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LOYALTY IN QUÉBEC PRIVATE LAW

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ABSTRACT

This paper provides an overview of the duty of loyalty in Québec private law. It dispels uncertainty regarding the duty's nature and then analyzes the duty of loyalty in the Civil Code of Québec. In doing so, this paper takes into account the mixed origins of the duty by establishing certain parallels with the common law. Ultimately, this paper suggests that the duty of loyalty arises when a legal actor has the power to act within the legal sphere of another.

I. INTRODUCTION

The duty of loyalty in Québec private law was shaped decades ago by the influence of common law fiduciary duties.[1] These duties revolve around a central fiduciary duty of loyalty,[2] which is fundamentally a duty of selflessness[3] or in other words, "a duty to look after another's interests."[4] Since the *Civil Code of Québec* (CCQ)

1. The influence of the common law in this regard was most notable in the corporate law area. *See* concerning the historical intertwinement of Québec's duty of loyalty with the common law fiduciary duties, Madeleine Cantin Cumyn, *Les personnes morales dans le droit privé du Québec* 31 LES CAHIERS DE DROIT 1021 (1990); Yves Caron, *De l'action réciproque du droit civil et du common law dans le droit des compagnies de la Province de Québec*, 1 STUDIES IN CANADIAN COMPANY LAW – ÉTUDES SUR LE DROIT CANADIEN DES COMPAGNIES, 102 (Jacob S. Ziegel ed., Butterworths 1967); Paul Martel, *Harmonization of the Canada Business Corporations Act with Québec Civil Law – Revision proposal*, 42 REVUE JURIDIQUE THÉMIS 147 (2007).

2. *See Bristol & West Building Society v Mothew*, Millet L.J., (1998) Ch 1, (1996) 4 All ER 698 [cited to All ER] at 18; *Lac Minerals Ltd v International Corona Resources Ltd*, La Forest J., (1989) 2 SCR 574, 61 DLR (4th) 14 [*Lac Minerals* cited to SCR] at 646; Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LAW Q. REV. 608 (2014) ("[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).

3. *See* Lionel Smith, *Can We Be Obliged to Be Selfless?*, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 141 (Andrew S. Gold, Paul B. Miller eds., Oxford University Press 2014).

4. Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 OXFORD J. LEGAL STUD. 1, 8 (2002). *See also* Daniel Clarry, The Irreducible Core of the Trust, 101, n. 475 (2011) (unpublished LL.M. Thesis, McGill University Institute of Comparative Law); Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 980, 1020 (2013).

came into effect in 1994, it has contained a duty of loyalty that is similar to the common law fiduciary duty of loyalty from which it derives, though is still distinctively civilian.

The *Civil Code of Québec* expressly imposes a duty of loyalty upon certain legal actors: the director of a legal person (such as a business corporation), the administrator of the property of another, the employee and the mandatary.[5] More specifically, the Code requires that the director acts "in the interest of the legal person,"[6] that the administrator of the property of another acts "in the best interest of the beneficiary or of the object pursued,"[7] and that the mandatary acts "in the best interests of the mandator."[8] The codal article that imposes a duty of loyalty on the employee, does not use this exact wording,[9] but case law has established that the employee must act in the best interests of his employer.[10]

Surprisingly, despite its codification more than twenty years ago, the duty of loyalty in Québec has rarely been studied in its own right.[11] Professor Cantin Cumyn is one of the only authors to have done so, and this paper owes much to her writings.

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5. Articles 322, 1309, 2138 and 2088 CCQ, respectively. Interestingly, while the word *loyauté* appears in the French version of articles 322, 1309, 2088 and 2138 CCQ, the word "loyalty" only appears in the English version art. 322 CCQ. *Loyauté* is translated as "faithfully" in articles 1309, 2088 and 2138 CCQ.

6. Art. 322, § 2 CCQ: "[the director] shall also act with honesty and loyalty in the interest of the legal person."

7. Art. 1309, § 2 CCQ: "[the administrator] shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued."

8. Art. 2138, § 2 CCQ: "[the mandatary] shall also act honestly and faithfully in the best interests of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of his mandator."

9. Art. 2088, § 1 CCQ provides that "[t]he employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work."

10. *See e.g. Concentrés scientifiques Bélisle inc c Lyrco Nutrition inc*, 2007 QCCA 676 at para 39 [*Concentrés scientifiques Bélisle*]; *Jenner c Helicopter Association of Canada (HAC)*, 2012 QCCS 3177 at para 147 [*Jenner*]; *Lanctôt c Romifal inc (Nova PB inc)*, 2010 QCCS 4755 [*Lanctôt*]; *Pro-quai inc c Tanguay*, 2005 QCCA 1217 at para 36 [*Pro-quai*].

11. Instead, loyalty is frequently subsumed under the general duty of good faith (*see* § 1.2).

The aim of this paper is to draw a portrait of the duty of loyalty in Québec. In doing so, it takes into account the specificity of Québec private law. Although predominantly civilian, it bears the imprint of both the civil and common law.[12] Therefore, parallels to the common law are occasionally made, as it remains a valuable source of inspiration and of comparison.

This paper first elucidates the nature of the duty of loyalty in Québec (Part I). Namely, it explains how the duty is connected to the exercise of legal powers. Then, loyalty is analyzed within the context of the Civil Code (Part II). Ultimately, this paper suggests that loyalty is a duty that arises when a legal actor has the power to act within the legal sphere of another.[13]

This definition of loyalty is interesting from a civilian as well as a comparative standpoint. First, from a civilian standpoint, the notion of legal sphere covers the whole scope of exercise of legal powers. Indeed, as it will be explained, legal powers may be exercised with respect to matters relating to the property of another or relating to the very person of another, referred to as patrimonial and extrapatrimonial rights, respectively. However, unlike the patrimony, a classical but rather narrow conceptualization of the legal sphere, which belongs exclusively to a person, the notion of a legal sphere is flexible. It may encompass patrimonial and extrapatrimonial rights regardless of the distinction between them—a distinction which, moreover, could be criticized as artificial.

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12. Regarding the specificity of Québec private law, *see* Daniel Jutras, *Cartographie de la mixité : La common law et la complétude du droit civil au Québec*, 88 CAN. BAR REV. 247 (2009); Sylvio Normand, *La culture juridique et l'acculturation du droit : le Québec 1* – Special Issue 1, *Legal Culture and Legal Transplants*, ISAIDAT L. REV., article 23 (2011), available at http://isaidat.di.unito.it/index.php/isaidat.

13. Professor Cantin Cumyn has evoked the idea of a *sphère juridique* or a "juridical sphere," which served as inspiration for this article. *See* MADELEINE CANTIN CUMYN & MICHELLE CUMYN, L'ADMINISTRATION DU BIEN D'AUTRUI, TRAITÉ DE DROIT CIVIL 96 (2d ed. Yvon Blais 2014); Madeleine Cantin Cumyn, *The Legal Power*, 17 EUROPEAN REVIEW OF PRIVATE LAW 345, 345 (2009).

Second, from a comparative standpoint, the notion of a legal sphere[14] is interesting because the ideas of legal power[15] and of patrimony[16] are not known to the common law. Free of any civilian connotation, the notion of a legal sphere is compatible with the common law, which readily recognizes that fiduciaries may deal with matters relating to property as well as to the physical or moral welfare of a person.[17] The focus of this paper, however, is to provide an understanding of loyalty in Québec private law.

II. NATURE OF THE DUTY OF LOYALTY

A. Inaccurate Bases of the Duty of Loyalty

In order to understand loyalty, it is necessary to grasp its basis. The duty of loyalty is often believed to rest upon the confidence in another or upon good faith. However, neither constitutes the true basis of the duty of loyalty. This section explains why this is so, thereby laying the groundwork for the analysis of the duty of loyalty that will follow.

1. Trust

Loyalty has long been—and still is—associated with the confidence one places in another [*i.e.*, "trust"]. To begin with, the term *fiduciary* as in "fiduciary duty" derives from the Latin *fiducia*, which means "trust." Moreover, within the Canadian common law,

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14. In a common law setting, Professor Lionel Smith talks about a "sphere of fiduciary management," which he describes as a "sphere of activity," and which should not be mistaken with the legal sphere described in this paper, which is the representation of a person or of a legal entity (Smith, *supra* note 3, at 158).

15. As it is understood in civil law, that is in contrast with a subjective right—a concept that is foreign to the common law. *See* Geoffrey Samuel, "*Le Droit Subjectif*" *and English Law*, 46 CAMBRIDGE L.J. 264 (1987).

16. *See* Alexandra Popovici, *Trusting Patrimonies* in TRUST AND PATRIMONIES 200 (Remus Valsan ed., Edinburgh University Press 2015).

17. Regarding the possibility that fiduciaries deal with matters relating to the physical or psychological integrity of a person, *see e.g.* Paul B Miller, *A Theory of Fiduciary Liability* 56 MCGILL L.J. 235, 276 (2011); *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449.

key cases have identified trust as an indicium of fiduciary relationships.[18]

In Québec private law as well, trust is regularly emphasized as a foundational aspect of the four relationships to which the *Civil Code of Québec* attaches a duty of loyalty.[19] For instance, the Supreme Court of Canada has affirmed that the mandate "is imbued with the concept of trust."[20] Trust also influences the appointment of a director of a legal person,[21] and the selection of an administrator of the property of another such as the liquidator of a succession or a trustee.[22] Finally, trust has been described as the foundation of employment contracts.[23]

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18. *See especially Canson Enterprises Ltd v Boughton &* Co, [1991] 3 SCR 534, 85 DLR (4th) 129; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) [cited to SCR]; *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574, 61 DLR (4th) 14, La Forest J., dissenting [*Lac Minerals* cited to SCR].

19. *See e.g.* Jean-Guy Belley, *L'obligation de loyauté dans les services financiers* 3 BULLETIN DE DROIT ÉCONOMIQUE 11 (2012); PIERRE-GABRIEL JOBIN & NATHALIE VÉZINA, JEAN-LOUIS BAUDOUIN ET PIERRE-GABRIEL JOBIN : LES OBLIGATIONS, 266, para 161 (7th ed. Yvon Blais 2013); Ginette Leclerc, *La bonne foi dans l'exécution des contrats* 37 MCGILL L.J. 1070, 1076 (1992); DIDIER LLUELLES & BENOÎT MOORE, DROIT DES OBLIGATIONS, 1121 para 1980 at 1120, para 1979 (2d ed., Éditions Thémis 2012); Mario Naccarato & Raymonde Crête, *La confiance : de la réalité à la juridicité* in RESPONSIBILITY, FRATERNITY AND SUSTAINABILITY IN LAW – IN MEMORY OF THE HONOURABLE CHARLES DOHERTY GONTHIER 647, 659 (Michel Morin et al. eds., LexisNexis Canada 2012) [Naccarato & Crête, *Réalité à juridicité*].

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

21. Very few requirements regarding the nomination of directors are provided by the CCQ and corporate laws, even where very large business corporations are concerned. This allows shareholders to elect a person they deem fit for the office of director—a person whom they trust. *See* RAYMONDE CRÊTE & STÉPHANE ROUSSEAU, DROIT DES SOCIÉTÉS PAR ACTIONS, 340, para 741 (3d ed., Éditions Thémis 2011). However, although shareholders elect directors, it should be noted that the beneficiary of the directors' duty of loyalty is the legal person (the business corporation)—not the shareholders. *See Peoples Dep't Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 at para 43.

