Loyalty in Quebec private law

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Abstract

The duty of loyalty is a relatively new notion in Quebec positive law. Certain aspects of the duty could be found in the *Civil Code of Lower Canada* (CCLC), but the duty of loyalty was only codified in 1994, with the entry into force of the *Civil Code of Quebec* (CCQ). Surprisingly, despite its codification, very few authors in Quebec have studied the duty of loyalty.

In this thesis, I explore the duty of loyalty in Quebec private law, from its emergence under the CCLC to its manifestations in the CCQ. I take the view that Quebec's duty of loyalty, although distinct from the fiduciary duties which are deeply anchored in the common law tradition, was nonetheless shaped by the influence of the latter. Therefore, I adopt a comparative approach as I establish certain parallels between the civil and the common law in order to enhance my analysis of the duty of loyalty in Quebec private law.

The first part of this thesis describes the emergence of the duty of loyalty in Quebec and sheds light on its relation to the common law. First, I examine the development of the duty of loyalty under the CCLC, with an emphasis on corporate law, an area of law that has been at the forefront of the emergence of the duty in Quebec. Second, I examine the changes introduced by the CCQ that had an impact on the interpretation of the duty of loyalty in Quebec.

The second part of this thesis examines the duty of loyalty in the current state of the law. I first identify certain elements that may undermine its understanding and development in Quebec private law. In doing so, I explore the nature of the duty of loyalty. On these bases, I then formulate a general theory of the duty of loyalty in Quebec private law. In order to do so, I examine the juridical situation of the director of a legal person, the administrator of the property of another, the employee and the mandatary, upon whom the CCQ imposes a duty of loyalty.

Résumé

L'obligation de loyauté est une notion relativement récente dans le droit positif québécois. Le *Code civil du Bas-Canada* (CcBC) exposait certains aspects de l'obligation de loyauté, mais cette dernière ne fut codifiée formellement qu'en 1994 avec l'entrée en vigueur du *Code civil du Québec* (CcQ). Étonnamment, malgré la codification de cette obligation, peu d'auteurs au Québec s'y sont intéressés.

Mon mémoire examine l'obligation de loyauté en droit privé québécois, de son émergence sous le CcBC jusqu'à ses manifestations actuelles dans le CcQ. J'adopte une approche comparative puisque l'obligation de loyauté, bien que distincte des *fiduciary duties* de la common law, a néanmoins été façonnée au contact de cette dernière. Ainsi, j'établis certains parallèles avec la common law et je m'y réfère notamment afin de mieux comprendre l'obligation de loyauté en droit québécois.

La première partie de ce mémoire retrace l'évolution de l'obligation de loyauté au Québec et met en lumière sa relation avec la common law. Dans un premier temps, j'examine le développement de l'obligation de loyauté sous le CcBC, particulièrement en droit corporatif, domaine ayant été au cœur de l'émergence de l'obligation de loyauté en droit québécois. Dans un deuxième temps, j'examine les changements que le CcQ a entraînés sur l'interprétation de l'obligation de loyauté au Québec.

La seconde partie étudie l'obligation de loyauté en droit actuel. Tout d'abord, j'identifie certains facteurs pouvant expliquer pourquoi l'obligation de loyauté, bien que codifiée dans le CcQ, soit encore incomprise et ne prenne pas la place qui lui revient au sein du droit privé au Québec. Ce faisant, j'examine la nature de l'obligation de loyauté. Sur ces assises, je propose ensuite une théorie générale de l'obligation de loyauté en droit privé québécois. Pour ce faire, j'analyse la situation juridique de l'administrateur d'une personne morale, de l'administrateur du bien d'autrui, de l'employé et du mandataire, auxquels le CcQ impose une obligation de loyauté.

Introduction

While the duty of loyalty is deeply anchored in the common law tradition, in which it is known as the fiduciary duty of loyalty, the duty of loyalty has not always been part of Quebec's positive law. Indeed, no such duty was expressly entrenched in the CCLC, which was the centrepiece of Quebec's private law from 1866 to 1994. A duty of loyalty nonetheless emerged over the years and is now clearly provided for in the CCQ, which establishes Quebec's *droit commun* – its *jus commune*.[1]

The CCQ contains, ever since it was brought into force in 1994, some legal provisions that explicitly impose a duty of loyalty on various legal actors: the director of a legal person[2], the administrator of the property of another,[3] the employee[4] and the mandatary.[5]

Although the duty of loyalty has been part of the CCQ for several years now, the leading authors on obligations in Quebec rarely discuss loyalty as an autonomous duty. As a matter of fact, loyalty is frequently subsumed under the general duty of good faith.[6] Moreover, in a foundational

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[1] The CCQ's preliminary provision states that the CCQ "lays down the *jus commune*".
[2] Art 322, para 2 CCQ.
[3] Art 1309, para 2 CCQ.
[4] Art 2088, para 1 CCQ.
[5] Art 2138, para 2 CCQ. According to the *Private Law Dictionary*, these are the instances where a duty of loyalty is expressly entrenched in the CCQ. Paul-André Crépeau Centre for Private and Comparative Law et al, eds, *Private Law Dictionary and Bilingual Lexicons. Obligations* (Cowansville, Que: Yvon Blais, 2003), *sub verbo* "obligation of loyalty", obs 1° [CPCL, *Private Law Dictionary. Obligations*]. Interestingly, although the word "loyauté" appears in the French version of each of these articles (arts 322, 1309, 2088 and 2138 CCQ), the term "loyalty" only appears in the English version of article 322, para 2 CCQ, which reads as follows: "[the director] shall also act with honesty and *loyalty* in the interest of the legal person" [emphasis added]. In the other articles establishing a duty of loyalty (arts 1309, 2088 and 2138 CCQ), the French term "loyauté" is translated as "faithfully".
[6] See e.g. Pierre-Gabriel Jobin & Nathalie Vézina, *Jean-Louis Baudouin et Pierre-Gabriel Jobin: Les obligations*, 7th ed (Cowansville, Que : Yvon Blais, 2013) [Jobin & Vézina, *Les obligations*] ("des applications particulières de la bonne foi et de l'équité ont été inscrites dans le Code civil, comme l'obligation de loyauté de l'employé envers son employeur (art 2088 CCQ) et du mandataire à l'égard du mandant (art 2138 CCQ)" at 20, para 14); Vincent Karim, *Les obligations*, vol 1, 3d ed (Montreal: Wilson & Lafleur, 2009) ("la notion de bonne foi entraîne plusieurs obligations corollaires telles que l'obligation […] de loyauté" [footnote omitted] at 61); Brigitte Lefebvre, *La bonne foi dans la formation du contrat* (Cowansville, Que: Yvon Blais, 1998) ("[l]a notion de loyauté n'est pas une notion distincte de celle de la bonne foi, mais plutôt une des facettes de cette notion de bonne foi. On pourrait la voir comme une notion moindre et incluse de la bonne foi" at 136); Didier Lluelles & Benoît Moore, *Droit des obligations*, 2d ed (Montreal: Éditions Thémis, 2012) at 1121, para 1980 [Lluelles & Moore, *Obligations*]; Mario Naccarato & Raymonde Crête, "La confiance: de la réalité à la juridicité" in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law – In Memory of the Honourable Charles Doherty Gonthier* (Markham, Ont: LexisNexis, 2012) 647 at 659 [Naccarato & Crête, "Réalité à juridicité"]; Maurice Tancelin, *Des obligations en droit mixte du Québec*, 7th ed (Montreal : Wilson & Lafleur, 2009) [Tancelin, *Obligations*] ("[l]'obligation d'honnêteté et de loyauté de l'administrateur dans l'intérêt de la personne morale, […] constitue un cran supplémentaire dans l'obligation de bonne foi" at 342, para 491.

work on obligations, the duty of loyalty isn't even indexed.[7] Conversely, while the common law fiduciary duty of loyalty is subject to some controversy as to the extent of its application[8], the concept has been (and still is) extensively studied in the common law legal tradition.[9]

In this thesis, my aim is to draw a portrait of the duty of loyalty in Quebec and ultimately, to put forth a general theory of loyalty in Quebec private law. In doing so, I take into account the specificity of Quebec private law, which, although predominantly civilian, bears the imprint of both the civil and the common law.

This thesis therefore has a comparative dimension, which appears most relevant given the historical intertwinement of the duty of loyalty in Quebec with the common law fiduciary duties. I resort to the common law as an interesting frame of comparison and as a valuable source of inspiration. This said, my aim is not to import common law theories on fiduciary loyalty or to undertake a point-by-point comparison between the duty of loyalty in civil and common law. Rather, I turn to the common law in order for it to shed light on the duty of loyalty in Quebec private law.[10]

In addition to this comparative approach, I analyze loyalty from an historical perspective. I take the view that Quebec's legal system is shaped by the interaction of the civil and the common law. This implies that the law in Quebec is not static; rather it evolves over time in response, to some extent, to the common law's influence. The duty of loyalty is a perfect example of a concept that has common law origins and then emerged in Quebec private law as a result of the

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[7] Tancelin, *Obligations*, *supra* note 6.

[8] See e.g. Anthony Duggan, "Fiduciary Obligations in the Supreme Court of Canada: A Retrospective" (2011) 50 Can Bus LJ 453; John D McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 Can Bus LJ 107; Paul B Miller, "A Theory of Fiduciary Liability" (2011) 56:2 McGill LJ 235 [Miller, "Fiduciary Liability"].

[9] See e.g. Peter Birks, "The Content of the Fiduciary Obligation" (2000) 34:1 Isr LR 3; Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 Law Q Rev 452; Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83:1 Can Bar Rev 35l; Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31:1 Queen's LJ 259 [Fox-Decent, "Fiduciary Nature"]; Miller, "Fiduciary Liability", *supra* note 8; Paul B Miller, "Justifying Fiduciary Duties" (2013) 58:4 McGill LJ 969; D Gordon Smith, "The Critical Resource Theory of Fiduciary Duty" (2002) 55:5 Vand L Rev 1399; Lionel Smith, "The Motive, Not the Deed" in Joshua Getzler, ed, Rationalizing Property, Equity and Trusts: essays in honour of Edward Burn (London, UK: LexisNexis, 2003) 53 [Smith, "The Motive"]; Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014)130 Law Q Rev 608 [Smith, "Fiduciary Relationships"].

[10] John EC Brierley has brilliantly used the comparative approach as a means of providing a clearer understanding of concepts found in a legal tradition. See e.g. "The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts" in H Patrick Glenn, ed, *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville, Que: Yvon Blais, 1993) 383 [Brierley, "New Quebec Law of Trusts"].

interaction between the civil and the common law. Therefore, a dynamic conception of the Quebec civilian legal tradition is put forth. To showcase this conception, I first examine Quebec's duty of loyalty from a diachronic perspective. Such a perspective sheds light on the context in which the concept arose in Quebec private law as well as on the reactions to the introduction, in Quebec, of a concept originating from the common law.[11]

More specifically, in the first part of this thesis, I investigate how the duty of loyalty in Quebec has developed over the last century or so, up until the entry into force of the CCQ in 1994. In chapter 1, the focal point of my enquiry is the duty of loyalty of directors of business corporations incorporated in Quebec since it is a major avenue through which the notion of loyalty was introduced into Quebec's legal landscape. More specifically, I attempt to show that the director's duty of loyalty as it now stands in the CCQ[12] is a product of the interaction between the civil and the common law. However, the scope of this study expands well beyond the case of the directors of legal persons and concerns, more generally, the duty of loyalty in the CCQ.

In chapter 2, I examine the changes introduced by the CCQ that had an impact on the analysis of the duty of loyalty in Quebec. I pay particular attention to the relation between civil and common law with regards to these changes.

In the second part of this thesis, I examine loyalty as it currently is in Quebec private law, from a synchronic standpoint. More specifically, in chapter 3, I identify and discuss limitations which threaten the duty of loyalty in Quebec due to civilian understandings of law. In doing so, I set the stage for the analysis of the duty of loyalty that follows in chapter 4.

In the last chapter, based on the manifestations of the duty of loyalty in the CCQ, I attempt to formulate a general theory of loyalty in Quebec's *jus commune*.[13] I suggest that the duty of

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[11] Sylvio Normand, " La culture juridique et l'acculturation du droit : le Québec" (2011) 1 – Special Issue 1, *Legal Culture and Legal Transplants*, ISAIDAT Law Review, article 23, online : <http://isaidat.di.unito.it/index.php/isaidat> [Normand, "Acculturation du droit"] ("[c]ette orientation facilite la compréhension du contexte dans lequel l'acculturation a été réalisée et les réactions qu'a parfois provoquées la réception d'un apport externe au droit québécois" at 3).

[12] Business corporations are legal persons.Therefore, directors of business corporations are subject to art 322 CCQ, which imposes a duty of loyalty on the directors of legal persons.

[13] A legal theory has been described as a "proposition générale dont l'objet consiste à présenter d'une manière cohérente ou logique différents éléments du système juridique" : Mathieu Devinat & Édith Guilhermont, "Enquête sur les théories juridiques en droit civil québécois" (2010) 44 RJT 7 at 17.

loyalty is a legal duty that comes into play in situations where an individual acts within the legal sphere of another.

The implications arising from my enquiries are significant. Indeed, defining loyalty's underlying conceptual framework has the potential to affect the liability of a large range of legal actors. What is more, my investigations will lead me, among other things; to distinguish loyalty from other concepts with which it may be confused[14], to identify situations in which the duty may be more difficultly enforced due to the context in which it arises[15] and to shed light on an exceptional sanction which is attached to disloyalty.[16]

[14] The duty of loyalty will be distinguished from the duty of good faith (section 3.2) and from the concept of competition (section 4.3.1).
[15] Section 3.3.3.
[16] Section 4.3.1.

Part 1 – The emergence of the duty of loyalty in Quebec private law

Chapter 1 – Under the CCLC: The equivocal emergence of the duty of loyalty in Quebec

No duty of loyalty was formally entrenched in the CCLC. Historically however, corporate law offered fertile ground for the development of a duty of loyalty in Quebec and for the borrowing of common law concepts, such as the fiduciary duty of loyalty. Up until 1994, it was uncertain whether corporate law in Quebec was to be governed by civil law principles[17], and there were voids in the CCLC that were often automatically filled with common law notions.[18] It was frequently assumed that the *droit commun* as regards corporate law was to be found in the common law.[19]

Corporate law is also the area of law in which the duty of loyalty was first given the closest meaning to that which it has today. Indeed, directors were considered to be under a duty to act in the best interests of the business corporation – or of the company, as it was called then.

For the above reasons, corporate law is the ideal field of observation of the emergence of the duty of loyalty in Quebec and its relation to the common law.

In this initial chapter, I first explain why corporate law in Quebec was so receptive to the influence of the common law. A large part of this chapter is then devoted to the director's duty of loyalty. Namely, I show that the director's duty of loyalty in Quebec emerged as a result of the interaction between the civil and the common law.

I conclude this overview of the emergence of the duty of loyalty under the CCLC by presenting and analyzing a landmark case concerning the duty of loyalty in Quebec, rendered by the

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[17] Madeleine Cantin Cumyn, "Les personnes morales dans le droit privé du Québec" (1990) 31 C de D 1021 at 1030-31 [Cantin Cumyn, "Les personnes morales"]; Yves Lauzon, "La perception judiciaire des devoirs des administrateurs de personnes morales : quel progrès ?", in Service de la formation permanente, Barreau du Québec, *Développements récents en droit commercial*, vol 112 (Cowansville: Éditions Yvon Blais, 1998) at 199 [Lauzon, "La perception judiciaire"].

[18] *Ibid* at 199-203; Caroline Pratte, "Essai sur le rapport entre la société par actions et ses dirigeants dans le cadre du *Code civil du Québec*" (1994) 39 McGill LJ 1 at 16.

[19] See generally Cantin Cumyn, "Les personnes morales", *supra* note 17. The *droit commun* (or *jus commune*) commun "joue […] le rôle d'une autorité ultime qui, sauf exception, peut servir à justifier une solution donnée" : John EC Brierley, "La notion de droit commun dans un système de droit mixte: le cas de la province de Québec" in *La formation du droit national dans les pays de droit mixte: les systèmes juridiques de common law et de droit civil* (Aix-en-Provence: Presses universitaires d'Aix-Marseille, 1989) 103 at 104, no 2 [Brierley, "La notion de droit commun"]. I will discuss the notion of *droit commun* in section 2.2.2.

Supreme Court of Canada in 1989. This decision sheds lights on the duty of loyalty, but it also raises issues that nourish my reflections throughout this thesis.

1.1 An area of law at the frontier of the civil and the common law

Under the CCLC, there was confusion as to whether corporate law was an area of civil or common law. In Quebec, corporate law's filiation with either of these legal traditions was unclear and it was uncertain whether corporate law fell under the ambit of public or private law.[20]

The ambiguity regarding corporate law's connection with the civil law was fuelled by several factors. To begin with, the CCLC's title on corporations had no counterpart in the *Code Napoléon*, the CCLC's French cousin.[21]

Furthermore, commercial law in the CCLC stood out as a distinctive area of law. Indeed, while French law was the avowed model[22] of private law in Quebec, the influence of English law on the CCLC's book on commercial law was noticeable.[23] A school of thought also suggested interpreting the CCLC's legal provisions that were inspired by the common law following common law principles.[24] What is more, the CCLC explicitly referred to the common law in its provisions concerning proof in commercial law.[25]

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[20] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1025-31; Cantin Cumyn, "Les innovations du Code civil du Québec, un premier bilan" (2005) 46 C de D 463 at 471 [Cantin Cumyn, "Premier bilan"].

[21] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1025.

[22] Technically, the CCLC was modelled after the *Code Napoléon* mostly with regards to its form rather than content. See art 7 of the *Acte pour pourvoir à la codification des lois civiles du Bas-Canada qui se rapportent aux matières civiles et à la procédure,* Statuts de la province du Canada, 1857, c 43) : "[Le Code civil et le Code de procédure civile] seront rédigés sur le même plan général et contiendront, autant que cela pourra se faire convenablement, la même somme de détails sur chaque sujet, que les codes français connus sous le nom de *code civil*, *code de commerce* et *code de procédure civile*". However, given that Quebec's private law has French roots – the French being the first Europeans to impose their laws on the territory and Quebec's French-inspired private law having been restored by the *Quebec Act* some years after the British Conquest–, the CCLC was very similar to the *Code Napoléon*.

[23] Cantin Cumyn, "Premier bilan", supra note 20 at 472; Yves Caron, "L'abus de pouvoir en droit commercial québécois" (1978) 19 C de D 7 at 8 [Caron, "L'abus de pouvoir"].What is more, the provisions contained in the CCLC's book on commercial law had originally been written in English and were translated in French only afterwards: Louis Baudouin, *Les aspects généraux du droit privé dans la province de Québec*, Institut de droit comparé de l'Université de Paris (Paris: Dalloz, 1967) at 14.

[24] This school of thought was promoted by Frederick Parker Walton: *The Scope and Interpretation of the Civil code of Lower Canada*, revised ed (Toronto: Butterworths, 1980) [introduction and translation by Maurice Tancelin] at 119-30 (*règle douze*).

[25] Art 1206, para 2 CCLC provided that "[w]hen no provision is found in this Code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England."

Among the other factors that seemed to indicate that corporate law was not an area of civil law was the fact that Quebec jurists failed to place the study of corporations in the broader context of legal persons, a fundamental category in civil law,[26] and one that is only of secondary importance in the common law.[27] Finally, Quebec's specific legislations concerning companies had always been modelled after the common law.[28]

Ambiguity also existed as to whether corporate law was an area of public or private law. Up until 1980, the incorporation of business corporations in Quebec was done through letters patent[29], a document issued by the state which "establish[ed] the name, capital structure, and the basic features of the corporation".[30] The involvement of the state in the constitution of a business corporation, although minimal, led some jurists to thinking that corporate law was an area of public law.[31] The classification of corporate law as public or private law was a critical issue since private law in Quebec is predominantly civilian, whereas public law has common law origins. Indeed, after New France's conquest by England, the *Quebec Act* of 1774[32] established that private law would remain civilian but that public law would be governed by the common law.

For these reasons, corporate law in Quebec was especially open to the reception of common law concepts. Given corporate law's strong connections with the common law, the resort to the

[26] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1033-34.
[27] *Ibid* ("[l]a personnalité morale ne joue qu'un rôle secondaire en droit anglais. Elle ne fait pas partie intégrante de la structure d'un système qui ignore les notions civilistes de patrimoine, de gage commun, de succession à la personne" at 1035).
[28] At the time of the entry into force of the CCLC, Quebec's legislation concerning companies was modelled after the English statutes, namely because commerce was mostly in the hands of the English community, who conducted business with England and the United States. See Yves Caron, "De l'action réciproque du droit civil et du common law dans le droit des compagnies de la Province de Québec" in Jacob S Ziegel, ed, *Studies in Canadian Company Law – Études sur le droit canadien des compagnies*, vol 1 (Toronto: Butterworths, 1967) 102 at 102 [Caron, "De l'action réciproque"]; Raymonde Crête & Stéphane Rousseau. *Droit des sociétés par actions*, 3d ed (Montreal: Éditions Thémis, 2011) at 37, para 79. The *Quebec Companies Act*, SQ 1920, c 72, adopted later, in 1920, was also very strongly influenced by the English model (James Smith & Yvon Renaud, *Droit québécois des corporations commerciales*, vol 1 "Les corporations commerciales" (Montreal: Judico, 1974) ("[q]uant à la loi de 1920, elle n'est constituée que d'emprunts aux législations anglaises et canadiennes, fédérale et provinciales" at 27, para 72)). This statute laid down principles of corporate law that are still in force today (Crête & Rousseau at 39, para 82).
[29] In 1980, as part of a reform of the Quebec *Companies Act* – inspired by the federal reform which had taken place only a few years before – the legislator introduced a new method of incorporation in Part IA of the *Companies' Act*. According to this method, a company is incorporated by the filing of its articles of incorporation. Incorporation through the filing of articles does not involve a discretionary action on the part of the state. The role of the state in this incorporation process therefore is negligible, by comparison with incorporation through letters patent which, in principle, is discretionary. See Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1036 and 1047.
[30] Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 416.
[31] Regarding this matter, see Pratte, *supra* note 8 at 7ff.
[32] *An act for making more effectual provision for the government of the province of Quebec in North America*, 14 Geo 3, c 83, s 10 (UK).

common law appeared legitimate where the CCLC or the corporate laws were silent or unclear regarding a particular matter. In other words, it was often thought that corporate law's *droit commun* was comprised of common law sources.[33] Therefore, according to certain authors, the relationship between directors and business corporations in Quebec but also, more specifically, the duty of loyalty originally developed alongside the common law.[34]

1.2 An historical overview of the director's duty of loyalty

Still today, it is debated whether the director's duty of loyalty, which is now entrenched in art 322 CCQ, is a legal transplant.[35] The preparatory works that have led to the enactment of the CCQ are generally silent regarding the common law's influence on the drafters of the CCQ.[36] Moreover, contrarily to other civilian jurisdictions such as Japan, where the American occupation authorities in 1950 transplanted their common law fiduciary duty of loyalty into the Japanese Commercial Code[37], Quebec has known no such drastic transplantation. Nonetheless, the common law did play a significant role in the emergence of the director's duty of loyalty in Quebec.

In common law, directors of business corporations have long been subject to a duty of loyalty, or more specifically, to fiduciary duties. Such duties are imposed on legal actors by way of analogy

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[33] See generally Cantin Cumyn, "Les personnes morales", *supra* note 17. The notion of *droit commun* will be described in chapter 2, section 2.2.

[34] Madeleine Cantin Cumyn & Michelle Cumyn, *L'administration du bien d'autrui*, 2d ed, Traité de droit civil (Cowansville, Que: Yvon Blais, 2014) ("le rattachement, habituel chez les praticiens, du droit des affaires au droit anglo-américain a introduit les notions d' « obligation fiduciaire » et de « relation fiduciaire » et fait porter la discussion sur leur applicabilité lorsqu'un administrateur est régi par le droit québécois, plutôt que sur les concepts qui pouvaient en être la contrepartie en droit civil" [footnotes omitted] at 279, para 296); Caron, "De l'action réciproque", *supra* note 28; Lubin Lilkoff, "La circulation du modèle juridique et le droit commercial québécois" in H Patrick Glenn, ed, *Droit québécois et droit français: communauté, autonomie, concordance* (Cowansville, Que: Yvon Blais, 1993) 399; Pratte, *supra* note 18 at 18-19.

[35] For conflicting positions, see, on the one side, Crête & Rousseau, *supra* note 28 at 62, para 123; Paul Martel, "Harmonization of the Canada Business Corporations Act with Quebec Civil Law – Revision proposal" (2007) 42 RJT 147 [Martel, "Harmonization"]; Maurice Martel & Paul Martel, *La société par actions au Québec*, vol 1 Les aspects juridiques, loose-leaf (consulted on 28 January 2015), (Montreal: Wilson & Lafleur, 2013). On the other side, see Cantin Cumyn, "The Legal Power" (2009) 17:3 ERPL 345 at 360-61, n 51 and, though less recently, Lauzon, "La perception judiciaire", *supra* note 17; Pratte, *supra* note 18.

[36] John EC Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Québec" (1992) 42 UTLJ 484 at 487-99; Brierley, "New Quebec Law of Trusts", *supra* note 10 at 396.

[37] Hideki Kanda & Curtis J Milhaupt, "Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law" (2003) 51:4 Am J Comp L 887 ("[t]he exact process by which this provision was transplanted is not entirely clear from the historical record, but the U.S. occupation authorities in charge of corporate law reform sought inclusion of this provision as part of a package of reforms designed to improve minority shareholders' rights under the Japanese Commercial Code" [footnote omitted] at 893).

with the duties imposed on trustees.[38] Fiduciary duties are mainly comprised of the "no-conflict" and the "no-profit" rules, which require fiduciaries to avoid conflicts of interests and not to profit from their fiduciary position.[39] Fiduciaries must also return profits obtained in violation of those duties.[40] Fiduciary duties revolve around a central fiduciary duty of loyalty[41], which fundamentally is "a duty to look after another's interests".[42] In a corporate law setting, the directors, as fiduciaries, have a duty to act in the best interests of the business corporation.[43]

In common law, the directors' fiduciary duty of loyalty arose as a result of certain historical events. In 1720, the *Bubble Act*[44] was passed by the British Parliament. Pursuant to this Act, all joint stock companies had to be incorporated by royal charter. In order to bypass this requirement, lawyers resorted to the trust to create unincorporated joint stock companies. The deed of settlement, upon which the trust establishing the unincorporated joint stock company rested, would provide that investors had the beneficial title while the trustees had the legal title. Some of the trustees were also members of the board of directors, and even where directors were

[38] I will explain how this analogy operates further in chapter 2, section 2.3.

[39] Smith, "The Motive", *supra* note 9 at 55. See also Paul Martel's identification of fiduciary duties: "Harmonization", *supra* note 35 at 155-58.

[40] Rotman, *Fiduciary Law*, *supra* note 30 at 515-16; Bruce Welling, Lionel Smith & Leonard I Rotman, *Canadian Corporate Law: Cases, Notes & Materials*, 4th ed (Markham, Ont: LexisNexis Canada, 2010) at 339, 394-95.

[41] See *Bristol & West Building Society v Mothew*, [1998] Ch 1, [1996] 4 All ER 698 [cited to All ER] ("the distinguishing obligation of a fiduciary is the obligation of loyalty" at 18, Millet LJ); *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14 [*Lac Minerals* cited to SCR] ("[the fiduciary obligation] can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary" at 646, La Forest J). See Conaglen, *supra* note 9; Smith, "Fiduciary Relationships", *supra* note 9 ("[a]lthough they may disagree about many things in relation to fiduciary obligations, courts and commentators agree that the law of fiduciary obligations is about ensuring loyalty" at 609).

[42] See e.g. Andrew Burrows, "We Do This At Common Law But That In Equity" (2002) 22 Oxford J Legal Stud 1 at 8; Daniel Clarry, *The irreducible core of the trust* (LL.M. Thesis, McGill University Institute of Comparative Law, 2011) [unpublished] at 101, n 475; Miller, "Justifying Fiduciary Duties", *supra* note 9 ("fiduciary relationships generate a duty that (at the very least) implies that the fiduciary is to act solely in the interests of the beneficiary" at 980 and "within the fiduciary relationship, the fiduciary is to serve the interests of the beneficiary" [footnote omitted] at 1020).

[43] In common law, it has long been established that the directors owe a duty of loyalty to the business corporation: see *Charitable Corporation v Sutton* (1742), 26 ER 642.

[44] *An Act for Better Securing Certain Powers and Privileges Intended to Be Granted by His Majesty by Two Charters for the Assurance of Ships and Merchandizes at Sea, and for Lending Money upon Bottomry; and for Restraining Several Extravagant and Unwarrantable Practices Therein Mentioned*, 6 Geo 1, c 18 (UK) [*Bubble Act*].

not trustees, they were regarded as such by the courts as long as they dealt with the trust property as a trustee would.[45]

The *Bubble Act* was repealed in 1825[46] and in 1844, the *Joint Stock Companies Act*[47] was enacted; this latter Act permitted the joint stock companies' incorporation through the registration of their deed of settlement. Thus, the trust was no longer needed, and directors were from then on called fiduciaries rather than trustees.[48] As a consequence, they were subject to fiduciary duties, which parallel the duties imposed on trustees.[49]

In Quebec private law, however, the concepts of "fiduciary relationship" and "fiduciary duties" did not exist. Directors of business corporations in Quebec thus could not be held to a duty of loyalty on the same basis than in common law – at least in theory. They were nonetheless considered as being under a duty to act in the best interests of the business corporation.[50] However, as the CCLC did not explicitly impose a duty of loyalty on directors (or on any other legal actor, for that matter), there were initially two principal approaches regarding the directors' duty of loyalty.[51] Some jurists turned to civilian principles, namely those governing the mandate, in search of an equivalent to fiduciary duties.[52] Others would readily incorporate the common law fiduciary duties into Quebec private law.[53]

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[45] Paul L Davies & Sarah Worthington, *Gower and Davies' Principles of Modern Company Law*, 9th ed (London, UK: Sweet & Maxwell, 2012) at 525, paras 16-39.

[46] *An Act to Repeal So Much of an Act Passed in the Sixth Year of His Late Majesty King George the First, as Relates to the Restraining Several Extravagant and Unwarrantable Practices in the Said Act Mentioned; and for Conferring Additional Powers upon His Majesty, with Respect to the Granting of Charters of Incorporation to Trading and Other Companies*, 6 Geo 4, c 91 (UK).

[47] *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies (Joint Stock Companies Act)*, 7 & 8 Vict, c 110 (UK).

[48] Pratte, *supra* note 18 at 13.

[49] Thus, within the common law itself, the fiduciary duty of loyalty may be seen as an "interdoctrinal legal transplant" since the trustees' duties were transposed, albeit with some nuances, to directors. See Edward Rock & Michael Wachter, "Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants" (2002) 96:2 Nw UL Rev 651 at 663. Interdoctrinal transplants involve "transplants from one doctrinal area to another, within the same national system" (*ibid*).

[50] James Smith & Yvon Renaud, *Droit québécois des corporations commerciales*, vol 3 "L'administration des corporations commerciales" (Montreal: Judico, 1974) at 1536.

[51] Martel & Martel, *supra* note 35 at para 23–180; Crête & Rousseau, *supra* note 28 at 384-88, paras 840-47. The following paragraphs draw largely on the accounts of Martel & Martel, *supra* note 35 and Martel, "Harmonization", *supra* note 35.

[52] See e.g. Caron, "De l'action réciproque", *supra* note 28 at 127-30; Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1394-99, paras 4-16. *McDonald v Bulmer* (1897), 12 SC 424; *Thérien v Brodie* (1893), 4 SC 23; *Upton v Hutchison* (1899), 8 QB 505; *Miller v Diamond Light & Heating Co of Canada* (1913), 22 QB 411; *Giguère v Colas* (1915), 48 SC 198. These decisions were cited in Martel, "Harmonization",

The latter of these approaches was based upon some decisions issued by the Supreme Court of Canada during the first half of the XX[th] century.[54] In these decisions, the Supreme Court invoked common law principles and even described Quebec directors as fiduciaries to justify their duty to act in the best interests of the business corporation.[55] Courts would also rely on the common law fiduciary principles to force directors to disgorge personal profits obtained in breach of a duty of loyalty.[56] The resort to the common law was undoubtedly encouraged by the fact that fiduciary duties "were more developed and refined than the civil law principles [with which they were equated]".[57] This being said, Quebec courts of law adopted this approach only rarely.[58] Moreover, given that art 356 CCLC stated that civil corporations had to be governed by the civil law in Quebec,[59] this approach seemed questionable.[60]

Some jurists, on the other hand, endorsed a "civilian approach" to loyalty.[61] According to them, the director's duty of loyalty was entrenched in art 1710 CCLC, which required the mandatary to act with "reasonable skill and all the care of a prudent administrator".[62] They considered that art 1890 CCLC was the anchor point allowing the resort to the principles governing the mandate,

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supra note 35 at 160, n 36. See also the numerous decisions cited in Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1403, n 39.

[53] See e.g. Jean Calais-Auloy, "Devoirs et responsabilité des administrateurs de compagnie dans la province de Québec" (1971) 23:3 RIDC 591; Clément Fortin, "De la nature juridique de la fonction d'administrateur et d'officier en droit québécois des compagnies" (1970) 1 RDUS 131 ("nous ne pouvons concevoir […] que la nature juridique de la fonction d'un administrateur soit celle d'un mandat" at 145) and ("[s]i l'on prétend, en droit québécois, que l'administrateur détient une charge, l'on peut se référer aux critères du droit anglais pour apprécier sa responsabilité, c'est-à-dire que l'administrateur sera en « fiduciary relationship » et s'obligera par conséquent à des devoirs dits « fiduciary »" at 146); David H Sohmer, "Protecting the Minority Shareholder in Letters Patent Jurisdictions", (1971) 31 R du B 388 at 393, n 21. See *Tanguay v Royal Papers Mills Co* (1907), 31 SC 397 (Sup Ct) [*Tanguay*]; *Hart c Felsen*, (1924) 30 RLns 109 (Sup Ct) [*Hart*]; *Barry c Larocque* (1934), 72 SC 70 [*Barry*]; *Abana Mines Ltd v Wall* (1935), 58 QB 352 [*Abana Mines*]; *Brimarièrre Inc c Laplante*, JE 84-78, AZ-84021042 (Sup Ct) [*Brimarièrre*]. These decisions were cited in Martel, "Harmonization", *supra* note 35 at 159, n 30.

[54] *Common v McArth*ur, (1898) 29 SCR 239 (available on CanLII); *Smith v Comtois*, [1927] SCR 590 (available on CanLII); *Sun Trust Co Ltd v Bégin*, [1937] SCR 305 (available on CanLII); *Bergeron v Ringuet*, [1960] 2 SCR 672, 24 DLR (2d) 449.

[55] Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1533-35; *Common v McArthur*, supra note 54 at 244-45; *Smith v Comtois*, *supra* note 54 at 594-95; *Sun Trust Co Ltd v Bégin*, *supra* note 54 at 307-308; *Bergeron v Ringuet*, *supra* note 54 (Fauteux and Taschereau JJ, dissenting).

[56] See Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1556-57.

[57] Crête & Rousseau, *supra* note 28 at 388, para 847 [translated by author, footnote omitted].

[58] Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1403, para 29.

[59] Art 356, para 2 CCLC provided that "[c]ivil corporations constituting, by the fact of their incorporation, ideal or artificial persons, are as such governed by the laws affecting individuals; saving the privileges they enjoy and the disabilities they are subjected to".

[60] Crête & Rousseau, *supra* note 28 at 388, para 847.

[61] See *supra* note 52.

[62] Art 1710, para 1 CCLC. In its French version, art 1710, para 1 CCLC required the mandatary to act with "l'habilité convenable et tous les soins d'un bon père de famille".

as this legal provision stated that "[t]he business is carried on by directors or other mandataries". Although it was contended that a duty of loyalty comparable to the common law fiduciary duty of loyalty was implicitly entrenched in art 1710 CCLC, there were also some uncertainties regarding the accuracy of this proposition.[63] For one thing, the duties of the mandatary under the CCLC were narrower in scope and less harsh than those of fiduciaries in common law;[64] "certain aspects of the common law [fiduciary] duties, such as the duty to declare any conflict of interests and to abstain from voting in situations of conflict of interests, as well as the duty not to divert corporate opportunities, weren't clearly recognized nor defined in civil law".[65] For another, the requirements imposed through art 1710 CCLC arguably were closer to a duty of prudence and diligence than to a duty of loyalty.[66] In other words, art 1710 CCLC imposed more of a duty to act as a prudent administrator than a duty to act in the best interests of the business corporation.[67] The only legal provisions that echoed certain aspects of the common law fiduciary duty of loyalty were arts 1706 and 1484 CCLC, which prohibited the mandatary to buy what he is mandated to sell, and art 1713 CCLC, which enjoined the mandatary to "pay over all that he has received under the authority of the mandate, even if it were not due".[68] Arts 1706 and 1484 CCLC indirectly codified a narrower version of the common law fiduciary duty to avoid conflicts of interests,[69] but the broad no-conflict and no-profit rules that form the core of the fiduciary duty of loyalty in common law were not expressly codified in the CCLC.[70]

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[63] According to Paul Martel, the directors' duties under the CCLC, encapsulated in arts 1710 (duty to act with reasonable skill and care) and 1713 CCLC (duty to render an account of what the mandatary has received in the execution of the mandate), "had little in common with the common law fiduciary duties": "Harmonization", *supra* note 35 at 159. See also Louise-Hélène Richard, "L'obligation de loyauté des administrateurs de compagnies québécoises: une approche extra-contractuelle" (1990) 50 R du B 925 at 942.

[64] Caron, "De l'action réciproque", *supra* note 28 ("[c]ette relation [fiduciaire] est plus vaste que la simple obligation d'agir en bon père de famille (*prudent administrator*) que nous connaissons dans notre droit. À l'opposé du droit anglo-américain qui, grâce à l'*Equity*, a pu construire un réseau d'obligations « fiduciaires », le droit civil s'est contenté d'obligations contractuelles spécifiques, et a admis l'obligation d'agir en bon père de famille en rapport avec ces obligations, c'est-à-dire qu'elle doit s'entendre de l'exécution des termes du contrat, et non pas d'un ensemble de règles de droit commun qui s'appliqueraient à toute forme de relations contractuelles ou équitables" at 128 [footnote omitted]); Crête & Rousseau, *supra* note 28 at 386, para 845.

[65] Crête & Rousseau, *supra* note 28 at 387, para 846 [translated by author, footnote omitted].

[66] Martel & Martel, *supra* note 35 at 23-54, para 23–180.

[67] Caron, "De l'action réciproque", *supra* note 28 at 128. On the duty of prudence and diligence and its distinction with the duty of loyalty, see chapter 3, section 3.3.2.

[68] Art 1713, para 1 CCLC.

[69] Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1545, paras 54-55.

[70] Claude Fabien, "Le nouveau droit du mandat" in *La Réforme du Code civil – Obligations, contrats nommés*, Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, t 2 (Sainte-Foy, Que: Les Presses de l'Université Laval, 1993) 881 at 895; Martel & Martel, *supra* note 35 at 23-54, para 23–180.

In 1979[71] the Quebec legislator explicitly established a parallel between directors of provincially-incorporated companies and mandataries; art 123.83 of the *Companies' Act*[72] stated that "directors are considered to be mandataries of the company". The legislator thereby created a statutory mandate[73] which solidified the connection between directors and mandataries.

According to one commentator, "[t]his amendment was concrete evidence of the victory of the civil law trend for provincial companies"[74], while according to others, it simply "changed the nature of the relationship between both legal traditions in Quebec corporate law, from confrontation to silent interaction".[75] In any case, the common law's influence in Quebec remained palpable and the wording of this provision caused considerable turmoil.

For instance, it was argued that if the legislator truly intended to characterize directors as mandataries, he should have done so explicitly, without using the words "considered to be".[76] Furthermore, some authors believed that the ambiguity of the expression "considered to be mandataries" had granted tribunals the flexibility to resort to notions other than the mandate and that this had caused the "infiltration" of common law notions in Quebec law.[77]

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[71] *Loi modifiant la Loi des compagnies et d'autres dispositions législatives*, SQ 1979, c 31. This Act, which amended Part IA of the Quebec *Companies Act*, RSQ 1964, c 271, entered into force on January 30, 1980.

