TYPES OF RELATIONSHIP ARISING IN OIL AND GAS AGREEMENTS

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The Nature of The Problem

In approaching the whole problem of fiduciary relationships as they arise in oil and gas transactions, a similarity immediately becomes apparent between the elusive "fiduciary relationship" and the equally elusive crude oil reservoir. Geologists and geophysicists in their preliminary exploratory work search for and locate prospective producing areas, but can provide no guarantee to the driller that oil will be found in these areas. Similarly, in the search for fiduciary relationships, it is our objective only to provide the prospective areas where fiduciary relationships may be found. It is not our task to find or identify the relationship but merely to direct the search. Nevertheless, even the geologist must have some appreciation and understanding of the nature and characteristics of oil in order to apply his special knowledge to the search for this elusive hydrocarbon. Likewise, to locate favourable exploration areas for the fiduciary relationship in oil and gas transactions, we must also have a concept of the relationship itself. Therefore, at the risk of switching metaphors, it seems proper to outline the characteristics of this equitable animal, at least to the extent necessary to facilitate our recognition of its spoor, should we, by chance, encounter it during this oil lawyers' safari.

Professor Williams refers to Professor Scott's definition of a fiduciary[1]:

> 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.

Professor Scott says[2]:

> What are the usual fiduciary relations? They include the relation of trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of kin of the decedent. The directors and officers of a corporation are in a fiduciary relation to the corporation, and to some extent at least to the shareholders. In a partnership each partner is in a fiduciary relation to the others, since, although he has his own interests to look after, he also has the power and the duty to look after the interests of the others.
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> Some fiduciary relationships are undoubtedly more intense than others. The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the Board of directors or a promoter acting for investors in a new corporation. All of these, however, are fiduciaries and are subject to the fiduciary principle of loyalty, although not to the same extent.

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Special acknowledgement is made to Professor Howard R. Williams for his paper *"The Fiduciary Principle in the Law of Oil and Gas"* reported in the proceedings of the 13th Annual Institute on Oil and Gas Law and Taxation of the South Western Legal Foundation, p. 201, to which frequent reference is made in this paper.

1 *The Fiduciary Principle in the Law of Oil and Gas*, 13th Annual Institute on Oil and Gas Law and Taxation 201, 203. See also 37 Calif. L. Rev. 539, 540.
2 37 Calif. L. Rev. 539, 541.

Professor Scott observes that where a fiduciary does an act which would be a breach of his fiduciary duty if done without the consent of his principal, such consent would protect him only if he has in no way taken advantage of his position as fiduciary in procuring such consent[3]. He refers[4] to the judgment of Mr. Justice Cardozo in *Wendt* v. *Fischer*:[5]

> If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.

In *Regal (Hastings) Ltd. v. Gulliver*[6] Lord Russell of Killowen said at page 386:

> 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 upon 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 whether the profiteer was under a duty to obtain the source of the profit for 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.

Professor Williams[7] deals in a comprehensive way with fiduciary obligations arising out of certain relationships in the oil industry. He discusses problems arising between joint owners and co-tenants, between owners of successive legal interests, and between lessor and lessee. He also discusses the fiduciary position of the operator of an oil property with respect to an overriding royalty interest[8].

Drawing on the insights of Professors Scott and Williams, and applying the principles laid down in United States, English and Canadian cases, it is proposed to identify the types of situations connected with oil and gas agreements which may give rise to problems of a fiduciary character.

Misuse of Confidential Information[9]

Information Gained In Negotiations

In the case of *Rader* v. *Boyd*[10] the Tenth Circuit Court of Appeal said:

> Parties may assuredly deal at arms' length for their mutual benefit without raising a confidential relationship between them.

Somewhere, however, in negotiations involving secret or confidential information the misuse of this information will precipitate equitable remedies. The United States courts usually invoke these remedies by finding that the parties have created a mining partnership or joint venture which results in the creation of a fiduciary relationship requiring restitution.

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3 *Ibid.*
4 Scott, *Loc. Cit. Supra.* at 544.
5 (1926) 243 N.Y. 439, 154 N.E. 303.
6 (1942) 1 All E.R. 379.
7 *Loc. Cit Supra.* 201, *et seq.*
8 In this connection see also Earl Brown, *Oil and Gas Leases*, 34 Mississippi Law Journal, pp. 29-31. NOTE: The latest case on this point appears to be *Meeker* v. *Ambassador Oil Company*, 18 O. & G.R. 642 (1962).
See also C. M. Martz and R. L. Hames, *Implied Rights of Royalty Owners*, Third Annual Rocky Mountain Mineral Law Institute 217, where the authors make the following statement:
A number of cases have indicated that a fiduciary relationship does exist between the owners of mineral and independent royalty interests but have described the duties of the mineral owners in a variety of ways. There is authority that he is a trustee, in fact, that he owes standard fiduciary duties to the royalty owner, that he holds a Power of Attorney creating a relationship of trust, that he must be loyal to the joint concern and of the utmost good faith, fairness and honesty in his dealings with the royalty owner, or that he must adhere to a high standard of fair play.
9 Professor Scott deals with this subject under the heading "Acquisition of Property by a Fiduciary", *See Constructive Trusts*, 71 L.Q.R. 39 at 48.
10 252 F. (2d) 585 at 587.

