B.*, Justice McLachlin spoke only of "relationships marked by discretionary power and trust".¹⁴⁰

The most recent decision of the Supreme Court is *K.L.B. v. British Columbia*.¹⁴¹ While the case offers little on the question of fiduciary criteria, it is arguably of considerable significance because Justice McLachlin appears to accept the distinction between nominate and fiduciary regulation. The claim before the court was that the Superintendent of Child Welfare had a *fiduciary* duty to act in the best interest of children in the care of the state. Justice McLachlin observed, however, that fiduciary responsibility was concerned with breaches of loyalty. She explained that the fiduciary duty of a parent "is not breached simply because the best interests of the child have not been promoted".¹⁴² She stated that "the goal of promoting the best interests of the child is larger than the concerns of trust and loyalty central to fiduciary law".¹⁴³ The judgment represents (potentially) a profound development for this area of the law. Justice McLachlin's apparent recognition of the distinction holds out the prospect that the court will now move to a test for fiduciary accountability that more precisely implements the policy of controlling opportunism.

The post-*Guerin* Canadian Supreme Court jurisprudence reveals

¹³⁵ (1997), 146 D.L.R. (4th) 214 (S.C.C.).

¹³⁶ (1998), 167 D.L.R. (4th) 577 (S.C.C.).

¹³⁷ (2003), 230 D.L.R. (4th) 513 (S.C.C.).

¹³⁸ *Supra* note 136 at 592.

¹³⁹ *Ibid.* at 593.

¹⁴⁰ *Supra* note 137 at 531. Justice McLachlin also offered (at 533) the unqualified assertion that breach of fiduciary duty "requires fault." That, as a general proposition, is not the conventional view. See *Boardman v. Phipps*, [1967] 2 A.C. 46.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* at 533.

¹⁴³ *Ibid.* at 534. Justice McLachlin eventually concluded that there was no *nominate* duty to act in the best interest of the children (her discussion on that point is largely irrelevant to any question of *fiduciary* breach). The Superintendent had, however, breached the general duty to take sufficient care.

what appears to be a long-standing competition amongst the judges to produce a workable abstract test for the application of fiduciary accountability. A “discretion” test found early application. “Power” and “reliance” tests were adopted in some judgments. “Vulnerability” is a criterion, in different senses, in several judgments. A “reasonable expectation” test has been employed. All of these notions, and others, are unsatisfactory descriptors for the conventional boundaries of fiduciary responsibility. They are likely responsible for the unsophisticated view some have that fiduciary responsibility concerns itself in an untargeted way with abuses of power or the exploitation of vulnerability. Others may interpret this case law as evidence of little more than a power grab by the court. These kinds of broad and question-begging concepts, like magisterial assertions that a particular judicial conclusion is “equitable” or what “justice requires,” are ideal tools for discarding the accountability that a more focused jurisprudence might impose on judicial discretion. But that perhaps goes too far. The analysis seems more tentative than anything else. It has the feel of experimentation. That does leave us, however, with a confusing exposition of the law in this area. It seems that the Supreme Court judges, for the most part, do comprehend the narrow function of conventional fiduciary responsibility. The difficulty is that they have yet to adopt or formulate an abstract test that accurately traces or defines the boundary contemplated by that function.

VI. *The Australian Jurisprudence*

If metered by the rhetoric of certain Australian judges, the Australian experience over the past few decades is markedly less problematic than the Canadian one. The Australians are almost dismissive of the effort to define abstract criteria and they freely use the Canadian cases as foils when setting out their own ostensibly more restrictive approach to fiduciary obligation. Australian judges are less inclined to cite academic contributions (other than Finn), but it is clear they are familiar with the literature and responsive to it. Ultimately, of course, the Australians are also necessarily engaged in the definition exercise. Their decisions necessarily reflect or imply a particular conception of fiduciary accountability. Though they claim the comfort of the status quo, their analyses challenge the conventional boundaries in significant respects. They also contribute to the overall uncertainty in the area when they deny that fiduciary status has been, or ought to be, the subject of concrete definition.

Guerin was decided in 1984.¹⁴⁴ That same year, the High Court of

¹⁴⁴ (1984), 13 D.L.R. (4th) 321 (S.C.C.).

