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# Fiduciary Duties



**M**ost of us likely do not give a moment's notice to the concept of fiduciary relationships.

This concept, however, is an *extremely* important principle of the common law. It provides a very flexible legal remedy often used to protect vulnerable individuals who have been wronged by another who holds a position of power over them.

Understanding fiduciary relationships and fiduciary duties is especially important to legal professionals because we are all in fiduciary relationships with our clients.

The focus of this article will be to explain and give some examples of how fiduciary relationships have been imposed and interpreted by our courts.

## Background

As you may know, our common law legal system originally developed from judicial precedents established by English courts, beginning almost 1000 years ago. Over the centuries, our courts have developed legally recognized rights and duties that arise when persons are in certain relationships with others.

For example, the case law developed the principle that a parent

has a duty to provide necessities to his or her child.

A fiduciary duty is the most onerous duty imposed by the common law. It is imposed by the courts whenever they find that a fiduciary relationship exists. The concept originally developed in Roman law and was borrowed by the Courts of Equity who developed the branch of the common law known as equity.

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Now part of our common law, these principles of equity are used by our modern-day courts generally to avoid injustices being perpetrated.

Fiduciary duties originally developed as part of the law of trusts. Thus, fiduciary duties would arise whenever parties made a trust agreement. Under the terms of a trust, the trustee became the legal owner of the property, yet owned and managed that property for the benefit of the beneficiary.

In such a case, the trustee was said to be in a fiduciary relationship with the beneficiary.

Equitable notions of justice demanded that trustees who had undertaken responsibility for the property or affairs of another should not be permitted to exploit their position for their own benefit at the expense of the beneficiary.

Our courts have expanded this very useful concept of a fiduciary relationship well beyond the law of trusts. Thus, in general terms, modern courts will likely find a fiduciary relationship exists whenever a relationship of trust or confidence exists between two parties. For example, because clients rely upon the integrity of their lawyer, the courts will deem this legal professional to be in a fiduciary relationship with his or her client.

Whenever a fiduciary relationship exists, the court will impose fiduciary duties upon the fiduciary who is in a position of trust toward another person.

The essence of a fiduciary relationship is that the fiduciary is in a position of confidence and power over another person and thus must exercise his or her power or discretion in the other's best interest.

Simply put, where a fiduciary relationship exists, the fiduciary must *not* make a personal profit from his or her position and must *not* allow personal interest to conflict with his

or her fiduciary duties. The fiduciary owes a duty of loyalty, a duty to act in good faith, and a duty to avoid any conflict of interest or self-interest.

Every fiduciary is required to subordinate his or her own interests to the promotion of the interests of the beneficiary. The law dictates that the fiduciary cannot utilize his or her position of power to his or her own advantage or to the other's detriment. Thus, the fiduciary must act solely and selflessly in the interests of the beneficiary.

### **How Do We Recognize a Fiduciary Relationship?**

In the decision of *Frame v. Smith* (1987) 2 S.C.R. 99, the court set out the following guidelines to help recognize fiduciary relationships, stating as follows.

Relationships in which a fiduciary obligation has been imposed 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; and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Fiduciary relationships are of many different types and can range from giving money to the errand boy who is bound to bring back the change, to the most intimate and confidential of trust.

For example, all professionals handling the affairs of others are typically in a fiduciary relationship with their clients. This would include partners, agents, directors, and legal professionals, as previously mentioned.

There is no closed category of cases where the courts will find a fiduciary relationship to exist. Indeed, they have recognized fiduciary obligations in a wide variety of situations. Here are some examples.

*Guerin v. The Queen* [1984] 2 S.C.R. 335 involved a lawsuit brought by the Musqueam against the federal government who made an agreement to lease their lands in 1958. These lands were 162 acres of superb green space, much of it waterfront, near UBC. The government rented these lands for 75 years to Shaughnessy Golf and Country Club in a sweetheart deal with a rent of merely \$29,000. More troublesome yet was the lack of rent escalation for 15 years. Even then, the escalation was capped at a maximum of 15 percent per annum.