A good example is the case of *Ballard v. Claude Drilling Company.*[11] In that case the plaintiff alleged that he hired a geologist to determine the geological prospects of a farmout option and that he then submitted such geological information to the defendant drilling company, proposing that the defendant drill a well in return for an undivided one-half interest in the option lands. After considering the deal for two days the defendant's president advised the plaintiff that he was "sold on the deal" but would have to get the consent of an associate whom he could not locate. He, therefore, urged the plaintiff to get an extension of his option. The plaintiff got an extension of the option and later the defendant's president advised the plaintiff that his associate was not interested in the deal. The plaintiff alleged that by that time it was too late to contact other drillers and that he had to give up his agreement. The plaintiff alleged that the defendant, with knowledge of the geological information gained from the plaintiff, contracted with the oil company from whom the plaintiff had obtained the option on substantially the same terms as had the plaintiff, and then had drilled a well. The court said:

> In this case plaintiffs had information respecting this lease which they had spent time and money to obtain. This included the results of the special study plaintiffs had given to the geological structure of the land in and near the Dick lease, the reports and maps of the geologist they had employed, and the terms of the farmout contract the oil company was willing to make. This was valuable information which belonged to plaintiffs *Dodge Co.* v. *Construction Information Company,* 183 Mass. 62; 66 N.E. 204. They were business or trade secrets recognized in the law as constituting rights against the wrongful use of which the owner will be protected.

Of course, the misuse of confidential information must be a factor contributing to the enrichment of the defendant. In *Bolin* v. *Smith*[12] the plaintiff and defendant entered into a partnersip for the purpose of trading in oil and gas properties. The defendant was the managing partner. The partnership drilled two dry holes on land known as the Howard land. The defendant was later urged by the plaintiff to secure farmouts on land lying immediately north of the Howard land. For this purpose partnership geology in the area was given to him. While the defendant was negotiating for the farmouts, the farmor oil company showed him its geology covering the area. The farmouts were obtained and several producing wells were drilled on the farmout tract. After expiration of the partnership leases on the Howard property, and after a good showing of oil in the first farmout well, the defendant acquired new leases on the Howard lands for his own account. The plaintiff brought action to impress a constructive trust on the defendant with respect to the new Howard leases, and for recovery of a share of the net proceeds from oil produced from these lands. Both the majority and dissenting judges assumed that before the plaintiff could make out his case the geological information acquired by the defendant had to be at least a "motivating circumstance" influencing the defendant in re-acquiring the Howard leases.

Information Acquired by Contractors with Oil Companies and by Drillers, Geological Parties, Etc.

In *Ohio Oil Company* v. *Sharpe*[13] an employee of the defendant company, which was doing geophysical work for the plaintiff company, turned

11 88 P. (2d) 1021.
12 294 S.W. (2d) 280.
13 135 F(2d)303. See also *Snakard* v. *McLaughlin,* 12 O. & G.R. 704.

confidential geophysical prospect information over to a third party who received it with the knowledge that it was confidential and the property of the plaintiff. The third party obtained leases on the land. The plaintiff's action for damages against the defendant succeeded.

Information Acquired by Lease Brokers

In *Barnsdall Oil Company* v. *Willis*[14] a lease broker employed by the plaintiff to acquire certain leases was held to be a constructive trustee when he took advantage of confidential information which he would not have received but for his employment with Barnsdall, to acquire leases in his own name.

In *Molstad and Company Limited* v. *Fedoruk et Ux.*[15] the Appellate Division of the Supreme Court of Alberta held that an agent with whom property is listed for sale stands in a fiduciary relationship to the vendor. Therefore, he is required, *inter alia*, to disclose all information he acquires which would be of advantage to the vendor. By withholding from the vendor the name of the real purchaser and the purpose for which the property is being acquired, he acts in violation of that relationship.

Information Acquired by Employees and Servants

A broad statement of the law is contained in the case of *Bennett Pacaud Co.* v. *Dunlop.*[16] There, Masten, J.A. of the Ontario Court of Appeal said, at page 243:

> I think that we should not hesitate to declare it to be law that no servant can be permitted to retain as against his employer profits acquired by engaging, during the term of employment, without his masters consent, in any business which gives him an interest conflicting with his duty to that employer.

The case of the geologist or other employee who acquires a mineral interest in his own name has been frequently dealt with by the courts. The leading United States authority is perhaps *Hunter* v. *Shell Oil Company.*[18] There, the defendant, a senior geologist employed by the plaintiff to collect geological and geophysical information and to advise the plaintiff on where to acquire interests and drill, in concert with others acquired royalty and other interests in various parcels on the basis of information acquired by him in the course of his employment. He was subsequently discharged. The court imposed a constructive trust in favour of the plaintiff.