Australia produced its own questionable decisions. In *Chan v. Zacharia*, the analysis was conventional and produced a conventional result.¹⁴⁵ At the end of his judgment, however, Justice Deane suggested that the court might be willing to reconsider the strict quality of fiduciary responsibility:

It may still be arguable in this Court that, notwithstanding general statements and perhaps even decisions to the contrary in cases such as *Regal (Hastings) Ltd. v. Gulliver* and *Phipps v. Boardman*, the liability to account for a personal benefit or gain obtained or received by use or by reason of fiduciary position, opportunity or knowledge will not arise in circumstances where it would be unconscientious to assert it or in which, for example, there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain for himself rights or benefits which he is absolutely precluded from seeking or obtaining for the person to whom the fiduciary duty is owed: cf. *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*. In that regard, one cannot but be conscious of the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases: see *Canadian Aero Service Ltd. v. O'Malley*, Cretney loc. cit. pp. 168ff; Oakley, *Constructive Trusts* (1978), pp. 57ff. There is "no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them": per Lord Selborne L.C., *Barnes v. Addy*.¹⁴⁶

There is nothing in these remarks that would justify relaxation of the strict standard. The courts have always understood that strict application might operate unfairly for truly innocent fiduciaries.¹⁴⁷ They have nevertheless insisted on strict liability in order to avoid the serious detection and evidentiary problems, and to remove any conceivable incentive for the corrupt impulse. It hardly seems necessary to add that the "inflexibility" of the standard is precisely the means by which the "vigour" of fiduciary accountability is maintained. Opportunism is a profound mischief, and there are costs associated with

¹⁴⁵ (1984), 154 C.L.R. 178 (H.C.A.).

¹⁴⁶ *Ibid.* at 204-205.

¹⁴⁷ *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223. Neither of the Canadian cases cited by Justice Deane offer any explicit or credible support for his position. The *Peso* court did not explicitly reject, or even discuss, the strict quality of the fiduciary standard. The judgment subsequently attracted heavy criticism. The *Canadian Aero* case relaxes the strict application of liability only after the formal termination of the fiduciary relation.

its effective regulation. One cost is the innocent fiduciary required to give up an unauthorized collateral profit. Another occasional cost is the affront to the judicial antipathy for windfall gains by beneficiaries. Dispensing with actual proof of self-regard is yet a further affront to those judges who believe they are well able to detect corrupt motive. These expected costs, however, do not begin to justify a relaxation of the strict standard. There is certainly no discernible consensus that strict application produces significant “hardship and injustice”.¹⁴⁸ Discarding the strict ethic would obviously be a fundamental change. There is no radical deficiency that would justify such a change. Still, the Australian judges continue to contemplate relaxation of the standard.¹⁴⁹

The second decision of the High Court in 1984 was *Hospital Products Limited v. United States Surgical Corporation*.¹⁵⁰ The facts disclosed a classic breach of fiduciary obligation. The majority of the court, however, rejected a fiduciary characterization. Justice Gibbs, with whom Justice Wilson agreed, expressed the view that the case law provided “no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established” and declared that “the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one”.¹⁵¹ He did not believe it would be “fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist” because, as he understood it, different types of fiduciary relations had different obligations and consequences.¹⁵² He considered that certain criteria offered in the cases, such as a relation of confidence or inequality of bargaining power, were unsatisfactory. He did eventually conclude, however, that there were two “important, if not decisive” criteria.¹⁵³ The criteria were (1) commercial parties (2) dealing at arm’s length. If those criteria were present, there was likely no fiduciary obligation. The parties before him satisfied the criteria and, accordingly, he refused to find fiduciary responsibility. The third member of the majority, Justice Dawson, framed the test for fiduciary status as “a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that

¹⁴⁸ See text at notes 19-20 *supra*.

¹⁴⁹ See *Warman International Limited v. Dwyer* (1995), 182 C.L.R. 544 (H.C.A.); *Clay v. Clay* (2001), 202 C.L.R. 410 (H.C.A.).

¹⁵⁰ (1984), 156 C.L.R. 41 (H.C.A.).

¹⁵¹ *Ibid.* at 68.

¹⁵² *Ibid.* at 69.

