WITTGENSTEIN AND THE EXISTENCE OF FIDUCIARY RELATIONSHIPS: NOTES TOWARDS A NEW METHODOLOGY

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I. INTRODUCTION

'Who is a fiduciary' is a notoriously uncertain question in the private law. Judicial method for determining the answer is quite unsettled, as is even what is relevant to the arguments on either side. Yet relationships are increasingly found to be of a fiduciary nature. Much has now been written about this. At a very high level of generality, one could say that persons in trusting relationships are identified as fiduciaries on account of what they agreed to, undertook, or are taken to have assumed. Beyond that there is no consensus. What a 'trusting relationship' is and what 'taken to have assumed' may include are matters which have virtually defied explanation. A new type of approach to these matters is proposed here.

A. Accepted Categories

Fiduciaries of the familiar sort are said to be those within the accepted categories of fiduciary relationships. Partners, agents and principals, employers and employees, companies and directors, and solicitors and clients are "accepted fiduciary relationships" listed by Mason J in *Hospital Products Ltd v United States*

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Surgical Corporation.[1] One might add to this list trustees and beneficiaries, receivers in bankruptcy and creditors, liquidators and contributories, and a few more. To call the relationships 'accepted' refers to the fact that the courts accept that they have a fiduciary consequence. Existence of a trusting relationship in these situations is easily established. Accepted categories describe situations where the courts make a ready inference to the existence of a fiduciary relationship. No more than that is meant. Being 'accepted' does not mean that presumptive effect is given to the relationship. The claim of a beneficiary who stands within an accepted category of relationship is just like the claim of any other fiduciary beneficiary. In this, the fiduciary relationship of *trust* is unlike the relation of *influence*. A person alleging 'accepted' fiduciary status simply brings the defendant within the court's range of reliable inference - unless special circumstances exist. So, for example, a principal suing an agent who makes a wrongful gain in the course of his or her agency has still to make out a case that the agency was a fiduciary one at the relevant time. Only then will equity provide its remedies to subtract the gain and pass it to the principal. Something of a formality in 'accepted' cases, one must still establish the existence of a fiduciary relationship.[2] Thus, fiduciary aspects of the relationship must be isolated and precedent cited to justify a fiduciary conclusion. Some commentators have referred to an 'accepted category' of relationship as a fiduciary 'legal phenomenon'.[3] The forensic consequence of this is the same. Courts' characterisation of accepted relationship categories as fiduciary may be so much a matter of course that it is virtually a rule of law. When an 'accepted category' of relationship is present on the facts, the claimant need not do much more than present a case based on prima facie evidence.

Recognising that there are accepted categories of fiduciaries does not take one far towards identifying non-standard fiduciary relationships. Accepted categories serve as a kind of analogical core when reasoning to further categories. However, the fact that analogies are available does not suggest any directions that the process of inference might take. Nor do the accepted categories supply any limits to the process.

II. TRADITIONAL IDENTIFICATION: ANALOGIES AND PURPOSES

Anglo-Australian law has traditionally had an empirical approach to the characterisation of facts.[4] In finding whether particular facts fall within one category or another, theory is irrelevant. Economics is irrelevant. Morals are irrelevant. Instead, a form of deductive reasoning is employed which usually

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1 (1984) 156 CLR 41 at 96.

2 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 204-5 (CA).

3 For example, P Finn, "The Fiduciary Principle" in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 33-41.

4 See the discussion in *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634 at 646, per Dixon J.

permits direct and simple answers. Assume that a question arises concerning whether a particular person is the auditor of a particular corporation. It is answered by ascertaining whether that person is a person appointed by the company in general meeting or the Commission pursuant to s 327 of the *Corporations Law*. Judges ask whether the facts of the case exhibit the distinguishing characteristic of the category - in this case, compliance with the legislative formalities for appointment.

Traditional characterisation of whether a particular relationship is a fiduciary one proceeds on similar lines. Actual or implicit reference is made to some fiduciary hallmark in the decided cases. Whether the facts of a case fall within an accepted category of fiduciary is then decided deductively. A person either did or did not serve as a company director, a receiver in bankruptcy, or a solicitor at a particular place and time. There are appropriate tests to establish this. Some of them are statutory. Whether the facts of a case are to fall within a new or emerging category of fiduciary relation is similarly determined. An epistemological leap by way of analogy is made from the accepted categories of fiduciary and/or existing authority and the conclusion deduced from it. Analogy, the familiar technique and engine of equity's development, is pressed into service. It is a process which has been refined over hundreds of years.

However, analogies can be misleading. Quite irrelevant likenesses may establish a common link between two things. Sticks of dynamite and candles have several common features. There may be coincidences of shape, size, and age that have no bearing on why the two things are being compared. To use a fiduciaries example, whether a particular investment banker is a fiduciary may have nothing to do with the eminence of a banker's clients or their level of income. It may not relate to the way the banker dresses or the clubs that she or he has joined. Yet all these things may be thrown up in an undiscriminating process of analogy moving from bankers who have been found to be fiduciaries. Some 'criteria of sameness' must exist to control this process and make it useful. The analogiser must seek one or more *common characteristics* between the subjects being compared. Purpose is the correcting focus. The existence of a purpose in the selection of common characteristics is critical. Otherwise, analogy has no direction and will lead to arbitrariness.

A. 'Common Characteristics' in the Process of Analogy

Consider the following four situations where a fiduciary relationship has been found to exist. A number of subsequent fiduciaries decisions have been based on each. But remarkably different 'primary characteristics' of the relation are suggested. The first situation is probably familiar.

1. A company was the distributor of certain products in Australia on behalf of an overseas supplier. The distributor was obliged by contract with the supplier to act in the supplier's best interests and develop the supplier's market. Contrary to this, the distributor established its own company with a view to pirating the supplier's market position.

