I. Analyzing Canson ................................................................. 1
   A. Introduction .................................................................. 1
   B. The judgments in the Supreme Court of Canada ............ 3
   C. Not every claim for money is a claim for a loss .............. 8
      1. Introduction .................................................................. 8
      2. Application to trusts .................................................... 11
      3. Conclusion ................................................................... 12
   D. Resolving evidentiary difficulties against one who wrongly created them ...... 13
   E. Conclusion .................................................................... 16

II. Case law after Canson .......................................................... 16
   A. Treatment Post Canson .................................................... 16
   B. A Selection of Cases Analyzed ......................................... 17
   C. Conclusion ..................................................................... 28

I. Analyzing Canson

A. Introduction

Canson Enterprises Ltd. v. Boughton & Co.\(^3\) remains the leading authority from the Supreme Court of Canada on the question of the limits to claims for compensation against fiduciaries. The case involved a claim against a solicitor, but the judgment addresses the measurement of claims against trustees as well.

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\(^2\) Whaley Estate Litigation.

The case itself concerned a lawyer who was in a conflict of duty and duty.\(^4\) The plaintiffs Canson Enterprises Ltd. and Fealty Enterprises Ltd. entered into a joint venture with Peregrine Ventures Inc., which would involve the acquisition of land for development.\(^5\) The acquisition involved an intermediary, George Treit, who was to take a commission from the joint venturers when they acquired the land from the Hendersons who were selling it. However, Treit had made a separate arrangement with another corporation, Sun-Mark Development Corp., because Sun-Mark had already agreed to purchase the land from the Hendersons for $410,000. Treit represented to Canson and Fealty that the price of the land was $525,000 and that he was not financially interested in it, apart from his agreed commission. The joint venturers paid that amount for the land, giving Sun-Mark a profit of $115,000; pursuant to Treit’s arrangement with Sun-Mark, half of this amount was paid to a company controlled by Treit. Peregrine was aware of this secret profit, and crucially, so was Ralph Wollen, who was the solicitor for Sun-Mark and for the joint venturers. On the one hand, he drafted the joint venture agreement; on the other hand, in acting as a conveyancer, he conveyed the land directly from the Hendersons to the joint venturers, concealing the involvement of Sun-Mark while paying to Sun-Mark its “flip” profit of $115,000. Obviously Wollen breached the duty that lies on a fiduciary to avoid being in a situation where his duty to one beneficiary conflicts with his duty to another.

\(^4\) The judgments make frequent reference to “conflict of interest”, which is short for “conflict of self-interest and fiduciary duty”, but the complaint was actually founded on a conflict between the fiduciary duty owed to one client and the fiduciary duty owed to another client.

\(^5\) The facts are set out in more detail in the trial judgment (31 B.C.L.R. (2d) 46) than in the Supreme Court of Canada judgments.
The joint venture went ahead, however, with the goal of developing the land. This turned out to be a disaster. The joint venturers hired an engineering firm to conduct soil tests; this firm failed to notice that there was a deep layer of peat in the soil. Construction went ahead with a warehouse. The land subsided and the warehouse suffered extensive damage. The joint venturers sued the soil engineers and the corporation that had driven the piles for the building. They succeeded against both, but due to the insolvency of these businesses they ended up with significant losses on the deal. This litigation proceeded as a special case on agreed facts. The agreed facts included that in the case of Canson, the loss suffered was $801,290.41, while in the case of Fealty it was $280,278.00. There was also an agreed fact that the plaintiffs would not have entered into the transaction had they known of the secret profit. The trial judge found liability on the parts of Treit, Sun-Mark, Peregrine, and certain other corporations. He also found Wollen liable; it was this liability that was the central concern when the case reached the Supreme Court of Canada.

B. The judgments in the Supreme Court of Canada

There were three judgments in the Supreme Court of Canada. La Forest J. wrote the majority judgment, in which Sopinka, Gonthier and Cory JJ. concurred. Stevenson J. also agreed with this judgment, but wrote a short judgment of his own to make a few points.6

6 One of these was an important terminological point (at 590): “This case is not one of profit making and restitutionary concepts do not fit.” Often judges refer to “restitution” when they are discussing compensation claims against fiduciaries. This can be very misleading because it is not a question of restitution for unjust enrichment. We will return to this. Stevenson J. also said (at 590): “I do not think that the so-called fusion of law and equity has anything to do with deciding this case.” In this we also agree with him, as the discussion will show.
McLachlin J., as she then was, wrote a concurring minority judgment, in which Lamer C.J. and L’Heureux-Dubé J. concurred.

Both the majority and the minority judgment struggle with the fact that in some sense, money claims against fiduciaries seem to be handled differently than “ordinary” claims in negligence. These differences are illustrated by cases like *Ex parte Adamson*\(^7\) and *Guerin* v. *R.*, \(^8\) cited in both judgments (and to both of which we shall return). Both judgments try to analyse in what way claims in equity are different, in order to make sense of the case law. The majority judgment settles on this formula:

> There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity’s concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on; ... In the case of a trust relationship, the trustee’s obligation is to hold the res or object of the trust for his *cestui que trust*, and on breach the concern of equity is that it be restored to the *cestui que trust* or if that cannot be done to afford compensation for what the object would be worth. In the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting from the breach of the particular duty.\(^9\)

In other words, the crucial distinction is said to be between cases where there is property held for another, and those where there is not. The property-holding category includes the trust, but also cases like *Guerin*.\(^10\) The minority judgment resisted this distinction and insisted that the crucial difference is between cases “in equity” and those “at common law”. For this reason, the case turned into a dispute about whether, and to what extent,

