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FIDUCIARY DUTIES
Obligations of Loyalty and Faithfulness

Michael Ng

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This loose-leaf service offers readers a wide-ranging, up-to-date analysis of fiduciary relationships in Canada. The publication's comprehensive coverage of fiduciary responsibility is organized into four parts: (1) Overview of Fiduciary Law; (2) Fiduciary Relationships; (3) Duties of Faithfulness; and (4) Consequences of a Breach of Faithfulness. The publication also provides readers with detailed case law analysis, valuable commentary, summaries of remedies awarded for breaches of fiduciary obligation, and other value-added reference tools. The publication includes coverage of many different types of established fiduciary relationships including directors/officers, key employees, executors and administrators, trustees, accountants, insurance advisers, lawyers, physicians, spouses, and others. The updatable loose-leaf format ensures currency.

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What's New in this Update:

New case law and commentary, including the following recent decisions:

- **Fiduciary Per Se Relationships – Caretaker Roles – Personal Representatives –** The appeal involved the interpretation of a will that provided trustees with the right to encroach on capital as they in their absolute discretion considered necessary or advisable for the benefit of the income beneficiary. The main issue was whether the trustees improperly relied on extraneous factors in the exercise of their discretion. Although reaching the same conclusion as the application judge on the issue of the monthly encroachment, Justice Pepall did so for different reasons. The application judge determined that in a trust established for the support, care and comfort of a beneficiary, the omission of any mention of the income of the beneficiary in the trust document means that a trustee may not demand that the beneficiary's own income be called on first and a means test is inappropriate. Justice Pepall noted that this proposition was more contentious. As a general premise, *Butler, Re*, [1951] O.W.N. 670 (Ont. H.C.) confirms that trustees holding a discretionary power to encroach on capital must obtain sufficient information to enable them to decide whether to exercise their powers. In that case, the trustees' failure to seek any information from the income beneficiary on her means, income, or circumstances resulted in intervention by the court. Having examined the jurisprudence and the commentary, Justice Pepall observed that one can extract certain threads. The starting point is that effect must be given to the testator's intentions as ascertained from the language of the will and surrounding circumstances. Trustees must therefore carefully examine the wording of the will or trust instrument. "The duty to consider all relevant matters has as its obvious corollary, a duty to make all necessary inquiries so that the trustee is adequately equipped to make a decision". Absent other direction in the will, Justice Pepall failed to see how a trustee could satisfy itself that payment of capital to the income beneficiary is necessary or advisable without considering the beneficiary's financial circumstances. The absence of words mandating consideration of an income beneficiary's financial circumstances is as unrevealing of intention as the absence of words that an income beneficiary's financial circumstances be disregarded. This is a neutral factor. While it may be that the absence of such words may lend strength to an interpretative exercise, they should not be treated as a standalone determinative proposition. Ideally, testators will state in wills that contain a discretionary trust with a power of encroachment

whether the income beneficiary's resources are to be considered. In the absence of such a direction however, reliance should not be placed on propositions stated to be of general application. Rather, in each case, resort must be made to the language of the will and the surrounding circumstances. The proper approach is case specific. This does not mean that in the absence of direction in the will or trust instrument that a means test is required of the beneficiary. Rather, it simply means that trustees may make some inquiries to satisfy themselves of their mandate and ought not to be criticized for doing so. Justice Pepall noted that there was nothing in Ollie's will that addressed specifically the issue of consideration being given to Gerald's financial circumstances. On the other hand, it was difficult to see how his resources would not necessarily inform both his "comfort and well-being" and the Trustees' ability to consider what was "necessary" or "advisable". Although admittedly dated, Gerald did declare in excess of $1 million in assets in 2011, yet claimed impecuniosity at the time he initiated his application without fully explaining the disbursement of those assets. The encroachment would not be regulated by Gerald's means but his financial circumstances were a proper factor for the Trustees to consider in their discretion under the will. Justice Pepall concluded that although reliance on the second proposition cited in Barnes was ill-placed, the application judge's reliance on the first proposition relating to extraneous matters was well founded. Her determination of that issue served to defeat any shortcoming in the remainder of her analysis. With respect to the application judge's reliance on the Trustees' distrust of their father and Wainman, in Justice Pepall's view, it was an error for her to characterize the distrust factor as extraneous or irrelevant to the exercise of the Trustees' discretion: *Walters v. Walters*, 2022 CarswellOnt 445, 2022 ONCA 38 (Ont. C.A.).

- **Fiduciary Per Se Relationships – Cohort Roles – Partners –** Justice Goepel observed that the most contentious issue on the appeal was the order that Hutchison should pay to the partnership $476,258.59 in equitable compensation for the Secret Profits. In making this award, Justice Goepel noted that the Chief Justice appeared to have overlooked the impact of the order on the certified capital accounts and his finding in Hinkson #1, that the certification of the capital accounts was *res judicata*. The certified capital accounts were premised on the Secret Profits being assigned to Hutchison as draws. If Hutchison must pay the Secret Profits back to the firm, his capital account would have to be recalculated. That recalculation would increase Hutchison's capital account to $1 million, more than double that of McKnight whose capital account would be unchanged from the calculations made by the special

referee. McKnight argued that the certification of the special referee's report was not an impediment to the award of equitable compensation, submitting that no judge had ordered the partnership be wound up on the basis of the certified capital accounts and there was nothing to prevent the capital accounts now being readjusted to take into account the order for equitable compensation. Justice Goepel explained that the submission mischaracterized the remedy granted in the First Action. The determination of the capital accounts was a necessary step in the winding up. Justice Grist, when he certified the capital accounts, recognized that there may be further issues to be resolved which could affect the ultimate equities between the parties. Indeed, the entire Second Action was dedicated to resolving those issues. What was resolved in the First Action was the capital accounts. The certification of the special referee's report was intended to conclusively fix the amounts of those accounts to bind the parties going forward. McKnight's various attempts to obtain a judgment against Hutchison were premised on the certified accounts. The Chief Justice finding in Hinkson #1 that the capital accounts were *res judicata* and could not be revisited was fatal to the award of equitable compensation. While it might have been open to Justice Grist to order Hutchison repay the Secret Profits to the firm, he chose a different remedy. McKnight did not appeal that decision and indeed, argued in the First Appeal that the accounting ordered by Justice Grist was the proper remedy for the breach: *McKnight v. Hutchison*, 2022 CarswellBC 159, 2022 BCCA 27 (B.C.C.A.).

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