¹⁵³ *Ibid.* at 70.

other”.¹⁵⁴ There was no “vulnerability,” in his view, because “negotiations were of a commercial nature and were at arm’s length”.¹⁵⁵ He added that extending fiduciary obligations to arm’s length commercial relations would “introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position”.¹⁵⁶ He also expressed the extraordinary [and plainly wrong] view that “a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately by accepting terms which are insufficient to safeguard his interests”.¹⁵⁷

The majority analysis is inexplicable. It certainly did not reflect the conventional jurisprudence. Neither the commercial character of an arrangement, nor the fact that it was negotiated at arm’s length, are inconsistent with the assignment of fiduciary liability. Fiduciary responsibility manifestly has application throughout the commercial sphere, and properly so.¹⁵⁸ It may be observed that, of the judges who heard the case from trial through appeal, a majority overall found fiduciary responsibility. Justice Mason pointed out that “it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another”.¹⁵⁹ The “commercial parties” and “arm’s length” criteria have no analytical cut in this context. They do not address the mischief. The majority in the High Court chose criteria that were essentially irrelevant to the question of fiduciary responsibility. Commercial parties negotiating at arm’s length regularly establish limited access arrangements that attract conventional fiduciary accountability.

The next major decision of the High Court, over a decade later, was *Breen v. Williams*.¹⁶⁰ The decision was reviewed above in the discussion of non-economic injury. Here the focus is on the court’s general views of fiduciary principle. Before turning to the High Court judgments, however, it is worth mentioning Justice Meagher’s judgment in the Court of Appeal, where he undertook to reprimand the

¹⁵⁴ *Ibid.* at 142.

¹⁵⁵ *Ibid.* at 146.

¹⁵⁶ *Ibid.* at 149.

¹⁵⁷ *Ibid.* at 147. That view was also expressed by Justice Sopinka in *LAC Minerals*, *supra* note 111 at 69. It represents an unjustified refusal to accept, or perhaps comprehend, the default application of fiduciary regulation.

¹⁵⁸ Flannigan, *supra* note 4.

¹⁵⁹ *Supra* note 150 at 100.

¹⁶⁰ (1996), 186 C.L.R. 71 (H.C.A.). See also *Daly v. Sydney Stock Exchange* (1986), 160 C.L.R. 371 (H.C.A.); *Whitehorse v. Carlton Hotel Pty. Ltd.* (1987), 162 C.L.R. 285 (H.C.A.).

Canadian judiciary. According to Justice Meagher, certain unidentified Canadian decisions illustrated “a tendency, which has been commented on elsewhere, to widen the equitable concept of a fiduciary relationship to a point where it is devoid of all reasoning. In other words, ...one has the uneasy feeling that the courts of that country...simply assert that [an actor] has committed a breach of some fiduciary duty”.¹⁶¹ The Canadian jurisprudence, we have seen, is problematic in certain respects. Justice Meagher’s critique, however, is unwarranted.¹⁶² The Canadian Supreme Court has been engaged in a useful exercise. It has attempted to articulate a coherent general test for fiduciary accountability. In doing so, the court has advanced the search for principle in the sense that a variety of conceptions have been subjected to critical review. Even if the conventional position were perfectly understood, the testing of alternative conceptions would still be valuable. In the circumstances, Justice Meagher’s rebuke is very much out of place. It would have been more profitable for all concerned had he met the Canadian authorities head on and expressed his views on the specific deficiencies he perceived in the analyses.

Suspicion of Canadian authority was also expressed in the High Court. Reference was made earlier to the observations of Justices Dawson and Toohey who, like Justice Meagher, characterized the Canadian approach as assertion rather than analysis.¹⁶³ The Australians, it turns out, commit the same sin. Justices Gaudron and McHugh, in their concurring joint judgment, offered specific criticisms of the Canadian jurisprudence. They detected a “tendency of Canadian courts to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs”.¹⁶⁴ No analysis or authority was offered to substantiate the claims of inappropriate expansion, supplementation or novelty. It was no more than assertion. The two judges then complained of a Canadian “tendency to view fiduciary obligations as both proscriptive and prescriptive”.¹⁶⁵ Again this was assertion without analysis. Apart

¹⁶¹ (1994), 35 N.S.W.L.R. 522 at 570 (N.S.W.C.A.).