In the leading case of *Amerada Petroleum Corporation* v. *Burline*[19] the defendant was the assistant production manager of the plaintiff. He acquired some interests in the Williston Basin in the same general area where the plaintiff was interested. He had not signed the plaintiff's agreement, of a type common in the oil industry, prohibiting an employee purchasing or dealing in oil and gas interests. The court found that he did not acquire his interests on the basis of any confidential or secret maps or other company sources. The court held that:

> Amerada had no interest, actual or in expectancy in the mineral interests acquired by Burline. His acquisition of the mineral interests in no way hindered or defeated the plans and purposes of Amerada in the area or the carrying on of the acquisition and development of mineral leases and interests by it. Neither

14 78 F Supp. 293, affirmed 173 F(2d)979.
15 (1957) 21 W.W.R. 172.
16 [1933] 2 D.L.R. 237.
18 198 F (2d) 485, O. & G.R. 1798. See also *Russell* v. *Republic Production Company*, 112 F(2d)663 and *Pratt* v. *Shell Petroleum Company*, 100 F(2d)833.
19 231 F (2d) 862; 5 O. & G.R. 1318.

his employment, nor his relationship to Amerada, imposed any duty on him to acquire the mineral interests for Amerada. Burline did not acquire or use confidential information belonging to Amerada in connection with the purchase of such mineral interests. His duties as Amerada's employee did not embrace the obtaining, interpreting, or using of geological or geophysical information. Those facts distinguish the cases of *Pratt* v. *Shell Petroleum Corporation, Hunter* v. *Shell Oil Company, Ohio Oil* v. *Sharpe*.[20]

A Canadian mining case is *Tombill Gold Mines Ltd.* v. *Hamilton et al.*[21] In this case the plaintiff, Tombill Gold Mines, Ltd., employed one of the defendants, General Engineering Company, as a mining and engineering consultant for a monthly fee which entitled the company to two and one-half days of an engineer's services whenever requested. These services were to be performed by the defendant, Hargraft, an employee of General Engineering Company. Robert Hamilton and Phillip Hamilton, individual defendants, were respectively President and Vice-President of General Engineering Company, and Robert Hamilton was also a director of the plaintiff company. The Hamilton brothers, as a result of information obtained by Hargraft from a prospector, filed mineral claims which were transferred to the defendant, Geco Mines Ltd., a company formed by the Hamilton brothers. The plaintiff, Tombill, was not informed of these developments, and when it learned of them brought action for damages claiming that the conduct of the defendants constituted a breach of contract between it and the General Engineering Company, and alternatively for a declaration that the claims belonged to it. The Ontario Court of Appeal affirmed the decision of the trial judge, Gale, J., holding that the only obligation of the defendant's servant, Hargraft, was to appraise new properties when instructed by the plaintiff, and that there was no breach of contract arising out of the failure of the defendants to inform the plaintiff of the prospective area. The court held that the defendant's conduct was outside the relationship existing between the plaintiff and General Engineering Company or Hargraft, and also outside the scope of any agency which had existed between the parties. The Court further held that the information acquired by Hargraft was not acquired in the course of performance by him of any duties for the plaintiff. Therefore there was no question of him competing with his principal. The dissenting judgment held that under the circumstances General Engineering owed a duty to offer the claims to its client before taking them for its own benefit.

Company Directors

It is well known that managers of businesses and directors of companies stand in a fiduciary capacity to their companies. Snell's *Principles of Equity,* in discussing fiduciary relationships says:[22]

Managers of businesses and others who assume control over the property of another are also within the scope of the principle.

The leading English case on company directors is the decision of the House of Lords in *Regal (Hastings) Ltd.* v. *Gulliver*.[23] Canadian cases

20 For further discussion on this type of problem see, Williams and Meyers *Oil and Gas Law* Vol. II ss. 442.2.
See also Jan. 1957 North Dakota Law Review 122 (The Burline case); Moses, *Unauthorized Use of Confidential Oil Information,* Rocky Mountain Mineral Law Foundation, First Annual Institute on Mineral Law, 267; 27 Tul. L. Rev. 466. An interesting Canadian case relating to the staking of "*Asbestos Claims*" is found in [1944] S.C.R. 111.
21 [1955] 5 D.L.R. 708 (Ont. C.A.); [1955] 1 D.L.R. 101; [1954] O.R. 871 (Trial).
22 25th ed., p. 499.
23 [1942] 1 All E.R. 378, 379.

involving corporate directors are *Zwicker* v. *Stanburg et al*[24] and cases cited by Rand, J. in *Midcon Oil and Gas Ltd.* v. *New British Dominion Oil Co. Ltd. et al.*[25]

Many problems permit only speculative answers. For example, what happens where the directors of a corporation are also stockholders or directors of a second corporation whose interests are in conflict with those of the first?

In *Weber* v. *Climax Molybdenum Company*[26] it was held that where a corporation formed a subsidiary which purchased certain mining property and issued a quantity of stock to the seller of the property, and the majority of the directors of the subsidiary, who were also officers of the parent company, voted to repay the parent company for advances made by issuing notes and stock before any profits had been realized, the action of the common directors was illegal and void and should be set aside.

Similarly, in *Old Mortgage and Finance Co.* v. *Pasadena Land Co.*[27] it was held that where directors were also stockholders in another corporation, a transaction was voidable and could be set aside even against a third party to the transaction who had knowledge of the dual representation.

Company Officers

The secretary is in a fiduciary relationship to his company and is liable to account for money received by way of secret commission.[28] Thus a secretary who received fully-paid shares as a reward for his services in completing a contract was held liable to the company for an amount equivalent to the highest value of the shares during the time they were held by him.

Professor Seavey[29] refers to *Bliss Petroleum Co.* v. *McNally.*[30] In this case the president of a corporation engaged in oil exploration, bought leases for his own account and sold them to his corporation at a profit. At the time his corporation had no funds available for the purpose. He was not permitted to keep the profit.

