The Rise of the "Remedial" Fiduciary Relationship: A Comment on *International Corona Resources Ltd* v. *Lac Minerals Ltd*

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Beginning from the observation that courts have been exhibiting a growing readiness to apply the fiduciary concept to commercial relations, the author examines the recent Ontario Court of Appeal decision in *International Corona Resources Ltd* v. *Lac Minerals Ltd* as an example of this trend. After attempting to elucidate the relationship between "breach of confidence", which is also at issue in the case, and breach of fiduciary duty generally, he considers the Court's treatment of the latter. He argues that the Court fails to make sufficiently explicit the defining criteria it adopts in finding a fiduciary relationship here, and does not explore specifically enough the nature of the obligation or to whom it is owed. The author then seeks to identify criteria for fiduciary relationships that emerge from a survey of the writings of various commentators. These emphasize two essential features: the presence of an obligation on one party to act exclusively in an interest other than his own, and the conferring of a power, involving a measure of discretion, on the party so acting. In terms of these criteria, it is possible to support the finding of a fiduciary relationship in *Corona*, but applying the criteria would constrain the analysis and, perhaps, the scope of the fiduciary relation in the case.

Prenant comme point de départ l'observation voulant que les tribunaux se montrent de plus en plus disposés à appliquer le concept de rapport fiduciaire aux relations commerciales, l'auteur présente le récent arrêt de la Cour d'appel de l'Ontario dans l'affaire *International Corona Resources Ltd* c. *Lac Minerals Ltd* comme une illustration de cette tendance. Après avoir tenté de dégager le lien entre l'utilisation d'information confidentielle, qui est aussi une question soulevée par cet arrêt, et la violation de relation fiduciaire en général, il considère l'analyse faite par la Cour de ce dernier aspect. Il soutient que le tribunal n'a pas suffisamment explicité les critères servant à déterminer l'existence d'un rapport fiduciaire, et il ajoute qu'on aurait dû aborder de façon plus spécifique la nature de l'obligation de fiduciaire et l'identité des créanciers de cette obligation. L'auteur poursuit en tentant d'identifier les critères déterminants d'un rapport fiduciaire qui émergent de la littérature sur le sujet. Il ressort de cette littérature deux éléments essentiels: l'obligation de l'une des parties d'agir dans un intérêt autre que le sien, ainsi qu'un pouvoir, impliquant une part de discrétion, pour la partie agissant ainsi. Selon ces critères, il serait possible d'identifier un rapport fiduciaire dans *Corona*, mais l'auteur ajoute que le recours à ces critères limiterait l'analyse et, peut-être, l'étendue du rapport fiduciaire dans cette affaire.

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I. Introduction

Speaking from an American perspective, Tamar Frankel not long ago observed that "[t]he twentieth century is witnessing an unprecedented expansion and development of fiduciary law."[1] And an Australian, R.P. Austin, has remarked that the fiduciary concept has lately been invading the commercial sphere:

> What is new, or at any rate much more to the forefront in recent years, is the extent to which fiduciary relationships are being asserted and sometimes established in commercial relationships which are outside the traditional fiduciary categories.[2]

Two cases recently decided in the Ontario Court of Appeal —*Standard Investments Ltd* v. *Canadian Imperial Bank of Commerce*[3] and *International Corona Resources Ltd* v. *Lac Minerals Ltd*[4] — illustrate this tendency in Canada. In the first, the Court found a fiduciary relationship between a bank and its corporate customer; in the second — which is the subject of this comment — the Court imposed fiduciary obligations on a party negotiating for a joint venture in relation to a mineral property.

The — ostensibly increasing — resort to the fiduciary concept to ground liability in commercial contexts has a number of important implications. For one thing, the fiduciary concept offers a basis of attack where elements necessary to contract or tort liability are lacking. Thus, in *Corona* itself, there was no contract;[5] the availability of an alternative basis of liability was of great value to the plaintiff. Moreover, the person arguing breach of fiduciary relationship has *less* to prove than a plaintiff alleging breach of contract or tortious injury. Once the relationship is characterized as fiduciary and the breach established, all else follows, so to speak. The position has been stated by Lord Russell of Killowen in *Regal Hastings* v. *Gulliver*:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff... or

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[1] "Fiduciary Law" (1983) 71 Calif. L. Rev. 795 at 796.

[2] "The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce" (1986-87) 12 Can. Bus. L.J. 96 at 100.

[3] (1985), 52 O.R. (2d) 473, 22 D.L.R. (4th) 410 [hereinafter *Standard Investments*]; leave to appeal to S.C.C. refused (1986), 53 O.R. (2d) 663, 65 N.R. 78.

[4] (1987), 23 O.A.C. 263, 62 O.R. (2d) 1 (C.A.) [hereinafter *Corona* cited to O.A.C.].

[5] See the trial judgment of Holland J., (1986) 53 O.R. (2d) 737 at 770-71, 25 D.L.R. (4th) 504 (H.C.) [hereinafter *Corona* trial judgment cited to O.R.]. In the tort context, see *Nocton* v. *Ashburton*, [1914] A.C. 932, [1914-15] All E.R. Rep. 45 (H.L.), where the House of Lords pointed out that an action for breach of fiduciary duty is sustainable in the absence of proof of fraud sufficient to ground an action in deceit.

> whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.[6]

Further, an action based on breach of fiduciary duty is advantageous from the point of view of *remedy*. Not only is the plaintiff's claim measured according to the defendant's gain rather than according to the plaintiff's loss,[7] but the range of available remedies is greater — including, notably, the constructive trust.[8]

The point is that invocation of the fiduciary principle can be a very attractive option for a plaintiff — more attractive, indeed, than a contractual approach. Its recognition by the courts thus raises the question of the extent to which "commercial morality"[9] should be enforced apart from more or less explicit agreements between parties. In this connection, Ernest Weinrib has observed that, besides having a role in safeguarding "the integrity of the plaintiff's business structure", "the fiduciary concept simultaneously performs the subordinate function of maintaining the integrity of the marketplace in which the organization operates."[10] If it is true that the fiduciary concept *is* a necessary complement to other legal principles in maintaining the integrity of the marketplace, the further question that must be asked is "What is the ambit of the fiduciary principle?" Is it something that can be encapsulated in rules and definitions, or must it remain a rather broad quasi-moral concept?

Although arguably once referring to a number of clearly-defined categories,[11] the term "fiduciary relationship" has in recent years become rather more protean. Indeed, one not infrequently encounters the assertion that

[6](1942), [1967] 2 A.C. 134 at 144-45, [1942] 1 All E.R. 378 (H.L.) [hereinafter *Regal Hastings*]. See also, for example, comments by Wilson J. in *Guerin* v. *Canada*, [1984] 2 S.C.R. 335 at 360-61, 13 D.L.R. (4th) 321, 55 N.R. 161 [hereinafter *Guerin* cited to S.C.R.].

[7]See, for example, Laskin J. (as he then was) in *Canadian Aero Service Ltd* v. *O'Malley* (1973), [1974] S.C.R. 592 at 621-22, 40 D.L.R. (3d) 371.