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\(^7\) *Ex parte Adamson* (1878), 8 Ch. D. 807 (C.A.).
\(^9\) At 578 (underlining in original).
\(^10\) In *Guerin* it was held that there was not a trust in the technical sense, although the Crown owed fiduciary obligations to the plaintiff First Nation band in relation to reserve land.
common law and equity are now fused Canada. According to the minority, different principles apply in equity:

I agree with Justice La Forest that the solicitor’s liability does not extend this far … I base this result, however, in equity. I cannot concur in the suggestion in my colleague’s reasons that apart from cases where the trustee controls the property of the cestui que trust, damages for breach of fiduciary duty should be measured by analogy to tort and contract.\[11\] …

In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff’s lost opportunity. The plaintiff’s actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach.\[12\]

The minority judgment attempts to show that the common law measures a loss at the time of the breach, while equity, more sensitively, does so at the time of trial, “with the full benefit of hindsight.”\[13\] This is a false dichotomy. The common law is perfectly capable of measuring losses at the time of trial; indeed, this is the ordinary rule.\[14\] Only in particular circumstances, which depend upon particular justifications, does the law ignore events happening between the wrong and the trial and which affect the assessment of the loss.\[15\]

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\[11\] At 542-3.
\[12\] At 556.
\[13\] See also at 554-5.
\[15\] For example, liability insurance held by the plaintiff, which reduces or eliminates the loss, is always ignored. This can only be explained on policy grounds, which must also be found to explain the exclusion of other “collateral benefits”: see generally Ratych v. Bloomer, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25. In contracts for the sale of goods, the presumption is that the assessment should be made at the time of breach; this is said to be
The minority judgment is difficult to follow in other ways as well. It suggests that “the plaintiff will not be required to mitigate”, but at the same time, that “losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach”. Surely this is all that mitigation ever means. It suggests that “[f]oreseeability is not a concern in assessing compensation”, but immediately qualifies this by saying that “it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.” And of course, the minority agreed that in the case at hand, the losses in question were not recoverable, even though it was part of the stated case they were causally linked to the defendant’s breach of fiduciary obligation. In other words, the conclusion must be that although they were linked in a “but-for” sense, they were not linked on a “common sense view of causation”. But the common law’s rules regarding remoteness are simply an attempt to provide a framework of legal analysis, which allows consistency of application across cases, for the idea of a “common sense view of causation”. The reason that we do not allow recovery (in tort or contract or breach of fiduciary obligation) for all losses that are linked in a “but-for” sense to the breach is that we think that this would cast the net of moral and legal responsibility too widely.\footnote{T. Hart and T. Honoré, Causation in the Law, 2 ed. (Oxford: Oxford University Press, 1985). See also} In difficult cases, common sense may run out, or different people’s common sense may point in different
directions.17 But there is nothing here that is peculiar to equity; both the common law and equity must struggle with this problem.

The minority judgment has attracted some support.18 In what follows, however, we will suggest that both the minority and the majority judgments failed to identify exactly what were the “special” rules that sometimes apply in cases of breach of trust, or breach of fiduciary obligation. When we look at the cases that occupied the Court’s attention in Canson, we see that there are in fact two principles that can indeed strongly affect the measurement of money claims against fiduciaries. Both are real principles, and both are important. Moreover, although the judges in Canson may not have realized it, the two principles are quite independent of one another. But as it happens, neither one was actually relevant in Canson; moreover, neither one belongs particularly to either the common law or equity. The first principle is that not every claim for money is a claim for a loss. When a money claim is not a claim for a loss, then issues of causation, remoteness and so on become immaterial. The second principle is that even when a claim is a claim for a loss, in some cases we will resolve an evidentiary difficulty as to the quantum of that loss against the defendant who wrongfully caused the loss. We examine these in turn.

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17 Difficult cases include overdetermination, where there are multiple causes each sufficient to bring out the same effect. See T. Honoré, “Necessary and Sufficient Conditions in Tort Law” in T. Honoré, ed., Responsibility and Fault (Oxford: Hart, 1999) 94.
C. Not every claim for money is a claim for a loss

1. Introduction

The most fundamental error that runs through Canson is a failure to recognize that not every claim for money is a claim for a loss. The judges knew that some money claims in equity were subject to a different manner of quantification that did not look to remoteness or foreseeability or even causation; they assumed that this meant that claims for compensation are handled differently in equity. The truth is that the claims which are assessed without regard to remoteness, foreseeability or causation are not claims for loss.

Let us begin to unpack this by citing a 19th century judgment that was quoted by both the majority and the minority in Canson. In Ex parte Adamson, James L.J., with whom Baggallay L.J. concurred, said:

The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.

What does it mean to say that “the suit was always for an equitable debt” rather than for damages? The difference is between a claim to enforce a primary obligation, and a claim for the loss caused by the failure to perform a primary obligation. This distinction is crucial, but it is not particularly equitable.