¹⁶² The scolding of Canadian judges is repeated elsewhere. See Meagher, Heydon & Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies*, 4th ed. (Sydney: Butterworths LexisNexis, 2002) at 217-218 (“So far as the opinions under consideration rest on the decisions of Canadian and New Zealand cases [sic] which have been in other respects attacked in the High Court or are otherwise questionable, their status is undermined. As Sir Thomas Beecham might have said, why should Australian courts bring third rate foreign cases into account when they have plenty of second rate cases of their own to consider?”).

¹⁶³ See text at notes 104-105 *supra*.

¹⁶⁴ *Supra* note 160 at 113.

¹⁶⁵ *Ibid.*

from that, there is no indication this “tendency” is more pronounced in Canada than in any other jurisdiction, including Australia, where that conceptual mistake is also made.¹⁶⁶ The two judges next insisted that “many” cases in Canada “pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their application to those relationships”.¹⁶⁷ This assertion, again unsupported by analysis, is incomprehensible. What “effect”? And what is “insufficient” regard? Finally, the two judges argued that “many” unidentified Canadian cases “pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies”.¹⁶⁸ Again assertion without analysis. On this specific point, it seems these judges would discourage the principled ascription of fiduciary responsibility if the collateral remedial effect [a separate issue] would be to produce priority in circumstances of insolvency. That is another radical proposition. None of these criticisms, it should be observed, fully directly confront the particular difficulties with the Supreme Court of Canada jurisprudence – the specific failures to respect the conventional boundary between the nominate and fiduciary dimensions (*Guerin*, *McInerney*) and the serial production of novel imprecise criteria.

The High Court, at least implicitly, did seem to comprehend the distinction between the nominate and fiduciary dimensions, although it is not clear what content it would assign to the nominate dimension. Initially the judges denied that fiduciary status had been defined, or was capable of definition. Justices Dawson and Toohey stated that “the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary”.¹⁶⁹ Shortly thereafter, however, they concluded that “what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that”.¹⁷⁰ If loyalty is equated with forgoing one’s self-interest, that is a faithful statement of the conventional position and, arguably, implicit recognition of the difference between the nominate and fiduciary dimensions. For their part, Justices Gaudron and McHugh asserted that “Australian courts have consciously refrained from attempting to provide a general test for

¹⁶⁶ Consider *Bennett v. Minister of Community Welfare* (1992), 107 A.L.R. 617 at 618 (H.C.A.) (“That fiduciary duty was a positive duty to obtain independent legal advice...”).

¹⁶⁷ *Supra* note 160 at 113.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* at 92.

¹⁷⁰ *Ibid.* at 93.

determining when persons or classes of persons stand in a fiduciary relationship with one another”.¹⁷¹ As they saw it, the fiduciary relationship “defies definition”.¹⁷² They nevertheless proceeded to define it. They did so in two ways. They first listed several non-exhaustive overlapping criteria “that, if present, point towards, but do not determine, the existence of a fiduciary relationship”.¹⁷³ That was thin analysis. Later, however, they did attempt a general definition:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorized benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.¹⁷⁴

It would appear that the Australian High Court does recognize the conventional distinction between nominate and fiduciary regulation, albeit with some reservation as to whether in all cases even that boundary is appropriate. There is, in the case, the suggestion that the court is not entirely at ease with fiduciary responsibility in the insolvency context, or as a concurrent liability where a tort action is available.

The most recent significant decision of the High Court is *Pilmer v. Duke Group Ltd.*¹⁷⁵ There was here another classic breach of fiduciary obligation. However, as in *Hospital Products*, the majority of the court rejected a fiduciary characterization. An acquiring corporation had retained a firm of accountants to provide an opinion on the value of the target corporation. That agreement created a limited access arrangement. The accountants were in a position to affect or influence the pricing decision. They had that access for the limited purpose of advising the acquirer of the prudence of the acquisition. It is obvious how that access might have been exploited. The accountants could have

¹⁷¹ *Ibid.* at 106.

¹⁷² *Ibid.*

¹⁷³ *Ibid.* at 107. The criteria were “the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfill a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.” This multiple factor approach replicates the conceptual confusion in *Hodgkinson*.

¹⁷⁴ *Ibid.* at 113.

