

# The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada

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## I. INTRODUCTION

FIDUCIARY DOCTRINE IS, QUITE SIMPLY, A PARADOX. On the one hand, it is comprised of legal principles that have been implemented by the courts in numerous instances for more than 250 years.<sup>1</sup> On the other, it is an often misunderstood and much maligned concept whose frequent use belies its juridical uncertainty.<sup>2</sup>

The manner in which the judiciary has approached the task of defining fiduciary relationships until relatively recently is a prime example of the paradoxical nature of fiduciary doctrine. For many years, the judiciary was largely content to apply fiduciary doctrine in the absence of any useable definitions or guidelines for its

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<sup>1</sup> See *Keech v. Sandford* (1726), 25 E.R. 223 (Ch.). Prior to its establishment within the common law, fiduciary doctrine had been a well-established part of Roman law. For a brief discussion of the types of relations in Roman society that were subject to fiduciary principles, see E. Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts*, 3d ed. (Cambridge: W. Heffer and Sons, 1955) at 3.

<sup>2</sup> See *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 at 26 (S.C.C.), *per* La Forest J.: "... [t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship." See also M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: De Boo, 1988) at 1-8: "[i]t is somewhat ironic that this area — one of the most rapidly expanding and powerful areas of law — is probably one of the least understood"; P.D. Finn, *Fiduciary Obligations* (Sydney: The Law Book Company, 1977) at 1: "... the term 'fiduciary' is itself one of the most ill-defined, if not altogether misleading terms in our law. Yet it retains a large currency being often used as though it were full of known meaning and despite judicial warnings to the contrary." Note also the comments by La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 407 (S.C.C.): "[w]hile the legal concept of a fiduciary duty reaches back to the famous English case of *Keech v. Sandford*, until recently the fiduciary duty could be described as a legal obligation in search of a principle."

implementation.<sup>3</sup> When describing fiducial relations, it simply listed so-called “traditional” examples.<sup>4</sup> The most often used of these examples included relationships between guardian and ward, parent and child, and teacher and student.<sup>5</sup> The rationale behind this avoidance of definition was that although fiduciary relations in general were not defined, the various incarnations of them were thought to be easily recognizable.<sup>6</sup>

More recently, a number of judges and legal scholars have endeavoured to define the fiduciary relation. A variety of methods have been attempted. These include taxonomic endeavours<sup>7</sup> which involve the grouping of fiduciary relationships by classes for which general rules have been devised,<sup>8</sup> as well as the contextual analyses of potential fiduciary relations.<sup>9</sup> In contrast, others have argued that

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<sup>3</sup> See L.S. Sealy, “Fiduciary Relationships” [1962] Camb. L.J. 69 at 73–74: “[t]he 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.”

<sup>4</sup> This practice was recognized by Wilson J. in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 at 97 (S.C.C.), where she stated that: “[i]n the past the question whether a particular relationship is subject to a fiduciary obligation has been approached by referring to categories of relationships in which a fiduciary obligation has already been held to be present.”

<sup>5</sup> See *Follis v. Albermarle TP.*, [1941] 1 D.L.R. 178 (Ont. C.A.). The wide range of possible fiduciary relationships was expressed by Fletcher Moulton L.J. in *Re Coomber*, [1911] Ch. 723 at 728 (C.A.) where he stated that “[f]iduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations ...”

<sup>6</sup> See E. Gillese, “Fiduciary Relations And Their Impact on Business and Commerce” (Paper presented at *Insight Conference on “Trusts and Fiduciary Relations in Commercial Transactions”*, 14 April 1988) [unpublished] at 7: “... in times gone by we really were not troubled by the absence of a coherent definition. When pushed to answer the question of who a fiduciary is, we simply rattled off the standard categories of fiduciaries: trustee-beneficiary; agent-principle [sic]; director-company; guardian-ward and solicitor-client. The traditional approach, in other words, was that although we could not define ‘the beast’, we could recognize one when we saw it so lack of a definition was not a problem.”

<sup>7</sup> See, for example, Vinter, *supra* note 1 at 369: “[c]ertainty of the law is a desideratum, and the reduction of the borderland to as narrow a tract as possible is one of the aims of this book.”

<sup>8</sup> Such as Sealy, *supra* note 3 at 73: “[i]t 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 rule or rules which govern each class.”

<sup>9</sup> See D.A. DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) 5 Duke L.J. 879 at 879; R. Flannigan, “The Fiduciary Obligation” (1989) 9 Ox. J. Leg. Stud. 285 at 311; L.I. Rotman, “Fiduciary Doctrine: A Concept in Need of Understanding” (1996) 34 Alta. L. Rev. (forthcoming [hereinafter “Fiduciary Doctrine”]); and L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) [hereinaf-

fiduciary relations cannot be defined at all<sup>10</sup> or that fiduciary relationships are fabricated from loosely tied, or entirely unrelated, principles that should never have been grouped together.<sup>11</sup>

The result of these diverse attempts to understand fiduciary doctrine has led to the formulation of a number of different fiduciary theories. Some of the more notable theories include: "Property theory," "Reliance theory," "Inequality theory," "Contract theory," "Unjust Enrichment theory," "Utility theory," and "Power and Discretion theory."<sup>12</sup> Despite the recent proliferation of fiduciary theories, no one theory is either wholly agreed upon or perceived to be superior to the others.<sup>13</sup> Each is the subject of debate or contention on one or more points. In fact, judges and scholars often combine elements from two or more of the theories in order to assist their own understanding of fiduciary doctrine.

One of the key characteristics of fiduciary doctrine singled out by juridical examinations is the notion of the beneficiaries' vulnerability at the hands of their fiduciaries. Vulnerability is the primary focus of the Inequality theory of fiduciary doctrine, one of the most oft-used fiduciary theories. In a number of its decisions dealing with fiduciary relationships, Inequality theory and the concept of vulnerability have assumed primary roles in the Supreme Court's formulation of its own theory of fiduciary doctrine. In some of its most recent cases, the debate over vulnerability's place in fiduciary doctrine has resulted in a distinct polarization of the court.

The Supreme Court of Canada's internal debate over the concept of vulnerability parallels a similar debate currently being carried on in judicial and scholarly

ter *Parallel Paths*].

<sup>10</sup> Such as S.M. Beck in "The Quickening of Fiduciary Obligation" (1975) 53 Can. Bar Rev. 771 at 781: "... clear definition is simply not possible, or desirable, when one is dealing with the interaction of human conduct and an infinite variety of ... situations."

<sup>11</sup> See, for example, Finn, *supra* note 2 at 1; Sealy, *supra* note 3 at 73; Sealy, "Some Principles of Fiduciary Obligation" [1963] Camb. L.J. 119; and M.D. Talbot, "Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies" (1959) 20 Ohio St. L.J. 320 at 324.

<sup>12</sup> The names of the theories reflect their major points of emphasis. These theories are discussed further in Rotman, "Fiduciary Doctrine", *supra* note 9, and Rotman, *Parallel Paths*, *supra* note 9, chapters 9. See also J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 51-91.

<sup>13</sup> See P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1 at 26: "... our present uncertainty is thought to be exacerbated by the lack of a workable and unexceptionable definition of a fiduciary. We have no shortage of rival approaches, but none has carried the day." See also *Liggett v. Kensington*, [1993] 1 N.Z.L.R. 257 at 281 (C.A.), *per Gault J.*: "[n]o clear test has emerged by which the existence of fiduciary obligations may be determined"; and *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 at 488 (H.C. Aust.) *per Dawson J.*: "[n]otwithstanding the existence of clear examples, no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary."

circles. Meanwhile, the court's competing views on the requirement of vulnerability within fiduciary relationships may be seen as a reflection of the discomfort exhibited by judges and legal scholars in relation to fiduciary doctrine as a whole.

This article elucidates the conflicting perspectives on vulnerability's place within the context of fiduciary relations. To accomplish this task, the Inequality theory of fiduciary doctrine, as well as some of the Supreme Court of Canada's most recent decisions involving fiduciary relationships, are critically examined. Through these decisions, the article juxtaposes the two divergent theories of vulnerability that have been formed in the Supreme Court, culminating in its most recent case dealing with fiduciary doctrine, *Hodgkinson v. Simms*.<sup>14</sup>

The current debate being waged in the Supreme Court over the proper position of vulnerability in fiducial relations is merely a new form of an old practice. It may be traced back to the judiciary's reliance upon traditional definitions of fiduciary relations rather than seeking a workable definition or more specific guidelines for the implementation of fiduciary doctrine. As the shortcomings of the existing jurisprudence demonstrate, the judiciary's "I know one when I see one" approach to fiduciary relationships has not enhanced the development of fiduciary doctrine.

The debate over whether vulnerability gives rise to fiduciary relationships or whether fiduciary relationships create vulnerability is, at first glance, little more than an iteration of the old riddle about the chicken and the egg. A deeper examination of the vulnerability debate reveals the riddle to be easily solvable; the solution, in turn, reveals much about the underlying basis of fiduciary theory.

## II. INEQUALITY THEORY

THE INEQUALITY THEORY OF FIDUCIARY DOCTRINE is premised upon the notion that beneficiaries are generally inferior in power *vis-a-vis* their fiduciaries, and that fiduciary law serves to temper this inequality by imposing strict duties upon fiduciaries to act in the best interests of their beneficiaries. When fiduciaries fail to live up to their duties, beneficiaries are entitled to bring a claim against them for breach of duty and, where appropriate, to obtain a remedy.

A common illustration of Inequality theory's characterization of fiduciary relationships is the relationship between guardian and ward. In this genre of fiducial relations, the guardian is legally responsible for the ward's interests. The ward is incapable of assuming control over these matters as a result of a legal disability which may be due to age or physical or mental incapacity. Clearly, the power in this form of relationship is vested entirely in the guardian. Moreover, as a result of the ward's disability, the power relations between the two lies heavily in the guardian's

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<sup>14</sup> *Supra* note 2.

favour. This power discrepancy also exists beyond the confines of their fiduciary relationship.