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19 Ex parte Adamson (1878), 8 Ch. D. 807 (C.A.).
20 At 819. The statement that the Court of Chancery never entertained a suit for damages is actually false. Claims for damages for loss caused were sometimes allowed, quite apart from the statutory jurisdiction, dating from 1858, to allow “damages in lieu” of an injunction or specific performance. See P.M. McDermott, Equitable Damages (Sydney: Butterworths, 1994). However, the contrast between debt and damages remains crucial despite this error.
Imagine that Alan and Belinda make a contract by which they agree that Alan will build Belinda a garage for $10,000. Let us assume that Alan does the work and Belinda pays. She then concludes that the work was not done properly. Belinda’s claim against Alan will be a claim for damages for breach of contract. It will take this form: that Alan had a contractual obligation to do work of a certain standard; this was a primary obligation, that is to say, an obligation that comes into existence without any wrongdoing; however, Alan breached this primary obligation; as a result, Alan has now come under a new obligation—a secondary obligation—to compensate Belinda for the loss caused by Alan’s breach of the primary obligation.

Now change the assumptions. Imagine that Alan builds the garage to the required standard, but Belinda does not pay him. Alan’s claim against Belinda will also be a contractual claim. However, Alan does not need to sue for damages; he can sue in debt. In this context, what that means is that he can claim $10,000 by making a claim of the following form: Belinda promised to pay Alan $10,000 for building the garage; Alan built the garage; Belinda owes Alan $10,000. The crucial point is to notice that when Alan makes this claim, he does not need to say anything about loss. He is not making a claim based on a secondary obligation to compensate him for the loss caused by Belinda’s breach of contract.21

Think about the debate in Canson in terms of this claim by Alan. There is no room for any consideration of remoteness or foreseeability or even causation in Alan’s claim. That

21 Whether he could make a claim of that kind is a different question. For example, what if Alan missed a profitable business opportunity due to Belinda’s non-payment? He might suffer a loss much greater than $10,000. We do not explore that issue here.
is not because it is a claim in equity. That is because it is not a claim for a loss suffered. A claim for a contractual debt is in a sense a claim for specific performance. Because it is a money claim, it is not described as specific performance. The common law courts always had jurisdiction to grant the relief sought; it was not necessary to go to Chancery and seek a decree of specific performance. But it is just like specific performance in the sense that the plaintiff seeks the enforcement of the defendant’s primary contractual obligation, rather than seeking damages to compensate for loss caused by the breach of those primary obligations.

This allows us to turn to specific performance as such. Assume a contract for the purchase and sale of an interest in land. If the vendor will not convey, the purchaser may seek specific performance. No one would argue for consideration of remoteness or foreseeability or causation in such a case, because it is not a claim for loss. Even mitigation drops out of the picture. It has sometimes been observed that such a claim may allow a plaintiff to avoid having to mitigate his or her loss.22 This is true, but it misses the point: the claim is not a claim for a loss. This is starkly illustrated when an order for specific performance is turned into a money order. Since 1858, the courts have had the jurisdiction to grant “damages in lieu of” specific performance. The Supreme Court of Canada has made it clear that when this occurs, the exercise is not one of compensating for loss.23 It is rather an exercise of giving the plaintiff an amount of money that will put the plaintiff in the same position he or she would be in as if she had been granted a decree.

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of specific performance, and the decree had been fulfilled. This may well be overcompensatory; this is all right, because the aim is not compensation.\textsuperscript{24}

2. Application to trusts

When we turn to trusts and fiduciary obligations, we see the same thing: not every claim is a claim for compensation for a loss caused by a breach of duty. In trust law, for example, some claims involve the direct enforcement of the trustee’s primary obligations under the trust.\textsuperscript{25} Such claims are like a claim for the specific performance of a contract. And, just as in that context, this kind of claim may turn into a kind of \textit{substitute} specific performance: if the trustee no longer has the trust property, he will have to replenish the fund out of his own assets. But even if it becomes a money claim, it is still like specific performance in the sense that the claim is not framed as a claim to replenish a loss; and, in the sense that no breach of trust needs to be pleaded to secure relief of this kind. The claim is merely a demand that the trustee perform the trust.

Assume that a trustee has taken $500 of trust money and purchased shares with it. If the shares were not an authorized investment, this is a breach of trust. The beneficiaries are free to adopt the unauthorized investment if it suits them. If it does not suit them, then the claim against the trustee proceeds through the accounting mechanism to which all trustees are subject. The trustee presents an account that shows the $500 disbursement; the beneficiaries are entitled to disallow that entry because it is unauthorized.\textsuperscript{26} The result

is that there is no entry in the account that justifies any disbursement of $500 of trust money; but the money was disbursed; hence, the trustee is personally liable to restore $500 to the trust, out of his own resources. 27 The trust has been compensated in a sense. But the claim to the $500 is not framed as a claim for a loss caused by a breach. It is framed as a claim to enforce the trustee’s primary obligation: “you are supposed to hold $500 on trust; do so.” It is a like claim to a claim for specific performance. That is why issues of remoteness, foreseeability and even causation—which are issues about loss—do not arise. In this light, we can understand the statement in Ex parte Adamson, to the effect that “[t]he suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.” 28 The debt is the primary obligation to hold the relevant property on trust; it is not a claim for loss caused. It is a claim for “restitution” in the sense that the trustee must put back what he took out of the trust fund. But it is not restitution in the usual sense, that is, the legal response imposed when one party has been unjustly enriched at the expense of another party. 29

3. Conclusion

Canson was a claim for loss suffered by the breach of a fiduciary obligation. It was not framed as a claim that the defendant perform his primary obligation. It could not have been, because his relevant primary obligation was to disclose to the plaintiff the conflicting fiduciary duties that he owed to other parties; or, if he could not do that with the consent of those other parties, to withdraw. It would have been nonsense to frame the

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27 Conversely, once he has done so, he can keep the unauthorized investment.
28 Above, note 7.
29 Above, note 6.
claim in that way. The only way to frame it was as a claim for loss caused. But as soon as a claim is framed in that way, issues of causation must be brought in, because the only relevant loss is the loss that the defendant caused. And as soon as causation is raised, issues of remoteness arise, because there are limits to the responsibility that we can rightly impose on someone for the causal outcomes of a breach of duty. All of the judges agreed, in the end, that the loss was too remote to be recoverable. To suggest, as did the minority, that this was because different rules govern in equity was to make a mistake. The majority was closer to the mark, in saying that the relevant question is whether the claim relates to entrusted property.\textsuperscript{30} But the real distinction, which has nothing to do with the difference between common law and equity, is whether the claim was for loss caused by a breach, or was a claim to enforce a primary duty.