¹⁷⁵ (2001), 180 A.L.R. 249 (H.C.A.).

taken a bribe from the shareholders of the target in exchange for confirming a high valuation. Or they might themselves have had a direct conflict through their own ownership of target shares. As it was, they served their own interests by yielding their formal independence to the directors of the acquiror (who were also shareholders of the target). They rubber-stamped the price proposed by the directors. They breached both the conflict and profit rules. Their *de facto* interest (their demonstrated *de facto* alignment with the directors) was in conflict with their duty to provide an unbiased valuation to the acquiror. They realized a personal benefit by avoiding a loss of favour with the directors, and thereby maintaining a lucrative relationship. Although partially masked by legal formality, this was raw opportunism on the part of submissive accountants willing to prostitute their professional duty to please *de facto* clients (the directors).

The majority of the court saw it differently, deciding against fiduciary liability on an evidentiary basis. The majority judges did not explicitly determine that the accountants had fiduciary obligations. They instead concluded that the appellants had not established that a breach had occurred:

The conflicting duty or interests must be identified. Conflict is not shown by simply pointing to the fact that there had been past dealings between the appellants and interests associated with the Kia Ora directors. The fact that dealings are completed will ordinarily demonstrate that any interest or duty associated with those dealings is at an end and no continuing duty or interest was identified here. Nor is it sufficient to say generally that there was a hope or expectation of future dealings. That will often be so. Most professional advisers would hope that the proper performance of the task at hand will lead the client to retain them again. No real or substantial possibility of conflict was demonstrated.¹⁷⁶

This was a striking conclusion given the court's apparent acceptance of the finding at trial that the accountants were "not independent" of the acquiror.¹⁷⁷ As well, in the Court of Appeal, the full court had pointed to a considerable body of evidence that indicated the accountants preferred the interests of the directors.¹⁷⁸ The majority did not review any of that evidence. It was an unsatisfactory analysis, particularly the conclusion that there was no real *possibility* of conflict. Justice Kirby, alone in dissent, found both a fiduciary obligation and a breach of that obligation. He differed from the majority on the evidence question. There was, in his view, a patent lack of independence and, consequently, a clear conflict of interest.

¹⁷⁶ *Ibid.* at 273.

¹⁷⁷ *Ibid.* at 272.

¹⁷⁸ (1999), 73 S.A.S.R. 64 (S.A.S.C.).

The majority in *Pilmer* had few observations, apart from quoted authority, on the general substantive analysis of fiduciary responsibility. Justice Kirby, on the other hand, offered a wide-ranging commentary. He accepted (with the majority) that the Canadian and United States authorities must be read with caution, he noted the Australian reluctance to “expand fiduciary obligations beyond what might be called proprietary interests into the more nebulous field of personal rights” and he questioned the dichotomy between proscriptive and prescriptive obligations.¹⁷⁹ Of particular interest are his views on the fundamental question of the existence of fiduciary responsibility. He cited *Breen* for the proposition that “the law has not formulated any precise or comprehensive definition of the criteria adopted for imposing such obligations”.¹⁸⁰ He nevertheless felt obliged to express “a notion of what is involved”.¹⁸¹ After reviewing a number of “theories,” he concluded that Finn had produced the best attempt to express the essence of fiduciary accountability: “[Finn] suggested that the unifying principle of fiduciary obligations arises from the existence of a duty of loyalty that . . . gives rise to a legitimate expectation that the other party will act in the interests of the first party”.¹⁸² Justice Kirby stated that, while “tautologous and subjective,” the Finn description assisted in “the practical application of basic doctrine to varying relationships and facts”.¹⁸³ Perhaps understandably, however (because it is tautologous), the “legitimate expectation” test played no part in Justice Kirby’s analysis. He produced the correct decision because he understood the mischief, not because he assessed reasonable or legitimate expectation.

Both *Pilmer* and *Hospital Products* represent restrictive approaches to the assessment of fiduciary responsibility. Along with *Breen*, they also reveal a continuing uncertainty over basic principle. In conceptual terms, these decisions are every bit as controversial as the Supreme Court of Canada cases. The Australians may disapprove of the Canadian jurisprudence, but they are equally removed from the conventional position. It may be that the Australians are so concerned to avoid the application of the *Guerin/Sparrow* analysis to their own aboriginal/Crown issues that they are unduly restrictive in their general analysis. The better approach for the Australian judges, arguably, would be to recognize the specific peculiarity or anomaly of *Guerin* and *Sparrow* (and *McInerney*), and openly concede (and thereby facilitate)

¹⁷⁹ *Supra* note 175 at 283-84.