[8]See D. Waters, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Can. Bar Rev. 37 at 45: "[E]quity offers remedies which go beyond common law remedies to bring about the most meritorious outcome to the dispute."

[9]This expression occurs in, for example, *Hospital Products Ltd* v. *United States Surgical Corp.* (1984), 55 A.L.R. 417 at 436, 156 Commonwealth L.R. 41, 58 A.L.J.R. 587 [hereinafter *Hospital Products* cited to A.L.R.] where Gibbs C.J. said that it was not necessary there to invoke the fiduciary principle "to vindicate commercial morality, for the ordinary remedies for fraud and breach of contract were available to USSC ... ." Note that these words point to a residual or gap-filling role for the fiduciary concept. In *Corona*, the Court of Appeal spoke of the trial judge's decision as recognizing "a usage in the mining industry which is consistent with business morality": *supra*, note 4 at 304.

[10]"The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 11, 15.

[11]But see *Tate* v. *Williamson* (1866), L.R. 2 Ch. App. 55.

the categories of fiduciary are not "closed".[12] Despite the word "categories", this suggests a fact-based approach relating to broad principles, rather than cut-and-dried "classification".[13]

The problem is, however, that the relevant principles themselves remain undefined and perhaps undefinable. Thus, for example, Gibbs C.J. in *Hospital Products Ltd* v. *United States Surgical Corp.* observed the following:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the fiduciary relationship may be established.[14]

According to one commentator, a conclusion coming out of that case is that there can be "no universal, all-purpose definition of the fiduciary relationship."[15] This poses some difficulties. We seem to have a potent legal concept whose defining criteria remain largely unidentified. Again, it may be desirable to have a residual equitable category for enforcing commercial morality, based to some extent on courts' intuitions about what is "just and proper".[16] On the other hand, as J.C. Shepherd has said, because of the potentially broad use of fiduciary relationships to ground constructive trusts, it may be desirable to attempt "to pin down the theoretical basis of this concept."[17]

This question of what is the specific theoretical basis of the fiduciary concept is raised by *Corona*, to which I now turn.

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[12]See, notably, *Laskin* v. *Bache & Co.* (1971), [1972] 1 O.R. 465 at 472, 23 D.L.R. (3d) 385 (C.A.), Arnup J.A.:

> [T]he category of cases in which fiduciary duties and obligations arise from the circumstances of the case and the relationship of the parties is no more "closed" than the categories of negligence at common law.

See also *Guerin*, *supra*, note 6 at 384, Dickson C.J.C.

[13]See Waters, *supra*, note 8 at 47: "A person may be a fiduciary . . . for one of two reasons. Either equity has already ruled that the relationship in question is inherently fiduciary . . . or, if such a ruling has not taken place, the alleged victim is able to show on the facts and in the circumstances of his case that the other owed him a fiduciary standard of behaviour." Waters suggests that these two cases might be termed "the pre-existing fiduciary relationship" and "the *ad hoc* fiduciary relationship" respectively.

[14]*Supra*, note 9 at 432.

[15]R.P. Austin, "Commerce and Equity — Fiduciary Obligation and Constructive Trust" (1986) 6 Oxford J. of Leg. Stud. 444 at 445-46. And see Waters, *supra*, note 8 at 55:

> [C]ourts of equity never felt the need to spell out the criteria for the fiduciary relationship in any detail . . . . The courts have appeared willing to say simply that one person is a fiduciary *vis-a-vis* the other, thus merely assuming the answer to the primary issue of whether the particular person should be subject to a particular express trustee obligation.

[16]See *Corona*, *supra*, note 4 at 301.

[17]"Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q. Rev. 51.

II. *Corona*: The Facts and the Decision

Because the case has received considerable publicity, I shall only briefly outline the factual situation in *Corona*, highlighting a few points crucial to the fact-based approach adopted by the courts.

Corona owned mining rights on a parcel of land in Northern Ontario. Its exploration of the land led it to believe that there was gold present on that parcel and adjacent land ("the Williams property"). Some — but not all — of the results of its exploration had been made public in mining circles, partly because Corona was interested in attracting financial (and other) support in developing the mining potential of the land. Lac expressed interest in the project, and Corona and Lac embarked on negotiations with a view to a possible joint venture. During these negotiations, Corona made available to Lac technical information — notably, samples of drill core — relating to its exploration. Corona sought to acquire mining rights to the Williams property, but Lac put in a competing bid, which was accepted by the owner, in spite of Corona's subsequently submitting a better offer. This precipitated the collapse of negotiations between the two parties. Lac thereafter developed a producing gold mine on the land thus acquired.

Among the salient facts emphasized by Holland J. at trial were the following: Corona and Lac were seriously negotiating for a joint venture; mining industry custom requires that parties so negotiating not act to each other's detriment; information imparted by Corona to Lac was indeed confidential and was imparted solely to permit Lac to evaluate the possible joint venture; and, but for Lac's actions, Corona would have acquired the mineral rights in question.

On the basis of these and other facts, Holland J. found that Lac had committed a breach of confidence by misappropriating the information that Corona had disclosed, and that there was a fiduciary relationship between the two parties, which Lac had also breached. While acknowledging that "breach of confidence" and "breach of fiduciary duty" are distinct causes of action, the trial judge said that in this case the two were "intertwined". He declared that, upon Corona's paying Lac $153,978,000, and other sums, Lac was to transfer its interest in the minerals and the producing gold mine on the land to Corona. The $153,978,000 order in Lac's favour was made on the basis of subsection 37(1) of the *Conveyancing and Law of Property Act*,[18] which allows to a person who "makes lasting improvements on land under the belief that it is his own" "a lien upon it to the extent of the amount by which its value is enhanced by the improvements."

[18]R.S.O. 1980, c. 90 [hereinafter the *Conveyancing and Law of Property Act*].

The Ontario Court of Appeal upheld the trial decision, again finding both a breach of fiduciary duty and a breach of confidence. The Court, however, rejected Holland J.'s reasoning with respect to the applicability of subsection 37(1) of the *Conveyancing and Law of Property Act*, since, before it made the improvements in question, Lac had notice of Corona's claim. Nevertheless, the Court did allow a lien in favour of Lac for the value of developing the mine and mill, on the basis of broad equitable principles:

> The sheer magnitude of the enrichment of, or benefit conferred on, Corona if LAC were denied a lien cannot be ignored, particularly in the light of the reality that the expenditures made by LAC to make the property productive inevitably would have been required on the part of Corona had there been no breach of the constructive trust. The principles of equity, in our view, need not be employed in a manner that itself creates an unjust enrichment or disturbs the conscience of the court.[19]

And later: "Forfeiting the investment as well as the property is too unreasonable a price to pay."[20]

This epitome is, I think, a fair indication — albeit sketchy — of what happened in the case. I want now to proceed to a consideration of the legal principles at issue. My main concern is with how the Court treated — and how it might have treated — the fiduciary concept. However, because it formed an alternative basis of decision in the case and because of its close identification with fiduciary relationships, I must discuss the notion of "confidentiality" as well. As I have already noted, both courts regarded the "breach of confidence" issue and the fiduciary issue as "intertwined". This interpenetration of the two concepts is true not only of this case, but more generally. Although "breach of confidence" and "breach of fiduciary duty" are notionally distinct, they not infrequently arise together; indeed, "confidence" is often spoken of as if it were the defining criterion of fiduciary relationships.[21] The central object of this comment is to say something about such defining criteria.