In *United States Surgical Corporation v Hospital Products International Pty Ltd*[5] the New South Wales Supreme Court at first instance held that this distributor, by doing what it did, was a fiduciary in breach of limited fiduciary relationship with the supplier. The relation covered "such of USSC's [the supplier] interests as were represented by the market"[6] - a decision upheld in the New South Wales Court of Appeal, where the significantly enlarged remedy of constructive trust was imposed.[7] As part of its reasoning on that appeal, the Court of Appeal noted of fiduciary characterisation that:

> it is necessary to find some criterion which the facts must satisfy. Since, as we have said, any fiduciary relationship which existed here did not fall within any established category, some principle or requirement must be found which is common to all or, at least, most, categories, it being likely that some may represent a particular response to special situations, eg the cases of undue influence and confidential information.[8]

The notion of *undertaking* was seen to be this criterion. After noting this to be the view in a number of authorities and commentators, the Court continued:

> [I]t follows that if F has undertaken to act in the interests of B, F will be a fiduciary: and, conversely, a fiduciary relationship cannot exist unless F has undertaken to act in the interest of B, it being understood that such an undertaking precludes F from acting in his own interest in the same matter, that is, in the matter in respect of which the undertaking was given.[9]

'Undertaking' is, in this formulation, the pivotal element and *sine qua non* of fiduciary relationships. It may now be something of an orthodoxy in Australia. For, although when *Hospital Products* reached the High Court the majority factually disagreed with the courts below and concluded against the existence of a fiduciary relationship, the lower courts' processes of fiduciaries reasoning were not disapproved. Gibbs CJ, in the High Court majority, remarked that the test proposed by the Court of Appeal was "not inappropriate in the circumstances". Mason J in the High Court dissented. He held that the distributor was a fiduciary and proposed a test for the implication of fiduciary relationships in very similar terms to that of the Court of Appeal.[10]

2. An army sergeant was on overseas duty. Wearing his army uniform, he rode through a city in a truck carrying contraband goods on several occasions. This was so inspection of the truck by the local police might be evaded. Substantial amounts of money were received by him for these services.

In *Reading v R*, the United Kingdom Court of Appeal held that the sergeant was a fiduciary. Being such, Reading was liable to account for moneys he received to the British Crown.[11] Judgment of the Court of Appeal was given by Asquith LJ. Assuming that a fiduciary relationship was a necessary part of the Crown's case to retain the confiscated moneys, he reasoned that:

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5 [1982] 2 NSWLR 766, per McLelland J.
6 *Ibid* at 811.
7 Note 2 *supra*, per curiam.
8 *Ibid* at 205.
9 *Ibid* at 206.
10 Note 1 *supra* at 72, per Gibbs CJ and at 96-7, per Mason J.
11 *Reading v R* [1949] 2 KB 232, affirming [1948] 2 KB 268 on different grounds.

> such a relationship subsisted in this case as to the user of the uniform and the opportunities and facilities attached to it; and that the [sergeant] obtained the sums by acting in breach of the duties imposed by that relation.[12]

The existence of this fiduciary relationship was the consequence of something entrusted by the trusting party - specifically, *property* was entrusted in the sergeant's uniform, and a "job to be performed" was entrusted.[13] In this way, the *Reading* fiduciary liability proceeded from a quite different theory from that in the above *Hospital Products* judgments. A different side of the relation is relied upon. For it was the corrupt distributor, the alleged fiduciary, who made the undertaking in *Hospital Products*. In *Reading*, the entrusting was an act of the Crown. The *Reading* relationship was generated by the party alleging it.

3. The defendant was a finance company. It joined with a promoter and a third company in a joint venture to develop a shopping centre. Prior to the project commencing and unbeknownst to the third company, the promoter gave the finance company a mortgage over all the joint venture land. This was to secure other borrowing that the promoter had made. The venture proved to be successful. However, the finance company claimed a right to enforce that mortgage for the promoter's other borrowing in priority to the third company's profit share. The third company was in danger of missing out, for the finance company had taken a prior charge over all the venture's profits.

In *United Dominions Corporation Ltd v Brian Pty Ltd,* the High Court of Australia held that the finance company was in breach of a fiduciary obligation by so doing.[14] The trusting relation here was characterized by *reliance* - that of one party to the joint venture on another. Reliance such as this can be described as being of the 'mutual' kind. All parties to the joint venture relied upon each other. The element of reliance proceeds from each party. In this respect, it is unlike both of the foregoing bases of the relationship. This is because the *undertaking* of the party trusted and the *property* entrusted by the trusting party moved from only one of the parties in each case. Reliance here proceeded from both. 'Mutual confidence' or reliance as a mode of fiduciary reasoning was originally specific to the accepted category of partnership. In this context it is acknowledged to be the base of fiduciary characterisation in the strongest terms. For example, in *Birtchnell v Equity Trustees Executors and Agency Co Ltd,*[15] Dixon J approved this dictum of Bacon VC in *Helmore v Smith*:

> If a fiduciary relation means anything, I cannot conceive of a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on.[16]

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12 *Ibid* at 236.
13 *Ibid.*
14 (1985) 157 CLR 1.
15 (1929) 42 CLR 384 at 407.
16 (1886) 35 Ch D 436 at 444 (first instance, affirmed on appeal).

In *United Dominions*,[17] it was applied to the analogous joint venture. The fiduciary nature of this joint venture was stated in the joint judgment of Mason, Brennan and Deane JJ, with which Gibbs CJ and Dawson J agreed. Beginning with the note that "[T]he term 'joint venture' is not a technical one with a settled common law meaning" and that there could not be any necessary characteristics implied by the term, the Justices concluded that:

> the most that can be said is that whether or not the relationship between the joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.[18]

Characterisation of the relationship was said to depend on the 'form and content' of the venture. It hinged on what was agreed. Evaluation of the contract terms of the joint venture became the focus of the fiduciary question. Two criteria were selected by which to evaluate those terms: first, whether or not the profits were 'mutual', or to be shared; and secondly, how the joint venture property was held by the promoter for the other two. The second criterion may beg the question to be determined: what sort of a venture between the mortgagor and the other two was this? If the property was held on trust, then the financier could not do as it did. The first criterion of this fiduciary relation was more critical: profit-sharing, or mutuality of gain.

The judgment of Gibbs CJ in that case was concerned with the further extension of the partnership analogy which the facts required. This was to impose fiduciary obligations at a time prior to the commencement of the joint venture. For this purpose he used two basically parallel principles:

> the 'obligation to perfect fairness and good faith' is not confined to persons who actually are partners, but 'extends to persons negotiating for a partnership, but between whom no partnership as yet exists'.[19]

and:

> a person who is negotiating for himself and his future partners as an agent for the intended partnership, and who clandestinely receives an advantage for himself, must account for that advantage to the partnership when it is formed.[20]

Gibbs CJ also referred to the kind of duty to be imposed on one who seeks the 'co-operation' of others. Such a person, "an intending partner, like a partner, owes a duty of the utmost good faith".[21] Thus, in summary, this brand of fiduciary is one of whom reciprocity is expected, not undertakings. 'Property entrusted' is not relevant at all. On the facts of the case, the shopping centre property was at all times held by the promoting venturer, which gave the mortgage to the financier. It was never owned or entrusted by the third venturer plaintiff.