¹⁸⁰ *Ibid.* at 287.

¹⁸¹ *Ibid.* at 287-88.

¹⁸² *Ibid.* at 288.

¹⁸³ *Ibid.*

their own engagement in the process of giving abstract definition to fiduciary accountability.

VII. *The English Jurisprudence*

The senior English courts have been content for the most part to employ a traditional approach.¹⁸⁴ An example is the 1993 decision of the Privy Council in *Attorney-General for Hong Kong v. Reid*, which confirmed the English commitment to the strict application of fiduciary responsibility.¹⁸⁵ The judgment of Lord Templeman is an illustration of the proposition that courts will do what is necessary to remove any incentive to act opportunistically. Generally, there are few indications in the senior English courts of any willingness to engage in the comprehensive articulation of the abstract character of fiduciary accountability.

The judgment of Lord Millett in *Bristol and West Building Society v. Mothew* is now regarded as stating the current English position on the nature of fiduciary responsibility.¹⁸⁶ The definitive extract, quoted regularly in English courts,¹⁸⁷ tracks the conventional understanding:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977) p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.¹⁸⁸

¹⁸⁴ The English treatment of the fiduciary accountability of corporate directors is problematic in certain respects. See Flannigan, *supra* note 15.

¹⁸⁵ [1994] 1 All E.R. 1 (P.C.).

¹⁸⁶ [1996] 4 All E.R. 698 (C.A.).

¹⁸⁷ *Swindle v. Harrison*, [1997] E.W.J. 2602 (C.A.); *Birmingham Midshires Building Society v. Infields (A Firm)*, [1999] E.W.J. 4428 (Q.B.); *Crowther v. Brownword*, [1999] E.W.J. 4264 (C.A.); *Maes Finance Ltd. v. Sharp & Partners (A Firm)*, [1999] E.W.J. 4419 (Q.B.); *Companhia de Seguros Imperio v. Heath (REBX) Ltd.*, [2001] 1 W.L.R. 112 (C.A.); *Johnson v. EBS Pensioner Trustees Ltd.*, [2002] E.W.J. 627 (C.A.).

¹⁸⁸ *Supra* note 186 at 711-12.

Lord Millett recognized that conventional fiduciary responsibility addresses disloyalty or opportunism. The “core” obligation, as the listed “facets” or rules illustrate, is to forgo self-interest.¹⁸⁹ Beyond that, however, there is little in the judgment to advance our comprehension of fiduciary analysis.

There is one semantic concern with Lord Millett’s remarks. The rules he listed are not “defining characteristics of the fiduciary” in the sense that they identify who is a fiduciary. Rather, they are *consequences* of a fiduciary characterization.¹⁹⁰ The rules themselves do not indicate what it is that makes a person a fiduciary. They only have application once triggered by a prior finding of fiduciary status. That is only a semantic point, but semantics are a main source of confusion in the fiduciary jurisprudence. Consider Lord Millett’s reference to *Finn*. It should be evident at this point that *Finn*’s observation confounds the matter. He appears to have it exactly backwards. Actors become subject to specific fiduciary rules because their access is limited (that is, because they are fiduciaries), not because they are somehow spontaneously subjected to fiduciary obligations.

The issue in *Bristol* was whether a lack of care on the part of a fiduciary was a fiduciary breach. Lord Millett agreed with the view that negligence by a fiduciary was properly regulated by general tort law principles. Acting negligently was not a fiduciary breach. As he explained it, “Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough.”¹⁹¹ He understood that the duty of care and the duty of loyalty are parallel general duties applied on a default basis to regulate two distinct mischiefs.

The English experience since *Bristol*, for the most part, is unremarkable. The English judges have remained on the sidelines in the debate over the definitive criteria for fiduciary responsibility. Their abstract analysis of the nature of the obligation usually begins and ends with the citation of Lord Millett’s judgment. One notable [and flawed] exception is the Privy Council decision in *Arklow Investments Ltd. v. MacLean*.¹⁹² Although Justice Henry cited Lord Millett’s remarks, he

¹⁸⁹ In *Armitage v. Nurse*, [1997] 2 All E.R. 705 at 713 (C.A.), Lord Millett suggested that the duty of loyalty is part of the irreducible core of the *trust* concept.