The result of this inequality in power relations creates the possibility that guardians may abuse their fiduciary positions for personal gain or the gain of third parties.<sup>15</sup> Should guardians abuse their power, fiduciary doctrine provides a mechanism for protecting the wards' interests. However, where such extremes in power relations do not exist, the Inequality theory maintains that there is no need for protection, and that no fiduciary duty exists. Therefore, the Inequality theory may be seen to be premised entirely upon an attempt to provide beneficiaries with legal recourse for their fiduciaries' indiscretions, but only in situations where their power relations are so tilted that the former are truly at the mercy of the latter.

Inequality theory highlights an important characteristic of fiduciary relationships — the vulnerability of the beneficiary at the hands of the fiduciary. Indeed, fiduciaries possess the ability, by virtue of their positions, to positively or negatively affect the interests of their beneficiaries. This is an inherent aspect of fiduciary relationships. Fiduciary law mandates that the fiduciary's actions must positively affect the beneficiary's interest; when the actions effect an adversity, the beneficiary has legal recourse to seek appropriate sanctions against the fiduciary.<sup>16</sup>

The vulnerability of the beneficiary in fiduciary relations stems from the positions occupied by the parties relative to each other and the balance of power distributed between them within the relationship. For instance, corporate directors hold fiduciary obligations to a corporation's shareholders, due, in part, to the

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<sup>15</sup> Which is equally a breach of their fiduciary duties: see Rotman, *Parallel Paths*, *supra* note 9 at chapter 10; Ellis, *supra* note 2 at 1-2-1-3. The prohibition against personal gain also applies to situations where there is an opportunity for personal gain or third party gain. This proposition dates back to *Keech v. Sandford*, where a fiduciary took advantage of an opportunity to renew a lease that his beneficiary could not legally pursue due to a lack of capacity. The fiduciary was found to have breached his duty to his beneficiary since he only obtained the opportunity to renew the lease as a direct result of his fiduciary position: see *supra* note 1 at 223-24. See also *Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.) and *LAC Minerals*, *supra* note 2.

<sup>16</sup> Such as the imposition of fiduciary remedies, which are discussed in greater length in Rotman, *Parallel Paths*, *supra* note 9 at chapter 10. The range of available remedies for a breach of fiduciary duty is far wider than that available in contiguous areas such as breach of confidence and negligent misrepresentation. Moreover, the remedies available for a breach of fiduciary obligation are much more elastic than those available at common law: see *Nocton v. Ashburton*, [1914] A.C. 932 at 952 (H.L.); K. Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498 at 520-27; Ellis, *supra* note 2 at 20-21-20-26; J.D. McCamus, "Remedies for Breach of Fiduciary Duty" in Law Society of Upper Canada Special Lectures, *Fiduciary Duties* (Toronto: De Boo, 1991); and I.E. Davidson, "The Equitable Remedy of Compensation" (1982) 3 Melbourne Univ. L. Rev. 349.

former's power and the latter's vulnerability to the exercise of that power.<sup>17</sup> While the shareholders collectively own the corporation, the directors control the key determinants in the corporation's profitability.

Although vulnerability is a notable characteristic of fiduciary relations, it is only one component of such relationships. Where vulnerability is overemphasized, it actually becomes a hindrance to understanding the nature and quality of fiduciary relationships.

### III. THE MISCHARACTERIZATION OF VULNERABILITY

VULNERABILITY IS OVEREMPHASIZED WHEN it ceases to be a characteristic endemic to fiduciary relationships and instead becomes a determining factor for their existence. In this latter scenario, fiduciary relations exist only if the parties occupy distinctively dominant and subordinate roles. Although fiduciary relations may exist between such parties, the fact that one person is inferior in power to another is not a sufficient basis upon which to ground a fiduciary relationship.<sup>18</sup> Fiduciary relationships are as prevalent among parties on an equal footing — such as partners in a business venture, spouses, and partners in a professional services firm (*i.e.* law, accounting, architecture) — as among parties in an unequal relationship, such as that of guardian and ward. As Ernest Weinrib explained in “The Fiduciary Obligation”:

[i]t cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. ... The fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement.<sup>19</sup>

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<sup>17</sup> See the comments made by Laskin C.J.C. in *Canadian Aero Service Ltd. v. O'Malley*, *supra* note 15 at 384: “[s]trict application [of fiduciary obligations] against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings.”

<sup>18</sup> See the commentary of Gibbs C.J. in *Hospital Products*, *supra* note 13 at 433: “[a]nother circumstance which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes.” See also Finn, *supra* note 13 at 46.

<sup>19</sup> (1975), 25 U.T.L.J. 1 at 6; Hon. J.R. Maurice Gautreau, “Demystifying the Fiduciary Mystique” (1989), 68 *Can. Bar Rev.* 1 at 5 where he stated that vulnerability “... is not an element leading to a fiduciary relationship, but rather, it is a characteristic of the result of the relationship. In other words, the vulnerability is the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power.”

There is no need or requirement that the relative positions of two or more persons involved in a fiduciary relationship be dominant and subordinate. The existence of fiduciary relations between partners in a professional services firm demonstrates this point. Suppose that two people, A and B, possess equivalent qualifications and work together as partners. The partners share equally in the profits and losses of the firm and neither is otherwise superior or inferior to the other. However, because of the nature of their relationship, the actions of one partner binds the other even where the other is unaware of the former's actions. For example, where A signs an agreement on behalf of the partnership, B incurs responsibility and/or liability under the agreement. Consequently, B, while in all other respects equal, is nevertheless vulnerable to A's actions and vice versa.

From this illustration, it may be observed that while the nature of any given fiduciary relation may result in an inequality in power between the fiduciary and the beneficiary *within that relationship*,<sup>20</sup> there is no need or requirement that inequality exists outside of that relationship or prior to its formation.<sup>21</sup> The relations between corporate directors and shareholders further illustrates this point. The fiduciary relationship between director and shareholder exists whether the shareholder owns a minimal amount of penny-stock or possesses a significant amount of shares in a major corporation. It also exists whether a person's holdings amount to a controlling or non-controlling share of the corporation. Furthermore, the directors' duty to shareholders is no different whether the shareholders are first-time purchasers or experienced business people of similar bargaining strength:

[i]t is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. In no sense are fiduciary relations and the risks they create for the entrustor similar to adhesion contracts or unfair bargains. The relation may expose the entrustor to risk even if he is sophisticated, informed, and able

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<sup>20</sup> Or perhaps only within a limited aspect of that relationship, since not every aspect of fiduciary relationships is necessarily fiduciary in nature. See, for example, *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 at 423 (S.C.C.): "[a] relationship may properly be described as 'fiduciary' for some purposes, but not for others"; *New Zealand Netherlands Society 'Oranje' Inc. v. Kuys*, [1973] 2 All E.R. 1222 at 1225-26 (H.L.): "[a] person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at"; *LAC Minerals*, *supra* note 2 at 28, *per La Forest J.*; R.G. Slaght, "Proving a Breach of Fiduciary Duty" in *Fiduciary Duties*, *supra* note 16 at 40; Shepherd, *supra* note 12 at 21; Finn, *supra* note 2 at 4; Sealy, *supra* note 3 at 81; R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask. L. Rev. 45 at 51; D. Klinck, "'Things of Confidence': Loyalty, Secrecy and Fiduciary Obligation" (1990) 54 Sask. L. Rev. 73 at 87.

<sup>21</sup> See Weinrib, *supra* note 19; T. Frankel, "Fiduciary Law" (1983) 71 Cal. L. Rev. 795 at 810; Gibbs C.J. in *Hospital Products*, *supra* note 18.

to bargain effectively. Rather, the entrustor's vulnerability stems from the structure and nature of the fiduciary relation.<sup>22</sup>

What may be gathered from this discussion is this: while vulnerability undoubtedly occupies a significant role within fiduciary relationships, the significance of that role must not be overstated. The fiduciary relationship creates vulnerability; vulnerability does not create the fiduciary relationship. It is a *consequence*, rather than a catalyst, of the fiduciary relationship.<sup>23</sup> As Maurice Gautreau explained in "Demystifying the Fiduciary Mystique," vulnerability is

... the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power.<sup>24</sup>

Fiduciary relationships may exist between unequal parties — *i.e.* parties whose power relations *vis-a-vis* each other are inherently unequal or were unequal prior to the formation of their fiduciary relationship — but the parties need not be unequal for a fiduciary relationship to occur.<sup>25</sup>

#### IV. ILLUSTRATING THE POWER RELATIONS IN FIDUCIARY RELATIONSHIPS

LIKE ALL OTHER RELATIONSHIPS, fiduciary relations have their own dynamic. This dynamic varies from relationship to relationship depending upon the parties involved as well as the form and content of their interaction. At the level of power

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<sup>22</sup> Frankel, *supra* note 21 at 810.

<sup>23</sup> See *Hospital Products*, *supra* note 13 at 454, *per* Mason J.: "[t]he relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position"; D.W.M. Waters, "Lac Minerals Ltd. v. International Corona Resources Ltd." (1990) 69 Can. Bar Rev. 455 at 475: "... it is not clear that vulnerability is a distinct element at all. Hospital Products points out that vulnerability is not so much a third element, as a consequence. It is the result of the existence of a power or discretion whereby the holder can benefit or harm the legitimate interests of another at will." See also P.D. Maddaugh, "Definition of Fiduciary Duty" in *Fiduciary Duties*, *supra* note 16 at 20: "... while the element of vulnerability is often present in a fiduciary relationship, it is not the factor that distinguishes such a relationship from other relationships such as those that underlie claims of 'undue influence' or 'unconscionability.'"

<sup>24</sup> Gautreau, *supra* note 19 at 5.