Professor Seavey says:[31]

> Here is, perhaps, a double ground for recovery. An agent gaining information while in the prosecution of his principal's business has a self denying duty to use it for the principal's benefit rather than his own. If there is doubt whether the principal can use it he should at least make the offer. *A fortiori*, one must not compete with his principal.[32] If he does so a constructive trust in the proceeds arises in the principal's favour. Where an agent sells property to his principal without the principal's knowledge, the transaction can be rescinded, irrespective of its fairness. If the principal knows, the agent can justify the sale only by showing that the price was fair, that the principal knew all relevant facts and, in some cases had the benefit of disinterested advice. If he buys property with the intent later to sell it to the principal, he should give the principal the benefit of the bargain, a counsel of perfection too seldom observed. In the *Bliss Petroleum Case*,[33] if there was competition, the President should have reported his purchases to the Directors, and should have offered to sell them to the company at the purchase price or to finance the purchase for the company at a reason-

24 [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 237.
25 [1958] S.C.R. 314 at 338.
26 216 N.Y. Supp. 481.
27 241 Mich. 426, 216 N.W. 922.
28 *McKay's* case (1875) 2 Ch. D. 1.
29 *Problems in Restitution*, 7 Okla. L. Rev. 258.
30 254 Mich. 569, 237 N.W. 53 (1931).
31 *Loc. Cit. Supra* at 260.
32 See also *Liability of Directors for Taking Corporate Opportunities, using Corporate Facilities or Engaging in a Competing Business*, 39 Colum. L. Rev. 219. (1938) See also *Extent of the Trustee's Duty not to Compete*, 50 Colum. L. Rev. 78 (1950).
33 *Bliss Petroleum Co.* v. *McNally*, *Supra* n. 27.

able fee. In the absence of some such conduct the corporation would be entitled to have the property for the original price paid, as, indeed, it would if the president bought intending later to sell it.

Seavey also refers[34] to the case of *Mayor of Salford* v. *Lever*[35] where an agent employed to purchase coal for his principal obtained from the seller of the coal a commission of one shilling per ton. The court held that the true price should be the contract price less the shilling. It was held that the purchaser could recover the overpayment from both the agent and the vendor of the coal.[36] Commenting on this case Professor Seavey says:

I admire the unexpected ingenuity of the Court in using the principal of unjust enrichment (payment by mistake as to the amount due) to achieve the result.

Corporate Problems

In the recent Canadian case of *International Petroleums Company Limited,*[37] Esso Standard (Inter-America) Inc., a wholly-owned subsidiary of the Standard Oil Company of New Jersey, made an offer, pursuant to Section 128 of the Dominion Companies Act, to the holders of capital stock of International Petroleums Company Limited to purchase the shares of International stock at $45.00 per share. Within a period of four months after the offer was made, as required by Section 128, the holders of not less than 9/10ths of the shares of International approved the offer. Standard Oil Company of New Jersey was the owner of approximately 96% of the shares of International at the time the offer was made by Esso Standard. A small minority of stockholders refused to sell on the ground that no true offer had been made because Standard Oil of New Jersey owned substantially all the stock. The Ontario Court of Appeal held that the purported acceptance by Standard Oil of New Jersey of Esso Standard's offer was a mere device to accomplish indirectly what it could not accomplish directly, namely the forcible acquisition of the shares of International which it did not already own, and that the offeror was in effect to the owner of over 9/10ths of International's shares. The Supreme Court of Canada upheld this decision.

Joint Ventures

The most difficult problems concerning fiduciary relations in the oil industry are, perhaps, those involving joint ventures — particularly as between the manager-operator of jointly-owned properties and the non-operators.

In their *Oil and Gas Law,*[38] Williams & Meyers, in dealing with the fiduciary duty of a managing partner in a joint venture say:

The managing partner in a joint venture in particular, owes a fiduciary duty to the other participants in the enterprise and is debarred from acquiring for his own benefit beneficial interests in property on the basis of information acquired in the performance of his duties as manager. He msut hold any interests so acquired on constructive trust (*Smith* v. *Brougham* 153 Texas 486, 3 O. & G.R. at 1534). In a sense, 'joint venture', like 'constructive trust', is an adjective rather than a substantive concept; its main employment by the courts is to provide a basis on which to find a fiduciary relationship on which to found a constructive trust (*Carroll* v. *Caldwell* 12 III. (2d)487, 8 O. & G.R. 1209). In this case although

34 *Loc. Cit. Supra.*
35 [1891] 1 Q.B. 168.
36 For a review of cases where a secret commission was involved, see *Peacocke* v. *Crane,* 14 D.L.R. 217.
37 [1963] S.C.R. 144, 37 D.L.R. (2d)598 (S.C.C.); 33 D.L.R. (2d)658(C.A.).
38 Vol. 2, Par 437. 1 — See also the (1964) supplement to Merrill's *Covenants Implied in Oil and Gas Leases* at 187.

> the Court declared that no fiduciary relationship as a matter of law results between the owner of the working interest and the owner of an override, in the instant case such a fiduciary relationship did exist between the parties on the ground that they were parties to a joint venture, and hence the override was held to attach to a new lease acquired by the owner of the working interest after the termination of a lease subject to the override.

In the Alberta case of *Manning* v. *Calvan Consolidated Oil & Gas Company Limited (No. 2)*[39] the defendant company was empowered to dispose of an exploration permit in which the parties owned an undivided interest. It was held that the defendant company was in breach of a fiduciary duty in making a farmout agreement concerning the permit as part of a package deal including other permits solely owned by the defendant company under circumstances whereby a conflict of interest might arise. In particular the farmout agreement provided for the transfer of drilling credits to the solely-owned permits.