¹⁹⁰ Lord Millett understood this, as his later comment (*supra* note 186 at 712) indicates: “The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity.”

¹⁹¹ *Supra* note 186 at 712.

¹⁹² [2000] 1 W.L.R. 594 (P.C.). See also *Goose v. Wilson & Co. (A Firm)*, [2000] E.W.J. 1299 (C.A.); *United Pan-Europe Communications N.V. v. Deutsche Bank A.G.*, [2000] E.W.J. 2781 (C.A.).

added some curious propositions of his own. He described the duty of loyalty as a “concept [that] encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognize, that the fiduciary will not utilize his or her position in such a way which is adverse to the interests of the principal”.¹⁹³ He offered no authority for this “legitimate expectation” test, nor did he employ the idea in his subsequent analysis. The more curious proposition, however, was his apparent requirement for mutuality: “Put shortly, there was no mutuality giving rise to the undertaking or imposition of a duty of loyalty.”¹⁹⁴ The suggestion seems to be that some sort of relationship above and beyond the receipt of confidential information was required for fiduciary responsibility. The acceptance of confidential information, however, is a sufficient basis for fiduciary accountability. Recipients have a limited access. It is not necessary that negotiating parties ultimately agree that one will act on behalf of the other in the course of any proposed use of the information. In this case, the negotiations in which the information was disclosed in fact failed to produce an agreement. The recipient, however, did not subsequently use the information (no benefit). Accordingly, there was fiduciary *accountability*, but no fiduciary *breach*. In conventional terms, it was straightforward. A “mutuality” requirement only truncates and misdirects the analysis.

Another observation may be made. The issue in *Arklow* was whether the defendants had (1) breached a fiduciary obligation or (2) misused confidential information. The court stated that it was not necessary to consider “[w]hether or not the obligation not to misuse confidential information is properly classed as a fiduciary duty”.¹⁹⁵ The court went on, however, to insist that: “Characterising the duty to respect confidential information as fiduciary does not create particular duties of loyalty, which are imposed as a result of the nature of the particular relationship and the circumstances giving rise to it. It is not the label which defines the duty.”¹⁹⁶ The point appears to be that asserting fiduciary character for the duty to respect confidences does not by itself define or establish fiduciary content. But that would be incorrect. A proper finding of fiduciary status or accountability (limited access) attracts a singular default duty to forgo self-interest. That duty is associated with a set of generic rules that have individual application as the circumstances dictate. Those rules, however, are only derivative

¹⁹³ *Ibid.* at 598. “Reasonable” and “legitimate” are apparently regarded by many judges as interchangeable qualifiers of “expectation.” The terms, however, are not conceptually congruent.

¹⁹⁴ *Ibid.* at 600.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

manifestations of the singular proscription against self-regard.¹⁹⁷ In cases of breach of confidence, that proscription produces the “rule” that fiduciaries must not exploit confidential information. Accordingly, once the label is properly attached (accountability imposed), the associated proscription *does* automatically define the default duty.

On the general question of the relationship between fiduciary obligation and breach of confidence, it is worth mentioning the words of Lord Steyn a few months later in *Attorney General v. Blake*.¹⁹⁸ With reference to the disclosure of confidential information by a spy, Lord Steyn stated: “If the information was still confidential, Blake would in my view have been liable as a fiduciary.... He was ... in a very similar position to a fiduciary. The reason of the rule applying to fiduciaries applies to him.”¹⁹⁹ That is a sound observation. The “reason of the rule” is the same for both fiduciary obligation and breach of confidence. Information that is confidential is information that cannot be freely exploited. Where access is for a defined or limited purpose, it is a breach of loyalty to disclose or exploit the information for other than the defined purpose.

In the end, although ostensibly closer to the conventional position, the English jurisprudence is in much the same condition as that of Australia and Canada. The English judges appear to understand the singular function of fiduciary responsibility, but have had difficulty in articulating an analytical construct that offers definition and distinction in the marginal cases where it matters. The continuation of this state of affairs will serve only to diminish the efficacy of fiduciary discipline in each of these jurisdictions.