4. The defendant was the Canadian Government. A band of Indians had surrendered land from a reserve to the Government pursuant to the *Indian*

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17 Note 14 *supra*.

18 *Ibid* at 10-11.

19 *Ibid* at 5, quoting from E Scamell, R Banks, *Lindley on Partnership*, Sweet & Maxwell (15th ed, 1984) p 480.

20 *Ibid*, citing *Fawcett v Whitehouse* (1829) 1 Russ & M 132; 39 ER 51, per Lord Lyndhurst LC.

21 *Ibid* at 6, quoting from *Directors of the Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99 at 113.

> *Act* 1952 (Can). This was for the Government to arrange a lease of the land to a golf club. Terms of the lease obtained by the Government were much less favourable than those approved by the band when the land was surrendered. In *Guerin v The Queen* the Supreme Court of Canada found that the Government owed a fiduciary duty to the band arising from its control over the use to which the lands could be put.[22]

The *power* of the Canadian Crown to affect the Indians' interests was the basis of the Court's decision in *Guerin.* Courts in Canada particularly have chosen to invest this characteristic with fiduciary consequences. A fertile source of abuses for equity to control is envisaged. It applies where, by exercise of powers (or discretions), the party trusted can alter the legal or practical interests of another.

Specifically in *Guerin,* powers under a federal *Indian Act* 1952 were the source of fiduciary obligations that the Government was under. On the majority view, the *Indian Act* gave the Government an "historic responsibility" to:

> act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred on the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s 18(1) of the Act. This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.[23]

This is distinct from each of the other fiduciary bases. A fiduciary relationship can arise unilaterally from the trusted party's possession of a power to affect another, just as though the trusted party had given an undertaking. Yet no undertaking is necessary. It might have been denied. The relation is actually more imposed on the trusted party than assumed. This fiduciary relation functions more as a tort. It regulates governments, whether they act through federal Departments of Indian Affairs, or otherwise.

Thus, in looking for 'one common characteristic', the courts have ended up with four. Undertaking, (entrusted) property, reliance and power have been exemplified. There may well be more, for the law of fiduciaries does not at this point seem beyond expansion. Each characteristic, to a varying degree, has the capacity to explain the others. Quite often, the different characteristics are blended. Consider the somewhat eclectic formulation of Mason J in *Hospital Products Ltd v United States Surgical Corporation.* He said of the 'accepted categories' that:

> [T]he 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. The 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.[24]

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22 *Guerin v The Queen* [1984] 2 SCR 335. See also *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1 at 199-205, per Toohey J, to be compared with the view of Dawson J (dissenting) at 163-7.

23 *Guerin v The Queen, ibid* at 348.

24 Note 1 *supra* at 96-7.

Justice Mason's formulation thus incorporates both the 'undertaking' characteristic, used by the New South Wales Court of Appeal in that case, and the Canadian 'power or discretion' formulation of Wilson J in *Frame v Smith*.[25] He continues, "[t]he expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a representative character in the exercise of his responsibility".

The judgment of Dawson J in *Hospital Products* also mentions the difficulty of "identifying and classifying those qualities in individual relationships which give rise to fiduciary obligations". He states that:

> 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.[26]

Dawson J cites for this the authority of *Tate v Williamson*.[27] This is a case usually referred to in the context of its 'undue influence' facts. A harsh bargain was extracted by a moneylender from a financially distressed heir. This exaction was the context in which the 'disadvantage or vulnerability' was relevant. Another *type* of fiduciary relationship was present. One distinguished commentator has argued that the reasoning of Lord Chelmsford LC in that case was really about the trusting relation because it is based on the moneylender's 'undertaking'.[28] Undue influence, disadvantage, and vulnerability will be quite irrelevant in this event. 'Disadvantage or vulnerability', in fact, may either be (unstated) corollaries of 'power or discretion', or, with respect, a doctrinal mistake. The fiduciary relationship of trust has been confused with the fiduciary relationship of influence. Yet the element of 'vulnerability' is bracketed with 'reliance' in innumerable United States and Canadian authorities. Possibly the suggestion is that reliance implies vulnerability. It should be remembered that the paradigm of reliance noted above was that which exists between equal partners.

Testing the traditional approach through a selection of cases, there are signs of serious inconsistency. No definition of the 'fiduciary relationship' is forthcoming. 'One common element' looks like several. Each of the 'common' elements we have seen resists explanation in terms of each other. What is contended now is that the confusion is implicit in the traditional approach. However, this is still the method of many commentators. JC Shepherd, for example, considers that the academic task is to "define the central concept being used when we identify any relationship or duty as 'fiduciary'".[29]

Alternatively, as put by another, there must be an "element common to, and thus definitive of, all those situations which produce the fiduciary".[30] This is the type of reasoning which might be called 'definitional'. It supposes that when the term

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25 In terms strikingly similar to those she used: (1987) 42 DLR (4th) 81 at 99 (SC).

26 Note 1 *supra* at 142.

27 (1866) 2 Ch App 55 at 60-1.

28 W Winder, "Undue Influence and Fiduciary Relationship" (1940) 4 *Conveyancer* (New Series) 274 at 282.

29 JC Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 *Law Quarterly Review* 51 at 51 (opening line); see also JC Shepherd, *Law of Fiduciaries*, Carswell (1981) pp 3-12.

30 DS Ong, "Fiduciaries: Identification and Remedies" (1986) 8 *University of Tasmania Law Review* 311 at 315.

'fiduciary' is applied to different categories of relationship, there must be some subsisting common element, a 'golden thread', which unites them. Perhaps a majority of judges share this view, although it is not commonly articulated. The existence of a common element is rather implied by a search for definitions. However, it should not be thought that the view is universal. The judgment of Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation* does not seem to share it.[31] Nor does it follow from the approach of the Canadian Supreme Court in *Canadian Aero Services Ltd v O'Malley*.[32]

III. FAMILY RESEMBLANCES

Difficulties of logic with the traditional understanding of 'fiduciary relationship' may be part of a wider problem in the philosophy of language. General terms used in any discourse may not function in the same way as specific ones. Ludwig Wittgenstein propounds a view which would emphatically deny the law's (unstated) logical premises which we have alluded to. A general concept, such as 'fiduciary relationship', would not, for Wittgenstein, entail the existence of any 'common element' when it is used.[33] This is the epistemology of the ancients. Searching for the common properties of general terms is a facile search for easy answers. It yields no useful knowledge. Rather, general terms entail nothing more than a series of 'family resemblances' between their particular instances.[34] "Men," he says "have a craving for generality":