D. Resolving evidentiary difficulties against one who wrongly created them

What about \textit{Guerin},\textsuperscript{31} which also loomed large in \textit{Canson}? Does it reveal a principle for the measurement of money claims that is particular to equitable claims? In that case, the federal Crown was responsible for arrangements relating to the reserve land of a First Nations band; the governing legislation does not allow bands to make direct dispositions. The band surrendered the land to the Crown so that it could lease it out on certain agreed terms; the Crown leased it out on less advantageous terms. The Court held that this was not a trust, but that there was a fiduciary obligation and it had been breached. The value of the loss caused by the breach had to be calculated. The Court did not put the band in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{30} In cases where property has been entrusted, it is more likely to be possible to frame the claim as one to enforce a primary duty, by substitution with a money award if necessary.
\item \textsuperscript{31} Note 8.
\end{itemize}
\end{footnotesize}
the position it would have been in had the Crown obtained the terms that had been agreed with the band. The reason is that the trial judge found as a fact that those terms could not have been obtained. Instead, the Court put the band in the position it would have been in had the Crown obtained the most advantageous use of the land that it could have done.

How do we understand this result? The majority in *Canson* put *Guerin* aside as a case that was concerned with the entrustment of property, which therefore involved stricter rules for the assessment of loss.\(^{32}\) However, on our own approach to *Canson*, discussed in the previous section, this is not the correct distinction. We observed in that section that issues of remoteness and even causation do not arise unless a claim is framed as a claim for a loss consequent upon a breach of duty. *Guerin*, however, was a case that involved a claim for compensation for loss caused by a breach of fiduciary obligation; it was a claim for damages. Therefore, on our approach, the governing principles should be the same as those that applied in *Canson*, and not the different principles that apply to claims to enforce a primary duty.

Even so, there was a particular principle of assessment that was applied in *Guerin*, and in fact it was one that could have applied in *Canson*, had there been occasion. Wilson J. said, in *Guerin*:

> Since the lease that was authorized by the Band was impossible to obtain, the Crown’s breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* (1906), 38 S.C.R. 198), so

\(^{32}\) At 578.
also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect …

Wilson J. puts the principle in terms of a presumption, drawing a contrast between equity and contract. There is such a presumption, but it is not confined to equity. There is a general principle that when a party creates an evidentiary difficulty, via his own legally wrongful act, then that difficulty will be resolved against that party. This is frequently applied in the common law, as in cases of conversion and fraud. It follows that if this presumption is not applied in negligence cases, it is not because of the division between common law and equity. The principle in question cannot be said to be one that arises “in equity”.

Since the wrong in Canson was a breach of fiduciary obligation, this principle could have applied. Had there been an evidentiary difficulty about the quantum of the loss, that

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33 At 362-3. The majority simply adopted the method of calculation used by the trial judge; it was this method for which Wilson J. was trying to provide a principled explanation.  
34 Armory v. Delamirie (1722), 1 Str. 505, 93 E.R. 664 (K.B.).  
37 McLachlin J. implied this by marking her disagreement with La Forest J. with the claim (at 542-3), “I base this result, however, in equity. I cannot concur in the suggestion in my colleague’s reasons that apart from cases where the trustee controls the property of the cestui que trust, damages for breach of fiduciary duty should be measured by analogy to tort and contract.” But she also said, with reference to Guerin (at 552), “The considerations applicable in this respect to breach of fiduciary duty are more analogous to deceit than negligence or breach of contract.” Deceit is a common law tort, so if the distinction is between deceit and breach of fiduciary obligation on the one hand, and breach of contract and negligence on the other, it is not a distinction between common law and equity. Similarly, McLachlin J. referred to Guerin as showing that in equity, foreseeable loss was irrelevant; but she herself noted that the same was true in the common law tort of deceit.
difficulty should have been resolved against the breaching fiduciary. However, there was no such difficulty and so the principle in Guerin was of no relevance. The amount of the loss in Canson was agreed in the stated case. The only question was whether it was too remote.

E. Conclusion
There are, of course, some important differences between the common law and equity.\textsuperscript{38} It is not clear, however, that reaching a decision in Canson required any complicated diversion through the question of whether law and equity are now fused. The principles by which money claims are measured are different in different cases. The differences, however, do not seem to arise out of an opposition between common law and equity. There is a crucial distinction between cases in which the plaintiff claims a loss caused by the defendant’s breach, and cases in which the plaintiff seeks to force the defendant to perform his primary duty, whether specifically or by a money substitute. Moreover, even within the category of claims for loss, there are some cases in which the ordinary burden of proof is reversed, and evidentiary difficulties as to the quantum of loss are resolved against the one who wrongfully created them. As it happened, however, this latter principle had no application in Canson, because there was no evidentiary difficulty in assessing the loss.