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[19]*Supra*, note 4 at 316.

[20]*Ibid.*

[21]See, for example, *Surveys & Mining Ltd* v. *Morrison*, [1969] Qd. R. 470 at 473 (S.C.), Campbell J.: "[T]he special position held by a consulting geologist involves the placing of confidence in him by his principal and is such as to impress him with a fiduciary character . . . ." A similar approach seems to characterize the English case of *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516 (C.A.). See also R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies*, 2d ed. (Sydney: Butterworths, 1984) at 123 [hereinafter Meagher *et al.*]; B.H. McPherson, "Joint Ventures" in P.D. Finn, ed., *Equity and Commercial Relationships* (Syndey: Law Book Co., 1987) 29 [hereinafter Finn].

III. "Breach of Confidence"

"Confidence" has two rather different meanings in the context with which we are concerned, and these two meaning are not always adequately distinguished. "Confidence" can mean something like "trust", as in "I have confidence in him." This is the sense in which, for example, Lord Denning used the term in *Lloyds Bank* v. *Bundy*, when he said: "The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on it implicitly to advise him about the transaction. The father trusted the bank."[22] I shall return to this meaning presently, when I consider whether it might be a sufficient criterion for fiduciary relationships. Suffice it for the moment to observe that confidence in this sense requires a "that" clause: "I have confidence that X will do something or behave in a certain way." We may have to look to the "that" clause in a particular case to determine whether the confidence creates a fiduciary relationship.

On the other hand, "confidence" can mean something like "secrecy", as in "I told him in the strictest confidence." This seems to be the primary meaning in the "breach of confidence" cause of action, and on one analysis, what was at stake in *Corona*. Before looking at "breach of confidence" in this sense, I must mention that the two meanings of "confidence" are often themselves "intertwined". Thus, X may give Y "confidential" (that is, secret) information, in the "confidence" (that is, trust) that Y will not reveal it or misappropriate it. Indeed, "confidence" in the sense of trust is perhaps an inevitable part of "confidence" in the sense of secrecy, although the converse is almost certainly not true.

That said, it appears that the "breach of confidence"cause of action typically arises in situations involving the misuse of private information. The elements of "breach of confidence" have been outlined, for example, by Megarry J. in *Coco* v. *A.N. Clark (Engineers) Ltd*:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case[23] on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.[24]

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[22](1974), [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.) [hereinafter *Lloyds Bank* v. *Bundy*].
[23][*Saltman Engineering Co.* v. *Campbell Engineering Co.* (1948), 65 R.P.C. 203 (Ch.D. & C.A.), [1963] 3 All E.R. 413 (C.A.).
[24](1968), [1969] R.P.C. 41 at 47 (Ch.D.) [hereinafter *Coco*].

Frances Gurry, who in his book *Breach of Confidence* essentially adopts Megarry J.'s criteria,[25] adds:

> The test ... for establishing the existence of an obligation of confidence is predicated on the basis of a disclosure of confidential information *for a limited purpose* — an obligation will exist whenever confidential information is imparted by a confider to a confidant for a limited purpose.[26]

In his judgment in *Corona*, Holland J. follows the approach outlined by Megarry J. and Gurry — as does the Ontario Court of Appeal. Given Holland J.'s factual findings, I have no quarrel with his approach to the "breach of confidence" issuc. However, I do have a few comments on its implications.

The first is that the situation in *Corona* typifies those in which courts have found an obligation of confidence to arise. As Gurry notes, in cases of pre-contractual negotiations, including proposed joint ventures, where negotiations have failed, "the courts have readily held the confidant bound by an obligation not to use the confidential information for any purpose other than assessing the feasibility of the proposal under negotiation."[27]

Second, there may be a question whether the information actually used or relied on was confidential. Here, as I have already noted, Corona had publicized some of the results of its explorations.[28] Holland J. found, however, that crucial information imparted to Lac by Corona was really private. The distinction between "public" and "private" information — where arguably both are used by the confidant — may be extremely problematical. Thus, in *Coco*, Megarry J. pointed out that "[t]he difficulty comes ... when the information used is partly public and partly private; for then the recipient must somehow segregate the two and, although free to use the former, must take no advantage of the communication of the latter."[29] One problem may be that the confidant who is unable to segregate the two may be, of all the world, prevented from benefitting from the public information.[30] Or, if he thinks he has successfully segregated the two, relying only on the public information, he may find that a court takes a different view.

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[25](Oxford: Clarendon Press, 1984) at 3-5 [hereinafter Gurry].

[26]*Ibid.* at 113. See also P.D. Finn, "Confidentiality and the "Public Interest"" (1984) 58 Australian L.J. 497 at 499.

[27]*Supra*, note 25 at 125. See, for example, *Seager* v. *Copydex Ltd* (1966), [1967] R.P.C. 349 (Ch.D. & C.A.).

[28]For details, see *Corona, supra*, note 4 at 281ff.

[29]*Supra*, note 24 at 47.

[30]Thus, suppose that negotiations between Lac and Corona had broken off before either had acquired the Williams property: would Lac have been precluded from acquiring the property on the basis that it had confidential information about it?

Third, respecting the requirement that the information have been imparted "in circumstances importing an obligation of confidence", it appears that constructive knowledge of the obligation will suffice. Thus, again in *Coco*, Megarry J. suggests a "reasonable man" test,[31] and Gurry says that the circumstances that might give rise to an inference of constructive knowledge include "custom".[32] More particularly, in *Corona*, Holland J. seems to have relied on Megarry J.'s observation in *Coco* that

> where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture ... , I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence ... .[33]

Fourth, Megarry J.'s third element requires that the misuse of the confidential information cause the confider some *detriment*. Here, the trial judge found such detriment in the fact that but for Lac's breach, Corona would have acquired the property for itself. However, the presence of the requirement may cause problems in other contexts. To take an extreme example, suppose that it had turned out that the acquisition of the property in question was *ultra vires* Corona. Lac's misappropriation of the information would then not have caused Corona any detriment — at any rate, not the detriment found here. Would this have precluded Corona's claim for breach of confidence? In his enumeration of the elements in the cause of action, Gurry does not mention detriment; he says only that breach occurs "when it is shown that the confidant has made an unauthorized use of the information by using it for a purpose other than that for which it was imparted to him."[34] And Megarry J. himself leaves open the question whether detriment, at least to the confider himself, is an absolute prerequisite.[35]

This point is relevant to the question of the relationship between breach of confidence and breach of fiduciary obligation, for it is clear in the case of the latter that detriment to the plaintiff need not be shown.[36] If it need be shown in breach of confidence cases, then one can imagine situations involving the imparting of confidential information in which a breach of confidence action would fail but an action for breach of fiduciary duty (if such could be found) might succeed. The plaintiff would want to argue that the imparting of the confidential information, apart from its relevance to "breach of confidence", *created* a fiduciary relationship between the parties.