22. CANTIN CUMYN & CUMYN, *supra* note 13 ("trust is, certainly, a significant element in the administration of the property of others, namely it generally inspires the choice of the administrator" at 283, para 299 [translated by author]). *See also Brassard c Brassard*, 2009 QCCA 898 at para 106. Trust also has to do with, *inter alia*, the prohibition made to the administrator of the property of another to delegate the exercise of a discretionary power (art. 1337, para 1 CCQ).

23. Louise Dubé & Gilles Trudeau, *Les manquements du salarié à son obligation d'honnêteté et de loyauté en jurisprudence arbitrale* in ÉTUDES EN DROIT DU TRAVAIL À LA MÉMOIRE DE CLAUDE D'AOUST 51 (Gilles Trudeau, Guylaine

However, justifying the duty of loyalty on the sole basis of trust appears problematic. First, providing a clear definition of an open-ended concept such as trust might prove challenging.[24] Second, although the law can bestow a duty of loyalty upon parties who are in a relationship, one party may not trust the other. Hence, trust cannot be the basis of the duty of loyalty—at least not in these cases.

In response to this last argument, however, one could invoke the interesting distinction drawn by Professor Jean-Guy Belley 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.[25] Trust, if not in its personal, subjective form, would at least be present in its institutional form in those cases where the law deems it necessary.[26]

Nevertheless, identifying trust as the basis of the duty of loyalty is inadequate for a fundamental reason: it relies on an element external to private law, rather than explaining private law in its own terms.[27] Trust is more of a social fact than a juridical notion with concrete legal implications.[28] It cannot, in and of itself, generate an obligation or a legal duty. Therefore, while a considerable degree of

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Vallée, Diane Veilleux, eds., Yvon Blais 1995) ("l'employé qui trahit cette confiance ébranle les bases mêmes de la relation d'emploi" at 57). *See also Bank of Montreal v Kuet Leong Ng*, [1989] 2 SCR 429 [*Kuet Leong* cited to SCR].

24. In common law, Professor Paul B. Miller rejects the idea of defining fiduciary relationships on the basis of trust (Miller, *supra* note 4, at 995-999). 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 . . . . So long as it lacks clear meaning, trust cannot justify fiduciary duties (*id.* at 997-998 [footnotes omitted]).

25. Belley, *supra* note 19, at 15-16.

26. *Id.* at 15. *See also*, by Jean-Guy Belley, *Théories et pratiques du contrat relationnel : les obligations de collaboration et d'harmonisation normative* in CONFÉRENCE MEREDITH LECTURES 1998-1999, LA PERTINENCE RENOUVELÉE DU DROIT DES OBLIGATIONS: BACK TO BASICS/THE CONTINUED RELEVANCE OF THE LAW OF OBLIGATIONS : RETOUR AUX SOURCES 137 (Yvon Blais 2000).

27. *See*, in common law, ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (Oxford University Press 2012).

28. For an opposite view, *see* Naccarato & Crête, *supra* note 19, at 659.

trust is usually involved in the employment contract, the mandate, the administration of a legal person, and the administration of the property of others, it does not follow that trust is *the* defining element that gives rise to a duty of loyalty.

2. Good Faith

In Québec, it is frequently assumed that the duty of loyalty expressly entrenched in the Civil Code finds its source in the general duty of good faith that pervades the latter.[29]

Good faith is a social standard of conduct that regulates the exercise of civil rights in contractual as well as extracontractual settings.[30] At a minimum, it requires one to act honestly and reasonably[31] and to avoid injuring others,[32] but it may also impose positive duties in certain contractual settings. For instance, 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.[33]

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29. Good faith, being a cardinal and multivalent notion in civil law, is entrenched under various forms in the *Civil Code of Québec*. According to articles 6, 7 and 1375 CCQ, good faith prohibits the abusive exercise of one's rights, but it also governs the conduct of parties at the time of the creation, the performance and the extinction of an obligation, whether the latter is contractual or extracontractual.

Regarding good faith's multivalence, *see* Brigitte Lefebvre, *La bonne foi : notion protéiforme*, 26 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE 321 at 353 (1996); Didier Lluelles, *La bonne foi dans l'exécution des contrats et la problématique des sanctions* 83:1 CAN. BAR REV. 181, 188 (2004); JEAN PINEAU ET AL., THÉORIE DES OBLIGATIONS (4th ed., Éditions Thémis 2001) ("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]).

30. PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS - OBLIGATIONS (2d ed., Yvon Blais, 2003), *sub verbo* "good faith", def 1 [*Private Law Dictionary - Obligations*].

31. *See Bank of Montreal v Bail Ltée*, [1992] 2 SCR 554, 93 DLR (4th) 490 [*Bail*]; *Houle v Canadian National Bank*, [1990] 3 SCR 122, 74 DLR (4th) 577.

32. Art. 7 CCQ.

33. For instance, in a franchise contract, the duty of cooperation requires that the franchiser provides technical and commercial assistance to his franchisees: *Provigo Distribution Inc. c Supermarché ARG Inc*, [1998] RJQ 47, 1997 CanLII 10209 (CA) [*Provigo* cited to CanLII] at 30-33. *See also* CHRISTINE LEBRUN, LE

The duty of loyalty is often seen as a particular type of duty of good faith in the performance of contracts[34]—a duty of good faith that imposes high standards, much like the duty of cooperation.[35] This is symptomatic of a misunderstanding of the duty of loyalty. As will be explained, loyalty and good faith are in fact two distinct duties that impose different requirements for their respective legal prerogatives.

It should also be noted that there is, in civil law terminology, a frequent but risky association between "loyalty" and "good faith." In Québec, the term "loyalty" is sometimes used to designate the general duty of good faith that applies in contractual and extracontractual settings, as well as the particular duty of good faith that applies in specific contractual settings.[36] This terminological conflation of loyalty with good faith certainly contributes to the conceptual confusion.[37]

The merging of the duty of loyalty with the duty of good faith is simply inaccurate. Interpreted in light of the legal power theory that will be introduced in the next section of this paper, the duty of loyalty is a duty to further interests other than that of the party upon

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DEVOIR DE COOPÉRATION DURANT L'EXÉCUTION DU CONTRAT 14, para 34 (LexisNexis Canada 2013).

34. *See* PRIVATE LAW DICTIONARY - OBLIGATIONS, *supra* note 30, *sub verbo* "good faith", def 1, obs 4° ("The Civil Code establishes duties of loyalty and honesty in different sectors of the law that are in fact illustrations of the general principle of good faith applied to specific situations (*e.g.* arts. 322, 1309, 2138 C.C.Q."); BRIGITTE LEFEBVRE, LA BONNE FOI DANS LA FORMATION DU CONTRAT 136 (Yvon Blais, 1998); MAURICE TANCELIN, DES OBLIGATIONS EN DROIT MIXTE DU QUÉBEC 342, para 491 (7th ed., Wilson & Lafleur 2009).

35. MARIE ANNIK GRÉGOIRE, LE RÔLE DE LA BONNE FOI DANS LA FORMATION ET L'ÉLABORATION DU CONTRAT, 23-24 (Yvon Blais 2003); VINCENT KARIM, Vol.1, LES OBLIGATIONS 101-102 (3d ed., Wilson & Lafleur 2009).

36. PRIVATE LAW DICTIONARY - OBLIGATIONS, *supra* note 30 (defines good faith as "*[l]oyalty* and honesty in the exercise of civil rights") (*sub verbo* "good faith", def 1 [emphasis added]).

37. *See e.g. id.*, *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.)"); LEFEBVRE, *supra* note 34, at 136 ("[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").

whom the duty is imposed. Good faith, on the other hand, establishes an honest and reasonable standard of behaviour, but it is not a duty to look after a co-party's interests.[38] In other words, while loyalty is a duty of selflessness,[39] good faith never imposes such a duty.

In this regard, it is of interest to highlight some of the Supreme Court of Canada's teachings in a relatively recent case heard on appeal from the Alberta Court of Appeal, *Bhasin v. Hrynew*.[40] Albeit rendered in a common law setting, this judgment is relevant in Québec private law for two important reasons. First, the Court gave the common law duty of good faith in the performance of contracts a scope comparable to that of the civil law. Second, the duty of loyalty in Québec is closely connected to the common law. This means that the distinction the Court drew between good faith in the performance of contracts and loyalty is bound to have some relevance in Québec civil law. Moreover, the Supreme Court of Canada is, after all, the country's highest judicial organ, which has impacted the Québec civil law.[41]

In this judgment, the Court overcame the common law traditional reluctance[42] to recognize a notion as extensive as the civilian good faith in the performance of contracts, while distinguishing it from loyalty.

Bhasin v. Hrynew opposed a retail dealer, Bhasin, and a company who marketed education savings plans. Bhasin argued that the

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38. GRÉGOIRE, *supra* note 35, at 14-17.

39. Madeleine Cantin Cumyn, *Les actes juridiques accomplis dans l'exercice de pouvoirs* in MÉLANGES JEAN-LOUIS BAUDOUIN 243 (Benoît Moore ed., Yvon Blais 2012) [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, *supra* note 3; Smith, , *supra* note 2, at 608 ("fiduciaries [are] people who are required to exercise their judgement in an unselfish way").

40. 2014 SCC 71.

41. Regarding the Supreme Court of Canada's influence on Québec civil law, *see especially* H. Patrick Glenn, *La Cour suprême du Canada et la tradition du droit civil*, 80 CAN. BAR REV. 151 (2001); Pierre-Gabriel Jobin, *La Cour suprême et la réforme du Code civil*, 79 CAN. BAR REV. 27 (2000).

42. *See* GEOFFREY SAMUEL, UNDERSTANDING CONTRACTUAL AND TORTIOUS OBLIGATIONS 32 (Law Matters Publishing 2005).

company had displayed 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 another retail dealer, Hrynew. As a result, Bhasin lost the value of his business, to the profit of Hrynew.

The Supreme Court affirmed the existence of a common law duty of honest performance of contracts. The Court ruled that the duty of honest performance, which is derived from good faith, is a "general organizing principle of the common law of contract"[43] and is immanent in any contractual undertaking. It was cautious in its scope, stating that the duty did not amount to a fiduciary duty of loyalty.[44] 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,"[45] 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."[46] The Court, thus, emphasized that good faith has "strong conceptual differences from the much higher obligations of a fiduciary."[47]

The Court also explained that the duty of good faith in contractual performance is 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."[48] Indeed, in commerce, parties may intentionally cause loss to one another, and this, as such, is not prohibited by the duty of good faith.[49] Requiring that a party performs a contract honestly does not mean that this party cannot pursue her self-interest in doing so. The Court

43. *Bhasin v Hrynew*, *supra* note 40, at para 33.
44. *Id.* at paras 60, 65, 73, 85.
45. *Id.* at para 65.
46. *Id.*
47. *Id.*
48. *Id.* at para 70.
49. *Id.*

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."[50]

Likewise, in civil law, good faith in the performance of contracts is not a duty of devotion to the party. Indeed, good faith never requires that a party selflessly furthers the interests of another, even under the duty of cooperation, its most constraining form.[51]

The reason for this is simple. In civil law, good faith governs the conduct of a person whenever she acts as a titulary of subjective rights, that is whenever a person acts for herself, on her own behalf and in her own interests. Good faith, as a mechanism that regulates the exercise of subjective rights, is thus compatible with the idea of selfishness, at least to a certain extent. Conversely, as will be shown further on, the duty of loyalty is precisely a duty of selflessness. This is due to the fact that loyalty regulates legal powers, which in essence must be exercised in an interest other than that of their holder.