The cases of *Kaye et al* v. *Smitherman*[40] and *Bolin* v. *Smith et al*[41] illustrate the strictness with which United States courts treat attempts by a joint venturer to acquire on his own behalf monetary gain in breach of his fiduciary obligations.

In *Ballard* v. *Claude Drilling Company*[42] the Kansas Supreme Court held that a fiduciary relationship existed between the parties based on the fact that the plaintiff proposed to go into a joint venture with the defendant. The Court stated:

> Whether a fiduciary relationship between the parties or a fiduciary relation, such as one proposing to go into a partnership or joint enterprise, contemplating some form of joint ownership and division of profits, as was contemplated here, fair dealing requires that the parties be frank with each other. The obligations of a fiduciary relation begin with the opening of the negotiations for the formation of the syndicate.

Perhaps the leading Canadian case on this subject, and one that has aroused considerable interest among United States legal writers, is *Midcon Oil and Gas Limited* v. *New British Dominion Oil Company Limited and Brook.*[43] In this case the corporate defendant, New British Dominion, was, by virtue of an "operating" agreement, the manager-operator of jointly held gas properties. The operating agreement specificially provided that no agency or partnership arrangement was created. The plaintiff and defendant owned the gas jointly, but the defendant as operator had the right to negotiate gas contracts. It took the view that any final contract had to be approved by the plaintiff. The defendant, Brook, president of New British Dominion, being unable to obtain other markets for the jointly-owned gas, promoted the financing and construction of a fertilizer plant which would utilize the gas. Brook and the corporate defendant received a large number of promotional shares in the plant corporation at 1c each, which, at the time of the trial, were worth about $1.60. The plaintiff, New British Dominion, sued for a declaration that because of defendant's fiduciary position, one-half of the shares so alloted were held by the defendants as trustee for it or, in the alternative, one-half of the value of the shares should be turned over to it.

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39 Lewis & Thompson, Div. B, Dig. 183.
40 225 Fed. (2d) 583, 5 O. & G.R. 691.
41 6 O. & G.R. 1037.
42 88 Pac. (2d) 1021. For the facts of this case see p. 335 ante.
43 [1958] S.C.R. 314 (S.C.C.); 21 W.W.R. 228 (C.A.); 19 W.W.R. 317 (Alta.).

Mr. Justice Primrose, who tried the case, found that the operating agreement negatived any relationship of a fiduciary nature between the parties. While not necessary for the decision of the case, he found that there was no "provision in the operating agreement which established a partnership or that the corporate defendant was in any sense in a fiduciary relationship to the plaintiff." He further held that even if there was a fiduciary relationship, the responsibilities of the defendant to the plaintiff had ceased with the operation and development of the area, and that because the defendants had promoted the chemical company independently of the joint operations the plaintiff had no claim to any of the profits of promotion.

In the Appellate Division of the Supreme Court of Alberta, Johnson, J.A. agreed with the Trial Judge that the operating agreement between the parties did not create a partnership, and that this was so quite independently of the clause in the operating agreement which repudiated such a position. Johnson, J.A. said:[44]

> I cannot however agree that no fiduciary relationship existed between the appellant (Midcon) and the corporate respondents (New British Dominion). There are at least two ways in which this relationship might arise. The agreement may have created the relationship of joint venturers in the production and marketing of the gas obtained from the gas fields. Joint adventuring creates fiduciary relationships akin to those created by partnership. *Sutton* v. *Forst* (1924) 55 O.L.R. 281 and *Meinhard* v. *Salmon* 249 N.Y. 458).

Johnson, J.A. disagreed with counsel's contention that because the operating agreement spelled out in detail the duties and liabilities of the parties the agreement had thereby negatived the existence of a fiduciary relationship particularly as regards the corporate defendant (New British Dominion), the operator of the jointly owned gas reserves. He said at page 235:

> If this is a case of joint adventure, it is doubtful if detailing the operator's duty in the manner which is here done would prevent a fiduciary relationship being created.

He found that the defendant operator's obligation to negotiate markets and account to the plaintiff for the plaintiff's share of the gas sold made the defendant the plaintiff's agent for this purpose. This agency created a fiduciary relationship requiring the utmost good faith on the part of the agent. He explains[45] that the sense in which the words "fiduciary relationship" are used in this connection is explained by Asquith, L.J. in the judgment of the English Court of Appeal in *Reading* v. *Reg.*[46]

> But the term 'fiduciary relation' in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise (for instance, *Shallcross* v. *Oldham* (1862) 2 J. & H. 609, 616, 70 E.R. 1202; and *Atty.-Gen.* v. *Goddard* (1929) 98 L.J.K.B. 743) and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available (for instance, *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1, 59 L.J.Ch. 570; and *Powell* v. *Jones* [1905] 1 K.B. 11, 74 L.J.K.B. 115).

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44 (1957) 21 W.W.R. 228, 234.

45 21 W.W.R. 228, at 235.

46 [1949] 2 K.B. 232 at 233; 118 L.J.K.B. 280.

In the Supreme Court of Canada the plaintiff's action was again dismissed. The Court was divided, however, with two of the five members of the Court dissenting. Mr. Justice Locke took the view that New British owed to Midcon the duty to act "in good faith in its efforts to sell gas", but that this duty did not impose on New British any liability affecting the shares purchased by it under the circumstances.