[31] *Supra*, note 24 at 48.
[32] *Supra*, note 25 at 120.
[33] *Supra*, note 24 at 48. See also *Corona* trial judgment, *supra*, note 5 at 772, 775.
[34] *Supra*, note 25 at 5.
[35] *Coco*, *supra*, note 24 at 48.
[36] See, for example, *Regal Hastings*, *supra*, note 6; *Boardman* v. *Phipps* (1966), [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.).

This may, of course, be a superfluous point if detriment in fact need not be proven for "breach of confidence". Incidentally, another factor perhaps indicating that detriment is not required is the availability of accounting for profits as a remedy for breach of confidence. This suggests again that the inquiry is not into the plaintiff's loss, but into the defendant's gain.

Thus, a resolution of *Corona* on the basis of "breach of confidence" — a cause of action founded on Lac's misuse of information confided to it privately for a limited purpose — appears appropriate, although some potential analytical problems do arise.[37]

Given that there was in *Corona* an appropriation of confidential information, two further inquiries are suggested: (1) What is the relationship of this kind of "confidence" to "confidence" more broadly conceived as "trust"? and (2) What is the relationship of either kind of "confidence" to the fiduciary concept?

As I have already intimated, any situation involving confidential information can be conceived as involving "confidence" in the broader sense as well. Thus, the information is imparted in the "confidence" that it will be used only for an understood limited purpose. The confider is "trusting" the confidant with the information. However, the sharing of private information is only one way in which one party may express confidence in another. In *Corona* there was a "confidential" relationship — based at the least on Corona's sharing information with Lac, but perhaps founded as well on other forms of trust between the parties.

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[37]Another question in the case was whether the imposition of a constructive trust is an available remedy for breach of confidence. Thus, for example, Gurry makes no mention of the constructive trust in his discussion of remedies. The Court of Appeal in *Corona* affirms that "there can be no doubt that one of the remedies available" when an equitable obligation is breached is the constructive trust. The Court relies on Goff and Jones' *The Law of Restitution*, 3d ed. (London: Sweet & Maxwell, 1986) for this position. Although Goff and Jones assert it as a *desideratum*, the authority they offer is sparse. Indeed, among the cases they cite in this context is *O'Sullivan* v. *Management Agency and Music Ltd* (1984), [1985] Q.B. 428, [1985] 3 All E.R. 351, which seems not to be about confidential information at all. The Court of Appeal does, however, point to a Supreme Court of Canada case — *Pre-Cam Exploration & Development Ltd* v. *McTavish*, [1966] S.C.R. 551, 57 D.L.R. (2d) 557 — as authority for granting a constructive trust for breach of confidence. Unless that case is to be distinguished — for example, on the basis that it involved use of confidential information by an ex-employee — the issue may be settled. Clearly, if a constructive trust is not available for breach of confidence per se, a plaintiff would want to establish the presence of a fiduciary relationship, so as not to be limited to personal remedies.

Also of concern in the area of remedies for breach of confidence is Gurry's observation that the defendant "is liable to account only for such profits as are attributable to his wrongful use of the plaintiff's property": *supra*, note 25 at 418. This may lead the courts to make apportionment of profits in some cases, although, when this becomes too complicated, Gurry suggests that damages are an appropriate substitute.

Does the presence of this confidentiality entail the existence of a fiduciary relationship? The answer is not clear. As an illustration, Gurry asserts that "the obligation of confidence can itself be regarded as a fiduciary obligation which defines for its own purposes its own class of fiduciaries."[38] If this is true, then *every* case of breach of confidence will also be a breach of fiduciary duty. Further inquiry, once the breach of confidence was established, would be rendered superfluous. Although the courts in *Corona* regarded the two concepts as "intertwined", it is not clear that they have become indistinguishable.

Another view is represented by Austin, who says: "Sometimes the term 'fiduciary' is misleadingly applied to other relationships, such as the relationship between informant and confidant in the law of misuse of confidential information (breach of confidence) ... ."[39] This implies that something more, or at least different, is required to find a fiduciary relationship.

The question is complicated by the fact that misuse of confidential information is frequently a feature of breaches of fiduciary obligations. Here a distinction must be made:

> In a breach of confidence action, the court's concern is for the protection of a confidence which *has been created by* the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is *not* focused on the information as a medium by which a *pre-existing* duty is breached.[40]

Thus, for example, in *Boardman*, the defendants, as solicitor and agent, respectively, of the trust, already stood in a fiduciary relationship to it. In the context of that relationship, they acquired confidential information which they used personally. This use of the confidential information was the *mode* of their breach of their fiduciary obligation. Had they not stood in a pre-existing fiduciary relationship to the trust, but been given confidential information, this imparting of the information would have *created* a confidential relationship. The question is whether the relationship thus created would have been *fiduciary*.

[38] *Supra*, note 25 at 159. See also Meagher *et al.*, *supra.*, note 21 at 123: "Perhaps, also, the equitable doctrine relating to undue influence . . . and confidential information should be included under the general 'fiduciary' rubric, though specific bodies of doctrine have been developed in relation to each."

[39] *Supra*, note 2 at 97. See also Waters, *supra*, note 8 at 41, referring to the bank-customer relationship: "Most [courts] have used the term 'fiduciary,' but others have spoken of a 'confidential' relationship, and the "confidential' has been distinguished from the 'fiduciary' — something less, but requiring of the bank similar good faith conduct."

[40] Gurry, *supra*, note 25 at 161-62. See also Waters, *supra*, note 8 at 61.

With these considerations in mind, I want to turn now to the handling of the fiduciary concept in *Corona*, and to an examination of other attempts to characterize fiduciary relationships — with a view to elucidating potentially unifying criteria.

IV. The Fiduciary Relationship in *Corona*

There are two possible bases for discerning a fiduciary relationship in *Corona*. First, Lac and Corona were parties whose relationship, albeit not formalized, contemplated cooperative or joint activity,[41] and thus involved mutual confidence. Again, this basis might require an answer to the question "Confidence that what?" Second, the imparting or transfer of confidential information by Corona to Lac could itself have constituted the fiduciary relationship. A third possibility is that the fiduciary relationship resulted from some combination of the two. For example, the fact that Corona gave confidential information to Lac, although perhaps not in itself sufficient to constitute a fully-fledged fiduciary relationship, was one element in the relationship pointing to the intensity of the trust Corona reposed in Lac.[42]

Although it is not entirely clear how the courts ultimately sorted out these bases, they both alluded to all the above possibilities. My concern here is to ask whether the relationship, apart from the imparting of confidential information, was fiduciary and, if not, whether the imparting of confidential information — already sufficient in itself to ground the breach of confidence suit — *should* suffice to create a fiduciary relationship.

Both courts found a fiduciary relationship without depending on the transfer of confidential information. Thus, the Court of Appeal said:

> [T]he trial judge was correct in finding that a fiduciary relationship came into existence between LAC and Corona as soon as they entered into serious negotiations with respect to a joint venture between them ... .[43]

As authorities for the proposition that not only those who had already formed a partnership or embarked upon a joint venture, but also parties (in certain circumstances) negotiating towards one of those ends, may be

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[41]Some cooperative activity, a "joint geochemical sampling program", had already begun, although not pursuant to any formal contract.

[42]This point is in fact made in the Court of Appeal's judgment: *supra*, note 4 at 278.