> There is [a] tendency to look for something in common to all the entities which we commonly subsume under a general term. We are inclined to think that there must be something in common to all games, say, and that this common property is the justification for applying the general term 'game' to the various games.; whereas games form a *family* the members of which have family likenesses. Some of them have the same nose, others the same eyebrows and others again the same way of walking; and these likenesses overlap. The idea of a general concept being a common property of its particular instances connects up with other primitive, too simple, ideas of the structure of language. It is comparable to the idea that *properties* are *ingredients* of the things which have the properties; eg that beauty is an ingredient of all beautiful things as alcohol is of beer and wine.[35]

When this is related to the question, 'who is a fiduciary?' it suggests that no one of the elements of 'undertaking', 'property', 'reliance', and 'power' should be expected in every fiduciary relationship. Some relationships, of course, may have several of these elements in common. The facts of the *Hospital Products Ltd v United States Surgical Corporation*[36] relationship had features in common with

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31 Note 1 *supra* at 67-75.

32 (1973) 40 DLR (3d) 371, per curiam (Laskin J).

33 See L Wittgenstein, *Preliminary Studies for the Philosophical Investigations*; generally known as *The Blue and Brown Books* B Blackwell (1969) pp 17-19; compare with L Wittgenstein, *Tractatus Logico-Philosophicus translated by DF Pears, BF McGuiness,* Routledge (1974) at [3.322]-[3.325].

34 L Wittgenstein, *ibid*, p 17.

35 *Ibid.*

36 Note 1 *supra.*

the 'undertaking' and 'power' based relationships, cited by Mason J[37] and the 'reliance' based relationships, cited by Dawson J.[38] When other relationships are placed side by side they may appear to have virtually no common features. Consider what the fiduciary relationship found in *Reading v R* (the army sergeant and the Crown's entrusted 'property')[39] had in common with the fiduciary relationship in *Guerin v R* (the Indian band liable to the government's 'power').[40] Are both cases talking about the same thing? Thus, it may be that no essential undertaking, property entrusted, or any other element, separately or in combination, need be uncovered in each fiduciaries case. Judging such a case or arguing it is therefore not easy. No key is easily found to what Mason J described as the fiduciary "gateway to relief in specie".[41]

The facts of a novel case, the method of our jurisprudence suggests, must be examined with a primary question in mind. Can an analogy from the fiduciary characteristics of previous cases be justified? Four primary characteristics are offered here: 'undertaking', 'entrusted property', 'reliance' and 'power'.

Fiduciary characterisation in a difficult or novel case will require a substantial exercise of legal judgment. No necessarily right or wrong answer to the question will appear. A judicial determination must be made of what is an acceptable degree of resemblance. The 'resemblances' approach is conformable to the newly result-oriented jurisprudence of equity in other jurisdictions. Policy considerations lately consulted by the House of Lords in *Barclays Bank plc v O'Brien*[42] and *CIBC Mortgages plc v Pitt*[43] and the Canadian Supreme Court in *Canson Enterprises Ltd v Boughton & Co*[44] and *Norberg v Wynrib*[45] serve as an express direction to the formation of fiduciary analogies. A fiduciary characterisation may only be made if it advances a judicial purpose. However, this is doctrinally within, as before, the boundaries of what is an acceptable resemblance.

The methodology described here is not new. Only a little theoretical subtlety in the conception of a fiduciary has been asserted. Courts, or some courts, have been for some time using the suggested method: closely analysing the facts of a case whilst keeping in mind various identified criteria. In *Hospital Products Ltd v United States Surgical Corporation,* these were the criteria described by Gibbs CJ as relevant 'circumstances' to be considered, in making the fiduciary characterisation. Was there a "relation of confidence" [scil *trust*], he asked, or any "inequality of bargaining power"? What was the effect of the relationship being argued for in a "commercial transaction"?[46] Fiduciary status was denied on the

37 *Ibid* at 96-7.
38 *Ibid* at 142.
39 Note 11 *supra.*
40 *Guerin v R,* note 22 *supra.*
41 Note 1 *supra* at 100.
42 [1994] 1 AC 180 at 188-9, per Lord Browne-Wilkinson, other Lords agreeing.
43 [1994] 1 AC 200 at 211, per Lord Browne-Wilkinson, other Lords agreeing.
44 (1991) 85 DLR (4th) 129 at 155-6, per Sopinka J and 146-9, per LaForest J, other judges agreeing.
45 (1992) 92 DLR (4th) 449 at 287-93, per McLachlin J.
46 Note 1 *supra* at 69.

combination of these circumstances. Mason J, in the same case, rather eclectically listed eight "factors" and came to the opposite conclusion.[47] Namely:

> (1) there [being] a valuable market for USSC's products in Australia [viz. an *interest* at stake]; (2) USSC, by appointing HPI, *entrusted* HPI with the exclusive responsibility of promoting that market...; (3) the manner in which the market was to be promoted was left to HPI's discretion [viz a *power or discretion*]; (4) the exercise of that discretion provided HPI with a special opportunity of acting to the detriment of the market for USSC's products, rendering USSC *vulnerable* to abuse by HPI...; (5) [no agency of HPI for USSC]; (6) although HPI's actions would not alter or affect USSC's legal rights vis-à-vis others, its actions could and did adversely affect in a practical sense the market in Australia for USSC's products and consequently its product goodwill in this country [viz an *adverse legal or practical effect*]; (7) in the circumstances mentioned in (1-6) above USSC relied on HPI to protect and promote USSC's product goodwill in Australia [viz *reliance*]; (8) [market responsibility was subject to contract term]. [emphasis added]

Several of Mason J's eight factors have 'family resemblance' potential in terms of the four criteria here suggested. The method of 'resemblances' can accommodate itself to the contemporary understanding of a fiduciary element in the relation between two parties. This may take two forms. Either one party, the beneficiary, actually trusts the other, or that party possesses a legally protected right to trust. Whether the beneficiary actually trusts the fiduciary is not critical. She or he can still be in a 'structure of actual trust' and also have a right to trust. Either 'trust in fact' or the 'right to trust' will have as their subject one or more of the beneficiary's interests. In structure, a fiduciary relationship resembles many other relationships recognized by law. One party's interests are under the control of another. For instance, one's vehicle might be under the control of a vehicle-repairer, or one's children's education under the control of their teachers. Sometimes the controlling party is trusted and sometimes not. To the degree that the features of a relation *resemble* the features of relationships in earlier cases found to be fiduciary, the relation is fiduciary. The matter is of evaluation. Its boundaries are those of acceptable analogy. Just as legal discourse never contains 'essences', except as a manner of speech, there is no essence in the fiduciary relation. It is just a form of language. Theories which attempt to draw rigorous distinctions between verbal phenomena on a scientific paradigm are destined to endless inconsistency.[48] Language is more like fashion than the data of science. No *a priori* characterisation of the fiduciary relation from within the kaleidoscopic variety of human interaction is possible. Nor should formal classification of persons' 'interests' be expected to yield a more precise result. In an empirical way, we have gathered together under the undertaking, property, reliance, and power headings many of the salient criteria of characterisation used in modern fiduciaries cases. This is in order to separately examine their analogical possibilities. First, one general point should be made.