Rand, J., with whom Cartwright, J. concurred, felt that the promotion of the fertilizer plant was so closely connected with the defendant's duty as operator of the partly owned gas field as to bring the acquisition of the shares within the realm of defendant's fiduciary duty, and that the defendant should have been required to account for the shares.

Constructive Trusts

Having examined a number of situations giving rise to fiduciary obligations, it may be helpful to consider the remedies available to a plaintiff in a court of equity in those cases where a fiduciary has acquired property in breach of his fiduciary obligation. Equity's principal weapon in this regard is to impose on the wrongdoer a constructive trust with respect to property acquired in breach of his fiduciary obligation.

Professor A. W. Scott in an article on *Constructive Trusts*[47] says that, in his belief, an exact definition of a constructive trust cannot be framed, and that the best one can do is to give a rough working description of it. He points out that the *"Restatement of Restitution"*[48] states:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

He refers also to a statement of Cardozo, J. of the New York Court of Appeals in *Beatty* v. *Guggenheim Exploration Company*:[49]

> A constructive trust is the formula through which the conscience of equity finds expression.

Professor Scott explains that the provision in the *Restatement* does not purport to define a constructive trust but attempts to cover, so far as possible, the circumstances under which such a trust arises.

Professor Scott explains that a constructive trustee is not a true trustee and that he is only a trustee to enable him to "surrender the property to his victim". In other words, as Dean Pound has pointed out, a constructive trust, unlike an express trust, "is a remedial and not a substantive institution.[50] Professor Scott continues:

> The Court does not give relief because a constructive trust has been created; but the Court gives relief because otherwise the defendant would be unjustly enriched; and because the Court gives this relief it declares that the defendant is chargeable as a constructive trustee.

In an article, *The Development of the Rule in Keech* v. *Sanford*,[51] W. G. Hart quotes Lord Justice Bowen in *Soar v. Ashwell*[52] where the learned judge says:

> A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour

47 71 L.Q.R. 39.
48 American Law Institute, *Restatement of Restitution*, para. 160 (1936).
49 (1919) 225 N.Y. 380, at 386.
50 *The Progress of the Law* (1920) 33 Harv. L. Rev. 420, at 421.
51 (1905) 21 L.Q.R. 258.
52 [1893] 2 Q.B. 390, 396.

> the Court considers as involving him in the duties and responsibilities of a trustee, although but for such conduct or behaviour he would be a stranger to the trust. A constructive trust is, therefore, as has been said 'a trust to be made out by the circumstances'.

The author says, however, that the term "constructive trust" is used in a wider sense than is covered by Lord Justice Bowen's statement. He points out that there need be no trust "already constituted" at all. For example, a vendor of land, after contract but before conveyance, is said to be a constructive trustee for the purchaser.[53] Again, if one of several partners entitled to a lease surrenders the lease and takes a new one for himself, he is a constructive trustee for the others.[54] If a vendor executes a conveyance before he has received the purchase money the purchaser is a constructive trustee for him.[55] Mr. Hart says a constructive trust is really a species of trust created by implication or operation of law, being distinguished from the other sub-class of such trusts, namely, resulting trusts, by the characteristic of being independent of any intention to create a trust on the part of the parties concerned.

Constructive Trusts and the Statute of Frauds

Constructive trusts may be imposed notwithstanding sections 4 and 7 of the Statute of Frauds because section 8 of the Statute makes an exception in cases where the trust arises by implication of law.

> *Section* 4
> "No action shall be brought whereby to charge any person . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."
>
> *Section* 7
> "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of no effect."
>
> *Section* 8
> "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

In *Espenasse v. Lowe*[57] the court said:

> Constructive trusts, or trusts resulting by implication of law, are not within the Statute of Frauds by an express exception in the statute itself. They arise from the apparent nature of the transaction.

In *Leslie* v. *Hill*[58] the plaintiff claimed an interest in oil and gas leases based on an oral agreement. The Statute of Frauds was raised as a defence. The court held that the Statute of Frauds is no defence insofar as the action was maintainable as a claim for money had and received or the agreement could be treated, in the alternative, as a partnership ac-

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53 *Shaw* v. *Foster* (1872), L.R. 5 H.L. 338.
54 *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298, 34 E.R. 115.
55 *Mackrith* v. *Symmons* (1808), 15 Ves. 329, 33 E.R. 778.
57 (1764), 3 E.R. 223, 7 Brown 345.
58 (1913), 38 O.L.R. 48.

counting. In *Deglman* v. *Guaranty Trust and Constantineau*[59] the Supreme Court of Canada held that the plaintiff was entitled to recover the value of services rendered notwithstanding the lack of compliance with section 4 of the Statute of Frauds.

There are a number of United States cases, particularly those dealing with an interest in land, in which the United States courts have held that a constructive trust will be imposed with respect to interests in land notwithstanding the absence of writing sufficient to satisfy the requirements of section 4 of the Statute of Frauds.[60]

Constructive Trusts and Restatement

Professor Scott explains in his article[61] that the *Restatement of Restitution* attempted to cover at least most of the situations in which a constructive trust is imposed in order to prevent unjust enrichment. The Restatement listed these under the following headings:

1. Conveyance procured by fraud, duress, undue influence or mistake;
2. Acquisition of an interest in land under an oral agreement;
3. Acquisition of property on death;
4. Acquisition of property by a fiduciary;
5. Following property into its product; and
6. Acquisition of property from a fiduciary who, in breach of his duty, transfers it to one who is not a bona fide purchaser.