[43]*Ibid.* at 301.

fiduciaries,[44] the courts cited, *inter alia*, *Lindley on Partnership*,[45] *Fawcett* v. *Whitehouse*,[46] and *United Dominions Corp.* v. *Brian Pty Ltd.*[47]

Some comment on this last case is appropriate, since the Court refers to it several times. Although the Australian High Court did find a fiduciary relationship among intending joint venturers, the scope of that finding must be scrutinized. Mason J. said, for example:

> [A] fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled.[48]

In the case, moreover,

> the arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiation. Each had ... agreed to be, and been accepted as, a participant in each of the proposed joint ventures, if both or either of them went ahead.[49]

In *Corona*, the Court of Appeal remarked that the intended relationship in *United Dominions* had developed further than that between Corona and Lac, but found facts — notably, mining industry practice, the confiding of information, and the cooperative geochemical programme — taking the relationship beyond "mere negotiation". Nevertheless, unlike in *United Dominions*, the terms of the prospective joint venture had not been settled, nor had any terms been given *de facto* effect.

In finding a fiduciary relationship on the basis of negotiation for a joint venture, the Court of Appeal relied heavily on the trial judge's finding that there is a custom in the mining industry "that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other."[50] As a result of their "serious negotiation" in the context of industry practice, "Lac and Corona owed fiduciary duties each to the other ... not to act to

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[44]R.A. Ladbury has recently questioned whether even the typical consummated joint venture amounts to a fiduciary relationship: see "Commentary" in Finn, *supra*, note 21, 37. He notes, for example, that in contrast to partners, joint venturers normally "are carrying on business severally and not in common" (at 41) and that they are not agents for each other (at 43).

[45]E.H. Scamell & R.C. Banks, eds, *Lindley on the Law of Partnership*, 15th ed. (London: Sweet & Maxwell, 1984) at 480.

[46](1829), 1 Russ. & M. 132, 39 E.R. 51 (Ch.) [hereinafter *Fawcett* cited to E.R.].

[47](1985), 59 A.L.J.R. 676, 157 Commonwealth L.R. 1, 60 A.L.R. 741 (H.C.) [hereinafter *United Dominions* cited to A.L.J.R.].

[48]*Ibid.* at 680.

[49]*Ibid.*

[50]*Corona*, *supra*, note 4 at 281, 304.

the detriment of the other";[51] moreover, "Lac was in breach of that duty by acquiring the Williams' property."[52]

This conclusion raises several questions. One of these is whether the Court of Appeal is implicitly enunciating a test of fiduciary relationships in something like the following terms: "A fiduciary relationship exists where the dealings between the parties are such as to indicate that one party is not to act to the detriment of the other." I shall return to this hypothesis later in discussing a number of tests that have been proposed for discerning the presence of fiduciary relationships.

A second question involves the validity of the observation that the simple acquisition of the Williams property by Lac (leaving aside for the sake of argument the breach of confidence) was a breach of a fiduciary duty. Perhaps one or two hypotheticals will illustrate my point. Suppose that all the information relevant to evaluating the Williams property was public, and that Lac and Corona were seriously negotiating for a joint venture, and Lac acquired the property on its own account.. Would there have been a breach of a fiduciary obligation? I think that such a conclusion would have been harder to reach. Or, suppose the facts of *Corona*, including the serious negotiation. But suppose that, instead of Lac's acquiring the property, Corona (without informing Lac) had acquired it. Would we say that, on the basis of the negotiations tending toward a joint venture, and the mining industry custom, that Corona held the property for itself and Lac — or, on the basis of the approach in *Corona*, *exclusively* for Lac? Again, the answer is far from self-evident. Indeed, we might be inclined to say that, since Corona "owned" the really critical information relevant to the acquisition, the fact of the pre-contractual negotiations was relatively unimportant. Or, suppose that, while negotiating with Lac, Corona was simultaneously negotiating with another party, and chose to enter a joint venture with that party. Would we say that Corona was in breach of a fiduciary obligation to Lac, and require it to hold its interest in the joint venture for Lac?

In each of these hypotheticals we can say that the criteria emphasized in the Court of Appeal are met: parties are negotiating seriously, and one party acts in such a way as to cause a detriment to the other — at least to the extent that that other is deprived of an anticipated benefit. But it is *not* clear in any of them that it would be appropriate to cry "breach of fiduciary duty" and impose a constructive trust. The Court of Appeal refers to a broad responsibility of "dealing fairly" in the context of such "fiduciary

[51] *Ibid.* at 281.
[52] *Ibid.*

relationships".[53] In these hypotheticals, one might find an obligation to "deal fairly" — for example, by one party's notifying the other that it intends to acquire the property, or is negotiating simultaneously with someone else. If this fair dealing is absent, we might feel comfortable about giving the "injured" party compensation for actual detriment suffered as a result of its reliance on the other. But this falls far short of treating the offender as a fiduciary, all of whose gains are to be held on trust.

Thus, if we abstract the breach of confidence from the situation in *Corona*, the argument for a fiduciary relationship becomes rather tenuous.

Even if it is appropriate to base a fiduciary relationship on the pre-contractual interactions here, the finding that Lac holds the *whole* benefit of the proposed joint venture for Corona seems extreme. The Court of Appeal does deal with this issue, but not entirely satisfactorily. In this context, interestingly, it in fact downplays the significance of the "negotiation" relationship:

> All parties acknowledged that LAC and Corona have never reached an agreement as to the terms of any contemplated partnership or joint venture. Nor was there any obligation on them to reach such an agreement. At most they were obliged to negotiate in good faith.[54]

Relative to an earlier point, I would ask whether an obligation "at most" "to negotiate in good faith" amounts to a fiduciary relationship.

More particularly with respect to my present point, I would ask why a breach of a putative fiduciary relationship created by negotiations for a *joint* venture should result in a benefit for only *one* of the parties. Had Corona and Lac in fact agreed upon a joint venture, and had Lac purported to acquire for itself a benefit contemplated by the joint venture, it would have held that benefit as a constructive trustee for Corona and *itself*, in the proportions contemplated by the agreement.[55] Why then should the fact that a more clearly fiduciary relationship (an actual joint venture) was not consummated redound to the benefit of the plaintiff?[56] There seems to be an interesting inversion here: had there been a clear contractual arrangement, and Corona been limited to suing for breach of contract, it could have recovered only for its loss; had the contract created a fiduciary relationship,

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[53]*Ibid.* at 301.

[54]*Ibid.* at 312.

[55]See, for example, *McLeod* v. *Sweezey*, [1944] S.C.R. 111, [1944] 2 D.L.R. 145.

[56]Perhaps an answer to this objection appears in the words of Gibbs C.J. in *United Dominions*, *supra*, note 47 at 680:

> Indeed, in such circumstances [i.e., pre-contractual negotiations], the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined by some formal agreement.

Corona could have sought a proprietary remedy with respect to a proportion of Lac's gain; but since no agreement defining relative interests was reached, Corona can claim Lac's whole gain[57] on the basis of what at best is scarcely more than an inchoate fiduciary relationship. In this regard, it is worth noting that Lord Lyndhurst in *Fawcett* v. *Whitehouse* held that a person negotiating for an intended partnership[58] "who clandestinely receives an advantage for himself, must account for that advantage to the partnership."[59] That is, to the partnership, including himself; not simply to the other partners.