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47 *Ibid* at 98-9; cf 'factors' in *Canadian Aero Service Ltd v O'Malley*, note 32 *supra* at 391, per Laskin J (judgment of the Court).

48 See L Wittgenstein, *The Blue and Brown Books* note 33 *supra*, pp 16-21.

A. Multiple Resemblances

It has been suggested that fiduciary relationships can be identified by showing that the characteristics of any one criterion exist in a particular case. Reliance, for instance, may form a sufficient basis for a fiduciary relationship. Alternatively, one party may have undertaken something to the other. Sometimes, however, the characteristics of several criteria are combined in the same case. We saw how *Hospital Products* evinced this phenomenon.[49] Relationships can be fiduciary for more than one reason. Thus, reliance can be combined with undertaking. In fact, an undertaking by the fiduciary can usually be spelt out of the dealings of commercial fiduciaries. Any person who knowingly assumes either a role where another trusts her or him, or the control of another's property or interests, can be said to have undertaken the obligations of so doing. Partnerships are an example. Partners undertake a responsibility towards the promotion of a mutual interest which includes the interest of another. Such an undertaking could form the basis of a fiduciary relationship between partners. Yet the courts have long chosen to articulate the fiduciary nature of this relation by the characteristic of reliance instead.[50] Deciding which resemblance in a relation is the salient or outstanding one is part of the exercise of judgment. Cases can be justified in more than one way. Alternative justifications may just be different, rather than wrong.

IV. CHARACTERISTIC 1: UNDERTAKING

This is probably the most accepted characteristic of fiduciary relationships, especially of the commercial type. Fiduciary characterisation is based on a representation by one party that she or he will act on behalf of another, or in her or his interests. It is analogous to the express trustee's acceptance of trusteeship. Austin Scott, writing in 1949, thought that the nature of a fiduciary could be expressed in these terms:[51]

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

Alternatively, as another has said, 'a fiduciary' is "simply someone who undertakes to act for or on behalf of another in some particular matter or matters".[52]

The *undertaking* conception of the relationship has its genesis in the acceptance by one party of another party's trust. Strict fiduciary liabilities are implied from that acceptance. Thus, in 1962, Sealy saw that undertakings were characteristic of, at least, the most important categories of fiduciary relationships.[53] Further, an

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49 Note 1 *supra*.

50 For example, the judgment of Dixon J in *Birtchnell v Equity Trustees Executors and Agency Co Ltd*, note 15 *supra* at 407-9 and cases there cited therein.

51 A Scott, "The Fiduciary Principle" (1949) 37 *California Law Review* 539 at 540.

52 P Finn, *Fiduciary Obligations*, Law Book Company (1977) at [467].

53 LS Sealy, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 76-7: "where the fiduciary has undertaken or been under an obligation".

eminent practicing lawyer in Canada has recently affirmed that a fiduciary relationship can be defined by the undertaking of one party.[54]

Australian importance of *undertaking* theory is underlined by the fact that it was the factor which gained the preponderance of judicial support in the celebrated *Hospital Products* litigation. As already noted, the facts there concerned the possible fiduciary liability of the Australian distributor of surgical products manufactured by a United States supplier. McLelland J, at first instance, found that the distributor was in a limited fiduciary relationship towards the supplier.[55] The scope of this relationship was limited to the supplier's market for its goods. McLelland J based his finding on two things. First, a "recognised analogy" with the trust as paradigm of fiduciary relationships constituted by *undertakings*: the distributor here had contractually assumed to act in the interests of the supplier.[56] Secondly, he relied on the power that the distributor had to detrimentally affect the supplier's market. On appeal, the New South Wales Court of Appeal agreed with the fiduciary finding generally, and explicitly with Justice McLelland's first basis for it, observing:[57]

> it is necessary to find some criterion which the facts must satisfy. Since...any fiduciary relationship which existed here did not fall within any established category, some principle or requirement must be found which is common to all or, at least, most categories.

In this way, the Court sought a 'common element' for all or most 'categories' of fiduciary relationship. Counsel in that case had suggested a number of categories which, "omitting the confidential information cases", might encompass the whole phenomenon. In each of these, the Court said, "F is acting for or on behalf of B". Hence,

> if F has undertaken to act in the interest of B, F will be a fiduciary; and, conversely, a fiduciary relationship cannot exist unless F has undertaken to act in the interest of B, it being understood that such an undertaking precludes F from acting in his own interest in the same matter, that is, in the matter in respect of which the undertaking was given.[58]

Undertaking was the criterion that the Court of Appeal found in each fiduciary relationship. Justice McLelland's references to *power* as one of the springs of a fiduciary relationship were jettisoned. Holding out of an undertaking to a beneficiary was a sufficient 'representative element' by which the person should be bound as a fiduciary. In the absence of such an undertaking, it was therefore incorrect to describe a person as a fiduciary. On the facts of the case, the distributor's undertaking was held to arise from an implied contractual promise to "do nothing inimical" to the supplier's market interests.[59]

When, on further appeal, *Hospital Products* reached the High Court, the whole Court denied the contractual basis of the 'representational element'. All but one

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54 J Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 *Canadian Bar Review* 1 at 7.
55 Note 5 *supra* at 810.
56 *Ibid* at 810-11.
57 Note 2 *supra* at 205, per curiam.
58 *Ibid* at 206.
59 *Ibid* at 198.

judge found that no fiduciary relationship existed otherwise as well.[60] Chief Justice Gibbs, however, in so finding, remarked that the 'undertaking' criterion for a fiduciary relationship was a "not inappropriate" one.[61] The major difference between Chief Justice Gibbs' judgment and the judgment of the Court of Appeal was that Gibbs CJ did not find the implied term upon which the Court of Appeal's undertaking had been based.[62] The other majority judgment of Dawson J saw fiduciary relationships as based in a different dominant idea - namely, the disadvantage and vulnerability characteristic discussed below.