In brief, loyalty is not merely a duty of good faith of greater intensity; it is a duty of a different nature. Good faith and loyalty regulate the exercise of distinct legal prerogatives: subjective rights (selfish legal prerogatives) and legal powers (selfless ones).[52] The fact that subjective right constitutes a strong paradigm in civil law—the civil law naturally envisions legal actors as titularies of subjective rights, not as holders of legal powers—may explain that loyalty

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50. *Id.* at para 86.

51. MARIE ANNIK GRÉGOIRE, LIBERTÉ, RESPONSABILITÉ ET UTILITÉ : LA BONNE FOI COMME INSTRUMENT DE JUSTICE 187 (Yvon Blais 2010). *See also Bail*, *supra* note 31; *Banque Royale du Canada c Dompierre*, 2003 CanLII 3102 (Sup Ct); *Caisse populaire Desjardins St-Jean-Baptiste-de-LaSalle c 164375 Canada inc.*, 1999 CanLII 13775 (CA); *Provigo*, *supra* note 33, at 25-26; *2328-4938 Québec inc c Naturiste JMB inc*, [2000] RJQ 2607, 2000 CanLII 19202 (Sup Ct) [cited at CanLII] (at paras 134-137, concerning the refusal of Québec courts to incorporate the common law "fiduciary obligation" and the demanding requirements it entails in a franchise contract).

52. Subjective right has been described as an "egoistic prerogative (prérogative égoïste)," whereas legal power has been described as an "altruistic prerogative (prérogative altruiste)." Cantin Cumyn, *The Legal Power*, *supra* note 13, at 355, referring to MICHEL STORCK, ESSAI SUR LE MÉCANISME DE LA REPRÉSENTATION DANS LES ACTES JURIDIQUES 176 (Librairie générale de droit et de jurisprudence 1982).

is frequently assimilated to good faith. However, as will be discussed next, legal power is key to understanding the duty of loyalty in Québec.

B. Legal Power as the Basis of the Duty of Loyalty

Although legal power is a civilian construct, it emerged in Québec in response to the influence of the common law. In fact, when the *Civil Code of Québec* introduced a new version of the trust—a civilian adaptation of the common law trust—a new legal regime was created to govern the conduct of the trustee: the administration of the property of others.[53] This regime, which has been described as an "extremely detailed codification of the common law fiduciary relationship,"[54] applies to various legal relationships besides that of trustee-beneficiary. The notion of legal power, as articulated by Professor Madeleine Cantin Cumyn, arose out of the regime of the administration of the property of others. As will be explained, legal power is now a cornerstone in the analysis of the duty of loyalty.

1. Emergence of Legal Power in Québec

In Québec, the emergence of legal power is tied to the history of the trust.[55] In 1888, the trust was first formally introduced in the *Civil Code of Lower Canada* (CCLC).[56] Although distinct from the

53. *See* CANTIN CUMYN & CUMYN, *supra* note 13. 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 indicates that the drafters intended the former to complement the latter.

54. [translated by author, footnotes omitted]: Yves Rossier, *Étude comparée de certains aspects patrimoniaux de la fiducie*, 34 MCGILL L.J. 817, at 906 (1989).

55. For a history of the Québec trust, *see* Popovici, *supra* note 16, at 201-205.

56. A chapter concerning the trust (articles 981a to 981n) was added to the CCLC in 1888, a chapter which reproduced the contents of the *Act Respecting Trusts*, SQ 1879, c 29. However, even before, the trust had been implicitly incorporated in Québec private law through articles 869 and 964 CCLC, which concerned testamentary gifts subject to a charge and substitution. *See* Madeleine Cantin Cumyn, *L'origine de la fiducie québécoise* in MÉLANGES PRESENTED BY MCGILL COLLEAGUES TO PAUL-ANDRÉ CRÉPEAU 199 at 200 (Yvon Blais 1997) [Cantin Cumyn, *L'origine de la fiducie*].

common law trust in multiple ways, it was nonetheless directly inspired by the latter.[57] The trust of the *Civil Code of Lower Canada*, however, had given rise to conceptual difficulties regarding the nature of the trustee's prerogative over the trust, which had been described as a *sui generis* ownership right by the Supreme Court of Canada.[58]

For some Québec jurists, it was difficult to conceive that the trustee could hold a title over trust property without benefiting from it. This *sui generis* ownership right was therefore described as a "partial derivative" of the common law "notion of dual titles."[59]

The *Civil Code of Québec* resolved this issue by introducing a new version of the trust.[60] Under this version, the trustee is no more than a manager. Indeed, one provision specifically states that the trustee has no real right in the trust patrimony.[61]

More specifically, under the *Civil Code of Québec*, the trustee is an administrator of the property of another.[62] Like the common law regime of fiduciary relationships, which extends the application of the trustees' fiduciary duties to other legal actors in relationships that parallel the trustee-beneficiary relationship, the *Civil Code of*

57. Sylvio Normand & Jacques Gosselin, *La fiducie du Code civil : un sujet d'affrontement dans la communauté juridique québécoise*, 31 LES CAHIERS DE DROIT 681 at 688 (1990). *See also* Cantin Cumyn, *L'origine de la fiducie*, *supra* note 56.

58. *Royal Trust Co v Tucker*, [1982] 1 SCR 250.

59. John E.C. Brierley, *The New Québec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts* in DROIT QUÉBÉCOIS ET DROIT FRANÇAIS : COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 383, 392 (H. Patrick Glenn ed., Yvon Blais 1993).

60. Art. 1261-1262 CCQ. This trust constitutes an autonomous patrimony, which is managed by a trustee for the benefit of the beneficiaries of the trust.

61. Art. 1261 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."

62. Art. 1278 CCQ.

Québec's regime regarding the administration of the property of others governs the conduct of various legal actors.[63] In fact, it was conceived as a general regime and provides the suppletive law[64] for when a person manages property that is not their own. Indeed, 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] sufficiently broad to qualify as part of a general law of administration."[65]

Professor Cantin Cumyn, who first articulated the notion of legal power in Québec, built her theory on the framework provided by the

63. Michelle Cumyn, *L'encadrement des conflits d'intérêts par le droit commun québécois* in LES CONFLITS D'INTÉRÊTS, 49, 51 (Dalloz 2013) [Cumyn, *Les conflits d'intérêts*]. The Code mentions that the following legal actors are also administrators of the property of others: the tutor (art. 208, 286 CCQ) and the curator (art. 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 (articles 2773, 2775 CCQ). *See* Madeleine Cantin Cumyn, *L'administration des biens d'autrui dans le Code civil du Québec*, 3 REVISTA CATALANA DE DRET PRIVET 17 at 24, para 11 (2004).

64. Art. 1299 CCQ provides that:

> 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].

65. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 353. *See* CANTIN CUMYN & CUMYN, *supra* note 13, at 49, para 57. Despite the Civil Code Revision Office's desire that the administration of the property of others be a suppletive regime, a *régime de droit commun*, 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* QUÉBEC, CIVIL CODE REVISION OFFICE, VOL.2 REPORT ON THE QUÉBEC CIVIL CODE: COMMENTARIES, T.1, 372-74 (Éditeur officiel du Québec 1978); 1 COMMENTAIRES DU MINISTRE DE LA JUSTICE : LE CODE CIVIL DU QUÉBEC 774ff (Publications du Québec, 1993) cited in CANTIN CUMYN & CUMYN, *supra* note 13, at 49-51.

regime of the administration of the property of others. As she explains, the trustee, just like other legal actors that are "charged with the administration of property or a patrimony *that is not [their] own*,"[66] clearly has no subjective right over the patrimony he administers; instead, he holds legal powers.[67]

2. Description of Legal Power

Following Professor Cantin Cumyn's theory of legal power, this notion must be interpreted in contrast with that of subjective rights.[68] While there is no universally accepted definition of subjective right,[69] it is generally seen as a legal prerogative attached to a subject of rights (a natural or legal person), which this person exercises, on her own behalf and interest, over another person or a thing.[70] Subjective rights are found within a person's patrimony, or the economic representation of a person.[71]

66. Art. 1309 CCQ.

67. CANTIN CUMYN & CUMYN, *supra* note 13 ("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). *See also* Cantin Cumyn, *L'exercice de pouvoirs*, *supra* note 39, at 248 ("[l]'immixtion dans les affaires d'une autre personne est une situation exceptionnelle dont la légalité repose sur l'existence de pouvoirs régulièrement conférés").

68. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 352; CANTIN CUMYN & CUMYN, *supra* note 13, at 80.

69. JACQUES GHESTIN & GILLES GOUBEAUX, TRAITÉ DE DROIT CIVIL. INTRODUCTION GÉNÉRALE 126 (4th ed., Librairie générale de droit et de jurisprudence 1994); HENRI LÉON JEAN MAZEAUD & FRANÇOIS CHABAS, LEÇONS DE DROIT CIVIL. INTRODUCTION À L'ÉTUDE DU DROIT 253 (12th ed., Montchrestien 2000).

70. *See* PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS – PROPERTY (Yvon Blais 2012) *sub verbo* "right" [*Private Law Dictionary - Property*]. Professors Brierley & Macdonald described subjective rights as "the 'legal rights' or the prerogatives of individuals or groups of individuals that the law recognizes in relation to others or to things" in QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW 155, para 125 (John E.C. Brierley & Roderick A. Macdonald eds., Emond Montgomery 1993).

71. Indeed, a person acquires subjective rights and incurs obligations through her patrimony.

Under the subjective right paradigm, civil law considers that a legal actor is either exercising his own rights or unlawfully interfering with those of another.[72] Thus, the civil law proceeds upon the idea that a person acquires rights and incurs obligations for herself, through her own patrimony.

However, this is not the case where holders of legal powers such as administrators of the property of others are concerned. For instance, when a curator[73] enters into a contract with a third party on behalf of a protected person, the curator himself does not acquire a right against the third party. Rather, this right forms part of the protected person's patrimony.

Legal power, therefore, is a rather peculiar notion as its exercise amounts to the lawful interference in the patrimony of another. In fact, legal power is more than a lawful interference; it is the power to act *within* the patrimony of another. When a holder of legal powers exercises his prerogatives, he neither acts on his own behalf, nor in his personal interests. Indeed, legal power having a substitutive dimension will be discussed further.

It should also be noted that although the notion of legal power in Québec emerged from the regime of the administration of the *property* of others, legal power may also be exercised upon a person. In civil law terms, legal power may affect patrimonial as well as extrapatrimonial rights.[74] Therefore, Professor Cantin Cumyn has

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72. This is the idea expressed, although in different terms, by Catherine Valcke, *The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Quebec*, 46 U. TORONTO L.J. 539 at 573 (1996): "[e]very human action is either a legitimate exercise of one's freedom . . . or else an illegitimate interference with someone else's freedom" [footnote omitted].

73. The curator is an administrator of the property of another (art. 282 CCQ). According to art. 281 CCQ, "[t]he court institutes curatorship to a person of full age if it is established that the incapacity of that person to care for himself and to administer his property is total and permanent and that he needs to be represented in the exercise of his civil rights."