Once again, these criticisms are based on an artificial deletion of the breach of confidence in *Corona*. But they do relate to real and important implications of the Court of Appeal's reasoning. Moreover, on one analysis, the fact that the breach of fiduciary duty took the form of a misuse of confidential information does not alter the argument that Lac holds on trust not for Corona alone, but for itself and Corona. In the words of Dixon J. in *Birtchnell* v. *Equity Trustees, Executors and Agency Co.*, relationships like that in *Corona* are "based ... upon a mutual confidence" that the parties will "engage in [the] particular ... activity or transaction for the joint advantage only."[60] Thus, assuming a fiduciary relationship between Corona and Lac, what was transacted between them was implicitly to be for their common advantage. Corona imparted confidential information to Lac in the context of the fiduciary relationship thus defined — or defined by the courts. The information was given to Lac not so that Lac could use it *only* for Corona, but so that Lac could use it in relation to the common or mutual benefit contemplated by the fiduciary relationship. If we were to say that, in the context of the relationship, *one* of the parties (Corona) was acting only in its own interest, Lac might legitimately object that it was acting only in its own interests and can be held to have undertaken nothing in any other behalf — thus, that it was not a fiduciary. This follows from the courts' conclusions, which characterize the fiduciary relationship based on "serious negotiation" as *mutual*. If the confidential information was imparted for the common benefit, then any gain made on the basis of that confidential information must similarly be held for Lac and Corona jointly.

On this first analysis, of course, the imparting of confidential information does not *create* the fiduciary relationship. The appropriation of con-

[57]I am not forgetting, of course, that Corona was ordered to compensate Lac for the cost of acquiring the property and developing the mine and mill. But this is different from the ongoing interest in the property that Lac almost certainly would have had in any joint venture.

[58]The negotiator there was described as an "agent" of the other two parties to the proposed partnership: *supra*, note 46 at 57.

[59]These are the words of Gibbs C.J. in *United Dominions*, *supra*, note 47 at 677, summarizing the effect of *Fawcett* v. *Whitehouse ibid.*

[60](1929), 42 Commonwealth L.R. 384 at 407-08 (Aus. H.C.).

fidential information is merely the mode in which a fiduciary relationship otherwise constituted is breached.

I turn now to the other possibility — that the fiduciary relationship was created by Corona's giving confidential information to Lac. This variant gives rise to considerations which may be rather different from those involved in the first.

First, as already mentioned, there is legitimate doubt that a fiduciary relationship existed solely on the basis of the negotiations. That is, it is arguable that the *sine qua non* of the fiduciary relationship here was the imparting of confidential information. If so, the question may again be asked: why should not a breach of confidence analysis suffice, without resort to the fiduciary concept? A related question is, "If a breach of confidence is simply a category of breach of *fiduciary* duty, why is it treated as independent or alternative — as it is even in *Corona*?" Assuming finally, nevertheless, that the giving of confidential information does create a fiduciary relationship, how precisely does it do so?

One answer is that the confiding of certain information manifests the particular trust or confidence that one party is reposing in the other, thus making that other a fiduciary for specific purposes. To establish the "terms" of the fiduciary relationship on this basis one must ask, "What is the *object* of the confidence thus reposed?" "I", Corona might say, "am giving you this private information in the confidence that you will use it only to assess the desirability of entering a joint venture *or* only for my benefit *or* only in ways that will not hurt me." It seems to me that a court must decide which of these possible objects is present before determining the consequences of the breach of fiduciary duty. Arguably, if it is the first ("to assess the desirability of the joint venture") the fiduciary relationship is one in which Lac must attend to the joint interests of Corona and itself. The presence of this joint interest should be reflected in the remedy. On the other hand, it might be said that Corona gave the information to Lac on the understanding that it would be used *only* for Corona's benefit. That is, before a joint venture was established, Lac could not be said to have had a joint interest in anything. The information would thus have been given to Lac only to allow it to decide whether to benefit Corona. Having acquired a benefit, it should on this analysis be deemed to have chosen to benefit Corona, and to have acquired the gain accordingly. If, as some of the language of the Court of Appeal implies, the understanding of Corona was essentially a negative one — "I am giving you this information in the confidence that you will not use it to hurt me" — it would seem that any remedy should relate only to Corona's *loss*. Here, it is merely fortuitous that the court was able to measure such loss according to Lac's gain.

What I am saying is no more than that a court must inquire (1) who is the beneficiary of the fiduciary relationship and (2) what is the benefit contemplated — which defines in turn the extent of the fiduciary obligation. In *Corona*, the court seems simply to assume (perhaps justifiably) that the "truster" is the exclusive beneficiary of everything the fiduciary acquires.

Another way of analysing the fiduciary relationship as one created by the confiding of information is to regard the information as property. The Court of Appeal may be doing something like this, implicitly. At one point the Court mentions that one traditional way in which fiduciary obligations arise is where A trusts B with property.[61] This observation is not, at that point, applied to the facts of *Corona*. Later, however, the Court does treat the information as property, citing Fridman and McLeod, *Restitution* (1982):

> [T]here appears to be no doubt that a fiduciary who has consciously made use of confidential information for private gain will be forced to account for the entire profits by holding such profits made from the use of confidential information in a constructive trust for the beneficiary-estate. The proprietary remedy flows naturally from the conclusion that the information itself belonged to the beneficiary and there has been no transaction effected to divest his rights over the property.[62]

This quotation, of course, supposes a pre-existing fiduciary relationship; the appropriation of confidential information is simply the mode of breach.

However, if the Court of Appeal is adopting the view that information is property, it might be easier to find a fiduciary relationship based on the transfer of the information. In effect, Corona would then be saying: "I am giving you my *property*, on the trust that you will use it for certain purposes only — for example, only for my benefit. If you use that property to acquire more or other property, that further property will be held on the same trust."

Characterizing confidential information as property might, therefore, be relevant for two reasons. Its transfer serves as a less ambiguous basis for a fiduciary relationship, and its misappropriation might more naturally lead to a proprietary remedy. However, even if this is the basis of the fiduciary relationship in *Corona*, questions similar to those I have already asked might

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[61]*Supra*, note 4 at 298. And see Waters, *supra*, note 8 at 54.

[62]*Corona*, *ibid.* at 312. Compare Gurry, *supra*, note 25 at 417, regarding breach of confidence: "the defendant has improperly received or withheld profits acquired from the use of the plaintiff's property — in this case his confidential information — in violation of the plaintiff's rights." The Supreme Court of Canada has recently, in *Stewart* v. *R.* (26 May 1988), No. 17827, decided that confidential information is not "property" for the purposes of the theft provision of the *Criminal Code*. It explicitly left open the question whether confidential information can be regarded as property in civil contexts, Lamer J. saying that the question has not been "conclusively decided" by any Canadian court (at 13). For a thorough discussion of this issue, see A.S. Weinrib, "Information and Property" (1988) 38 U.T.L.J. 117.

be posed: For whose benefit is Lac holding Corona's property in the form of information — for Corona's only, or for Corona's and Lac's jointly? If the information is treated as property, it is easier to say that Lac holds it, pending or failing actual agreement about a joint venture, solely for Corona. Moreover, it might be harder to say that Lac holds Corona's property *only* so as not to hurt Corona.

