Chapter 6
The Fiduciary Concept, Contract Law, and Unjust Enrichment: A Functional Comparison
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INTRODUCTION

The fiduciary concept has a peculiar status in Canadian law. While the Canadian law of fiduciaries traces its origins to the same foundation as fiduciary jurisprudence emanating from other common law jurisdictions, the fiduciary concept has been applied more aggressively (i.e., to a wider range of circumstances and in more unique ways) in Canada than elsewhere. Sir Anthony Mason, former chief justice of the Australian High Court, once made the colourful extra-curial suggestion that Canadian fiduciary jurisprudence is divided into three parts: ‘[t]hose who owe fiduciary duties, those to whom fiduciary duties are owed and judges who keep creating new fiduciary duties.’

1 Sir A. Mason, as quoted in A(C) v. Critchley (1998) 166 DLR (4th) 475 [74] (BCCA). See also E. Cherniak, ‘Comment on paper by Professor Jeffrey G. MacIntosh’ in Fiduciary Duties, Law Society of Upper Canada Special Lectures, 1990 (De Boo, Toronto 1991) 275, who relates the story of how Mason told then-Chief Justice Brian Dickson of the Supreme Court of Canada that ‘he understood that in Canada there were only three classes of people; those who are fiduciaries; those who are about to become fiduciaries; and those who are being fiduciaries.’
Despite the growth of the fiduciary concept in Canada and elsewhere, a significant sense of uncertainty still plagues the fiduciary concept. Even a cursory glance at existing fiduciary jurisprudence and commentary indicates this phenomenon. Curiously, this state of affairs has not impeded the fiduciary concept’s continued use. This is not an exclusively modern development. Nor, for that matter, is it peculiarly Canadian. There has long been a greater interest in the ends to be achieved through the application of the fiduciary concept than in infusing it with greater certainty to guide its use. This is a problematic development, because, as former Chief Justice Bora Laskin of the Supreme Court of Canada once said:

...important as it is to know what the law is, it is at least equally important to know what the law is for. The distinction that I draw is between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to our social and economic conditions, and serving ends that express the character of our organized society.

The growth in use of the fiduciary concept in the face of questions over its application and implications has created what I call the ‘fiduciary paradox.’ As Justice La Forest bluntly states in LAC Minerals Ltd. v. International Corona Resources Ltd., ‘[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.’ While there is

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2 It is suggested that the present uncertainty that surrounds the fiduciary concept is more perceived than real; it is the product of its unexplained and unquestioned application rather than the result of any substantive uncertainty inherent in the fiduciary concept itself. See the discussion on this topic in L. I. Rotman, Fiduciary Law (Thomson/Carswell, Toronto 2005) 39.

3 Indeed, the difficulties associated with the fiduciary concept’s use in Canadian jurisprudence appear in other jurisdictions as well. Some of these difficulties are rather obvious, as, for example, in the problematic applications of the fiduciary concept to achieve particular results observable in Chase Manhattan Bank v. Israel-British Bank [1981] Ch. 105 and English v. Dedham Vale Properties [1978] 1 All ER 382 (Ch).

4 As Sealy indicates in an early article, ‘judges in most cases have been more ready to find that the type of fiduciary situation upon which their decision depends does or does not exist, than to say what, for that purpose, amounts to such a fiduciary position’: L. S. Sealy, ‘Fiduciary Relationships’ [1962] CLJ 69, 73–4.


6 See the more detailed discussion in Rotman, Fiduciary Law (n. 2) ch. 2.

7 (1989) 61 DLR (4th) 14, 26 (SCC). In A(C) v. Critchley (n. 1) [75], McEachern C. J. blames the Supreme Court of Canada for its failure to clarify the confused state of the fiduciary concept: ‘Our Supreme Court of Canada has led the way in the common law