[72] The *Companies Act* is now replaced by the Quebec *Business Corporations Act*, CQLR, c S-31.1 [BCA], which entered into force on February 14, 2011.

[73] Unlike the typical mandate which originates from a contract, the directors are entitled to act in such quality as a result of an election process. Richard, *supra* note 63 ("notre analyse des rapports compagnie-administrateur fait cependant abstraction de tout contexte contractuel. En effet, l'administrateur occupe ses fonctions par le biais d'un processus d'élection et, à notre avis, il n'est lié à la corporation par aucun contrat" at 938).

[74] Martel, "Harmonization", *supra* note 35 at 160.

[75] Crête & Rousseau, *supra* note 28 at 389, para 848 [translated by author, footnote omitted].

[76] Pratte, *supra* note 8 ("[s]i le législateur avait voulu conférer à ces derniers le statut de mandataire, pourquoi ne pas l'avoir fait expressément au lieu d'utiliser la conjonction « comme »" at 17). It is therefore surprising that the Quebec legislator kept this wording at article 321 CCQ ("[a] director is considered to be the mandatary of the legal person"). The legislator did, however, amend the *Companies' Act* in 1999 (*An Act to harmonize public statutes with the Civil Code (Bill n°5)*, SQ 1999, c 40, art 70) to remove the wording "considered to be" and replaced it by "are". Art 123.83 of the *Companies' Act* could be read as follows: "[d]irectors, officers and other representatives of a company are mandataries of the company". Interestingly, this provision was not reproduced integrally in the BCA. Indeed, art 116 BCA mentions that "[t]he officers are mandataries of the corporation", but it is silent as to the nature of the director-corporation relationship.

[77] Francis Larin & Nicolas Beaulieu, "La nature juridique de la fonction d'administrateur et le nouveau *Code civil du Québec*" (1995) 2 REJ 313 ("[la rédaction ambigüe de l'article 123.83 de la *Loi sur les compagnies*] a permis, en quelque sorte, l'emprunt de notions de common law en droit québécois. En ne prévoyant pas expressément quels sont les devoirs d'un administrateur envers sa compagnie, et en accordant une certaine marge de manœuvre par l'utilisation des termes « comme un mandataire », le législateur québécois a fait en sorte que nos tribunaux se sentent autorisés à façonner à leur manière cette thèse du mandat, en y incluant les devoirs mieux définis du droit anglais" at 337).

This being said, art 123.83 of the *Companies' Act* did legitimize the resort to the CCLC's provisions concerning the mandate, provisions which somewhat echoed certain aspects of the common law fiduciary duties. However, the duty of loyalty still was not explicitly codified in the CCLC, and linking the duty of loyalty to a specific legal provision was a common concern to the vast majority of civil law jurists.[78]

In parallel with this, a landmark case, *Canadian Aero Service Ltd v O'Malley*[79], was rendered in Canadian common law.[80] This case concerned officers of a company who founded their own enterprise in order to obtain a contract regarding a project upon which they had previously worked on behalf of their former employer before resigning. In *Canadian Aero*, the Supreme Court of Canada reaffirmed the fiduciary principles governing the conduct of directors. It stated that a fiduciary relationship "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest".[81] The Court emphasized the rule prohibiting directors to take advantage of their position to reap personal benefits. It also extended the application of these fiduciary duties to senior officers; that is to say employees in "top management" positions.[82] The Court held that "a director or a senior officer […] is precluded from obtaining for himself, either secretly or without the approval of the company […], any property or business advantage either belonging to the company or for which it has been negotiating".[83] The Court ruled that a director or a senior officer who breaches this duty must return his profits to the company.[84]

This decision found resonance in Quebec, particularly during the 1980's, where numerous decisions affirmed that the common law fiduciary duties as articulated in *Canadian Aero* found application in Quebec private law.[85] This decision was invoked in cases relating to

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[78] Pratte, *supra* note 8 at 49.
[79] [1974] SCR 592, 40 DLR (3d) 371 [*Canadian Aero* cited to SCR].
[80] This case will be briefly analyzed in this thesis, section 4.3.1.
[81] *Canadian Aero*, *supra* note 79 at 606.
[82] *Ibid*.
[83] *Ibid* at 606-607.
[84] *Ibid* at 622.
[85] See e.g. *Brimarièrre*, *supra* note 53; *Entreprises Rock ltée (in re): Noretz c Habitations CJC inc*, [1986] RJQ 2671, JE 1986-1036 (Sup Ct) [*Entreprises Rock* cited to RJQ]; *Excelsior, compagnie d'assurance-vie c Mutuelle du Canada compagnie d'assurance-vie*, [1992] RJQ 2666, JE 92-1661 (CA) [*Excelsior* cited to RJQ]; *Marque d'or Inc c Clayman*, [1988] RJQ 706, JE 88-291 (Sup Ct); *NFBC National Financial Brokerage Center Inc c Investors Syndicate Ltd*, [1986] RDJ 164, AZ-86122020 (CA) [*NFBC* cited to RDJ]; *Piché, Charron & Associés c Perron*, JE 84-756, AZ-84021369 (Sup Ct); *Positron Inc c Desroches*, [1988] RJQ 1636, JE 88-757 (Sup Ct) [*Positron*]; *Resfab Manufacturier de Ressort Inc c Archambault*, [1986] RDJ 32, JE 86-106 (CA); *157079 Canada Inc c Ste-Croix*,

misappropriation of corporate opportunities and competition, in corporate settings as well as in employment contracts. However, Quebec Courts were generally cautious when stating that the fiduciary principles set forth in *Canadian Aero* were part of Quebec private law as well; this was not to be seen as an incorporation of the common law into Quebec private law.[86] Rather, Courts affirmed that these principles were implicitly contained in the CCLC's provisions concerning the mandate.[87] This latter approach was a clear departure from that of the Supreme Court of Canada in some previous decisions, where the common law fiduciary duties were bluntly imposed on corporate directors in Quebec.[88]

1.3 The duty of loyalty on the eve of the CCQ

The most notable case concerning the duty of loyalty in Quebec private law that preceded the entry into force of the CCQ concerned an employee rather than directors.[89] This said, in *Kuet Leong*, the Supreme Court of Canada did not limit its analysis to the employee's duty of loyalty; it attempted to uncover and articulate the duty of loyalty's general basis in Quebec private law.

The issue in *Kuet Leong* was whether a trader employed by a bank was subject to art 1713 CCLC, which required the mandatary "to render an account of his administration, and to deliver and pay over all that he has received under the authority of the mandate, even if it were not due".[90] In the course of his employment, the trader had used the account of one of the bank's clients, without this client's knowledge, to make transactions for which he had kept the profits. He had also made a secret agreement with other clients according to which he kept half of the profits for the transactions he performed on their behalf. Thereby, the trader had reaped significant personal profits, though he had caused no loss to the bank, his employer.

[1988] RJQ 2842, JE 88-1368 (Sup Ct). These decisions were cited in Pratte, *supra* note 18 at 17, n 89 and Martel, "Harmonization", *supra* note 35 at 161-62.

[86] See e.g. *Entreprises Rock*, *supra* note 85 at 2673 :

> Ce n'est pas introduire la Common Law dans notre système de droit civil que d'exiger de l'administrateur des biens d'autrui une éthique aussi stricte que celle que la Common Law impose aux administrateurs des biens de compagnies. Le Code civil a reconnu formellement d'ailleurs que l'administrateur ne peut s'approprier les biens qu'il administre pour autrui à l'article 1484. La règle formulée dans [*Canadian Aero*] a sa place dans notre droit civil, parce qu'elle incorpore au droit des sociétés une règle morale nécessaire pour la protection de l'actif des sociétés contre la cupidité des administrateurs et officiers.

Likewise, see *Excelsior*, *supra* note 85 at 30; *NFBC*, *supra* note 85 at 170; *Positron*, *supra* note 85.

[87] See e.g. *Entreprises Rock*, *supra* note 85; *Excelsior*, *supra* note 85; *NFBC*, *supra* note 85; *Positron*, *supra* note 85.

[88] *Bergeron v Ringuet*, *supra* note 54; *Common v McArthur*, supra note 54; *Smith v Comtois*, *supra* note 54; *Sun Trust Co Ltd v Bégin*, *supra* note 54.

[89] *Bank of Montreal v Kuet Leong Ng*, [1989] 2 SCR 429, 62 DLR (4th) 1 [*Kuet Leong* cited to SCR].

[90] Art 1713, para 1 CCLC.

Essentially, the Supreme Court ruled that the obligation to return profits obtained in breach of a duty of loyalty, imposed on the mandatary by way of art 1713 CCLC, could be imposed on other legal actors as well, as long as they exercised control over the affairs of another and were in a position of trust comparable to that of the mandatary. Since the trader was in such position of trust and as he "enjoy[ed] control over large sums of the employer's money"[91], he was ordered to return the profits he had realized through his disloyal transactions. Incidentally, then, this decision also introduced restitution of profits as a sanction for the breach of the duty of loyalty into Quebec private law.[92]

Certain elements of the Supreme Court's decision must be underlined. From the outset, it should be noted that in *Kuet Leong*, the Court assimilates the duty of loyalty to a form of good faith. Indeed, the Supreme Court affirmed that the common law fiduciary duty of loyalty translates, in the context of an employment contract under civil law, as *duties of good faith and loyalty*, and as a duty to avoid conflicts of interest.[93] I will return to this assimilation of loyalty with good faith in chapter 3, which in my opinion is inaccurate and misleading.

Regarding the basis of the duty of loyalty, the Supreme Court of Canada held that the duty of loyalty, and more specifically the corresponding duty to return profits, was imposed because of the nature of the functions of a given legal actor – not because of his status – and independently from a statutory provision. The Court referred to the situation of directors in asserting that a duty of loyalty – particularly the duty to return profits realized in breach of a duty of loyalty – was part of Quebec law despite an express provision to this effect.[94] According to the Court, directors were nonetheless subject to a duty to return profits due to the nature of their control over the

[91] *Kuet Leong*, *supra* note 89 at 444.
[92] Michelle Cumyn, "L'encadrement des conflits d'intérêts par le droit commun québécois" in Association Henri-Capitant, *Les conflits d'intérêts*, Journées nationales, Lyon 3, t 17 (Paris: Dalloz, 2013) 49 [Cumyn, "Les conflits d'intérêts"] ("[*Kuet Leong*] a eu le mérite d'introduire en droit québécois le recours de la restitution des profits, et de poser clairement la question de son fondement et de son champ d'application" at 62). Despite this Supreme Court decision, the employee's duty to return undue profits has not been explicitly entrenched in the CCQ. The CCQ, however, expressly imposes this duty on the director of a legal person, the administrator of the property of others and the mandatary (arts 326, 1366, 2146 and 2184 CCQ).
[93] *Kuet Leong*, *supra* note 89 ("[t]he fiduciary obligation recognized in these circumstances in the common law translates in the civil law into terms of good faith and loyalty of the employee to the employer and the avoidance of conflict of interest including seeking an advantage which is incompatible with the terms of employment" at 443).
[94] *Ibid* at 442-43. Thereby, according to one commentator, the Court "expressly upheld the Quebec case law that had made applicable to directors and officers of corporations the common law duty to return profits realized in breach of these persons' duty of loyalty" (Martel, "Harmonization", *supra* note 35 at 164).

company, which resembled that which a mandatary has over the affairs of his mandator.[95] The Court also held that the intensity of the obligation of loyalty was correlative to the degree of trust and control vested in an individual.[96]

As for the foundations of restitution of profits, the Court's reasoning is somewhat confusing, to say the least. The Court declared that disgorgement of profits is an essential corollary of the employee's duty "to execute *in good faith* his obligations under the contract of employment"[97], of the mandatary's duty to act as a prudent administrator and also of the director's duty to act in the best interests of the corporation.[98] What the Supreme Court probably meant is that restitution of profits is a corollary of the duty of loyalty.[99] However, by stating that restitution of profits attaches to the duty of good faith, to the duty to act as a prudent administrator and to the duty to act in the best interests of the corporation, the Court seemed to be equating three completely distinct duties.[100]

More generally, the Court held that restitution of profits "gives effect to a much broader policy of the civil law for the protection of honesty and good faith in the execution of contracts".[101] The Court thereby implied that any violation of the duty to act in good faith in the performance of contracts could lead to disgorgement of profits.[102]

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[95] *Kuet Leong*, *supra* note 89 at 442-43.
[96] *Ibid* ("[t]he intensity of the employee's obligation of good faith increases with the responsibility attached to the position held by the employee" at 438) and ("[i]f good faith is the foundation of every contract of employment, it requires that to each measure of trust and authority placed in the employee correspond a like measure of responsibility and obligation" at 444). It is important to keep in mind that in this decision, the Supreme Court assimilates the duty of loyalty with the duty of good faith.
[97] *Ibid* at 444 [emphasis in the original].
[98] *Ibid* ("[w]ithout such accountability, the respondent's commitment to execute *in good faith* his obligations under the contract of employment is without substance, just as the mandatary's obligation to exercise the skill and care of a prudent administrator would be empty without the obligation to render an account of his administration, or the director's obligation to act in the best interests of the corporation would be meaningless if the director was not required to disgorge profits gained in breach of that obligation" at 431 [emphasis in the original]).
[99] This is what I argue in this thesis. See chapter 4, section 4.3.1.
[100] I will distinguish the duty of loyalty from the duty of good faith and the duty of prudence and diligence in chapter 3, sections 3.2 and 3.3.2.
[101] *Kuet Leong*, *supra* note 89 at 436.
[102] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 62.

With regards to transactions whereby the trader had secretly used a client's account, the Court affirmed that the rules applicable to the possessor in bad faith could also be invoked in order to force the trader to return his profits to the bank.[103]

Finally, the Court declared that restitution of profits was also based on the "fundamental moral precept"[104], inherent to the CCLC, according to which "one should not profit from one's own bad faith or wrongdoing".[105]

In other words, the Court was cautious in ordering the employee to disgorge his profits and attempted to justify the imposition of this sanction on every possible ground. This indicates that restitution of profits is not a conventional sanction.[106]

This decision touched upon many issues, namely the foundations of the duty of loyalty and of restitution of profits, but in a way it left those issues unsettled. More specifically, it raised other questions: can good faith be equated with loyalty? Does the employee's duty of loyalty have the same basis than the director's and the mandatary's? Can the mere duty of good faith justify the application of the powerful sanction that is disgorgement of profits? Therefore, Quebec jurists generally invoke *Kuet Leong* cautiously: its meaning and implications remain nebulous.[107]

Thus, on the eve of the CCQ, jurisprudence had established the existence of a duty of loyalty in Quebec private law through a broad interpretation of the mandate and its related provisions, and even through the attribution of a moral basis to the duty of loyalty, which could be found to emanate from the CCLC. Moreover, the Supreme Court of Canada had put forth a conception of the duty of loyalty as contingent on the functions performed by a legal actor. Despite these developments, the exact legal basis of the duty of loyalty in Quebec private law and its nature remained uncertain.[108]

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[103] *Kuet Leong*, *supra* note 89 at 435-36.
[104] *Ibid* at 441.
[105] *Ibid* at 439, 441 and 445.
[106] I will discuss the originality of restitution of profits in chapter 4, section 4.3.1.
[107] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 62. See also Claude Massé, "Chronique de droit civil québécois: session 1988-89" (1990) Supreme Ct L Rev (2d) 325, 335.
[108] *Ibid*.

1.4 Conclusion

This brief historical overview aimed to show that the emergence of the duty of loyalty in Quebec was a long and equivocal process, which, as I will describe in the next chapter, culminated with the duty of loyalty's codification in the CCQ in 1994.

More specifically, this overview displays the legal community's continuous attempt – if not struggle – to legitimize the presence of a duty of loyalty in Quebec private law. Indeed, despite its apparent common law origins, jurists have sought to attribute civilian foundations to this duty.[109] This illustrates the power of attraction exerted by the common law[110], as well as the civil law's correlative difficulty to embrace the duty of loyalty on a civilian basis.

Chapter 2 – Under the CCQ: Novelties of the CCQ that had an impact on the duty of loyalty

The CCQ, which entered into force on January 1st 1994, brought about noteworthy changes that influenced the interpretation of the duty of loyalty in Quebec. Most notably, after several years of uncertainty surrounding the existence of a duty of loyalty in Quebec private law, the duty of loyalty was finally codified in the CCQ. Moreover, the relationship between the civil and the common law – relationship that had been at the forefront of the emergence of the concept of loyalty in Quebec – was altered. In effect, the codification of the duty of loyalty as well as the CCQ's preliminary provision, which aimed to restore the Civil Code's centrality within Quebec's legal regime, severed Quebec's duty of loyalty from the common law.

The CCQ also innovated in that it introduced a title on the administration of the property of others, which is considered by some authors as the duty of loyalty's field of predilection,[111] and which resembles the common law regime of fiduciary relationships in certain regards.

2.1 The codification of the duty of loyalty

The CCQ gave new exposure to notions imbued with morality such as loyalty, but also good faith, with which the duty of loyalty is often wrongfully assimilated. These duties were not

[109] Crête & Rousseau, *supra* note 28 ("[les tribunaux et les auteurs] ont tenté de « civiliser » ces *duties* en en prolongeant leurs fondements dans le concept de droit civil de la personne raisonnable et dans la notion plus générale de morale et de bonne foi transcendant le Code" at 389, para 848 [footnote omitted]).
[110] *Ibid* at 65, para 127.
[111] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 50. See also, generally, Cantin Cumyn & Cumyn, *supra* note 34.

expressly entrenched in the CCLC. At best, as was shown in chapter 1, it could be argued that the duty of loyalty was implicitly part of the mandatary's duty to act with "reasonable skill and all the care of a prudent administrator".[112] This being said, loyalty did underlie certain provisions such as arts 1484 and 1706 CCLC, which imposed restrictions on the mandatary charged with the sale of the mandator's property, and art 1713 CCLC, which required the mandatary to return to the mandator all that he had received in the course of the mandate.[113]

In the CCQ, the legislator expressly imposed a duty of loyalty on individuals in certain legal relationships. The duty of loyalty of the director of a legal person, such as a business corporation, is now entrenched in art 322 CCQ.[114] The administrator of the property of another,[115] the employee[116] and the mandatary[117] are expressly subject to a duty of loyalty as well.

As regards the duty of good faith, unlike the situation under the CCLC, where the principle of the primacy of the letter of the contract between the parties prevailed,[118] arts 6, 7 and 1375 CCQ now explicitly establish that good faith must govern the conduct of persons at all times. However, though the notions of good faith and loyalty both evoke moral considerations, it is inaccurate to equate them, as I will argue in chapter 3.

2.1.1 The impact of the duty of loyalty's codification

In a certain way, the codification of the duty of loyalty severed its connection with the common law fiduciary duties. Indeed, "since the adoption of the [CCQ], Quebec courts can no longer

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[112] Art 1710, para 1 CCLC.

[113] Fabien, "Le nouveau droit du mandat", *supra* note 70 ("[l]'obligation de loyauté n'est pas énoncée au Code civil du Bas-Canada. On pouvait néanmoins en soupçonner l'existence à travers les articles 1706 et 1484 C.c.B.C. qui édictent certaines prohibitions en matière de vente, à l'endroit du mandataire" at 895 [footnote omitted]); Claude Fabien, "L'abus de pouvoirs du mandataire en droit civil québécois" (1978) 19 C de D 55 at 67-68 [Fabien, "L'abus de pouvoirs du mandataire"].

[114] It should be noted that the provincial and the federal Acts on business corporations also impose a duty of loyalty on directors of business corporations. S 119 (1) of the Quebec BCA states that "the directors are bound by the same obligations as are imposed by the Civil Code on any director of a legal person". This provision also indicates that the CCQ is the cornerstone with regards to the interpretation of the duty of loyalty of directors of provincially-incorporated business corporations in Quebec. As for federally-incorporated business corporations, s 122 (1)a) of the *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA], states that directors shall "act honestly and in good faith with a view to the best interests of the corporation".

[115] Art 1309, para 2 CCQ.

[116] Art 2088, para 1 CCQ.

[117] Art 2138, para 2 CCQ.

[118] Pierre-Gabriel Jobin, "L'équité en droit des contrats" in Pierre-Claude Lafond, ed, *Mélanges Claude Masse. En quête de justice et d'équité* (Cowansville, Que: Yvon Blais, 2003) 473 at 481; Christine LeBrun, *Le devoir de coopération durant l'exécution du contrat* (Montreal: LexisNexis, 2013) at 28, para 65; Jean Pineau & Serge Gaudet, *Pineau Burman Gaudet: Théorie des obligations*, 4th ed (Montreal: Éditions Thémis, 2001) at 31, para 17.

justify importing the common law fiduciary duties into Quebec law on the pretext that Quebec law is silent on this point".[119] What is more, as a result of the duty of loyalty's codification in the CCQ, jurists in Quebec may believe that the common law has lost some of its importance and usefulness.

As a matter of fact, one commentator notes that since 1994, there is a general tendency in Quebec case law, observed in various areas of law, towards the rejection of the common law. This rejection is based on the belief that common law notions are incompatible with the civilian legal tradition, but also that the common law is simply unnecessary to the understanding of legal concepts in Quebec private law.[120] In other words, with the entry into force of its new Civil Code, Quebec's private law may have appeared self-sufficient. However, as I have shown in the first chapter of this thesis and I will show further in this chapter,[121] the common law played a significant role in shaping the duty of loyalty as it now stands in the CCQ. As I will argue further in this chapter, the common law's influence on the development of the duty of loyalty in Quebec therefore should not be minimized simply because the duty of loyalty is expressly entrenched in the CCQ.

Codification also entails the risk that the analysis of the notions codified be crystallized around the text of the legal provisions concerned.[122] In other words, there may be a lack of incentive to investigate the foundations of the duty of loyalty as the CCQ itself may seem to provide a satisfying basis for the imposition of this duty on a legal actor. In chapter 3, I will return to the impact of the civil law's methods, such as codification, on the interpretation of the duty of loyalty in Quebec.[123] I will argue that it is crucial to look beyond the text of the articles that establish a duty of loyalty and to understand why certain legal actors are subject to this duty.[124]

2.2 The CCQ and the *jus commune*

With the entry into force of the CCQ, the Civil Code's prominence within Quebec private law was reaffirmed, namely through its preliminary provision which states that the CCQ "lays down

[119] Martel, "Harmonization", *supra* note 35 at 219.
[120] Daniel Jutras, "Cartographie de la mixité : La common law et la complétude du droit civil au Québec" (2009) 88 Can Bar Rev 247 at 270-71 [Jutras, "Cartographie de la mixité"].
[121] Section 2.3.
[122] See Jutras, "Cartographie de la mixité", *supra* note 120 ("[l]'effet de codification […] cristallise la pensée autour du texte" at 265).
[123] Section 3.1.
[124] Section 3.1.3.

the *jus commune*".[125] The fact that the CCQ, a civil law creation, was thereby specifically identified as the "primary expression"[126] of Quebec's *jus commune* – or *droit commun*[127] – had an impact on its relation to the common law. Quebec's *jus commune* was recentered on the civil law tradition as a result of the Civil Code's re-codification. This is particularly significant with regards to the duty of loyalty which, if not transplanted from the common law, was at least greatly influenced by the latter.

2.2.1 The re-codification of the Civil Code

The CCLC was at the heart of Quebec private law from 1866 to 1994. Although the CCLC did not provide so explicitly, it was generally acknowledged that the CCLC established the *droit commun*.[128] However, the CCLC's status as the centerpiece of Quebec private law had gradually been undermined by several factors.[129]

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[125] The CCQ's preliminary provision provides that:

> The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.
>
> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

[126] Roderick A Macdonald, "Encoding Canadian Civil Law" in Paul-André Crépeau & Quebec Research Center for Private and Comparative Law, eds, *Mélanges presented by McGill colleagues to Paul-André Crépeau* (Cowansville, Que: Yvon Blais, 1997) 579 at 599.

[127] In the preliminary provision's French version, the expression "droit commun" is used instead of *jus commune*. To avoid the confusion that a literal translation of "droit commun" (common law) may have caused in Quebec, the legislator considered it was preferable to use another expression in the English version. This said, according to one commentator, a deeper reflection should have been devoted to the translation of "droit commun" (Alain-François Bisson, "La disposition préliminaire du Code civil du Québec" (1999) 44 McGill LJ 539 at 551-53 [Bisson, "La disposition préliminaire"]).

[128] *Ibid* at 558.

[129] Some commentators claim that the extensive role of judges in interpreting the CCLC and the doctrine of *stare decisis*, inherited from the common law, led to a certain "de-codification" of Quebec private law (David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill LJ 523 at 533-34; Normand, "Acculturation du droit", *supra* note 11 at 17; Maurice Tancelin, "Comment un droit peut-il être mixte?" in Frederick Parker Walton, *The Scope and Interpretation of the Civil code of Lower Canada*, revised ed (Toronto: Butterworths, 1980) [introduction and translation by Maurice Tancelin] 1 at 2). Moreover, the adoption of numerous laws regarding matters that should have been governed by the CCLC as well as the introduction of amendments to the CCLC affected the CCLC's prominence and disrupted its harmony, respectively (Cantin Cumyn, "Premier bilan", *supra* note 20 at 465; Normand, "Acculturation du droit", *supra* note 11 at 15). More specifically, the amendments to the CCLC were drafted the way specific statutes are in common law rather than as part of a civil code which contains interrelated legal provisions that give each other meaning (Alain-François Bisson, "Dualité de systèmes et codification civiliste" in *Conférences sur le nouveau Code civil du Québec. Actes des Journées louisianaises de l'Institut canadien d'études juridiques supérieures – 1991* (Montreal: Yvon Blais, 1992) 39 at 44). These amendments, as well as the laws that were adopted to supplement the CCLC, narrowed the latter's scope (Normand, "Acculturation du droit", *supra* note 11 at 15).

The Civil Code's predominant status in Quebec private law was reaffirmed as a result of its re-codification, with the entry into force of the CCQ in 1994. The preliminary provision clearly emphasizes the CCQ's importance within Quebec law.[130] It reads as follows:

> The Civil Code of Québec, in harmony with the Charter of human rights and freedoms […] and the general principles of law, governs persons, relations between persons, and property.
>
> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

The preliminary provision thus provides that the CCQ establishes the *jus commune*. [131] The *jus commune* is a body of law that applies unless specific laws provide otherwise. It is also an "ultimate authority"[132] to which jurists may resort.[133] I will return to this notion shortly.

The CCQ's relevance was also explicitly affirmed with regards to corporate law, which had been at the forefront of the emergence of the duty of loyalty in Quebec.

Under the CCLC, the Civil Code's role seemed marginal in this area of law; the common law appeared to contain the *droit commun* pertaining to corporate law.[134] For instance, as I explained

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[130] Concerning the preliminary provision's function in the CCQ, see Bisson, "La disposition préliminaire", *supra* note 127 at 553-54.

[131] Concerning the notion of *droit commun* in Quebec, see Bisson, "La disposition préliminaire", *supra* note 127; Jean-Maurice Brisson, "Le Code civil, droit commun?" in Pierre-André Côté, ed, *Les journées Maximilien-Caron – 1992* (Montreal : Thémis, 1993) 593; John EC Brierley, "Quebec's 'Common Laws' (droits communs): How Many Are There?" in Ernest Caparros et al, eds, *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 109 [Brierley, "Quebec's 'Common Laws' "]; Brierley, "La notion de droit commun", *supra* note 19; H Patrick Glenn, "La Disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit" (2005) 46 C de D 339 [Glenn, "Disposition préliminaire"]; Howes, *supra* note 129; Macdonald, *supra* note 126; Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 664-66.

[132] Brierley, "La notion de droit commun", *supra* note 19 ("[l]a notion de droit commun joue ainsi le rôle d'une autorité ultime qui, sauf exception, peut servir à justifier une solution donnée") at 104, no 2; Brierley, "Quebec's 'Common Laws' ", *supra* note 131 at 113-14:

> The notion of a *droit commun* or "common law" is a device for advancing a justification for the selection of legal rules […]. It reaches into the very heart of the theoretical scheme of "sources of law" in the legal system as a whole and plays the role of an ultimate justification. It is, in this sense, an idea of fundamental importance to the very notion of law, its "sources" or, in more contemporary language, in the justifications advanced in legal decision-making.

[133] In this sense, the *jus commune* can be seen as suppletive law. See Naccarato & Crête, "Réalité à juridicité", *supra* note 6 ("[a]ussi, le droit commun constitue un droit supplétif auquel nous faisons appel lorsque les sources locales ou positives font défaut" at 665, referring to Glenn, "Disposition préliminaire", *supra* note 131 at 343). A complete assimilation of the concepts of *droit commun* and *suppletive law* should however be avoided: Paul-André Crépeau Centre for Private and Comparative Law et al, eds, *Dictionnaire de droit privé et lexique bilingue. Les obligations* (Cowansville, Que: Yvon Blais, 2003), *sub verbo* "droit commun", def 1, obs 6°.

in the previous chapter, since the CCLC did not explicitly impose a duty of loyalty on directors, certain jurists would turn to the common law to supplement this void.[135] However, as a result of the re-codification, the CCLC's title on corporations was replaced by a title on legal persons.[136] Corporate law was thereby resituated as an area of civil law.[137]

Moreover, art 300 CCQ provides that legal persons such as business corporations must also comply with the CCQ's provisions.[138] In other words, art 300 CCQ also establishes, implicitly, the CCQ's status as *droit commun* with regards to corporate law.[139]

The Civil Code's renewed importance in Quebec private law had an impact on the latter's relation to the common law. As a matter of fact, it has been affirmed that the CCQ is more than the result of a modernization operation of Quebec law – it marks an attempt to resituate Quebec's *droit commun* within a civilian framework, in response to the predominance of the common law tradition in North America.[140] The CCQ's attachment to the civilian legal tradition is implied by the preliminary provision where it states that the CCQ "lays down the *jus commune*".[141]

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[134] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1031; Pratte, *supra* note 18 at 5.

[135] See e.g. Calais-Auloy, *supra* note 53; Fortin, *supra* note 53; Sohmer, *supra* note 53 at 393, n 21. See *Abana Mines*, *supra* note 53; *Barry*, *supra* note 53; *Brimarièrre*, *supra* note 53; *Hart*, *supra* note 53; *Tanguay*, *supra* note 53.

[136] The title called "Legal persons" is the fifth title of the CCQ's book one, on persons.

[137] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1033-35; Crête & Rousseau, *supra* note 28 ("l'adoption du titre consacré aux personnes morales dans le *Code civil du Québec* a aussi été l'occasion de préciser et de renforcer les rapports entre le droit commun de tradition civiliste et le droit des sociétés par actions. Par cette réforme, le législateur y a expressément reconnu l'application supplétive des dispositions du Code aux personnes morales régies par des lois particulières, incluant les sociétés constituées tant au niveau provincial que fédéral" at 61, para 122 [footnote omitted]).

[138] Art 300 CCQ states that legal persons (such as business corporations) "are primarily governed by the Acts applicable to their particular type" and then "by [the] Code where the provisions of such Acts require to be complemented". As a result, the rules provided for by the CCQ complete those mentioned in the specific laws applicable to business corporations: the CBCA for federally-incorporated business corporations operating in Quebec and the BCA for provincially-incorporated business corporations.

[139] Crête & Rousseau, *supra* note 28 at 61, para 122.

[140] Bisson, "La disposition préliminaire", *supra* note 127 ("[e]n réponse aux questions de l'opposition officielle, les légistes du gouvernement [...] justifièrent [la disposition préliminaire] par le besoin d'affirmer, en contexte nord-américain, que l'on était en pays de droit civil, évoquèrent les spectres de la common law" at 551); Cantin Cumyn, "Premier bilan", *supra* note 20 at 466.

[141] *Ibid* at 469; Glenn, "Disposition préliminaire", *supra* note 131 ("la plus grande signification du Code civil au Québec est d'indiquer l'appartenance de ce dernier à la grande tradition civiliste et particulièrement au droit commun de la francophonie" at 348).

Since the CCQ's entry into force, there has effectively been a realignment of Quebec's *droit commun* on the civil law legal tradition.[142] Decisions such as those issued by the Supreme Court of Canada during the first half of the XXth century[143], in which common law fiduciary principles were invoked by the Court to justify the imposition of a duty of loyalty on directors in Quebec, could no longer be rendered.

2.2.2 The notion of jus commune

While common law principles may no longer be bluntly incorporated into Quebec private law, the common law has enduring relevance in the interpretation of certain elements of Quebec private law. Closed-mindedness towards the common law would be inconsistent with the very nature of a mixed legal system and the notion of *droit commun* itself.

The CCQ may well be the "primary expression" of the *jus commune*; the latter encompasses more than just the CCQ.[144] The preliminary provision itself recognizes the CCQ's incompleteness where it states that the CCQ governs "in harmony with […] the general principles of law".[145] In fact, Quebec's *jus commune* is comprised of various sources such as implicit norms and societal values,[146] local positive law and foreign civilian positive law[147], historical law[148] and general legal principles stemming, for instance, from legal literature and case law.[149] Thus, the *droit commun* is a broad notion whose sources are multiple and whose content evolves over time.[150]

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[142] See e.g. Daniel Jutras, "Regard sur la common law au Québec : perspective et cadrage" (2008) 10 RCLF 311 at 325 [Jutras, "Perspective et cadrage"].

[143] *Common v McArthur*, supra note 54; *Smith v Comtois*, *supra* note 54; *Sun Trust Co Ltd v Bégin*, *supra* note 54; *Bergeron v Ringuet*, *supra* note 54 (Fauteux and Taschereau JJ, dissenting). See this thesis, chapter 1, section 1.2.

[144] Brierley, "Quebec's 'Common Laws' ", *supra* note 131 ("if not absurd, a civil code commits the sin of vanity in as much as it aspires to be complete and self-sufficient on the matters within its purview" at 116).

[145] Glenn, "Disposition préliminaire", *supra* note 131 at 348-49.

[146] Brierley, "Quebec's 'Common Laws' ", *supra* note 131 at 116-17.

[147] Naccarato & Crête, "Réalité à juridicité", *supra* note 6 ("[le droit commun] englobe tant le droit positif étatique, que le droit positif multi-étatique, tels la francophonie ou encore le droit positif étranger issu de la même tradition, aussi bien que le droit historique et les traditions sociales" at 666).

[148] Brierley, "Quebec's 'Common Laws' ", *supra* note 131 at 118-120

[149] See Glenn, "Disposition préliminaire", *supra* note 131 at at 344-47; Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 666.

[150] Brierley, "La notion de droit commun", *supra* note 19 at 104, no 2 :

> [L]a notion du droit commun n'est autre chose que l'expression d'une certaine idée: un corps donné de normes s'applique sauf dérogation expresse. La notion de droit commun joue ainsi le rôle d'une autorité ultime qui, sauf exception, peut servir à justifier une solution donnée. Le droit commun se situe donc au centre même d'une théorie générale des sources du droit. Envisagé de cette manière, il

The temporal dimension of the *droit commun* is crucial; while the content of the *droit commun* is constantly evolving, it must also be understood by reference to the historical past, which "continue[s] to impinge on the way jurists think".[151] Indeed, "[t]he historical facts from which a legal system is derived […] have an unrelenting grip upon its future".[152]

The historical influence of the common law upon Quebec's legal system is manifold. Quebec's legal infrastructure and its conception of the hierarchy of the sources of law were influenced by the common law.[153] As a matter of fact, to this day, the authority of case law and its status within the hierarchy of the sources of law, inherited from the common law, are distinctive features of Quebec's legal mixity.[154]

Furthermore, the common law's influence on public law in Quebec is undeniable. Indeed, shortly after the 1763 British conquest, the French-inspired law that governed the colony before the 1763 conquest was restored by the *Quebec Act*, but only where "property and civil rights"[155] – in other words, private law matters – were concerned. Public law matters were to be governed by the common law. Therefore, it is generally considered that there is a duality of *droits communs* in Quebec: the civil law for private law matters and the common law for public law matters.[156]

However, the common law's role in shaping Quebec private law shouldn't be ignored either.[157] As was shown in chapter 1 with regards to the director's duty of loyalty and as will be shown in

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n'est que normal que le droit commun exprime une réalité changeante et qu'il dévoile un contenu variable selon le moment historique pour l'identifier et selon la branche du droit envisagé.

[151] Brierley, "Quebec's 'Common Laws' ", *supra* note 131 at 118. See *ibid* at 118-20.

[152] *Ibid* at 120.

[153] Regarding the status of jurisprudence in Quebec, see John EC Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 121-25.

[154] In comparison with other civilian jurisdictions, where civil codes have absolute pre-eminence and where courts have little or no law-making power, Quebec has a very active judiciary. In Quebec, legal concepts may even emerge through case law. See Bjarne Melkevik, *Réflexions sur la philosophie du droit*, coll Dikè (Sainte-Foy, Qc: Presses de l'Université Laval, 2000) at 200-20; Normand, "Acculturation du droit", *supra* note 11 at 16 ("[l]a relation entre le texte du Code et la jurisprudence est, à cet égard, révélatrice de la conception des sources. La hiérarchie qui devrait découler du processus même de codification ne va pas de soi. La jurisprudence occupe, en effet, un statut qui n'est habituellement pas le sien dans un système de droit civil"). Quebec's duty of loyalty is a perfect example of a concept that first arose through case law.

[155] See, regarding the interpretation to give to "property and civil rights", Maurice Tancelin, "Comment un droit peut-il être mixte?", *supra* note 129 at 4ff.

[156] Brierley, "La notion de droit commun", *supra* note 19 at 105, no 5.

[157] See Jutras, "Cartographie de la mixité", *supra* note 120 at 272.

the next section of this chapter with regards to the administration of the property of others, Quebec private law itself bears the imprint of the common law.[158]

The fact that the CCQ is now expressly recognized as the "primary expression"[159] of Quebec's *jus commune* shouldn't be seen as a disavowal of the sources that have forged Quebec law; these sources remain relevant. In Brierley's words, "[a] receptive rather than a narrow conception of law is thus very much part, and a welcome part, of Quebec's civil law tradition even in the presence of an enactment as comprehensive and systematic as the Civil Code".[160] Moreover, according to Brierley, it is possible to see in the preliminary provision's reference to the "general principles of law" an opening to "draw upon the *experience vécue* of the [c]ommon law tradition"[161], where institutions and concepts shaped by that latter legal tradition are concerned.[162] The duty of loyalty incontestably is such a concept.

Thus, although no explicit reference to the common law is established in the preliminary provision or in the CCQ generally, the common law should nonetheless be considered, not as a formal source of law, but as a valuable source of inspiration. After all, a mixed legal system is, by nature, an open one.[163] This openness also derives from the notion of *droit commun* itself – a dynamic notion that "varies through time and space"[164], yet bears the imprint of its past influences.

2.3 The regime of the administration of the property of others

The regime of the administration of the property of others, which is described by one author as the focal point of the analysis of the duty of loyalty in Quebec private law[165], is unprecedented in the civilian legal tradition.[166] It is an innovation of the CCQ. This section draws largely on Cantin Cumyn's writings, a leading figure in Quebec with regards to the regime of the

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[158] See *ibid*.
[159] Macdonald, *supra* note 126 at 599.
[160] Brierley, "Quebec's 'Common Laws' ", *supra* note 131 at 128. See also Howes, *supra* note 129 at 557.
[161] Brierley, "New Quebec Law of Trusts", *supra* note 10 at 396.
[162] *Ibid* at 397.
[163] Brierley, "La notion de droit commun", *supra* note 19 at 118, no 24.
[164] *Ibid* ([translated by author] "[l]e droit commun constitue une réalité abstraite et unique, dont les manifestations sont variables, c'est-à-dire que son contenu est variable dans le temps et dans l'espace" at 118, no 24).
[165] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 50.
[166] Cantin Cumyn & Cumyn, *supra* note 34 ("[l]a codification québécoise du régime de l'administration du bien d'autrui est une innovation dans la tradition civiliste. Il n'existe aucun exemple antérieur de même envergure dans un autre pays de droit civil" at 2-3, para 3 [footnote omitted]).

administration of the property of others.[167] Cantin Cumyn is also one of the few authors in Quebec who has written about the duty of loyalty, and more specifically about this duty in relation to the administration of the property of others and the concept of legal power. This latter concept, which underlies the regime of the administration of the property of others, will be introduced in this section and discussed throughout the next chapters.