74. *See* PRIVATE LAW DICTIONARY – PROPERTY, *supra* note 70, *sub verbo* "extrapatrimonial right":

> Right that, because of its close association with the person who enjoys it, is not part of his or her patrimony . . . . Because they are imagined as the antithesis of property or patrimonial rights, extrapatrimonial rights

argued that the regime of the administration of the property of others could apply, by analogy, when an administrator exercises his powers with regard to the person of another.[75]

The notions of legal power and subjective right can be illustrated by resorting to the idea of a legal sphere. Where a person acts as a titulary of subjective rights, she is acting within her own legal sphere—a sphere within which she is the only sovereign.[76] Holders of legal powers, however, act within a legal sphere that is not their own. Where a legal actor acts within the legal sphere of another, he does not act on his own behalf nor in his personal interests.

The fact that legal powers are exercised in an interest other than that of their holder implies that the latter cannot exercise these legal prerogatives for whatever end he wishes to pursue, unlike the titulary of subjective rights.[77] Legal power has therefore been described as a "prerogative constrained by a purpose."[78] The potential purposes of the powers are numerous, but they may be grouped into two categories: the representation of a person and the accomplishment of another goal. Whereas legal powers of the first type are known as powers of representation, the powers of the second type are known as autonomous powers.[79]

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are often defined as rights that are not susceptible of pecuniary evaluation.

75. Madeleine Cantin Cumyn, *De l'administration des biens à la protection de la personne d'autrui* in OBLIGATIONS ET RECOURS CONTRE UN CURATEUR, TUTEUR OU MANDATAIRE DÉFAILLANT 205 (Yvon Blais 2008) [Cantin Cumyn, *De l'administration*]; Cantin Cumyn, *The Legal Power*, *supra* note 13, at 359-60.

76. The civilian notion of patrimony is a way to conceptualize this legal sphere that belongs exclusively to a person. Art. 2, para 1 CCQ states that "[e]very person is the holder of a patrimony". The legal sphere with which we are concerned, however, encompasses both patrimonial and extrapatrimonial rights.

77. The exercise of subjective rights is nonetheless subject to certain constraints, such as the duty of good faith, discussed above.

78. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 355, referring to the notion of *prérogative finalisée* put forth by EMMANUEL GAILLARD, LE POUVOIR EN DROIT PRIVÉ paras 235-239 (Economica 1985). Such a description of legal power may be contrasted with a "right as an unbounded prerogative [*prérogative laissée au libre arbitre*]." *Id.*

79. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 356.

3. Loyalty Interpreted in Light of Legal Power

The duty of loyalty requires that the holder of legal powers exercises his powers in absolute accordance with the purpose for which they were granted to him.[80] The protection and the promotion of the interests of the beneficiary (or beneficiaries) of the duty of loyalty are subordinated to the holder's (of legal powers) compliance with the aim of the powers with which he is vested.

A holder of legal powers who uses his powers to further a purpose other than that for which they were granted to him necessarily breaches his duty of loyalty. This implies that the holder of legal powers cannot exercise these prerogatives to pursue his own interests.[81] Indeed, as was mentioned above, legal power is necessarily exercised in an other-regarding purpose.

The meaning of the duty of loyalty is grasped more easily when distinguished from another notion, the duty to act with prudence and diligence in the exercise of legal powers.[82]

First, while the duty of loyalty is specific and exclusive to legal power, the duty to act with prudence and diligence can also regulate the exercise of subjective rights.[83] However, the standard of the reasonable person placed in the same circumstances—the reference in determining whether one has displayed a prudent and diligent conduct—is necessarily higher for the holder of legal powers than for

80. *Id.* at 360-61.

81. Conflicts of interests will be discussed in the second part of this paper, section 3.2.1.

82. Concerning the distinction between loyalty and prudence and diligence, *see* Cantin Cumyn, *The Legal Power*, *supra* note 13, at 362-63; Caroline Pratte, *Essai sur le rapport entre la société par actions et ses dirigeants dans le cadre du Code civil du Québec*, 39 MCGILL L.J. 1, 48-49 (1994).
Note that the director of a legal person, the administrator of a property of another, the employee and the mandatary are subject to a duty of prudence and diligence under the CCQ (articles 322, para 1; 1309, para 1; 2088, para 1 and 2138, para 1).

83. 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.

the titulary of subjective rights.[84] Indeed, unlike subjective rights, legal powers must in essence be exercised in an interest other than that of their holder.[85]

Second and more importantly, unlike the duty of loyalty, the duty of prudence and diligence is not concerned with the purpose of the powers. Rather, it has to do with the way the holder of legal powers exercises the prerogatives with which he is vested, rather than the goal he pursues.[86] The duty of prudence and diligence requires that the legal powers be exercised with care and in a timely manner, following the standard of the reasonable person placed in the same circumstances. This implies that the holder of legal power must always take active steps to protect and promote the interests of the beneficiary.[87] However, it may happen that a holder of legal powers does not act in time to protect the interests of the beneficiary and, thus, acts negligently. Yet, this does not mean that the holder of legal powers would thereby seek to further another purpose than that for which he was granted powers.[88] It is therefore possible to be in breach of the duty of prudence and diligence without being disloyal.

Returning to the duty of loyalty, as mentioned above, it is intrinsically linked to the purpose of the powers. More specifically, Professor Cantin Cumyn explains that a legal actor vested with powers of representation must exercise his powers in accordance with the

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84. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 363. *See also* Cantin Cumyn, *De l'administration*, *supra* note 75, at 213; CANTIN CUMYN & CUMYN, *supra* note 13, at 251-52, para 273.

85. For this reason, it has been argued that the "reasonable person" may not be the appropriate standard to determine whether a holder of legal powers 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 acts (and therefore cares) for another. *See* ALEXANDRA POPOVICI, *Le bon père de famille* in LES COULEURS DU DROIT 125, 134-38 (Bras Miranda et al eds., Éditions Thémis 2010).

86. Pratte, *supra* note 82, at 49 ("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").

87. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 363.

88. *See* Pratte, *supra* note 82, at 48 (referring at fn. 272 to Gaillard, *supra* note 78, at para 150).

purpose of these powers and in the best interest of the person represented, whereas a legal actor vested with autonomous powers must primarily exercise his powers in the furtherance of the goal for which he was granted powers.[89] Article 1309 CCQ, which sets out the duty of loyalty of the administrator of the property of another, encapsulates the nuance: "[the administrator] shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued."

In the context of the exercise of autonomous powers, the meaning of loyalty may appear more nebulous. Indeed, autonomous powers may be granted for almost any purpose other than for the representation of a person[90] and this purpose may be rather open-ended—such as in the administration of a trust patrimony or the liquidation of a succession. Moreover, it is generally harder to identify the beneficiary in the context of the exercise of autonomous powers than it is with powers of representation, and the beneficiary (or beneficiaries) is generally more remote. There may even be no beneficiary, for instance in a trust.[91] However, in certain circumstances, the trust itself could be seen as a beneficiary.[92]

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89. In Professor Cantin Cumyn's words: "[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" (*supra* note 13, at 360).

90. Professor Cantin Cumyn writes that "the potential purposes of an autonomous power are many and variable", whereas "the purpose of a power to represent another is unique and invariable." (Cantin Cumyn, *The Legal Power*, *supra* note 13, at 360).

91. Unlike the common law, Québec civil law admits the possibility that there be no trust beneficiaries: *see* Frédéric Zenati-Castaing, *L'affectation québécoise, un malentendu porteur d'avenir. Réflexions de synthèse*, 48 REVUE JURIDIQUE THÉMIS 623, 636 (2014).

92. *See* Cantin Cumyn, *The Legal Power*, *supra* note 13, at 362 ("the trust itself should also be considered a beneficiary of the administration, despite the fact that it is not a person"). Professor Cantin Cumyn also considers that the trust, a patrimony by appropriation (art. 1261 CCQ), is a subject of rights, alongside the person (natural or legal): Madeleine Cantin Cumyn, *La fiducie, un nouveau sujet de droit ?* in MÉLANGES ERNEST CAPARROS 129 (Jacques Beaulnes et al. eds., Wilson & Lafleur 2002).

The liquidation of a succession constitutes another illustration of the remoteness (and multiplicity) of beneficiaries in the context of the exercise of autonomous powers,[93] as the *de cujus*, whose will must be respected, is deceased. It is also possible that there are future heirs who have yet to be born.

Therefore, as regards autonomous powers, loyalty is best described as a duty to further the purpose for which one was granted powers, rather than as a duty to act in the best interests of a beneficiary. Nonetheless, where autonomous powers are exercised, there are persons who benefit from the fulfillment of the powers' purpose. In other words, the holder of legal powers who exercises autonomous powers is still acting in the legal sphere of others (*e.g.*, whether it is the trust, the beneficiaries of a trust or the beneficiaries of the liquidation of a succession). Generally, such beneficiaries are just more remote than the beneficiary of a power of representation.

The main requirements that stem from the duty of loyalty will be discussed in the second part of this paper.[94] For the moment, however, it is worth underlining that the administration of the property of others constitutes the *Civil Code of Québec*'s most elaborate regime in this respect.[95] In addition to the requirements imposed upon the four legal actors under a duty of loyalty, the administrator of the property of another is under a duty to account and inform.[96] More specifically, the administrator must "allow the beneficiary to examine the books and vouchers relating to the administration"[97]

93. For a discussion relating to 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 1 at 38, para 65 (Yvon Blais 2009).

94. Section 3.2. These requirements are the duty to avoid conflicts of interests, to act with impartiality and not to mingle the property administered.

95. Cumyn, *Les conflits d'intérêts*, supra note 63, at 57-58.

96. *See* CANTIN CUMYN & CUMYN, *supra* note 13, at 297-302, paras 316-321, 375-391, 397-414.

97. Art. 1354 CCQ.

and provide annual accounts that are sufficiently detailed.[98] The administrator must also provide a final account upon termination of his position.[99]

Professor Michelle Cumyn notes that these requirements are imposed specifically on the administrator of the property of another because the administrator is rarely under the direct supervision of the beneficiary of the duty of loyalty.[100] Indeed, as explained above, the beneficiary in the context of the exercise of autonomous powers is generally remote and may even be non-existent. Moreover, in cases where the administrator of the property of another is vested with powers of representation, the represented is either absent or affected by incapacity.[101] This implies that the beneficiary is unable to effectively supervise the administrator. In such cases, the intervention of a third party, whom the Civil Code refers to as "interested person,"[102] is often necessary to ensure that the powers are exercised with loyalty, that is, in conformity with their purpose.[103] The duty to account and inform thus facilitates surveillance of the administrator by interested persons, who may thereby take action more rapidly if the administrator breaches his duty of loyalty.

Now that the way in which the duty of loyalty was integrated into Québec civil law through the theory of legal power has been explained, it is interesting to return to the common law, from which the duty originates. As will be shown, a common law understanding of the nature of loyalty can be surprisingly similar to a civilian one.

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98. Articles 1351 and 1352, para 2 CCQ.
99. Art. 1363, para 1 CCQ.
100. Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 57-58.
101. *Id.* at 58 (Professor Cumyn mentions the protection mandate, the management of the business of another, and the curatorship to the property of another).
102. Many provisions of the Civil Code found within the regime of the administration of the property of others allow an "interested person" to take action where there is no existent beneficiary or where the beneficiary is unable to act: art. 1324, para 1; 1330, para 2; 1333, para 2; 1352, para 2; 1360, para 2; 1363, para 2 CCQ.
103. This scheme, where a third party must step in to protect the interests of another, departs from the typical structure of private law: Alexandra Popovici, Êtres et avoirs. De l'existence de droits sans sujet en droit civil actuel (2015) (unpublished doctoral thesis, Université Laval).

