The Law of Fiduciaries, J.C. Shepherd, Toronto: The Carswell Company Limited, 1981. Pp. *xxix*, 386, $55.00 (cloth).

To quote Black in part, a fiduciary is "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires."[1] Most of us in the legal profession know this. Are we equally knowledgeable when confronted with the title of J.C. Shepherd's book, *The Law of Fiduciaries*? My guess is that we are not. Mr. Shepherd attempts to fill a large part of the probable gap in our collective knowledge of the topic. In this reviewer's opinion he succeeds to a significant degree, even while his work does not deal *in extenso* with fiduciary remedies.

In a preface the author indicates his belief that the ability of human beings to trust each other is the single most important element in interpersonal relataionships. He then states: "The law of fiduciaries is the legal system's attempt to recognize the more blatant abuses of the trust we place in each other."[2] It might have been more in keeping with a book on the law of fiduciaries to place its thrust in a more positive vein, rather than accentuating an immediate recognition of the negative aspects (which admittedly are all too frequently attendant upon it). Notwithstanding that, the book's basic thrust and content appear to more than justify its existence, as it offers both comparisons of the existing law on the subject from a Canadian perspective as well as suggested courses for the law's future growth in the area.

The book proceeds from an introductory portion of some 42 pages (Part I), through theoretical considerations (Part II) to dealings with the corpus (Part III), the beneficiaries (Part IV) and collateral profits (Part V). It finally looks at considerations in Part VI such as confidential information, conflict of interest and corporate interrelationships. The book is thus a varied mine of thought-provoking ore. While asking as well as answering questions, it can be of significant assistance in making members of our profession — wherever placed — aware of those areas of the law which deal with situations involving the fiduciary relationship.

Attempts to define even the term fiduciary, says the author, have more often resulted in evasion than in definition. In Chapter 4 he offers some legal philosophical suggestions as to why such a definition should be a problem *e.g.*, is the law relating to fiduciaries based in property or justice?

---

[1] *Black's Law Dictionary 5th ed.*; (St. Paul Minn.: West Publishing Co. 1979) at 563.

[2] J.C. Shepherd, *The Law of Fiduciaries* (Toronto: The Carswell Company Limited, 1981) at v.

Whatever the reasons for definitional problems — and a major cause of the fogginess surrounding the term the author lays at the feet of historical anomalies — he feels that "too many developmental and external factors force on the fiduciary concept a vagueness not intrinsic to the concept itself."[3] He sees the largest stumbling block as being the distinguishment between the substantive theory of fiduciary relationships, and the evidentiary and procedural superstructure which has developed around it. "As long as we continue to see the various procedural rules as substantive, and vice versa, the theoretical basis of the fiduciary relationship must remain out of our conceptual grasp."[4]

The author then points to the decision of the Supreme Court of Canada in *Canaero* v. *O'Malley*[5] and pays high credit to Chief Justice Laskin for having swept aside rules relating to fiduciaries in favour of a much more flexible approach to the determination of the fiduciary concept in a given set of circumstances. But, he indicates, rather than giving us a general theory or principle the Supreme Court of Canada only stated that each case should be decided on its own facts, taking into account a listed number of considerations. The author takes up the task of enunciating a general theory of fiduciaries to fill what he sees as a gap left by our highest Court.

While stating that the two main duties of fiduciaries have been described as responsibility and loyalty, of the two the author appears to emphasize the loyalty aspect. He then embarks on a classification, with descriptions, of those who are considered by our law to be fiduciaries. The list includes property holders (those who hold or manage property on behalf of others); representatives, stemming from the law of agency; and a third class called advisors, arising out of considerations surrounding undue influence. The author recognizes overlap and the increase in the number of categories within each of the groups named. Somewhat hesitantly he also mentions a fourth class, a good example of which is the majority shareholder of a corporation.

Next follows a summary of existing fiduciary principles. The author first indicates that the law of fiduciaries is a two-step process: the finding of a fiduciary relationship or obligation (a duty of loyalty), and the determination of whether the duty owed in the relationship has been breached. He then postulates nineteen other definitions or statements which deal with the law of fiduciaries — either as it presently exists or as it is proposed should exist in order that the law be analytically consistent. These include a definition of when a fiduciary relationship exists; the necessity for the use of presumptions and other tools to enable a determination of whether a fiduciary loyalty has been breached; methodology to be employed by the courts in individual cases; evidentiary rules; and some special rules *e.g.*,

[3] *Ibid.*, at 5.

[4] *Ibid.*, at 7.

[5] *Canadian Aero Services Ltd.* v. *O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 317.

"Confidential information is a species of property, and the doctrine respecting it is analogous to but different from the law of fiduciaries."[6] In a subsequent analysis of the law of fiduciaries relevant principles are discerned, then their rationale and effects discussed.

The book is helpful in a comparative way (and to this reviewer has one of its most instructive chapters) when in Chapter 5 it presents several competing theories of the fiduciary relationship. In presenting these, the author — perhaps not immodestly — makes the statement that each of the competing theories discussed is susceptible of modification and sophistication which could remove all of its weaknesses; and that "the exercise of so modifying any given theory must necessarily result in the creation of a theory identical to the theory proposed by us in chapter 6."[7] The theories raised by the author in Chapter 5 include the property theory ("A fiduciary relationship exists where one person has legal title and/or control over property or any other advantage, and another is the beneficial owner thereof.");[8] the reliance theory (". . . a fiduciary relationship exists where one person reposes trust, confidence or reliance in another.");[9] the unequal relationship theory ("A fiduciary relationship exists wherever there is established an inequality of footing between two parties.");[10] the contractual theory ("A fiduciary is a person who undertakes to act in the interests of another person.");[11] the unjust enrichment theory ("A fiduciary relationship exists where one person obtains property or other advantage which justice requires should belong to another person.");[12] the commercial utility theory ("A fiduciary relationship will be found by the court in every situation in which the court feels it necessary to hold a person or a certain class of persons to a higher than average standard of ethics or good faith in the interests of protecting the integrity of a commercial enterprise.");[13] the power and discretion theory (". . . there is a relation in which 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 the law's blunt tool for the control of this discretion.");[14] and the rule or dualistic theories, where one or more than one of the foregoing theories may be married to another, or where categories of persons where fiduciary relationships may be found are suggested.