2.3.1 The emergence and the nature of the regime

Under the CCLC, the regime of the mandate was the default legal regime which governed situations where a legal actor managed the property of another. The regime of the administration of the property of others was introduced in the CCQ to replace the mandate in this respect.[168] In effect, the mandate, which results from a contractual agreement between two parties[169] did not adequately reflect all the cases of administration of the property of others. For instance, the categorization of corporate directors as mandataries, which I discussed in chapter 1, did not seem accurate. Indeed, contrary to the mandator-mandatary scheme, a plurality of parties (the shareholders, the business corporation and the directors) are involved in the management of the business corporation.[170] Moreover, unlike mandataries, directors do not perform their functions as a result of a contractual agreement; they are entitled to act as such as a result of an election process and their powers are provided by the law rather than by a contract.[171] Therefore, for the Civil Code Revision Office, corporate law was a major potential field of application for the new regime of the administration of the property of others.[172]

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[167] Her treatise *L'administration du bien d'autrui* originally published in 2000 (Cowansville, Que: Yvon Blais, 2000), is fundamental in this field.

[168] Quebec, Civil Code Revision Office, *Report on the Quebec Civil Code*, vol 2: Commentaries, t 1 (Quebec: Éditeur officiel du Québec, 1978) ("[t]he principle aim of the Draft [of the Title on the *Administration of the Property of Others*) is to combine [the rules common to various types of administration] under a single Title so as to avoid [...] considering mandate as the typical contract on administration of the property of others" at 372), ("[a]lthough […] [the] mandate [is] obviously of a general nature, [it] cannot be adapted to all situations " at 373).

[169] Contrary to the situation under the CCQ, under the CCLC, the mandatary was not limited to perform acts of representation and could perform various acts of administration. Contrast article 2130 CCQ ("[m]andate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power") with article 1701 CCLC ("[m]andate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it").

[170] Cantin Cumyn & Cumyn, *supra* note 34 at 42-43, para 51; Larin & Beaulieu, *supra* note 77; Smith & Renaud, "L'administration des corporations commerciales", *supra* note 50 at 1535, para 39.

[171] Richard, *supra* note 63.

[172] Cantin Cumyn & Cumyn, *supra* note 34 at 48, para 56; Caron, "L'abus de pouvoir", *supra* note 23 at 19; Civil Code Revision Office, *supra* note 168 at 374. Though the Civil Code Revision Office intended the regime of the administration of the property of others to be applicable to legal persons, its application in this context was finally

As a matter of fact, the CCQ's title on the administration of the property of others also draws its inspiration from the duties imposed on corporate directors.[173] As was explained in the first chapter of this thesis, the common law played a significant role in shaping these duties. Therefore, according to one author, the regime of the administration of the property of others emerged out of the combination of the rules governing the mandate under the CCLC and the common law fiduciary duties.[174]

The common law also triggered, to a certain extent, the emergence of the regime of the administration of the property of others in Quebec. Indeed, as Cantin Cumyn points out, Quebec jurists would overcome the civil law's shortcomings regarding the management of the affairs of another by resorting to common law notions such as the trust.[175] The administration of the property of others thus emerged, alongside the CCQ trust, in response to the resort to common law notions.

Under the CCLC, the trust as it is now under the CCQ didn't exist.[176] The only trusts that did exist were those created gratuitously, either by gifts or by wills.[177] Moreover, the nature of the trustees' functions and their duties under Quebec private law was rather uncertain.[178]

The CCLC's trust, although distinct from the common law express trust technically speaking, had nonetheless been directly inspired by the latter.[179] Therefore, Quebec jurists attempted to fill

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excluded due to pressures coming from various organisms. See Cantin Cumyn & Cumyn, *supra* note 34 at 45-46, paras 58-59.

[173] Civil Code Revision Office, *supra* note 168 at 372-73; François Rainville, *L'administration du bien d'autrui et les patrimoines d'affectation*, coll Bleue, Série Répertoire de droit (Montreal: Wilson & Lafleur, 2004) at para 1.

[174] Jutras, "Cartographie de la mixité", *supra* note 120 ("[t]elle qu'elle existe aujourd'hui en droit québécois, l'obligation de loyauté [des administrateurs de personnes morales] est inspirée à la fois du concept de devoirs fiduciaires, en common law, et, dans une version moins convaincante dont elle s'est affranchie, des règles du mandat en droit civil. L'une et l'autre source se sont combinées pour produire un régime distinct et cohérent sur l'administration du bien d'autrui" at 268 [footnote omitted]).

[175] Madeleine Cantin Cumyn, "L'administration des biens d'autrui dans le *Code civil du Québec*" (2004) 3 Revista Catalana de Dret Privet 17 at 18 [Cantin Cumyn in Revista Catalana].

[176] A chapter concerning the trust (arts 981a to 981n) had been added to the CCLC in 1888, chapter which reproduced the contents of the *Act Respecting Trusts*, SQ 1879, c 29.

[177] Art 981a CCLC.

[178] Cantin Cumyn, "Les personnes morales", *supra* note 17 at 1044; Martel, "Harmonization", *supra* note 35 at 158.

[179] Sylvio Normand & Jacques Gosselin, "La fiducie du Code civil : un sujet d'affrontement dans la communauté juridique québécoise " (1990) 31:3 19 C de D 681 at 688, n 13-15, referring to Pierre-Basile Mignault, *Le droit civil canadien*, t 5 (Montreal: C Théoret, 1901) at 154; François Langelier, *Cours de droit civil de la province de Québec*, t 3 (Montreal: Wilson & Lafleur, 1907) at 332; *Mathison c Shepherd* (1909), 35 SC 29 (Sup Ct) at 48, Mathieu J; *Curran v Davis,* [1933] SCR 283 at 302, Rinfret J (available on CanLII). See Madeleine Cantin Cumyn, "L'origine

in the gaps of the law in Quebec, namely regarding the nature of the trustee's power over the property administered, by resorting to common law notions.

In the common law express trust, the settlor transfers trust property to the trustee who holds it in trust for the beneficiary. The trustee holds the legal title; he is the owner at common law. However, in equity, which is inspired by ideas of justice, fairness and morals,[180] the beneficiary is the true owner of the trust property and holds the equitable title. Thus, the trust assets belong to the trustee, the owner at common law, but the trustee must manage those assets for the benefit of the beneficiary, the owner in equity. [181]

Given that there is no such duality of ownership in civil law, jurists attempted to find a solution that was compatible with the civilian conception of absolute ownership. Eventually, the Supreme Court of Canada ruled that trustees had a *sui generis* property right in the trust they administered[182], a "partial derivative" of the common law "notion of dual titles".[183] However, this solution was regarded as highly unsatisfying for some Quebec jurists.[184]

The possibility that the trust be established by onerous title, as well as the idea of the trust as an autonomous patrimony, arose with the CCQ.[185] The CCQ thereby "attempt[ed] to bring the

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de la fiducie québécoise" in Paul-André Crépeau & Quebec Research Center for Private and Comparative Law, eds, *Mélanges presented by McGill colleagues to Paul-André Crépeau* (Cowansville, Que: Yvon Blais, 1997) 199.

[180] H Patrick Glenn, *Legal Traditions of the World*, 4th ed (Oxford, NY: Oxford University Press, 2010) at 271.

[181] Waters, Gillen and Smith provide an excellent definition of the trust:

> The essential features of a common law trust […] are a segregated fund comprising an asset or a number of assets, a person or purpose as the object of the trust with exclusive right to the enjoyment of the fund or its dedication, and a person holding title to the asset or assets held in the trust and in some instances administering or managing the fund (Donovan WN Waters, Mark Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 3).

[182] *Royal Trust Co v Tucker*, [1982] 1 SCR 250, JE 82-246. In this decision, the Supreme Court endorsed Rinfret J's approach in *Curran v Davis*, *supra* note 179.

[183] Brierley, "New Quebec Law of Trusts", *supra* note 10 at 392.

[184] See e.g. Brierley, "New Quebec Law of Trusts", *supra* note 10 ("even though the trustee's title was characterized as a *sui generis* property *right*, his position *vis-à-vis* the beneficiaries was analyzed as that of a debtor by virtue of being the titulary of the trust property, albeit a patrimony distinct from his own. The apparent consequence [was] that the trust beneficiary [was] analyzed as the creditor of the trustee rather than of the trust itself" at 392 [emphasis in the original]); Madeleine Cantin Cumyn, "La propriété fiduciaire: mythe ou réalité?" (1984) 15 RDUS 7; Cantin Cumyn, "Les personnes morales", *supra* note 17 ("faire porter [la fiducie] sur le droit de propriété conduit à situer la problématique en dehors des structures du droit civil. […] Que la Cour suprême ait choisi cette interprétation des articles 981a et suivants du Code civil met en lumière la dépendance du droit québécois à l'égard des modes de raisonnement propres au droit des juridictions voisines" [footnote omitted] at 1044-45); Normand & Gosselin, *supra* note 179.

[185] Arts 1261-1262 CCQ. See, regarding the adaptation of the common law trust in the CCQ, and for an analysis in favour of the resort to the common law to interpret the CCQ trust, Brierley, "New Quebec Law of Trusts", *supra* note 10.

Quebec version of the trust into a close parallel with the [c]ommon law institution"[186] as it "proceeds upon the idea that, as a matter of fundamental principle, the beneficial enjoyment of property can be separated from its management".[187] However, "[a]s a technical vision of the trust concept, it obviously owes nothing, directly, to the [c]ommon law tradition".[188] Indeed, different conceptual frameworks underlie the CCQ trust and its common law counterpart; "[the CCQ trust's] starting premise, […] the patrimony, is […] no less a *magum mysterium* for the [c]ommon law lawyer than is the duality of legal and equitable title for the [c]ivil law lawyer".[189]

The CCQ's title on the administration of the property of others was introduced to complete the new legal regime of the trust.[190] From a structural perspective, the fact that the title concerning the administration of the property of others follows the trust in the CCQ's book four on property also indicates that the drafters intended the former to complement the latter.[191]

The regime of the administration of the property of others therefore sets the obligations of the administrator of the trust patrimony.[192] However, it also regroups rules governing other instances of administration of the property of another, which previously were spread out in the CCLC, as well as other rules that were applied in practice but had no legislative support.[193] As Cantin Cumyn explains, the "previously existing rules governing the various institutions involving the management of the property of others, particularly tutorship, curatorship, liquidation of a succession, trust, mandate, and the administration of legal persons [were] identified […] [to be]

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[186] *Ibid* at 384.
[187] *Ibid* at 385.
[188] *Ibid* at 393.
[189] *Ibid*.
[190] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 51.
[191] However, the relevance of the title on the administration of the property of others in the CCQ's book on property is debatable – it might have been more accurate for it to be part of the book on obligations. Indeed, in the course of their functions, administrators of the property of another create obligations. See Nicholas Kasirer, "Lear et le droit civil" (2000) 46 McGill LJ 293 at 300. The same is true of the trust institution itself: "despite the decision to place the provisions on the trust in Title VI in the Book relating to "Property" (Book IV, "Certain Patrimonies by Appropriation"), it is as much, if not more, when fully analyzed, a matter of "obligations" as it is of "property" [footnote omitted] in Brierley, "New Quebec Law of Trusts", *supra* note 10 at 387. See also Tancelin, *Obligations*, *supra* note 6 at 350-51, para 501A.
[192] Art 1278 CCQ.
[193] Quebec, Ministère de la justice, *Commentaires du ministre de la justice: Le Code civil du Québec*, vol 1 (Quebec: Publications du Québec, 1993) [Quebec, *Commentaires du ministre de la justice*, vol 1] ("[s]ous le titre *De l'administration du bien d'autrui*, le code regroupe les règles, auparavant disséminées dans le Code civil du Bas Canada ou dans d'autres lois, qui s'appliquent à tous ceux qui administrent des biens qui ne leur appartiennent pas; il les complète par des règles dégagées par les tribunaux et inspirées de la pratique" at 774).

sufficiently broad to qualify as part of a general law of administration".[194] Thus, the administration of the property of others was thought out as a general regime, providing the suppletive law[195] where an individual "is charged with the administration of property or a patrimony that is not his own".[196]

This configuration of the regime of the administration of the property of others, in which the rules governing the conduct of the trustee apply to other legal actors[197], resembles the common law regime of fiduciary relationships[198], which also extends the application of the trustees' duties – fiduciary duties –, to other legal actors in relationships that parallel the trustee-beneficiary relationship.

In common law, fiduciary relationships are trust-like in that they operate by way of analogy with the trust;

> The technical difference being there is no requirement that the fiduciary hold legal title to property in the wider context. A company director and a real estate agent clearly deal with assets that are vested in others than themselves, yet they are not trustees. Thus, while the express trust is at the core of the fiduciary concept, around that core are layered several trust-like relationships in which one person is like a

[194] Cantin Cumyn, "The Legal Power", *supra* note 35 at 353.
[195] See art 1299 CCQ: "Any person who is charged with the administration of property or a patrimony that is not his own assumes the office of administrator of the property of others. *The rules of this Title apply to every administration unless another form of administration applies under the law or the constituting act, or due to circumstances*" [emphasis added]. It is clear that the Civil Code Revision Office intended the administration of the property of others to be a suppletive regime, a *régime de droit commun*. See Cantin Cumyn & Cumyn, *supra* note 34 ("[l]'intention de l'Office de révision du Code civil est sans équivoque : il ne devait y avoir, *a priori*, aucune limite à l'application éventuelle du nouveau titre, dès lors que l'on se trouve en présence d'un cas d'administration de biens pour autrui" at 49, para 57); Civil Code Revision Office, *supra* note 168 at 372-74. However, as Cantin Cumyn points out, the Minister of Justice, when commenting on the CCQ's title on the Administration of the property of others, seems to have narrowed its scope as he did not mention that it could be resorted to as a suppletive regime: see Quebec, *Commentaires du ministre de la justice*, vol 1, *supra* note 193 at 774ff, cited in Cantin Cumyn & Cumyn, *supra* note 34 at 51, paras 58-59.
[196] Art 1299 CCQ.
[197] The CCQ provides that the following legal actors are administrators of the property of others: the tutor (arts 208, 286 CCQ) and the curator (arts 262, 282 CCQ) of the property of a person, the liquidator of a legal person (art 360 CCQ), the State where successors have renounced the succession or where no successor is known or claims the succession (art 701 CCQ), the liquidator of a succession (art 802 CCQ), the manager of undivided property (art 1029 CCQ), the manager of the syndicate of co-owners (art 1085 CCQ), the trustee (art 1278 CCQ), the manager of the business of another (art 1484 CCQ), the general partners in a limited partnership (art 2238 CCQ), the liquidator of an undeclared partnership (art 2266 CCQ), the creditor of a surrendered property (art 2768 CCQ), the creditor who has taken possession of a property (arts 2773, 2775 CCQ).
[198] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 51.

> trustee for another in that he manages the subject-matter, not in his own interests, but in the interest of that other.[199]

Therefore, in common law, the fiduciary nature of the relationship established between fiduciaries and beneficiaries, as well as the standard of conduct imposed on fiduciaries, derive from the trust. Indeed, "[t]he essential structure of a trust, in which managerial power is divorced from beneficial ownership, creates the danger that the trustee will act for his own benefit, not for the benefit of the beneficiaries".[200] Although fiduciaries are not trustees since they do not hold legal title to the assets they manage as trustees do, there nevertheless is a separation of managerial power and ownership, where fiduciaries manage the property of another.[201]

This being said, the common law regime of fiduciary relationships goes beyond the context of the administration of the *property* of others. Indeed, at common law, fiduciaries may deal with what one author calls matters of right, personality and welfare.[202] Therefore, it is important not to assume that the civilian regime of the administration of the *property* of others and the common law regime of fiduciary relationships are complete equivalents. However, Cantin Cumyn suggests that the CCQ's regime of the administration of the property of others could also be applied by analogy where an administrator exercises his powers with regards not to the property of another, but with regards to that other person herself.[203]

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[199] Peter D Maddaugh, "Definition of Fiduciary Duty" in *Special Lectures of the Law Society of Upper Canada. 1990: Fiduciary Duties* (Scarborough, Ont: R De Boo, 1991) at 17.

[200] Thomas P Gallanis, "The contribution of fiduciary law" in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge, UK: Cambridge University Press, 2013) 388 at 397.

[201] The fiduciaries' duty of loyalty, however, is not as uncompromising as the trustees'. For a comparison of the requirements that loyalty imposes on corporate directors and trustees, see Rock & Wachter, *supra* note 49 at 668-73.

[202] Miller, "Fiduciary Liability", *supra* note 8 ("matters of personality include aspects of the actual and legal personality of incapable and artificial persons, including the determination of the ends or interests of persons as such. Matters of welfare include decisions bearing upon specific aspects of the personal integrity and well-being of natural persons, including their physical and mental health. Matters of right include decisions relating to the legal rights, obligations, powers and liabilities of natural and artificial persons, including those in relation to contract and property" at 276).

[203] Madeleine Cantin Cumyn, "De l'administration des biens à la protection de la personne d'autrui" in Service de la formation continue du Barreau du Québec, *Développements récents – obligations et recours contre un curateur, tuteur ou mandataire défaillant (2008)*, vol 283 (Cowansville, Que: Yvon Blais, 2008) 205 [Cantin Cumyn, "Des biens à la protection de la personne" ("[m]algré l'apparence d'une portée limitée du titre sur l'administration du bien d'autrui, son analyse montre qu'il énonce des principes communs à l'exercice de pouvoirs privés […]. L'interprète est donc non seulement justifié, mais il serait mal avisé de n'y pas puiser les normes pertinentes à la solution des difficultés survenant dans l'exercice de pouvoirs impliquant la personne plutôt que le bien d'autrui" at 210); Cantin Cumyn, "The Legal Power", *supra* note 35 at 359-60.

2.3.2 The importance of the regime with regards to the duty of loyalty

Like the common law fiduciary regime, which places the fiduciary duty of loyalty at center stage, "the duty of loyalty is of the essence of the administration of the property of others".[204] In common law, the fiduciary duty of loyalty has been identified as the cardinal duty of fiduciaries.[205] The landmark decision in this regard is the English Court of Appeal case *Bristol and West Building Society v Mothew*[206], in which Millet LJ stated that "[t]he distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary".[207]

In the civilian regime of the administration of the property of others, the analysis of the duty of loyalty rests upon the concept of legal power, as articulated in Quebec by Cantin Cumyn.[208] Cantin Cumyn drew her inspiration from the works of French authors Roubier[209], Gaillard[210] and Storck[211].

The concept of power also exists under a common law analysis of fiduciary relationships, where it amounts to the capacity to affect another's legal situation,[212] and more precisely to a form of authority.[213] However, the concept of legal power in Quebec private law, which is described below, is different from the common law's conception of power.

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[204] Cantin Cumyn in Revista Catalana, *supra* note 175 at 21 [translated by author].
[205] See e.g. *Lac Minerals*, *supra* note 41 ("[the fiduciary obligation] can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary" at 646, La Forest J); Conaglen, *supra* note 9 at 479; Smith, "Fiduciary Relationships", *supra* note 9 at 609).
[206] *Supra* note 41.
[207] *Ibid* at 711-12, Millett LJ.
[208] See especially Cantin Cumyn & Cumyn, *supra* note 34, Cantin Cumyn, "The Legal Power", *supra* note 35.
[209] Paul Roubier, *Droits subjectifs et situations juridiques* (Paris: Dalloz, 1963).
[210] Emmanuel Gaillard, *Le pouvoir en droit privé* (Paris: Economica, 1985).
[211] Michel Storck, *Essai sur le mécanisme de la représentation dans les actes juridiques* (Paris: Librairie générale de droit et de jurisprudence, 1982).
[212] Séverine Saintier, "Représentation, mandat et conflit d'intérêts en droit anglais" in Association Henri-Capitant, *Les conflits d'intérêts, Journées nationales, Lyon 3*, t 17 (Paris: Dalloz, 2013) 63 at 65.
[213] Fox-Decent, "Fiduciary Nature", *supra* note 9; Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford, NY: Oxford University Press, 2011) [Fox-Decent, *Sovereignty's Promise*]; Miller, "Fiduciary Liability", *supra* note 8 at 272-73.

Although "[t]he word *power*, used in the sense of a legal prerogative, is all but absent from the text of the Code"[214], the concept of legal power, which underlies the CCQ's title concerning the administration of the property of others, is, according to Cantin Cumyn, central in civil law.

Art 1299 CCQ provides that "[a]ny person who is charged with the administration of property or a patrimony that is not his own assumes the office of administrator of the property of others". In other words, the administrator manages the affairs of another – not his own. Therefore, according to Cantin Cumyn, "article 1299 implicitly opposes the exercise of subjective rights to that of powers".[215] Indeed, "the interest of another, to which the exercise of a power is subordinated, is the key distinguishing feature between a power and a right, the latter being a prerogative that a titulary may exercise freely".[216] In other words, in civil law, the concept of legal power is to be interpreted in sharp contrast with that of subjective right – a concept which, parenthetically, is foreign to the common law.[217] The concept of subjective right and its implications in civil law will be explained further in chapter 3, but for present purposes, it should be kept in mind that a subjective right is a legal prerogative that one exercises for oneself, as opposed to a legal power which is to be exercised in the interest of another.

Legal powers are divided into two large categories: powers of representation and autonomous powers.[218]

Representation is the mechanism through which "a representative [performs] a juridical act in the name and on behalf of another, the person represented, whose patrimony is directly affected by the act".[219] In this context, "[t]he person to whom powers of representation have been attributed must necessarily act in the name and the exclusive interest of the person represented".[220]

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[214] Cantin Cumyn, "The Legal Power", *supra* note 35 at 354 [emphasis in the original]. The author notes that "[o]nly arts 1308, 1310, 1319, 1320 and 1321 CCQ mention the powers of the administrator" (*ibid* at 354, n 28).
[215] Cantin Cumyn & Cumyn, *supra* note 34 at 80, para 88 [translated by author].
[216] Cantin Cumyn, "The Legal Power", *supra* note 35 at 355, n 31.
[217] See Geoffrey Samuel, " 'Le Droit Subjectif' and English Law", (1987) 46:2 Cambridge LJ 264 [Samuel, "Droit Subjectif"].
[218] Cantin Cumyn, "The Legal Power", *supra* note 35 ("[t]he distinction between powers of representation and autonomous powers (expressed by reference to their purpose – that is, the element that characterizes these prerogatives) constitutes the main categorical division within private powers" at 356-57 [footnote omitted]).
[219] CPCL, *Private Law Dictionary. Obligations*, supra note 5, *sub verbo* "representation".
[220] Cantin Cumyn, "The Legal Power", *supra* note at 360.

Autonomous powers are "powers attributed to a person for a purpose other than representation, which are therefore exercised without representation".[221] Thus, "the potential purposes of an autonomous power are many and variable",[222] whereas "the purpose of a power to represent another is unique and invariable".[223] More specifically, the purposes of autonomous powers "are determined by the source of the autonomous power, whether contractual, legal, or judicial".[224]

The duty of loyalty acquires real meaning in light of the nature of the powers exercised. A person vested with powers of representation must act in the interest of the person represented, whereas a person vested with autonomous powers must exercise her powers in the furtherance of a goal. [225] In Cantin Cumyn's words,

> The obligation of loyalty is directly related to the purpose of the powers, which either focuses on the interest of the person represented or covers a wider area for the accomplishment of another goal. The obligation of loyalty in this context requires that the exercise of powers of representation should only be undertaken in the interest of the person represented. Applied to autonomous powers, loyalty commands that the powers be exercised solely for the accomplishment of their goal. It prohibits their use in the personal interest of the person exercising them or in the interest of a third party who has no connection to the purpose.[226]

Art 1309, para 2 CCQ encapsulates the essence of the administrator of the property of another's duty of loyalty. It states that "[the administrator] shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued". The first part of this sentence – which requires that the administrator acts "in the best interest of the beneficiary" – implicitly refers to the exercise of a power of representation while the second part – which requires that the administrator acts in the best interest "of the object pursued" – refers to the exercise of an autonomous power.[227]

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[221] *Ibid* at 356.
[222] *Ibid* at 360.
[223] *Ibid*.
[224] *Ibid*.
[225] *Ibid*.
[226] *Ibid* at 360-61 [footnote omitted].
[227] As for the duty of honesty mentioned in art 1309 CCQ, according to Cantin Cumyn and Cumyn, it is part of the administrator's duty of loyalty: Cantin Cumyn & Cumyn, *supra* note 34 at 280, para 297.

The fact that the administrator must act in "the best interest of the beneficiary or of the object pursued"[228] implies that he cannot act in his own interest: "[i]t is precisely because the administrator is invested with powers to carry out his mission that he is not authorized to act in his own interest nor according to his pleasure".[229] Art 1310, para 1 CCQ states that "[n]o administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator". However, the administrator himself can be a beneficiary in certain cases.[230] In those cases, "[the administrator] shall exercise his powers in the common interest, giving the same consideration to his own interest as to that of the other beneficiaries".[231]

The facets of the administrator of the property of another's duty of loyalty, alongside that of the other legal actors subject to a duty of loyalty under the CCQ, will be examined in chapter 4. However, it should be noted that these facets are practically identical to the common law fiduciary duties.[232] Most notably, the broad no-conflict and no-profit rules which are so central in the common law regime of fiduciary relationships[233] are now clearly entrenched in the CCQ.[234]

Thus, on many aspects, similarities between the regime of the administration of the property of others and the common law regime of fiduciary relationships may be observed.[235] These similarities relate to the configuration of the regime of the administration of the property of others, the centrality of the duty of loyalty within the respective civil and common law regimes, as well as the content of the duty of loyalty. Most importantly however, the regime of the administration of the property of others sheds light on the concept of legal power, upon which the analysis of Quebec's duty of loyalty rests.

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[228] Art 1309, para 2 CCQ.
[229] Cantin Cumyn, "The Legal Power", *supra* note at 352.
[230] For instance, where the trustee is also a beneficiary of the trust or where the liquidator of a succession is also an heir.
[231] Art 1310, para 2 CCQ.
[232] See Paul Martel's analysis in "Harmonization", *supra* note 35 at 155-58, 167.
[233] Smith, "The Motive", *supra* note 9 ("[t]here are notoriously two main things that a fiduciary may do. The 'no-conflict' rule says that a fiduciary must avoid any conflict of interest and duty, and indeed any conflict of duty and duty. The 'no-profit' rule requires the fiduciary to avoid making any profit out of the fiduciary relationship, except where expressly authorized by the constitutive act (such as the deed of trust), or by the court" at 55).
[234] Arts 1311, 1312 and 1314 CCQ. See, for a detailed identification of the main fiduciary duties in common law and a comparison with the duties of the administrator of the property of another, Martel, "Harmonization", *supra* note 35 at 155-58, 167.
[235] According to one commentator, the regime of the administration of the property of others is in fact an "extremely detailed codification of the common law fiduciary relationship" [translated by author, footnotes omitted]: Yves Rossier, "Étude comparée de certains aspects patrimoniaux de la fiducie" (1989) 34 McGill LJ 817 at 906.

2.4 Conclusion

Two general yet crucial observations stand out of this overview of the CCQ's novelties that had an impact on the interpretation of the duty of loyalty. First, the connection between Quebec's duty of loyalty and its common law counterpart was somewhat severed, namely as a result of the codification of the duty of loyalty. The realignment of Quebec's *jus commune* on the civilian legal tradition also contributed, to a certain extent, to this severance. This being said, the notion of *jus commune* acknowledges the common law's undeniable relevance in the interpretation of concepts shaped by its influence. Second, the introduction of a title on the administration of the property of others, which bears a strong resemblance with the common law regime of fiduciary relationships, shed light on the concept of legal power. This concept offers new grounds for the analysis of the duty of loyalty in Quebec.

Given the genealogy of the duty of loyalty in Quebec private law, isolation with regards to the common law is not justified. As Paul Martel points out:

> It would be counterproductive to deprive our courts of such a rich and valuable source and to force them to reinvent a wheel that their common law colleagues have spent over a century designing and refining. The duties of loyalty under the [CCQ] not only have the same basis in principle as the common law fiduciary duties, but also are recently and obviously based on those fiduciary duties, where directors of legal persons and even administrators of the property of another are concerned.[236]

Likewise, according to Daniel Jutras, "it is time to admit that the interaction between Quebec's civil law and common law cannot be treated inflexibly and that in many respects common law is not foreign to Quebec".[237] There are institutions and concepts of mixed origins even in Quebec private law. Indeed, as I discussed in the first chapters of this thesis, the duty of loyalty, now integrated in the CCQ, was shaped by the influence of the common law. The duty of loyalty and the regime of the administration of the property of others may well now be part of the CCQ, they emerged because of the encounter of the civil and the common law in Quebec.[238] It is thus

[236] Martel, "Harmonization", *supra* note 35 at 220-21.
[237] Jutras, "Cartographie de la mixité", *supra* note 120 at 272.
[238] See *ibid* at 268 :

> Telle qu'elle existe aujourd'hui en droit québécois, l'obligation de loyauté [des] administrateurs [de personnes morales] est inspirée à la fois du concept de devoirs fiduciaires, en common law, et, dans une version moins convaincante dont elle s'est affranchie, des règles du mandat en droit civil. L'une et l'autre source se sont combinées pour produire un régime distinct et cohérent sur l'administration du bien d'autrui. Ce régime est désormais codifié, et appuyé sur un concept de « pouvoir » qui comporte à la fois finalité et limites. *Là encore, même si le droit civil québécois a trouvé en lui-même les pièces*

important not to adopt a closed attitude towards the common law, which may "impoverish Quebec's civil law and deprive it from its specificity". [239]

Accordingly, in the next chapters, I draw parallels with the common law as I articulate a theory of loyalty.[240] I also resort to the common law in order to understand why the duty of loyalty in Quebec remains largely unexplored and misunderstood, years after its explicit incorporation in the CCQ.[241]

It should be noted however that the aim of this thesis is not to import common law theories on loyalty, but rather to develop a theory of the duty of loyalty proper to Quebec private law, while at times using the common law as a point of comparison and as a valuable source of inspiration.

Part 2 – An analysis of the duty of loyalty in the CCQ

Chapter 3 – The civil law's reluctant embrace of loyalty

Although the duty of loyalty is now explicitly entrenched in the CCQ, it is subject to wider civilian constraints and understandings of law. Namely, due to the rigidity associated with civil law – and more specifically civil codes – loyalty risks being compartmentalized under the CCQ. Loyalty is also regularly wrongfully assimilated with good faith. Finally, the duty of loyalty does not fall under the civilian subjective right paradigm. In this chapter, I explain how these elements affect the understanding of loyalty in Quebec civil law. This will set the ground for my analysis of the duty of loyalty in the CCQ which follows in chapter 4.

3.1 A legal compartmentalization of the duty of loyalty in the CCQ?

Under the CCLC, the duty of loyalty was a flexible concept. As the duty of loyalty was not codified, jurists and courts had to analyze whether a duty of loyalty came into play in a given situation, and if it did, on what bases. For instance, in *Kuet Leong*, the Supreme Court's analysis

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de ce nouvel assemblage conceptuel, difficile de nier qu'elles ont été mises en lumière au contact de l'autre tradition" [footnotes omitted, emphasis added].

[239] *Ibid* at 271 [translated by author]. See also Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 662.

[240] See chapter 4.

[241] See chapter 3.

of the duty of loyalty was chiefly based on the degree of trust and control vested in a legal actor.[242]

However, a duty of loyalty is now expressly imposed on the director of a legal person[243], the administrator of the property of another,[244] the employee[245] and the mandatary.[246] Does this entail that a duty of loyalty may exclusively be imposed upon these legal actors? This section addresses the question as to whether the codification of the duty of loyalty has led to its compartmentalization to predetermined instances.

In this regard, Paul Martel writes that "[a]lthough an opening was provided by *Kuet Leong*, the Quebec National Assembly chose to limit the duties of loyalty to a certain number of legal relationships".[247] Martel has previously deplored what he considers to be a legal compartmentalization of the duty of loyalty in Quebec private law:

> Il aurait été plus opportun de suivre dans le Code civil la direction indiquée par la Cour suprême [dans l'arrêt *Kuet Leong*], et d'imposer un devoir général de loyauté et d'honnêteté à toutes les personnes, peu importe leur titre, rencontrant les critères dégagés dans les arrêts [de common law], et de préciser que l'intensité de ce devoir augmente avec celle de l'autorité et de la confiance accordées (arrêt *Kuet Leong Ng*). À partir de ces principes, nos tribunaux auraient pu faire face à toutes les situations, et s'inspirer de la jurisprudence de common law, qui a 100 ans d'avance sur la nôtre. Malheureusement, une telle approche ne pouvait convenir à notre législateur cartésien. Il s'est donc ingénié à codifier ces devoirs de loyauté et d'honnêteté, en prescrivant la gradation du lien juridique impliqué. Cela a pour effet d'introduire dans notre droit une rigidité et des incertitudes que ne connaît pas la common law et dont la Cour suprême aspirait à le libérer dans l'arrêt *Kuet Leong*.[248]

On the other hand, in common law, the fiduciary concept (meaning the fiduciary relationships and the duties they entail) is an "indistinct, fluid [one]".[249] Leonard I. Rotman describes the fact that the fiduciary concept is so often invoked, yet hazy and undefined, as the "fiduciary paradox".[250] Indeed, there is a plurality of methods to identifying fiduciary relationships. No

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[242] *Kuet Leong*, *supra* note 89 at 438-44.
[243] Art 322, para 2 CCQ.
[244] Art 1309, para 2 CCQ.
[245] Art 2088, para 1 CCQ.
[246] Art 2138, para 2 CCQ.
[247] Martel, "Harmonization", *supra* note 35 at 221.
[248] Paul Martel, "La loyauté et la bonne foi des dirigeants des compagnies au Québec : l'éthique et l'équité gagnent du terrain" (1993) 27 RJT 309 at 348-349 [Martel, "La loyauté et la bonne foi", footnotes omitted].
[249] Martel, "Harmonization", *supra* note 35 at 153
[250] Rotman, *Fiduciary Law*, *supra* note 30 at 17

determinate approach to fiduciary law is employed by Canadian common law courts, and in fact, "one of the few points of agreement among fiduciary law commentators is that there is no universally accepted theory of the fiduciary concept".[251]

The breadth of the principles that structure the fiduciary concept has resulted in a patchwork of theories and approaches, the five main ones being the status-based, the fact-based, the remedy-based, the analogical and the innate recognition approaches.[252] Identifying fiduciary relationships has thus been a recurrent issue in the Supreme Court of Canada for the past several years.[253] The fiduciary concept has been increasingly invoked in all sorts of situations, most certainly because of the plurality of manners through which fiduciary relationships are identified. Among those, the status-based (to which the analogical approach sometimes is assimilated) and the fact-based approaches prevail in fiduciary jurisprudence.[254]

In the following sections, I will provide an overview of the two main common law approaches to identifying fiduciary relationships – relationships which give rise to a fiduciary duty of loyalty. These approaches will then serve as points of reference in determining where Quebec private law stands and which type of approach is best.

3.1.1 The status-based approach

In common law, under the status-based approach, a relationship is deemed to be fiduciary if it falls within one of the categories of legal relationships that have previously been identified as fiduciary; "[c]onfronted with a given relationship, the court will categorize it […] and determine whether the category is conventionally recognized as fiduciary".[255] The director-corporation relationship has long been recognized as fiduciary.[256] Other *per se* fiduciary relationships include the solicitor-client and the guardian-ward relationships.[257]

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[251] *Ibid* at 54 [footnote omitted].
[252] *Ibid* at 53.
[253] See e.g. *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247; *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161 [cited to SCR]; *McInerney v MacDonald*, [1992] 2 SCR 138, 93 DLR (4th) 415 [*McInerney* cited to SCR]; *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449 [cited to SCR]; *Lac Minerals*, *supra* note 41; *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 [cited to SCR]; *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321.
[254] Miller, "Fiduciary Liability", *supra* note 8 at 240; Rotman, *Fiduciary Law*, *supra* note 30 at 53.
[255] Miller, "Fiduciary Liability", *supra* note 8 at 241.
[256] See *Charitable Corporation v Sutton*, *supra* note 43.
[257] Rotman, *Fiduciary Law*, *supra* note 30 at 67.

Some authors subsume the analogical approach under the status-based one. Under both of these approaches, "[t]he process of reasoning that generates status is purely analogical: new categories of relationship are recognized as fiduciary simply by virtue of having been found sufficiently similar to a paradigmatic category – typically, that between trustee and *cestui que trust*".[258] Nonetheless, the analogical approach may be distinguished from the status-based (or categorical) approach as follows: "instead of limiting the scope of its analysis once a sufficient body of precedent had been established, as the categorical approach does, the analogy approach limits its analysis to fact situations that are sufficiently similar to those recognized by the categorical approach, thus providing a limited broadening of the latter".[259]

Although the status-based approach "is the longest-standing and most widely used method of identifying fiduciary relationships",[260] it has been virulently criticized. Rotman, for instance, argues that:

> [E]ven those so-called "traditional" categories were, at one time, novel applications of the fiduciary concept. […] By subsequently denying the authority of fact-based determinations of fiduciary status, the status-based method disregards the appropriateness of the very methodology responsible for its existence. Indeed, looking exclusively to an established list for fiduciary determinations […] improperly shifts one's focus from what ought to be the true nature of the inquiry: namely, whether the nature of the interaction, based on the facts presented, indicate the need to impose fiduciary principles.[261]

Similarly, Paul B. Miller contends that "[t]he status-based approach is not telling of the character of the fiduciary relationship. […] No effort was made to articulate the general kind of legal relationship within which these particular kinds (trust, and quasi-trust) fell".[262]

In other words, it seems that the emphasis should be placed upon the nature of the relationships and their features rather than on their categorization.[263]

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[258] Miller, "Fiduciary Liability", *supra* note 8 at 241.
[259] Rotman, *Fiduciary Law*, *supra* note 30 at 75.
[260] Miller, "Fiduciary Liability", *supra* note 8 at 241.
[261] Rotman, *Fiduciary Law*, *supra* note 30 at 68 [footnote omitted].
[262] Miller, "Fiduciary Liability", *supra* note 8 at 241.
[263] Rotman, *Fiduciary Law*, *supra* note 30 ("[t]he emphasis on relationships and their characteristics demonstrates that a person is not properly impressed with fiduciary duties simply by virtue of being described as a fiduciary" at 254).

Finally, another weakness of this "all or nothing" approach is that it does not sit well with the established common law principle that not all aspects of fiduciary relationships are fiduciary.[264]

3.1.2 The fact-based approach

While the inflexible status-based approach confines the fiduciary concept's sphere of application to limited, pre-determined occurrences, under the fact-based approach, the court examines the particular circumstances of a case and assesses whether a given relationship is fiduciary in nature. The fact that this *ad hoc* approach experienced a resurgence in fiduciary jurisprudence in the past years arguably "demonstrates a recognition that the categorical approach and those associated with it too arbitrarily limit the range of relationships that may potentially be described as fiduciary".[265]

Under the fact-based approach, the court looks for indicia of a fiduciary relationship. However, I will now show, there is no consensus as to what are the defining features of these relationships.

The contemporary development of a formula which encapsulates what fiduciary relationships tend to look like began with Wilson J's identification of three features of fiduciary relationships in *Frame v Smith*[266] :

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[267]

As Robert Flannigan points out, the problem with such a formula is that it is "potentially either expansive or restrictive. It is capable of producing any desired conclusion merely through the instrumental interpretation of the open-ended notions of power and vulnerability".[268] It is therefore not surprising that Wilson J's "rough and ready guide" to fiduciary relationships

[264] *Ibid* at 73. See *Galambos v Perez*, *supra* note 253, ("[i]t is important to remember, however, that not every legal claim arising out of a per se fiduciary relationship […] will give rise to a claim for a breach of fiduciary duty" at para 36, Cromwell J). See also *Lac Minerals*, *supra* note 41 at 597, Sopinka J; *McInerney*, *supra* note 253 at 149, La Forest J; *Wewaykum Indian Band v Canada*, 2002 SCC 7, [2002] 4 SCR 245 at 291-92, Binnie J [*Wewaykum* cited to SCR].
[265] Rotman, *Fiduciary Law*, *supra* note 30 at 78.
[266] *Supra* note 253.
[267] *Ibid* at 136.
[268] *Supra* note 9 at 70.

subsequently was altered or merely set aside on various occasions. In this regard, three key Canadian cases are particularly relevant.

