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FIDUCIARY DUTIES
Obligations of Loyalty and Faithfulness

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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 – Section 35 of the Constitution Act, 1982 –** The Court of Appeal concluded that although it was open to the trial judge to reject the specific declaratory terms sought by the appellants, he nonetheless committed a material error in principle in resolving this part of the claim. In the Court of Appeal's view, the trial judge took an unduly narrow approach to the scope of declaratory relief that was properly available to him in the context of the appellants' pleadings, and, critically, in light of his findings of a proved Aboriginal right to fish and the ongoing impairing effects on that right of storing and diverting water from the Nechako River. The restrictive approach resulted in a declaration that, because of its generalized nature, was of no real practical utility to the appellants. The appellants' request for declaratory relief cited alleged historical failures by Canada and British Columbia to adequately protect the appellants' constitutionally entrenched interests. However, it was also grounded in the governments' ongoing and presently active participation in the regulation of water in the Nechako River. In the Court of Appeal's view, the appellants' pleadings and the trial judge's conclusion regarding resultant "damage" that newly manifests itself each year provided a sufficient factual and legal basis from which to consider declaratory relief against government that was prospective in nature, and independent of liability against RTA. The Court of Appeal noted that dismissing the private law claim against RTA did not mean there was no longer a "cognizable threat to [the appellants'] legal interest[s]". To the contrary, ongoing and future impairment of the appellants' right to fish and associated harm to their Indigenous communities logically arose from the trial judge's non-*obiter* findings. Those findings had not been displaced on appeal and they included determinations that: the appellants have a constitutionally protected Aboriginal right to fish the Nechako River watershed; regulation of the Nechako River through the installation and operation of the Kenney Dam and related reservoir has negatively affected the abundance and health of the fish population in the watershed; the resulting decline in the fish population and Aboriginal fisheries has had "hugely negative impacts" upon the appellants as Indigenous communities; the water licences issued to RTA explicitly authorize the diversion of water from the Nechako River, the amount of water stored in the reservoir, and the use of that stored water for maximum hydroelectricity production; the flow of water from

the reservoir into the Nechako River is governed by an agreement between RTA and both levels of government, as directed by a Technical Committee; RTA has always strictly complied with the water licences and the Technical Committee's flow regime and any resultant harm to fish and the fishery in the Nechako River is the inevitable result of these regulatory requirements; and, while the cause of the harm to fish and the fishery may be much the same from year to year (a regulated flow), the resulting damage occurs anew each year even though the precise quantification of that damage is challenging: *Thomas v. Rio Tinto Alcan Inc.*, 2024 CarswellBC 457, 2024 BCCA 62 (B.C. C.A.).

- **Fiduciary *Per Se* Relationships – Adviser Roles – Legal Advisers –** Justice Voith noted that instead, the appeal turned on the primary issue identified at the outset: whether Golden was in a conflict of interest and, if so, whether that conflict could ground a successful appeal. Justice Voith explained that emphasizing facts that should have "alerted" Golden to the existence of potential defences that might have been raised on behalf of the appellant missed the point and did not, without more, advance the appellant's position. Justice Voith noted that incompetence on the part of counsel in the civil context is not enough to ground an appeal based on the ineffective assistance of counsel. In order to establish a conflict of interest, it is necessary to "link the alleged failure to give adequate individual consideration to each appellant's defence to an existing conflict between the interests of the appellants". The inquiry therefore begins with whether an actual conflict of interest exists. Justice Voith was of the view there was a conflict between the interests of the appellant and Truong. This conflict arose not only because Truong was not straightforward with her mother, but more obviously because the two parties were joint debtors responsible for the same financial obligations under the same agreements. Any defence raised on behalf of either the appellant or Truong or Lit Nail necessarily had the prospect of shifting either all or more of the financial obligations under the Lease and Indemnity Agreement from one of them to the others. Advancing the defences of *non est factum*, or of mistake, or of any other defence on behalf of the appellant necessarily had the prospect of adversely affecting the financial interests of Truong and Lit Nail. Justice Voith explained that the second part of the enquiry asks whether the conflict adversely affected counsel's performance. Justice Voith was of the view that in a civil appeal, a third enquiry or condition is required. In particular, counsel must have actual knowledge of the conflict that exists and nevertheless persist in acting in the face of that conflict. A failure on the part of counsel to recognize a conflict of interest would not be "truly extraordinary",

it would not arise in only the "rarest of cases". In Justice Voith's view, a civil appeal that relies on the ineffective assistance of counsel, and that is based on a purported conflict of interest without any suggestion of knowledge or complicity by the other party, should only succeed if the court is satisfied that trial counsel was actually aware of the conflict and nevertheless chose to act "in the face" of that conflict. Civil appeals based on the ineffective assistance of counsel should be carefully circumscribed. They should be extraordinary and will often be grounded in some form of fraud or impropriety. Second, whether counsel "should have known" of a conflict of interest will frequently require factual determinations that may be inappropriate when there is no requirement that trial counsel's evidence be before the court. The appellant accepted that there was no evidence that Golden actually knew of the conflict. In Justice Voith's view, that was dispositive of the appeal which was dismissed: *Nguyen v. 1108911 B.C. Ltd.*, 2024 CarswellBC 396, 2024 BCCA 48 (B.C. C.A.).