4. A Common Law Perspective

A common law theory of fiduciary duties was recently formulated by Professor Paul B. Miller.[104] The parallel between Miller's account of fiduciary power and the theory of legal power described above is striking. In both legal traditions, the legal actors under a duty of loyalty do not exercise their prerogatives for themselves, on their own behalf. This stands out as the determining element underlying loyalty. For present purposes, only a glimpse of Miller's theory is presented.

Miller puts forth the idea that persons in everyday life exercise means "by which [they] act purposively through law."[105] For instance, he mentions that a person may "[enter into a] contract, . . . inherit, . . . establish a trust [or] establish possessory interests in property."[106] Those means derive from what Miller calls "capacities" of a person, "capacities that are constitutive of [every person's] legal personality." According to Miller, fiduciary duties arise when one person exercises the legal capacities (or the means) of another.[107] In exercising the means of another person, fiduciaries act as the person's extension.[108] Miller justifies the fiduciary duty of loyalty precisely on the basis of this substitutive[109] aspect of fiduciary powers; "[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."[110]

Finally, according to Miller, the means that fiduciaries exercise affect what he calls the "practical interests" of the beneficiary.[111] He

104. Miller, *supra* note 4.
105. *Id.* at 1019.
106. *Id.* at 1019.
107. *Id.* at 1017: "[f]iduciary powers are legal capacities derived from the legal personality of other persons, natural or corporate" and at 1021: "[f]iduciary power is properly understood as a means belonging rightfully to the beneficiary."
108. *Id.* at 1020.
109. *Id.* at 1019 ("[f]iduciary power is substitutive") and at 1017 ("[i]n wielding [the fiduciary powers], the fiduciary stands in substitution for [the beneficiary] within the ambit of the power").
110. *Id.* at 1020.
111. *Id.* at 1015.

explains that these practical interests relate to matters of right, personality, and welfare, which he describes 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.[112]

Numerous parallels with the civil law can be drawn. The practical interests that may be affected by the exercise of fiduciary powers, as identified by Miller, are encompassed in the notions of patrimonial and extrapatrimonial rights in the civil law. In other words, it can be said that the practical interests described by Miller are constitutive of the beneficiary's legal sphere.

The notions of capacity and legal personality, fundamental to Miller's analysis, are also reminiscent of core concepts in the civil law. Moreover, under Miller's theory and in civil law, powers may be understood in relation to legal capacity.

In Québec, one of the first articles in the Civil Code states that persons possess juridical personality and have enjoyment of their rights. The capacity to exercise civil rights[113] is a corollary to the capacity to enjoy such rights, both of which are attributes of a subject of rights. In certain cases, however, the exercise of rights may be delegated to another, either as a result of a contractual agreement

112. *Id.* at 1014.

113. 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."

or a statutory provision.[114] For instance, minors are, to a certain extent, incapable of exercising their rights.[115] The tutor, therefore, exercises his powers on behalf of the minor to palliate the latter's incapacity. Thus, although power and capacity should not be conflated in civil law, capacity cannot be dissociated from a subject of rights because they are closely connected. Indeed, in civil law, the capacity of a person to exercise his rights may be substituted with legal powers.[116]

This brief overview reveals important commonalities between civilian and common law understandings of the basis of loyalty. Under a civil law theory of legal powers as well as under Miller's theory, the prerogatives exercised by a legal actor subject to a duty of loyalty have a substitutive dimension. Under both accounts, loyalty is tied to the fact that these prerogatives, whether we call them "legal powers" or "means," are not exercised on one's own behalf, but for an other-regarding purpose. Additionally, the interests that are susceptible of being affected by the exercise of these prerogatives are comparable in civil and common law.

C. Conclusion

This first part aimed to invalidate the bases that are often erroneously attributed to loyalty in Québec and to the present true basis of loyalty in civil law: legal power. Under a theory of legal powers, loyalty is a duty to act selflessly in the sole furtherance of the purpose of the powers granted to a legal actor. Parallels were drawn between the civilian notion of legal power and a common law understanding of fiduciary power, parallels which shed light on the fact

114. *See* art. 4 (2) CCQ above. *See also* CANTIN CUMYN & CUMYN, *supra* note 13, at 69-70, paras 73-76.

115. Art. 153, 155 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 (art. 311 CCQ). *See* CANTIN CUMYN & CUMYN, *supra* note 13, at 69, para 72.

116. *Id.* at 70, para 76.

that the prerogatives held by the legal actor under a duty of loyalty are invariably exercised for an other-regarding purpose.

A simple way to conceptualize the juridical situation of a legal actor under a duty of loyalty is through the idea of a legal sphere. This legal sphere represents a person or a legal entity (such as a trust) on the legal scene.

Traditionally, in civil law, a person is represented through her patrimony.[117] However, under a duty of loyalty, when legal actors exercise their legal powers with regard to matters relating to the person as well as to property, the idea of a legal sphere is more adequate.[118] Thus, in civil law, this legal sphere may be seen as encompassing both patrimonial and extrapatrimonial rights. In common law, it encompasses the set of interests that may be affected by the exercise of fiduciary power.

In Québec private law, a legal actor who acts within the legal sphere of another exercises legal powers and is therefore held to a duty of loyalty. Where powers of representation are exercised, the legal sphere within which the holder of legal powers exercises his prerogatives is that of the person represented. Because the holder of legal powers acts in the legal sphere of another, the holder of legal powers must embrace the other's interests. As for autonomous powers, since they may be granted for a wide range of purposes and exercised in a variety of situations, the identification of the legal sphere within which the powers are exercised will depend on the context.

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117. 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 70, *sub verbo* "patrimony"). The patrimony was famously described as an "emanation of legal personality" by CHARLES AUBRY & CHARLES-FRÉDÉRIC RAU, COURS DE DROIT CIVIL FRANÇAIS 231 (Nicholas Kasirer trans., 4th ed. Marchai et Billard 1873); Nicholas Kasirer, *Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine*, 38 REVUE GÉNÉRALE DE DROIT 379, 473 (2008).

118. Note however that originally, the concept of patrimony also encompassed "innate" rights, which are now known as extrapatrimonial rights. *Id.* at 472.

This understanding of loyalty is illustrated more concretely in the next part of this paper. The juridical situation of legal actors subject to the duty of loyalty under the *Civil Code of Québec*, as well as the ramifications of this duty in the Civil Code, will be examined.

III. Analysis of the Duty of Loyalty

In order to get a better picture of loyalty in Québec private law, is it necessary to examine the landscape of the duty of loyalty in the *Civil Code of Québec*. This part of the paper first discusses the juridical situation of the legal actors upon whom a duty of loyalty is expressly imposed. Then, it highlights the core requirements of the duty of loyalty. Lastly, it analyzes the restitution of profits, an interesting mechanism that enforces the duty of loyalty.

A. The Juridical Situation of the Legal Actors Under a Duty of Loyalty

Under the *Civil Code of Québec*, the four categories of legal actors that are subject to a duty of loyalty involve holders of legal powers—legal actors who act within the legal sphere of another.

The juridical situation of the administrator of the property of another, having been discussed previously, will not be re-examined. As for the mandatary and the director of a legal person, the fact that they act within the legal sphere of another is easily conceivable. Therefore, their situation will be analyzed only briefly. The largest part of this section will thus be devoted to the employee, whose legal situation is ambiguous in Québec private law.

1. The Mandatary and the Director of a Legal Person

In Québec, the mandate has always been associated with the idea of acting for another. Under the *Civil Code of Lower Canada*, this

situation where a person acted for another was usually envisioned through the paradigm of the mandate.[119]

With the entry into force of the *Civil Code of Québec*, this paradigm shifted from the mandate to the administration of the property of others.[120] While the mandatary under the previous code could accomplish many acts of administration—much like the actual administrator of the property of another—the mandatary can only perform acts of representation under the *Civil Code of Québec*.[121]

Typically, in a mandate, the mandator is substituted for the mandatary in the accomplishment of a juridical act, and the rights and obligations that arise from this juridical act instantly form part of the mandator's legal sphere.[122] The *Civil Code of Québec* also provides that the mandatary may perform juridical acts that concern the person of the mandator, and more specifically acts that relate to his protection or moral well-being.[123] For instance, the protection mandate

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119. CANTIN CUMYN & CUMYN, *supra* note 13, at 31, para 36.

120. *Id.* at 47-48, para 56. Note, however, that for Professor Adrian Popovici, the mandate was not completely superseded by the administration of the property of others in this respect (ADRIAN POPOVICI, LA COULEUR DU MANDAT 344 (Éditions Thémis 1995) ("le mandat n'est plus seul; il a un rival ou un adjuvant, l'administration du bien d'autrui").

121. Contrast art. 2130, para 1 CCQ:

> Mandate is a contract by which a person, the mandator, confers upon another person, the mandatary, *the power 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. [emphasis added]

with art. 1701, para 1 CCLC: "Mandate 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." [emphasis added]

122. POPOVICI, LA COULEUR DU MANDAT, *supra* note 120, at 18 ("[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" [footnote omitted, emphasis in the original]).

123. 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.

requires that the mandator receives all the care required by his state of health.[124]

The *Civil Code of Québec* establishes a connection between the mandate and the administration of legal persons such as business corporations. Indeed, art. 321 CCQ assimilates the director of a legal person to a mandatary.[125] However, it should be noted that unlike the mandatary, the director can exercise autonomous powers, namely when he administers the legal person as a member of the board of directors.[126] In this case, the powers vested in the directors are autonomous powers as they are to be used to see to the proper operation of the business corporation. No representation is involved.[127]

That said, regardless of the type of legal power exercised, the director clearly acts within the legal sphere of another. He is the means through which the legal person "comes to life." The legal person is legally incapable of exercising its own rights and therefore acts through its organs, such as the board of directors.[128]

See also Claude Fabien, *Le nouveau droit du mandat* in 2 LA RÉFORME DU CODE CIVIL – OBLIGATIONS, CONTRATS NOMMÉS, TEXTES RÉUNIS PAR LE BARREAU DU QUÉBEC ET LA CHAMBRE DES NOTAIRES DU QUÉBEC 881 at 889 (Presses de l'Université Laval 1993).

124. MICHEL BEAUCHAMP & CINDY GILBERT, TUTELLE, CURATELLE ET MANDAT DE PROTECTION 345 (Yvon Blais 2014). However, according to Professor Michelle Cumyn, these mandates may be assimilated to instances of administration of the property of another due to the inability of the represented to supervise adequately the representative (Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 57-58).

125. Art. 321 CCQ:

> A director is considered to be the mandatary of the legal person. He shall, in the performance of his duties, conform to the obligations imposed on him by law, the constituting act or the by-laws and he shall act within the limits of the powers conferred on him.

126. Art. 311 CCQ: "Legal persons act through their organs, such as the board of directors and the general meeting of the members."

127. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 358; Pratte, *supra* note 82, at 41. However, individually, a director can of course be granted the power to represent the legal person when he enters into a contract with a third party, on behalf of the legal person (*see id.*).

128. Art. 311 CCQ. *See* Marcel Lizée, *De la capacité organique et des responsabilités délictuelle et pénale des personnes morales*, 41 MCGILL L.J. 131 (1995).

2. The Employee

The juridical situation of the employee, on the other hand, is far more equivocal. In fact, the employee is erroneously perceived as a titulary of subjective rights—that is as acting in his own legal sphere.