---

[6]*Supra*, footnote 2 at 40.

[7]*Ibid.*, at 51.

[8]*Ibid.*, at 52.

[9]*Ibid.*, at 56.

[10]*Ibid.*, at 61.

[11]*Ibid.*, at 64.

[12]*Ibid.*, at 71.

[13]*Ibid.*, at 78.

[14]*Ibid.*, at 83.

In Chapter 6 the author proposes a theory, which is at least in part a synthesis from the requirements of a fiduciary relationship discussed earlier in the book. His theory is that "A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power."[15] This postulation is followed by an analysis and examples, both helpful in understanding the content and the extent of the theory. Basic to this theory, which the author calls the theory of the transfer of encumbered power, is that it treats the power transferred as if it were in fact a piece of property. And, since powers have been trust *res* for some time, there appears to be little difficulty in combining the concept of a power being held by a fiduciary with a particular way in which it is to be held — i.e., as encumbered — under the author's theory of the transfer of an encumbered power.

It appears that Mr. Shepherd in Chapter 6 endeavours to reduce the number of sometimes complementary yet often competing theories of the fiduciary relationship which he has set out in Chapter 5. This in itself is a laudable objective. Whether one succeeds in whole or in part in such an endeavour must await, it is suggested, the testing of the theory by many minds and the crucible of the effluxion of time with its cases and its comments. An early criticism of the shortened rule could be made that it does not cover all bases — for example, the imposition aspect emphasized by courts in the unjust enrichment theory. However, if a change in emphasis (and in some instances of substance) were to be accepted by the profession in the interests of simplification and uniformity, the author's theory may turn out to be the "appropriate" one for the foreseeable legal future.

Chapter 7 is devoted to the determination of the breach by a fiducuary of the relationship. As indicated earlier in his book, the author sees this as a two-stage process: finding a fiduciary relationship with its duty of loyalty, and then ascertaining whether the duty of loyalty has been breached. He indicates that presumptions and procedural devices may be used in finding whether the latter exists. Ultimately in the chapter the author suggests seven distinct steps as being an effective means to cover the two-stage process mentioned.

In Chapter 8 the author comments on the "dizzying waltz" the following two principles have had through the history of the law of fiduciaries. The first principle is that "A fiduciary is not allowed to put himself in a position where his interest and his duty conflict." The second is "A fiduciary is disentitled from making a profit out of his position."[16] The author appears to treat the conflict of interest concept as the central problem and indicates that both principles are saying the same thing. More strongly he suggests that both are red herrings because ". . . the main rules in the law of fidu-

[15] *Ibid.*, at 93.

[16] *Ibid.*, at 147.

ciaries, which are . . . evidentiary rules created solely for practical purposes, are directed at the determination of whether a fiduciary has actually chosen against his duty."[17]

Having postulated his theory of the transfer of encumbered power the author then turns his attention to the testing of the theory under various headings, some of which were mentioned previously: dealings with the corpus (Part III); dealings with the beneficiaries (Part IV); collateral profits (Part V); and other issues such as confidential information, conflict of interest, corporate interrelationships and future directions of the law of fiduciaries (all in Part VI). By way of testing his theory in the waters of the topics chosen, the author in many instances had made a further-theory approach at the beginning of a chapter. For example, in Chapter 12, entitled Self-Hiring, the proposition is expressed at the commencement as follows:

> "Where any fiduciary who has the power to hire, or otherwise have trade dealings on behalf of his *corpus*, hires or has dealings with himself or any business enterprise with which he is connected, there is a rebuttable presumption that the fiduciary has misused his powers in the transaction. The beneficiary can avoid the transaction, and can require the fiduciary to refund fees paid to him or his business enterprise in his personal capacity. The defences available to the fiduciary are the same as in Rule 5."[18]

The further-theory approach is both illustrative and helpful in a comparative way, bringing to the reader's attention many of the usual kinds of particular classes of situations in which actual or potential fiduciaries find themselves. While in some instances one might wish for more conclusiveness on some issues raised (for example, in comments on disclosure four examples are given where disclosure *could* be relevant), a number of analyses and explanations are tendered which are at least directory, if not conclusive. Again, the book is seen to be valuable for the insights tendered.

Whether one agrees or does not agree with the author's basic theory of the transfer of encumbered power, and the manner in which he tests the same under the headings and with the further theories just mentioned, it would have to be admitted that a guiding spotlight has been shone by him on the oftentimes nebulous topic of fiduciaries and the law(s) surrounding them. And, while his book should be classified as other than a how-to book for quick referential use by the general practitioner, its materials in this reviewer's opinion merit an ingestion and a slow, thorough digestion by both Bench and Bar. Through a careful testing of the author's suggested approaches against the existing concepts on the topic, the legal profession should be able to promote a continuing evolution of the law of fiduciaries which will be based upon reasoned analysis.

BEVERLEY G. SMITH*

---

[17] *Ibid.*, at 150.

[18] *Ibid.*, at 185. This appeared as Rule 7 in Chapter 3 entitled "Fiduciary Principles — Summary" at 38.

*B.C.L. (U.N.B.). Professor, Faculty of Law, University of New Brunswick.