<sup>25</sup> *Ibid.*: "... vulnerability may be present in advance and frequently is (for example, an infant in relation to a guardian), but it does not have to be present, as in the case of a sophisticated businessman who takes in a junior partner."



relations, however, the foundation of all fiduciary relations is the same. Understanding how this foundation works is an integral part of understanding fiducial relations.

To understand the relative positions of the parties in fiduciary relationships, one should think of the fiduciary relationship as a transfer of powers from the beneficiary, *B*, to the fiduciary, *F*. The powers transferred by *B* to *F* originally belonged to the former and, in fact, still do. *B* has merely loaned the powers to *F* within the ambit of their fiduciary relationship; they do not become *F*'s own possession.

*F* is duty-bound to use these powers in the same manner as *B* would, subject to any constraints *B* imposes on their use. *F* may not exceed these imposed limits or else be liable for breach of duty; the purpose of *F*'s duty is to act within the parameters established by *B* through the latter's transfer of powers, not exceed them. When the fiduciary relationship is terminated, the powers return to *B*. As McLachlin J. stated in the Supreme Court of Canada's decision in *Norberg v. Wynrib*: "[i]t is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary."<sup>26</sup>

In a typical, albeit oversimplified, situation giving rise to a fiduciary relation, assume that, for business reasons, it is advantageous for one person, *B*, to transfer some powers, *P*, to *F*, a shrewd investor. *B* transfers the powers to *F* on the understanding that *F* will have exclusive use of those powers, but only for investment purposes consistent with *B*'s best interests. According to the basic criteria for the establishment of fiduciary relations — namely that: (i) one or more persons (*X*) possess the ability to positively or negatively affect the interests of one or more others (*Y*); (ii) *Y*'s interests within the confines of the particular relationship may only be served directly or indirectly<sup>27</sup> through the actions of *X*; (iii) *X* has an

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<sup>26</sup> *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 at 501 (S.C.C.).

<sup>27</sup> One may be a fiduciary without directly affecting another's interests. As in the relationship between a corporate director and a shareholder, where the director indirectly affects the shareholder's interests by exercising control over the corporation which the shareholder owns a piece of, one's indirect actions may affect another's interests and therefore give rise to a fiduciary relationship in appropriate circumstances: see P.L. Davies, "Directors' Fiduciary Duties and Individual Shareholders" in E. McKendrick, ed., *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon Press, 1992) 83 at 84: "... directors owe legal duties directly to individual shareholders in appropriate situations, and ... judicial decisions have increasingly recognised the force of this point"; Ellis, *supra* note 2 at 15–24: "[i]n most instances, the duty owed to the company [by its directors] is reflective of a similar duty owed to the shareholders, who are in fact the owners of the corporation"; *Coleman v. Myers*, (1977) 2 N.Z.L.R. 255 (C.A.); *Goldex Mines Ltd. v. Revill* (1975), 7 O.R. (2d) 216 (C.A.); *Greenhalgh v. Ardenne Cinemas Ltd.*, [1950] 2 All E.R. 1120 (C.A.); Shepherd, *supra* note 12 at 351–56; and J.G. McIntosh, "Corporations" in *Fiduciary Duties*, *supra* note 16 at 207.

obligation to act in Y's best interests;<sup>28</sup> and (iv) Y relies upon the honesty, integrity, and fidelity of X towards Y's best interests as a result of their relationship — a fiduciary relationship between B and F may be said to exist.

The fiduciary relationship between B and F arises as a result of the transfer of powers from B to F since F possesses the ability to affect B's interests; B's interests, for investment purposes, may only be served by F (since only F is empowered to act in that capacity); F is obligated to act in B's best interests by virtue of their arrangement; and, as a result of their relationship, B relies upon F's honesty, integrity, and fidelity. Prior to this transaction of powers, both B and F had complete and equal powers — Q. Once the transfer was completed, the power relations tilted in favour of F, since F's powers now amount to Q + P, whereas B only possesses Q - P.

## V. RATIONALIZING THE MISCHARACTERIZATION OF VULNERABILITY

ONE POSSIBLE REASON for the mischaracterization of vulnerability as a prerequisite to the finding of a fiduciary relationship may be the excessive juridical categorization of acceptable classes of fiduciary relations. Ironically, many juridical attempts to explain the nebulous fiduciary relation have actually created the confusion that presently surrounds it. These attempts have led many to incorrectly believe that fiduciary relations are restricted to the paradigms established in their illustrations. Unfortunately, their illustrations are almost invariably relationships between patently unequal parties. One such example may be seen in *Follis v. Albemarle TP.*, where McTague J.A. stated that:

[i]t seems to me ... that there must be established some inequality of footing between the parties, either arising out of a particular relationship, as parent and child, guardian and ward, solicitor and client, trustee and *cestui que trust*, principal and agent, etc., or on the other hand, that it can be established that dominion was exercised by one person over another, no matter how the particular relationship may be categorized.<sup>29</sup>

Indeed, the most common illustrations of fiduciary relationships used by judges and scholars are more closely related to guardian-ward relations than to those between partners in a professional services firm. The Supreme Court of Canada has participated in perpetuating the myth that fiduciary relations exist only between

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<sup>28</sup> A fiduciary relationship may arise as a result of: (i) the parties voluntarily entering into such an arrangement; (ii) the unilateral actions of a would-be fiduciary; (iii) the nature of the intercourse between the parties; or (iv) its imposition by the courts. Moreover, it may arise where neither of the parties intended to create such a relationship.

<sup>29</sup> *Supra* note 5 at 181.

unequal parties.<sup>30</sup> However, its recent decision in *Hodgkinson v. Simms* has brought the court's internal debate over vulnerability as a necessary characteristic of fiduciary relations to a head.<sup>31</sup>

## VI. THE CONCEPT OF VULNERABILITY IN THE S.C.C.

WITH THE VARIOUS FORMULATIONS and theories of fiduciary doctrine in existence, it should not come as a surprise to discover that the Supreme Court of Canada has not acted all that differently in its own attempts to understand fiduciary doctrine over the past twenty-five years. During that time, the court has had the opportunity to grapple with fiduciary theory in a wide variety of circumstances.<sup>32</sup> Within the last decade, an even greater influx of cases dealing with fiduciary issues has resulted in the court's formulation of more concrete notions of the necessary factors that result in the creation of fiduciary relations. As La Forest J. noted in *Hodgkinson v. Simms*, the Supreme Court's most recent decision involving fiduciary relationships:

[a]s I stated in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision.<sup>33</sup>

With greater opportunities to consider cases involving fiduciary relationships, two distinct strands of thought have come to characterize the Supreme Court's more recent considerations of fiduciary doctrine and have competed to gain predominance in the court's understanding of what is required to found a fiduciary relationship. Each strand focusses upon the issue of vulnerability — specifically, whether it must be present in order for a fiduciary relationship to exist, and, if so, where it

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<sup>30</sup> See, in particular, *Frame v. Smith*, *supra* note 4, especially at 99–100; *LAC Minerals*, *supra* note 2 especially at 63, *per Sopinka J.*; *Canson Enterprises v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.); *Norberg v. Wynrib*, *supra* note 26; and *M. (K.) v. M. (H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.). Note also Flannigan, *supra* note 20 especially at 62–63.

<sup>31</sup> *Supra* note 2.

<sup>32</sup> See, for example, *Canadian Aero Service Ltd. v. O'Malley*, *supra* note 15 (senior corporate officers/directors to corporation); *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1973), 40 D.L.R. (3d) 303 (S.C.C.) (franchisor to franchisee); *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.) (federal government to Indian band); *Molchan v. Omega Oil and Gas Ltd.* (1988), 47 D.L.R. (4th) 481 (S.C.C.) (partnerships); *Frame v. Smith*, *supra* note 4 (custodial parent to non-custodial parent); *LAC Minerals*, *supra* note 2 (senior mining company to junior mining company); *Canson Enterprises Ltd. v. Boughton & Co.*, *supra* note 30 (solicitor to client); *Norberg v. Wynrib*, *supra* note 26 (doctor to patient); and *M. (K.) v. M. (H.)*, *supra* note 30 (father to daughter).

<sup>33</sup> *Supra* note 2 at 29.

fits within a proper consideration of fiduciary theory. These competing philosophies came to the forefront in *LAC Minerals Ltd. v. International Corona Resources Ltd.*<sup>34</sup> and appear to have reached their zenith in *Hodgkinson v. Simms*.

In *Hodgkinson*, La Forest J.'s majority decision appears to have reversed the trend that the majority decisions of the court had been following since the case of *Frame v. Smith*.<sup>35</sup> The Supreme Court's internal debate over vulnerability's proper place within fiduciary theory illustrates the greater debate still raging over the proper construction and application of fiduciary principles and, in particular, of the misconceptions surrounding fiduciary doctrine since its common law origins. However, to understand the full thrust of the Supreme Court's debate it is necessary to examine the cases in which this debate has flourished, beginning with *Frame v. Smith*.

### A. *Frame v. Smith*

The first of the Supreme Court of Canada's more recent investigations of fiduciary doctrine came under comparatively unusual circumstances. *Frame v. Smith* involved a dispute over the custody of a child and the enforcement of parental rights of access. Upon the separation of the appellant and respondent, the respondent wife, Smith, was granted custody of the three children of the marriage. Frame commenced an action against his former wife for damages, alleging that she deliberately interfered with his access rights. He alleged that this interference caused him severe emotional and psychiatric distress, as well as considerable expense.

In response to Frame's action, Smith moved for an order to strike out the statement of claim as disclosing no cause of action. The motion was granted and upheld on appeal. At the Supreme Court of Canada, Frame's appeal was dismissed by a majority decision. What is significant about the case, for present purposes, is Wilson J.'s dissenting judgment. While she agreed with the majority that Frame's statement of claim disclosed no cause of action in tort, she disagreed with the majority's conclusion that the statement of claim did not give rise to an action for breach of fiduciary duty.<sup>36</sup>

Wilson J.'s inquiry deviated from the practice common to contemporaneous juridical examinations of fiduciary doctrine. Instead of approaching the question

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<sup>34</sup> *Supra* note 2.