The conceptual difficulty when an employee is concerned has to do with the fact that the employment contract is generally seen under the perspective of the financial benefits it brings to the employee. Therefore, the employee is perceived as acting in his own interests, as a titulary of subjective rights. This is unsurprising as it is indeed difficult to conceptualize that a person is under a duty to act selflessly when she is remunerated for her services.

However, the employee is not the only legal actor subject to a duty of loyalty who is remunerated. The director, the mandatary, and the administrators of the property of another are often paid. Lawyers who accept the mandate[129] to represent clients and trustees are also usually remunerated.[130] Yet, jurists recognize more willingly that these legal actors exercise legal powers in the performance of their functions. This may be due 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 certain historical elements.

The mandate and the administration of the property of another, as they now exist in Québec civil law, originate from the Roman *mandatum*.[131] Under the classical period of Roman law, the Roman *mandatum* was performed gratuitously for a friend.[132] A monetary counterpart for the accomplishment of the mandate would be given

129. More precisely, the contract between a lawyer and his client is of a hybrid nature. It is both a mandate and a contract for services. *See Bérocan inc c Masson*, [1999] RJQ 195 (Sup Ct).

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

131. CANTIN CUMYN & CUMYN, *supra* note 13, at 11, para 9.

132. *Id.* at 12, para 9; JEAN GAUDEMET, DROIT PRIVÉ ROMAIN 272-73 (2d ed., Montchrestien 2000).

only for the mandates performed for certain "honorable"[133] professions. However, this financial counterpart was not considered to be a salary, but rather a token of gratitude for the service rendered.[134]

Although the importance of the mandate's gratuitous nature diminished throughout the ages, under the *Civil Code of Lower Canada*, the mandate, which then encompassed some forms of administration of the property of another,[135] was still presumed to be gratuitous.[136] Offices like that of trustee and liquidator of a succession were also presumed to be gratuitous.[137] The mandate and the administration of the property of others have only recently been detached from the idea of gratuitousness, and only to a certain extent.[138]

However, in regard to the employee, the emphasis placed on the benefits gained from the employment contract obscures the fact that he is in reality acting in his employer's legal sphere. The fact that the employee's duty of loyalty is sometimes described as a point of equilibrium between his personal interests and that of his employer shows the ambivalence of the jurists when it comes to determining the nature of the employee's status.[139] In other words, is the employee a titulary of subjective rights or a holder of legal powers? In

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133. *Id.* at 273.

134. *Id.* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 413-420 (2d ed., Clarendon Press 1996).

135. The mandate under the *Civil Code of Lower Canada* did not only encompass instances of representation arising out of a contractual agreement as it does under the *Civil Code of Québec*; it encompassed all acts of management. *Compare* art. 2130 CCQ with 1710 CCLC.

136. Art. 1702 CCLC.

137. *See* articles 981*g* and 910 (2) CCLC. *See also* CANTIN CUMYN & CUMYN, *supra* note 13, at 171, para 179.

138. *See* art. 1300 CCQ (concerning the administration of the property of others) and 2133 CCQ (concerning the mandate). However, following art. 2133 CCQ, the mandate between two natural persons is still presumed to be gratuitous.

139. *See e.g.* Louise Dubé & Gilles Trudeau, *supra* note 23, at 54 ("[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"); MORIN ET AL., LE DROIT DE L'EMPLOI AU QUÉBEC 247 (4th ed., Wilson & Lafleur 2010) ("[l]es parties pourront délimiter l'équilibre que devra respecter le salarié entre ses intérêts et ceux de l'employeur").

the performance of his functions, does he act within his own legal sphere or that of his employer?

Certainly, when a person decides to enter into an employment contract, she is acting as a titulary of subjective rights as she is exercising her right to work[140] and is certainly driven by her own personal interests, including the desire to earn a salary. The same is true of the lawyer who accepts a mandate or the trustee who accepts the office of trustee. The remuneration offered might have influenced their undertaking. Nonetheless, *in the course of their functions*, these legal actors exercise legal powers and act within the legal sphere of another.

Likewise, the employee certainly acts within the legal sphere of another when he performs tasks in the course of his employment contract. Indeed, the employee has the power to alter the patrimonial situation of his employer. He may, for instance, conclude contracts on behalf of his employer. Even the employee who does not perform juridical acts on behalf of his employer can modify the latter's patrimonial situation. Namely, because the employee acts within the legal sphere of his employer, the *Civil Code of Québec* provides that the employer is liable for the injuries caused by his employee.[141] In fact, under the Civil Code, it is in the very nature of the contract of employment for the employee to act "according to the instructions

140. *Id.* at 234.

141. Art. 1463 CCQ: "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." 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 upon 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 probably underlies art. 1463 CCQ. On the history of art. 1054 CCLC, *see* JEAN-LOUIS BAUDOUIN ET AL., 1 LA RESPONSABILITÉ CIVILE: PRINCIPES GÉNÉRAUX 809, para 814 (8th ed., Yvon Blais 2014).

and under the direction or control of another person, the employer."[142] The employee truly is, to borrow Professor Miller's words, acting as an "extension" of his employer.

Thus, the *Civil Code of Québec* imposes a duty of loyalty upon *all* employees, indistinctively, although the intensity of this duty may vary.[143] Regardless of the functions he performs, the employee does not act within his own legal sphere, but rather within that of his employer. Employees therefore exercise legal powers; their interests are subsumed under that of their employer. As a matter of fact, Québec case law recognizes that employees must act in the best interests of their employer.[144]

In short, the key is to distinguish the circumstances in which a person acts within her own legal sphere from those where she acts within the legal sphere of another. Loyalty is not 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 under no duty of loyalty. In the other, the person vested with legal powers is subject to a duty of loyalty because she acts in the legal sphere of another.

It must also be emphasized that the situation in which a legal actor acts *within* the legal sphere of another does not amount to a mere interference with this sphere, "from the outside;" the substitutive dimension of legal power discussed previously must be kept in mind.

For instance, although the contractor and the provider of services may affect the legal sphere of another, they do not alter this legal

142. Art. 2085 CCQ.

143. 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. On the intensity of the obligation, *see* PAUL-ANDRÉ CRÉPEAU, L'INTENSITÉ DE L'OBLIGATION JURIDIQUE, (Yvon Blais 1989).

144. *See e.g. Concentrés scientifiques Bélisle*, *supra* note 10, at para 39; *Jenner*, *supra* note 10, at para 147; *Lanctôt*, *supra* note 10; *Pro-quai*, *supra* note 10, at para 36.

sphere from within.[145] Indeed, they are not exercising a legal prerogative on behalf of or for the benefit of another under the course of their functions. They accomplish the tasks in their own name, albeit upon request of their client. To borrow Miller's words again, they do no act as "extensions" of the titulary of the legal sphere that they alter when performing their functions.[146] Therefore, their interest is not completely absorbed into that of the client. This explains why, unlike the four legal actors upon whom the *Civil Code of Québec* explicitly imposes a duty of loyalty, other legal actors such as the contractor and the provider of services are not subject to a duty of loyalty under Québec private law.

Now that it is established that all four legal actors under a duty of loyalty act within the legal sphere of another, we will explain the obligations that flow from the duty of loyalty. These requirements are ways through which the Civil Code ensures that a legal actor who acts within another's legal sphere pursues the sole purpose of his powers in a selfless manner.

B. Facets of Loyalty

As explained previously, the duty of loyalty requires that the legal actors under this duty act in an other-regarding purpose, more specifically in the best interest of the person they represent (or of a goal). This duty has various facets entrenched in the *Civil Code of*

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145. Art. 2098 CCQ describes the contract of enterprise or 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.

146. *See* BAUDOUIN ET AL., *supra* note 141, 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.

Québec. They indicate how legal actors, who are in the atypical juridical situation where they act within the legal sphere of another, must behave in order to abide by their duty of loyalty. The main facets, as identified by Professors Cantin Cumyn and Cumyn, are the prohibition against conflicts of interests, the obligation to act with impartiality when there is more than one beneficiary, and the obligation not to mingle the property administered with one's own.[147] The facets of the duty of loyalty will be analyzed along those same lines.

1. Conflicts of Interests

The four legal actors upon whom the *Civil Code of Québec* 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 in which 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.[148]

Given that legal powers are, in essence, prerogatives that must be exercised in the interest of a represented or in the furtherance of a purpose,[149] holders of legal powers must not act in their personal interest[150] or in any interest that is not related to the accomplishment of the purpose for which they were granted powers.[151] Put another way, when acting in the legal sphere of another, a legal actor must embrace the sole interests of that other. Therefore, a holder of legal

147. Professors Cantin Cumyn & Cumyn also mention the duty to render accounts, which has already been discussed above in section 2.3 (*supra* note 13, at 284, para 301).

148. FRANCE HÉBERT, L'OBLIGATION DE LOYAUTÉ DU SALARIÉ 50 (Wilson & Lafleur 1995). Regarding the notion of conflict of interests in Québec private law, *see also* Cumyn, *Les conflits d'intérêts*, *supra* note 63.

149. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 360-61.

150. Even when the holder of legal powers himself is a beneficiary of the administration—for instance where the trustee is also a beneficiary of the trust or where the liquidator of a succession is also an heir—he must not favour his own interests over that of the other beneficiaries (art. 1310, para 2 CCQ). *See* CANTIN CUMYN & CUMYN, *supra* note 13, at 285, para 303.

151. Cantin Cumyn, *The Legal Power*, *supra* note 13, at 361.

powers may not favour any other interest, including his own. Thus, the rule against conflicts of interests incontestably is the most fundamental facet of loyalty.[152]

The prohibition against conflicts of interests is explicitly codified where the director,[153] the mandatary,[154] and the administrator of the property of another are concerned.[155] The employee's duty of loyalty is established in art. 2088 CCQ,[156] but the *Civil Code of Québec* says little concerning its facets. Nonetheless, the literature and case law recognize the employee's duty to avoid conflicts of interests.[157]

Not only are conflicts of interests prohibited, but the legal actors under a duty of loyalty must also declare any interest that could potentially lead to a situation of conflict of interests.[158] The potential source of conflict of interest being disclosed simplifies the beneficiary's surveillance of the legal actor subject to a duty of loyalty.

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152. Likewise, in common law, Miller states that "[the duty of loyalty] has minimum core content consisting of the conflict rules" (Miller, *supra* note 4, at 978).

153. 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."

154. 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."

155. 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."

156. Art. 2088, para 1 CCQ: "[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."

157. HÉBERT, *supra* note 148, at 50 ("[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"); MORIN ET AL., *supra* note 139, at 358. *See also Hasanie c Kaufel Group Ltd*, 2002 CanLII 8334 (Sup Ct); *Labrecque c Montréal (Ville de)*, 2009 QCCRT 0283 (available on CanLII); *Pierro c Allstate Insurance Company*, 2005 QCCA 1165 (available on CanLII).

158. Art. 324, para 2 and 1311 CCQ. The rule is not entrenched in the *Civil Code of Québec* where the employee and the mandatary are concerned, but it is recognized by courts and commentators: *see* MORIN ET AL., *supra* note 139, at 358 (concerning the employee); *Risi c Fologex Ltée*, JE 96-1767 (Sup Ct); *91453 Canada inc c Duquette*, JE 91-598 (Sup Ct) (concerning the mandatary).

The other ramifications of the rule prohibiting conflicts of interests vary depending upon the legal regime. However, they can be grouped into two major categories: rules prohibiting self-dealing activities and rules prohibiting personal usage of the property or information under the control of the legal actor subject to the duty of loyalty. Naturally, profits deriving from such personal usage are also prohibited.[159]

The second category of rules is a simple manifestation of the prohibition of conflicts of interests, where the subject matter is property or information.[160] In other words, a legal actor under a duty of loyalty must not favour his personal interests by using property or information from the legal sphere of another to his own ends.