The first case, *Lac Minerals Ltd v International Corona Resources Ltd*[269], concerned a junior and a senior mining company negotiating a joint venture. The senior company, Lac Minerals Ltd (Lac Minerals), had used confidential information obtained from the junior company, International Corona Resources Ltd (Corona), to buy the property under discussion, thereby depriving the junior company from it. Sopinka J, writing for the majority, endorsed Wilson J's formulation from *Frame v Smith* and emphasized vulnerability as the one essential defining feature of fiduciary relationships.[270] The majority ruled that no fiduciary relationship had been established in this arm's length commercial relationship.[271] However, according to the minority, led by La Forest J, a fiduciary relationship had been established. The touchstones of La Forest J's reasoning were the trust and confidence Corona had placed in Lac Minerals. Corona could reasonably expect that Lac Minerals would act in its interests – industry practices served as guidance as to what were reasonable expectations.[272] As to the vulnerability element, La Forest J held that it was not "a necessary ingredient" [273] of fiduciary relationships, although he believed that Corona was in a position of vulnerability.[274] With regards to the vulnerability facet of fiduciary relationships, the Supreme Court's discussion "is no more than assertion and counter-assertion and such debates are effectively unwinnable".[275]

In the second case, *Hodgkinson v Simms*[276], a financial advisor, Simms, did not disclose to his client, Hodgkinson, that he had a pecuniary interest in a real estate project in which Hodgkinson had invested upon the advice of Simms. Eventually, the real estate market crashed and Hodgkinson lost the investments he had made in the project. Although he lost his investments solely because the market crashed – Simms had not been negligent – Simms was ordered by the court to compensate Hodgkinson for his loss. Although the financial advisor-client is not a conventional category of fiduciary relationship, the majority, led by La Forest J, held that under a

[269] *Supra* note 41.
[270] *Ibid* at 599.
[271] *Ibid* at 606.
[272] *Ibid* at 663-664.
[273] *Ibid* at 662.
[274] *Ibid* at 666.
[275] Duggan, *supra* note 8 at 457.
[276] *Supra* note 253.

fact-based analysis, Hodgkinson and Simms could be found to be in a fiduciary relationship.[277] La Forest J reaffirmed the reasonable expectation test he had put forward in *Lac Minerals*, thereby disregarding the majority's endorsement in *Lac Minerals* of Wilson J's three part formula.[278] Sopinka and McLachlin JJ, for the dissent, found there to be no fiduciary relationship. Essentially, "the difference between the majority and the minority revolved around a question of degree on the trust and reliance front"[279]; while the majority affirmed that partial reliance on the part of the client towards his financial advisor was sufficient to satisfy the vulnerability criterion[280], the minority argued that total reliance is necessary for there to be a fiduciary relationship.[281]

The third case, *Galambos v Perez*[282], involved the bookkeeper of a law firm, Perez, who had voluntarily lent money to the law firm in financial difficulty. When it went bankrupt, Perez claimed her money back and sued the law firm and its principal, Galambos, for breach of fiduciary duty, among other things. The court unanimously held that no fiduciary relationship had been established between Perez and Galambos. The court substituted Wilson J's formula from *Frame v Smith* for a new one:

1. The fiduciary must undertake, expressly or impliedly, to act in the best interests of the beneficiary;[283]
2. "[T]he fiduciary has a discretionary power to affect the other party's legal or practical interests".[284]

Cromwell J, writing for the court, stated that Galambos held no discretionary power over Perez and that this was determinative of the non-fiduciary nature of their relationship.[285]

These cases show that "[d]eterminations of fiduciary liability are exercises in approximation"[286] in the common law tradition. Under the fact-based approach, which rests on vague concepts, a

[277] *Ibid* at 428ff.
[278] *Ibid* at 409-412.
[279] Duggan, *supra* note 8 at 458.
[280] *Hodgkinson v Simms*, *supra* note 253 at 418-19. See Duggan, *supra* note 8 at 458; Lionel Smith, "Case Comment. Fiduciary Relationships – Arising in Commercial Contexts – Investment Advisors: *Hodgkinson v. Simms*" (1995) 74:4 Can Bar Rev 714 at 716-19.
[281] *Hodgkinson v Simms*, *supra* note 253 at 465-71.
[282] *Supra* note 253.
[283] *Ibid* at paras 69, 75.
[284] *Ibid* at para 83.
[285] *Ibid* ("the finding of the trial judge that Mr. Galambos had no discretionary power over Ms. Perez's interests that he was able to exercise unilaterally or otherwise is fatal to her claim that there was an *ad hoc* fiduciary duty on Mr. Galambos' part to act solely in her interests in relation to these cash advances" at para 86).

test for identifying fiduciary relationships may be set aside and replaced by another. The fact-based approach thus "affords flexibility at the cost of predictability".[287] Therefore, observers fear an undue expansion of fiduciary liability.[288] This led to the recent emergence of principled theories of the fiduciary concept,[289] which aim to resituate fiduciary liability within a structured framework.

3.1.3 A "legal" approach?

In the CCQ, a duty of loyalty is explicitly attached to certain legal relationships. Does this entail, as Martel feared[290], that the duty of loyalty under Quebec's *jus commune* is limited to those particular instances?

At first glance, the civil law's structure and methods do seem to tend towards a legal compartmentalization of the duty of loyalty. Namely, the fact that the civil law is generally codified[291] evokes ideas of rigidity and completeness.[292] In other words, one could think that a

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[286] Miller, "Fiduciary Liability", *supra* note 8 at 239.
[287] Miller, "Fiduciary Liability", *supra* note 8 at 249.
[288] See e.g. McCamus, *supra* note 8; Miller, "Fiduciary Liability", *supra* note 8 at 237.
[289] See e.g. Fox-Decent, *Sovereignty's* Promise, *supra* note 213; Miller, "Fiduciary Liability", *supra* note 8; Miller, "Justifying Fiduciary Duties", *supra* note 9.
[290] Martel, "La loyauté et la bonne foi", *supra* note 248.
[291] Codification, however, isn't the one defining feature of civilian legal systems. See See Bisson, "Dualité de systèmes et codification civiliste" *supra* note 129 ("[b]ien que l'on confonde souvent le droit civil, en tant que système, avec son achèvement législatif moderne, c'est-à-dire la codification, celle-ci n'est pas de l'essence du droit civil; elle n'en est que l'instrument, encore que l'on puisse évidemment estimer qu'il s'agit là d'un instrument particulièrement efficace qui est devenu inséparable des vertus du système" at 43); Cantin Cumyn, "Premier bilan", *supra* note 20 at 464; Catherine Valcke, "The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Quebec" (1996) 46:4 UTLJ 539 at 542. Moreover, not all codes are civil codes. For these reasons, some authors identify civilian systems through what they call the "codification effect", rather than through codification itself. See Bisson, "Dualité de systèmes et codification civiliste" *supra* note 129 at 49, n 33; Alain-François Bisson, "Effet de codification et interprétation en droit civil québécois" (1986) 40 Rev jur et pol, Ind et coop 521; Valcke, *supra* note 291 at 542. Codification is an expression of the civil law's methods and of its mode of reasoning: Cantin Cumyn, "Premier bilan", *supra* note 20 ("[l]es éléments structurants, qui mettent le droit civil en état d'être codifié, sont intimement liés au mode de raisonnement déductif qu'il adopte: mentionnons ici l'importance accordée aux catégories juridiques et aux classifications, le soin mis à préciser le contenu des concepts et des notions juridiques, le recours aux principes généraux, la recherche de cohérence et d'harmonie entre les solutions retenues à l'intérieur du droit commun" at 464).
[292] Regarding the civil law's "completeness", see Jutras, "Cartographie de la mixité", *supra* note 120; Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 660; Sylvio Normand, "An Introduction to Quebec Civil Law" in Louise Bélanger-Hardy & Aline Grenon, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) 25 at 55; Valcke, *supra* note 291 at 549-551. See also my discussion concerning the openness of the *droit commun*: section 2.2.2.

civil code is a self-contained body of law and hence, that the duty of loyalty cannot come into play beyond the cases where it is codified.[293]

Moreover, due to some of the civil law's methods, namely categorization and classification, which are tied to the civilian deductive form of reasoning,[294] Quebec private law may seem bound to a taxonomic approach to loyalty – one that relies on the status of the legal actor. In civil law, categorization determines the legal regime applicable to a given legal actor. It is through the categorization of a given legal actor as, for instance, a mandatary or a provider of services that civilian jurists determine which set of legal provisions is applicable to this particular legal actor.

In light of the common law experience, confining Quebec law to a taxonomic approach to loyalty does not appear desirable. Such an approach obscures the nature of the relationships that give rise to a duty of loyalty as well as the fundamental elements the duty of loyalty rests upon. This may hinder the understanding and the expansion of the concept of loyalty.

Since Quebec private law of course has civilian origins, it is codified and is applied mostly following a deductive method, which means that jurists generally apply pre-existing written legal rules. This being said, it is important not to caricature legal systems.[295] As was argued in chapter 2, Quebec private law remains open to sources outside of its legislative corpus.[296] What is more, Quebec has a very active judiciary whose role goes beyond the strict application of written law and which has not been afraid at times to develop concepts and impose duties that were absent from the written law. The duty of loyalty itself emerged through case law before it was

[293] On the issue of determining whether imposing a duty of loyalty beyond the instances in which it is explicitly established in the CCQ is compatible with the civil law in Quebec, see the discussion in Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 660-62.
[294] Cantin Cumyn, "Premier bilan", *supra* note 20 at ("[l]es éléments structurants, qui mettent le droit civil en état d'être codifié, sont intimement liés au mode de raisonnement déductif qu'il adopte : mentionnons ici l'importance accordée aux catégories juridiques et aux classifications" at 464).
[295] Bisson, "Dualité de systèmes et codification civiliste" *supra* note 129 ("[i]l est affligeant de constater que, malgré les rectifications régulièrement apportées par tant de bons auteurs, les systèmes viennent à nous, dans les discours de tant de juristes, non pas dans leur réalité vivante, mais dans une grossière armure de légende : logique « cartésienne » et cohérence, mais déplorable rigidité, d'une part; pragmatisme « anglo-saxon » et souplesse, mais déplorable incohérence, d'autre part" at 41).
[296] See also Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 662.

introduced in the CCQ.[297] This latitude that the judiciary has in Quebec and the corresponding status of jurisprudence are, after all, distinctive features of Quebec's legal mixity.[298]

Although the common law fact-based approach probably shouldn't be seen as a model either because of its lack of coherence and predictability, an enquiry that focuses on the bases upon which the CCQ's duty of loyalty rests appears necessary. Then, once the contours of a theory of loyalty are drawn, the judges could use the flexibility they inherited from the common law to impose duties of loyalty even where it is not expressly provided by the CCQ. This may be called a "legal" approach to loyalty, an approach that rests upon the examination of the juridical situation of given legal actors in order to determine whether they are under a duty of loyalty.

In chapter 4, I will proceed to such an analysis. More specifically, I will examine the nature of the functions performed by the legal actors under a duty of loyalty in Quebec's *jus commune*. In the remainder of this chapter, however, I discuss two other impediments to an accurate understanding of loyalty in Quebec private law.

3.2 The wrongful assimilation of loyalty with good faith

In civil law, good faith is a dominant and tentacular notion, to such a point that it may inappropriately obscure other concepts. As a matter of fact, in Quebec, the duty of loyalty is often wrongfully assimilated with, or subsumed under, the general duty of good faith.

Conversely, the common law has generally been reluctant to recognize a concept as extensive as the civil law's good faith,[299] though a recent case from the Supreme Court of Canada has considerably broadened the scope of the common law duty of good faith in the performance of contracts.[300] Even so, good faith and loyalty are distinguished more readily in common law than in civil law.[301]

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[297] See this thesis, chapter 1. Unjust enrichment is another example; the concept was developed by courts before it was entrenched in the CCQ at arts 1493-96 CCQ; see *Cie Immobilière Viger v L Giguère Inc*, [1977] 2 SCR 67 (available on CanLII).

[298] Normand, "Acculturation du droit", *supra* note 11 at 16.

[299] Geoffrey Samuel, *Understanding Contractual and Tortious Obligations* (Exeter: Law Matters Publishing, 2005) at 32.

[300] *Bhasin v Hrynew*, 2014 SCC 71.

[301] Regarding the distinction between good faith and loyalty in common law, see e.g. Daniel Clarry, *The irreducible core of the trust* (LL.M. Thesis, McGill University Institute of Comparative Law, 2011) [unpublished] at 90-100; Miller, "Justifying Fiduciary Duties", *supra* note 9 ("[i]t is debatable whether there is anything else to the duty of loyalty. Some have argued that it includes a requirement of good faith. But it is unclear what this obligation requires

In this section, I contend that loyalty should be distinguished from good faith. I argue that the assimilation of loyalty with good faith that takes place in civil law hinders the accurate understanding of loyalty.

After having briefly introduced the notion of good faith, I describe how loyalty is often assimilated with good faith in Quebec private law. Afterwards, I argue that loyalty and good faith are in fact two very distinct duties, which impose different requirements and come into play in different settings. In support of my argument, I draw upon the recent decision of the Supreme Court of Canada in *Bhasin v Hrynew*[302] which, although rendered in a common law setting, is relevant in Quebec private law.

3.2.1 The assimilation of loyalty with good faith in Quebec private law

Although good faith is a fundamental notion in Quebec private law, it was, just like loyalty, absent from the CCLC. Good faith was gradually developed by authors[303] and caselaw[304], up until its explicit incorporation in the CCQ. It is now formally entrenched under various forms at arts 6, 7 and 1375 CCQ[305], yet the CCQ provides no definition of good faith. The description that follows thus relies on the accounts of good faith provided by the literature and case law.

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of the fiduciary and how it relates to the substance of the duty of loyalty" at 978 [footnotes omitted]); Richard Nolan & Matthew Conaglen, "Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?" in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) 319; Lionel Smith, "Can We Be Obliged to be Selfless?" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford, UK: Oxford University Press, 2014) 141 ("[i]t is clear, moreover, that when a person is under a duty of good faith, he is not under a duty that requires him to act in another's best interests" at 147); Smith, "The Motive", *supra* note 9 ("[b]ut the demands of good faith do not generally reach to the heights of the fiduciary obligation. An obligation to act in good faith does not import a duty of loyalty" at 66 [footnote omitted]).

[302] *Supra* note 300.

[303] See the well-known article written by Paul-André Crépeau, "Le contenu obligationnel d'un contrat" (1965) 43:1 Can Bar Rev 1.

[304] See *Bank of Montreal v Bail Ltée*, [1992] 2 SCR 554, 93 DLR (4th) 490 [*Bail* cited to SCR]; *Houle v Canadian National Bank*, [1990] 3 SCR 122, 74 DLR (4th) 577; *National Bank v Soucisse*, [1981] 2 SCR 339 (available on CanLII).

[305] Art 6 CCQ provides that "[e]very person is bound to exercise his civil rights in good faith", whereas art 7 CCQ provides that "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith". These two articles have been described as the Thomson and Thompson of good faith: see Marie Annik Grégoire, "Articles 6 et 7 du Code civil du Québec : chapeau noir et chapeau melon ou les Dupont et Dupond de la bonne foi" in Générosa Bras Miranda & Benoit Moore, eds, *Mélanges Adrian Popovici. Les couleurs du droit* (Montreal: Éditions Thémis, 2010) 261. Finally, according to art 1375 CCQ, "[t]he parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished".

Summarily, good faith is an objective[306] social standard of conduct which regulates the exercise of civil rights.[307] Minimally, it requires to act honestly and to avoid injuring others,[308] but it may also generate positive duties. The term "loyalty" is sometimes used as a synonym for the general duty of good faith in the exercise of civil rights.[309] This reveals, from the outset, a connection between loyalty and good faith in Quebec's legal vocabulary.

Good faith is often analyzed alongside the doctrine of abuse of rights[310], from which it should be distinguished.[311] The doctrine of abuse of rights is encapsulated in art 7 CCQ, which states that "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith".[312] Although the concepts overlap to some extent, good faith is broader[313] than the doctrine of abuse of rights,

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[306] As opposed to subjective, meaning that whether or not one has acted in good faith is evaluated by reference to a societal standard rather than by reference to one's personal motivations: Brigitte Lefebvre, "La bonne foi: notion protéiforme", (1996) 26 RDUS 321 ("[l]a notion de bonne foi n'est plus restreinte à l'étude de l'intention ou de la croyance d'un individu, mais implique également l'examen objectif de ses agissements en fonction d'un standard de comportement et ce, indépendamment de sa véritable intention" at 324) [Lefebvre, "Notion protéiforme"]. Note that the English version of art 6 CCQ mentions that "[e]very person is bound to exercise his civil rights *in good faith*" whereas the French version uses the expression "selon les exigences de la bonne foi". Notwithstanding this divergence in the vocabulary employed, good faith is still measured according to an objective standard. (CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "good faith", def 1, obs 2°). See e.g. *ABB inc c Domtar inc*, 2005 QCCA 733, [2005] RJQ 2267; *Construction DJL inc c Montréal (Ville de)*, 2013 QCCS 2681, JE 2013-1215; *Friedman c Ruby*, 2012 QCCS 1778, JE 2012-1169; *Hydro-Québec c Construction Kiewit Cie*, 2014 QCCA 947, JE 2014-953.

[307] CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "good faith", def 1; Vincent Karim, "La règle de la bonne foi prévue dans l'article 1375 du *Code civil du Québec*: sa portée et les sanctions qui en découlent" (2000) 41 C de D 435 at 441 [Karim, "Règle de la bonne foi"].

[308] Art 7 states that "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith". See Marie Annik Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice*, coll Minerve (Cowansville, Que: Yvon Blais, 2010 at 181 [Grégoire, *Liberté, responsabilité et utilité*]; LeBrun, *supra* note 118 at 3, para 6.

[309] The *Private Law Dictionary*. *Obligations*, *supra* note 5 defines good faith as "[l]oyalty and honesty in the exercise of civil rights" (*sub verbo* "good faith", def 1). See also Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308; Jobin & Vézina, *Les obligations*, *supra* note 6 at 265, para 161; LeBrun, *supra* note 118 at 3, para 6, and 14, para 34; Pineau & Gaudet, *supra* note 118 at 572, no 315.

[310] See e.g. *Subaru Auto Canada ltée c Caravane et auto du Cap inc*, JE 96-754, AZ-96011347 (CA) [cited to Azmiut] ("[l]es notions d'équité et de bonne foi sont indissociables, nous le voyons bien, de la théorie de l'abus des droits" at 8).

[311] Karim, "Règle de la bonne foi", *supra* note 307 at 442; Lefebvre, *La bonne foi dans la formation du contrat*, *supra* note 6 at 102 ("[l]a bonne foi a un champ d'application beaucoup plus étendu que l'abus de droit, qui n'en représente qu'un aspect" at 102).

[312] Abuse of rights is to be interpreted following one of the two axes set out in art 7 CCQ: an individual may commit an abuse of rights either intentionally or by adopting an excessive conduct that is contrary to the requirements of good faith. According to one author, "these two axes clearly demonstrate that good faith and bad faith are not always two sides of the same coin": *ibid* at 101 [translated by author]. Abuse of rights may relate to matters involving ownership, as well as contractual or procedural matters: Karim, "Règle de la bonne foi", *supra* note 307 at 442.

[313] *Ibid* at 441; Lefebvre, *La bonne foi dans la formation du contrat*, *supra* note 6 at 102; Lluelles & Moore, *Obligations*, *supra* note 6 at 1124, para 1987.

which is only a facet of good faith. In effect, good faith is a multivalent notion[314] whose content goes beyond the prohibition of abusive exercise of rights.

Namely, good faith finds particular application in contractual settings, where it is said to give rise to a "duty of loyalty", which rests on art 1375 CCQ. Art 1375 CCQ, which mentions that "[t]he parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished", applies to contractual as well as to extra-contractual obligations. This said, the contract is seen as the main field of application of the duty of good faith-loyalty set out in art 1375 CCQ.[315] Under this conception of loyalty, loyalty is a sub-duty,[316] a corollary,[317] of the general duty of good faith. More specifically, loyalty is seen as an application of the broad duty of good faith in the performance of contracts.[318]

Under this view, the duty of loyalty mostly consists of negative duties.[319] Globally, it requires that both parties[320] do not disrupt the harmony of the contractual relationship.[321] Namely, a party cannot: make in any way the performance of the other party's obligations more difficult,[322] act in a way which prevents the other from benefiting from the contract,[323] deliberately refuse to perform her obligations,[324] profit from an unfair situation at the expense of the other party or create false expectations.[325]

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[314] Lefebvre, "Notion protéiforme", *supra* note 306 at 353; Didier Lluelles, "La bonne foi dans l'exécution des contrats et la problématique des sanctions" (2004) 83:1 Can Bar Rev 181 at 188 [Lluelles, "Problématique des sanctions"]; Lluelles & Moore, *Obligations*, *supra* note 6 at 1119, para 1978; Pineau & Gaudet, *supra* note 118 ("la bonne foi est un concept-phare du droit civil contemporain, aux contours d'autant plus flous que son domaine est étendu. Il n'est donc pas aisé de la définir d'une façon précise, encore moins d'en expliquer sommairement toutes les subtilités" at 34-35, para 17.1 [footnote omitted]); Adrian Popovici, "Le sort des honoraires extrajudiciaires" (2002) 62 R du B 53 at 98-103.

[315] Pineau & Gaudet, *supra* note 118 ("[b]ien que ce texte [de l'article 1375 C.c.Q.], à l'instar des principes posés aux articles 6 et 7 C.c.Q., vise toutes les obligations, qu'elles soient d'origine contractuelle ou légale, il demeure que le contrat est le domaine de prédilection de l'obligation de bonne foi-loyauté" at 40, para 17.4).

[316] Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 at 176, 181.

[317] Karim, *Les obligations*, *supra* note 6 at 101.

[318] Jobin & Vézina, *Les obligations*, *supra* note 6 at 265, para 160.

[319] *Ibid* at 265, para 161; Lluelles & Moore, *Obligations*, *supra* note 6 at 1120, para 1979.

[320] Jobin & Vézina, *Les obligations*, *supra* note 6 at 266, para 161.

[321] Lluelles & Moore, *Obligations*, *supra* note 6 at 1120, para 1979.

[322] Jobin & Vézina, *Les obligations*, *supra* note 6 at 266, n 324, referring to *Aéroports de Montréal c Hôtel de l'aéroport Mirabel*, [2003] RJQ 2479 (available on Azimut) (CA), aff'g [2002] RJQ 1721 (available on Azimut) (Sup Ct); Karim, *Les obligations*, *supra* note 6 at 101; Pineau & Gaudet, *supra* note 118 at para 315.

[323] Lluelles & Moore, *Obligations*, *supra* note 6 at 1120, para 1979.

[324] *Ibid* at 1120, n 58, referring to *Samson & Associés c Chatila*, JE 2003-485, AZ-50158530 (Sup Ct).

[325] LeBrun, *supra* note 118 at 15, para 35. See generally, regarding the duties that loyalty entails, Lluelles & Moore, *Obligations*, *supra* note 6 at 1120-34, paras 1979-96.

In other words, under this conception of loyalty, loyalty consists of duties "not to". It is therefore considered by some to be the passive form of the general duty of good faith in the performance of contracts, its active form being the duty of cooperation.[326] The duty of cooperation requires that the parties to a contract actively facilitate the fulfillment of their common goals, as long as this does not unduly interfere with the pursuit of a party's own legitimate interests.[327]

It is to be noted, however, that for some authors, the duty of loyalty and the duty of cooperation relate to the same concept.[328] They consider that loyalty not only requires that a party avoids harming the other party during the performance of her obligations, but that she positively facilitates the performance of the contract.[329]

This being said, jurists in Quebec generally consider that the duties of loyalty entrenched in arts 322, 1309, 2088 and 2138 CCQ derive from the "duty of loyalty" described above, understood as a sub-duty of the general duty of good faith in the performance of contracts.

For instance, in *La bonne foi dans la formation du contrat*, Brigitte Lefebvre wonders what conclusion should be drawn from the specific inclusion in the CCQ of explicit duties of loyalty at arts 322, 1309, 2088 and 2138 CCQ.[330] She determines that the term *loyauté* found in these articles[331] was not employed to create an opposition between the concepts of loyalty and good faith; in her opinion, this choice of vocabulary simply denotes that good faith imposes particular

[326] LeBrun, *supra* note 118 at 14, para 34.
[327] Karim, *Les obligations*, *supra* note 6 ("[l]a coopération consiste en l'adoption par les contractants d'une conduite qui facilite l'exécution du contrat et lui permet de produire son plein effet. Les parties doivent donc favoriser un comportement qui permet la réalisation des objectifs communs du contrat, tout en assurant à chacune d'elles l'atteinte de ses buts personnels, sans toutefois nuire à l'intérêt de l'autre" at 101 [footnote omitted]). See *Provigo Distribution Inc c Supermarché ARG Inc*, [1998] RJQ 47, AZ-98011010 (Azimut) (CA) [*Provigo* cited to AZ].
[328] Marie Annik Grégoire, *Le rôle de la bonne foi dans la formation et l'élaboration du contrat*, coll Minerve (Cowansville, Que: Yvon Blais, 2003) at 23-24 [Grégoire, *Rôle de la bonne foi*]; Karim, *Les obligations*, *supra* note 6 at 101-102.
[329] For instance, in a franchise contract, the duty of cooperation requires that the franchiser provides technical and commercial assistance to his franchisees: *Provigo*, *supra* note 327 at 30-31, 33.
[330] *Supra* note 6 ("[p]ourquoi le législateur ne parle-t-il de loyauté que dans les situations où il existe une relation particulière entre les parties du type de celles que l'on rencontre entre un mandant et son mandataire, entre l'administrateur d'une personne morale et cette dernière, entre un employeur et son employé, entre l'administrateur du bien d'autrui et les personnes en faveur de qui il administre les biens? Le devoir de loyauté n'existerait-il que dans des situations où la confiance est primordiale et les risques de conflits d'intérêts très probables?" at 134-35).
[331] It should be noted however that while the word *loyauté* appears in the French version of arts 322, 1309, 2088 and 2138 CCQ, the word "loyalty" only appears in art 322 CCQ's English version. *Loyauté* is translated as "faithfully" in arts 1309, 2088 and 2138 CCQ.

requirements in certain contracts.[332] Therefore, she contends that loyalty merely is a facet of good faith.[333]

Similarly, the *Private Law Dictionary* states that arts 322, 1309 and 2138 CCQ "are in fact illustrations of the general principle of good faith applied to specific situations".[334] Art 2088 CCQ, which imposes a duty of loyalty on the employee, is also thought to be an application of the principle of good faith.[335] In fact, according to some commentators, the duty of loyalty expressly entrenched in the CCQ simply corresponds to a high degree of good faith.[336]

Thus, in Quebec private law, it is commonly thought that loyalty is inexorably linked with good faith. As was shown, even the duty of loyalty expressly entrenched at arts 322, 1309, 2088 and 2138 CCQ is generally seen as a manifestation of the duty of good faith in the performance of contracts. This is symptomatic of a misunderstanding of the duty of loyalty.

3.2.2 Loyalty and good faith's different nature

Contrary to the prevailing assumption in Quebec private law, the duty of loyalty expressly entrenched in the CCQ has nothing to do with the duty of good faith in the performance of contracts. The duties are different in nature; they impose different requirements because they operate in different settings.

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[332] Lefebvre, *La bonne foi dans la formation du contrat*, *supra* note 6 ("[a]insi, lorsqu'on utilise le terme « loyauté » dans le Code, ce n'est pas pour faire opposition entre cette notion et celle de bonne foi, mais c'est plutôt pour rendre l'idée des exigences particulières que la bonne foi requiert dans ces types de contrats" at 136).

[333] *Ibid* at 135. Likewise, according to Martel, a duty of loyalty was codified in certain articles of the CCQ "in order to establish that [the concept of good faith as a fundamental underlying principle] is to govern the conduct of parties": "Harmonization", *supra* note 35 at 166.

[334] CPCL, *Private Law Dictionary. Obligations*, supra note 5, *sub verbo* "good faith", def 1, obs 4°. *C.f. ibid sub verbo* "obligation of loyalty", obs 1 ° ("[t]he obligation of loyalty may be express (arts. 322, 1309, 2088, 2138 C.C.Q.) or implied (arts. 6, 7, 1375, 1434 C.C.Q.)"). According to some commentators, the duty of good faith can be invoked in order to impose a duty of loyalty in cases where it is not expressly provided by the CCQ: Lluelles & Moore, *Obligations*, *supra* note 6 at 1121, para 1980.

[335] France Hébert, *L'obligation de loyauté du salarié* (Montreal : Wilson & Lafleur, 1995) ("[l]'obligation de loyauté qui incombe au salarié en vertu de l'article 2088 C.c.Q. émane donc de la bonne foi qui doit dominer les relations contractuelles" at 40); Madeleine Cantin Cumyn, "L'obligation de loyauté dans les services de placement" (2012) 3:1 Bulletin de droit économique 19 at 19-20.

[336] Tancelin, *Obligations*, *supra* note 6 ("[l]'obligation d'honnêteté et de loyauté de l'administrateur dans l'intérêt de la personne morale, 322 C.c.Q. constitue un cran supplémentaire dans l'obligation de bonne foi" at 342, para 491); Ginette Leclerc, "La bonne foi dans l'exécution du contrat – Première partie : Le contrat en général (rapport canadien)" in *La bonne foi. Actes des Journées louisianaises* – 1992, Travaux de l'Association Henri Capitant, t 43 (Paris: Litec, 1994) 265 [Leclerc, "La bonne foi"] ("[e]n définitive, on peut conclure que l'obligation de loyauté est une des facettes de l'obligation de bonne foi, facette qui entre en jeu lorsque la nature du contrat exige un degré de bonne foi particulier" at 269).

Interpreted in light of the legal power theory that was introduced in chapter 2, the duty of loyalty in Quebec private law requires that the person under this duty acts in the interests of another or in the furtherance of a goal.[337] Good faith, on the other hand, imposes an honest standard of behaviour, but it does not consist in a duty to look after the co-party's interests.[338]

For instance, in a Quebec Court of Appeal case[339] which concerned the duty of good faith a financial institution owed to its clients, the clients argued that the financial institution had been negligent in granting them a loan that they wouldn't be able to repay, due to their financial condition. The Court of Appeal rejected the clients' claim; it held that although the financial institution was under a duty of good faith towards its clients, it had no duty to look after its clients' interests.[340]

In another case involving a financial institution, a client argued that the bank should have informed him that his other guarantee contract remained in force when it released him of a first guarantee. As the client had not specifically asked to be released from his other guarantee, the Superior Court rejected the client's argument and ruled that the duty of good faith does not require that the bank offers more than what the client specifically asked for.[341]

These two cases clearly show that in a contractual setting, good faith imposes an honest standard of behaviour, but goes no further. Good faith is not a duty of devotion to another party. As mentioned by the Supreme Court of Canada in *Bank of Montreal v Bail*[342] – a landmark case concerning good faith in Quebec private law –, there is a "fundamental obligation which rests on everyone […] to take care in conducting his or her affairs".[343] Thus, whereas good faith is

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[337] Cantin Cumyn, "The Legal Power", *supra* note 35 at 360-61. This interpretation of the duty of loyalty also flows from the very wording of arts 322 (regarding the director of a legal person), 1309 (regarding the administrator of the property of another) and 2138 CCQ (regarding the mandatary), which all mention a duty to act "in the interest" or "in the best interest" of the beneficiary of the duty of loyalty. As I will discuss in section 3.3.2, the employee is under a duty to act in the best interests of his employer as well, although it is less clear from the wording of art 2088 CCQ.

[338] Grégoire, *Rôle de la bonne foi*, *supra* note 328 at 14-17.

[339] *Caisse populaire Desjardins St-Jean-Baptiste-de-LaSalle c 164375 Canada inc*., [1999] RRA 482, REJB1999-11807 (CA) [cited to REJB].

[340] *Ibid* at paras 20-21.

[341] *Banque Royale du Canada c Dompierre*, JE 2003-1455, AZ-50182358 (Sup Ct) [cited to Azimut] ("[l]e devoir d'agir de bonne foi, même pour une banque, ne va pas jusqu'à offrir plus que ce qu'un débiteur demande" at para 36).

[342] *Supra* note 304.

[343] *Ibid* at 587.

omnipresent in civil law, "it is illusory to believe that there is, in Quebec private law, a general obligation to satisfy the interests of another".[344]

In common law, a recent Supreme Court case, *Bhasin v Hrynew*[345], heard on appeal from the Alberta Court of Appeal, made it very clear that the duty of good faith does not amount to a duty of loyalty. Although rendered in a common law setting, where good faith is traditionally given a narrower scope than in civil law,[346] this judgment is relevant in Quebec private law. First, because the Court emphasizes the distinction between good faith and loyalty in establishing the existence of a common law duty of good faith in the performance of contracts, which is given comparable scope to contractual good faith in civil law. Second, because the CCQ's duty of loyalty has common law origins, as was demonstrated in the first part of this thesis. This means that the distinction the Court draws between good faith in the performance of contracts and loyalty has some relevance under Quebec private law. What is more, the Supreme Court of Canada is, after all, the country's highest judicial organ.[347]

In *Bhasin v Hrynew*, the Court established the existence, in common law, of a duty of honest performance in all contracts, deriving from a duty of good faith. The case opposed a retail dealer, Bhasin, and a company who marketed education savings plans. Bhasin argued that the company had a dishonest behaviour in exercising the non-renewal provision contained in the dealership agreement. Namely, the company had resorted to this provision in order to force the merging of Bhasin's business with that of a competitor, Hrynew, although it had led Bhasin to believe that the company's restructuration plans were far from certain. Moreover, the company had appointed Hrynew to verify its retail dealers' compliance with Alberta securities laws, among whom Bhasin. The company had also misled Bhasin in saying that Hrynew was under an obligation of confidentiality with regards to the business records he consulted during his verifications. As a result of the company's exercise of the non-renewal clause, Bhasin lost all of his business' value to the profit of Hrynew's.

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[344] Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 at 150 [translated by author].
[345] 2014 SCC 71.
[346] Samuel, *Understanding Contractual and Tortious Obligations*, *supra* note 299 at 32.
[347] Regarding the Supreme Court of Canada's influence on Quebec civil law, see especially H Patrick Glenn, "La Cour suprême du Canada et la tradition du droit civil" (2001) 80 Can Bar Rev 151; Pierre-Gabriel Jobin, "La Cour suprême et la réforme du Code civil" (2000) 79:1 Can Bar Rev 27.

In ruling that a duty of honest performance deriving from good faith as a "general organizing principle of the common law of contract"[348] was immanent in any contractual undertaking, the Court was cautious in stating that this duty did not amount to a fiduciary duty of loyalty.[349] The Court held that the duty of good faith in the performance of contracts requires that a party "[has] appropriate regard to the legitimate contractual interests of the contracting partner"[350] but that it "does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first".[351] The Court thus emphasized good faith's "strong conceptual differences from the much higher obligations of a fiduciary".[352]

The Court also explained that the duty of good faith in contractual performance was not contrary to the philosophy that underpins the law of contracts, "which generally places great weight on the freedom of contracting parties to pursue their individual self-interest".[353] Indeed, in commerce, parties may intentionally cause loss to one another, and this, as such, is not prohibited by the duty of good faith.[354] Requiring that a party performs a contract honestly does not mean that this party cannot pursue her self-interest in doing so. The Court stated that the duty of good faith in contractual performance simply is "a reassurance that if the contract does not work out, [both parties] will have a fair opportunity to protect their interests".[355]

This brings me to discuss the different contexts in which the duties of good faith and loyalty operate. In civil law, good faith certainly arises in contractual settings, but it also regulates, more generally, the exercise of one's rights.[356] In fact, good faith comes into play whenever a person acts for herself, on her own behalf and in her own interests. In other words, the duty of good faith governs the conduct of a person whenever she acts under her capacity of titulary of subjective rights.[357] The contract is, however, an ideal legal instrument for the exercise of subjective

[348] *Bhasin v Hrynew*, *supra* note 345 at para 33.
[349] *Ibid* at paras 60, 65, 73, 85.
[350] *Ibid* at para 65.
[351] *Ibid*.
[352] *Ibid*.
[353] *Ibid* at para 70.
[354] *Ibid*.
[355] *Ibid* at para 86.
[356] CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "good faith", def 1; Karim, "Règle de la bonne foi", *supra* note 307 at 441.
[357] The concept of subjective right was introduced in chapter 2 and will be discussed in greater detail in section 3.3.1, but for the present purposes, a subjective right should simply be understood as a legal prerogative a person exercises on her own behalf and in her own interests.

rights[358] as it usually is a means by which a person seeks to protect and promote her own interests against those of the other contracting party.[359] Indeed, the contract is generally seen as the reunion of two sets of distinct – and sometimes conflicting – interests that settle on an object which it is in their common interest to carry out. [360]

Good faith does not come in contradiction with such a conception of the contract. Good faith simply regulates the selfish exercise of one's rights. Indeed, even under its most constraining form – the duty of cooperation –, contractual good faith never requires that a party selflessly furthers the interests of another party.

The duty of cooperation does require that a party actively helps the other party to fulfill the object of the contract, even if it does not immediately profit to the helping party.[361] This may seem to depart from the classic conception of contract as the instrument through which the parties seeks to satisfy their own personal interests. However, as commentators rightly point out, "this squaring of the circle is illusory. In truth, in a long term perspective, cooperation is profitable to each of the parties".[362] Indeed, "[cooperation] is not devoid of interest for the party subject to this duty, as it promotes the sustainability of the contract".[363] Most importantly, cooperation never goes so far as to require that a party acts in abnegation of her own interests.[364]

Good faith, being a mechanism that regulates the exercise of subjective rights, is thus compatible with the idea of selfishness, at least to a certain extent. Conversely, the duty of loyalty is

[358] Samuel, "Droit Subjectif", *supra* note 217 at 266.
[359] Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 ("[p]ar l'intérêt qu'il protège, le droit subjectif est très certainement une des premières sources de motivation à conclure un contrat" at 172).
[360] See Laurent Aynès, "L'obligation de loyauté" (2000) 44 Arch Philo Droit 195 ("[l]a plupart des conventions associent des intérêts conflictuels qui s'entendent sur un objet commun" at 200).
[361] Jobin & Vézina, *Les obligations*, *supra* note 6 at 271, para 162. See also *Bail*, *supra* note 304; *Provigo*, *supra* note 327.
[362] Llueles & Moore, *Obligations*, *supra* note 6 at 1134, para 1997 [translated by author].
[363] [translated by author] Catherine Thibierge-Guelfucci, "Libres propos sur la transformation du droit des contrats" (1997) RTD civ 357 ([c]e principe de coopération] participe d'une aspiration qualitative d'altruisme et de solidarité qui n'est cependant pas dépourvue d'intérêt pour la partie qui s'y trouve soumise, puisqu'il favorise la pérennité du contrat » at 382, no 31), cited in Llueles & Moore, *Obligations*, *supra* note 6 at 1135, n 156.
[364] Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 ("[a]insi, même lorsque l'on impose une obligation de renseignement ou un devoir de collaboration, il n'est nullement question que le cocontractant avantagé le fasse en abnégation de ses propres intérêts" at 187). See also *2328-4938 Québec inc c Naturiste JMB inc*, [2000] RJQ 2607, JE 2000-2013 (Sup Ct) (concerning the refusal of Quebec courts to incorporate the common law "fiduciary obligation" and the demanding requirements it entails in a franchise contract); *Provigo*, *supra* note 327 at 25-26.

precisely a duty of selflessness.[365] This is due to the fact that loyalty regulates the exercise of legal powers, which are in essence exercised in an interest other than that of the holder of the legal powers.

This being said, loyalty and good faith may be co-existing duties. In fact, the four legal actors upon whom a duty of loyalty is imposed by the CCQ act, under certain circumstances, as titularies of subjective rights although they are, in the exercise of their functions, vested with legal powers. Their duality of statuses will be explained more thoroughly in the next part of this chapter. In such circumstances, good faith regulates the conduct of a legal actor acting under his quality[366] of titulary of subjective rights, whereas this same legal actor will be under a duty of loyalty if he is vested with legal powers. Therefore, a person may be under a duty of loyalty *and* a duty of good faith. Only, she will be subject to those duties under different qualities.