<sup>35</sup> *Supra* note 4. Incidentally, the only discussion of fiduciary doctrine in that case came in Wilson J.'s dissenting judgment, but her reasoning was later adopted by the majority decision in *LAC Minerals* and existed as unchallenged authority until the court's decision in *Hodgkinson v. Simms*.

<sup>36</sup> Although the possibility of an action for breach of fiduciary duty was not advanced by Frame's counsel in his original material, the Supreme Court felt that the issue needed to be addressed before it ruled on whether the statement of claim should be struck for disclosing no cause of action.

of whether a fiduciary obligation existed by reference to standard categories of fiduciary relationships,<sup>37</sup> she attempted to find a general fiduciary principle from which to base her analysis. Her inquiry led her to formulate three general characteristics of relationships in which she stated fiduciary obligations have been held to exist:

- (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.<sup>38</sup>

On its face, Wilson J.'s third characteristic appears to be consistent with the above discussion of vulnerability's role within the confines of fiduciary doctrine. She explained that the beneficiary's vulnerability

... arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.<sup>39</sup>

From Wilson J.'s discussion of vulnerability in *Frame*, it is apparent that her understanding of it is not synchronous with the argument put forward herein or, for that matter, with her initial explanation of the concept and when it arises.

Wilson J. held that, as a result of the requirement that beneficiaries be vulnerable to the actions of their fiduciaries, "fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length."<sup>40</sup> She determined that the equal positions of these type of businessmen ought to allow them to deal with any vulnerability arising from their transactions on the basis of voluntary agreements rather than having fiduciary law imposed upon their dealings:

[t]he law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, *i.e.*, any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.<sup>41</sup>

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<sup>37</sup> See *supra* note 5 and its accompanying text.

<sup>38</sup> *Frame v. Smith*, *supra* note 4 at 99.

<sup>39</sup> *Ibid.* at 100.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

Under Wilson J.'s explanation of vulnerability in *Frame*, there is a definite inequality in power between fiduciaries and beneficiaries that is not evident from a straightforward reading of her third characteristic of fiduciary relationships. Indeed, the implications arising from her third characteristic do not necessarily entail that there must be any inequality of bargaining power between the parties. As the above discussion of Inequality theory reveals, beneficiaries are vulnerable to the actions of their fiduciaries within the confines of their fiduciary relationships as a result of their respective positions within those relationships, rather than from any pre-existing inequality of the parties. Therefore, the inequality existing within a fiduciary relationship may apply as easily to parties of equal bargaining strength as to parties of unequal bargaining strength.

Wilson J.'s analysis in *Frame* may be seen to stand for the proposition that fiduciary doctrine should intervene only in situations where beneficiaries are incapable of protecting their interests from being taken advantage of by their fiduciaries as a result of some pre-existing inequality in their positions *vis-a-vis* their fiduciaries. Under her formulation, where parties are inherently unequal, fiduciary doctrine properly regulates the nature of their interaction. However, where the parties are essentially equal, as in commercial settings, she deemed the law of the marketplace to be sufficient to the task of protecting the parties' respective interests.

### ***B. Lac Minerals Ltd. v. International Corona Resources Ltd.***

The *LAC Minerals* case is the most highly publicized of the Supreme Court's more recent decisions on fiduciary doctrine. It is also one of the court's most notorious decisions in the area. It built upon Wilson J.'s characterization of fiduciary doctrine in *Frame v. Smith* and, in so doing, initiated the court's full-blown investigation of the fiduciary concept. The *LAC Minerals* case also marked the origins of the court's doctrinal split over vulnerability's place within fiduciary doctrine.

International Corona Resources Ltd. ("Corona") was a junior mining company on the Vancouver Stock Exchange ("VSE"). In the process of conducting exploratory drilling on a piece of land it owned in Northern Ontario, it discovered that neighbouring properties, including one owned by a Mrs. Williams, were likely to be significantly gold-bearing and should be acquired. In order to acquire these adjacent properties, Corona needed additional financial backing, and accordingly released some information about its findings to the VSE, which in turn published the information in its newsletter. Officials from LAC Minerals Ltd. ("LAC"), a senior mining company on the VSE, read the newsletter and arranged to meet with Corona officials and view the Corona property.

LAC officials were shown maps, results, and a drilling plan by Corona. More importantly, they were informed of Corona's theory about possible gold deposits on the adjacent properties. After the meeting, LAC officials gathered information on the adjacent properties and went to the Assessment Office of the Ontario Depart-

ment of Mines to obtain copies of all claim maps, reports, publications, and assessment work files available on the area. LAC then began to stake claims to the areas adjacent to the Corona and Williams properties.

At a second meeting between Corona and LAC officials, LAC was told that Corona was interested in staking claims in the Williams property. LAC proposed that the two companies work together, whereupon discussions of how such a joint venture would take form began. At a subsequent meeting, Corona informed LAC that it had hired an agent to acquire the Williams property. Shortly thereafter, Corona's agent, who had already made a formal offer on the Williams property, was told by Mrs. Williams that she had received a higher offer. The other offer, unbeknownst to Corona, was from LAC. LAC's offer was successful and it began to develop the Williams property on its own. When Corona discovered what LAC had done, it requested that LAC transfer the property to it. No agreement between the two companies was reached and Corona initiated proceedings against LAC for breach of contract, breach of confidence and breach of fiduciary duty.

At trial, LAC was found to have breached its duty of confidence and its fiduciary obligations to Corona.<sup>42</sup> The trial judgment was upheld by the Ontario Court of Appeal. LAC's appeal to the Supreme Court of Canada was unsuccessful. The Supreme Court found LAC liable on the grounds of a breach of duty not to use confidential information, thereby rendering LAC a constructive trustee. However, the court's majority decision<sup>43</sup> held that no fiduciary relationship existed between LAC and Corona. La Forest and Wilson JJ., dissenting, held that there was, indeed, a fiduciary relationship between the parties. They did not, however, agree upon the reason why the fiduciary relationship existed.

The majority judgment, rendered by Sopinka J., wholeheartedly adopted the understanding of fiduciary doctrine formulated by Wilson J. in *Frame v. Smith*.<sup>44</sup> In accordance with Wilson J.'s view of vulnerability in *Frame*, he held that the judiciary will rarely find the existence of fiduciary relationships in the context of arm's length commercial transactions. Rather than basing his rationale on the freedom of contract, as Wilson J. had done in *Frame*, Sopinka J. held that the implementation of fiduciary doctrine should be used only when absolutely necessary, due to the

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<sup>42</sup> The claim for breach of contract was dismissed, since no contract had been signed between the parties.

<sup>43</sup> Per Sopinka, McIntyre, and Lamer JJ.

<sup>44</sup> LAC Minerals, *supra* note 2 at 62: "... certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith* ..."

consequences attached to the finding of a breach of such a relationship.<sup>45</sup> Instead of imposing fiduciary obligations on parties “willy-nilly,” Sopinka J. held that “equity’s blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.”<sup>46</sup>

In elaborating upon Wilson J.’s three characteristics in *Frame v. Smith*, Sopinka J. held that vulnerability was the only characteristic indispensable to the existence of fiduciary relations.<sup>47</sup> He determined that the trial judge and Court of Appeal erred in not giving enough weight to the key element of vulnerability in arriving at their conclusions.<sup>48</sup> The fact that Corona revealed confidential information to LAC and subsequently relied upon LAC not to divulge that information or use it against Corona’s own interests did not, in his view, impose a fiduciary duty upon LAC since the two companies were experienced businesses dealing at arm’s length:

[w]hile it is perhaps possible to have a dependency of this sort [that between parent and child, priest and penitent, and the like] between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact that they [Corona] were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary.<sup>49</sup>

If Corona was placed in a vulnerable position as a result of informing LAC of its confidential information, Sopinka J. held that Corona voluntarily placed itself

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<sup>45</sup> *Ibid.* at 60.

<sup>46</sup> *Ibid.* at 61.

<sup>47</sup> *Ibid.* at 63. To further corroborate his argument he cited the *Hospital Products* case, *supra* note 13 at 488, *per* Dawson J.: “[t]here is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is 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 other”; Weinrib, *supra* note 19 at 7: “... the hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other’s discretion”; and D.S.K. Ong, “Fiduciaries: Identification and Remedies” (1986) 8 U. Tasmania L. Rev. 311 at 315, where he stated that the element common to all fiduciary relationships is “implicit dependency, objectively expected, by one person upon another in the latter’s execution of a specific task or specific tasks for the former.”

<sup>48</sup> *LAC Minerals*, *supra* note 2 at 64.