II. Case law after Canson

A. Treatment Post Canson

\textsuperscript{38} For one attempt to say what they are, see L. Smith, “Fusion and Tradition” in S. Degeling and J. Edelman, eds., \textit{Equity in Commercial Law} (Sydney: Thomson/Law Book Co., 2005) 19.
The errors identified in the above analysis of *Canson*, and the conclusions reached on the categorization and treatment of claims for compensation, or loss, boil down to the question of whether the claim is for compensation against a fiduciary for breach, is a claim for compensation against a fiduciary in lieu of being prevented from enforcing a primary duty, and coincidentally, the nature of the breach, the relationship, and the duty breached. The critical distinction identified, however, does not appear to have been expressly identified in the measurement of claims against fiduciaries and trustees in the, in or about, 254 cases post *Canson*, which cite and analyze *Canson*. To date, *Canson* has been distinguished in, in or about, 6 cases at the Supreme Court of Canada level and the Court of Appeal level.

*Canson* has been followed in, in or about, 146 cases since *Canson*, considered in about 108 cases, and referred to in about 112 others. There is a further, in or about, 300 other cases that mention *Canson* without specific analyses.

There is no doubt that *Canson* remains a leading authority on limits to claims for compensation against fiduciaries, and measurement of claims against trustees.

In spite of the errors identified, the Supreme Court of Canada achieved the right result in standing for the proposition that the treatment by our courts should strive to treat similar wrongs similarly, regardless of the particular cause(s) of action pleaded.
In *Canson* it is recognized that while a breach of fiduciary duty is capable of taking on a variety of forms, leading in turn to a variety of remedial considerations that may consequentially be employed, the resulting redress by the court should always be uniform or consistent.

B. A Selection of Cases Analyzed

La Forest J. in *Hodgkinson v. Simms*[^39]:

“Barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of the common law action, or an equitable remedy, should give rise to different levels of redress.”

*Canson* was followed in *Hodgkinson v. Simms*. In *Hodgkinson*, La Forest J. also suggests that it is well established that the proper approach to damages for breach of fiduciary duty is “restitutionary”. The court in *Hodgkinson* held that an award of equitable damages was the appropriate remedy where the wrong in question went “to the heart of the duty that lies at the core of the fiduciary principle”, and where disgorgement would have subjected the plaintiff to the risks of market fluctuations.[^40] In *Hodgkinson* the first of these two factors was the relevant factor. La Forest J. emphasized the need to put special pressure on those in positions of trust and power.[^41] It was recognized, however, that there is to be some flexibility in remedies in equity and, in particular that they should not be out of proportion with the defendant’s behaviour.[^42] Recall that the concept of behaviour and losses resulting from behaviour will be adjuged to flow from the behaviour


and not the breach according to the Supreme Court of Canada in \textit{Canson}^{43}. \textit{Hodgkinson} mainly concerned a case of material non-disclosure in which the appellant alleged breach of fiduciary duty and breach of contract against the respondent in the performance of a contract for investment and other tax related advices and services. The appellant, Hodgkinson, was entitled to be put in as good a position as he would have been in had the breach not occurred. The Supreme Court of Canada dismissed the appeal and maintained the damages awarded by the British Columbia Court of Appeal\textsuperscript{44}. The measure of damages for breach of contract founded on principles of common law put the injured party in the same position as he would have been in had the wrongdoer performed what he promised. In other words, the equitable principle of restitution. In the Supreme Court of Canada case the court was persuaded that the client would not have made the investment if he had known of his advisor’s relationship with the developer, and the advisor was ordered to compensate him for all his losses. The Court of Appeal would have restricted recovery to the difference between what he paid for the investments and what their value was at the time of purchase. The bonus was to be deducted from the value because if there had been no payment, the price of the investments would presumably have been reduced by that amount. In effect, recovery was the ‘disgorgement’ of the secret profit. La Forest J., in assessing damages, found that the trial judge rightly focused on the nature of the breach rather than the nature of the loss. La Forest J. in his Reasons for Judgment stated that a measure of damages that places the exigencies of the marketplace on the respondent, the defaulting party, can be used because it is in accordance with the principle that a defaulting fiduciary has an obligation

\footnotesize{\textsuperscript{43} \textit{Canson Enterprises Ltd. v. Boughton & Co.}, [1991] 3 S.C.R. 534 at 556}  
\footnotesize{\textsuperscript{44} \textit{Hodgkinson v. Simms}, 11 B.C.A.C. 248}
to effect restitution in specie or its monetary equivalent. Mr. Simms, the accountant, relied on Canson holding in the minority that a court exercising equitable jurisdiction may consider the principles of remoteness and causation in reaching a just and fair result. In Hodgkinson the court took the view that the fiduciary did obtain an advantage at the expense of his beneficiary.

The BCCA viewed the correct treatment as disgorging a gain. But in the SCC, Hodgkinson got all of his loss. Canson had to be distinguished; as noted, Simms wanted to use it to say that Hodgkinson’s loss was too remote. However the Court said that a loss caused by a fall in the market was not too remote, even though the loss in Canson (caused by the negligence of other parties) was too remote. Note, however, that this decision regarding remoteness is itself not especially about law vs equity. In the Smith New Court case (referenced above), which is a deceit case and not a fiduciary case, the market risk was held to fall properly on the defendant.