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The Supreme Court of Canada found this was an exploitative bargain that was "unconscionable" and a breach of the Crown's fiduciary duty to the Musqueam nation whose affairs the Crown was managing. The court thus awarded damages of \$10 million to the Musqueam.

More recently, in *Norberg v. Wynrib* (1992) 92 DLR (4<sup>th</sup>) 449, at 499, McLachlin J. declared that "fiduciary relationships are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests."

In this case, Ms. Norberg was a young woman addicted to painkiller medication. She was obtaining these drugs from an elderly doctor, who suggested he would supply drugs in return for her giving him sexual favours. This casual arrangement of "sex for drugs" continued for some time.

When Ms. Norberg asked Dr. Wynrib for help getting off drugs, he advised her simply "to quit." He continued supplying drugs to Ms. Norberg until she decided, on her own,

to go to a rehabilitation centre to get help with her drug addiction.

When the case reached the Supreme Court of Canada, two of the justices found that a fiduciary relationship existed. They found the doctor to be a fiduciary because he was in a relationship of trust and confidence and had the power to exercise a discretion over his patient.

This discretion made her particularly vulnerable to any abuse by him. They ruled that the doctor had breached his fiduciary duties to his patient and awarded damages on that basis.

This case is also a good illustration of the courts' ability to shape the common law to make it more socially responsive and acceptable to the community. Similarly, other decisions have recognized a fiduciary relationship between parent and child and school boards and students.

Another good example of the scope of fiduciary duties is the recent case of *Olive Hospitality Inc. v. Woo* 2006 BCSC 1554, appeal decision at 2007 BCSC 355. The facts and trial decision are summarized in the opening paragraphs of the appeal decision.

Olive Hospitality Inc. was engaged in the development of a specialty restaurant franchise in this province, financed by Asian investors seeking entrepreneurial opportunities to facilitate their immigration to Canada. With an investment of \$2,178,500 and financing from HSBC Bank Canada, the company had, through its subsidiaries, opened three restaurants and was about to open a fourth as part of a business plan for the eventual operation of 30 restaurants. Tae Soo Woo was a director of the company. He resigned in acrimonious circumstances. He sent a notice of his resignation to the bank and in so doing maliciously defamed the company in statements he made relating to its financial stability. The fourth restaurant was never opened and the investment was then lost when the company sold its assets for \$10 and the assumption of some debt.

On the trial of this action, commenced by the company and its subsidiaries against its former director, Madam Justice Ross awarded general and punitive damages of \$60,000 for defamation (plus \$6,323.39 in respect of funds improperly taken from the company) and \$1,088,995 in damages for breach of fiduciary duty based on the value of a lost opportunity to realize a future financial advantage: 23 B.L.R. (4th) 78, 2006 BCSC 1554.

In this case, the BCCA overturned the trial decision essentially on the basis that the resultant loss to the company had not been properly established. At trial the loss that was proven was actually the loss to the other individual shareholders, rather than to the company that was the plaintiff.

The list continues to expand. As this article goes to press, Madame Justice Wedge has very recently reserved in the case of the Vancouver Canucks dispute involving Francesco Aquilini's purchase of the team. According to press reports, Tom Gaglardi and Ryan Beedie have brought that action, alleging that Aquilini was their partner and thus owed them the duties of a fiduciary.

They allege he breached those duties by secretly negotiating to purchase the Canucks while they were still attempting to do so.

### **Powers of Attorney**

A common fiduciary relationship is that of a person holding a Power of Attorney for another. Many BC decisions have made it clear that a holder of a Power of Attorney owes a fiduciary duty to the donor.