<sup>49</sup> *Ibid.* at 68. Note that Sopinka J. cites Wilson J.’s statements in *Frame v. Smith* that fiduciary obligations seldom arise in dealings between experienced businessmen of similar bargaining strength acting at arm’s length: see *supra* note 40. In making this statement, Sopinka J. ignored the commentary by Ernest Weinrib in “The Fiduciary Obligation”, *supra* note 19 at 7, where he stated that “[a]n agent surely would not be heard to say that he had no fiduciary duty because his principal was a man of business experience who had created the agency relation with his eyes open.” See the commentary in notes 53–55, *infra*, as well as the accompanying text, regarding Sopinka J.’s selective use of sources.



in that position. Due to the voluntariness of its actions, Corona could not then expect to receive the protection of fiduciary doctrine:

[i]f Corona placed itself in a vulnerable position because Lac was given confidential information, then this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from LAC that it would not acquire the Williams property unilaterally.<sup>50</sup>

In making this statement, Sopinka J. failed to recognize that it is immaterial to the finding of a fiduciary relationship whether an undertaking is gratuitously incurred.<sup>51</sup> Furthermore, by placing its trust and confidence in LAC for the purpose of negotiating a joint venture for the development of the Williams property without LAC's objection, Corona was under no obligation to take positive action to ensure that LAC would not use the information it had obtained to Corona's detriment.<sup>52</sup>

In addition to these deficiencies inherent in Sopinka J.'s judgment, the sources that he relied upon to corroborate his view that vulnerability is the only characteristic indispensable to the existence of fiduciary relations actually refute that argument. The judgments rendered in the *Hospital Products* case, for example, maintain either that inequality in bargaining power is not a requirement of fiduciary relations,<sup>53</sup> or that vulnerability is merely a consequence of fiduciary relations.<sup>54</sup> Moreover, Ernest Weinrib clearly stated in "The Fiduciary Obligation" that vulnerability is not the *sine qua non* of fiduciary relationships.<sup>55</sup> Finally, the statement by D.S.K. Ong in "Fiduciaries: Identification and Remedies" — that the element common to all fiduciary relationships is "implicit dependency, objectively expected, by one person upon another in the latter's execution of a specific task or specific tasks for the former"<sup>56</sup> — implies that a beneficiary's vulnerability occurs only as a result of a fiduciary relationship. From these observations, Sopinka J.'s attempts

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<sup>50</sup> *LAC Minerals*, *supra* note 2 at 69.

<sup>51</sup> See, for example, A.W. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539 at 540; Sealy, *supra* note 3 at 76; and *Lyell v. Kennedy* (1889), 14 A.C. 437 at 463 (H.L.), *per* Lord McNaghten: "[n]or do I think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever."

<sup>52</sup> See *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 8 E.T.R. 219 at 228 (S.C.C.); *Midcon Oil & Gas Limited v. New British Dominion Oil Company Limited* (1958), 12 D.L.R. (2d) 705 at 716 (S.C.C.), *per* Rand J., dissenting; Ellis, *supra* note 2 at 2–22.

<sup>53</sup> See *supra* note 18, *per* Gibbs C.J.

<sup>54</sup> See *Hospital Products*, *supra* note 23, *per* Mason J. and Waters, *supra* note 23.

<sup>55</sup> See *supra* note 19.

<sup>56</sup> See *supra* note 47.

to corroborate his position on vulnerability may be seen to either misinterpret these sources or reflect his extrication of discrete points while ignoring contrary arguments within the same sources.

In opposition to Sopinka J.'s majority decision, Wilson J. determined that a fiduciary relationship did exist between LAC and Corona. However, in making that determination she also adhered to her earlier analysis in *Frame v. Smith*. She held that the fiduciary relationship did not arise as a result of the parties' arm's length negotiations over the development of the properties. Instead, she found that it came about as a result of the information made available by Corona to LAC, resulting in the former's vulnerability and the latter's duty not to use the information for its own benefit:

[i]t is my view that, while no ongoing fiduciary relationship arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary duty arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to LAC's misuse of that information. At that point LAC came under a duty not to use that information for its own exclusive benefit. LAC breached that fiduciary duty by acquiring the Williams property for itself.<sup>57</sup>

La Forest J., also finding the existence of LAC's fiduciary obligations towards Corona,<sup>58</sup> disagreed with the formulations of fiduciary doctrine espoused by both Sopinka and Wilson JJ.<sup>59</sup> He held that vulnerability is not

... a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation.<sup>60</sup>

La Forest J. held that persons are vulnerable "if they are susceptible to harm, or open to injury" and are only vulnerable to a fiduciary if the fiduciary may inflict

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<sup>57</sup> *LAC Minerals*, *supra* note 2 at 16.

<sup>58</sup> Although he held that his finding of LAC's fiduciary obligations was not strictly necessary for the outcome of the case: see *LAC Minerals*, *supra* note 2 at 25–26.

<sup>59</sup> *LAC Minerals*, *supra* note 2 at 19: "... I have a conception of fiduciary duties different from that of my colleague, and I would hold that a fiduciary duty, albeit of limited scope, arose in this case."

<sup>60</sup> *Ibid.* at 39. La Forest J. agreed with Wilson J.'s proposition put forward in *Frame* — that beneficiaries' vulnerability is relevant to determining if new classes of relationship ought to give rise to fiduciary obligations — but held that that consideration was not relevant in the matter before him: see *ibid.* at 39–40.

such harm or injury.<sup>61</sup> However, as in the case of *Keech v. Sandford*,<sup>62</sup> he demonstrated that fiduciary duties may be breached without resulting in harm to a beneficiary:

I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. ... [T]he issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that the other would act or refrain from acting in a way contrary to the interests of that other.<sup>63</sup>

From his stance in *LAC Minerals*, La Forest J.'s understanding of vulnerability within the context of a fiduciary relationship is neither that beneficiaries must be inferior in power to their fiduciaries, nor that they must be at the mercy of the latter's actions. Rather, his understanding suggests that, having regard to all the facts and circumstances, fiduciaries must be capable of adversely affecting their beneficiaries' interests by virtue of their positions *vis-a-vis* their beneficiaries. While fiduciaries do possess the ability to affect their beneficiaries' interests as a result of their fiduciary positions, the mere fact that a person possesses the power to act in a manner contrary to the interests or desires of another does not necessarily give rise to a fiduciary relationship.<sup>64</sup>

### ***C. Canson Enterprises Ltd. v. Boughton & Co.***

After *LAC Minerals*, the next major fiduciary case before the Supreme Court of Canada was *Canson Enterprises Ltd. v. Boughton & Co.*<sup>65</sup> In that case, the appellants, Canson Enterprises Ltd. ("Canson") and Fealty Enterprises Ltd. ("Fealty") and the respondent, Peregrine Ventures Inc. ("Peregrine"), agreed to purchase a property and develop it as a joint venture on the recommendation of the respondent, Treit. Under their agreement, Treit was to be paid a 15% commission on any profit from the property's resale.

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<sup>61</sup> *Ibid.* at 40.

<sup>62</sup> *Supra* note 1. The case is briefly summarized in the text of note 15, *supra*.

<sup>63</sup> *LAC Minerals*, *supra* note 2 at 40.

<sup>64</sup> For example, two people bidding against each other at an auction possess the ability to act in a manner contrary to the other's interests — for example, by increasing his or her bid for the object being bid upon, thereby increasing its price — but neither may be said to be bound by fiduciary duties to each other or to competing bidders. Note also La Forest J.'s illustration of this point in *LAC Minerals*, *supra* note 2 at 40: "[e]ach director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the actions of each and every director. Nonetheless, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.

<sup>65</sup> *Supra* note 30.

Prior to this transaction, Sun-Mark Development Corporation ("Sun-Mark") had entered an interim agreement with the vendors of the property, the Hendersons, to purchase the property for \$410,000. Unknown to Canson and Fealty, but known to Peregrine, Treit had an arrangement with Sun-Mark that he and Sun-Mark would share equally in the profit from the sale of the Henderson property to the joint venturers. The Henderson property was sold to the joint venturers for \$525,000, resulting in a profit of \$57,500 for each of Treit and Sun-Mark. According to the agreed upon statement of facts by which the case was brought forward,<sup>66</sup> Canson and Fealty would not have purchased the property or entered into the joint venture had they known of Treit's agreement with Sun-Mark.

The appellants' allegations of breach of fiduciary duty came about from the actions of the respondent Boughton & Co. ("Boughton"), a law firm that acted on behalf of Canson, Fealty, and Peregrine regarding their purchase of the Henderson property and their joint venture agreement. The same lawyer at Boughton, Wollen, also acted for Sun-Mark in its purchase and resale of the Henderson property.

At no time did Wollen inform the appellants that the property was being purchased through an intermediary. To conceal this fact, Wollen drew up two different statements of adjustments, one for the Hendersons showing the price to be \$410,000, and one for Canson, Fealty, and Peregrine, showing the price to be \$525,000. The second statement of adjustments indicated that the vendor was not Sun-Mark, but the Hendersons. Upon the sale of the property to the joint venture, Wollen paid the \$115,000 profit to Sun-Mark without disclosing the existence of the secret profit to Canson and Fealty. The conveyance prepared by Wollen indicated a transfer of the property directly from the Hendersons to the joint venturers, but the bill for his services rendered and the associated costs of both transactions were submitted entirely to the joint venturers.

After their purchase of the property, Canson, Fealty, and Peregrine proceeded with their development. A warehouse constructed on the property was damaged when its supporting piles began to sink. The joint venturers successfully sued the soil engineers and pile-driving company relating to the warehouse damage. However, the engineers and pile-driving company were unable to pay the amount awarded and the company holding the mortgage on the property foreclosed. The proceeds of settlement of the lawsuit were apportioned between Canson, Fealty, and Peregrine.

In an attempt to recover the shortfall between the proceeds they obtained and their losses suffered, Canson and Fealty initiated proceedings against Boughton, Peregrine, and Treit. The appellants alleged that the respondents' failure to disclose the secret profit constituted deceit or a breach of fiduciary duty. The sole issue to

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<sup>66</sup> The appellants' claim was brought forward as a Special Case pursuant to Rule 33 of the *British Columbia Supreme Court Rules*.

be determined by the British Columbia Supreme Court was whether the respondents were liable to the appellants in damages and to what extent.

The British Columbia Supreme Court held that, on the facts placed before it, Boughton was liable for breach of fiduciary duty for failing to disclose the secret profit, but not for deceit. Both the British Columbia Court of Appeal and the Supreme Court of Canada unanimously upheld the trial judge's ruling on appeal.