Mason J wrote a dissenting judgment which essentially agreed with the Court of Appeal, apart from not finding the implied term. Beginning with generalities about the fiduciary relation, he saw that the "critical feature" of all fiduciary relationships was 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.[63]

Applying this conception, he found that a fiduciary relation was appropriate in this case but should be limited to the supplier's market for its products.[64]

The undertaking characteristic has had currency in Anglo-Australian law for many years under various guises. For example, in *Walden Properties Ltd v Beaver Properties Pty Ltd*, an 'undertaking' was spelt out of the obligations which a self-appointed agent imposed upon her- or him- self.[65] When a company's receiver accepts appointment, she or he is said to do the same.[66] Alternatively, in *Noranda Australia Ltd v Lachlin Resources NL*,[67] an 'undertaking' was provided by an express contract term.

Undertaking as a theory cannot explain those fiduciary characterisations where the facts are directly inconsistent with any 'representative' or voluntary element. Too many fiduciary relationships have been found where fiduciaries been entirely ignorant of their beneficiaries. In other cases, persons found to be fiduciaries have obviously been acting only on their own behalf.[68] These fiduciaries represented nothing. They did not accept any trust; they merely abused it. In other cases again, it is difficult to imagine how the putative fiduciary had any option to accept or decline a trust thrust upon her or him.[69]

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60 Note 1 *supra*, per Gibbs CJ, Wilson J, Deane and Dawson JJ; Mason J dissenting.
61 *Ibid* at 72.
62 *Ibid* at 63-7.
63 *Ibid* at 96-7.
64 *Ibid* at 101-2.
65 [1973] 2 NSWLR 815 at 833, per Hope JA (Kerr CJ agreeing) (CA).
66 *Cape v Redarb Pty Ltd* (1992) 8 ACSR 67 at 80, per Higgins J (ACT SC).
67 (1988) 14 NSWLR 1, per Bryson J: see note 52 *supra* at [398] and the (unlikely) case of *Deonandan Prashad v Janki Singh* (1916) LR 44 Ind App 30 (PC), cited by the NSW CA in *Hospital Products*, note 2 *supra* at 207-8.
68 For example, *Reading v R*, note 11 *supra*.
69 For example, *Moore v Regents of the University of California* 793 P 2d 479 (SC of California 1990); *Plaza Fibreglass Manufacturing Co Ltd v Cardinal Insurance Co* (1990) 68 DLR (4th) 586.

V. CHARACTERISTIC 2: PROPERTY

'Property' names a sort of meta-language in the identification of fiduciary relationships. It is a shorthand to describe one class of beneficiaries' interests which can be the subject of trust in another. In order that various purposes can be achieved, commercial fiduciaries are entrusted with the various things by their beneficiaries. Property might exist, for example, in share certificates left with a broker so that the shares can be sold, or title deeds to land might be entrusted to the custody of a solicitor. Either an item of property for sale or the proceeds of its sale could be held by a mercantile agent. These situations exemplify where property interests are held by one person on behalf of another. At a further level of abstraction, beneficiaries' property might exist in their business opportunities or profitable contracts that come under another's control.

Trusted persons such as agents, employees, brokers, or solicitors will sometimes acquire from the persons trusting them the legal title to property or control over it. This is to facilitate the performance of tasks with that property or its safe-keeping. The prime example of legal title being held for another is the institution of the trust itself. Fiduciaries who hold the legal title to fiduciary property may be treated indistinguishably from trustees.[70] In other cases, beneficiaries will retain the legal title to the property themselves and be able to assert 'pure proprietary' claims to get it back.[71] The fact of entrusting or equitable jurisdiction may not need to be established for the purpose of a 'pure proprietary' claim.[72]

Both equitable and 'pure proprietary' rights are subject to the terms of any contract between the parties to the contrary. Equitable rights are subject also to any contrary mutual intention in the entrusting itself. Both of these may occur in certain types of agency where property held by agents in that capacity is held in their own names.[73] Equitable interests of trusting parties in this kind of property are identified simply as the beneficiary's 'property'. In protecting a property interest of either kind, fiduciary law will often act in aid of the common law relation of agency. Principals who delegate to agents the power to manage their property may be saved the trouble of devising a contract with a list of prohibitions against the agent misappropriating that property. Fiduciary law does the job for them. Equity implies appropriate prohibitions into the relationship.[74]

'Property theory' is not often cited as a justification by the courts where the existence of a fiduciary relationship is contested. Nor is it much espoused by legal writers advocating the systematisation of fiduciary law. This may be because of property's observed tendency to obscure most substantive issues:

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70 JC Shepherd, "Towards a Unified Concept of Fiduciary Relationships", note 29 *supra* at 63.

71 G Jones, *Goff and Jones: Law of Restitution*, Sweet & Maxwell (4th ed, 1993) pp 75-7.

72 See *Walker v Corboy* (1990) 19 NSWLR 382.

73 FMB Reynolds, *Bowstead on Agency*, Sweet & Maxwell (15th ed, 1985) pp 162-3.

74 See R Posner, *Economic Analysis of Law*, Little Brown & Co (3rd ed, 1986) at note 2 on 384; AG Anderson, "Conflicts of Interest: Efficiency, Fairness and Corporate Structure" (1978) 25 *UCLA Law Review* 738; S Shavell, "Risk Sharing and Incentives in the Principal and Agent Relationship" (1979) 10 *Bell Journal of Economics* 55; V Brudney, RC Clark, "A New Look at Corporate Opportunities" (1981) 94 *Harvard Law Review* 997 at 999.

> [W]hat argument over property finally reduces to, as do most arguments about property, is what are legitimate interests that call for the protection of the law.[75]

In this area, policy questions may arise in this form. Should equity deprive persons of gains they make for themselves in the course of producing greater gains for those who trust them? Should all profits belong to those who provided the profit-maker with the initial opportunity or introduction to make them? Resolution should involve examining such things as the nature of the wrong committed, the fairness of the transaction to both parties and the commerciality or otherwise of the facts. Yet all this is submerged when a 'property or not' determination is made.[76] Consideration is not directed to important questions such as what sanction a defendant deserves for what has been done or whether any and what wrong has been committed at all. 'Property' analysis may hence be on the margins of proper fiduciary characterisation. Nevertheless, 'property' is a convenient reasoning tool and may not be beyond analogical childbirth.