Put simply, compensation seems to apply to repairing a loss of the plaintiff; disgorgement seems to apply to giving up a gain of the defendant. Restitution primarily refers to cases in which a transfer (where there is both loss and gain) has to be undone; this is frequently seen in cases of restitution for unjust enrichment. In unjust enrichment, restitution means giving back. In the trust context, restitution has often been used in relation to claims to restore a trust fund; there is a kind of giving back, because the trustee must give back what he took from the trust. But cases like Canson and Hodgkinson, not noticing the

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difference between claims to enforce a trust and claims for loss, have gone on to use the word restitution to describe what are really just claims for compensation, that happen to arise in an equitable context.\textsuperscript{46}

In the case of \textit{Banting v. Child}\textsuperscript{47} the appeal concerned the trial judge’s order that the appellants, Jeffrey Child \textit{et. als}, pay compensation to Mr. Banting respecting his investment in a failed restaurant venture. The trial judge found that Mr. Child owed Mr. Banting a fiduciary duty and that Mr. Child breached that duty by causing a corporation owned by him, which also owned the building in which the restaurant was to operate, to enter into a secret agreement to lease with Spectre Corporation, a company in which Child and Banting were partners, and by failing to disclose the agreement to lease to Mr. Banting. Like with \textit{Canson} and \textit{Hodgkinson}, the court found that “but-for” this breach of fiduciary duty, Mr. Banting would not have invested the bulk of his money as a partner with Mr. Child. The appellant’s submission was that Mr. Banting suffered no loss of profit. In \textit{Canson}\textsuperscript{48} a breach of fiduciary duty was found to be a wrong regardless of whether a loss could be foreseen. Additionally, the high duty assumed and the difficulty of detecting such a breach makes it fair and reasonable to adopt a measure of compensation to ensure that the fiduciaries are “kept up to their duty”. \textit{Banting v. Child} therefore picked up on the principles enunciated in the majority judgment in \textit{Canson}\textsuperscript{49}:

“\text{There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity’s concern is simply that the duty be performed honestly and in accordance with the}

\textsuperscript{46} See footnote 6
\textsuperscript{47} \textit{Banting v. Child} 2005 O.A.C. 87 (Ont. C.A.)
undertaking of the fiduciary. And further in the case of a trust relationship, the
trustee’s obligation is to hold the res or object of the trust for his cestui que trust,
and on breach the concern of equity is that it be restored to the cestui que trust or
if that cannot be done to afford compensation for what the object would be worth.
In the case of a mere breach of duty, the concern of equity is to ascertain the loss
resulting from the breach of the particular duty. Where the wrongdoer has
received some benefit, the benefit can be disgorged, but the measure of
compensation where no such benefit has been obtained by the wrongdoer raises
different issues.”

The appellants further submitted that the trial judge erred in the remedy awarded. The
Court of Appeal in Banting found that the trial judge did not deprive Mr. Child of all of
the benefit of the partnership nor deprive him of his partnership interest. The trial judge
was entitled to make an award of compensation where, as in this case, neither an
accounting nor restitution was appropriate. In this they relied on Canson and dismissed
the appeal.

In the Ontario Court of Appeal case of Authorson (Litigation Guardian of) v. Canada
(Attorney General)50 again the court is faced with the process of assessing damages for
breach of fiduciary obligation. Canson is followed in, and considered in, Authorson. In
Authorson the court is assessing loss of opportunity. In the Court of Appeal Judgment it
was said that the Supreme Court of Canada had sanctioned the view that losses for breach
of fiduciary duty may be assessed at the time of trial with full benefit of hindsight citing
Guerin51 and Canson52, and see Semelhago v. Paramadevan53. The Court of Appeal,
however, emphasized, relying on Canson, that the measure of damages for breach of
fiduciary duty is restitutional. Plaintiffs are entitled to be placed in as good a position as

50 Authorson (Litigation Guardian of) v. Canada (Attorney General) 2007 ONCA 501
they would have been in had the breach not occurred. The Court of Appeal also relied on
*Hodgkinson v. Simms*\(^5^4\). However, the Court of Appeal stated that there was no
entitlement to be placed in a better position as the motion’s judge had determined. The
Court of Appeal was critical of the fact that no authority had been suggested that the
hindsight principle may be used for such a purpose and it would make no sense to do so
because it would be inconsistent with the basis for recovery in a fiduciary obligation case.
On this reasoning the Court of Appeal allowed the Crown’s appeal and dismissed the
cross-appeal.

In the Ontario Court of Appeal case of *Waxman v. Waxman*\(^5^5\) leave to appeal to the
Supreme Court of Canada was refused. The Court of Appeal in assessing the damages
falling from a breach of fiduciary duty and a consequential constructive trust of company
shares, held that it was appropriate to order the plaintiff be entitled to a transfer of the
trust property (50% of the shares) and damages in the amount of 50% of the profits
arising since the commencement of the constructive trust. The Court of Appeal relied on
both *Canson* and *Hodgkinson* in the Supreme Court. La Forest J. in *Hodgkinson* was
specifically noted in this regard\(^5^6\) and his comments “Equity’s objective in a circumstance
like this is restitutionary”, and therefore the Court of Appeal were inclined to put Morris
Waxman in as good a position as he would have been in had the fiduciary breaches not
occurred. Moreover, it was noted that where the breach is found to be dishonest, equity
does not permit the failed fiduciary to profit from his wrongdoing. *Waxman* is an