In the end, characterizing confidential information as property may be rather artificial, even unnecessary, in the fiduciary context. For one thing, we know that the presence of a fiduciary relationship does not depend upon a transfer of property. Correspondingly, a proprietary remedy in the form of a constructive trust may arise where the fiduciary does not exploit property.

I want now to return to a question posed at the outset of this comment: can we specify any criteria or essential characteristics that identify fiduciary relationships generally? Again, I will attempt to relate my discussion to the facts of *Corona*.

V. The Fiduciary Concept

In *Corona*, the Court of Appeal enumerated four classes of relationships which have been held to be fiduciary. One, as we have seen, depends upon the transfer of property, or at least the holding of the principal's property by the fiduciary. A second is "where persons repose trust in one another where common [*sic*] property may or may not be involved."[63] This was the kind of situation the courts found in *Corona* itself. A third class is "that where a relationship of dependency exists" which "may or may not involve trust property or the passing of confidential information."[64] And the fourth class arises "where the person seeks the advice of another and the other is aware of the first person's reliance on that advice";[65] the court cites *Standard Investments*[66] and *Lloyds Bank* v. *Bundy*[67] as examples. Indicators of the

[63] *Corona, ibid.* at 298.

[64] *Ibid.* at 299.

[65] *Ibid.*

[66] *Supra*, note 3. The characterization of the relationship here as fiduciary has been questioned: see Austin, *supra*, note 2.

[67] *Supra*, note 22. This case is not overwhelming authority for the existence of a fiduciary relationship in such situations, even though Sachs L.J. more than once uses the expression "fiduciary care". The case was concerned with the presence of undue influence, and considered the defendant's reliance on the plaintiff for advice in that context. Commenting in the case of *National Westminster Bank* v. *Morgan*, [1985] A.C. 686 at 709, [1985] 1 All E.R. 821 (H.L.), Lord Scarman agreed that the relationship in *Bundy* was such as to support an inference of undue influence, but said: "I would prefer to avoid the term 'confidentiality' as a description of the relationship which has to be proved."

existence of a fiduciary relationship include, then, property-holding, confidence or trust, dependency, and reliance. As the Court of Appeal notes, none of these elements is necessarily determinative: "These relationships have a fiduciary component if appropriate circumstances are found to exist."[68] So the standard is "appropriate circumstances": what is "appropriate"?

In *Guerin*, Dickson C.J.C. noted that "[t]he concept of fiduciary obligation originated long ago in the notion of breach of confidence".[69] Indeed, as I have previously mentioned, "confidence" is frequently cited as the essential feature of fiduciary relationships, and the words of Lord Chelmsford in *Tate* v. *Williamson* are frequently invoked:

> [T]he courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage ... .[70]

At the same time, the simple reposing of confidence may not be sufficient. For example, J.C. Shepherd says: "It is patent that people go around trusting others all the time, without necessarily creating a fiduciary relationship as a result."[71] Thus, while we would expect confidence to be present in most fiduciary relationships, it will not be present in all,[72] and it may be present in many relationships that are not fiduciary.

Several commentators have essayed to isolate the defining criterion of "fiduciary" — with debatable success. I will not presume to offer anything new in this regard, but will merely attempt to locate common threads in what others have said.

Austin Scott, referring to the parable of the unjust steward,[73] says that he was "certainly in a fiduciary position": "It was his duty in dealing with

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[68]*Corona*, *supra*, note 4 at 299.

[69]*Supra*, note 6 at 383.

[70]*Supra*, note 11 at 61.

[71]*Supra*, note 17 at 59. To similar effect, see Gibbs C.J. in *Hospital Products*, *supra*, note 9 at 433. Thus, I may have confidence that the doctor removing my gall bladder knows what he is doing; this does not in itself create a fiduciary relationship. On the other hand, my confidence that my doctor will not exploit for his own advantage personal or professional information I impart to him in the context of our physician-patient relationship may very well entail fiduciary obligations.

[72]Notably, it may not be present in the quintessential fiduciary relationship, the trust. The beneficiary need not have any confidence at all in the trustee.

[73]*The New Testament*, Luke 16:1-8.

his master's affairs to act solely in the interest of his master."[74] Scott formulates the following definition:

> Who is a fiduciary? A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.[75]

This is somewhat ambiguous. It contains the notion of acting for another, but not the complete selflessness implied in the earlier "solely in the interest" of another. Presumably, Scott does not mean to include ordinary contractual situations, in which A agrees to act in B's interests in the sense that he undertakes to do something for B. Indeed, Scott cites the *Restatement of Trusts*, section 170:

> The first duty of a trustee is ... "to administer the trust solely in the interest of the beneficiary." It is this duty of loyalty, owing from every fiduciary to his principal, which I am to discuss... .[76]

More recently, Weinrib has identified what he describes as "two elements" that "form the core of the fiduciary concept" and that "can also serve to delineate its frontiers": "First, the fiduciary must have scope for the exercise of discretion, and, second, this discretion must be capable of affecting the legal position of the principal."[77] Is it enough basis for a fiduciary relationship that one party may exercise a discretion affecting another? By putting it in slightly different terms we may perhaps highlight what Weinrib is getting at: the relationship is one in which one party has power and the other party is correspondingly vulnerable. Still something is missing — a factor that Weinrib mentions in analysis, but not as a defining criterion: "The desirability of deterring the fiduciary from using his discretion except for the benefit of the principal or beneficiary ... ."[78] This seems to point to something like what Scott had in mind: the relationship is one in which the fiduciary is bound to use his power solely for the principal. But, rather than seeing this as an antecedent requirement, Weinrib treats it as a consequence flowing from a relationship otherwise established.

In *Guerin*, Dickson C.J.C. apparently approves Weinrib's assertion that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."[79] At the same time, he incorporates another element:

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[74]"The Fiduciary Principle" (1949) 37 Calif. L. Rev. 539 at 540.
[75]*Ibid.*
[76]*Ibid.*
[77]*Supra*, note 10 at 4.
[78]*Ibid.*
[79]*Guerin*, *supra*, note 6 at 384, quoting Weinrib, *supra*, note 10 at 7.

> [W]here by statute, agreement, or perhaps by uni-lateral undertaking, *one party has an obligation to act for the benefit of another*, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.[80] [emphasis added]

Paul D. Finn similarly emphasizes that the "in limine requirement" making a position fiduciary is that "it must exist for the benefit of another", and that this requirement "excludes a wide variety of persons in many common relationships from the potential class of fiduciaries."[81] He points out as well that the fiduciary must have some discretion as to how he will serve the beneficiaries.[82]

J.C. Shepherd, attempting to define the essence of "fiduciary", considers a number of suggested theories — "unjust enrichment", "commercial utility", "reliance", "unequal relationship", "property", "undertaking", and "power and discretion". Criticizing them all, he suggests:

> A fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive it with a duty to utilise that power in the best interests of another, and the recipient of the power uses that power.[83]

Again, we have here the notion of a power coupled with an obligation to exercise the power without regard to self-interest.

