

# Publisher's Note

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<b>FIDUCIARY DUTIES</b> <b>Obligations of Loyalty and Faithfulness</b> Michael Ng Release No. 9, October 2024
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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 – Senior Management and “Key” Employees** – The trial judge’s conclusion that Langlois’ fiduciary duties continued after he left ACS was a finding of mixed fact and law and was entitled to deference on appeal. The trial judge considered ACS’ agreement with ASF but concluded that it was no more than an attempt to mitigate the harm caused by Langlois’ unilateral decision to leave ACS. ACS’ agreement with ASF did not eliminate ACS’ vulnerability vis-à-vis Langlois. As the trial judge noted, years after his departure from ACS, Langlois was still holding himself out as “the” expert in powder coating. ACS remained vulnerable to Langlois and he continued to hold power and discretion in relation to ACS, because he took with him, and continued to exploit following his departure, the knowledge and expertise he licensed to 786. Contrary to the appellants’ submissions, Justice Simmons explained that Langlois’ situation was not similar to that of a departed employee whose relationship with his former employer had terminated. Following his departure from ACS, Langlois continued to be bound by the terms of the License Agreement. His continuing fiduciary obligations flowed, in part, from the continuing existence of that agreement, the continued power and discretion he held vis-à-vis ACS and his former partners because of his knowledge and expertise, and their vulnerability to him as a result of that knowledge and expertise. Justice Simmons agreed with the trial judge’s conclusion that the February 14, 2012 e-mail was nothing more than an attempt to mitigate the harm caused by the breakdown in ACS’ relationship with Langlois. Justice Simmons noted that to conclude that sending a message to potential customers, signaling the continued viability of the business, was enough to demonstrate that Langlois was relieved of his fiduciary duties could imply that businesses cannot hold themselves out as able to carry on business to their customers in the face of a loss of a business partner unless they are willing to release the former partner of all last- ing fiduciary duties and associated liabilities. The trial judge concluded that Langlois breached his contractual and fiduciary obligations by misappropriating corporate opportunities that belonged to ACS for the benefit of PCS/Vacuum Metallizing. Langlois and Sugar ultimately shared the profits from those opportunities to the exclusion of PCS and Gary. The appellants submitted that in reaching those conclusions, the trial judge applied the wrong test, arguing that she erred

in law by concluding that the RM2 opportunity belonged to ACS because it was not a “fresh initiative” for Langlois at PCS, but rather the result of Langlois’ relationship with Rokicki, which Langlois nurtured while at ACS. Instead of asking whether the RM2 contract was a “fresh initiative”, the appellants submitted that the trial judge should have considered whether the RM2 contract was a “maturing business opportunity” for ACS that was “ripe” at the time Langlois left ACS. Given that the ACS plaintiffs conceded that the RM2 opportunity was not available while Langlois was at ACS, the appellants submitted that it could not have met this threshold. Similarly, as the trial judge concluded that “PCS decided to invent . . . the Pultrucoater” in January 2013, the subsequent sales of Pultrucoater machines could not possibly be considered a “maturing business opportunity” let alone one that was “ripe” when Langlois left ACS: 7868073 *Canada Ltd. v. 1841978 Ontario Inc.*, 2024 CarswellOnt 7127, 2024 ONCA 371 (Ont. C.A.).

- **Consequences of a Breach of Faithfulness – Remedies for Fiduciary Breach – Compensation for Actual Losses** – Justice Elwood was not persuaded that a monetary award would be an inadequate remedy in the circumstances. Justice Elwood noted that the fourth condition from *Soulos* states “there must be no factors which would render imposition of a constructive trust unjust in all the circumstances”. Justice Elwood was concerned that a constructive trust would be unfair to Joe and his family because it would not be a proportionate remedy. A constructive trust would ignore the contingencies that remained before SRL could purchase the property. It would be disproportionate to Joe’s breach of fiduciary duty and SRL’s interest in the property. The imposition of a constructive trust would be unjust. Justice Elwood explained that equitable compensation, provides the court with a flexible and discretionary remedial approach that appropriately recognizes the contingencies inherent in a lost corporate opportunity. It provides the court with the flexibility necessary to fashion a remedy that is responsive to the nature of Joe’s breach and the unique familial context in which the opportunity arose. Equitable compensation is designed to restore the beneficiary to the position it would have occupied “but for” the breach of the fiduciary duty, not a better one. It allows for consideration of negative contingencies, so as to properly assess the value of what was lost. Justice Elwood noted that there were two contingencies that must be considered: would Carol agree to sell the property to SRL; and, could SRL raise the purchase price? Selling the Grazing Lands to SRL would have been consistent with Carol’s past conduct. Still, there was more than a fanciful possibility Carol would have refused to sell the Grazing Lands

to SRL. She regarded this property as the last of Palmer's legacy. She hoped that the grandchildren would show an interest in purchasing this property. While it may not have made logical sense for her to keep this one property "in the family", people do not always act logically. Carol was under no obligation to SRL. In Justice Elwood's view, there was more than an even chance Carol would have agreed to sell the Grazing Lands to SRL if Joe had acted in accordance with his duty, but her agreement was materially less than a sure thing. Justice Elwood noted that it was difficult to assess the financing contingency. Joe told Mike that he hoped to get Carol to agree to vendor take-back financing on behalf of Palmer. Mike's evidence was that, in the event Carol did not agree, he had arranged private financing until SRL could obtain bank financing. However, there was no evidence confirming the commitment to provide the necessary funds or the terms of the anticipated financing. Justice Elwood concluded that there was more than an even chance Joe and Mike would have raised the purchase price, but again, materially less than a sure thing. Recognizing that damages are to be assessed, not calculated, Justice Elwood assessed the negative contingencies at 33%. SRL was entitled to compensation based on a resale of the property, not its original purpose as grazing lands. Justice Elwood awarded damages to SRL assessed at 66% of the fair market value of the Grazing Lands at the date of trial (September 2022), less the price Joe paid and any expenses he incurred. The fair market value of the property must be determined using an appraisal by a professional to be agreed upon between the parties. The purchase price, taxes and expenses must be confirmed by Joe in an affidavit with documentation in support: *Sather Ranch Ltd. v. Sather*, 2024 CarswellBC 1020, 2024 BCSC 598 (B.C. S.C.).