The two separate understandings of vulnerability arising in Sopinka and La Forest JJ.'s decisions in *LAC Minerals* were not discussed by the Supreme Court in *Canson*. However, McLachlin J.'s brief reference to *LAC Minerals* in her judgment glossed over the significant difference between Sopinka and La Forest JJ.'s divergent views on vulnerability. In affirming Wilson J.'s notions of fiduciary doctrine established in *Frame v. Smith*, McLachlin J. explained that Wilson J.'s statements in *Frame* were approved by both Sopinka and La Forest JJ. in *LAC Minerals*. However, she did not mention La Forest J.'s different understanding of vulnerability. By not mentioning La Forest J.'s explicit rejection of Sopinka J.'s characterization of vulnerability as an essential requirement of fiduciary relations in *LAC Minerals*, McLachlin J. implied that their judgments in that case are compatible, whereas this is clearly not so.<sup>67</sup>

#### D. *Norberg v. Wynrib*

*Norberg v. Wynrib*<sup>68</sup> and the Supreme Court of Canada's contemporaneous decision in *McInemey v. MacDonald*<sup>69</sup> were noteworthy upon their release for their indication of the extent of the doctor-patient fiduciary relationship. Although the fiduciary nature of doctor-patient relationships was not a new phenomenon,<sup>70</sup> these cases extended the obligations arising under such relationships beyond previously-held realms. In addition to its discussion of the doctor-patient relationship, *Norberg v.*

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<sup>67</sup> As the court's later decision in *Hodgkinson v. Simms*, *supra* note 2, indicates, Sopinka and La Forest JJ.'s respective characterizations of vulnerability are clearly not reconcilable. In *Hodgkinson*, McLachlin J. sided with Sopinka J.'s formulation of vulnerability's place within fiduciary relationships. Her siding with Sopinka J. in *Hodgkinson* was foreshadowed by her treatment of the vulnerability concept in the Supreme Court's earlier decision in *Norberg v. Wynrib*, *supra* note 26.

<sup>68</sup> *Supra* note 26.

<sup>69</sup> *Supra* note 20.

<sup>70</sup> See, for example, *Rowe v. Grand Trunk Railway Co.* (1866), U.C.C.P. 500; *Mitchell v. Homfray* (1881), 8 Q.B.D. 587 (C.A.); *Williams v. Johnson*, [1937] 4 All E.R. 34 (P.C.); *Hunter v. Mann*, [1974] Q.B. 767; *Tannock v. Bromley* (1979), 10 B.C.L.R. 62 (S.C.); *Nixdorf v. Hicken*, 612 P.2d 348 (S.C. Utah 1980); *Krueger v. San Francisco Forty Niners*, 234 Cal. Rep. 579 (C.A. 1987); *Weisenger v. Mellor* (1989), 16 A.C.W.S. (3d) 260 (B.C.S.C.); *Ellis*, *supra* note 2 at 10-1 to 10-22; and *Vinter*, *supra* note 1 at 7-85.

Wynrib marked McLachlin J.'s foray into the Supreme Court's debate over the concept of vulnerability.<sup>71</sup>

The *Norberg* case revolved around a situation in which a female patient addicted to drugs was prescribed drugs by her physician in exchange for sexual favours. The patient, Norberg, had become addicted to drugs while in her late teens. She had been suffering severe headaches and excruciating pain in her jaw. She was prescribed various types of pain-killers, but as her pain worsened, her dosages were increased. Norberg's sister, a drug addict, gave her Fiorinal, a pain-killer drug. By the time the source of Norberg's pain was linked to an abscessed tooth and eliminated, she was addicted to Fiorinal.

Norberg began to see Dr. Wynrib, an elderly medical practitioner, in 1982. She obtained Fiorinal prescriptions from him until he confronted her about her addiction later that year. At that time, Dr. Wynrib told Norberg that he would continue to prescribe Fiorinal for her in exchange for sexual favours. Norberg sought her drugs elsewhere until she could no longer obtain an adequate supply. In desperation, she returned to Dr. Wynrib at the end of 1983 and acceded to his demands. Over the course of the next year or so, Norberg regularly visited Dr. Wynrib and exchanged sexual acts for Fiorinal.

Norberg was later convicted of obtaining prescription drugs from more than one physician under the *Narcotic Control Act*. After successfully completing drug rehabilitation, she launched an action against Dr. Wynrib for sexual assault, negligence, breach of fiduciary duty, and breach of contract.

At trial, Dr. Wynrib was found liable only for a breach of professional duty. The British Columbia Court of Appeal dismissed Norberg's appeal. The majority decision of the Supreme Court of Canada unanimously upheld Norberg's further appeal, with Sopinka and McLachlin JJ. dissenting only as to the quantum of damages awarded.

La Forest J.'s majority judgment held that in the relationship between Norberg and Dr. Wynrib, Dr. Wynrib used the power and knowledge obtained from his position to initiate the arrangement and exploit her vulnerability.<sup>72</sup> La Forest J. did not, however, characterize the relationship as fiduciary. Instead, he treated Norberg's claim on the basis of the tort of battery.<sup>73</sup>

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<sup>71</sup> While McLachlin J. did discuss fiduciary doctrine in *Canson Enterprises Ltd. v. Boughton & Co.*, *supra* note 30, she did not include a discussion of vulnerability aside from the implications arising from her reconciliation of Sopinka and La Forest JJ.'s decisions in *LAC Minerals*.

<sup>72</sup> *Norberg*, *supra* note 26 at 467.

<sup>73</sup> *Ibid.* at 459: "[t]he Court of Appeal in the instant case was unwilling to characterize the relationship between the appellant and the respondent as a fiduciary relationship. Since I am dealing with the case on the basis of the assault claim, I need not consider this point."

Sopinka J. held that the case ought to be resolved on the basis of Dr. Wynrib's duty to treat Norberg arising out of their doctor-patient relationship.<sup>74</sup> He rejected La Forest J.'s focus on battery, looking instead to what he described as the non-fiduciary aspects of their relationship — the contractual or tortious breach of Dr. Wynrib's duty to his patient. Sopinka J. concluded that the only duty applicable to Dr. Wynrib was "the obligation of a physician to treat the patient in accordance with standards in the profession."<sup>75</sup>

In opposition to La Forest and Sopinka JJ. — and not without her sharp criticism of their respective methods of analysis<sup>76</sup> — McLachlin J. held that the relationship between Norberg and Dr. Wynrib ought to be examined solely on the basis of fiduciary duty:

... to look at the events which occurred over the course of the relationship between Dr. Wynrib and Ms. Norberg from the perspective of tort or contract is to view that relationship through lenses which distort more than they bring into focus. Only the principles applicable to fiduciary relationships and their breach encompass it in its totality.<sup>77</sup>

Her subsequent discussion of the fiduciary nature of the doctor-patient relationship quoted Wilson J.'s analysis of fiduciary doctrine in *Frame v. Smith* with approval.

Since she held the relationship to be fiduciary, McLachlin J. determined that it ascribed to what she called "the peculiar hallmark of the fiduciary relationship," namely "the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests."<sup>78</sup> In finding that Dr. Wynrib "had scope for the exercise of power and discretion with respect to her," that he could "unilaterally exercise that power or discretion in a way that affected

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<sup>74</sup> *Ibid.* at 473.

<sup>75</sup> *Ibid.* at 481.

<sup>76</sup> *Ibid.* at 494–95. At 495, she stated that: "[n]one of the appellate judges who have written on the case offers a convincing demonstration of why it is wrong to characterize the relationship between Dr. Wynrib and Ms. Norberg as a fiduciary relationship; indeed none of the judgments seriously discusses the legal requirements for establishing the existence of a fiduciary duty or its breach, much less considers the facts in relation to those requirements." She also criticized Sopinka J. in particular for what she viewed as his "closed, commercial view of fiduciary obligations," holding that it "is neither defended nor reconciled with the authorities, including those of this court": *ibid.* at 495. In criticizing La Forest and Sopinka JJ., McLachlin J. may have sparked those two judges to elaborate upon their views of fiduciary doctrine in the Supreme Court of Canada's subsequent decisions in *M. (K.) v. M. (H.)*, *supra* note 30 and *Hodgkinson v. Simms*, *supra* note 2.

<sup>77</sup> *Norberg*, *supra* note 26 at 484. To corroborate her view that the relationship was fiduciary in nature, she relied upon La Forest J.'s judgment in *McInerney v. MacDonald*, *supra* note 20.

<sup>78</sup> *Norberg*, *supra* note 26 at 486.

her interests,” and that Norberg’s status as a patient “rendered her vulnerable and at his mercy,” McLachlin J. held that “Wilson J.’s test [from *Frame*] appears to be met.”<sup>79</sup> She further held that on the basis of the facts, “[a]ll the classic characteristics of a fiduciary relationship were present.”<sup>80</sup>

McLachlin J. held that doctor-patient relationships are characterized by patients’ vulnerability to their doctors regardless of whether the patients are physically vulnerable. As she explained, ‘the patient, by reason of lesser expertise, the “submission” which is essential to the relationship, and sometimes, as in this case, by reason of the nature of the illness itself, is typically in a position of comparative powerlessness.’<sup>81</sup> She also found that societal influences contributed to a heightened degree of patient vulnerability and that women are particularly vulnerable to sexual exploitation by physicians.<sup>82</sup> Due to Norberg’s drug addiction, McLachlin J. determined that she was even more vulnerable and in need of fiduciary law’s protection than the average patient.<sup>83</sup>

McLachlin J.’s position on vulnerability’s role in *Norberg v. Wynrib* appears to vacillate between Sopinka and La Forest JJ.’s stances in *LAC Minerals*. On one hand, she stated that beneficiaries in such relationships, while they do not need to be vulnerable *per se*,<sup>84</sup> are, in fact, vulnerable to their fiduciaries due to their weaker position: “the fiduciary approach ... is founded on the recognition of the power imbalance inherent in the relationship between fiduciary and beneficiary, and to giving redress where that power imbalance is abused.”<sup>85</sup> However, she also stated that “an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition.”<sup>86</sup> It was not until the Supreme Court’s decision in *Hodgkinson v. Simms* that she adopted a definite side in her understanding of vulnerability.