Tamar Frankel has similarly sought to adumbrate "a unified approach to the law governing fiduciary relations."[84] Frankel identifies two characteristic elements in the fiduciary relation. One is "the understanding of the parties and the perception by the courts that the fiduciary acts as a substitute for the entrustor, to benefit the entrustor."[85] This, he says, is in contrast with contract and status relations, in which each party acts for his own benefit.[86] The second characteristic element is that "the fiduciary obtains power from the entrustor or from a third party for the sole purpose of enabling the fiduciary to act effectively."[87]

Once more, we see the obligation to act in the interest of another coupled with a power that is to be devoted only to giving effect to that obligation. This seems to be the approach taken recently by Waters as well. Fiduciary relationships, he says, have been found by analogy with the express trust relation:

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[80] *Guerin, ibid.*
[81] *Fiduciary Obligations* (Sydney: Law Book Co., 1977) at 10.
[82] *Ibid.* at 13.
[83] *Supra*, note 17 at 75.
[84] *Supra*, note 1 at 808.
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.* at 809.

> Two features of an express trust have dominated the courts' thinking; the fact that the trustee is vested with title to specific, earmarked property, for which property he must account to the beneficiary, and, secondly, that the trustee is discharging a task for the exclusive benefit of another.[88]

With respect to the second, Waters says that it "allowed Equity to bring within the analogy of trusts all those who put their skills at the service of others, and exercise a degree of discretion as to how best to carry out the task at hand."[89] While, Waters says, both characteristics — "control of property *and* an obligation to act for another" — are present in the express trust, only one is required for fiduciary relationships more generally.[90]

Perhaps the clearest judicial adoption of this approach to fiduciary relationships occurs in the Australian High Court case of *Hospital Products.* There, Gibbs C.J., while doubting (as we have seen) that a "universal, all-purpose definition" of fiduciary relationships is possible, approved the test invoked by the court of appeal in that case, namely, where "in a particular matter a person has undertaken to act in the interests of another and not in his own."[91] And Mason J. said that:

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.[92]

This approach has been judicially recognized in Canada. Thus, Lambert J.A. in *Burns* v. *Kelly Peters & Associates Ltd* referred to *Hospital Products* and said that "two key questions" must be answered, namely:

> (1) whether the defendants had undertaken with the plaintiffs to act in relation to the ... transaction, or transactions of that nature, in the interests of the plaintiffs;
>
> (2) whether the defendants had been entrusted with power to affect the plaintiffs' interests in a legal or practical sense, so that the plaintiffs were in a position of vulnerability.[93]

Austin, commenting on *Hospital Products*, notes that the court there was broadly agreed on a couple of other propositions: that a person "may be a fiduciary *quoad* part of his activities but not *quoad* other parts" and that "a relationship may be fiduciary where B's duty is neither to exclude his

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[88]*Supra*, note 8 at 54.
[89]*Ibid.*
[90]*Ibid.*
[91]*Hospital Products, supra*, note 9 at 435.
[92]*Ibid.* at 454.
[93](1987), 16 B.C.L.R. (2d) 1 at 27, [1987] 6 W.W.R. 1 (B.C.C.A.).

personal interest entirely nor even to put A's interest above his own, but is instead a duty to act in A's and B's joint interest."[94]

Assuming the approach I have just outlined to be the appropriate one for identifying fiduciary relationships, how would it apply to *Corona*?

First, let us look at the relationship of negotiation and ask the initial question: was there an obligation on the parties to act solely in an interest other than their own individual or separate interests? The courts found that they were obliged not to act to each other's detriment: is this the same thing as an obligation to act exclusively in each other's interest? I should think not. In the negotiations, each party was legitimately pursuing its own interests. At most, they were obliged, on the basis of the stage which the negotiations had reached, to seek not their own individual interests, but some joint interest. But, as I have already observed, this would not support a constructive trust solely in Corona's favour.

Even if there was an obligation to act in the joint interest to the exclusion of separate interests, did the relationship confer a discretionary power on either party, allowing it to affect the other's, or the joint, position? Again, it is highly doubtful that the negotiations, *tout court*, involved the conferring of such a power.

Thus, if this is the test, the Ontario Court of Appeal was probably wrong to imply a fiduciary relationship simply on the basis that the parties were seriously negotiating towards a joint venture.

Even if the broad relationship was not fiduciary, were there any aspects of it that were? This brings us to the issue of Corona's entrusting confidential information to Lac. Here, the case for fiduciary obligation is much stronger. Clearly, Corona did not give Lac the information so that Lac could use it for its own purposes. Almost as clearly, however, Corona did not give the information to Lac on the understanding that Lac was to consult only the interests of Corona in using the information. An argument could be made, although this is not the *only* argument that could be made, that Lac was to use the information only for some kind of joint interest — a joint interest which would define to whom Lac owed fiduciary obligations. Alternatively, it could be argued that the information was imparted for the joint interest on condition that that joint interest crystallized; failing such crystalization, Lac was to hold the information solely for Corona.

Moreover, in this case, a power was much more clearly conferred upon one of the parties — Lac. By giving Lac the information, Corona put itself in a vulnerable position, because of the possibility that Lac would use the

[94]*Supra*, note 4 at 101.

power in ways other than its implicit undertaking obliged it to. Thus, one could say that the divulging of the confidential information did create a fiduciary relationship, the only question being whether the obligation was exclusively to Corona or to Corona and Lac jointly. One implication of this analysis is an answer to a question canvassed earlier: almost inevitably, any breach of confidence will entail a breach of fiduciary obligation.

VI. Conclusion

The Ontario Court of Appeal was probably right in finding a fiduciary relationship on the facts of *Corona*. However, the absence of precision in the reasoning of the decision might have implications for other cases, where the facts satisfy a broad or intuitive approach, but not a more precise one. In abandoning any attempt to identify general criteria for fiduciary relationships, the Court decided the case in the absence of standards, or on the basis of unenunciated standards. The Court's reasons, distilled to their essence, might read, "We're not sure what we're supposed to be looking for, but we'll know when we've found it."

An aspect of this imprecision is the Court's failure to elucidate the scope of the fiduciary relationship in *Corona*. By this I mean that it failed to recognize the problems of pinpointing which aspects of the relationship were fiduciary, and to whom the fiduciary obligations were owed. Again, it may have been right in accepting that the whole relationship was fiduciary, and that Lac was bound to consult Corona's interest exclusively. But a more rigorous approach would have required it to consider these issues more explicitly.

It is, of course, possible to maintain — on the basis of *Tate* v. *Williamson* and its progeny — that the fiduciary concept is inherently nebulous, and that its value lies in the adaptability that this character imparts. This position may be supported by reference to the unsatisfactory and contradictory efforts to outline (I hesitate to say "define") criteria. At stake is the enduring legal tension between "clarity and predictability"[95] on the one hand, and the open-texturedness that allows "justice" to be accomplished in each situation, on the other. Since the province of equity is still ostensibly the latter, it is perhaps perverse to build an argument by resort to the former.

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[95]The words are Austin's, *ibid.* at 105.