It is apparent from this enumeration that the acquisition of property by a fiduciary is only one method by which a constructive trust may be imposed.

Professor Scott gives the following definition which he believes is wide enough to cover the various ways in which such a trust may be created:

> A person who has been unjustly enriched at the expense of another, or through the wrongful use of the property of another, or through the abuse of a fiduciary relation to another may be compelled to make restitution to the other.

He regards this statement as a principle rather than a rule, but no more indefinite, he believes, than other legal concepts such as "reasonableness", "clean hands" or "equity".

Unjust Enrichment In Anglo-Canadian Law

In an article, *Unjust Enrichment in the Canadian Common Law and Quebec Law—Frustration of Contract*,[62] Professor Ian Baxter rejects the proposition that unjust enrichment is a new concept to English law. In the introduction to his article he states that the principles of unjust enrichment have for centuries remained close to the hearts of true lawyers. He traces the background of unjust enrichment to the concept identified by Lord Mansfield as quasi-contract, a lable he used to cover a collection of cases not bound together by any clear general principles.

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59 [1954] S.C.R. 725.
60 See *Catlett* v. *Jordan* (1952) 244 Pac. (2d)564.
Dayvault v. *Baruch Oil Corporation* 211 Pac. (2d)335.
Patecek v. *Blair* 240 Pac. (2d)240.
Erwin v. *Hays* 267 S.W. (2d)884.
Omohundro v. *Matthews* 4 T.S.C.J. 12; 9 O. & G.R. 330 (1957).
Wilson v. *Therrell* 304 S.W. (2d)723; 8 O. & G. R. 350 (1957).
Bufalini v. *deMichelis* 136 Cal. App. (2d)452; 5 O. & G.R. 4 (1955).
61 71 L.Q.R. 39.
62 32 Can. Bar. Rev. (1954) p. 855.

Cheshire and Fifoot in their *Law of Contract*[63] trace the history of quasi-contract, explaining its rationalization on the basis of unjust benefit. This, they say, was accepted by Lord Mansfield's contemporaries and remained substantially unchallenged until the present century. However, in the twentieth century the courts and legal writers are divided on their support of Lord Mansfield's principles. This division followed the speeches of Lord Haldane and Lord Sumner in *Sinclair* v. *Brougham*.[64] This was a case involving priorities as between ordinary shareholders and customers in the winding up of an *ultra vires* banking venture. Lord Sumner took the view that actions for money had and received must be classified as contractual in nature since they lie in the writ of assumpsit. Cheshire and Fifoot point out that in that particular case the actual promise would have been *ultra vires* and, therefore, a promise could not be imputed.

In *Holt* v. *Markham*,[65] a case involving an over-payment of salary to a demobilized air force officer, Scrutton, L.J. referred to the "now discarded doctrine of Lord Mansfield" and lamented the development of the action for money had and received as a "history of well-meaning sloppiness of thought".

On the other side Lord Wright was probably the most prominent of Lord Mansfield's supporters. In the *Fibrosa*[66] case he said:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a certain category of the common law which has been called quasi contract or restitution.

He criticized Lord Sumner's observations in *Sinclair* v. *Brougham*, stating they were *obiter dicta and added*:[67]

> Serious legal writers have seemed to say that these words of the great judge in *Sinclair* v. *Brougham* closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a *reductio ad absurdum* of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity, which are also available, as they were found to be in *Sinclair* v. *Brougham*.

Cheshire and Fifoot state that there is a third school of judges who "discreetly treat the whole problem as an open question".

Lord Porter, in his speech in *Reading* v. *The Attorney-General*, says:[68]

> It was suggested in argument that the learned judge founded his decision solely upon the Doctrine of Unjust Enrichment and that that doctrine was now recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

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63 (5th Ed.) p. 554 et seq.
64 [1914] A.C. 398. See also H. C. Gutteridge and R.J.A. David, *The Doctrine of Unjustified Enrichment*. 1934 Camb., L.J. 204.
65 [1923] 1 K.B. 504, 92 L.J. (K.B.) 406.
66 [1943] A.C. 32 at 61, *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson Combe Barbour tLd.*; See also his remarks in *Brooks Wharf and Bull Wharf, Ltd.* v. *Goodman Brothers*, [1937] 1 K.B. 534, at 543; [1936] 3 All E.R. 696 at 707.
67 *Id.* (A.C.) at 64.
68 [1951] A.C. 507 at 513.

While Lord Porter rejected the Doctrine of Unjust Enrichment as forming part of the law of England, nevertheless he concurred in the following statement of Mr. Justice Denning (as he then was) at trial:[69]

> In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in obtaining money, then he is accountable for it to the master. It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant *has unjustly enriched himself by virtue* of his service without his master's sanction, the law says that he ought not to be allowed to keep the money, but it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master.

Professor Scott,[70] in commenting on the judgment of Lord Porter in the *Reading* Case says:

> The English courts do, however, in this case and in many others, as we have seen, give relief against a defendant who otherwise would be unjustly enriched. Perhaps they will in due time accept the broader generalization as the general principle underlying the many specific situations in which they do give relief.