VI. CHARACTERISTIC 3: RELIANCE

Reliance as a characteristic may be interpreted to include two things. Either a person may *rely in fact* on another, or, in the circumstances, the same person may be *entitled to rely*.[77] Reliance in fact occurs where a person actually holds trust or has confidence in another. Business partners usually have this sort of confidence in one another, or businesspersons may actually place trust in the judgment of their financial advisors or their bank managers. Entitlement to rely, on the other hand, occurs by operation of law. It occurs in those relationships which the law recognises as inherently confidential and worthy of protection. Fiduciary status is then given without much argument. Clients, for instance, may be entitled to rely on the integrity of a solicitor whom they have consulted according to fiduciary standards. This is so regardless of who the solicitor is and whether the client actually trusts her or him. The different reliance types substantially overlap. Each example of reliance given in this paragraph of either kind, involving partners, bank managers, business advisors, and solicitors could probably be argued for as an example of the other type. Partners and bank managers might be such as one is entitled to rely upon. In many cases, a solicitor is one who is actually relied upon. Almost all instances at large of 'entitlement to rely' are also 'reliances in fact'. Partners are entitled to rely on each other and usually do. Repeated instances of factual reliance move towards the 'entitlement to rely'. Requirements of proof in court change accordingly. Much of the reliance characteristic here is illustrated by ambivalent relationships: joint venture participants, bank managers, and the like. They are midway between actual and expected reliance.

Reliance can in this way be distinguished between its actual and hypothetical applications. The 'factual phenomenon' and the 'legal phenomenon' of the thing

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75 S Beck, "The Quickening of Fiduciary Obligation: *Canadian Aero Services v O'Malley*" (1975) 53 *Canadian Bar Review* 771 at 781.

76 T Frankel, "Fiduciary Law" (1983) 71 *California Law Review* 795 at 829.

77 Cf P Finn, note 3 *supra* at 33-54.

have been said to be opposed.[78] However, any difference between these two sheds little light on our concern to understand fiduciary reasoning. We are no closer to identifying new fiduciary types. Also, it is tautologous to say that one trusts or reposes confidence in a fiduciary. Of course one trusts a person trusted. Identity of who by the reliance characteristic is a 'fiduciary' cannot be developed by repeating the word 'trust'. Elucidation will more likely come about instead by distinguishing different ways in which trust can be relied on. Reliance in a fiduciary relation may be either 'two-sided' or 'one-sided'. This general division of the characteristic is proposed to reflect the different ways in which reliance may be placed. Two-sided reliance is where the parties rely on each other mutually. One-sided reliance is where one party relies on another party in the relationship, often from a position of vulnerability or inequality. Reasoning processes under each heading can be examined separately.

A. Two-Sided Reliance (the Partnership Analogy)

Equity has recognised several relations where each party places trust and confidence in the other, where both parties are mutually reliant - or, as we will call it, 'two-sided'. Partnership is its paradigm and the main source of analogies which inform the reasoning in novel cases. Originally an equitable idea, 'partnership' as defined in the uniform partnership legislation may now subsume the whole equitable sense of the term.[79] It is:

> the relation which subsists between persons carrying on business in common with a view to profit.[80]

This is the canonical definition of partnership in Australia. In *Birtchnell v Equity Trustees, Executors and Agency Co Ltd,* Dixon J said of partnership's equitable nature that

> The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners.[81]

Mutual trust and confidence of partners is one of the 'accepted categories' of fiduciary relation. A "stronger case of the fiduciary relationship cannot be conceived", Dixon J says. He continues with a quotation from the judgment of Bacon VC in *Helmore v Smith.*[82] This was a case where a partner went temporarily insane. His co-partner allowed the sheriff to proceed to execution against the insane partner's partnership share for a very small sum. The co-partner then purchased the share from the sheriff for a bargain price. It was an act of great disloyalty. When the insane partner recovered his sanity, he successfully brought action to have the sale set aside as an act in breach of fiduciary duty. Bacon V-C observed:

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78 *Ibid* at 33-94; 36A *Corpus Juris Secundum* 381-9 (1961) and 37 *Am Jur* 2d §16 (1968).

79 R Ladbury, "Commentary" in P Finn (ed), *Equity and Commercial Relationships*, Law Book Company (1987) at 45-6.

80 *Partnership Act*: UK, s 1(1); NSW, s 1(1); Vic, s 5(1); Qld, s 5(1); WA, s 7(1); SA, s 1(1); Tas, s 6(1).

81 Note 15 *supra* at 407.

82 Note 16 *supra* at 444.

> [partners'] mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on.

A point is made about the nature of partners' trust. Partners trust "one another" Bacon V-C says, in a mutual way. Trust proceeds from each party, both in deciding to join the relation in the first place and in deciding to stay in it.

B. One-Sided Reliance

Several legal and equitable regimes compete to regulate the consequences of one-sided reliance, sometimes under the names of vulnerability or inequality. First, there is the fiduciary relationship of trust. This is what concerns us in these notes. A person relies on another, as she or he may be entitled to do so, and, if the other disappoints that reliance, the relationship has been breached. Next there are the typical facts which the fiduciary relation of influence attends to. A vulnerable or unequal party in a relationship places her or his trust in a stronger or more competent party. If the reliance is exploited by the stronger party, a series of remedial obligations is available. Fiduciary relationships of trust may often be found in this undue influence type of case. However, the latter type of reliance does not often attract the trusting relationship in Australia. It is much more common in the North American cases.[83] In Australia, the trusting relation is one of several resources to remedy the untoward consequences of this type of reliance. It is not always, it must be said, the most appropriate resource.[84]

Anglo-Australian case law tends to class 'one-sided' forms of reliance where the parties are unequal as instances of 'undue influence',[85] or 'unconscionability'.[86] However, the law is not always consistent. It is increasingly affected by competing strains of theory coming from Canada and the United States. Thus, in 1984 Dawson J in *Hospital Products Ltd v United States Surgical Corporation* said that "inherent in the nature" of the fiduciary relation was "a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance on the other and requires the protection of equity".[87]

This is close to some celebrated words used by EJ Weinrib in an article approved in the Canadian Supreme Court.[88] Fiduciary types are thereby conflated. Trusting and influencing are confounded. Multi-national corporations or departments of state, wronged by their fiduciary agents, are made to conform to a disadvantaged claimant's profile. Undue influence is more appropriate instead where the consent of the weaker party is impeached. Unconscionability is also inappropriate. It looks to substantive factors, such as a relation's outcome, or what the weaker party has agreed to.