In brief, loyalty is not merely a duty of good faith of greater intensity; it is a duty of a different nature. The nature of the duty of loyalty will be examined more closely in the next section, but the paragraphs above nonetheless showed that good faith is very distinct from the duty of loyalty. Essentially, while loyalty is characterized as a duty to further the interests of another or of a purpose, in no case does the duty of good faith impose such a requirement. This is due to the fact that good faith and loyalty regulate the exercise of distinct legal prerogatives: subjective rights (selfish legal prerogatives) or legal powers (selfless ones). Assimilating loyalty with good faith, as is commonly done in civil law, therefore undermines the understanding of loyalty because it does not situate the duty upon the correct basis. However, as I will explain in the next section, the concept of subjective right constitutes an important paradigm in civil law; civilian jurists

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[365] Madeleine Cantin Cumyn, "Les actes juridiques accomplis dans l'exercice de pouvoirs" in Benoît Moore, ed, *Mélanges Jean-Louis Baudouin* (Cowansville, Que: Yvon Blais, 2012) 243 [Cantin Cumyn, "L'exercice de pouvoirs"] ("[l]e pouvoir, intrinsèquement circonscrit par la finalité en vue de laquelle il est conféré, n'est jamais destiné à servir l'intérêt de celui qui est autorisé à l'exercer" at 246). Concerning the idea of selflessness in common law fiduciary relationships, see Smith "Can We Be Obliged to be Selfless?", *supra* note 301; Lionel Smith, "Fiduciary Relationships", *supra* note 9 ("fiduciaries [are] people who are required to exercise their judgement in an unselfish way" at 608); PA Keane, "The Conscience of Equity" (2009 WA Lee Lecture in Equity, delivered at the Banco Court, Supreme Court of Queensland, 2 November 2009), (2010) 10 Queensland University of Technology Law & Justice Journal 106 ("[t]he fiduciary obligation is a special exception to the acceptance of selfishness as a fact of life" at 116).

[366] In French, the expression *ès qualités* indicates that a person is not acting on her own behalf, but in the exercise of her functions. See Office québécois de la langue française, *Banque de dépannage linguistique*, online : BDL <http://bdl.oqlf.gouv.qc.ca/bdl> *sub verbo Ès qualité* ("[l]a langue juridique a conservé un emploi bien vivant de *ès* dans l'expression *ès qualités*, qui est suivie ou non d'un complément. Cette expression qualifie une personne qui agit dans le cadre de ses fonctions, selon les qualités propres à sa fonction, et non à titre personnel"). See e.g. art 1344 CCQ.

naturally envision persons as titularies of subjective rights, that is as persons who exercise their own rights in their personal interest. As good faith regulates the exercise of subjective rights, the predominance of the concept of subjective right in civil law may explain why loyalty is often assimilated to good faith.

3.3 The uncertain nature of loyalty

In civil law, due to the paradigm of subjective rights, it is generally assumed that a person acts on her own behalf and in her own interest. Therefore, the civil law tends to consider that a person is either exercising her own rights or unlawfully interfering with those of another.[367]

Yet, the situation of the legal actors under a duty of loyalty does not fit into this paradigm. In the performance of their functions, the legal actors subject to a duty of loyalty are not exercising their own rights nor are they illegitimately interfering with those of the person on whose behalf they are acting. I will discuss the nature of the functions performed by the legal actors subject to a duty of loyalty more thoroughly in chapter 4, but for the purposes of the following section, it is important to simply take note that the legal actors upon whom a duty of loyalty is imposed act on behalf of another or in the furtherance of a purpose. The civil law thus is in a deadlock when it comes to understanding the nature of the functions performed by legal actors whose situation does not correspond to that of titularies[368] of subjective rights.

In this section, I first describe the notion of subjective rights and I explain how it is ubiquitous in civil law. I then distinguish the concept of subjective right from that of legal power, a concept which I introduced previously in chapter 2 and with which the notion of loyalty is intrinsically linked. Finally, I discuss whether loyalty is an obligation – a notion which is closely related to that of subjective rights.

3.3.1 The subjective right paradigm

While duties and remedies are at the forefront of common law legal analysis, the civil law places the emphasis on the person, her rights and her liabilities.

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[367] This is the idea expressed, although in different terms, by Valcke, *supra* note 291: "[e]very human action is either a legitimate exercise of one's freedom […] or else an illegitimate interference with someone else's freedom" at 573 [footnote omitted].

[368] See Cantin Cumyn, "The Legal Power", *supra* note 35 ("[a]lthough the word *titulary* is no longer in current use in English, it has been retained to translate *le titulaire d'un droit* in preference to *holder* (*détenteur*), which, in the civil law, mostly relates to a personal right to use a thing belonging to another person. The lessee is a typical holder of a thing" at 352, n 20).

More specifically, in civil law, persons are generally seen as titularies of subjective rights. While there is no universally accepted definition of the concept[369], it is generally acknowledged that a subjective right is a legal prerogative attached to a subject of rights (a natural or legal person), which this person exercises, in her own interest, over another person or a thing, the legal object.[370] A subjective right is a legal prerogative exclusive to its titulary; it is therefore opposable to others. If someone infringes on another's subjective right, the titulary of a subjective right is legally entitled to enforce the respect of his right. Simply put, the titulary of a subjective right has a right which the rest of the world has a duty to respect.[371]

Within the scope of his legal prerogative, the titulary of a subjective right may exercise his right the way he wants, as long as he respects the limits imposed by the law.[372] Therefore, a subjective right is an "egoistic prerogative"[373] because the titulary of a subjective right does not have to exercise his legal prerogative in an interest other than his own and cannot be legally compelled to do so.

Put another way, every person has a "legal sphere"[374] within which she is the only sovereign. Subjective rights are found within this sphere. The civilian notion of patrimony is a way to conceptualise this legal sphere which belongs exclusively to a person.[375] As a matter of fact, the patrimony has famously been described as an "emanation of legal personality".[376] Indeed, the patrimony can be seen as the "material extension" of a person; a person acquires subjective rights and incurs obligations through her patrimony. More specifically, the patrimony is a

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[369] Jacques Guestin & Gilles Goubeaux, with the collaboration of Muriel Fabre-Magnan, *Traité de droit civil. Introduction générale*, 4th ed (Paris: Librairie générale de droit et de jurisprudence, 1994) (when introducing the concept of subjective right, the authors underline the "caractère flou d'une notion sur la définition de laquelle personne ou presque ne parvient à s'accorder" at 126). See also Grégoire's excellent summary of the dissensions surrounding the subjective right: *Liberté, responsabilité et utilité*, *supra* note 308 at 121-29.

[370] *Ibid* (the subjective right is described by the author as a "prérogative individuelle sur autrui ou sur un bien") at 44.

[371] *Ibid* ("le pendant d'un droit subjectif est l'obligation pour autrui de le respecter" at 45 [footnote omitted]).

[372] The only limits to the exercise of subjective rights are civil liability, good faith and abuse of rights: see Cumyn, "Les conflits d'intérêts", *supra* note 92 at 54.

[373] Cantin Cumyn, "The Legal Power", *supra* note 35 at 355, referring to Michel Storck, *Essai sur le mécanisme de la représentation dans les actes juridiques* (Paris: Librairie générale de droit et de jurisprudence, 1982) at 176.

[374] The idea of a legal sphere will be developed in chapter 4.

[375] Art 2, para 1 CCQ states that "[e]very person is the holder of a patrimony".

[376] Charles Aubry & Charles-Frédéric Rau, *Cours de droit civil français*, 4th ed, t 6 (Paris: Marchai et Billard, 1873) at 231, translation by Nicholas Kasirer, "Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine" (2008) 38 RGD 379 at 473 [Kasirer, "Aubry and Rau on the Patrimoine"].

universality of assets and debts, attached to a person[377], in which the assets may serve to pay off the debts. It is a grouping of subjective rights and obligations, in which the rights guarantee the performance of the obligations.[378] The patrimony thus is the juridical construct that represents the subject of rights on the legal scene; it contains his rights and obligations.

The manifestations of the subjective right paradigm are countless.[379] The obligation is a clear iteration of the paradigm. The CCQ describes the obligation as follows:

> It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.[380]

For the present purposes, the first part of the CCQ's definition is crucial; an obligation arises between two persons, the debtor and the creditor. The obligation arises as a result of the interaction between two persons and binds the debtor of the obligation personally, while the creditor has a corresponding subjective right (a claim) which he may invoke against the debtor. In the debtor-creditor relationship of obligation, the obligation and the corresponding subjective right are part of the parties' respective patrimonies.

The concept of subjective right also pervades the CCQ's very structure, inherited from the *Corpus Iuris Civilis*. The CCQ's preliminary provision states that the CCQ "governs persons, relations between persons, and property". In other words, the CCQ is built around three major pillars: the person, obligations and property.[381] Thus, the person is the focal point of civilian private law, and she is seen under the angle of the rights she possesses (such as the right of ownership, which dominates the civilian law of property) and the obligations she may incur.

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[377] Art 2, para 1 CCQ.

[378] Paul-André Crépeau Centre for Private and Comparative Law et al, eds, *Private Law Dictionary and Bilingual Lexicons. Property* (Cowansville, Que: Yvon Blais, 2012) *sub verbo* "patrimony" [CPCL, *Private Law Dictionary. Property*]; Guestin & Goubeaux, *supra* note 369 at 158, para 207.

[379] For instance, the fact that strict formalities are attached to liberalities indicate that the legislator is suspicious with respect to actions performed with a liberal intent, "on the basis of a spirit of generosity rather than in fulfilment of some obligation" (John EC Brierley, "The Gratuitous Trust : A New Liberality in Quebec Law" in Paul-André Crépeau & Quebec Research Center for Private and Comparative Law, eds, *Mélanges presented by McGill colleagues to Paul-André Crépeau* (Cowansville, Que: Yvon Blais, 1997) 119 at 123). See art 1824, para 1 CCQ; Jobin & Vézina, *Les obligations*, *supra* note 6 at 109, para 69. The fact that a sufficient interest is required to validly bring a claim to court constitutes another manifestation of the subjective right paradigm. See art 55 of the *Code of Civil Procedure*.

[380] Art 1371 CCQ.

[381] The CCQ's book one is called "Persons", its book four is called "Property" and its book five "Obligations".

It is to be noted that there is no subjective right paradigm per se in the common law tradition, which historically developed along a different frame of thought. As Geoffrey Samuel explains, "[i]n England the historical absence of an Institutional system whereby rights were founded upon legal relationships […] means that far less emphasis has been accorded to the actual conceptual devices linking citizens with each other (obligations), with things (property) or with the State (public law)".[382] Rather, in common law, the relationships between persons are analyzed in terms of duties, duties which give rise to specific forms of actions when they are breached.[383] Therefore, "it is extremely difficult to talk about le *droit subjectif* outside the rational structure inherited from the *Corpus Iuris Civilis*".[384]

This being said, civilian legal analysis rests upon the concept of person, a concept shaped by the influence of the subjective right paradigm. The civil law proceeds upon the idea that the person, a titulary of subjective rights, acquires rights and incurs obligations for herself when she performs juridical acts. Such rights and obligations are found within that person's patrimony.

However, in the course of their functions, the legal actors under a duty of loyalty are not acting as titularies of subjective rights. The rights and obligations that arise as a result of their actions are imputed to another person than themselves; the patrimony of another is affected by their actions. For instance, when a mandatary enters into a contract with a third party on behalf of the mandator, the mandatary himself does not acquire a personal right against the third party – a right that would entitle him personally to request the legal enforcement of the performance of the obligation. Rather, this right is attributed to the mandator. Likewise, the mandatary himself does not incur obligations as a result of this juridical act; instead, the obligations are part of the mandator's patrimony.

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[382] Samuel, "Droit Subjectif", *supra* note 217 at 267.

[383] See generally Samuel, *Understanding Contractual and Tortious Obligations*, *supra* note 299. See also Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 at 44-45.

[384] Samuel, "Droit Subjectif", *supra* note 217 at 267. Although historically the notion of subjective right developed in a manner specific to the civil law, from a conceptual standpoint, the notion still finds resonance in the common law. Indeed, for some common law authors, duties and rights are correlatives of one another and are held by persons against persons: see e.g. Peter Birks, *English Private Law* (Oxford, NY: Oxford University Press, 2000); Donal Nolan & Andrew Robertson, *Rights and Private Law*, (Portland, Oregon: Hart Publishing, 2012); Ernest Weinrib. The Idea of Private Law (Oxford, UK: Oxford University Press, 2012). In this sense, they may resemble subjective rights. Nonetheless, the concept of subjective right, taken as a personal legal prerogative one exercises over another person or a thing, is foreign to the common law: see Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 at 44-45; Samuel, "Droit Subjectif", *supra* note 217.

Therefore, the mandatary, just like the other legal actors under a duty of loyalty, does not fit into the civilian conception of persons, seen as titularies of subjective rights who directly affect their own patrimony. In the performance of their functions, the legal actors subject to a duty of loyalty are exercising a legal prerogative on behalf of another. This is where the concept of legal power, which will be discussed next, comes into play.

3.3.2 Loyalty in relation to subjective right and legal power

Whereas the titulary of a subjective right may seek to satisfy his personal interests as long as it does not unduly harm another, a legal power is not a legal prerogative one exercises in one's own interest.[385] Therefore, a legal power has been described as an "altruistic prerogative (*prérogative altruiste*)".[386] It has also been described as a "prerogative constrained by a purpose (*prérogative finalisée*)"[387] because it has a predetermined purpose, either the representation of a person or the accomplishment of another goal. Indeed, as mentioned previously, "[t]he person to whom powers of representation have been attributed must necessarily act in the name and the exclusive interest of the person represented. The person to whom autonomous powers have been attributed exercises them to achieve the goal for which the powers were granted in the first place".[388] In both of these cases, the holder of a legal power is bound to act loyally, that is in conformity with the purpose of his powers and independently from his personal wishes or preferences.[389] Loyalty, taken as the duty to act in another's best interests or in the furtherance of a purpose, is inherent to the exercise of legal powers.

All four legal actors upon whom a duty of loyalty is explicitly imposed by the CCQ are holders of legal powers. I explain why in this subsection and give further explanations in chapter 4.[390]

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[385] Cantin Cumyn, "Les actes juridiques accomplis dans l'exercice de pouvoirs", *supra* note 365 ("[l]e pouvoir, intrinsèquement circonscrit par la finalité en vue de laquelle il est conféré, n'est jamais destiné à servir l'intérêt de celui qui est autorisé à l'exercer" at 246).

[386] Cantin Cumyn, "The Legal Power", *supra* note 35 at 355, referring to Storck, *supra* note 373 at 176.

[387] Cantin Cumyn, "The Legal Power", *supra* note 35 at 355, referring to Emmanuel Gaillard, *Le pouvoir en droit privé* (Paris: Economica, 1985) at nos 235-239. Such a description of a legal power may be contrasted with a "right as an unbounded prerogative [*prérogative laissée au libre arbitre*]": *ibid*.

[388] Cantin Cumyn, "The Legal Power", *supra* note 35 at 360.

[389] This conception of loyalty echoes certain common law accounts of the fiduciary duty of loyalty. See e.g. Fox-Decent, "Fiduciary Nature", *supra* note 9 ("the fiduciary duty is best characterized as a duty to exercise power exclusively for the sake of the other-regarding purposes for which it is held" at 280); Fox-Decent, *Sovereignty's* Promise, *supra* note 213 ("the most fundamental and general fiduciary duty is […] fidelity to the other-regarding purposes for which fiduciary power is held" at 37).

[390] Section 4.1.2.

Beforehand, however, in order to delineate the scope of application of the duty of loyalty in the exercise of legal powers, it is necessary to briefly distinguish loyalty from another duty that applies to holders of legal powers, the duty to act with prudence and diligence.[391]

Essentially, the duty to act with prudence and diligence regulates the holder of legal powers' conduct surrounding his exercise of these legal prerogatives, whereas the duty of loyalty assures that the purpose for which the legal powers were granted is respected.[392] More specifically, "the obligation of prudence and diligence in the exercise of legal powers requires that the person in whom they are invested should take adequate steps to fulfil his mission".[393] Thus, a breach of the duty to act with prudence and diligence does not necessarily entail a breach of the duty of loyalty; one can act negligently while not seeking to further a purpose other than that for which one was granted legal powers.[394]

A duty to act with prudence and diligence may be imposed on a holder of legal powers as well as on a titulary of subjective rights.[395] However, according to Cantin Cumyn, the former's duty of prudence and diligence is different from that of the latter.[396] Indeed, Cantin Cumyn explains that the standard of conduct of the reasonable person placed in the same circumstances – which is the reference in determining whether one has had a prudent and diligent conduct[397] – is inevitably higher for a holder of legal powers since the latter must necessarily exercise his legal prerogative "on behalf of another or in an interest other than his own".[398] Namely, whereas the titulary of

[391] The director of a legal person, the administrator of a property of another, the employee and the mandatary are all subject to a duty of prudence and diligence under the CCQ. See arts 322, para 1 CCQ; 1309, para 1 CCQ; 2088, para 1 CCQ and 2138, para 1 CCQ.
[392] Pratte, *supra* note 18 ("l'obligation de diligence et de prudence vise la mise en œuvre du pouvoir, alors que la loyauté garantit le respect de la finalité du pouvoir" at 49).
[393] Cantin Cumyn, "The Legal Power", *supra* note 35 at 363.
[394] Pratte, *supra* note 18 at 48 n 272, referring to Gaillard, *supra* note 387 at no 150.
[395] For instance, according to art 2100, para 1 CCQ, the provider of services – a titulary of subjective rights – is bound to act with prudence and diligence.
[396] Cantin Cumyn, "The Legal Power", *supra* note 35 at 362-63.
[397] The "reasonable person" may not be the appropriate standard of reference in determining whether a holder of legal powers has had a prudent and diligent conduct. While the "reasonable person" evokes the idea of a rational and prudent person, it does not necessarily evoke the idea of a person who cares for another's well-being. Therefore, it may be hazardous to resort to the standard of the "reasonable person" to evaluate the conduct of a holder of legal power, who in essence exercises his legal prerogatives in an interest other than his own; see Alexandra Popovici, "Le bon père de famille" in Générosa Bras Miranda & Benoit Moore, eds, *Mélanges Adrian Popovici. Les couleurs du droit* (Montreal: Éditions Thémis, 2010) 125 at 134-38.
[398] Cantin Cumyn, "The Legal Power", *supra* note 35 at 363. See also Cantin Cumyn, "Des biens à la protection de la personne", *supra* note 203 ("[p]arce que le pouvoir est une prérogative attribuée en vue d'un but à atteindre, celui

subjective rights may choose, to his detriment, not to act in order to protect his rights, the holder of a legal power must always take action in order to promote the interest of the person he represents (if he is vested with powers of representation) or of the goal for which he was granted legal powers (if he is vested with autonomous powers).[399]

Returning to the legal actors who are subject to a duty of loyalty under the CCQ, out of the four, three of them – the administrator of the property of another, the director of a legal person and the mandatary – are generally considered to be holders of legal powers. The employee, on the other hand, is usually perceived as a titulary of subjective rights.[400] Although I examine the employee's juridical situation in chapter 4, I will briefly analyze his situation in this section as well as it is particularly revealing of the tension between the concepts of legal power and subjective right in civil law.

As I just mentioned, authors generally perceive the employee as a titulary of subjective rights. As explained above, a subjective right is essentially a legal prerogative that one exercises for oneself. Contrary to legal powers, subjective rights do not entail a duty to act in the interests of another or in the furtherance of a purpose; hence, they do not automatically generate a duty of loyalty. The case of the employee therefore is peculiar because he is seen as a titulary of subjective rights, yet under Quebec's *jus commune*, he is under a duty of loyalty.[401] How can this be?

Cantin Cumyn opposes two types of duties of loyalty: the duty of loyalty in the exercise of legal powers, which I described above, and what she calls "contractual loyalty". For Cantin Cumyn, the duty of loyalty super-imposed on contracts such as contracts of employment relates to "the duty to act in good faith, which increases in importance with respect to long-term contracts or

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qui en est investi sera souvent soumis à une norme plus exigeante que celle qui serait appliquée s'il exerçait son propre droit" at 213); Cantin Cumyn & Cumyn, *supra* note 34 at 251-52, para 273.

[399] *Ibid*; Cantin Cumyn, "Des biens à la protection de la personne", *supra* note 203 at 213; Cantin Cumyn, "The Legal Power", *supra* note 35 at 363.

[400] Cantin Cumyn, "L'obligation de loyauté dans les services de placement", *supra* note 335 at 21; Cumyn, "Les conflits d'intérêts", *supra* note 92 at 54-55.

[401] Art 2088, para 1 CCQ.

those with a significant element of *intuitus personae*".[402] She also contends that contractual loyalty may be rightfully assimilated to the general duty to act with prudence and diligence.[403]

According to Cantin Cumyn, "contractual loyalty does not compel a party to exercis[e] a right positively in the interest of the other party".[404] Cantin Cumyn defines contractual loyalty as a duty to "take into account the interest of the other party"[405] rather than a duty to act in the best interests of the beneficiary of the duty of loyalty. Thereby, Cantin Cumyn reconciles the employee's duty of loyalty with the assumption that the employee is a titulary of subjective rights.

Defining an employee's duty of loyalty as a duty to "take into account the interest of the other party"[406] appears somewhat weak. According to the labour law commentators cited by the Supreme Court of Canada in *Kuet Leong*, "[f]rom his managers especially, an employer expects such devotion and fidelity that he can place complete confidence in them".[407] What is more, Quebec jurisprudence recognizes that the employee must act in the best interests of his employer.[408]

I believe that the employee's duty of loyalty is no different from that of the director of a legal person, the administrator of the property of another and the mandatary, who must act either in the best interests of the person they represent or for the achievement of the purpose for which they

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[402] Cantin Cumyn, "The Legal Power", *supra* note 35 at 362, n 62.
[403] Cantin Cumyn, "L'obligation de loyauté dans les services de placement", *supra* note 335 ("[l]e devoir de loyauté n'est pas une obligation distincte de l'obligation générale de prudence et de diligence" at 21). However, in art 2088, para 1 CCQ, the duty to act with prudence and diligence and the duty of loyalty appear as two distinct concepts. Art 2088, para 1 CCQ provides that "[t]he employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work".
[404] Cantin Cumyn, "L'obligation de loyauté dans les services de placement", *supra* note 335 ("[d]ans les différents cas de figure où elle s'applique, l'obligation de loyauté contractuelle n'oblige pas une partie à exercer un droit positivement dans l'intérêt de l'autre partie. Elle est donc compatible avec la notion de droit subjectif" at 20).
[405] *Ibid* [translated by author] ("[d]ans la loyauté contractuelle, il s'agit, pour une partie contractante exerçant un droit, de tenir compte de l'intérêt de l'autre partie" at 22).
[406] *Ibid*.
[407] *Kuet Leong*, *supra* note 89 at 438, referring to Nicole Catala & Jacques Aaron, *Le personnel et les intermédiaires de l'entreprise* (Paris: Librairies techniques, 1971) at 67-68.
[408] See e.g. *Concentrés scientifiques Bélisle inc c Lyrco Nutrition inc*, 2007 QCCA 676, JE 2007-1062 [*Concentrés scientifiques Bélisle*] ("[l'employé] doit faire primer (dans le cadre du travail) les intérêts de l'employeur sur les siens propres" at para 39); *Jenner c Helicopter Association of Canada (HAC)*, 2012 QCCS 3177, JE 2012-1491 at para 147; *Lanctôt c Romifal inc (Nova PB inc)*, 2010 QCCS 4755, JE 2010-1918 [*Lanctôt*]; *Pro-quai inc c Tanguay*, 2005 QCCA 1217, JE 2006-138 at para 36 [*Pro-quai*].

were granted legal powers. In effect, contrarily to the prevalent assumption and as I will now show, the employee is also a holder of legal powers.

When a person decides to enter into an employment contract, she is obviously acting as a titulary of subjective rights as she is exercising her right to work[409] and is motivated by her own personal interests such as her desire to earn a salary. However, when acting in the course of his employment, the employee acts as a holder of legal powers; his interests are subsumed under that of his employer.[410] After all, it is in the very nature of the contract of employment that the employee acts "according to the instructions and under the direction or control of another person, the employer".[411]

What is more, in the execution of his functions, the employee directly affects the employer's patrimony, even if the employee does not enter into contracts on behalf of his employer. In effect, according to the principle set out in art 1463 CCQ, the employer is liable for the injuries caused by his employee.[412] In other words, when performing his functions of employee, the employee acts within the patrimony of another; his actions directly affect his employer's patrimony, even if the employee doesn't perform juridical acts on behalf of his employer. For instance, an employee whose task is to place different types of cookies on trays is nonetheless acting within the employer's patrimony in the execution of his functions. Indeed, if ever the employee makes a mistake which causes harm to someone – for instance if he places a peanut butter cookie on a "nut-free" tray which is intended to be sold to nut-allergic customers –, the employer will be liable for the employee's mishap.[413] Thus, the employee does not act within his own patrimony nor does he act on his own behalf when he performs his functions of

[409] Morin et al, *Le droit de l'emploi au Québec*, 4th ed (Montreal: Wilson & Lafleur, 2010) at 234.
[410] See Pratte, *supra* note 18 ("[à] l'instar du dirigeant et du mandataire, dès que l'employeur attribue un pouvoir à son employé en vertu d'un contrat de travail, on peut envisager que les intérêts de ce dernier s'assimilent à ceux de son employeur qui est le bénéficiaire de l'exercice de ce pouvoir. Ainsi, l'obligation de loyauté contractuelle ne s'oppose pas à la théorie du pouvoir en droit privé" at 48).
[411] Art 2085 CCQ.
[412] Art 1463 CCQ reads as follows:

> The principal is bound to make reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his remedies against them.

[413] This said, according to art 1463 CCQ, the employer retains his remedies against the employee.

employee.[414] In other words, when acting in the course of his employment, the employee exercises legal powers.

The conceptual difficulty regarding the employee is that he is generally perceived solely as a titulary of subjective rights. This may have to do with the fact that the employment contract is generally seen under the perspective of the financial benefits it brings to the employee – namely, a salary – in such a way that the employee is perceived as acting invariably in his own interests, as a titulary of subjective rights. The fact that the employee exercises legal powers for his employer is thus obscured. This is not surprising as it indeed may be difficult to conceptualize that a person is acting selflessly, for someone else, if this person receives a pecuniary advantage in return.

This said, the mandatary and the administrator of the property of another are also generally remunerated in exchange for their prestation, and are also, on the one side, acting as titularies of subjective rights. One can think of the lawyer who accepts to represent his client in exchange for remuneration; when the lawyer accepts to undertake the mandate, he is most certainly driven by his own interests. However, in the performance of his functions, he acts as a holder of legal powers and therefore must be guided only by his client's interests. The same is true of the trustee, an administrator of the property of another, who is remunerated in exchange for his administration.[415] This remuneration might have influenced his decision to accept the office of trustee. Yet, jurists recognize more willingly that the mandatary and the administrator of the property of another exercise legal powers in the performance of their functions.

This may be due, at least partly, to the fact that the mandate and the administration of the property of another, unlike the employment contract, have a long history of gratuitousness. In this regard, it is interesting to briefly highlight some historical elements. The mandate and the administration of the property of another as they now exist in Quebec private law originate from the Roman *mandatum*. Back under the classical period of Roman law, the Roman *mandatum* was

[414] Originally, art 1054 CCLC, from which art 1463 CCQ derives, was inspired by the master-servant relationship. By holding the master responsible for the acts of his servants, it was expected that the master would choose his servants wisely. In other words, liability was imposed on the master because the actions performed by his servants were a direct consequence of his choice of servants. Thus, art 1054 CCLC considered that some persons, such as servants or employees, were mere executors. The same premise undoubtedly underlies art 1463 CCQ. On the history of art 1054 CCLC, see Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile*, vol 1: Principes généraux, 8th ed (Cowansville, Que: Yvon Blais, 2014) at 809, para 814.

[415] Art 1300 CCQ provides that as a general rule, the administrator of the property of others is remunerated.

performed gratuitously, for a friend.[416] A monetary counterpart for the accomplishment of the mandate would be given only for the mandates performed in the exercise of liberal professions related to fields such as law, medicine or architecture. However, this financial counterpart was not considered to be a salary, but rather a token of gratitude for the service rendered.[417]

Although the importance of the mandate's gratuitous nature diminished throughout the ages, under the CCLC, the mandate (which encompassed some forms of administration of the property of another[418]) was still presumed to be gratuitous.[419] Moreover, offices like that of trustee and of liquidator of a succession were also presumed to be gratuitous.[420] The mandate and the administration of the property of others have only recently been detached from this idea of gratuitousness – and then again, only to a certain extent.[421]

As for the director of a legal person, it may be easier to conceptualize that he is not acting for himself notwithstanding the fact that he is remunerated since he is the means through which the legal person "comes to life"; the legal person is legally incapable of acting on its own and necessarily acts through its organs, such as the board of directors.[422]

Returning to the employee, the subjective right paradigm under which civilian jurists perceive the employee influences their description of the employee's obligation of loyalty. The

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[416] Cantin Cumyn & Cumyn, *supra* note 34 at 11, para 9; Jean Gaudemet, *Droit privé romain*, 2d ed, coll Domat droit privé (Paris : Montchrestien, 2000) at 273.

[417] *Ibid* at 272-73; Paul Frédéric Girard, *Manuel élémentaire de droit romain*, 8th ed, revised ed by Félix Senn (Paris: Dalloz, 2003) [introduction by Jean-Philippe Lévy] at 620-621; Reinhard Zimmermann, *The law of obligations: Roman foundations of the civilian tradition*, 2d ed (Oxford, UK: Claredon Press, 1996) at 413-420.

[418] The mandate under the CCLC did not only encompass instances of representation arising out of a contractual agreement; it encompassed all acts of management. Contrast article 2130 CCQ ("[m]andate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power. […]) with article 1701 CCLC ("[m]andate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it. […]"). Under the CCQ, the mandate governs cases where contractual representation is involved. The other cases of administration of the property of another are governed by the regime of the administration of the property of others. See this thesis, section 2.3.1.

[419] Art 1702 CCLC.

[420] See arts 981*g* and 910, para 2 CCLC. See also Cantin Cumyn & Cumyn, *supra* note 34 at 171, para 179.

[421] Art 1300 CCQ (concerning the administration of the property of others) and art 2133 CCQ (concerning the mandate). However, art 2133 CCQ provides that the mandate between two natural persons is still presumed to be by gratuitous.

[422] Art 311 CCQ. Organs are the means through which the various functions of an organization are performed: Marcel Lizée, "De la capacité organique et des responsabilités délictuelle et pénale des personnes morales" (1995) 41 McGill LJ 131 ("[l]'organe est un moyen qu'utilise l'organisation pour répartir et exécuter les diverses tâches servant à la réalisation de ses objectifs. Le fait d'organiser consiste précisément à répartir les fonctions entre les organes de façon à favoriser un fonctionnement efficace" at 146).

employee's obligation of loyalty sometimes is described as a point of equilibrium between the employee's personal interests and those of the beneficiary of his obligation of loyalty, the employer.[423] More specifically, scholars and judges write that the employee's obligation of loyalty must be balanced with his own legitimate rights and interests[424] "such as his right to exercise his profession freely and to make use of the competences he acquired".[425]

Such accounts of loyalty are tainted by the authors' perception of the employee as a titulary of subjective rights, hence their description of loyalty as a point of balance between two sets of interests. This illustrates the conceptual difficulty civilians have in considering a person as a holder of legal powers – that is, as someone who acts in the interests of *another* person or of a purpose.

In truth, loyalty does not intervene at a point of balance between two sets of interests. Rather, there are discrete spheres: in one, the person acts as a titulary of subjective rights and is not subject to a duty of loyalty. In the other, the person acting as a holder of legal powers (for instance the employee in the performance of his functions) is under a duty of loyalty as he is acting in another's legal sphere.

To sum up, a duty of loyalty is never imposed on a legal actor by virtue of his status of titulary of subjective rights. Yet, under the civilian paradigm, persons are seen as titularies of subjective rights, which assuredly is a hurdle to the understanding – and even to the recognition – of the duty of loyalty in civil law.

3.3.3 An obligation of loyalty?

The civil law paradigmatically conceives of relations between persons, seen as titularies of subjective rights, in terms of obligations.[426] It is therefore interesting to examine whether loyalty

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[423] See e.g. Louise Dubé & Gilles Trudeau, "Les manquements du salarié à son obligation d'honnêteté et de loyauté en jurisprudence arbitrale" in Gilles Trudeau, Guylaine Vallée & Diane Veilleux, eds, *Études en droit du travail à la mémoire de Claude D'Aoust* (Cowansville, Que: Yvon Blais, 1995) 51 ("[o]n voit à quel point l'obligation d'honnêteté et de loyauté intervient à un point de tension entre les intérêts légitimes, mais divergents, des parties à la relation de travail" at 54); Morin et al, *supra* note 409 ("[l]es parties pourront délimiter l'équilibre que devra respecter le salarié entre ses intérêts et ceux de l'employeur" at 247).

[424] *Ibid* at 234, 355-56; Jobin & Vézina, *Les obligations*, *supra* note 6 at 269, para 161. See *9009-4582 Québec inc (Entreprises Essa) c Entretien JFB inc*, 2007 QCCS 1901, JE 2007-1056; *Gravino c Enerchem Transport Inc*, 2008 QCCA 1820, [2008] RJQ 2178.

[425] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 54 [translated by author].

[426] The concept of obligation has been described as the "code général des relations de l'homme avec ses semblables" : Gérard Trudel, *Traité de droit civil du Québec*, t 7 (Montreal: Wilson & Lafleur, 1946) at 15.

is in fact an obligation. In order to do so, the notion of obligation should be briefly distinguished from that of duty.[427]

I described the notion of obligation above. Summarily, an obligation results from a "[j]uridical relationship between two persons by virtue of which one of them, the *debtor*, is bound towards another, the *creditor*, to perform a prestation".[428] An obligation, therefore, is owed by one person to another.

Another important feature of a civil obligation is that it may be legally enforced.[429] In fact, the creditor's claim is a true "grip" over another person.[430]

An obligation must also have an object[431], but the issue of the object of the obligation will not be addressed here.[432]

A duty, on the other hand, is "[t]hat which a person must do or refrain from doing"[433]; it refers to a standard of conduct. A duty thus represents an "eventual debt".[434] In other words, a duty will

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[427] Whereas in civil law, an obligation may be distinguished from a duty, in common law, an obligation may rightfully be assimilated to a duty. According to *Black's Law Dictionary*, an obligation "may refer to anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise social relations, courtesy, kindness, or morality" (Bryan A Garner & Henry Campbell Black, *Black's Law Dictionary*, 9th ed (St Paul, Minn: West, 2009) *sub verbo* "obligation", def 1). In principle, unlike in civil law, there is no distinction per se between the duty and the obligation. Nonetheless, it is interesting to note that in the recent years, the obligation in common law has taken a meaning closer to that which it has in civil law, probably due to the latter's influence. A common law obligation could therefore also be understood as arising from contract or tort. See Samuel, *Understanding Contractual and Tortious Obligations*, *supra* note 299 at xxvii, 172; Tancelin, *Obligations*, *supra* note 6 at 1, para 1 and at 5, para 3. However, as Samuel points out, "the expression 'law of obligations' must be treated with great caution by English lawyers. It might seem at first sight an attractive generic category, and might even appear to make common law more attractive in a rational sort of way […]. However, […] [it is] a viable idea in the abstract but illusive when one moves to ground level" (*Understanding Contractual and Tortious Obligations*, *supra* note 299 at 172).

[428] CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "obligation", def 2 [emphasis in the original].

[429] See art 1590 CCQ. CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "obligation", def 2, obs 1°. See also Brierley & Macdonald, *supra* note 153 at 378-379, no 402; Jobin & Vézina, *Les obligations*, *supra* note 6 at 28-29, para 19; Lluelles & Moore, *Obligations*, *supra* note 6 ("[l]'obligation civile intéresse le droit au niveau de son efficacité" at 15, para 11).

[430] Guestin & Goubeaux, *supra* note 369 at 153, para 201.

[431] Art 1371 CCQ.

[432] In common law, it has been argued that loyalty is not a legal duty "in the strict sense", but rather a rule or a mode of exercise of fiduciary powers. See Smith "Can We Be Obliged to be Selfless?", *supra* note 301; Smith, "Fiduciary Relationships", *supra* note 9 at 609ff.

[433] CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "duty".

[434] Roubier, *supra* note 209 at 103:

> Le devoir juridique, envisagé comme dette éventuelle, n'est, lui, guère plus qu'une menace de dette. Celle-ci, avant d'apparaître sur la scène juridique, ne peut être comptée au passif d'un patrimoine. Il

transmute into an obligation only if the standard of conduct imposed by the duty is breached. Only then will there be a debtor-creditor relationship of obligation. Put another way, contrary to the obligation, a duty does not involve an identifiable debtor and creditor.[435]

For the purposes of the following analysis, I also consider that a duty, unlike an obligation, is not necessarily susceptible of legal enforcement. It should be said, however, that this is not a point which is raised by commentators that distinguish duties from obligations. Nonetheless, this allows me to designate, under the term "duty", those juridical requirements that cannot be called "obligations" since they may not be legally enforced.

Thus, in this section, I distinguish obligations from duties on two grounds: the existence of an identifiable debtor and creditor and enforceability.

Returning to my main enquiry, from the outset, it is clear that when a legal actor under a duty of loyalty interacts with third parties while exercising his legal powers, he does not personally incur obligations. The obligations thereby created affect the patrimony of the beneficiary of the duty of loyalty rather than the holder of legal powers' own patrimony.

However, with respect to his relation with the beneficiary of the duty of loyalty, in my opinion, the holder of legal powers may be either under an obligation or a duty to act loyally, depending on the circumstances. More precisely, administrators of the property of another are subject to a *duty* of loyalty whereas the mandatary, the employee and the director of a legal person have an *obligation* of loyalty – although as I will show, the situation of the director of a business corporation (which is a legal person) is rather ambiguous. For present purposes, it is relevant to briefly discuss the case of the administrator of the property of another and that of the director of a business corporation as their respective duty of loyalty departs in some way from the civilian conception of an obligation.

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faut que l'éventualité se produise, qui lui donnera naissance, car jusque-là il n'y a qu'un cadre légal abstrait, qu'il est nécessaire de compléter.

[435] Adrian Popovici, *La couleur du mandat* (Montreal: Éditions Thémis, 1995) at 288. Taking art 1457 CCQ as an example, Popovici explains that this article's first paragraph, which mentions "a duty to abide by the rules of conduct […], according to the circumstances, usage or law, so as not to cause injury to another", establishes a *duty*, whereas its second paragraph, which states that a person who breaches art 1457, para 1 CCQ "is liable to reparation for the injury", establishes an *obligation* to repair the injury (*ibid* at 379, n 881).

First, in certain instances of administration of the property of another, there is no creditor, which means that there is no *obligation* of loyalty since an obligation requires that there be an identifiable debtor and creditor. This is the case in the liquidation of a succession, where there are future child heirs who have yet to be born but to whom the liquidator of a succession owes a duty of loyalty.[436] This may also be the case in a trust, when there is no existing beneficiary.[437]

Second and most importantly, regardless whether there is an identifiable creditor, it appears that administrators of the property of another are always subject to a duty rather than an obligation of loyalty because of the lack of enforceability of their duty of loyalty. Indeed, in practice, it is difficult for the beneficiary of the administration (who is also the beneficiary of the duty of loyalty) to constrain the administrator to act loyally; the beneficiary does not exercise a direct form of control over the administrator of the property of another. However, under the civilian conception of an obligation, an obligation must be susceptible of legal enforcement.

In a recent text, Michelle Cumyn underscores the fact that beneficiaries exercise various degrees of control over the legal actors upon whom a duty of loyalty is imposed by the CCQ. As she points out, where an administrator of the property of another is vested with a power of representation, the beneficiary has no direct control over the administrator, either because the beneficiary is absent or affected by an incapacity.[438] This is the case in a protection mandate[439] or

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[436] Concerning the identity of the beneficiaries in the liquidation of a succession, see Jacques Beaulnes, "Regards croisés sur la saisine du liquidateur successoral" in *La liquidation des successions* (Cowansville, Que: Yvon Blais, 2009) 1 at 38, para 65; Cantin Cumyn & Cumyn, *supra* note 34 at 323, para 338.