\(^{5^5}\) *Waxman v. Waxman* 2004 CarswellOnt 1715; 186 O.A.C. 201; 44 B.L.R. (3d) 165

example of the application of the restitutionary principles enunciated in *Hodgkinson* as a remedy for a breach of fiduciary duty. The distinction observed by La Forest J.\(^\text{57}\) concerning the division between a situation where a person has control of the property and one where a person is under a fiduciary duty to perform an obligation honestly and in accordance with the fiduciary’s undertaking, that the remedy for breach of fiduciary duty should not automatically be the same as the remedy for breach of trust. In breach of trust cases the object of the trust must be restored to the beneficiary and if not the beneficiary must be compensated to the value of the object to be restored. As such, in breach of fiduciary duty cases the court assesses the losses flowing from the breach. In *Canson*, whereas the clients were entitled to recover the secret profit, the court did not bar the opportunity for further recovery for breach of fiduciary duty simply because the solicitor who did not benefit from the secret profit, nor the breach of fiduciary duty, yet, on the facts, further recovery in *Canson* was denied. On the issue of reduction of equitable compensation awarded in respect of Paul Ennis and Ennis & Associates, the Court of Appeal reduced the compensation on common law principles of remoteness and causation as enunciated in both *Canson* and *Hodgkinson*. To this end, the Supreme Court of Canada and the Court of Appeal have applied common law principles in limiting equitable compensation. The appeal against damages was allowed in part.

In the Ontario Court of Justice case *692331 Ontario Limited v. Garay*\(^\text{58}\) Justice Festeryga determined the obligation of a trustee is to make restitution of the amounts improperly


\(^{58}\) *692331 Ontario Limited v. Garay*, 1997 36 B.L.R. (2d) 231
disbursed. As such, Justice Festeryga considered that causation, foreseeability, and remoteness are irrelevant factors since the inquiry in each case would be whether the loss would have happened if there had been no breach. The court relied on the established principles of *Canson*. This was a case of breach of trust and breach of fiduciary duty. On quantum the court determined that the plaintiffs should be compensated for the losses that would not have occurred if there had not been breach of trust and fiduciary duties. Incidentally, this is also a case where punitive damages were awarded on the basis decided in the Supreme Court of Canada case of *Hill v. Church of Scientology of Toronto*\(^{59}\).

The Saskatchewan Court of Appeal in *Baskerville v. Thurgood*\(^{60}\) dismissed the appeal from the Judgment of Hrabinsky J. where the trial judge found the defendant liable for breach of fiduciary duty in the sale of shares and awarded damages in the amount of the price of the shares plus borrowing costs of the purchaser without offsetting the value of the shares. The Saskatchewan Court of Appeal found that the advisor should make restitution for having breached his fiduciary duty by restoring the investor and his wife to the position they were in before the breach occurred. The return of the price of the shares was held as compensation for the borrowing costs and the use or loss of use of their money with interest was held to be the right result in relying on principles set out in *Canson*. In this way also the court measured the damages taking into consideration the advantage of the profit which Thurgood derived from the transaction and must disgorge


\(^{60}\) *Baskerville v. Thurgode* (1990), 87 Sask. R. 23
and the other to constitute the measure of restitution or compensation to which the Baskervilles were found to be entitled.

In *Olive Hospitality Inc. et al. v. Woo*\(^6\) the British Columbia Supreme Court considered *Canson* and the principles of remoteness but the case really concerned punitive damages for breach of fiduciary duty as considered in the Supreme Court of Canada decision, *Whiten v. Pilot Insurance Co.*\(^2\), wherein Binnie J. described the role of punitive damages and when such damages should apply.

Justice Ross concluded punitive damages applied and made a compensatory award recognizing per Binnie J. in *Whiten*\(^3\) “compensatory damages also punish”.

In the Alberta Court of Appeal case of *Finch v. Ross, Todd & Co.*\(^4\) the trial judge found that the solicitor acting for Finch and the Zelman brothers in connection with the receipt of loan funds had owed fiduciary duties to all three. The trial Judge found that Herman, the Solicitor, breached his fiduciary duties to Finch by failing to disclose his actions on behalf of the Zelman brothers, and this failure precluded the respondent from withdrawing from the business arrangement prior to the advance of the loan funds. The

\(^{61}\) *Olive Hospitality Inc. et al. v. Woo*, 2006 B.C.S.C. 1554


\(^{64}\) *Finch v. Ross, Todd & Co.* 2006 CarswellAlta 392; 2006 ABCA 98; 57 Alta. L.R. (4\(^{th}\)) 239; 384 A.R. 133; 384 W.A.C. 133
trial judge also held that Herman breached his fiduciary duties by failing to represent Finch with undivided loyalty and failing to make full disclosure of all material information. The trial judge awarded $60,000.00 to Finch representing the value of Finch’s ostriches in June 1993. Relying on Canson, the Court of Appeal held that the proper approach to determining damages for breach of fiduciary duty is restitutionary and that remoteness of damage is generally not a relevant consideration. The appeal was dismissed.

*Canson* is also referred to in *Minera Aquiline Argentina SA v. IMA Exploration Inc.* a British Columbia Supreme Court case, and pursuant to Justice Koenigsberg, the purpose of compensatory damages, whether assessed in equity or at common law, is to put the plaintiff in the position it would have been in “but for” the defendant’s breach. The “but for” test always requires one to consider, on the balance of probabilities, what would have happened if the defendant had lived up to its legal obligations. The plaintiff’s loss flowing from the breach is not determined by reference only to the facts known on the date of the breach; it is determined with the full benefit of hindsight. In terms of the measure of the lost opportunity, the applicable concept of restoration (restitution), relied upon was as set out in the Reasons of McLachlin J. in *Canson*:

“In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach [in this case the plaintiff’s lost opportunity]. The plaintiff’s

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actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Forseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.”