In *Deglman* v. *The Guaranty Trust Company of Canada*,[71] the Supreme Court of Canada agreed that the plaintiff was entitled to recover the value of services rendered to the deceased on the basis of quantum meruit notwithstanding the absence of writing sufficient to comply with the Statute of Frauds.

Cartwright, J. said at page 734:

> This right (to recovery) appears to me to be based, not on the contract, but on an obligation imposed by law.

He then referred to the statement of Lord Wright[72] in the *Fibrosa Case*:[73]

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort.

Cartwright, J. also concurred in the view of Rand, J. who said:[74]

> This matter is elaborated exhaustively in the restatement of law of contract issued by the American Law Institute, and Professor Williston's monumental work on contracts in Volume II, section 536 deals with the same topic.

The *Degleman case* was referred to in *Baker* v. *The Guaranty Trust Company* by Spence, J.[75]

In *Estok* v. *Heguy*,[76] Brown, J. of the Supreme Court of British Columbia carefully reviewed the recent authorities. He says (at page 173):

> In view of what Lord Wright said in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe Barbour Ltd., supra*[77] in 1943, I am somewhat at a loss to under-

69 [1948] 2 K. B. 268, [1948] All E.R. 27.
70 71 L.Q.R. 39 at 50.
71 [1954] S.C.R. 725.
72 *Id.* at 734.
73 [1943] A.C. 32 at p. 62.
74 *Supra* n. 71 at 728.
75 1 D.L.R. (2d) at 448, 461.
76 (1963) 43 W.W.R. 167.
77 [1943] A.C. 32, (H.L.) 111 L.J.K.B. 433.
Lord Wright says, at p. 61 (A.C.):
It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called *quasi*-contract or restitution.

> stand the statement in Lord Porter's speech in 1951 . . . I can only surmise that while Lord Wright's position on quasi-contract or restitution was accepted, there was an objection to the expression 'unjust enrichment', perhaps because it was unprofessorial or American.

Brown, J. also refers to the Alberta case of *Reeve* v. *Abraham*[78] and the Manitoba case of *Morrison* v. *Canadian Security, Co.*,[79] and concluded by referring to the "present gradual trend" toward the views of Lord Wright.

Conclusions

1. The English and United States courts grant similar relief on any given set of facts notwithstanding the difference in approach to problems involving fiduciaries. As Professor Scott says:[80]

> The English courts do, however, in this case[81] and in many others, as we have seen, give relief against a defendant who would otherwise be unjustly enriched. Perhaps they will in due time accept the broader generalization as the general principle underlying the many specific situations in which they do give relief.

Since the *Reading Case* it is apparent that courts in Canada prefer the American approach, and the concept of "unjust enrichment" is likely to find increasing favour in Canadian courts.

2. The principal problem in cases of fiduciary relations will, however, continue to be the determination of the limits of the fiduciary duty—that "rather vague duty of fidelity", as it was called by Lord Greene,[82] who concluded that it must, in each case, be a question of fact.

In the *Midcon Case, Johnson, J.A.* of the Alberta Court of Appeal[83] pointed out that there was a limitation on the liability of the fiduciary to account.

> 'The use of the fiduciary position must be', he says, 'the real reason why the profit or advantage was obtained and not merely a contributory cause . . . Lord Russell, I think, had this limitation in mind when, in *Regal Hastings Limited* v. *Gulliver*, supra, he held the directors liable because the shares 'were acquired by reason, and only by reason of the fact that they were directors of Regal and in the course of their execution of that office'.

The majority judgments in both the Supreme Court of Alberta and the Supreme Court of Canada supported the view that the shares in the *Midcon Case* were not acquired "by reason and by reason only" of the defendants' fiduciary position.

Rand, J., on the other hand, expresses a different view. He refers[84] to Professor Scott's work on trusts:[85]

> The principle, however, goes further than this and applies even where the interest purchased by the fiduciary for himself is not an interest in property of the beneficiary entrusted to him, or property which he has undertaken to purchase for the beneficiary, provided that the property which he purchases for himself is sufficiently connected with the scope of his duties as fiduciary so that it is improper for him to purchase it for himself.

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78 (1957) 22 W.W.R. 429.
79 (1954) 12 W.W.R. (N.S.) 57.
80 71 L.Q.R. 39 at 50.
81 *Reading* v. *the Attorney General*, [1951] A.C. 507.
82 *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* [1946], Ch. 169 at p. 174; Quoted by Roach, J.A. in *Tombill Gold Mines Ltd.* v. *Hamilton* (1955) 5 D.L.R. 708, 733.
83 21 W.W.R. 228, 236.
84 [1958] S.C.R. 314, 340.
85 (2nd. ed.) (1956) Sec. 504, Vol. 4, p. 3238.

And, in what seems to be the most significant passage in all of the judgments in the Midcon Case, he said at page 341:

> The loyalty of a fiduciary declared by these authorities means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that results from the use, in any manner or degree by the fiduciary, of the property, interest or influence of the beneficiary. Equity, in applying the rule as one of fundamental public policy, does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits.

If one applies this test, it is difficult to see how the judgments in the *Midcon Case* or the *Tombill Case* can stand. It is suggested that Canadian courts will move in the direction of Rand, J.'s judgment, and that if any serious question exists as to whether or not there has been a breach of the fiduciary obligation, relief will be given.