As for the category of rules prohibiting self-dealing, it is interesting to point out that while the administrator of the property of another and the mandatary cannot, in principle, be parties to a contract which involves the property administered[161] or which relates to an act the mandatary has agreed to perform,[162] the principle is reversed where the director of a legal person is concerned. Paragraph one of article 325 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."[163] As the late Yves Caron pointed out, this rule, which may not be conceivable in other settings, is justified by the reality in which legal persons, such as business corporations, operate—that is,

159. Articles 323, 1314 and 2146, para 1 CCQ. As for the employee, art. 2088, para 1 CCQ provides that he must not "use any confidential information he obtains in the performance or in the course of his work." Otherwise, the legal actors must return the profits obtained. This will be discussed in section III-C.

160. In common law, this is known as the no-profit rule. Lionel Smith, *The Motive, Not the Deed* in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53 (Joshua Getzler ed., LexisNexis 2003) ("[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).

161. Art. 1312, para 1 CCQ.

162. Art. 2147 CCQ.

163. Art. 325, para 1 CCQ.

typically a competitive environment dominated by the idea of profit.[164] Moreover, given that directors are often also shareholders, Caron has argued that it would be counterproductive to prohibit directors from having any interest in the legal person.[165]

That being said, it must be emphasized that article 325 CCQ is not inconsistent with the 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 the acquisition or contract.[166] Otherwise, the act may be annulled and the profit remitted to the legal person.[167]

2. Impartiality

A legal actor may be vested with the power to act in a plurality of legal spheres, concurrently, if there is more than one beneficiary—for instance if a legal actor acts as a mandatary on behalf of various individuals. In these cases, the duty of loyalty requires that the legal actor act with impartiality toward each of the beneficiaries. Professor Cantin Cumyn explains that this rule is similar to, and is in fact inspired by, the common law even-hand rule, which requires the fiduciary to act in the best interests of all of the beneficiaries.[168]

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164. "L'abus de pouvoir en droit commercial québécois" (1978) 19 C de D 7 at 12-13:

> [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 ?

165. *Id.*

166. Art. 325, para 2 CCQ.

167. Art. 326 CCQ.

168. CANTIN CUMYN & CUMYN, *supra* note 13, at 289, n. 966, referring to WATERS' LAW OF TRUSTS IN CANADA 1023-1027 (Mark Gillen & Lionel D. Smith eds., 4th ed. Carswell 2012).

In the *Civil Code of Québec*, this rule is entrenched where the administrator of the property of another and the mandatary are concerned.[169] The duty to act impartially flows from the fact that each of the beneficiaries is entitled to the loyalty of the administrator or mandatary.[170] Therefore, no beneficiary must be prioritized over another. This rule does not set aside 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 beneficiaries with conflicting or potentially conflicting interests are safeguarded.

3. Mingling of Property

Another facet of the duty of loyalty specifically concerns the legal actors whose function it is to manage property that is not their own, such as directors of a legal person, trustees, and, more generally, any administrator of the property of another.[171] This facet of loyalty requires that a separation be kept at all times between the property administered and the administrator's[172] own property. In other words, a clear distinction between the content of the holder of legal powers' and the beneficiary's respective legal spheres must be maintained.

According to Professor Cantin Cumyn, the rule against the mingling of property requires that the holder of legal powers take appropriate measures to let third parties know that he is not the owner of the property.[173] Namely, this facet of loyalty allows the personal

169. Articles 1317 CCQ and 2143, para 1 CCQ.
170. CANTIN CUMYN & CUMYN, *supra* note 13, at 289, para 307.
171. Art. 323 CCQ states that the director of a legal person may not "mingle the property of the legal person with his own property". Likewise, art. 1313 CCQ mentions that the administrator of the property of another may not "mingle the administered property with his own property."
172. The term "administrator" is used here to designate all legal actors who manage property, and not simply the administrator of the property of others.
173. Professors Cantin Cumyn & Cumyn mention that 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 (CANTIN CUMYN & CUMYN, *supra* note 13, at 292-97, paras 311-15).

creditors of the holder of legal powers to know that the property they manage is not their own, meaning they cannot be paid upon it.[174]

The rule against the mingling of property is also a way for the beneficiary and interested parties to keep track of the property administered. An illicit transfer of property from the beneficiary's legal sphere to that of another (including, of course, the administrator's own) would indeed be contrary to the duty of loyalty.

The obligation not to mingle the property administered, along with the prohibition against conflicts of interests, and the obligation to act with impartiality, presented above, constitute core aspects of the duty of loyalty entrenched in the *Civil Code of Québec*. The next and last part of this paper examines restitution of profits, which can be seen as yet another requirement that flows from the duty of loyalty, or as a sanction for disloyalty. As will be shown, restitution of profits corroborates the understanding of loyalty set forth in this paper.

C. Restitution of Profits

In common law, disgorgement of unauthorized profits, through the constructive trust mechanism, is a classic fiduciary remedy.[175] As a matter of fact, in certain countries, the success or failure of the transplant of the common law fiduciary duty of loyalty has been

174. Holders of legal powers are not in a debtor-creditor relationship of obligation with respect to the third parties with whom they interact when exercising their powers. Therefore, art. 2644 CCQ, which mentions that "[t]he property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors," is of no application in such situations. *See also id.* at 293, para 312.

175. LEONARD I. ROTMAN, FIDUCIARY LAW 717-23 (Thomson Carswell 2005). Concerning the constructive trust, *see generally* Robert Chambers, *Constructive Trusts in Canada*, 37 ALTA. L. REV. 173 (1999); MALCOM COPE, CONSTRUCTIVE TRUSTS (Law Book Co 1992); A.J. OAKLEY, CONSTRUCTIVE TRUSTS (3d ed., Sweet & Maxwell 1997); Leonard I. Rotman, *Deconstructing the Constructive Trust*, 37 ALTA. L. REV. 133 (1999); DONOVAN W.M. WATERS Q.C., THE CONSTRUCTIVE TRUST (Tholone Press 1964); GILLEN & SMITH, *supra* note 168, at 477-564 (chapter 11).

attributed to the availability of the disgorgement of profits remedy, which reveals its importance.[176]

The constructive trust may be foreign to the civil law,[177] but restitution of profits appears as its functional equivalent in Québec private law.[178] Although this mechanism has yet to be explored, understanding loyalty as a duty that arises where one person acts within the legal sphere of another helps to understand restitution of profits.[179]

1. Description of Restitution of Profits

Under the terms of the *Civil Code of Québec*, the director of a legal person,[180] the administrator of the property of another and the mandatary must return the profits obtained in the performance of

176. Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law* 51 AM. J. COMP. L. 887, 896 (2003); Rebecca Lee, *Fiduciary Duty Without Equity: 'Fiduciary Duties' of Directors Under the Revised Company Law of the PRC*, 47 VA. J. INT'L L. 897, 908 (2007) (in a corporate law setting). Disgorgement of unauthorized profits has been described as a "fiduciary remedy" (*id.* at 908).

177. This may be because "[c]ivilian systems, as a general rule, are more careful to distinguish property and obligation than is the common law" (BRUCE WELLING, LIONEL SMITH & LEONARD I. ROTMAN, CANADIAN CORPORATE LAW: CASES, NOTES & MATERIALS (4th ed., LexisNexis Canada 2010) 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 ÉLÉMENTS DE COMMON LAW CANADIENNE: COMPARAISON AVEC LE DROIT CIVIL QUÉBÉCOIS 187 at 235 (Louise Bélanger-Hardy & Aline Grenon eds., Thomson Carswell 2008)).

178. *See Lefebvre c Filion*, 2007 QCCS 5912, [2008] RJQ 145. *See also* Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 60-62; Didier Lluelles, *La bonne foi dans l'exécution des contrats et la problématique des sanctions* 83 CAN. BAR REV. 181, 211-213 (2004).

179. It must be pointed out, however, that restitution of profits under the *Civil Code of Québec* does not uniquely sanction breaches of the duty of loyalty. For instance, the possessor in bad faith must return profits: art. 931, para 2 CCQ.

180. Art. 326, para 1 CCQ provides that the director of a legal person may be ordered to return the profit or benefit realized 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.

their functions.[181] Although the Code does not offer anything explicit in regard to the employee, the courts have not been reluctant to order employees to remit their profits.[182]

Restitution of profits is one of the sanctions for the breach of the duty of loyalty.[183] It is sometimes assimilated to a form of non-compensatory damages, along with punitive damages.[184] The non-compensatory damages sanction "faults" that do not necessarily result in a loss for the "victim."[185] Punitive damages, as the name suggests, aim to punish the wrongdoer. As for restitutionary damages, although they may have an incidental punitive aspect, they aim to return to the victim a profit of which he has been deprived, but which does not necessarily amount to a loss *per se*.[186]

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181. The codal provisions that impose restitution upon the mandatary and the administrator of the property of another go even further: they require that "*all that [is] received* in the performance of [their] duties be returned" (art. 1366, para 1 CCQ and 2184, para 1 CCQ) [emphasis added]. For instance, in *Lefebvre c Filion*, *supra* note 178, the Superior Court of Québec ordered a real estate broker who acted as a mandatary to hand over to his client a building which he bought for himself rather than for his client, in breach of his duty of loyalty. In this decision, the Court drew parallels with a famous common law case heard by the Supreme Court of Canada, *Soulos v Korkontzilas*, [1997] 2 SCR 217. Thus, in Québec private law, restitution does not only target profits obtained in violation of a duty of loyalty, but also immovable property such as buildings.

182. In *Kuet Leong*, *supra* note 23, 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). This decision was rendered under the *Civil Code of Lower Canada*, but it remains relevant today. *See also*, under the *Civil Code of Québec*, *LNS Systems Inc c Allard*, 2001 CanLII 25020 (Sup Ct), rev'd on other grounds *(sub nom Abbas-Turqui c LNS Systems Inc*) 2004 CanLII 26082 (CA).

183. Professor Cumyn has identified four categories of sanctions for the breach of the duty of loyalty in Québec's *jus commune*: specific performance, removal from office, nullity of the act accomplished without powers, and damages. This last category of sanctions can be divided into compensatory damages and restitution of profits. Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 58-62.

184. Geneviève Viney, *La condamnation de l'auteur d'une faute lucrative à restituer le profit illicite qu'il a retiré de cette faute* in MÉLANGES JEAN-LOUIS BAUDOUIN 949 at 952 (Yvon Blais 2012).

185. *Id*. 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* MARIÈVE LACROIX, L'ILLICÉITÉ. ESSAI THÉORIQUE ET COMPARATIF EN MATIÈRE DE RESPONSABILITÉ CIVILE EXTRACONTRACTUELLE POUR LE FAIT PERSONNEL 179 (Yvon Blais 2013).

186. Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 60; Viney, *supra* note 184, at 958. The facts of a Supreme Court of Canada case, *Kuet Leong*, *supra* note

It is interesting to point out, however, that it may be questioned whether the restitution of profits truly is a form of damages or a sanction. According to Professors Smith and Berryman,

> [i]n both common law and Québec civil law, in situations where one person is managing the property or affairs of another, in a fiduciary capacity, improper gains must be surrendered, although *it is arguable that the law ascribes rights acquired by the manager to the principal as the correct legal implementation of the parties' relationship, rather than as a remedy for wrongdoing.*[187]

In other words, rather than a sanction for disloyalty, restitution could be seen as a mechanism that enforces the duty of loyalty through the rightful allocation of profits in situations where a legal actor acts within the legal sphere of another.[188] More specifically, given that holders of legal powers act within the legal sphere of another, it appears logical that they should not keep for themselves, but rather return to that other legal sphere whatever they have obtained through the exercise of their prerogatives. Under this perspective, restitution of profits may be seen, first and foremost, as a mere requirement deriving from the duty of loyalty, independent of any breach.[189]

23, provide an example of such a situation; in *Kuet Leong*, a bank trader made significant profits through the unauthorized use of a client's account and as a result of private arrangements he had made with some of the bank's clients. Although the bank suffered no loss *per se* as the transactions were in any case illegal, the Court nonetheless ordered the trader to remit the profits he had thereby realized.

187. Lionel Smith & Jeff Berryman, *Disgorgement of profits in Canada* in DISGORGEMENT OF PROFITS: GAIN-BASED REMEDIES THROUGHOUT THE WORLD 281 (Ewoud Hondius & André Janssen eds., Springer 2015) [emphasis added].

188. In common law, although Professor Smith's "sphere of fiduciary management" is different from the legal sphere described in this paper, he conveys a similar idea regarding the attribution of profits: "[i]t is not possible, within the logic of such a relationship, for the fiduciary lawfully to extract wealth from the sphere of fiduciary management (except as authorized). On the contrary, everything in that sphere is attributed to the beneficiary" (Smith, *supra* note 3, at 150) and "as in all fiduciary relationships, the law attributes property and opportunities arising from the sphere of fiduciary management to the beneficiary" (*id.* at 158).

189. *See* Smith & Berryman, *supra* note 187, at 281, 295.

To have a better understanding of the relation between restitution of profits and loyalty, we will discuss a case study.

2. Restitution in Relation to Loyalty

Abbas-Turqui c Labelle Marquis Inc.,[190] a case heard by the Québec Court of Appeal, examines the meaning of acting in another's legal sphere and discusses the difference between restitution and other sanctions. As will be shown in this case, restitution of profits was not deemed the appropriate sanction. Nevertheless, this case is especially instructive as to the relation between the duty of loyalty and restitution of profits.

In this decision, the Court of Appeal overturned the previous decision of the Superior Court ordering an employee to hand over the profits he had obtained through the performance of a competitive activity which, according to the Superior Court, amounted to a breach of loyalty.

The facts were the following. An employee, named Abbas-Turqui, had concluded a sale on behalf of his own company rather than for his employer. The sale concerned military equipment similar to that which the employer sold. Abbas-Turqui had conducted the sale in breach of a non-competition clause that was part of his employment contract. To arrange the sale, Abbas-Turqui used his employer's fax, telephone, and computer equipment.

In its judgment, the Court of Appeal first discarded the argument that there had been misappropriation of a business opportunity.[191] The Court then rightfully held that restitution of profits was not the appropriate sanction. The Court briefly distinguished the case from *Kuet Leong*,[192] a landmark decision of the Supreme Court of Canada

190. 2004 CanLII 26082 (CA) [cited to CanLII].

191. 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. Additionally, according to the Court, there was no proof that the employer would have obtained this particular contract had Abbas-Turqui's company not existed (*id.* at para 14).

192. *Supra* note 23.

that introduced the restitution of profits as a sanction for disloyalty in Québec, even before the current Civil Code entered into force.[193]

In *Kuet Leong*, a trader employed by a bank reaped substantial profits through the unauthorized use of a client's account, and as a result of private arrangements he had made with some of the bank's clients. In doing so, the bank trader was acting in his quality[194] of 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. Ultimately, the trader was ordered to remit to the bank the profits he had gained through his disloyal transactions.

Contrary to the situation in *Kuet Leong*, in *Abbas-Turqui c Labelle Marquis Inc.*, the employee 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.[195] Therefore, according to the Court of Appeal, Abbas-Turqui could not be ordered to return his profits on these bases. The Court thus modified the quantum of damages to match the injury suffered by the employer instead of the profits earned by Abbas-Turqui.[196] In other words, restitution of profits was replaced by compensatory damages.

This case shows that the mere use of the property of another is insufficient to consider that a legal actor is acting within the legal

193. For a critical analysis of *Kuet Leong*, *see* Cumyn, *Les conflits d'intérêts*, *supra* note 63, at 62; Claude Massé, *Chronique de droit civil québécois : session 1988-89*, SUPREME CT. L. REV. (2d) 325, 335 (1990).

194. 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.

195. *Abbas-Turqui c Labelle Marquis Inc.*, *supra*, note 190, at paras 12-13. That said, the Court of Appeal still implicitly recognized that the employer is entitled to restitution of profits where the employee reaps profits while using the funds of the employer or when acting as his representative.

196. The Court held that the loss suffered by the employer corresponded to the value of the services that Abbas-Turqui had devoted to his own business: *id.* at para 16.

sphere of another. Unlike the situation in *Kuet Leong*, in which the profits earned by the trader were attributable to his employment contract with the bank, Abbas-Turqui had not been "acting in a representative capacity for the appellant, carrying on its business."[197] Indeed, although Abbas-Turqui did use his employer's fax, telephone and computer, he did not conduct the sale in his quality of employee, while acting within the legal sphere of his employer. To use the words of Professor Miller, whose theory was previously outlined, the employee was not exercising the "means" of his employer.[198]

Rather, Abbas-Turqui was acting in his own legal sphere and thus could not be in breach of a duty of loyalty in this situation. However, he remained bound to a non-competition agreement. This raises another distinction, between the duty of loyalty and the notion of non-competition.

Abbas-Turqui c Labelle Marquis Inc. shows that it is possible not to breach a duty of loyalty but to breach a non-competition agreement. As established above, Abbas-Turqui was not acting within his employer's legal sphere when he conducted the contentious sale. He therefore could not have been in breach of a duty of loyalty. He did, however, conclude a contract in the same area of activity as his employer, which his employment contract prohibited. Thereby, he breached his non-competition agreement.[199]

Such a situation can be explained as follows. While non-competition relates to the duty of loyalty in that it is often imposed on a legal actor who must respect the duty of loyalty, non-competition is nonetheless a distinct concept. Non-competition is imposed on a legal actor who acts within his own legal sphere. In other words, it regulates the exercise of subjective rights as opposed to legal pow-

197. *Kuet Leong*, *supra* note 23, at 436.
198. Miller, *supra* note 4, at 1020.
199. 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. Regarding the non-competition agreement, refer to the Superior Court's decision, 2001 CanLII 25020 at para 28.

ers. Although no duty of loyalty attaches to the exercise of subjective rights, it can be modulated by certain legal[200] or contractual limitations such as non-competition agreements.

Compensatory damages are generally appropriate to sanction the conduct of a legal actor who acts within his own legal sphere, as a titulary of subjective rights. Indeed, subjective rights are not exercised on behalf of another and the person who exercises her rights acts in her own legal sphere, within which she is the only sovereign. Therefore, a titulary of subjective rights is generally bound to compensate another person only to the extent of her wrongful interference in that other person's legal sphere. This wrongful interference is measured in terms of loss or injury. Thus, in general, compensatory damages adequately sanction breaches of duties that are attached to the exercise of subjective rights, such as non-competition agreements. This explains why compensatory damages, rather than restitution of profits, were appropriate in *Abbas-Turqui c Labelle Marquis Inc.*[201]

Conversely, holders of legal powers are not sovereign in the sphere in which they exercise their powers, which have an other-regarding purpose. Therefore, they may not, in principle,[202] appropriate anything that comes from the legal sphere of another. Restitution of profits is thus especially adapted to their situation.

D. Conclusion

This second part of the article provided an examination of loyalty within the context of the *Civil Code of Québec*. First, it showed how each legal actor under a duty of loyalty acts within the legal sphere of another. Even the employee, who clearly benefits from his

200. Such as good faith.
201. *Supra* note 190, at para 16.
202. There are exceptions to this principle. *See*, for instance, art. 325, para 1 CCQ, which allows the director of a legal person to "acquire, directly or indirectly, rights in the property under his administration". The director must, however, inform the legal person of the acquisition or contract (art. 325, para 2 CCQ).

employment contract because of the salary he receives, nevertheless acts within the legal sphere of his employer.

Second, the various requirements deriving from the duty of loyalty were presented. They aim to ensure that the legal actor under a duty of loyalty does not exercise the prerogative with which he is vested in his own interest. Two of these requirements, in particular, illustrate how the Civil Code deals with the dual personality of legal actors under a duty of loyalty who are, in the course of their functions, acting in the legal sphere of another (as holders of legal powers) and not in their own (as titularies of subjective rights). More specifically, these legal actors must avoid conflicts of interests and maintain a separation between their personal legal sphere and that within which they exercise their powers.

Finally, this article explored restitution of profits, a mechanism whose relation to loyalty is best understood when one thinks of loyalty as a duty that arises where a legal actor acts within the legal sphere of another.

IV. GENERAL CONCLUSION

Various elements such as trust and good faith are often thought to underlie the duty of loyalty entrenched in the *Civil Code of Québec*. However, the latter's only accurate juridical basis under Québec private law is the notion of legal power.

The duty of loyalty is inherent to the exercise of legal powers, which amounts to the power to act within the legal sphere of another. Where a legal actor acts within the legal sphere of another—as opposed to his own legal sphere—he does not act on his own behalf and, therefore, he may not act in his personal interests, but in an interest other than his own. Therein lies the duty of loyalty.

Loyalty is therefore a duty of selflessness.[203] It is more than a mere duty to take into account the interests of another. It is a duty to

203. Cantin Cumyn, *L'exercice de pouvoirs*, *supra* note 39 ("[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). In

further the sole purpose for which one was granted legal powers. A legal actor's furtherance of the purpose of the powers vested in him ensures the protection and the promotion of the interests of the beneficiary of the duty of loyalty.

Finally, in an interesting closing of the loop, the theory of loyalty presented in this paper can also be helpful in order to clarify some aspects of the law of fiduciary obligations, from which Québec'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. Open-ended elements such as "good conscience,"[204] deterrence,[205] or the absence of "factors which would render [its] imposition . . . unjust"[206] have been invoked to justify the imposition of a constructive trust.

However, the understanding of loyalty set forth in this paper rests upon a sound legal basis. Following this understanding, the constructive trust could be seen as a fiduciary mechanism that comes into play where a person appropriates something originating from the legal sphere of another, while she is vested with the power to act within that other's legal sphere. In such a situation, it stands to reason that such a misappropriated thing be returned, in its entirety, to the legal sphere from which it stems.

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common law, *see* Smith, *Can We Be Obliged to Be Selfless?*, *supra* note 3; Smith, *Fiduciary Relationships*, *supra* note 2 ("fiduciaries [are] people who are required to exercise their judgement in an unselfish way" at 608).

204. ROTMAN, *supra* note 175, at 220-221 ("[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 181).

205. ROTMAN, *supra* note 175, at 719-20. *See* La Forest J's majority judgment in *Hodgkinson v Simms*, *supra* note 18, at 208-209. For a criticism of deterrence as a justification for fiduciary remedies in common law, *see* Smith, *supra* note 2, at 627.

206. *Soulos*, *supra* note 181, at 241. This is the fourth of four criteria for the imposition of a constructive trust, as formulated by the Supreme Court of Canada in *Soulos*.