[437] However, under a certain conception of the trust, the trust itself is a beneficiary of the trustee's *obligation* of loyalty. This school of thought considers that the trust, a patrimony by appropriation (art 1261 CCQ), is a subject of rights, alongside the person (natural or legal). See Madeleine Cantin Cumyn, "La fiducie, un nouveau sujet de droit?" in Jacques Beaulne, ed, *Mélanges Ernest Caparros* (Montreal: Wilson & Lafleur, 2002) 129 ("[l]a fiducie doit alors être admise comme une troisième espèce de sujet de droit, à côté de la personne humaine et de la personne morale" at 143); Pineau & Gaudet, *supra* note 118 at 7-8. Considered as a subject of rights, the trust has the capacity to have rights and obligations. Thereby, the trust can be seen as the creditor of the trustee's obligation of loyalty. This being said, such a conception of the trust is questionable; the term "beneficiary" employed by the CCQ in the title concerning the administration of the property of others would then be ambiguous as it would have a dual meaning: it could refer to persons as well as trusts. For a criticism of the trust as a subject of rights, see Alexandra Popovici, *Le patrimoine d'affectation. Nature, culture, rupture* (LL.M. Thesis, Université Laval, 2012) [unpublished].

[438] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 58.

[439] Cumyn assimilates the protection mandate to an instance of administration of the property of another because of the little effective control (or absence thereof) that the mandator, who is affected by an incapacity, may exercise over the mandatary. Likewise, as Cumyn explains, the general mandate (art 2135 CCQ) should be considered as an instance of administration of the property of another. Indeed, the mandator may not exercise direct control over the mandatary as he usually can in mandates that are special, as opposed to general. See Cumyn, "Les conflits d'intérêts", *supra* note 92 at 58, n 48. See also Julie Loranger, "La fiducie comme alternative au mandat donné en

in a situation of management of the business of another[440] or curatorship to the property of another.[441]

Conversely, in a special mandate,[442] the mandator normally has direct control over the mandatary who, like some administrators of the property of another, exercises powers of representation. Indeed, as Cumyn explains, the mandator gives instructions to the mandatary and may ratify or repudiate the acts accomplished outside the scope of the powers of representation vested in the mandatary.[443] What is more, the mandator may revoke the mandate at any time.[444] Thus, because the mandator has effective control over the mandatary, the mandatary's duty of loyalty sits better with the notion of "obligation" than the administrator's. After all, an obligation evokes the ideas of constraint, compulsion and enforcement.[445]

Just like the administrators of the property of another who exercise powers of representation, administrators who exercise autonomous powers, such as the trustee or the liquidator of a succession, are not under the direct supervision of the beneficiaries of their duty of loyalty. It must be recalled that autonomous powers are granted for the accomplishment of a purpose other than the representation of a person. Autonomous powers may have a rather open-ended aim. Thus, autonomous powers in essence imply that the person vested with these legal prerogatives enjoys certain autonomy to accomplish the purpose for which she was granted those powers.[446]

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prévision de l'inaptitude" in Service de la formation continue du Barreau du Québec, *Développements récents en successions et fiducies (2012)*, vol 353 (Cowansville, Que: Yvon Blais, 2012) 153.

[440] Management of the business of another arises "where a person, the manager, spontaneously and under no obligation to act, voluntarily and opportunely undertakes to manage the business of another, the principal, without his knowledge, or with his knowledge if he was unable to appoint a mandatary or otherwise provide for it" (art 1482 CCQ).

[441] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 53.

[442] Art 2135 CCQ.

[443] Cumyn, "Les conflits d'intérêts", *supra* note 92 ("[l]e mandant exerce un contrôle direct sur le mandataire à qui il peut donner des directives, dont il peut ratifier ou répudier les actes accomplis sans pouvoir et dont il peut révoquer en tout temps le mandat" at 57, referring to arts 2139 and 2176 CCQ).

[444] *Ibid*.

[445] CPCL, *Private Law Dictionary. Obligations*, *supra* note 5, *sub verbo* "obligation", def 2.

[446] The administrator of the property of another is subject to strict requirements under the CCQ due to the vast autonomy he has in the performance of his functions and the minimal control the beneficiary of the duty of loyalty has over him: see Cumyn, "Les conflits d'intérêts", *supra* note 92 at 53. For example, the administrator must follow the rules regarding inventory, security and insurance (arts 1324-1330 CCQ) and presumed sound investments (arts 1339-1344 CCQ). He must also "[render] a summary account of his administration to the beneficiary at least once a year" (art 1351 CCQ) and a final account upon termination of his administration (art 1363, para 1 CCQ). Moreover, the CCQ provides for other forms of control that interested persons may exercise on the administrator of the

In this regard, the trust is especially illustrative of the lack of control the beneficiaries may have on an administrator of the property of another. Not only does the trustee exercise autonomous powers, which necessarily involve a high level of autonomy, but in such a scenario, the trustee and the beneficiaries are in an indirect relationship.

In effect, the trustee has "the exclusive administration of the trust patrimony"[447], which means that he exercises his legal powers on the trust assets – not on the personal assets of the beneficiairies of the trust. This gives rise to a tripartite situation in which the trust is an intermediary between the trustee and the beneficiaries. Since the trustee does not exercise his powers directly on the beneficiaries' patrimonies, but rather on the trust,[448] it is therefore harder for the beneficiaries to supervise adequately the exercise of the trustee's powers. Hence the need for some additional methods of supervision such as the annual accounts that the trustee must provide.[449]

Moreover, unlike the mandatary whose mandate may be revoked at any time by the mandator[450] or the employee who can be dismissed by the employer[451], the trustee is not under an effective power of constraint. Although art 1290, para 1 CCQ provides that "[t]he settlor, the beneficiary or any other interested person may, […] take action against the trustee to compel him to perform his obligations […] or to have him removed", there is a possibility that no one sufficiently feels concerned, personally, to take action against a disloyal trustee. For instance, the person whose unborn great-grandchild may, one day, be a beneficiary of a trust will not necessarily feel the urge to take action against a trustee whose management of the trust appears suspicious. What is more, such intervention would require that this person use her own funds to take the trustee to court. As people may be reluctant to use their own monetary resources for a purpose that does not benefit them personally, a trustee's disloyal behaviour may go unsanctioned.

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property of another, to compensate for the beneficiary's lack of direct control (arts 1352, para 2 and 1360, para 2 CCQ). See this thesis, section 4.2.4.

[447] Art 1278, para 1 CCQ.

[448] In Quebec private law, the trust is a patrimony by appropriation. Art 12 CCQ provides that :

> The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

[449] Art 1351 CCQ. See this thesis, section 4.2.4.

[450] Art 2176 CCQ.

[451] Art 2094 CCQ.

A few words should also be said regarding the director of a legal person, and more specifically the director of a business corporation. Although the director is subject to an *obligation* of loyalty in terms of positive written law, upon closer examination, it is possible to argue that he is in fact under a mere *duty* to act loyally.

As was mentioned above, in civil law, an obligation binds two persons. The CCQ contains several legal provisions that suggest that the director and the legal person are two distinct persons[452], yet it is also possible to conceive of the director and the legal person as one same entity. Indeed, since a legal person is legally incapable of acting on its own, it acts through its organs, namely the board of directors.[453] Seen this way, there is no external entity to which the director owes an obligation of loyalty.[454]

Moreover, although positive written law provides mechanisms to control the director's actions[455], in practice, the director's obligation of loyalty may not always be susceptible of legal enforcement. In the case of a business corporation, in theory, the board of directors and the meeting of shareholders supervise the exercise of the director's powers. However, Cantin Cumyn, (who has argued for the application of the regime of the administration of the property of others to directors of legal persons such as business corporations), highlights the incongruity of the situation:

> The administrators, who as organs are considered a part of the company, find themselves in the position of defining the company's interest, that being the purpose of their powers, and supervising their use, in the interest of the legal person they represent. The board of directors, as the incarnation of the company's will, is called upon to judge the compatibility of the exercise of its powers with the interests of the

[452] Art 309 CCQ ("[l]egal persons are distinct from their members"); art 313 CCQ ("[t]he by-laws of a legal person establish contractual relations existing between the legal person and its members"); art 321 CCQ ("[a] director is considered to be the mandatary of the legal person").

[453] Art 311 CCQ. See Lizée, *supra* note 422 ("[l]'organe est un moyen qu'utilise l'organisation pour répartir et exécuter les diverses tâches servant à la réalisation de ses objectifs. Le fait d'organiser consiste précisément à répartir les fonctions entre les organes de façon à favoriser un fonctionnement efficace" at 146).

[454] Therefore, Cantin Cumyn contends that "it is incoherent for the legislature to state that the administrator is the mandatary of the legal person, having already stated that the board of directors is one of its organs": "The Legal Power", *supra* note 35 at 364.

[455] Those mechanisms are, namely: the removal of directors (art 2175 CCQ; s 142 (1) BCA; ss 108(1)b), 109 CBCA), the derivative action (s 445 BCA; s 239 (1) CBCA), the court's power of supervision where major decisions are taken (s 415 BCA and s 192 CBCA), the request for an investigation of the corporation (ss 421, 425 BCA; ss 229, 230 CBCA), the request for the dissolution and judicial liquidation of the corporation (ss 461-463 BCA; ss 213, 214 CBCA), the action for non-compliance (s 460 BCA; s 247 CBCA) and the action for abuse of power or iniquity (s 450 BCA; s 241 CBCA).

> company, its mandator. Under this regime, shareholders are relegated to the role of third parties, which casts doubt on whether they have the requisite interest to challenge the exercise of powers.[456]

Under this scheme, directors are in a perpetual situation of conflict of interests as they are simultaneously charged with the administration of the business corporation and with the supervision of this administration.[457] This may lead to inaction on the part of the directors, and hence their obligation of loyalty may not be legally enforced. As for shareholders, they generally are not entitled to act in the name of the business corporation and, except in special circumstances,[458] they may even be prevented from exercising their voting rights on different matters, which reduces their oversight of the directors' management.[459] On the basis of such reasoning, the director's situation resembles that of the administrator of the property of another since in practice it is possible that the director remains beyond any form of effective control.

The juridical situation of the legal actors expressly subject to a duty or an obligation of loyalty under the CCQ will be studied more thoroughly in the next chapter. However, this last subsection aimed to show that in Quebec private law, loyalty does not always correspond to an obligation and thus is not a univocal concept. Indeed, in certain cases, loyalty is an obligation, meaning that it binds two persons and that it can be legally enforced by the creditor of the obligation. In other cases, however, loyalty takes the form of a constraint (a duty). More specifically, administrators of the property of another are subject to a *duty* of loyalty. On the other hand, mandataries, employees and – at least theoretically – directors of a legal person such

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[456] Cantin Cumyn, "The Legal Power", *supra* note 35 at 364 [footnote omitted].

[457] The situation was decried in an article published in 1978 and written by the late Yves Caron, "L'abus de pouvoir", *supra* note 23 at 14. This being said, business corporations often attempt to deal with this issue by requiring the presence of outsiders on the board of directors. As a matter of fact, both the BCA and the CBCA require that there be at least three outsiders on the board of directors of publicly traded business corporations: s 106 (2) BCA and s 102 (2) CBCA. However, in practice, the effectiveness of the presence of outsiders on the board of directors as a measure to prevent situations of conflicts of interests may be questioned. See e.g. Janet McFarland, "Related boards a matter of opinion", *The Globe and Mail* (8 October 2002) B1, B6, cited in Crête & Rousseau, *supra* note 28 at 343.

[458] Under the BCA, the "resolution that favours certain shareholders of a class or series of shares or changes prejudicially the rights attaching to all the shares of a class or series of shares" and the "special resolution authorizing the articles to be amended in order to allow the board of directors to change prejudicially the rights attaching to all the shares of a class or series of shares without shareholder authorization" require the approval of shareholders without voting rights: s 191 (1), (2). See also s 192 BCA. Under the CBCA, the following require the approval of all the shareholders: the amendment of articles which affects the rights of shareholders, "the sale, lease or exchange of all or substantially all" the corporation's assets, the proposal for the dissolution and the liquidation of the corporation: ss 173, 176, 189 (3) and 211 (3) CBCA. See Crête & Rousseau, *supra* note 28 at 256-57, paras 555-56.

[459] Caron, "L'abus de pouvoir", *supra* note 23 at 15-16; Crête & Rousseau, *supra* note 28 at 31-32, para 65.

as a business corporation have an *obligation* of loyalty. This being said, in the remainder of this thesis, the terms "duty" and "obligation" are employed interchangeably and do not refer to a particular category of legal actors, unless specified otherwise.

3.4 Conclusion

Despite the fact that a duty of loyalty is explicitly entrenched in the CCQ, some factors undermine the understanding and the development of loyalty in Quebec private law.

First, now that the duty of loyalty is codified, it risks being compartmentalized under the CCQ. Drawing on the criticisms directed towards the common law status-based approach to fiduciary relationships, I argued that such compartmentalization may impede the development of the duty of loyalty in Quebec private law. This said, based on the common law experience, I showed that a too flexible approach such as the common law fact-based approach is not adequate either due to its incoherence and unpredictability. Instead, I pleaded for a "legal approach", an approach based on the legal characteristics of the functions performed by a legal actor rather than on open-ended concepts such as trust, reliance and vulnerability, which are often invoked under the common law fact-based approach. I explained that this legal approach is compatible with the mixed nature of Quebec's legal system.

Second, I explained that the assimilation of loyalty with good faith, which is prevalent in civil law, obscures the nature of the duty of loyalty. Essentially, good faith never requires that a person serves the sole interests of another, which is on the other hand the essence of the duty of loyalty. This is because good faith regulates the exercise of subjective rights, which are egoistic legal prerogatives, whereas loyalty regulates the exercise of legal powers, which are legal prerogatives exercised in the interest of another. [460]

Last, I explained that it may be difficult to conceive of loyalty in civil law due to the subjective right paradigm, under which persons are seen as acting on their own behalf, in their own interest and within their own patrimony. Indeed, in the exercise of their functions, the legal actors upon whom a duty of loyalty is imposed act as holders of legal powers – not as titularies of subjective

[460] "Another" refers to a person or a trust. In the CCQ's regime of the administration of the property of others, the word "others" may refer to persons or to a trust.

rights. I also explained that under Quebec's *jus commune*, loyalty does not always fit into the civil law's conception of obligation, which is closely related to the concept of subjective right.

On the basis of these ideas, I will proceed to an analysis of the duty of loyalty in Quebec's *jus commune* in the next chapter.

Chapter 4 – The duty of loyalty in Quebec's *jus commune*

In this final chapter, I sketch the contours of a general theory of the duty of loyalty in Quebec's *jus commune*. I first examine the juridical situation of the legal actors upon whom a duty of loyalty is expressly imposed by the CCQ: the director of a legal person, the administrator of the property of another, the employee and the mandatary. Then, I highlight the duty of loyalty's core requirements. Lastly, I analyze one of the sanctions attached to the breach of the duty of loyalty. I show how these elements support my conception of the duty of loyalty.

The relevance of the common law as a valuable source of inspiration having been established in the first part of this thesis, I resort to a common law theory of fiduciary duties which has recently been put forth by Miller[461] in my attempt to understand and articulate the underpinnings of the duty of loyalty in Quebec private law.

4.1 The juridical situation of the legal actors under a duty of loyalty

In chapter 3, I identified the nature of the duty of loyalty; loyalty is inherent to the exercise of legal powers. Naturally, then, in this section, I take as a premise that a duty of loyalty comes into play when one exercises legal powers. However, I seek to determine what exactly in the juridical situation of holders of legal powers justifies the imposition of a duty of loyalty.

In order to do so, I examine the nature of the functions performed by the legal actors who are expressly subject to a duty of loyalty under the CCQ. I search for a guiding thread that explains why a duty of loyalty is imposed upon each of these legal actors.

First, however, I discuss whether trust, which is often evoked with regards to loyalty, may justify the imposition of a duty of loyalty on a legal actor in Quebec private law.

[461] "Justifying Fiduciary Duties", *supra* note 9.

4.1.1 The trust vested in a legal actor

The term *fiduciary* as in "fiduciary duty" – the common law parent of Quebec's duty of loyalty – derives from the latin word *fiducia*, which means "trust".[462] In the overview of some key Canadian common law fiduciary cases in chapter 3, trust was often identified as an indicium of fiduciary relationships.[463]

In Quebec private law as well, trust is regularly underscored as a foundational aspect of all four relationships giving rise to a duty of loyalty under the CCQ.[464]

For instance, according to the Supreme Court of Canada, the mandate "is imbued with the concept of trust".[465] Indeed, an *intuitu personae* contract such as the mandate involves a high degree of trust; a mandate is generally given to a person whom the mandator trusts.[466] This also explains why the mandator is entitled to revoke the mandate at any time[467]; it is important that the mandator trusts the mandatary at every stage of the relationship.[468]

Trust underlies the regime of the administration of the property of others as well. Cantin Cumyn writes that "trust is, certainly, a significant element in the administration of the property of others, namely it generally inspires the choice of the administrator".[469] Moreover, the *intuitu*

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[462] Maddaugh, *supra* note 199 at 16.

[463] See especially *Hodgkinson v Simms*, *supra* note 253; *Lac Minerals*, *supra* note 41, La Forest J, dissenting.

[464] See e.g. Jean-Guy Belley, "L'obligation de loyauté dans les services financiers" (2012) 3:1 Bulletin de droit économique 11; Jobin & Vézina, *Les obligations*, *supra* note 6 ("[c]'est dans les relations marquées par la confiance que l'obligation de loyauté est la plus fréquente et la plus exigente" [footnote omitted] at 266, para 161); Leclerc, "La bonne foi", supra note 336 ("[u]ne analyse détaillée de la jurisprudence révèle cependant que l'obligation de loyauté est surtout appliquée dans le cadre de contrats mettant en cause une relation de confiance entre les cocontractants, tels le contrat de travail et le contrat de mandat" at 268); Ginette Leclerc, "La bonne foi dans l'exécution des contrats" (1992) 37 McGill LJ 1070 at 1076; Lluelles & Moore, *Obligations*, *supra* note 6 at 1120, para 1979; Naccarato & Crête, "Réalité à juridicité", *supra* note 6 at 659.

[465] *Laflamme v Prudential-Bache Commodities Canada Ltd*, 2000 SCC 26, [2000] 1 SCR 638 at para 28.

[466] Lluelles & Moore, *Obligations*, *supra* note 6 at 1194 para 2079.

[467] Art 2176 CCQ.

[468] Lluelles & Moore, *Obligations*, *supra* note 6 at 1194 para 2079 :

> Même s'il est conclu pour une durée fixe, le contrat de mandat peut être résilié, avant terme, soit par le mandant (on parle alors de « révocation » (art. 2176 [CcQ]), soit par le mandataire (on parle alors de « renonciation ») (art. 2178 [CcQ]). Cette faculté repose en grande partie sur le caractère intuitu personae de la relation qui unit ces deux contractants. On ne confie pas une affaire à n'importe qui : on compte sur ses qualités particulières. De plus, et surtout, c'est la confiance qui justifie un tel lien: confiance du mandant dans les qualités professionnelles et l'honnêteté du mandataire, confiance du mandataire dans le caractère sérieux de la mission confiée et des conditions stipulées. Si cette confiance qui existait, au départ, se trouve à disparaître, pourquoi le contractant déçu devrait-il rester lié par un tel contrat? [footnotes ommitted].

[469] Cantin Cumyn & Cumyn, *supra* note 34 at 283, para 299 [translated by author, footnote omitted].

personae aspect of the administration of the property of others explains that the administrator "may not delegate […] the exercise of a discretionary power, except to his co-administrators".[470]

Similarly, trust is a fundamental component of the office of director of a legal person. For instance, in the case of business corporations, very few requirements regarding the nomination of directors are provided by the CCQ[471] and the corporate laws, even where very large business corporations are concerned.[472] This allows shareholders to elect[473] a person they deem fit for the office of director – a person whom they trust.[474]

Finally, the mutual trust the parties have in each other has been described as the basis of the employment contract.[475]

While the relationships identified above do involve trust, it does not follow that trust is the defining element that gives rise to a duty of loyalty.[476] Trust, in itself, cannot generate an obligation or a legal duty.[477] A person may trust another for certain purposes, but the person whom she trusts will not necessarily be bound to act loyally, at least from a legal point of view. Rather, as I will show next, a duty of loyalty arises where a legal actor has the power to act within the legal sphere of another. Of course, there may be a considerable degree of trust at play

[470] Art 1337, para 1 CCQ.
[471] The only restrictions imposed by the CCQ relate, namely, to minority, incapacity, bankruptcy and violation of the law: arts 327 and 329 CCQ.
[472] Crête & Rousseau, *supra* note 28 at 340, para 741.
[473] See s 106 (3) BCA; s 110 CBCA.
[474] Although shareholders elect directors, the beneficiary of the directors' duty of loyalty is the legal person (in this case the business corporation) – not the shareholders. In *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461, a case originating from Quebec that involved a business corporation incorporated under the CBCA, the Supreme Court of Canada confirmed that the duty of loyalty is owed to the business corporation itself : *ibid* at para 43. See also Stéphane Rousseau, "La reconfiguration du devoir de loyauté des administrateurs de sociétés par actions : de Charybde en Scylla?" (2000) 102 R du N 7.
[475] See e.g. Dubé & Trudeau, *supra* note 423 ("l'employé qui trahit cette confiance ébranle les bases mêmes de la relation d'emploi" at 57); *Daigle c Caisse populaire Les Etchemins*, JE 95-1070, AZ-95011528 (CA); *Kuet Leong*, *supra* note 89.
[476] As Cantin Cumyn and Cumyn (*supra* note 34) explain with regards to the administrator of the property of others, "[trust] only offers a complementary justification for the administrator's duty of loyalty" (at 283, para 299 [footnote omitted, translated by author]). In *Brassard c Brassard*, 2009 QCCA 898, EYB 2009-158543, the Quebec Court of Appeal endorsed Cantin Cumyn's view: "l'obligation de loyauté s'apprécie indépendamment de la *confiance* régnant entre les parties" (at para 106 [emphasis in the original]).
[477] See chapter 3, section 3.3, regarding the distinction between the duty and the obligation of loyalty. However, it should be noted that the terms "duty of loyalty" and "obligation of loyalty" are used interchangeably in this chapter.

in such circumstances, but trust is not *the* defining element which determines whether a person is under a duty to act loyally.[478]

4.1.2 The power to act within the legal sphere of another

As argued in chapter 3, all four legal actors explicitly subject to a duty of loyalty under the CCQ exercise legal powers. Holders of legal powers, by contrast with titularies of subjective rights who act in their own personal interest, exercise their legal prerogative "in the interest of another or for the achievement of a purpose".[479]

In this section, I build on the premise that the administrator of the property of another, the mandatary, the director of a legal person and the employee exercise legal powers. I examine their respective legal situation, and more specifically the nature of the functions they perform, in order to determine when exactly a duty of loyalty arises under Quebec's *jus commune*.

Beforehand, however, it is relevant to point out that although I analyze the situation of each of the legal actors separately, they can also be subject to a duty of loyalty under different titles, concurrently. For instance, a mandate may be superposed to an employment contract.[480]

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[478] What is more, given that the term "trust" is not univocal, it is problematic to describe trust as the defining element which gives rise to a duty of loyalty. In a common law setting, Miller rejects the idea of defining fiduciary relationships on the basis of trust ("Justifying Fiduciary Duties", *supra* note 9 at 997-999). Amongst other things, he points out that:

> [T]he meaning of trust is contested. Trust may be defined as any of a number of states of mind, forms of conduct, or both (e.g., a demonstrated attitude or emotion). In any event, there is no agreement about what trust comprises. There are other complexities. Trust may be unilateral or reciprocal. It applies to different levels and kinds of social interaction (interpersonal, organizational, public, and political). It also has different objects (e.g., one can trust in the testimony of another, their promises, their competence, and so on). The correlative concept, trustworthiness, is equally unclear. It is uncertain whether trustworthiness is a function of the character, competencies, or motivations of a person in whom trust is to be placed; the nature of the relationship between those who give and receive trust; or the social, political, organizational, and legal contexts which might influence their motivation or behavior. So long as it lacks clear meaning, trust cannot justify fiduciary duties (*ibid* at 997-998, [footnotes omitted]).

Regarding the various meanings of the word "trust", see Belley, *supra* note 464. Belley draws an interesting distinction between "traditional" trust – the subjective trust a person has in another due to their relationship of familiarity and intimacy – and "modern" trust – a rather impersonal trust, required, namely, for institutional purposes: *ibid* at 15-16.

[479] Cantin Cumyn, "The Legal Power", *supra* note 35 ("a power may be defined as a prerogative conferred on a person in the interest of another or for the achievement of a purpose, while the right is a prerogative that gives its titulary an advantage in his own interest" at 355 [footnote omitted]).

[480] However, even when combined with another type of contract, the mandate retains its own autonomy: Denys-Claude Lamontagne, "Le mandat" in Denys-Claude Lamontagne & Bernard Larochelle, eds, *Droit spécialisé des contrats*, vol 1 (Cowansville, Que: Yvon Blais, 2000) 595 ("[d]ans beaucoup de cas, le mandat peut coexister avec un autre type de contrat (contrat de service, contrat de travail), si bien que l'on peut parler de contrat mixte. Mais, en

Likewise, art 321 CCQ assimilates the director of a legal person to a mandatary,[481] which means that the director must comply with two sets of duties: those of a director of a legal person and those of a mandatary. The director of a legal person can also be the employee of the legal person.[482]

Moreover, in certain cases, the rules governing the administration of the property of others apply to a mandatary. The CCQ explicitly refers to the regime of the administration of the property of others where the general mandate[483] is concerned.[484] The general mandate usually concerns situations where, as in the administration of the property of others, the beneficiary of the duty of loyalty is absent or incapable of exercising effective control on the mandatary.[485] From this perspective, the general mandate may be seen as an instance of administration of the property of others.

This being said, for purposes of clarity, I will examine successively the situation of the administrator of the property of another, the mandatary, the director of a legal person and the employee.

When I first introduced the regime of the administration of the property of others in chapter 2, I explained that the administrator of the property of another holds legal powers, as opposed to subjective rights. Administrators of the property of others may hold powers of representation,

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toutes circonstances, le mandat annexe ou accessoire n'est pas absorbé par le contrat principal : il conserve son autonomie propre" at 602, para 981 [footnotes omitted]).

[481] However, there are significant distinctions between the mandatary and the director. For instance, unlike the powers of the mandatary, which derive from a contract, the powers of the director of a legal person are provided by the CCQ. In the case of the director of a business corporation, the director's powers are also provided by the BCA (in the case of directors of provincially-incorporated business corporation) or the CBCA (for directors of federally-incorporated business corporation). Therefore, Cantin Cumyn contends that "[t]o the extent that [the director's] powers of representation find their source in the law, it is inappropriate to equate them with mandate" ("The Legal Power", *supra* note 35 at 358).

[482] For cases in which the director of a legal person was also the latter's employee, see *Dufour c Désilets*, JE 99-2147, AZ-99022056 (Sup Ct); *Wood c Commer-Tech America Inc*, JE 2004-53, AZ-50208173 (Sup Ct), rev'd 2005 QCCA 556. 9021-2648 Québec inc. c. Bourbeau-Gauthier, AZ-50152138 (CS), J.E. 2003-134, REJB 2002-35743; *9021-2648 Québec inc c Bourbeau-Gauthier*, JE 2003-134, AZ-50152138 (Sup Ct).

[483] The mandate is a specific regime applicable where the conditions mentioned at art 2130 CCQ are met. It "may be special, namely for a particular business, or general, namely for all the business of the mandator" (art 2135 CCQ).

[484] Art 2135, para 2 CCQ provides that "[a] mandate expressed in general terms confers the power to perform acts of simple administration only. The power to perform other acts is conferred only by express mandate, except where, in the case of a mandate given in anticipation of the mandator's incapacity, that mandate confers full administration".

[485] For instance, the protection mandate. See Cumyn, "Les conflits d'intérêts", *supra* note 92 at 58, n 48. The beneficiary's lack of control over the administrator of the property of another was also discussed in this thesis, section 3.3.3.

which are to be exercised for the representation of a person, or autonomous powers, which are to be exercised for the accomplishment of a purpose other than the representation of a person.

It is of the essence of this regime that the administrator manages "property or a patrimony that is not his own".[486] The property upon which the administrator exercises his powers does not always belong to another person, namely where the administrator manages a trust, which is a patrimony by appropriation.[487] In any case, however, the administrator has the power to alter the patrimony of another person or of a trust. According to Cantin Cumyn, this implies that the administrator does not exercise subjective rights.[488]

The regime of the administration of the property of others encompasses two types of administration: simple and full administration. The CCQ provides that "[a] person charged with simple administration shall perform all the acts necessary for the preservation of the property or useful for the maintenance of the use for which the property is ordinarily destined".[489] On the other hand, "[a] person charged with full administration shall preserve the property and make it productive, increase the patrimony or appropriate it to a purpose, where the interest of the beneficiary or the pursuit of the purpose of the trust requires it".[490] In other words, simple administration aims to preserve the value of the property administered whereas full administration is oriented towards the maximization of its value.[491] I will return to these notions of simple and full administration later in this subsection. For the moment, all that is important is to take note that in any case, the administrator of the property of another holds legal powers as he manages the property or patrimony of another.

The mandatary holds legal powers as well, and more specifically powers of representation. Although acts of representation may be performed outside of a mandate, the mandate is the prototype of the power of representation.[492] In a mandate, the mandator is substituted by the

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[486] Art 1299 CCQ.
[487] Art 1261 CCQ.
[488] Cantin Cumyn & Cumyn, *supra* note 34 ("s'agissant « d'administrer un bien ou un patrimoine qui n'est pas le sien », il est exclu que les prérogatives en cause correspondent à l'exercice des droits propres de l'administrateur" at 75, para 89); Cantin Cumyn, "L'exercice de pouvoirs", *supra* note 365 ("[l]'immixtion dans les affaires d'une autre personne est une situation exceptionnelle dont la légalité repose sur l'existence de pouvoirs régulièrement conférés" at 248).
[489] Art 1301 CCQ.
[490] Art 1306 CCQ.
[491] Cantin Cumyn & Cumyn, *supra* note 34 at 187, para 196.
[492] Cantin Cumyn, "The Legal Power", *supra* note 35 at 349.

mandatary in the accomplishment of a juridical act, but the rights and obligations which flow from this juridical act are instantaneously part of the mandator's patrimony.[493] The mandatary does not act on his own behalf nor for his personal benefit, but in the name and for the benefit of the mandator whom he represents.[494]

The director of a legal person holds legal powers which he must exercise for the benefit of the legal person, such as a business corporation.[495] Because a legal person is legally incapable of acting on its own, it acts through its organs, such as the board of directors.[496]

Although the Quebec legislator chose to assimilate the relationship between the director and the legal person to a mandate[497], in Cantin Cumyn's words, "the range of the functions and objects of the powers invested in those who enable legal persons to participate in the life of the law precludes giving them a singular characterization".[498] Indeed, the circumstances in which, as in a mandate, the director exercises powers of representation should be distinguished from the circumstances in which he exercises autonomous powers.

Individually, a director can be granted the power to represent the business corporation when he enters into a contract with a third party, on behalf of the business corporation.[499] Collectively, however, the directors administer the business corporation as an organ of the business corporation, the board of directors. In this latter case, the powers vested in the directors are

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[493] Popovici, *La couleur du mandat*, *supra* note 435 ("[l]e pouvoir de représentation explique l'effet essentiel du mandat : le mandant est lié par contrat avec le tiers, de telle sorte que naissent *directement* dans son patrimoine des droits et obligations du contrat conclu avec le tiers, avec les recours réciproques directs contractuels résultant de ce contrat" at 18 [footnote omitted, emphasis in the original]).

[494] Cantin Cumyn & Cumyn, *supra* note 34 ("[l]'attributaire de pouvoirs de représentation exerce les droits du représenté à sa place et en son nom : il agit dans l'intérêt exclusif du titulaire des droits" at 97, para 111).

[495] Art 322, para 2 CCQ. Stéphane Rousseau, "Fasicule 7 – Devoirs des administrateurs et des dirigeants" in *JurisClasseur Québec – Droit des sociétés* (Montreal: LexisNexis Canada, 2012) ("[a]insi, le devoir de loyauté des administrateurs s'adresse toujours à la société") at 7/17, para 31. While the CBCA (s 122) and the CCQ (art 322) mention that a duty of loyalty is owed to the legal person (the business corporation), s 119 (1) of the Quebec BCA simply states that "the directors are bound by the same obligations as are imposed by the Civil Code on any director of a legal person". In common law, it has long been established that the directors owe a duty of loyalty and a duty of care to the business corporation: *Foss v Harbottle* (1843), 67 ER 189, 2 Hare 461; *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165 (available on CanLII). In *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461, a case originating from Quebec involving a business corporation incorporated under the CBCA, the Supreme Court of Canada confirmed that the duty of loyalty is owed to the business corporation (at paras 42-43).

[496] Art 311 CCQ. See Lizée, *supra* note 422.

[497] Art 321 CCQ mentions that "a director is considered to be the mandatary of the legal person". See also s 110 BCA.

[498] Cantin Cumyn, "The Legal Power", *supra* note 35 at 358.

[499] *Ibid*.

autonomous powers as they are to be used to see to the proper operation of the business corporation; no representation is involved.[500]

As for the employee, as discussed in chapter 3,[501] he also exercises legal powers when performing his functions of employee. In effect, when the employee acts in the course of his employment, the actions he performs as an employee affect his employer's patrimony and are also directly attributed to the employer, which explains that the employer must repair any injury caused by his employees' fault.[502] What is more, the CCQ specifies that the employee is "under the direction or control of another person, the employer".[503]

The employee's subordination to the employer is said to be the distinctive feature of the employee-employer relationship.[504] Although the nature of the tasks performed by certain employees requires a high level of autonomy,[505] the employee nonetheless remains subordinated to his employer at all times. What is more, commentators claim that the employee's duty of loyalty is in fact a manifestation of his subordination to his employer.[506] Neither the administrator of the property of another, the mandatary nor the director of a legal person are in such a relationship of subordination with the beneficiary of their duty of loyalty. In fact, they are granted certain freedom in the exercise of their powers, and may even, subject to certain constraints, delegate some of their powers.[507]

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[500] *Ibid*; Pratte, *supra* note 18 ("[d]ans sa relation interne avec la société par actions, le membre du conseil d'administration est un administrateur du bien d'autrui qui fait partie d'un organe doté par la loi d'un pouvoir propre d'administration. Les coadministrateurs agissent en collégialité au nom de l'organe, pour le compte de la société par actions. Dans son rapport externe, le membre du conseil d'administration peut, au même titre que tout autre dirigeant, se voir attribuer un pouvoir de représentation de la société par actions, à l'égard d'un tiers, dans l'accomplissement d'un acte juridique" at 41).

[501] Section 3.3.2.

[502] Art 1463 CCQ.

[503] Art 2085 CCQ.

[504] Hébert, *supra* note 335 at 2.

[505] The autonomy of the employee varies according to his hierarchical rank in the working organization and his responsibilities: Dubé & Trudeau, *supra* note 423 ("[l]'employeur doit laisser au salarié suffisamment d'autonomie pour lui permettre d'être fonctionnel; cette liberté d'action variera selon le niveau hiérarchique et les responsabilités rattachées au poste" at 56).

[506] See e.g. Hébert, *supra* note 335 at 2, 36.

[507] See art 1337 CCQ (administrator of the property of another), arts 2140-42 CCQ (mandatary). Concerning the director of a legal person such as a business corporation, see s 118 LSA.

Although the CCQ imposes a duty of loyalty on all employees, some of them – namely managers – are usually held to a duty of loyalty of greater intensity[508] under Quebec private law.[509] Generally, an employee with a higher hierarchical rank will be held to a heavier obligation of loyalty.[510] This said, the nature of the functions performed by the employee, rather than his status, is determining.[511]

The employee's degree of control on vital elements of the working organization is a factor in determining the intensity of the employee's duty of loyalty.[512] Authors also explain that a more stringent duty of loyalty is imposed on an employee where he represents directly his employer or where he personifies his employer when dealing with other employees or third parties.[513] In other words, though all employees step into the shoes of their employer when performing their

[508] The intensity of the obligation essentially is a doctrinal and jurisprudential construct pertaining to the defences available to a defendant, which are fewer and narrower in scope as the obligation grows in intensity. Obligations may be classified according to three intensities: the obligation of means (*obligation de moyens*), the obligation of result (*obligation de résultat*) and the obligation of guarantee (*obligation de garantie*). An obligation of means requires that reasonable steps be taken for the realisation of a given outcome, whereas an obligation of result, as its name suggests, requires that the expected result be attained except in cases of *force majeure*. However, a person under an obligation of guarantee cannot invoke *force majeure* as a defence for a failure to reach the expected result. This said, the content of the obligation does not vary with the obligation's intensity. On the intensity of the obligation, see Paul-André Crépeau, *L'intensité de l'obligation juridique*, (Montreal: Yvon Blais, 1989) at 4, para 7; Jobin & Vézina, *Les obligations*, *supra* note 6 at 47, para 36; Karim, *Les obligations*, *supra* note 6 at 21; Lluelles & Moore, *Obligations*, *supra* note 6 at 49-50, para 102.

[509] As a general rule, the employee's duty of loyalty corresponds to an obligation of means (Jobin & Vézina, *Les obligations*, *supra* note 6 at at 49, para 37). However, the duty of loyalty's intensity can be higher with respect to the manager, whose duty of loyalty may correspond to an obligation of result: Hébert, *supra* note 335 ("[e]n somme, en ce qui a trait aux aspects positifs de l'obligation de loyauté, l'intensité varierait selon le poste occupé par le salarié oscillant selon les circonstances d'une simple obligation de moyens pour le subalterne à une obligation de résultat pour le cadre supérieur" at 44, referring to Claude D'Aoust, Louis Leclerc & Gilles Trudeau, *Les mesures disciplinaires : étude jurisprudentielle et doctrinale*, Monographie n° 13 (Montreal: École de relations industrielles, Université de Montréal, 1982) at 339).

[510] François Guay, "Les obligations contractuelles des employés vis-à-vis leur employeur: la notion d'obligation fiduciaire existe-t-elle en droit québécois?" (1989) 49 R du B 739 at 42-50; Morin et al, *supra* note 409 at 360. See e.g. *Concentrés scientifiques Bélisle*, *supra* note 408 at para 39; *Joseph Ribkoff inc c Kanfi*, 2006 QCCS 3681(available on Azimut) at para 93; *Kuet Leong*, *supra* note 89 at 438; Lanctôt, *supra* note 438 at para 61; *Pro-quai*, *supra* note 408 at para 40.

[511] Jobin & Vézina, *Les obligations*, *supra* note 6 at 269, para 161. See eg *Groupe Bocenor inc c Drolet*, 2007 QCCS 3355 (available on Azimut) at para 46; *NFBC*, *supra* note 85; *Pro-quai*, *supra* note 408 at paras 37-40; *9020-4983 Québec inc (Institut d'échafaudage du Québec (IEQ)) c Tremblay*, [2005] RJQ 479, AZ-50289050 (Sup Ct).

[512] Morin et al, *supra* note 409 ("[p]lus il dispose ou contrôle des éléments vitaux de l'entreprise, plus il se doit d'être rigoureusement loyal […]" at 360).

[513] *Ibid* ("[e]n pratique, il est des postes cependant où la nécessité d'une application plus rigoureuse ou plus intensive s'impose, soit parce que leurs titulaires sont placés en situation où les occasions de violation sont plus fréquentes ou plus pressantes, soit parce qu'ils représentent directement l'employeur ou encore, qu'ils sont plus immédiatement son prolongement auprès des autres salariés ou des tiers (fournisseurs, clients réels ou potentiels, concurrents, etc.)" at 360). See also Guay, *supra* note 510 at 754; Hébert, *supra* note 335 at 42-50.

functions of employee, the further an employee goes in his personification of his employer, the greater the intensity of his duty of loyalty.