The Supreme Court of British Columbia in *Fraser Park South Estates Ltd. V. Lang Michener Lawrence & Shaw* 67 in Supplementary Reasons for Judgment of the Honourable Madam Justice Satanove, disgorgement of a benefit received by the defendants through a breach of fiduciary duty was the principle invoked where the defendant law firm breached its fiduciary obligation. The disgorgement amount quantified by the actual fees paid, and interest from the time the fees were actually paid. In a sense, the plaintiffs sought to force the defendant by way of money substitute to perform its primary duty. *Canson* was distinguished in this case.

In *Lac Minerals Ltd. V. International Euro Resources Ltd.* 68, the Supreme Court of adjuged the nature of the wrong and the nature of the loss, not the nature of the cause of action, which was said to dictate the scope of the remedy. In this case a constructive trust was imposed in respect of a breach of confidence.

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67 *Fraser Park South Estates Ltd. V. Lang Michener Lawrence & Shaw*, 1999 CanLII 5680 (BC S.C.)
In *Soulos v. Korkontzilas*\(^{69}\), a real estate broker entered into negotiations to purchase a commercial building on behalf of his client. The initial offer was rejected, and the owner, in subsequent negotiations, advised the agent of the amount it would accept. The agent did not pass this information on to his client, but instead arranged for his wife to purchase the property. It was then put into their names as joint tenants. Three years later the client found out what happened. He sued the agent for breach of fiduciary duty, claiming a constructive trust. He had suffered no financial loss, because the value of the property had gone down, but he still wanted it for prestigious reasons in the community. He abandoned his claim for damages because the market value of the property had decreased from the time that the agent had purchased it. The trial judge found that Korkontzilas had breached his duty of loyalty to Soulos and whereas the trial judge had held that a constructive trust was not an appropriate remedy because there had been no enrichment, the Court of Appeal in a majority decision reversed that judgment and ordered that the property be conveyed to Soulos at the purchase price subject to the appropriate adjustments and the Supreme Court of Canada confirmed this decision.

C. Conclusion

The inevitability of loss is a factor in quantifying damages for breach of fiduciary duty. Mitigation, causation, foreseeability, remoteness, negligence and intervening acts continue to be relevant factors to consider in measuring compensation for breaches of sort, or damages in contract and in tort.

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The measure of compensation or damage, while predicated on consistency of result and while having underpinnings of policy, are unfortunately not a defined science. The measurement will depend primarily on the nature of the wrong or the breach.

In *Canson* and in *Hodgkinson*, restitutionary principles are prominent and the Court of Appeal and the Supreme Court since 1991 appear to have consistently remedied arbitrary awards of damages which do not comply with the principles laid down in these two cases. A possible and notable exception being that of Ermineskin Indian Band & Nation v. Canada\(^{70}\) was treated more in line with Guerin\(^{71}\), another exception.

In Ermineskin\(^{72}\), the Federal Court of Appeal case directed a reference in the Federal Court with regard to the following 6 factors:

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1. The Bands had substantial and increasing year-end balances in their trust accounts over time;

2. The Bands’ spending requirements were considerable and there was a need for liquidity to ensure the spending requirement could be satisfied;

3. Because it was necessary to preserve capital for future beneficiaries, the investments that should have been made should both have been in the high risk category;

4. There was a requirement that the Crown obtain the Bands’ consent before making investments, limiting the ability of the Crown to make investment decisions;

5. The calculation of damages should be made on the assumption that there would be regular and periodic reviews at least once per year of the results earned to date and recommendations for the future; and

6. The period for assessing damages should run from six years prior to the filing of the Statement of Claim in each action to the date of assessment.

The Federal Court of Appeal applied *Canson* principles per McLachlin J. in assessing a remedy for breach of fiduciary duty, “the Plaintiffs’ actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight.”\(^7\) The Court also examined the rate of return a prudent trustee should have achieved in measuring liability. The Appeal was granted to the Federal Court for the assessment of damages. This holding is consistent with the decision of the Supreme Court of Canada in *Guerin*. Dickson J., for the majority determined that when reserve lands were surrendered to the Crown, the arrangement was “trust-like” and the consequences for breach of the Crown’s fiduciary duties were likewise similar to those imposed on a common law trustee.\(^4\)


In terms of allowing for loss in *Hodgkinson* the breach of duty related directly to the risk which came into being. In *Canson*, on the other hand, the solicitor had no control over the risks which eventually materialized.

The “but for” principle facilitates the restitutionary remedy.

The apportionment of liability is not always capable of being clearly applied. *Canson*, however, provides the limits to claims for compensation against fiduciaries and the measurement of claims against trustees through the application of the common law and the flexibility of equity.

Claims for loss proper necessarily encompass principles of remoteness, foreseeability, and causation. Claims for money are not always reflective of loss, and are often employed to enforce, or alternatively compensate for, a primary obligation not performed, yet, contracted or undertaken specifically, or arising by the very nature of the relationship.

In conclusion, caselaw after *Canson* has not clarified the crucial distinction identified in the within analysis of *Canson* itself, yet the Courts continue to limit claims for compensation, and apportion the measurement of claims against Trustees, and Fiduciaries.