VIII. Conclusion

The boundaries of fiduciary accountability appear to be unsettled.²⁰⁰ That is an illusion. Though currently obscured by a layer of confusion, the conventional boundaries remain intelligible and unchanged. Those who have access for a defined or limited purpose are subject to

¹⁹⁷ See text at notes 15-16 *supra*.

¹⁹⁸ [2000] 4 All E.R. 385 (H.L.).

¹⁹⁹ *Ibid.* at 404.

²⁰⁰ It is common to speak of “boundaries,” rather than a single boundary. Some see a number of boundaries, including those supposed to exist with undue influence, breach of confidence, non-economic injury and pre/post termination obligations. Others see only one main boundary – that which separates fiduciary status or obligation from other forms of legal accountability. That boundary encloses all second order boundaries (undue influence, breach of confidence, etc.) that might be drawn for some analytical purpose within the fiduciary jurisdiction.

fiduciary regulation; those with open access are not. Most judges understand this distinction intuitively. They also recognize that different nominate arrangements are properly subjected to generic fiduciary control. Traditionally they applied this form of regulation by direct appeal to public policy, by analogy or by the assertion of policy artifacts (the conflict and profit rules). These analytical techniques were conceptually untidy in some respects, but the function and boundaries of the jurisdiction were uncontroversial. Unfortunately, in the last while, commentators and judges unintentionally challenged the conventional boundaries when they introduced various abstract criteria in attempts to organize what they regarded as disjointed or unpolished analysis. They introduced these concepts, in most instances, in order to describe and clarify, not displace, what they perceived to be the *conventional* boundaries. The problem was that their criteria implied or accommodated boundaries that were not congruent with the conventional scope of fiduciary accountability. The criteria were insufficiently precise for their intended definition task. Nevertheless, because they sprang from credible sources, they had the appearance of logic and authority, and were incorporated to different degrees in judicial analyses. That produced an additional measure of confusion quite apart from the inherent indeterminacy of the various criteria. If all the criteria were potentially applicable, what was their relationship to one another? Were they redundant? Was there priority amongst them? Did they have different weight? Predictably, the novelty, number and controversial content of the criteria produced substantial confusion. Equally predictably, the fiduciary jurisdiction was criticized, even ridiculed, for its vagueness and, more damaging, its seeming plasticity.

The main difficulty with several of the criteria was their open-ended quality. They could be interpreted in both restrictive and expansive ways. The misinterpretation concern was realized in several senior court decisions (and many more lower court decisions). The Supreme Court of Canada notoriously adopted expansive interpretations in the aboriginal/Crown and medical records contexts. The court passed over the conventional boundary between the nominate and fiduciary dimensions. In contrast, in those same areas, the High Court of Australia declined to make the conceptual leap. In other respects, however, employing other criteria, the High Court has been unduly restrictive. In Canada, the more recent decisions of the Supreme Court are conventional in result, though the judges continue to toy with suspect criteria. The one promising development is the decision in *K.L.B.*, which suggests the possibility of a significant rehabilitation or clarification of the jurisprudence. Throughout this same period, the senior English courts have resisted manufacturing or applying novel criteria, though there are exceptions. Most recently, the English appear

to have accepted Lord Millett's conventional statement of principle, and have not otherwise generally engaged in the abstract analysis of fiduciary accountability.

The solution to the problem of an opaque jurisprudence is not always apparent. That is not the case here. It is possible in this area to chronicle with some precision the production of increasing levels of confusion as a result of the introduction of numerous imprecise and irrelevant criteria over a number of decades. The solution is straightforward. Each and every one of the introduced criteria must be discarded. Unjust enrichment, discretion, encumbered power, abuse of power, power differential, total reliance, vulnerability, reasonable (legitimate) expectation, commercial character, arm's length, mutuality, and a collection of others, are all unsatisfactory as general tests. It is necessary to expunge them all in order to restore our proper comprehension of the conventional boundaries. The conventional function is undisputed. It is manifest public policy that our limited access arrangements be shielded from the infection of self-interest. That policy produces specific boundaries. There is no other policy identified in the jurisprudence that would justify altering those boundaries. A failure to recognize the distinction between nominate and fiduciary regulation, or to discard the confusions of the past decades, will condemn the jurisprudence to a further period of uncertain application and continuing questions of legitimacy.