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<sup>79</sup> *Ibid.* at 489.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at 492.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 493.

<sup>84</sup> *Norberg*, *supra* note 26 at 491, quoting Frankel, *supra* note 21 at 810.

<sup>85</sup> *Norberg*, *supra* note 26 at 499. See also *ibid.* at 491: “[i]t 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 law.” To corroborate this latter point, she relied upon Wilson J.’s statement in *Frame v. Smith* that “fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm’s length”: see *supra* note 40.

<sup>86</sup> *Ibid.* at 501.



**E. M.(K.) v. M.(H.)**

This case concerned the ability of a woman who had been sexually abused by her father while she was a child to claim damages against him eleven years after the assaults had ended. The abuse began when the appellant was eight years old and continued until she left home at age seventeen.

The appellant had attempted to tell others about the incest on three previous occasions. When she was eleven years old, she attempted to tell her mother. Later, when she was sixteen, she told a school counsellor. After she was married, she told her husband. Nothing ever came of these disclosures. It was only after she had commenced therapy treatments that she realized that her father was responsible for the abuse and that his actions were the cause of her psychological problems. She then commenced proceedings against her father, seeking damages for assault and battery and breach of fiduciary duty.

At trial and upon appeal, her action was held to be statute-barred due to a lapse of the applicable statutory limitation period. The majority decision of the Supreme Court of Canada held that the appellant's claim was not prohibited by the lapse of statutory limitations on any of its grounds.

La Forest J. seized the opportunity in *M.(K.) v. M.(H.)* to recapitulate his understanding of fiduciary doctrine and to comment upon McLachlin J.'s criticism of his analysis in *Norberg v. Wynrib*. He agreed with her statement in that case that it is improper to overlook a claim of breach of fiduciary duty where concurrent common law claims existed, as he had done in *Norberg*. Although he found that the appellant's common law claims in *M.(K.) v. M.(H.)* fit the circumstances of the case, he reviewed a number of the Supreme Court's previous decisions on fiduciary doctrine to avoid replicating his mistake in *Norberg*.

La Forest J. traced the evolution of the Supreme Court's thinking on fiduciary doctrine from *Guerin v. R.*<sup>87</sup> through *Frame v. Smith*,<sup>88</sup> *LAC Minerals*,<sup>89</sup> *Canson Enterprises Ltd. v. Boughton & Co.*,<sup>90</sup> and *McInerney v. MacDonald*<sup>91</sup> in concluding that: "[o]ver the past decade, this court has explored the scope of fiduciary obligations, and we have perhaps reached the point where a 'fiduciary principle' can be applied through a well-defined method."<sup>92</sup> His discussion focused, however, upon Wilson J.'s decision in *Frame v. Smith* due to its similarities with the matter arising

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<sup>87</sup> *Supra* note 32.

<sup>88</sup> *Supra* note 4.

<sup>89</sup> *Supra* note 2.

<sup>90</sup> *Supra* note 30.

<sup>91</sup> *Supra* note 20.

<sup>92</sup> *M.(K.) v. M.(H.)*, *supra* note 30 at 323.

in *M.(K.) v. M.(H.)*. La Forest J. held that even a cursory examination of Wilson J.'s three indicia of fiduciary relationships formulated in *Frame* demonstrated that parents owe fiduciary obligations to their children: "[p]arents exercise great power over their children's lives, and make daily decisions that affect their welfare. In this regard, the child is without doubt at the mercy of her parents."<sup>93</sup> He stated that fiduciary obligations are imposed upon parents since "[t]he inherent purpose of the family relationship imposes certain obligations on a parent to act in his child's best interests."<sup>94</sup> The vulnerability of children to their parents, therefore, was clearly a key element in La Forest J.'s finding of a fiduciary relationship between the appellant and her abusive father.

La Forest J.'s heavy reliance upon children's vulnerability to their parents in *M.(K.) v. M.(H.)* does not indicate a rejection of his position in *LAC Minerals*. Although fiduciary relationships do not exist only between unequal parties, they may exist between parties whose power relations *vis-a-vis* each other are inherently unequal or were unequal prior to the formation of their fiduciary relationship.<sup>95</sup> The pervasiveness of vulnerability in the parent-child relationship is what renders that particular relationship fiduciary. Equally, though, the relationship between partners in a professional services firm produces fiduciary obligations in their professional interaction without any vulnerability necessarily existing outside of that relationship.

From these examples, it may be seen that the determination of whether a particular relationship is fiduciary is dependent upon the specific circumstances peculiar to that relationship. For this reason, fiduciary doctrine is appropriately characterized as *situation-specific*.<sup>96</sup> Relationships are properly described as fiduciary by reference to their facts and circumstances rather than by fitting within already-established categories of fiducial relations. Subsequently, there is no inconsistency in having fiduciary relations exist simultaneously in equal and patently unequal power relationships.

### F. *Hodgkinson v. Simms*

*Hodgkinson v. Simms* is more closely analogous to *LAC Minerals* than to *Norberg v. Wynrib* or *M.(K.) v. M.(H.)* because of the power relations of the parties involved *vis-a-vis* each other. It should be noted, however, that the principles relating to

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<sup>93</sup> *Ibid.* at 325.

<sup>94</sup> *Ibid.* at 326.

<sup>95</sup> See *supra* note 25.

<sup>96</sup> The situation-specificity of fiduciary doctrine is discussed in greater detail in Rotman, "Fiduciary Doctrine", *supra* note 9, and Rotman, *Parallel Paths*, *supra* note 9.

vulnerability applicable to *Hodgkinson* and to *LAC Minerals* are equally applicable to the patently unequal relations of the parties in *Norberg* and *M.(K.) v. M.(H.)*.

The appellant, a stockbroker inexperienced in tax planning, wanted an independent professional to advise him about tax planning and tax sheltering. He hired the respondent, Simms, a chartered accountant who specialized in providing tax shelter advice and investments, in particular real estate tax shelter investments.

Hodgkinson wanted to find ways to defer tax, but also acquire stable, long-term investments. Simms advised him to invest in multi-unit residential buildings, or MURBs, real estate investment projects which, by conventional wisdom at that time, were considered safe and conservative. Hodgkinson purchased 4 MURBs recommended by Simms. He later suffered heavy financial losses when their value plummeted due to a decline in the real estate market. After the market crash, all of the MURBs purchased by Hodgkinson were either sold at a loss or were the subject of foreclosures, thereby resulting in the loss of virtually all of his investments.

While acting upon Simms' recommendations, Hodgkinson believed that Simms was an independent and trustworthy advisor. This fact was important to Hodgkinson, who was wary of the high risk world of promoters in which he operated in his own job. He relied heavily upon Simms' advice and did not question him about it. However, he was unaware that Simms was also acting for the developers of the MURBs when Simms advised him to invest in them. He neither asked Simms about his involvement nor did Simms voluntarily disclose that information to him. At trial it was revealed that had Hodgkinson known of the nature and extent of Simms' involvement in the MURB projects, he would not have invested in them.

Hodgkinson brought an action against Simms for breach of fiduciary duty, breach of contract, and negligence in an attempt to recover his losses. The negligence claim was dismissed at trial and was not pursued upon appeal. The trial judge awarded damages for breach of fiduciary duty and breach of contract. The British Columbia Court of Appeal upheld the finding of breach of contract, but reversed the trial judge's conclusion as to breach of fiduciary duty and varied the damages awarded. Upon Hodgkinson's appeal to the Supreme Court of Canada, a majority decision held that his appeal should be allowed.

The issue of vulnerability took centre stage in the Supreme Court's judgments in *Hodgkinson*. La Forest J.'s majority judgment<sup>97</sup> adhered to his earlier findings in *LAC Minerals* in finding that vulnerability is not a requisite part of every fiduciary relationship. Sopinka and McLachlin JJ.'s vigorous dissenting judgment clung to

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<sup>97</sup> L'Heureux-Dube and Gonthier JJ. concurring, Iacobucci J. dissenting *viz.* distinguishing *LAC Minerals*: see *Hodgkinson*, *supra* note 2 at 160: "[a]lthough I agree with much of [La Forest J.'s] excellent reasons, I prefer to treat *Lac Minerals Ltd. v. International Corona Resources Ltd.* ... by simply distinguishing that case from the present one."

the principle that Sopinka J. had established as the majority's position in *LAC* — that vulnerability is the hallmark of the fiduciary relationship.

La Forest J. maintained that vulnerability is often a key characteristic of fiduciary relationships, but that its presence is neither necessary to give rise to a fiduciary relationship nor does it entail the automatic existence of fiduciary obligations:

[f]rom a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicia of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the “golden thread” that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.<sup>98</sup>

Unlike the requirements of the doctrine of unconscionability, he held that fiduciary relationships do not require a pre-existing inequality of the parties.<sup>99</sup> La Forest J. reconciled his findings in *Hodgkinson* with the notions of vulnerability expressed by Wilson J. in *Frame v. Smith* and the majority in *LAC Minerals* by explaining that Wilson J.'s three characteristics of fiduciary doctrine in *Frame* are merely *indicia* that help to recognize fiduciary relationships, not the ingredients that define those relations.<sup>100</sup> Accordingly, he determined that any concerns about extending fiduciary doctrine's application to arm's length commercial transactions did not apply to professional advisory relationships.<sup>101</sup>

As a result of what he viewed as fiduciary doctrine's desire to protect and reinforce the integrity of social institutions and enterprises, La Forest J. determined that the regulation of commercial transactions cannot always be left to the market-

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<sup>98</sup> *Hodgkinson*, *supra* note 2 at 25.