For example, *Kask Estate v. Welsh* 2000 BCSC 791, which involved a daughter who held a POA for her elderly father. She succeeded in depleting his estate in the years before his death after he became mentally incompetent. By the time of his death, little was left in the estate. In finding the daughter liable for breach of fiduciary duty, Lysyk J. said as follows:

[24] In that Ms. Welsh held her father's Power of Attorney, she owed to him a fiduciary duty:...It was her duty not to prefer her interest or that of her family over his in the handling of his money which he had entrusted to her. I do not consider that Ms. Welsh determined she would deplete all of what would be her father's estate once she held his Power of Attorney and had the opportunity to spend his money. Rather, it seems more probable that she simply found his money to be a ready resource and, instead of preserving it as apart from the costs of maintaining him as she was duty bound to do, she spent it.

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A similar case, *Egli (Committee of) v. Egli* 2004 BCSC 529 involved a son who had transferred his father's home and investment accounts to him and his wife under a Power of Attorney that the father had given him some years before. By the time of the father's death, the estate had been completely depleted by these *inter vivos* transfers.

The trial judge ultimately decided that the transfer of the family home was valid; the transfer of an investment account, however, was in breach of the son's fiduciary duty. The son was thus ordered to compensate his father's estate for the amounts transferred.

Garson J. stated at paragraph 82:

It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage (Chapman). The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor. I am not aware of any authority that detracts from this principle in circumstances where

the benefit is conferred on family members.

In this case, the judge found the transfer of the house was done with full knowledge and consent; the transfer of the investment account, however, was not.

The principle enunciated in the above case may be somewhat problematic in that, almost invariably, where the holder of the Power of Attorney executes some transaction that personally benefits the holder, he or she will insist that all was done with the full approval and knowledge of the elderly, frail donor.

In *Fraser v Fraser* 2000 BCSC 0211, four brothers were assisting their 90-year-old mother to manage her financial affairs. One of them, unbeknownst to his three brothers, obtained a Power of Attorney from their mother without her first obtaining independent legal advice.

A few days later, he convinced her to take \$40,000 from her GIC and invest it in Eron Acceptance. This represented 70 percent of her estate and was clearly a risky investment in which he lost all her money. Although he did not use the POA to effect the transaction, the judge found that he had obtained the POA specifically for that purpose and would have used it, if necessary.

In finding the defendant liable for the loss, Dillon J. observed as follows:

[26] The defendant breached his fiduciary duty to the plaintiff in conducting himself in this manner when he knew that the plaintiff relied upon him. *This fiduciary duty arises in all of the circumstances here, but also arose from the Power of Attorney whether or not it was actually used in the transaction* (emphasis added)... . He failed to exercise reasonable care in numerous respects, including: failing to read or understand the investment documents, failing to adequately protect the bulk of the plaintiff's assets, failing to diversify the investment, failing

to obtain independent advice, unreasonably relying on oral representations made at large meetings, investing at high risk in all of the circumstances, failing to obtain the consent and advice of his brothers, and failing to inform the plaintiff or his brothers either before or after the investment.

### **Remedies for Breach of Fiduciary Duties**

Whenever a court finds a breach of fiduciary duty, then the fiduciary will be liable to place the beneficiary in that same position as the claimant would have been, had no breach been committed. Equity adopts the position that where a breach occurs, any gain resulting belongs to the beneficiary, whereas any loss is the trustee's personal loss and full restitution must be made.

A breach of a fiduciary relationship can give rise to a wide range of remedies. Generally speaking, in addition to awarding compensation (damages are the common law remedy,

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compensation is the equitable remedy), our courts can impose restitutionary remedies such as the constructive trust, rescission, injunctive relief, equitable compensation and tracing, and last, an accounting for profits. Thus a claim of breach of fiduciary duty may open many doors not otherwise available at common law.

### **Conclusion**

Whenever there is an inherent trust relationship between the parties with a corresponding potential for exploitation or damage, our courts are increasingly willing to recognize the existence of a fiduciary relationship and award a remedy for breach of fiduciary duties.

The concept of fiduciary relationships with corresponding fiduciary duties is one of the most sensible and flexible responses of the common law to the modern requirements of justice in individual cases. ▲

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