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83 In the United States, see *Broomfield v Kosow* 212 NE 2d 556 (1965) and in Canada, *Morrison v Coast Finance Ltd* (1966) 55 DLR (2d) 710 (BCCA).

84 Note 3 *supra* at 27-30.

85 For example, *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

86 For example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

87 Note 1 *supra* at 142.

88 EJ Weinrib, "Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1 at 6-7; specifically approved by Wilson J in *Frame v Smith*, note 25 *supra* at 99.

Under this 'one-sided' heading we shall class the claim of a party to a relationship who either relies in fact on another or is entitled so to do. We will not be specifically concerned with reliant parties who are specially disadvantaged or vulnerable. These are matters for undue influence. An example of the current type of fiduciary relation is that between employer and employee. An employer is entitled to expect that the employee in the course of her or his employment will act in the employer's and not the employee's interest. At least, this is true until the employer is informed otherwise. The employer is 'vulnerable' to the extent that the employee may act otherwise than he is relied upon to do.

VII. CHARACTERISTIC 4: POWER (OR DISCRETION)

This is the last characteristic of the fiduciary relation that will be proposed. It provides that a fiduciary relation may exist where the trusted party has a power (or discretion) to change the legal or practical interests of the party trusting. Expressed by Toohey J in *Mabo v The State of Queensland [No 2]*, "the source of the [fiduciary] obligation...is precisely the power to affect the interests of a person adversely".[89]

The word 'power', in strictness, may imply for its possessor a discretion in whether to exercise it or not. So it may be unnecessary to speak separately of a 'discretion'. Sometimes the two words are used interchangeably.[90] The idea is that fiduciary relationships can be about the control of unregulated discretions. The purpose of the category is to curb possible abuses of power.

The power conception of a fiduciary relation has been particularly influential in Canada. In many ways this Canadian conception of a fiduciary relation appears to function as a tort.[91] In an influential 1975 article, Ernest Weinrib wrote that the "primary policy" of the fiduciary relation was to regulate situations where:

> the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is equity's blunt tool for control of the discretion... Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its boundaries. 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.[92]

A fiduciary relationship can therefore arise unilaterally where the power characteristic is invoked. This sounds a little anomalous. Is not a relationship necessarily of a bilateral nature? On the Canadian view, only one party need possess the indicia of a discretion, power, control in relation to another. Nothing need proceed from the party liable to these things. Of course, 'discretion', 'power', or 'control' over the interests of the trusting party is equivalent to any measure of reliance from that party's perspective.

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89 *Mabo v State of Queensland [No 2]*, note 22 *supra* at 201.

90 JC Shepherd, "Towards a Unified Concept of Fiduciary Relationships", note 29 *supra* at 68.

91 Note 54 *supra* at 15.

92 EJ Weinrib, note 88 *supra* at 4.

Apart from Weinrib, Justice Wilson of the Supreme Court has been another important source of Canadian fiduciary law. Her dissenting judgment in *Frame v Smith*[93] has been much approved.[94] The case involved an unlikely damages claim by a husband against his former wife. The wife's liability was argued to arise from her denial of his legal right to have access to the children of the former marriage. Finding that the wife was a fiduciary, her Honour said that there has been "no definition of the concept 'fiduciary'", although the contexts where it arose had the following 'common features':

(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.[95]

Features described by Wilson J in *Frame v Smith* seem to be cumulative or rather, to be the premises of a syllogism with a fiduciary conclusion. There are problems with this, as well as Weinrib's formulations of the power characteristic when it is universalised. For 'power or discretion' as a unified conception of the fiduciary relationship is at the one time not wide enough and too wide. It is not wide enough to explain the bribery and secret commissions cases. In *Reading v R*,[96] Sergeant Reading was scarcely able to change the Crown's legal or practical interests in any sensible way, but he was a fiduciary all the same. Nor could the bribed sergeant of the Metropolitan Police in *Attorney-General v Goddard*[97] affect the interests of the Attorney-General. The vendor of land after sale and prior to settlement holds the land as fiduciary for the purchaser without having any ability to affect the purchaser's interests.[98] Think also of the cases where the parties' relations are inchoate. Could the sitting tenant and prospective partner in *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd*[99] be at the mercy of the proposed partner's 'power or discretion'? The only harm that could come to the sitting tenant at the point at which negotiations had been reached was by the proposed partner doing wrong. If a fiduciary relationship can be constituted by the wrong it remedies, the nakedness of the fiduciary category is exposed. The relation is just an instrument to desired conclusions.

The 'power or discretion' idea is at the same time too wide. This characteristic would attach fiduciary sanctions to those legal powers which do not have correlative duties. Consider, for example, a lessor's power to renew a lease. Should the power that this affords the lessor over the lessee turn the lessor into a fiduciary? Something more is needed. Most franchises embody power in the franchiser, but this is not enough. Additional trusting or mutuality must exist.

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93 Note 25 *supra* at 98-9.
94 For example, Sopinka and La Forest JJ (dissenting) in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 599, 645 and La Forest and McLachlin JJ (dissenting) in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 155, 136.
95 Note 25 *supra* at 99.
96 Note 11 *supra*.
97 (1929) 98 LJKB 743.
98 Note 74 *supra* at 70.
99 (1986) 2 Qd R 1.

Something similar is found in the United States cases where a franchiser not renewing a franchise is found to be a delinquent fiduciary. In *Arnott v American Oil Company*,[100] for example, a service station proprietor and franchisee was found to be in a fiduciary relationship with an oil company franchiser only after cogent evidence of common interest and profit was shown. The decision may in any event be wrong. Consider also the mortgagee's power of sale. A mortgagee's exercise of this will often detrimentally affect the mortgagor's interests. However, the orthodoxy in *Henry Roach (Petroleum) Pty Ltd v Credit House*[101] and *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd*[102] is that this power exists only to serve the mortgagee's interest.

Perhaps the whole 'power or discretion' determinant is unsuited to the resolution of fiduciary disputes in private law. The notion of 'power' may be too general and 'open-ended' to be reduced to the categories that the private law works with. Power is perhaps not, and cannot be, a characteristic element in a fiduciary relationship. Rather, power describes the relationship's result. Power is what a fiduciary relationship may, but need not always, confer on one party to it. It is not how the relationship is constituted, as with the other characteristics. This may disqualify the 'power-based' fiduciary relationship from applying where the power is an unanalysable raw fact. Governmental power is of this type. A convergence of fiduciary and administrative law in principle seems unattainable.

100 609 F 2d 873 (1979).
101 [1976] VR 309 at 313, per Lush J.
102 (1978) 139 CLR 195.