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<p>FIDUCIARY DUTIES Obligations of Loyalty and Faithfulness Michael Ng Release No. 5, June 2025</p>

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—Senior Management and “Key” Employees—Business Opportunities**—The plaintiff argued that Arseneau owed a fiduciary duty to PDI due to the position she held at TRIP. In Justice MacNeil’s view, the underlying characteristics of relationships in which fiduciary duties are imposed were not present in the relationship between Arseneau and PDI. Arseneau was not an officer or director of PDI nor was she in “top management”. While Arseneau was given the title “Vice President”, in actuality, she was not in a position of power and authority at PDI with the potential to prejudicially affect PDI’s legal or practical interests. When she began working at PDI she had no specific title. In 2012, she was given the title of Vice President. However, her role did not change, and she did not receive any additional compensation in relation to the change of title. The revenue generated by her office was minimal compared to the overall revenue of PDI in 2015. The requisite vulnerability was not present. There was no evidence that Arseneau undertook, either expressly or impliedly, to act in the best interests of PDI and relinquish her self-interest. Such an undertaking is fundamental to the existence of a fiduciary relationship. Justice MacNeil noted that Arseneau was not a typical “employee”. She did not sign an employment contract with PDI nor did she sign a non-competition/non-solicitation agreement or a restrictive covenant. She was brought in to PDI to operate TRIP with her ownership of her book being specifically recognized. In those circumstances, she was more like a co-owner/partner in the TRIP venture than an employee. Justice MacNeil concluded that there was no common intention that the TRIP client information should belong to PDI only, and it would be inappropriate to impose any restriction on Arseneau from using the TRIP client information after her association with PDI had ended. Given PDI’s repudiation of its contract with Arseneau, PDI could not insist on her honouring any fiduciary or confidentiality obligation that may have existed during the course of employment. The TRIP client list was not something that PDI handed to Arseneau. Rather, she developed it over her time there, and it began with a co-mingling of her Kimberley book with PDI’s transportation book. Arseneau did not owe a fiduciary duty to PDI: *Tar Heel Investments Inc. v. H.L. Staebler Company Limited et. al.*, 2025 CarswellOnt 227, 2025 ONSC 240 (Ont. S.C.J.).
- **Fiduciary *Per Se* Relationships—Agency Roles—Generally**—Justice Francis was also not persuaded that the doc-

trine of clean hands prevented recovery. Hu argued that Zhong obtained mortgage approval from the bank by providing false information. Zhong admitted that he gave the bank inaccurate information about his wife's foreign income when he applied for a mortgage. He used his wife's overseas pension to calculate the family's income, despite the fact that his wife was not yet in receipt of her pension. He claimed that he did this on the advice of Hu. In determining whether to use the limited power to deny recovery on the basis of Zhong's wrongful act, Justice Francis was required to consider whether recovery for Zhong would undermine the integrity of the justice system. The quantum of income that was wrongly included in the family's income for the purposes of the mortgage application was not in evidence, and Zhong was not asked when his wife would be eligible to receive her overseas pension. It was therefore extremely difficult to assess the extent to which Zhong engaged in conduct that was wrongful with respect to his mortgage application. However, even if the pension funds were a significant portion of the family's claimed income, Justice Francis did not agree with Hu's submission that Zhong "would be profiting from his wrongdoing if a disgorgement order was made from the sale of the 2038 Property. Justice Francis explained that there were two problems with that argument. The first was the implicit premise that Zhong's purchase of the 2038 Property would not have completed because of false information in his mortgage application. Even if Zhong did overstate his overseas income on his mortgage application, it did not follow that the bank would not have advanced the mortgage funds had Zhong's bid on the 2038 Property been successful. Indeed, the mortgage approval letter Zhong received from the bank did not require proof of income. It required "12 months [principal, interest and taxes] to serve as alternative credit worthiness (\$82,138) + down payment (\$735K)." Therefore, if he had met these conditions, the bank would have advanced the funds, irrespective of the status of his wife's overseas income. Second, the notion that disgorgement of Hu's profits would result in Zhong "profiting from his wrongdoing" failed to account for the nature of disgorgement as a remedy for breach of fiduciary duty, as well as the vastly different nature of the two alleged wrongs in this case. Disgorgement is about giving back ill - gotten gains. Hu made a profit on the purchase and sale of the 2038 Property as a direct result of his decision to prefer his own interests over the interests of his client when he decided to buy the 2038 Property. In contrast, Zhong overstated his family's income on a mortgage application. Zhong's action simply did not rise to a level of wrongdoing that would cause the integrity of the justice system to be undermined if a disgorgement order was made. Justice Francis concluded that

Hu should disgorge his profits from the sale of the 2038 Property: *Zhong v. Alan Hu Personal Real Estate Corporation*, 2025 CarswellBC 66, 2025 BCSC 40 (B.C.S.C.).