<sup>99</sup> *Ibid.* at 27: “... while the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability; see *Waters v. Donnelly* (1884), 9 O.R. 391 at 401; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 249.” To further buttress this assertion, he also cited *Weinrib*, *supra* note 19.

<sup>100</sup> *Hodgkinson*, *supra* note 2 at 30.

<sup>101</sup> *Ibid.* at 40: “[i]n sharp contrast to arm's length commercial relationships, which are characterized by self-interest, the essence of professional advisory relationships is precisely trust, confidence, and independence. Thus, the concern expressed by Wilson J. in *Frame*, *supra*, and echoed by Sopinka J. in *Lac Minerals*, *supra*, about the dangers of extending the fiduciary principle in the context of an arm's length commercial relationship is simply not transferrable to professional advisory relationships.”

place.<sup>102</sup> In making this assertion, La Forest J. echoed the sentiments expressed almost seventy years earlier by Cardozo J. in *Meinhard v. Salmon*:

[m]any forms of conduct permissible in a work-a-day world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.<sup>103</sup>

La Forest J.'s recognition of the need to hold fiduciaries' duties above the morals of the marketplace led him to reaffirm his previous findings in *LAC Minerals* that vulnerability is only the corollary of fiduciaries' ability to harm their beneficiaries. He determined that beneficiaries' vulnerability flows from the relative position of the parties in fiduciary relationships rather than having it create the fiduciary nature of those relationships. Consequently, and in direct opposition to Sopinka J.'s statements in *LAC Minerals*, he held that it was a mistake to overemphasize the ingredient of vulnerability in determining the existence of fiduciary relations.<sup>104</sup>

Sopinka and McLachlin JJ.'s dissenting judgment, with Major J. concurring, strenuously opposed La Forest J.'s characterization of vulnerability in *Hodgkinson*. On three separate occasions, their judgment emphasized the majority's determination in *LAC Minerals* that vulnerability is an indispensable ingredient in all fiduciary relationships.<sup>105</sup> A closer examination of the basis for their opinion demonstrates its limitations.

Sopinka and McLachlin JJ. characterized vulnerability as encompassing all three characteristics of fiduciary relationships listed by Wilson J. in *Frame v. Smith*. Under

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<sup>102</sup> *Ibid.* at 36.

<sup>103</sup> 164 N.E. 545 (1928) at 546 (N.Y.C.A.).

<sup>104</sup> *Hodgkinson*, *supra* note 2 at 45–46: "[a]s I stated in *Lac Minerals*, at p. 664, power and discretion in this context mean only the ability to cause harm. Vulnerability is nothing more than the corollary of the ability to cause harm, *viz.*, the susceptibility to harm. For this reason, it is undesirable to overemphasize vulnerability in assessing the existence of a fiduciary relationship." See also the comments made by Lambert J.A. in *Burns v. Kelly Peters and Associates Ltd.* (1988), 41 D.L.R. (4th) 577 (B.C.C.A.) at 600, where he stated that: "... the concept of vulnerability as expressed in the *Hospital Products* case is nothing other than a description of the victim's situation when he is in a position where the fiduciary can exert influence over him by abusing his confidence in order to obtain an advantage ..." This statement was cited with approval by La Forest J. in *Hodgkinson*, *supra* note 2 at 46.

<sup>105</sup> See *Hodgkinson*, *supra* note 2 at 119, 128, and 134. In addition, at 131, the Justices held that the beneficiary's vulnerability is the hallmark to which a court looks in determining whether a fiduciary relationship exists.

their formulation, vulnerability “comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other.”<sup>106</sup> However, they contended that vulnerability does not merely mean that one party is weak or weaker than the other, but connotes the beneficiary’s implicit dependency upon the fiduciary such that the beneficiary is at the latter’s mercy.<sup>107</sup> Sopinka and McLachlin JJ. further demonstrated their understanding that fiduciary relationships exist only between unequal parties in the following passage:

[p]hrases like “unilateral exercise of power”, “at the mercy of the other’s discretion” and “has given over that power” suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of a fiduciary obligation. Reliance is not a simple thing. ... To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.<sup>108</sup>

Sopinka and McLachlin JJ. held that professional advisory relationships are not worthy of the imposition of fiduciary doctrine since the parties to those relationships are not inherently unequal. They determined that since the person seeking the advisor’s assistance has the ability to decide whether or not to act on the advice given, that person is not at the mercy of the advisor. Consequently, under their mode of analysis, professional advisory relationships do not require the imposition of fiduciary doctrine’s “draconian” obligations upon advisors:

[t]he critical question, as noted earlier, is whether there is total assumption of power by the fiduciary, coupled with total reliance by the beneficiary. In short, that the beneficiary was vulnerable in the sense of being at the mercy of the fiduciary’s discretion. That is not, on the evidence, the sort of relationship which is before us on this appeal.<sup>109</sup>

For these reasons, Sopinka and McLachlin JJ. concluded that La Forest J.’s rejection of the majority’s reasons in *Lac Minerals* was incorrect.<sup>110</sup>

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<sup>106</sup> *Ibid.* at 129.

<sup>107</sup> *Ibid.* at 130.

<sup>108</sup> *Ibid.* at 132.

<sup>109</sup> *Ibid.* at 142.

<sup>110</sup> See *Hodgkinson*, *supra* note 2 at 134: “[w]e are unable to agree with our colleague, at p. 26, that the Court of Appeal ‘erred in importing the analysis in the *Lac Minerals* case to professional advisory relationships.’ ... The reasons of both the majority and minority in *Lac Minerals* canvassed the entire spectrum of fiduciary and potential fiduciary relationships. Professional relationships as such were not identified as a separate category which attracted special consideration.” See also *ibid.* at 135, where Sopinka and McLachlin JJ. stated: “[t]he analysis in *Lac Minerals* is, therefore, directly applicable to determine whether, applying the relevant criteria, fiduciary obligations should be extended to apply to this case. We see no reason to depart from the principles so recently stated

Sopinka and McLachlin JJ.'s dissenting judgment in *Hodgkinson* appears to be based as much upon an attempt to prevent La Forest J. from overturning the majority's view of vulnerability in *LAC Minerals* as to determining the issues in *Hodgkinson*. Ironically, the court's majority decision in *Hodgkinson* did not, technically speaking, repudiate the precedent established in *LAC Minerals*. Iacobucci J., despite agreeing with the disposition of the matter by La Forest J., preferred to treat *Hodgkinson* as distinguishing *LAC Minerals* rather than overturning it.<sup>111</sup>

Based on the situation created by *Hodgkinson*, it is unclear whether the Supreme Court's next major decision on fiduciary relationships will push ahead with La Forest J.'s vision of vulnerability in *Hodgkinson* or if it will advocate a return to Sopinka J.'s reasoning in *LAC Minerals*. For the reasons proffered herein, it is suggested that the former ought to prevail.

In writing on the *LAC Minerals* decision in 1990, Donovan Waters hypothesized that La Forest J.'s dissent would be the judgment which would receive greater attention down the road.<sup>112</sup> Based upon the swing in the court's stance on fiduciary doctrine in *Hodgkinson*, Waters' prediction would appear to have already come true.

## VII. CONCLUSION

THE CONTINUED EXISTENCE of the Supreme Court's debate over vulnerability demonstrates that the court's understanding of fiduciary doctrine has travelled a great distance during the past decade. It is equally clear from the court's decision in *Hodgkinson v. Simms*, in particular the vigorous dissent by Sopinka and McLachlin JJ., that the court's debate is far from over.

It may be seen from the above discussion of Inequality theory that beneficiaries' vulnerability stems entirely from their dependency upon their fiduciaries' *uberrima fides*, or utmost good faith, towards the former's best interests within the confines of fiduciary relationships. That being so, it is not possible for beneficiaries' vulnerability to give rise to the very entity that engenders that vulnerability. The description of relationships as fiduciary denotes law's imparting of its protection to parties who, by virtue of their positions in certain types of socially valuable relationships,

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in *Lac Minerals* by reason of a supposed distinction between professional advisers and other 'commercial interactions.' "

<sup>111</sup> See *supra* note 97.

<sup>112</sup> See Waters, *supra* note 23 at 472: "[t]hough it is the voice of only one member of the court, one senses that it is the theoretical thinking of [La Forest J.'s] judgment that is going to ring down through the years, rather as Laskin J.'s dissent in *Murdoch v. Murdoch* was to catch the imagination of the second half of the 1970s."

are susceptible to having their interests abused by the other participants in those relationships.

It is precisely because fiduciary relationships create vulnerability in beneficiaries, rather than vice-versa, that fiduciary doctrine seeks to protect beneficiaries through the imposition of its harsh sanctions. The rule against conflict of interest, for example,<sup>113</sup> is designed to simultaneously protect beneficiaries, deter fiduciaries from deviating from the fiduciary standard of *uberrima fides*, and penalize those fiduciaries who actually depart from it. A similar effect is achieved through the wide range of remedies available to a wronged beneficiary.<sup>114</sup>

Vulnerability is an inherent aspect of fiduciary relations, but it does not transcend the fiduciary aspect of particular relationships. It is a by-product of fiduciary relations rather than a primary ingredient in their creation. What should be emphasized in any examination of the fiduciary nature of a relationship is whether the nature of the parties' interaction is such that it ought to be presumed that one or more of the parties owes obligations of a fiduciary nature to one or more others. Pre-existing power relations are irrelevant. Once these fundamental premises are established and accepted, it is possible for a more complete and accurate juridical picture of fiduciary doctrine to come into being.

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<sup>113</sup> Which holds that fiduciaries must: (i) not profit from their positions; (ii) provide full disclosure of their fiduciary dealings; (iii) not compromise their beneficiaries' interests; (iv) treat all beneficiaries fairly and equally; and (v) not delegate fiduciary responsibilities. See the elaboration of these points in Rotman, *Parallel Paths*, note 9 at chapter 10.

<sup>114</sup> See the references, *supra* note 16.