In this regard, a parallel can be drawn between the manager and the administrator of the property of another charged with full administration. Both enjoy considerable autonomy in the performance of their functions and they have a greater capacity to affect the employer's or the beneficiary's patrimony than an "ordinary" employee or an administrator charged with simple administration.

While simple administration is oriented towards the preservation of the patrimony administered, full administration is oriented towards efficiency, which explains that some measures of control are imposed exclusively on the administrator charged with simple administration.[514] Namely, contrarily to the administrator charged with full administration, the administrator charged with simple administration must comply with the requirements relating to presumed sound investments.[515] He must also obtain the beneficiary's or the court's authorisation to alter the contents of the patrimony administered.[516] The administrator charged with full administration, on the other hand, has wider discretion to determine the grounds that justify any undertaking.[517] Since discretion is more pronounced in full administration, the risk of disloyalty is increased. The potential repercussions of disloyalty are equally greater and more harmful as the administrator charged with full administrator has greater control over the patrimony administered. Therefore, just like the manager who is held to a higher standard of loyalty than the mere employee, the administrator charged with full administration should be under a harsher duty of loyalty than the administrator charged with simple administration.[518]

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[514] Cantin Cumyn & Cumyn, *supra* note 34 ("[m]arquée par un souci de protection, la simple administration comporte des contrôles que la peine administration ne connaît pas. Dans la pleine administration, c'est le souci d'efficacité qui domine" at 187, para 196 [footnote omitted]).
[515] Arts 1304, para 1, 1339-43 CCQ.
[516] Arts 1303, 1305 CCQ.
[517] Cantin Cumyn & Cumyn, *supra* note 34 at 193, para 202. Cantin Cumyn and Cumyn suggest comparing arts 1303-1305 CCQ (simple administration) with art 1307 CCQ (full administration): *ibid*, n 611.
[518] Note that according to Cantin Cumyn and Cumyn, the duty of loyalty does not vary in intensity (*ibid* at 283, para 299). However, due to the impressive control the administrator charged with full administration has on the patrimony administered, I believe that the intensity of this administrator's duty of loyalty should be greater than that of the administrator charged with simple administration. In other words, the defences available to the administrator charged with full administration should be fewer than those available to the administrator charged with simple administration.

This being said, regardless whether they are vested with discretionary power, administrators of the property of another and employees are subject to a duty of loyalty under the CCQ. By contrast, in common law, the notion of discretion – or more precisely, discretionary authority – ,[519] is a cornerstone in understanding fiduciary relationships and the duties they entail.[520] Arguably, in common law, only those legal actors who exercise discretionary authority over the interests of another are deemed to be fiduciaries and thus are under a fiduciary duty of loyalty. Discretion has repeatedly been emphasized as a defining component of fiduciary relationships by Canadian fiduciary jurisprudence[521] and has been placed at the forefront of recent theories concerning fiduciary duties.[522] However, the exercise of discretion cannot be the basis of the duty of loyalty in Quebec private law as it is not a common feature of the functions performed by the legal actors subject to a duty of loyalty under the CCQ.[523]

Rather, what stands out of this overview of the nature of the functions of the legal actors subject to a duty of loyalty under the CCQ is that they all have the power to alter a patrimony that is not their own in the performance of their functions.[524] This situation where a person has the power to modify the patrimonial situation of another[525] is so unusual that it is not even traditionally envisioned by the civil law, which is built on the subjective right paradigm, as was explained in

[519] Fox-Decent, "Fiduciary Nature", *supra* note 9; Fox-Decent, *Sovereignty's* Promise, *supra* note 213 at 97-101; Miller, "Fiduciary Liability", *supra* note 8 at 274-75.

[520] Ernest J Weinrib, who is commonly seen as the precursor of the discretionary theory approach to fiduciary relations, has affirmed that "[t]he need to control discretion has been a justification for the imposition of the harsh rule concerning fiduciaries since the beginning" ("The Fiduciary Obligation" (1975) 25 UTLJ 1 at 4).

[521] See e.g. *Hodgkinson v Simms*, *supra* note 253 at 466; *Norberg v Wynrib*, *supra* note 253 at 272. Most recently, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, a case relating to aboriginal rights in which the Court had to differentiate the concept of honour of the Crown from that of fiduciary duty, the Court accentuated the discretionary power element as determining: "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty" (para 18, McLachlin CJC, relying on *Wewaykum*, *supra* note 264 at para 79).

[522] See e.g. Fox-Decent, "Fiduciary Nature", *supra* note 9; Fox-Decent, *Sovereignty's* Promise, *supra* note 213; Miller, "Fiduciary Liability", *supra* note 8; Miller, "Justifying Fiduciary Duties", *supra* note 9 at 1017-18.

[523] For instance, the "mere employee" or the administrator of the property of another charged with simple administration may have no discretion in the performance of their functions, yet they are under a duty of loyalty according to the CCQ.

[524] The patrimony should be understood as encompassing more than just property, but also rights and obligations. The term "patrimony" has been defined by the Paul-André Crépeau Centre for Private and Comparative Law as the "[u]niversality of the rights and obligations of a person having a pecuniary value in which rights answer for obligations": CPCL, *Private Law Dictionary. Property*, *supra* note 378, *sub verbo* "patrimony".

[525] "Another" refers to a person or a trust. In the CCQ's regime of the administration of the property of others, "others" may designate persons as well as a trust.

chapter 3. Besides, the fact that a legal actor can modify the legal position of another[526] creates, incidentally, an asymmetry between the parties, especially when this alteration of the patrimony of another is done without that other person's knowledge.[527]

In order to enrich my analysis, it is of great interest to briefly go over a common law theory of fiduciary duties which has recently been put forth by Paul B Miller.[528] Albeit grounded in common law, this theory offers interesting insight on the duty of loyalty in civil law as well. What is more, Miller's analysis may find resonance with civilian jurists as the parallel between his account of fiduciary power and the concept of legal power is striking. For present purposes, only a glimpse of Miller's theory is presented.

In a very civilian manner, Miller's analysis of fiduciary relationships is structured around the person of the beneficiary. Miller does not analyze fiduciary duties in terms of duties owed by one person to another. Rather, his analysis of fiduciary duties "gestures at the position of the beneficiary in the fiduciary relationship".[529]

For Miller, every person has a legal personality and capacities that are constitutive of this legal personality.[530] Miller argues that the powers exercised by fiduciaries correspond to the legal capacities of the beneficiary.[531] According to the author, "[t]hese capacities – to contract, to inherit, to establish a trust, to establish possessory interests in property – are the very means by which individuals act purposively through law".[532]

Fiduciaries thus exercise what Miller calls "means" of the beneficiary.[533] In exercising the means of the beneficiary, fiduciaries act as extensions of the latter.[534] Therefore, Miller contends

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[526] As mentioned in section 3.3.2, even legal actors who do not have the power to perform juridical acts on behalf of another may still affect that other's legal position. For instance, according to art 1463 CCQ, an employer will be held liable for the injuries caused by his employee's fault, whether or not the functions of the employee include the performance of juridical acts. Thereby, the employer's legal position will be affected.

[527] For instance, as discussed above, administrators of the property of another (especially administrators charged with full administration) or managers may take important initiatives that have significant impact on the patrimony of the beneficiary or the employer.

[528] "Justifying Fiduciary Duties", *supra* note 9.

[529] *Ibid* at 1014.

[530] *Ibid* ("capacities that are constitutive of the *legal personality* of another individual or group of individuals" at 1013 [emphasis in the original]).

[531] *Ibid* ("fiduciary powers are legal capacities derived from the legal personality of other persons, natural or corporate" at 1017).

[532] *Ibid* at 1019.

[533] *Ibid* ("fiduciary power is properly understood as a means belonging rightfully to the beneficiary" at 1021).

that "[f]iduciary power is substitutive".[535] He explains that "[i]n wielding [the fiduciary powers], the fiduciary stands in substitution for [the beneficiary] within the ambit of the power".[536]

An interesting parallel can be drawn between Miller's "means" and the civilian concept of legal power.

In civil law, legal powers may be understood with regards to legal capacity as well. The CCQ provides that subjects of rights "posse[ss] juridical personality" and therefore "ha[ve] the full enjoyment of civil rights".[537] The capacity to exercise civil rights is a corollary of the capacity to enjoy such rights.[538] However, where legal powers are granted to a person, they are substituted to a subject of rights' capacity to exercise his rights.[539]

For instance, minors are, to a certain extent, incapable of exercising their rights.[540] Legal powers then palliate for the subject of rights' incapacity; the holder of legal powers will exercise his powers on behalf of the minor. On the other hand, where a subject of right is capable of exercising his rights, but nonetheless delegates the exercise of such rights to another as a result of a contractual agreement[541], legal powers limit the subject of right's capacity to exercise his rights as the legal prerogative held by the holder of legal powers must be exercised exclusively by the latter. Therefore, legal powers may either compensate for a subject of right's incapacity or limit his capacity to exercise his rights.[542]

Thus, under Miller's account of fiduciary power as well as under a civilian theory of legal powers, the capacity of the beneficiary to exercise his means or his civil rights is substituted by the exercise of fiduciary powers or, in a civil law setting, of legal powers. Miller justifies

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[534] *Ibid* at 1020.
[535] *Ibid* at 1019.
[536] *Ibid* at at 1017.
[537] Art 1 CCQ reads as follows :

> Every human being possesses juridical personality and has the full enjoyment of civil rights.

[538] Grégoire, *Liberté, responsabilité et utilité*, *supra* note 308 at 151. Art 4 CCQ provides that :

> Every person is fully able to exercise his civil rights.
>
> In certain cases, the law provides for representation or assistance.

[539] Cantin Cumyn & Cumyn, *supra* note 34 at 69-70, paras 73-76.
[540] Arts 153, 155ff CCQ. Likewise, legal persons are incapable of exercising their rights on their own. Therefore, they act through their organs, which are composed of holders of legal powers such as directors. See art 311 CCQ.
[541] For instance, in a mandate (art 2130 CCQ).
[542] Cantin Cumyn & Cumyn, *supra* note 34 ("[l]orsqu'elle ne vient pas suppléer à une incapacité légale ou matérielle, l'administration du bien d'autrui apparait comme une dérogation au principe de la capacité juridique des personnes" at 70, para 76).

fiduciary duties precisely on the basis of this substitutive aspect of fiduciary powers. According to Miller, "[g]iven that fiduciary power is a means of the beneficiary, the interaction between fiduciary and beneficiary must be presumptively conducted for the sole advantage of the beneficiary".[543]

Miller's theory provides useful input for the analysis of the duty of loyalty under the CCQ. In Quebec private law as well, it is possible to claim that legal actors under a duty of loyalty act "as an extension of [an]other"[544] in the performance of their functions, where there is an existing beneficiary.[545] This explains that, unlike the four legal actors whose situation was examined above, other legal actors such as the provider of services[546] are not held to a duty of loyalty under Quebec private law. In effect, the provider of services does not act as an extension of the titulary of the patrimony which he alters when performing his functions.[547] To borrow Miller's words, the provider of services is not exercising "a means" of his client.

Accordingly, it is possible to claim that a duty of loyalty arises where a legal actor has the power to alter the situation of another *from within*. A duty of loyalty does not merely arise where a person has the power to *affect* the patrimonial situation of another "from the outside". For instance, although the provider of services may affect the patrimony of another, he does not alter this patrimony from within.

Miller's theory is also consistent with what I suggested above regarding the employees who are held to a duty of loyalty of greater intensity under Quebec private law. Employees whose task is to represent their employer when dealing with other employees or third parties are held to a

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[543] Miller, "Justifying Fiduciary Duties", *supra* note 9 at 1020.
[544] *Ibid* at 1019.
[545] As mentioned in chapter 3, section 3.3.3, there may be no existing beneficiary to whom the holder of legal powers owes a duty of loyalty, for instance in a trust.
[546] Art 2098 CCQ describes the contract for services as follows:

> A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.

[547] See Baudouin, Deslauriers & Moore, *supra* note 414 at 834, para I-867 :

> L'entrepreneur exécute le travail à ses risques, de la manière dont il l'entend et, en général, avec ses propres instruments. L'article 2099 C.c. précise, en effet, qu'il conserve le libre choix des moyens d'exécution et qu'aucun lien de subordination n'est créé par la convention. […] L'entrepreneur reste maître de l'exécution du travail, même si le cocontractant, en raison de son intérêt au succès de l'entreprise, conserve un droit de surveillance générale.

heavier duty of loyalty[548] since they are acting, even more directly than other "ordinary" employees, as extensions of their employer.

Continuing on with my overview of Miller's theory, the means that fiduciaries exercise affect what Miller calls the practical interests of the beneficiary.[549] He explains that these practical interests relate to matters of right, personality and welfare. Miller describes such interests as follows:

> Matters of personality include aspects of the personality of corporate or natural persons who lack legal capacity, including the determination of their ends. Matters of welfare include decisions bearing on the physical and psychological integrity and well-being of natural persons. Matters of right include decisions bearing upon the interests of corporate and natural persons relative to their legal rights, duties, powers, and liabilities, including those in relation to contract and property. [550]

As I will explain shortly, the practical interests that may be affected by the exercise of fiduciary powers are constitutive of the beneficiary's "legal sphere".

In Quebec civil law, the sphere of "interests" that can be affected by the exercise of legal powers may seem narrower than the sphere of practical interests described by Miller. Indeed, following my analysis of the functions performed by the four legal actors subject to a duty of loyalty under the CCQ, I affirmed above that loyalty arises where a person has the power to alter the patrimonial situation of another from within. However, I believe that the requirements of loyalty should also be imposed where a legal actor has power over another's very person. In other words, under Quebec private law, legal actors who take decisions that relate to the psychological or physical welfare of another should also be under a duty of loyalty.

As mentioned by Miller, in common law, a fiduciary duty of loyalty may arise even in circumstances where no management of property is involved.[551] According to Miller, "[t]he

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[548] Morin et al, *supra* note 409 at 360. See also See also Guay, *supra* note 510 at 754; Hébert, *supra* note 335 at 42-43, 49-50. In some way, those employees are imbued with their ex-employer's "personality" longer than other mere employees since they were his "direct personification" during their contract of employment.

[549] Miller, "Justifying Fiduciary Duties", *supra* note 9 ("[t]he beneficiary is invariably dependent upon the fiduciary as power is exercised to affect her practical interests" at 1015).

[550] *Ibid* at 1014.

[551] Miller writes:

> [W]hile many fiduciary relationships involve the exercise of power over property, not all do. The paradigmatic fiduciary relationship between trustee and beneficiary is a misleading paradigm in that respect. Many relationships of recognized fiduciary status do not necessarily implicate any of the

primary function of the duty of loyalty is to secure the exclusivity of the beneficiary's claim on power as a means, *whatever the nature of the underlying interest*".[552] Thus, in common law, fiduciaries may also deal with matters relating to welfare, which "include decisions bearing upon specific aspects of the personal integrity and well-being of natural persons, including their physical and mental health".[553] For instance, in the famous *Norberg v Wynrib*[554] case, the Supreme Court of Canada held that a doctor who accepted sexual favours and issued drug prescriptions in return was in breach of his fiduciary duties; the doctor exercised fiduciary power over his patient's physical and mental health.[555]

Likewise, loyalty in Quebec private law should not be restricted to cases where legal powers are exercised upon property. It is indeed possible to exercise legal powers while dealing with matters that do not relate to property. Besides, the same kind of asymmetry between the parties is created whether a legal actor has power over the patrimony of another or over her person.

As a matter of fact, the CCQ explicitly recognizes[556] that the mandatary, who is under a duty of loyalty, may perform juridical acts that concern the person of the mandator. More specifically, the mandatary may accomplish acts which relate to the protection or the moral well-being of the mandator.[557] For instance, in a mandate in case of incapacity, also called a protection mandate, the mandatary may have to see that the mandator receives all the care required by his state of health.[558]

In the particular setting of the administration of the property of others, although it is clear that the legal powers are exercised upon the *property* of another, Cantin Cumyn has suggested that the

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beneficiary's proprietary interests. Parents enjoy fiduciary power over the person and property of their children. Lawyers enjoy fiduciary power over legal interests (rights, obligations, powers) of clients that often have no bearing on their property. In many cases, the interests subject to the fiduciary relationship cannot reasonably be construed as proprietary ("Justifying Fiduciary Duties", *supra* note 9 at 989).

[552] *Ibid* at 1022 [emphasis added].

[553] Miller, "Fiduciary Liability", *supra* note 8 at 276.

[554] *Supra* note 253.

[555] *Ibid* at 272.

[556] Art 2131 CCQ provides that:

> The object of the mandate may also be the performance of acts intended to ensure the personal protection of the mandator, the administration, in whole or in part, of his patrimony as well as his moral and material well-being, should he become incapable of taking care of himself or administering his property.

[557] Fabien, "Le nouveau droit du mandat", *supra* note 70 at 889.

[558] Michel Beauchamp, with the collaboration of Cindy Gilbert, *Tutelle, curatelle et mandat de protection* (Cowansville, Que: Yvon Blais, 2014) at 345.

rules governing this regime could also be applied by analogy to an administrator who exercises his powers over another person.[559] She explains that autonomous powers and powers of representation can also relate to "the caring for the person of another",[560] whether this person is natural or legal.[561] For instance, the consent to care[562], the exercise of parental authority[563] and the tutorship to the person[564] involve the exercise of legal powers for the caring of a person.[565] A duty of loyalty could therefore also be attached to the exercise of legal powers over a person, even if it is not expressly provided by the CCQ. As I argued in chapter 3, loyalty should not be restricted to the cases where it is explicitly provided for by the CCQ.[566]

On the basis of the preceding observations, I contend that in Quebec private law, a duty of loyalty arises where a legal actor acts within what may be called the "legal sphere" [567] of another. Where a legal actor acts within the legal sphere of another, he does not act on his own behalf nor in his personal interests.

In civil law, this legal sphere may be seen as encompassing both patrimonial and extrapatrimonial rights. In common law, it encompasses the set of practical interests that may be affected by the exercise of fiduciary power, as described by Miller. This legal sphere represents a person or a legal entity (such as a trust) on the legal scene. Traditionally, in civil law, a subject of rights is represented through his patrimony.[568] However, as I argued that legal actors under a

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[559] Cantin Cumyn, "Des biens à la protection de la personne", *supra* note 203 ("[m]algré l'apparence d'une portée limitée du titre sur l'administration du bien d'autrui, son analyse montre qu'il énonce des principes communs à l'exercice de pouvoirs privés […]. L'interprète est donc non seulement justifié, mais il serait mal avisé de n'y pas puiser les normes pertinentes à la solution des difficultés survenant dans l'exercice de pouvoirs impliquant la personne plutôt que le bien d'autrui" at 210); Cantin Cumyn, "The Legal Power", *supra* note 35 at 359-60.
[560] *Ibid* at 357.
[561] *Ibid* at 357-58.
[562] Art 12 CCQ.
[563] Art 33 CCQ.
[564] Art 177ff CCQ, arts 256 and 258 CCQ.
[565] Cumyn, "Les conflits d'intérêts", *supra* note 92 at 53.
[566] Section 3.1.3.
[567] Cantin Cumyn has evoked the idea of a *sphère juridique* (Cantin Cumyn & Cumyn, *supra* note 34 at 96) or a "juridical sphere" ("The Legal Power", *supra* note 35 at 345), from which my own conception of a legal sphere is inspired.
[568] Art 2, para 1 CCQ states that "[e]very person is the holder of a patrimony". The Paul-André Crépeau Centre for Private and Comparative Law defines the patrimony as follows: "Universality of property and debts of which a person is titulary or that is appropriated to a purpose recognized by law" (*Private Law Dictionary. Property*, *supra* note 378, *sub verbo* "patrimony"). The patrimony was famously described as an "emanation of legal personality" by Aubry and Rau (*supra* note 376 at 231, translation by Kasirer, "Aubry and Rau on the Patrimoine", *supra* note 376 at 473).

duty of loyalty may exercise their legal powers with regards to matters relating to the person as well as to property, the idea of a "legal sphere" is more accurate.[569]

To sum up, in Quebec private law, a duty of loyalty arises whenever a legal actor has the power to act within the legal sphere of another. This legal sphere encompasses the patrimony of another other, but it may also encompass extrapatrimonial rights, which relate to the very person of another. I explained that a legal actor under a duty of loyalty acts *within* the patrimony of another, contrary to a legal actor who may only *affect* the patrimony of another from the outside, such as a provider of services.

4.2 The core of the duty of loyalty

As explained previously, interpreted in light of a theory of legal powers, the duty of loyalty is a duty to act in the best interests of the person represented or to further the purpose for which a legal actor was granted legal powers.[570] This interpretation of the duty of loyalty echoes the wording of arts 322 CCQ[571], 1309 CCQ[572] and 2138 CCQ[573], which mention a duty to act "in the interest" or "in the best interest" of the legal person, the beneficiary or the object pursued, and the mandator, respectively. The content of the duty of loyalty is expressed less clearly in art 2088 CCQ, which simply mentions that "[t]he employee is bound […] to act faithfully".[574]

Various requirements flow from the duty of loyalty. In this section, I present the facets of loyalty found in Quebec's *jus commune*, and more specifically in the CCQ.

According to Cantin Cumyn and Cumyn, who wrote about the administrator of the property of another, the duty of loyalty is comprised of the following facets: the prohibition against conflicts

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[569] Note however that originally, the concept of patrimony also encompassed "innate" rights, which are now known as "extrapatrimonial rights": *ibid* at 472.

[570] It is useful to recall Cantin Cumyn's account of the duty of loyalty:

> The obligation of loyalty is directly related to the purpose of the powers, which either focuses on the interest of the person represented or covers a wider area for the accomplishment of another goal. The obligation of loyalty in this context requires that the exercise of powers of representation should only be undertaken in the interest of the person represented. Applied to autonomous powers, loyalty commands that the powers be exercised solely for the accomplishment of their goal. ("The Legal Power", *supra* note 35 at 360-61 [footnote omitted].)

[571] Which concerns the director of a legal person.

[572] Which concerns the administrator of the property of another.

[573] Which concerns the mandatary.

[574] Art 2088, para 1 CCQ reads as follows: "The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he obtains in the performance or in the course of his work".

of interests, the obligation to act with impartiality where there are many beneficiaries, the administrator's obligation not to mingle the property he administers with his own and the obligation to provide accounts and other information to the persons who have an interest in the administration.[575] I will analyze the core of the duty of loyalty along those same lines.

4.2.1 The rule prohibiting conflicts of interests

All four legal actors upon whom the CCQ imposes a duty of loyalty must not place themselves in a situation of conflict of interests. Simply put, a situation of conflict of interests is one where the legal actor subject to a duty of loyalty could be tempted to prioritize his personal interest or that of a third party over that of the beneficiary of his duty of loyalty.[576]

As I argued in chapter 3 and in the first part of this chapter,[577] the director of a legal person, the administrator of the property of another, the mandatary and the employee are holders of legal powers as they act within the legal sphere of another. A legal power is not a legal prerogative that one may exercise according to one's free will; it must be exercised in a predetermined aim. More specifically, holders of legal powers are under a duty to act in the interest of the person represented or in the furtherance of a purpose.[578] Necessarily, then, holders of legal powers must not act in their personal interests[579] or in any interest other than that for which they were granted powers. Thus, the rule against conflict of interests incontestably is loyalty's most fundamental facet.[580]

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[575] Cantin Cumyn & Cumyn, *supra* note 34 at 284, para 301.

[576] Hébert, *supra* note 335 at 50. Regarding the notion of conflict of interests in Quebec private law, see also Cumyn, "Les conflits d'intérêts", *supra* note 92; Alain Létourneau, "Vers une clarification de la notion d'intérêt" in *Éthique, Profession juridique et société – Collection de droit 2011-2012, volume hors série*, École du Barreau (Cowansville, Que: Yvon Blais, 2011) 25; Catherine Piché, "Définir l'étendue des tentacules du conflit d'intérêts pour mieux les maîtriser" in Association Henri-Capitant, *Les conflits d'intérêts, Journées nationales, Lyon 3*, t 17 (Paris: Dalloz, 2013) 31.

[577] Sections 3.3.2 and 4.1.2

[578] Cantin Cumyn, "The Legal Power", *supra* note 35 at 360-61.

[579] This being said, the administrator of the property of another can himself be a beneficiary, for instance where the trustee is also a beneficiary of the trust or where the liquidator of a succession is also an heir. In those cases, the administrator simultaneously is a titulary of subjective rights and a holder of legal powers with regards to the same property (Cantin Cumyn & Cumyn, *supra* note 34 at 285, para 303). This increases the risk of disloyalty as the administrator may be tempted to act in his own interests, as a titulary of subjective rights would. However, the CCQ provides that the administrator who is a beneficiary must not favour his own interests over that of the other beneficiaries (art 1310, para 2 CCQ).

[580] Cantin Cumyn, "The Legal Power", *supra* note 35 ("[t]he obligation of loyalty is directly related to the purpose of the powers, which either focuses on the interest of the person represented or covers a wider area for the accomplishment of another goal. […] It prohibits their use in the personal interest of the person exercising them or in the interest of a third party who has no connection to the purpose" at 360-61 [footnote omitted]). In common law,

Miller conveys a similar idea in the following exerpt, where he states that the means which the fiduciary exercises does not belong to him. Therefore, the fiduciary cannot exercise his fiduciary power in his own interest:

> The conflict rules proscribe appropriation by the fiduciary of fiduciary power understood as a means belonging exclusively to the beneficiary. The fiduciary may not treat fiduciary power as an unclaimed means or as a personal means. The duty of loyalty secures the beneficiary's legitimate expectation that fiduciary power, as one of *her* means, will be used only to achieve her ends. The wrongful character of fiduciary disloyalty is the same regardless of whether the conduct of the fiduciary is self- or other-regarding; in either event, the fiduciary has treated fiduciary power as a means at his disposal and, in doing so, has violated the beneficiary's exclusive claim upon the disposition of her means.[581]

Returning to the CCQ, the prohibition against conflicts of interests is explicitly codified where the director[582], the mandatary[583] and the administrator of the property of another are concerned.[584] As for the employee, though his duty of loyalty is established by art 2088 CCQ[585], the CCQ is mostly silent about its content.[586] Nonetheless, the literature and case law recognize the employee's obligation to avoid conflicts of interests.[587]

The legal actors subject to a duty of loyalty must avoid conflicts of interests, and they must also declare any interest that could potentially lead to a situation of conflict of interests.[588] The

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Miller states that "[the duty of loyalty] has minimum core content consisting of the conflict rules" ("Justifying Fiduciary Duties", *supra* note 9 at 978).

[581] *Ibid* at 1021 [emphasis in the original].

[582] Art 324, para 1 CCQ: "A director shall avoid placing himself in any situation where his personal interest would be in conflict with his obligations as a director".

[583] Art 2138, para 2 CCQ: "[the mandatary] shall avoid placing himself in a position where his personal interest is in conflict with that of his mandator".

[584] Art 1310, para 1 CCQ: "No administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator".

[585] Art 2088, para 1 CCQ, provides that "[t]he employee is bound […] to act faithfully and honestly and not to use any confidential information he obtains in the performance or in the course of his work".

[586] In such a case, we must turn towards jurisprudence and legal writings that interpret the employee's obligation of loyalty under the CCQ. The content of the obligations of the employee is also generally specified in other legal sources, such as the contract of employment itself, the labour laws and, in some cases, in a collective agreement.

[587] Hébert, *supra* note 335 ("[l]'obligation de loyauté défend à l'employé de se placer en situation de conflit d'intérêts, c'est-à-dire dans une situation qui lui permettrait de faire primer ses intérêts ou ceux d'une tierce partie au détriment des intérêts de son employeur" at 50); Morin et al, *supra* note 409 at 358. See also *Hasanie c Kaufel Group Ltd*, DTE 2002T-835, AZ-50141743 (Sup Ct); *Labrecque c Montréal (Ville de)*, DTE 2009T-518, AZ-50564666 (CRT); *Pierro c Allstate Insurance Company*, 2005 QCCA 1165 (available on Azimut).

[588] Arts 324, para 2 and 1311 CCQ. The rule is not provided for explicitly where the employee and the mandatary are concerned, but it is recognized by courts and commentators: see Morin et al, *supra* note 409 at 358 (concerning the employee); *Risi c Fologex Ltée*, JE 96-1767, AZ-96021746 (Sup Ct); *91453 Canada inc c Duquette*, JE 91-598, AZ-91021197 (Sup Ct) (concerning the mandatary).

potential source of conflict of interest being disclosed, this simplifies the beneficiary's surveillance of the legal actor subject to a duty of loyalty.

As for the other ramifications of the rule prohibiting conflicts of interests, they vary depending on the legal regime. However, they can be regrouped into two major categories: the rule prohibiting self-dealing activities and the one prohibiting personal usage of the property or information under the control of the legal actor subject to the duty of loyalty.

As mentioned in chapter 1, the rule prohibiting self-dealing was one of the duty of loyalty's very first manifestations in Quebec positive law. Under the CCLC, art 1706, which concerned the mandate, provided that "[a]n agent employed to buy or sell a thing cannot be the buyer or seller of it on his own account". This rule was also reiterated in the title pertaining to sale.[589]

The rule prohibiting the seller to buy what he must sell is now codified in the CCQ at art 1709, which is also expressly applicable to the administrator of the property of another.[590] The CCQ also states that the administrator of the property of another cannot, in principle,[591] "become a party to a contract affecting the administered property or acquire, otherwise than by succession, any right in the property or against the beneficiary".[592]

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[589] Art 1484 CCLC read as follows:

> The following persons cannot become buyers, either by themselves or by parties interposed, that is to say:
> Tutors or curators, of the property of those over whom they are appointed, except in sales by judicial authority;
> Agents, of the property which they are charged with the sale of;
> Administrators or trustees, of the property in their charge, whether of public bodies or of private persons;
> Public officers, of national property, the sale of which is made through their ministry.
> The incapacity declared in this article cannot be set up by the buyer; it exists only in favor of the owner and others having an interest in the thing sold.

[590] Art 1709 CCQ reads as follows:

> A person charged with the sale of property of another may not acquire such property, even through an intermediary; the same applies to a person charged with administration of property of another or with supervision of its administration, subject, however, as regards the administrator, to article 1312.
>
> Nor may such a person sell his own property for a price paid out of the the property or patrimony which he administers or of which he supervises the administration.
>
> In no case may such persons apply for annulment of the sale.

[591] The administrator of the property of another may be authorized to do so by the beneficiary or by the Court: art 1312, para 2 CCQ.

[592] Art 1312, para 1 CCQ.

With regards to the mandate, the prohibition set out in art 1706 CCLC was broadened under the CCQ to encompass all acts which the mandatary has agreed to perform for the mandator. This demonstrates the importance conferred to loyalty under the CCQ. More specifically, art 2147 CCQ prohibits the mandatary "even through an intermediary, [to] become a party to an act which he has agreed to perform for his mandator, unless the mandator authorizes it or is aware of his quality as a contracting party".

Thus, in principle, the administrator of the property of another and the mandatary cannot be parties to a contract which involves the property administered[593] or which relates to an act the mandatary has agreed to perform.[594] However, the principle is reversed in the case of the director of a legal person. Art 325, para 1 CCQ provides that "[the] director may, even in carrying on his duties, acquire, directly or indirectly, rights in the property under his administration or enter into contracts with the legal person".[595] This rule, which may not be conceivable in other settings, is due to the specific context in which legal persons operate.[596] In the case of a business corporation, as the late Yves Caron pointed out, it would be counterproductive to prohibit directors to have any interest in the corporation:

> [M]algré le devoir de loyauté, il n'est pas possible – ni même souhaitable – d'interdire à l'administrateur tout conflit d'intérêts avec la corporation. Comment prohiber ces conflits dans un système capitaliste où l'esprit de l'entrepreneur doit nécessairement s'associer avec l'idée de profit et où l'administrateur est souvent un actionnaire (important) de la corporation?[597]

This being said, art 325, para 1 CCQ is not inconsistent with the director's duty of loyalty. On the contrary, the director's lawful conclusion of contracts with the legal person and his acquisition of rights in the property under his administration are conditional to his divulgation of such acquisition or contract.[598] Otherwise, the act may be annulled and the profit remitted to the legal person.[599]

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[593] Art 1312, para 1 CCQ.
[594] Art 2147 CCQ.
[595] Art 325, para 1 CCQ.
[596] For a discussion, in a common law setting, on the inadequacy of the rules governing the trust with respect to the situation of directors of business corporations, see Rock & Wachter, *supra* note 49.
[597] Caron, "L'abus de pouvoir", *supra* note 23 at 12-13.
[598] Art 325, para 2 CCQ.
[599] Art 326 CCQ.

Another dimension of the rule against conflicts of interests pertains to the rule prohibiting personal usage of the property under the control of the legal actor subject to the duty of loyalty or of information he obtains by reason of his functions. Naturally, profits deriving from such personal usage are also prohibited. This rule is entrenched in the CCQ where the director of a legal person, the administrator and the mandatary are concerned.[600]

As for the employee, the CCQ provides that he must not "use any confidential information he obtains in the performance or in the course of his work".[601] This rule is similar to that imposed on the director, the mandatary and the administrator of the property of another, which prohibits the use of information obtained in the performance of their functions.[602] This facet of loyalty simply is a manifestation of the rule against conflicts of interests, where the subject matter is property or information.[603] In other words, a legal actor under a duty of loyalty must not favour his personal interests by using property or information extracted from the legal sphere of another to his own advantage.

4.2.2 The duty to act with impartiality

A legal actor may owe a duty of loyalty to beneficiaries with potentially competing interests. In these cases, the duty of loyalty requires that the legal actor acts impartially in their regard.

This rule is similar to, and is in fact inspired from,[604] what is known in common law as the even-hand rule, which requires the fiduciary to act in the best interests of all of the beneficiaries.[605]

In Quebec private law, this rule is entrenched in the CCQ where the administrator of the property of another and the mandatary are concerned. The CCQ provides that the administrator of the

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[600] Arts 323, 1314 and 2146, para 1 CCQ. Otherwise, the legal actors must return the profits obtained in breach of this duty. This will be discussed in section 4.3.1.
[601] Art 2088, para 1 CCQ.
[602] Quebec, Ministère de la justice, *Commentaires du ministre de la justice: Le Code civil du Québec*, vol 2 (Quebec: Publications du Québec, 1993) [Quebec, *Commentaires du ministre de la justice*, vol 2] ("[les obligations du salarié] rejoignent celles prévues pour l'administrateur du bien d'autrui (art. 1309 C.C.Q.) et pour le mandataire (art. 2138 C.C.Q.)" at 1312). Art 2088 CCQ also entails a duty not to disclose confidential information (duty of confidentiality), which, according to Morin, is distinct from the duty of loyalty (Morin et al, *supra* note 409 at 348).
[603] In common law, this is known as the no-profit rule. Smith, "The Motive", *supra* note 9 ("[t]he 'no-profit' rule requires the fiduciary to avoid making any profit out of the fiduciary relationship, except where expressly authorized by the constitutive act (such as the deed of trust), or by the court" at 55).
[604] Cantin Cumyn & Cumyn, *supra* note 34 at 289, n 966.
[605] See Waters, Gillen & Smith, *supra* note 181 at 1023-1027.

property of another must act impartially where there is a plurality of beneficiaries.[606] This is not to say that the duty to act impartially replaces the duty of loyalty, which requires that the holder of legal powers acts in the best interests of the beneficiary of the duty of loyalty or of the purpose for which the legal actor was vested legal powers. Rather, the duty to act impartially flows from the fact that each of the beneficiaries is entitled to the loyalty of the administrator.[607]

As regards the mandatary, where he "agrees to represent, in the same act, parties whose interests conflict or could conflict"[608], it may be rather challenging for him to abide by his obligation to act in the best interests of the beneficiary. Nonetheless, in those cases, the CCQ provides that the mandatary must "act impartially towards each of [the parties]".[609]

As in the administration of the property of others, the mandatary's obligation to act impartially does not set aside, nor is inconsistent with, the duty to act in the best interest of the beneficiary of the duty of loyalty. Rather, through the duty to act impartially, the interests of the parties with conflicting or potentially conflicting interests are safeguarded.

4.2.3 The duty not to mingle the property administered

Another facet of the duty of loyalty concerns the legal actors subject to a duty of loyalty whose function it is to manage property or a patrimony that is not their own, such as directors of a legal person, trustees, and more generally all administrators of the property of others. This facet of loyalty requires that a separation be kept at all times between the property administered and the administrator's[610] personal patrimony.

The CCQ states that the director of a legal person may not "mingle the property of the legal person with his own property".[611] Likewise, the administrator of the property of another may not

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[606] Art 1317 CCQ. There may be a plurality of beneficiaries simultaneously or successively: Cantin Cumyn & Cumyn, *supra* note 34 at 289-91.
[607] *Ibid* ("[u]n administrateur est tenu d'exercer ses pouvoirs dans l'intérêt du bénéficiaire. Par conséquent, lorsqu'il y a pluralité de bénéficiaires, chacun a également droit à la loyauté de l'administrateur, d'où l'obligation qui lui incombe d'être impartial, une obligation qui s'infère de la nature des prérogatives exercées" at 289, para 307).
[608] Art 2143, para 1 CCQ.
[609] Art 2143, para 1 CCQ. The mandatary must also inform the mandators of the double mandate "unless he is exempted by usage or by the fact that each of the mandators is aware of the double mandate": art 2143, para 1 CCQ.
[610] The term "administrator" is used here to designate all legal actors who manage property, and not simply the administrator of the property of another.
[611] Art 323 CCQ.

"mingle the administered property with his own property".[612] In other words, the administrator's personal patrimony cannot be confused with that which he administers as a holder of legal powers.

This rule shows that a legal actor under a duty of loyalty truly acts within a legal sphere that is not his own. A clear distinction between the administrator's and the beneficiary's respective legal spheres must be maintained at all times. There is no possible exemption from this rule, which reveals its importance.[613]

This rule aims to prevent that the administered property disappears or be used for the administrator's personal ends or for the benefit of his creditors or other third parties, which would be contrary to the duty of loyalty.[614]

Cantin Cumyn and Cumyn also explain that the duty not to mingle the property administered requires that the holder of legal powers takes appropriate measures[615] to let third parties know that he is not the owner of the property which he administers. Such information is especially important for creditors as they may not be paid upon the property that a person administers as a holder of legal powers.[616] Needless to say, this duty is especially important where a legal actor not only has juridical control over the property administered, but its physical control as well, as the administrator may appear all the more like the owner of the property he in fact administers in his quality of holder of legal powers.

4.2.4 The duty to account and inform

This last facet of the duty of loyalty specifically concerns the administrator of the property of another.

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[612] Art 1313 CCQ. According to Cantin Cumyn and Cumyn, this duty entrenched in art 1313 CCQ should be interpreted broadly, so as to include a duty not to mingle the property pertaining to different administrations, where more than one patrimony are under the control of the administrator, besides his own: Cantin Cumyn & Cumyn, *supra* note 34 at 292, para 311.

[613] *Ibid* ("[l]'identification suffisante des biens est, avec l'inventaire et le compte annuel, une obligation essentielle à laquelle il n'y a aucune véritable dérogation" at 292, para 311 [footnote omitted]).

[614] *Ibid*.

[615] For instance, these measures may include the opening of a distinct bank account for the sums of money administered by the holder of legal powers. With respect to immovable property, the name of the person who manages a given property in her quality of administrator should be registered in the Land register of Québec. See *ibid* at 293-97, paras 313-15.

[616] Arts 2644-45 CCQ are of no application in this situation. See *ibid* at 293, para 312.

At all times during the administration, the administrator must "allow the beneficiary to examine the books and vouchers relating to the administration".[617] Where the administration exceeds one year, the CCQ also provides that the administrator shall "[render] a summary account of his administration to the beneficiary at least once a year".[618] This account must be "sufficiently detailed to allow verification of its accuracy".[619] Moreover, the account may be audited by an expert if the court orders so; the CCQ provides that "[a]ny interested person may, on a rendering of account, apply to the court for an order that the account be audited by an expert".[620]

The fact that any interested person – not just the beneficiary of the administration – may apply to the court to request that the account be audited is especially noteworthy. This tempers the potential harmful effects of the beneficiary's lack of control over the administrator. Indeed, as was explained in chapter 3, in the regime of the administration of the property of others, the administrator generally escapes the direct supervision of the beneficiary as this beneficiary is usually either absent or affected by an incapacity.[621] What is more, as I explained, administrators may be vested with autonomous powers, which involve a high level of autonomy. This situation complicates surveillance of the administrator.

Finally, upon termination of his administration, the administrator, whether he legitimately exercised his powers or whether he exercised inexistent powers,[622] "shall render a final account of his administration to the beneficiary and, where applicable, to the administrator replacing him or to his co-administrators".[623] No administrator of the property of another can be exempted from this last obligation.[624]

No such rules are provided by the CCQ where the director, the employee and the mandatary are concerned since, as was explained in chapter 3, they generally are under the direct supervision of the beneficiary of their obligation of loyalty – although this questionable where the director of a legal person is concerned.[625] On the other hand, the administrator of the property of another is

[617] Art 1354 CCQ.
[618] Art 1351 CCQ.
[619] Art 1352, para 1 CCQ.
[620] Art 1352, para 2 CCQ.
[621] See chapter 3, section 3.3.
[622] Cantin Cumyn & Cumyn, *supra* note 34 at 375, para 397.
[623] Art 1363, para 1 CCQ.
[624] Cantin Cumyn & Cumyn, *supra* note 34 at 375, para 397.
[625] See chapter 3, section 3.3.

not under the direct supervision of the beneficiary and thus has considerably more autonomy in the performance of his functions than the other legal actors subject to a duty of loyalty.[626]

4.3 The sanctions of the duty of loyalty

This section explores restitution of profits, one of the sanctions attached to the breach of the duty of loyalty. As I will explain, restitution of profits is especially noteworthy in civil law and it is particularly revealing of the nature of loyalty.

Prior to this however, a quick examination of loyalty's other sanctions is useful. Professor Cumyn has identified four categories of sanctions for the breach of the duty of loyalty in Quebec's *jus commune*: specific performance, removal from office, nullity of the act accomplished without powers and damages.[627] This last category of sanctions can be divided into compensatory damages and restitution of profits.

A few interesting points regarding some of these sanctions should be highlighted. First, as Cumyn points out, the revocation of the mandate by the mandator, which amounts to a removal from office, may not be considered as a sanction for disloyalty per se. Indeed, the mandator may revoke the mandate at any time and therefore not simply to sanction a breach of the duty of loyalty.[628] On the other hand, the dismissal of the employee by the employer must necessarily be motivated by a serious reason, such as a breach of the employee's obligation of loyalty.[629] Likewise, the removal of the director of a legal person[630] or of the administrator of the property of another must be founded on his inability to perform his duties or on his non-fulfillment of his

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[626] See chapter 3, section 3.3; Cumyn, "Les conflits d'intérêts", *supra* note 92 at 57-58.
[627] *Ibid* at 58-62.
[628] Art 2176 CCQ. Cumyn, "Les conflits d'intérêts", *supra* note 92 ("[à] proprement parler, la révocation du mandat n'est pas une sanction, mais une faculté que le mandant est libre d'exercer, sans avoir à fournir de motifs" at 59). This said, the mandator "is […] bound to make reparation for injury caused to the mandatary as a result of a revocation made without a serious reason and at an inopportune moment" (art 2181, para 1 CCQ).
[629] Art 2094 CCQ. Disloyalty has been recognized by jurisprudence as a serious motive which justifies the employee's dismissal: see e.g. *Desnoyers-St-Germain c Banque Nationale du Canada*, JE 2002-599, AZ-50116827 (Sup Ct); *Krause c Lakeshore School Board*, DTE 98T-764, AZ-98029109 (Sup Ct); *Pilotte c Chibou-vrac inc*, DTE 2001T-1002, AZ-01022021 (Sup Ct); *Sinclair c General Electric Capital Canada Inc*, DTE 2001T-613, AZ-01021676 (Sup Ct).
[630] Art 329 CCQ.

obligations.[631] An "interested person" may apply for the administrator of the property of another's removal.[632]

Second, the fact that the nullity[633] of the act accomplished without powers is seen as a sanction for disloyalty shows that loyalty is intrinsically linked to the finality of the powers in Quebec private law, under a theory of loyalty based on the exercise of legal powers. It should be recalled that following Cantin Cumyn's account of the duty of loyalty,[634] "[t]he obligation of loyalty is directly related to the purpose of the powers, which either focuses on the interest of the person represented or covers a wider area for the accomplishment of another goal".[635] Thus, a holder of legal powers who exercises his powers for a purpose other than that for which they were granted necessarily breaches his duty of loyalty. In other words, the duty of loyalty also requires that a legal actor acts within the scope of his powers.[636]

By comparison, in common law, where the concept of legal power as it is known in civil law does not exist, a distinction between misuse of powers and disloyalty seems to have been done more easily.[637] However, it is possible that a distinction between misuse of powers and disloyalty has arisen in common law simply because loyalty has been more extensively studied in that legal tradition. This being said, according to Miller's account of fiduciary duties which was

[631] Art 1360, para 2 CCQ.
[632] Art 1360, para 2 CCQ.
[633] This nullity is relative, meaning that it may or may not be invoked by the beneficiary of the duty of loyalty: arts 1419 and 1420 CCQ. For examples of situations that may lead to relative nullity, see arts 326, 328, 1709 and 2147 CCQ: see Cumyn, "Les conflits d'intérêts", *supra* note 92 at 59. See also Cantin Cumyn & Cumyn, *supra* note 34 at 336-40, paras 356-58.
[634] See *ibid* at 90, 284, 328, paras 101, 300, 345.
[635] Cantin Cumyn, "The Legal Power", *supra* note 35 at 360 [footnote omitted].
[636] Cantin Cumyn & Cumyn, *supra* note 34 at 90, para 101 and 328-29, para 345. However, theoretically, a person could act beyond the scope of her powers, but in the interests of the beneficiary of her duty of loyalty. To take a very simple example, let us imagine that a person vested with legal powers to buy coffee for another buys chocolate instead of coffee for that other person, which ultimately pleases that person very much. In such a scenario, this would nonetheless be considered as a disloyal behaviour in the eyes of the law. This raises the following question; could it be that loyalty in fact requires that a person be loyal to the *law*, rather than to the beneficiary of the duty of loyalty himself? This could be the starting point of an interesting analysis…
[637] Smith, "The Motive", *supra* note 9 ("[c]learly, a power may not be exercised beyond its scope; a power to pay money to a person for his or her education does not allow a payment to help the person buy a house. That kind of review does not owe anything to the duty of loyalty" at 68 [footnote omitted]); Smith, "Fiduciary Relationships", *supra* note 9 ("just because it was made loyally, it does not follow that the exercise of judgment was made lawfully" at 612). See Geraint W Thomas, *Thomas on Powers*, 2nd ed (Oxford, UK: Oxford University Press, 2012) ch 7-9. In civil law, interpreted in light of the concept of legal power, loyalty appears to be based on an objective interpretation of the finality of the powers vested in a legal actor. Conversely, in common law, loyalty may be analyzed subjectively: Smith, "The Motive", *supra* note 9 ("[the fiduciary] must act (or not act) in what *he perceives to be* the best interests of the beneficiary" at 67 [emphasis in the original]); Smith "Can We Be Obliged to be Selfless?", *supra* note 301 at 141-158 at 148. See also Peter Watts, "Authority and Mismotivation" (2005) 121 Law Q Rev 4.

summarized previously,[638] "the fiduciary stands in substitution for [another] person *within the ambit of the power*".[639] This somewhat echoes Cantin Cumyn's civilian theory of legal powers according to which the duty of loyalty is circumscribed by the finality of the powers vested in a legal actor.

Finally, for the purposes of this paragraph, the distinction I have made in chapter 3[640] between the *duty* and the *obligation* of loyalty should be recalled. In a nutshell, I argued that the administrator of the property of another is under a duty of loyalty, whereas the mandatary, the employee and – debatably – the director are subject to an *obligation* of loyalty. The distinction I have drawn between the duty and the obligation of loyalty is essentially based on the fact that the obligation of loyalty, unlike the duty of loyalty, is necessarily susceptible of legal enforcement.[641] Thus, although the sanctions attached to a breach of the duty of loyalty do not differ substantially from those attached to the obligation of loyalty, their effectiveness is compromised since, as was demonstrated in chapter 3, the administrator of the property of another generally escapes any form of direct control on the part of the beneficiary of the duty of loyalty. Of course, many provisions of the CCQ found within the regime of the administration of the property of others allow an "interested person" to take action where there is no beneficiary or where the beneficiary is unable to act,[642] but in practice this is far less effective than where the beneficiary himself takes action to sanction disloyalty.

4.3.1 Restitution of profits

In common law, disgorgement of unauthorized profits, through the constructive trust mechanism, is a classic fiduciary remedy.[643] What is more, in certain countries, the success or failure of the

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[638] See section 4.1.2.
[639] Miller, "Justifying Fiduciary Duties", *supra* note 9 at 1017 [emphasis added].
[640] Section 3.3.3.
[641] Regarding the distinction between the duty and the obligation of loyalty, see chapter 3, section 3.3.
[642] Arts 1324, para 1; 1330, para 2; 1333, para 2; 1352, para 2; 1360, para 2; 1363, para 2 CCQ.
[643] Rotman, *Fiduciary Law*, *supra* note 30 at 717-23; Saintier, *supra* note 212 at 75. However, it should be noted that the constructive trust "may serve both restitutionary and compensatory purposes": Rotman, *Fiduciary Law*, *supra* note 30 at 718. Concerning the constructive trust, see generally Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alta L Rev 173; Malcom Cope, *Constructive Trusts* (Sydney: Law Book Co, 1992); AJ Oakley, *Constructive Trusts*, 3d ed (London, UK : Sweet & Maxwell, 1997); Leonard I Rotman, "Deconstructing the Constructive Trust" (1999) 37 Alta L Rev 133; Donovan WM Waters QC, *The Constructive Trust* (London: Atholone Press, 1964); Waters, Gillen & Smith, *supra* note 181 at 477-564 (chapter 11).

transplant of the common law's fiduciary duty of loyalty has been attributed to the availability of the disgorgement of profit remedy, which reveals its importance.[644]

The constructive trust may be foreign to the civil law[645], but restitution of profits is a sanction for the breach of the duty of loyalty under Quebec private law.[646] This being said, in civil law, restitution of profits does not uniquely sanction breaches of the duty of loyalty[647] and this remedy has yet to be explored. However, as I will discuss shortly, all four legal actors expressly subject to a duty of loyalty under the CCQ must return the profits obtained in breach of this duty. Before examining the circumstances in which restitution of profits comes into play, it is useful to briefly describe this sanction and to explain its originality.

Restitution of profits is especially noteworthy since it departs from the traditional compensatory form of damages, which is deeply anchored into the civil law.[648] Indeed, under the civilian subjective right paradigm, damages are generally assessed on a compensatory basis. As explained in chapter 3, titularies of subjective rights act on their own behalf and in their own legal sphere. Accordingly, under this scheme, a debtor is required to compensate a creditor only to the extent of his wrongful interference in that creditor's patrimony or, more largely, in that creditor's legal sphere. The damages that compensate this wrongful interference are measured in

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[644] Kanda & Milhaupt, *supra* note 37 at 896; Rebecca Lee, "Fiduciary Duty Without Equity: 'Fiduciary Duties' of Directors Under the Revised Company Law of the PRC" (2007) 47 Va J Int'l L 897 at 908 (in a corporate law setting). Disgorgement of unauthorized profits has been described as a "fiduciary remedy" (*ibid* at 908).

[645] This may be because "[c]ivilian systems, as a general rule, are more careful to distinguish property and obligation than is the common law": Welling, Smith & Rotman, *supra* note 40 at 396. Another possible explanation is that the constructive trust requires the exercise of considerable judiciary discretion, whereas the civil law traditionally implements a structured legal framework which confines the tribunals' discretionary power within fairly strict parameters: Aline Grenon, "La fiducie" in Louise Bélanger-Hardy & Aline Grenon, eds, *Éléments de common law canadienne: comparaison avec le droit civil québécois* (Toronto: Thomson Carswell, 2008) 187 at 235.

[646] See Cumyn, "Les conflits d'intérêts", *supra* note 92 at 60-62; Lluelles, "Problématique des sanctions", *supra* note 314 at 211-213.

[647] For instance, the possessor in bad faith must return profits: art 931, para 2 CCQ. The duty to return profits was also imposed on a provider of services in *Développement Tanaka inc c Corporation d'hébergement du Québec*, 2009 QCCS 3659, (available on Azimut). Furthermore, as I mentioned in chapter 1, the Supreme Court's decision in *Kuet Leong* suggests that restitution of profits could be imposed to sanction breaches of the duty of good faith as well (*Kuet Leong*, *supra* note 89 at 431). This, however, seems excessive. See Cumyn, "Les conflits d'intérêts", *supra* note 92 at 62; Popovici, *La couleur du mandat*, *supra* note 435 at 224-25.

[648] See e.g. Geneviève Viney, "La condamnation de l'auteur d'une faute à restituer le profit illicite qu'il a retiré de cette faute" in Benoît Moore, ed, *Mélanges Jean-Louis Baudouin* (Cowansville, Que: Yvon Blais, 2012) 949. In Quebec private law, the general principle regarding damages is entrenched in art 1611, para 1 CCQ, which states that "[t]he damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived". Even the rule on unjust enrichment, at art 1493 CCQ, limits the damages to the loss sustained, to the extent of the correlative enrichment: "[a] person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for the latter's correlative impoverishment, if there is no justification for the enrichment or the impoverishment".

terms of loss or injury. This does not mean that only titularies of subjective rights may be condemned to compensatory damages, but these damages are especially adapted to their situation.

However, where there is a breach of a duty of loyalty, compensatory damages alone may not be adequate since a legal actor can breach his duty of loyalty without causing any loss to the beneficiary of that duty. Cumyn describes such a situation accurately: "the employee, the mandatary, the administrator may have taken inconsiderate risks while making some investments that the employer, the mandator or the beneficiary of the administration would never have approved. In such a case, the profits generated may match the risk undertaken. Such profits may not be considered as lost profits giving rise to a claim for reparation under civil law's compensatory logic".[649]

Restitutionary damages should thus be distinguished from compensatory damages, and are, along with punitive damages, part of the category of non-compensatory damages, which aim to sanction "faults" that do not necessarily result in a loss for the "victim".[650] This said, although "[s]omething in the character of disloyalty justifies remedies so robust that they would seem punitive in other contexts",[651] restitutionary damages must not be confused with punitive damages. Strictly punitive damages aim to punish the wrongdoer whereas restitutionary damages, though they may have an incidental punitive aspect, aim to return to the victim a profit of which she has been unjustly deprived – a profit that may not be considered as a loss per se.[652]

I argued that a duty of loyalty arises where a legal actor, a holder of legal powers, acts within the patrimony of another, and more largely within the legal sphere of another. Accordingly, all that

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[649] [translated by author] Cumyn, "Les conflits d'intérêts", *supra* note 92 ("[p]ar exemple, le salarié, le mandataire, l'administrateur ont pu prendre des risques inconsidérés en effectuant des placements que l'employeur, le mandant, le bénéficiaire de l'administration n'auraient jamais approuvés. Dans un tel cas, les profits réalisés se révèlent parfois à la hauteur du risque encouru. De tels profits ne peuvent pas être considérés comme un gain manqué donnant ouverture à une indemnisation suivant la logique compensatoire du droit civil" at 60).

[650] Viney, *supra* note 648 ("les dommages-intérêts restitutoires ou confiscatoires font partie d'une catégorie plus vaste, celle des dommages-intérêts non compensatoires, qui regroupe également ceux qui sont destinés à sanctionner spécialement certaines fautes graves, même lorsqu'elles ne sont pas « lucratives »" at 952). A parallel may be drawn between the illicit action and the action which gives rise to restitution of profits. Both generate liability without being constitutive of a fault per se since the "victims" suffer no loss as a result of these actions: see Marième Lacroix, *L'illicéité. Essai théorique et comparatif en matière de responsabilité civile extracontractuelle pour le fait personnel*, coll Minerve (Cowansville, Que: Yvon Blais, 2013) at 179.

[651] Miller, "Justifying Fiduciary Duties", *supra* note 9 at 1004 [footnote omitted].

[652] Viney, *supra* note 648 at 958.

is extracted from the legal sphere within which the holder of legal powers exercise his powers should remain in this legal sphere. Therefore, a holder of legal powers may not personally acquire profits that arise from the exercise of his functions.

I will return to my argument further and illustrate it with examples coming from case law. First, however, it is useful to go over the circumstances in which the legal actors subject to a duty of loyalty under the CCQ are held to return profits.

Art 326, para 1 CCQ provides that the director of a legal person may be ordered to return the profits realized[653] if he is involved in an acquisition or a contract with the legal person and "fails to give information correctly and immediately [to the legal person]" regarding this acquisition or contract.[654]

For their part, the administrator of the property of another and the mandatary must return the profits they earned through the unauthorized use[655] of information[656] or property[657] obtained because of their functions. The CCQ provides that the administrator and the mandatary may be bound to pay compensatory damages in addition to returning their profits.[658]

Moreover, the administrator of the property of another and the mandatary may have to return more than just the profits wrongfully obtained. Indeed, art 1366, para 1 CCQ provides that the administrator of the property of another "shall hand over *all that he has received in the*

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[653] Art 326, para 1 CCQ reads as follows: "Where the director of a legal person fails to give information correctly and immediately of an acquisition or a contract, the court, on the application of the legal person or a member, may, among other measures, annul the act or order the director to render account and to remit the profit or benefit realized to the legal person."

[654] See art 325 CCQ, which requires such disclosure.

[655] In a mandate, the authorization may be unnecessary where the use the mandatary makes of property or information "arises from the law or the mandate": art 2146, para 1 CCQ.

[656] Art 1366, para 1 CCQ provides that the administrator of the property of another "is also accountable for any personal profit or benefit he has realized by using, without authorization, information he had obtained by reason of his administration". Art 2146, para 2 CCQ provides that "the mandatary [who] uses […] information without authorization […] shall indemnify the mandator by paying, in addition to any indemnity for which he may be liable for injury suffered […] an amount equal to the enrichment he obtains".

[657] According to art 1366, para 2 CCQ, "[w]here an administrator has used property without authorization, he is bound to indemnify the beneficiary or the trust patrimony for his use by paying an appropriate rent or the interest on the money". As regards the mandate, the same rule is established by art 2146, para 2 CCQ.

[658] Art 2146, para 2 CCQ states that: "If the mandatary uses the property or information without authorization, he shall indemnify the mandator by paying, *in addition to any indemnity for which he may be liable for injury suffered*, in the case of information, an amount equal to the enrichment he obtains or, in the case of property, appropriate rent or the interest on the sums used" [emphasis added]. Regarding the administrator of the property of another, see art 1366 CCQ.

performance of his duties, even if what he has received was not due to the beneficiary or to the trust patrimony".[659] Likewise, pursuant to art 2184, para 1 CCQ, the mandator is entitled to the restitution of "*everything [the mandatary] has received in the performance of his duties*, even if what he has received was not due to the mandator".[660] Art 2184 CCQ is reminiscent of art 1713 CCLC, which foreshadowed the duty of loyalty before it was explicitly entrenched in the CCQ, and which enjoined the mandatary to "pay over all that he has received under the authority of the mandate, even if it were not due".[661]

In a very interesting decision, relying on art 2184 CCQ, the Superior Court ordered a real estate broker who had acted as a mandatary to hand over to his client a building which he had bought for himself rather than for his client, in breach of his duty of loyalty.[662] In stating that art 2184 CCQ could be invoked with regards to movable as well as immovable property such as a building, the Court referred to a famous common law case originating from Ontario and heard by the Supreme Court of Canada, *Soulos v Korkontzilas.*[663] Although the Superior Court cautiously stated that the common law constructive trust had not been transplanted into Quebec private law, it affirmed that art 2184 CCQ allows to achieve the same results.[664] Therefore, in Quebec private law, restitution does not only target profits obtained in violation of a duty of loyalty, but also property.

Employees may be bound to return their profits as well. This particular sanction is not entrenched in the CCQ's dispositions regarding the employment contract, but it is part of Quebec's *jus commune*. Indeed, based on the Supreme Court decision *Kuet Leong* analyzed in chapter 1, it is possible to assert that restitution of profits may also be imposed on a disloyal

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[659] Emphasis added.
[660] Emphasis added.
[661] Art 1713, para 1 CCLC. See this thesis, chapter 1. See also Quebec, *Commentaires du ministre de la justice*, vol 2, *supra* note 602 at 1373.
[662] *Lefebvre c Filion*, 2007 QCCS 5912, [2008] RJQ 145.
[663] [1997] 2 SCR 217 (available on CanLII) [*Soulos* cited to SCR].
[664] *Lefebvre c Filion*, *supra* note 662 ("[l]e Tribunal n'entend pas établir ici qu'il y a lieu d'importer la notion de fiducie par interprétation dans notre droit québécois. Ce n'est pas la question en litige. Le Tribunal conclut cependant que l'article 2184 C.c.Q. permet d'appliquer la même solution" at para 66). Regarding the conceptual distinctions between the civil law duty to return profits and the common law constructive trust, see Mario Naccarato, "Notes lexicographiques : Fiduciaire" (2005) 107 R du N 357 at 363, n 23.

employee.[665] In this regard, the following case, which involves an employee, is especially instructive as to the relation between the duty of loyalty and restitution of profits.

In a 2001 decision, an employee, Abbas-Turqui, was ordered by the Quebec Superior Court to return to his employer the profits he earned through the performance of a competitive activity, which, according to the Court, amounted to a breach of his duty of loyalty.[666] While Abbas-Turqui was working for his employer, he concluded, with the complicity of another employee, a sale on behalf of another company – a company in which he was a partner. The sale concerned military equipment similar to that which his employer sold. The employee had concluded the sale in breach of a non-competition clause he had agreed to as part of his employment contract. To arrange the sale, Abbas-Turqui had used his employer's fax, telephone and computer equipment. The Superior Court held that Abbas-Turqui had used the employer's property for his own ends.[667] The Court also ruled that Abbas-Turqui had seized a business opportunity which belonged to his employer.[668] Therefore, Abbas-Turqui was ordered to hand over his profits to his employer.

This decision was overturned by the Court of Appeal in *Abbas-Turqui c Labelle Marquis Inc*.[669] The Court first discarded the argument that there had been misappropriation of a business opportunity. The Court held that the contract had been attributed to Abbas-Turqui's company because of his personal contacts – or more specifically, those of his partner.[670] Moreover, according to the Court, there was no proof that the employer would have obtained this particular contract had Abbas-Turqui's company not existed.[671]

The Court then held that restitution of profits was not the appropriate sanction in such a situation. The Court briefly distinguished the case from *Kuet Leong*, in which a disloyal employee was ordered to return profits. According to the Court of Appeal, contrarily to the situation in *Kuet*

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[665] In *Kuet Leong*, *supra* note 89, the Supreme Court ruled that an employee can be bound to return profits, regardless of whether he may be assimilated to a mandatary (at 436). See Cumyn, "Les conflits d'intérêts", *supra* note 92 at 62.
[666] *LNS Systems Inc c Allard*, JE 2001-1277, AZ-01021690 (Sup Ct), rev'd *(sub nom Abbas-Turqui c LNS Systems Inc)* JE 2004-898, 2004 CanLII 26082 (CA) [cited to Azimut].
[667] *Ibid* at 6-8.
[668] *Ibid* at 12.
[669] *Abbas-Turqui c LNS Systems Inc*, JE 2004-898, 2004 CanLII 26082 (CA) [*Labelle Marquis* cited to CanLII].
[670] *Ibid* at para 14.
[671] *Ibid*.

Leong, Abbas-Turqui had not earned personal profits while using funds made available by his employer, nor had he made his profits while acting as a representative of his employer.[672] Therefore, Abbas-Turqui could not be held to restitution of profits on these bases either. Thus, the quantum of damages was modified by the Court of Appeal in order to match the injury suffered by the employer instead of the profits earned by Abbas-Turqui.[673] In other words, the restitutionary damages were replaced by compensatory ones.

In order to understand how restitution of profits relates to the breach of the duty of loyalty, it is useful to analyze more closely how the *Labelle Marquis* case differs from *Kuet Leong*. In *Kuet Leong*, a disloyal employee was ordered by the Supreme Court to return the profits he had gained while "acting in the course of his employment and as representative of the [employer]".[674] The employee, a trader employed by a bank, had gained personal profits as a result of private arrangements he had made with some of the bank's clients and also while using, without authorization, a client's account. In this case, the Supreme Court rightfully ruled that restitution of profits was the appropriate sanction; the trader had made his profits in the exercise of his functions as an employee, while using funds made available by the bank and with the complicity of clients he knew due to his employment contract with the bank.

Contrary to the situation in *Kuet Leong*, in *Labelle Marquis*, the employee was not "acting in a representative capacity for the appellant, carrying on its business".[675] Indeed, although Abbas-Turqui worked on his personal business project during his working hours for his employer, and although he used his employer's fax, telephone and computer, he did not conclude the sale in the performance of his functions of employee, while acting as a representative of his employer.

Labelle Marquis shows that the mere use of the property of another is not sufficient to consider that a legal actor is acting within the patrimony – or more largely within the legal sphere – of another. In Miller's words, this does not in itself amount to exercising the "means" of another.[676] When using the employer's telephone, fax and computer equipment, Abbas-Turqui was not

[672] *Ibid* at paras 12-13. This being said, the Court of Appeal still implicitly recognized that the employer is entitled to restitution of profits where the employee makes profits using the funds of the employer or when acting as his representative.
[673] The Court held that the loss suffered by the employer corresponded to the value of the services which Abbas-Turqui had devoted to his own business: *ibid* at para 16.
[674] *Kuet Leong*, *supra* note 89 at 436.
[675] *Ibid*.
[676] Miller, "Justifying Fiduciary Duties", *supra* note 9 at 1020.

acting in his employer's patrimony. Rather, when using his employer's belongings, Abbas-Turqui was affecting his employer's patrimony from the outside. Abbas-Turqui thus was not acting in his employer's legal sphere when he concluded the contract for his own company. Therefore, restitution of profits was not the appropriate sanction.

It would indeed be nonsensical to argue that the mere use of property belonging to another entails that all profits deriving – even indirectly – from such use are owed to the owner of the property in question. For instance, it would be incongruous to argue that a university professor, also employed as a consultant for a law firm, must surrender to the university the profits resulting from his consultancy contract when he gives advice to the law firm he works for using the university's telephone. This said, when a person unlawfully uses the property of another for her own account, compensatory damages can be claimed by the person to whom the property unlawfully used belongs. However, the use of someone else's property (even if it is considerable – for instance, if one uses the entirety of the content of another's patrimony) cannot give rise to restitutionary damages unless in doing so, the person who uses another's property acts *within* the legal sphere of another, as a holder of legal powers.

Labelle Marquis also illustrates the distinction between the duty of loyalty and the concept of non-competition. Before explaining how so, it is necessary to distinguish both concepts.

Non-competition is distinct from the duty of loyalty. The duty of loyalty regulates the exercise of legal powers; it comes into play where a legal actor acts within the legal sphere of another. On the other hand, non-competition restrains the conduct of a legal actor where he acts in his own personal legal sphere, as a titulary of subjective rights. Although no duty of loyalty attaches to the exercise of subjective rights, certain legal or contractual limitations such as the duty of good faith or non-competition agreements can restrict the exercise of subjective rights.

A duty of non-competition is frequently imposed on legal actors who are or have been under a duty of loyalty, so that they do not profit personally from information or any other resource they may have – consciously or not – extracted from the legal sphere of another. Non-competition agreements must also be limited in time[677] after the termination of the holder of legal powers'

[677] Art 2089, para 2 CCQ. See Marie-France Bich, "La viduité post emploi: loyauté, discrétion et clauses restrictives" in Service de la formation continue du Barreau du Québec, *Développements récents en droit de la propriété intellectuelle (2003)*, vol 197 (Cowansville, Que: Yvon Blais, 2003) 243; Marianne St-Pierre Plamondon

functions as it is presumed that although the latter is still imbued from the legal sphere of another, this will fade away with time.[678] Thus, although non-competition relates to the duty of loyalty, in the sense that it is imposed on a legal actor because he is or has been under a duty of loyalty, non-competition is a distinct concept, which regulates the exercise of subjective rights as opposed to legal powers.

This distinction between loyalty and non-competition has major consequences with regards to the sanctions for a breach of duty. Restitution of profits is especially adapted to the situation of holders of legal powers, as they may not personally appropriate anything extracted or deriving from the legal sphere of another. It is only logical that they should return to the titulary of that legal sphere whatever they have obtained in the performance of their functions.

By contrast, as I mentioned above, compensatory damages are generally appropriate to sanction the conduct of a titulary of subjective rights. Subjective rights are not exercised on behalf of another and the person who exercises her rights acts in her own legal sphere. Therefore, a titulary of subjective rights is bound to compensate another person only to the extent of the wrongful harm he may have caused that other person, but he is not bound to disgorge all of the gains thereby realised. Therefore, in general, compensatory damages adequately sanction breaches of duties that are attached to the exercise of subjective rights, such as good faith[679] or non-competition agreements.

For instance, in *Labelle Marquis*, Abbas-Turqui did not obtain the contract because of contacts, information, property or funds extracted from his employer's legal sphere, or simply by virtue of his position as employee. Abbas-Turqui thus was not acting in his quality of employee, but as a titulary of subjective rights. He did, however, conclude a contract in the same sphere of activity than his employer, which his employment contract prohibited. Thereby, he breached his non-

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& Alex O'Reilly, "L'obligation de loyauté s'effrite : quelles protections reste-t-il à l'employeur?" in Service de la formation continue du Barreau du Québec, *Développements récents en droit du travail (2014)*, vol 383 (Cowansville, Que: Yvon Blais, 2014) 97 at 153-54; *4388241 Canada inc c Forget*, 2012 QCCS 3103, JE 2012-1490.

[678] Therefore, the CCQ provides that the employee's duty of loyalty "continue[s] for a reasonable time after the contract terminates": art 2088, para 2 CCQ.

[679] Therefore, the Supreme Court's assertion in *Kuet Leong* according to which restitution of profits "gives effect to a much broader policy of the civil law for the protection of honesty and good faith in the execution of contracts" (*supra* note 89 at 436) is too broad a statement.

competition agreement.[680] Thus, compensatory – not restitutionary – damages were appropriate.[681]

Labelle Marquis can be contrasted with the facts of the common law case *Canadian Aero*[682], which I briefly described in chapter 1. In *Canadian Aero*, the distinction between non-competition and loyalty is more tenuous. In this case, officers of a company resigned to form their own company and thereby obtained a contract which their previous employer had been seeking to obtain for several years. As a matter of fact, they had previously worked on this business opportunity on behalf of their former employer. The Supreme Court of Canada ruled that the ex-officers breached their fiduciary duties and ordered them to disgorge their gains.[683]

Canadian Aero may seem to relate to the concept of non-competition. However, in this case, the performance of a competitive activity by the ex-officers amounted to a breach of the duty of loyalty rather than to a breach of a duty of non-competition.

Although formally the employment contract was terminated, the ex-officers were still acting within the legal sphere of the company they used to work for. Indeed, in elaborating a proposal which led them to obtain the contract for their own company, the ex-officers relied almost exclusively on very specific information they had gathered while working on the business opportunity on behalf of their former employer. In other words, contrary to the facts of *Labelle Marquis*, in *Canadian Aero*, the ex-officers were using information extracted from their former employer's legal sphere in order to reap personal profits.

Thus, competition certainly can be prohibited, namely through a non-competition clause, but when an employee competes against his (actual or ex) employer while acting within the latter's legal sphere, he breaches his duty of loyalty. In such a case, restitutionary damages – not compensatory ones – are appropriate.

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[680] It should be noted however that, unlike the Superior Court, the Court of Appeal does not mention the non-competition agreement that was signed between Abbas-Turqui and his employer.
[681] According to the Court of Appeal, the loss suffered by the employer corresponded to the value of the services which Abbas-Turqui had devoted to this other business opportunity (*Labelle Marquis*, *supra* note 669 at para 16).
[682] *Supra* note 79.
[683] *Ibid* at 622.

4.4 Conclusion

The aim of this last chapter was to formulate a theory of the duty of loyalty in Quebec private law based on its manifestations in Quebec's *jus commune*, and more specifically in the CCQ.

I argued that trust is not sufficient to ground the duty of loyalty. Rather, I reiterated that the duty of loyalty is attached to the exercise of legal powers. More specifically, I contended that a duty of loyalty arises where a legal actor acts within the legal sphere of another. I defined this legal sphere as encompassing the patrimony and the very person of another. I also emphasized that the power to act within the legal sphere of another is more than a mere interference with another's legal sphere. It is the power to alter this legal sphere *from within*.

I described various requirements deriving from the duty of loyalty, requirements that form its core. Those requirements aim to ensure that the legal actor under a duty of loyalty acts in the best interest of the person represented or in the fulfillment of the purpose for which he was granted legal powers, most notably by prohibiting situations of conflict of interests. The interests of the beneficiary of the duty of loyalty are also safeguarded where there is a plurality of beneficiaries with potentially conflicting interests since the legal actor under a duty of loyalty must act impartially toward each of the beneficiaries. The duty of loyalty also requires that a separation be kept at all times between a legal actor's personal patrimony – that which he holds as a titulary of subjective rights – and the patrimony that he manages in his quality of holder of legal powers. Finally, the administrator of the property of another must render accounts so that the beneficiaries or other interested persons may ensure that the interests of the person represented or of the purpose for which the administrator was granted powers are served. This additional facet of the administrator's duty of loyalty is justified by the fact that he is generally under a lesser degree of control than the other legal actors subject to a duty of loyalty under the CCQ.

I also discussed restitution of profits, a sanction attached to the breach of the duty of loyalty. I argued that all that is extracted from the legal sphere within which a holder of legal powers exercise his powers should remain in this legal sphere. Therefore, it is only logical that the profits made by a holder of legal powers while he acts within the legal sphere of another should return to the titulary of this legal sphere.

General conclusion

The duty of loyalty in Quebec private law is the product of the civil and the common law's dialogue. It emerged decades before the CCQ, as a result of the interaction between the common law fiduciary duties and the provisions governing the mandate under the CCLC. In corporate law in particular, the common law was omnipresent in the discourse pertaining to the duty of loyalty.

The duty of loyalty was formally entrenched in the Civil Code in 1994, with the entry into force of the CCQ. The regime of the administration of the property of others, an innovation of the CCQ which bears striking resemblances with the common law regime of fiduciary relationships, offered new grounds for the analysis of the duty of loyalty. Indeed, the administration of the property of others sheds light on the civilian concept of legal power, which is now a cornerstone in the analysis of the duty of loyalty in Quebec private law. Despite the historical intertwinement of Quebec's duty of loyalty with the common law fiduciary duties, according to some commentators, its codification in the CCQ as well as the CCQ's preliminary provision have had the effect to sever the duty of loyalty's connection with the common law. Nonetheless, as I have argued, an attitude of openness towards the common law should be encouraged, given that the duty of loyalty in Quebec was shaped by the influence of the common law and given that Quebec is, after all, a mixed jurisdiction which should therefore be open to the sources of law that have forged its identity.

Moreover, as I have shown, the explicit incorporation of the duty of loyalty in the CCQ did not clarify its nature. First, misconceptions regarding the civil law and the codification method itself may impede the development of the duty of loyalty in Quebec. Those misconceptions relate to ideas of rigidity and completeness of the civil law. Second, quite frequently, the duty of loyalty is wrongfully subsumed under the broad duty of good faith, as the latter is more familiar to civil law jurists. Third, the duty of loyalty does not fit into the civil law's dominant paradigm. This paradigm postulates that persons are titularies of subjective rights and therefore act on their own behalf, in their own interests and within their own patrimony. However, the duty of loyalty arises in totally opposite circumstances, where a legal actor acts as a holder of legal powers.

A holder of legal powers does not act on his personal behalf. He acts in an interest other than his own and affects the patrimony of another in the performance of his functions. Thus, concurring with Cantin Cumyn, I argued that loyalty attaches to the exercise of legal powers, which are of

two types: powers of representation are granted for the representation of a person and autonomous powers are granted for the accomplishment of another goal. The duty of loyalty requires that legal powers be exercised in the bests interests of the person represented or for a goal other than representation.[684]

My analysis of the duty of loyalty in Quebec private law drew largely upon the works of Cantin Cumyn, but also upon a recent common law theory of fiduciary duties put forth by Miller.[685] Through an analysis of the situation of the four legal actors[686] upon whom the CCQ imposes a duty of loyalty, I formulated a general theory of the duty of loyalty in Quebec private law. I argued that a duty of loyalty arises where a legal actor, a holder of legal powers, acts within the legal sphere of another.[687] This legal sphere is a way to conceptualize a patrimony. However, this legal sphere may also be understood as encompassing extrapatrimonial rights, where the titulary of that legal sphere is a person[688]. Thus, I argued that a legal actor is under a duty of loyalty where he acts within the legal sphere of another and thereby has the power to alter that other's patrimony or to affect the very person of another. [689]

The theory I set forth helps distinguish loyalty from other duties with which it is sometimes wrongfully equated, namely duties relating to good faith and non-competition. Unlike the duty of loyalty, those duties arise where a person acts within her own legal sphere and therefore on her own behalf. The distinction between the duty of loyalty and other duties has very concrete implications, namely with regards to the sanctions that may be imposed for breach of duty. For instance, restitution of profits, which is an exceptional sanction in civil law as it gives rise to non-compensatory damages, may be imposed to sanction a breach of the duty of loyalty, but not to sanction a breach of the duty of good faith or of a non-competition agreement.

Understanding the duty of loyalty as a duty that arises where a legal actor acts within the legal sphere of another is not only helpful in civil law. In an interesting closing of the loop, this theory,

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[684] Cantin Cumyn, "The Legal Power", *supra* note 35 at 360.
[685] Miller, "Justifying Fiduciary Duties", *supra* note 9.
[686] The director of a legal person, the administrator of the property of another, the employee and the mandatary.
[687] "Another" here refers to a person or a a trust (a patrimony by appropriation). Cantin Cumyn has evoked the idea of a *sphère juridique* (Cantin Cumyn & Cumyn, *supra* note 34 at 96) or "juridical sphere" ("The Legal Power", *supra* note 35 at 345), from which my own conception of a legal sphere is inspired.
[688] As opposed to a trust.
[689] See Cantin Cumyn, "Des biens à la protection de la personne", *supra* note 203 at 210; Cantin Cumyn, "The Legal Power", *supra* note 35 at 359-60.

based on the duty of loyalty's manifestations in the CCQ, can help understand elements of the common law regime of fiduciary relationships as well, from which Quebec's duty of loyalty originates. For instance, there is still a fair amount of uncertainty surrounding the foundations of the constructive trust, a classic fiduciary remedy. Indeed, open-ended elements such as "good conscience"[690], deterrence[691] or the absence of "factors which would render [its] imposition […] unjust"[692] have been invoked to justify the imposition of a constructive trust.

On the other hand, the theory of loyalty put forth in this thesis rests on a sound legal basis. Following my theory, one could claim that the constructive trust is a fiduciary mechanism that comes into play when one person appropriates something originating from the legal sphere of another. Therefore, such misappropriated thing should be returned, in its entirety, to the titulary of the legal sphere from which it was extracted. What is more, the idea of a legal sphere is compatible with the common law tradition, which does not know the concepts of legal power and patrimony.

[690] Rotman, *Fiduciary Law*, *supra* note 30 ("[t]he majority's imposition of a constructive trust in *Soulos* [is] premised on 'good conscience' "; "[t]he wording of the majority in *Soulos* clearly indicates that the […] primary focus is to remove the property from the agent rather than to award it to his client" at 220-21, discussing *Soulos*, *supra* note 663).
[691] Rotman, *Fiduciary Law*, *supra* note 30 at 719-20. See La Forest J's majority judgment in *Hodgkinson v Simms*, *supra* note 253 at 208-209. For a criticism of deterrence as a justification for fiduciary remedies in common law, see Smith, "Fiduciary Relationships", *supra* note 9 at 627.
[692] *Soulos*, *supra* note 663 at 241. This is the fourth of four criteria for the imposition of a constructive trust, as formulated by the Supreme Court in *Soulos*.

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