International Higher Education Agents in Canada: Protecting a Socially and Commercially Valuable Service

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

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and Commercially Valuable Service

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Abstract
Foreign universities looking to increase their Canadian student enrolment typically contract with
non-exclusive agents or representatives to reach that objective. The global higher education
sector pays nearly a billion dollars in commissions to agents annually. Although largely
unknown to the public, Canadian students pursuing an international education – some sources
indicating as high as 80% - choose to work with and rely on agents throughout the information
gathering, assessment, selection, and application process. Unfortunately, the question of industry
regulation in Canada has failed to appreciate the impact agents representing foreign institutions
have on the education decisions of Canadians. Despite this oversight, the absence of statutory
protection does not preclude the application of fiduciary law where the nature of the relationship
gives rise to such obligations. Without such a relationship a socially and commercially valuable
industry may become overrun with self-interested agents, to the detriment of Canadian students.

1 Disclosure: the author is a Co-Founder and Managing Director at Future Project (FP Education Advisors
Inc.), a higher education recruitment agency operating in Canada and holds a British Columbia real estate
licence (inactive).
Acknowledgments

To Danica, for her incredible support throughout.

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To Professor Michael Trebilcock, for his patience and thoughtful direction.
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Introduction

A university degree is not a commodity. It cannot be bought and sold on Ebay. A degree is a positional good; its value is a function of the ranking of its desirability by others in comparison with alternatives. A degree is also far more than this and it is not reducible to vocational training towards a handsome pay cheque. It is the key to unlocking human potential, to securing a more just society, to enabling educated citizens to escape the destiny of an off-the-peg life.²

If the above view of higher education ("HE") is accepted generally or even limited to merely an aspirational ideal, it should be acknowledged that student recruitment practices indicate that a university or college degree is indeed a commodity to be bought and sold. At the very least, the student pursuing a positional good, particularly the international student, has become a high-value commodity of international economic and cultural interest, enabling growth in what is now popularly referred to as the ‘knowledge-based economy’.³ A contributing factor in this occurrence has no doubt been that declining government tax revenue, or at least the allocation of tax revenue, has not kept pace with and is insufficient to cover the rapidly rising costs of higher education.⁴ This reality has created an unsustainable financial model, with the implication that academic institutions, and their students, should pay an ever-increasing part of the cost.⁵

² Martin McQuillan, “Cool it, Which? A degree is not a fridge” (13 February, 2014) Times HE, online: <http://www.timeshighereducation.co.uk/comment/opinion/cool-it-which-a-degree-is-not-a-fridge/2011229.article>.


⁴ Statistics Canada Fact Sheet (June 2011) Spending on Postsecondary Education at 8, online: <http://www.statcan.gc.ca/pub/81-599-x/81-599-x2011007-eng.pdf>.

Notwithstanding the ongoing debate regarding the move towards the privatization of HE services previously provided by the state and other measures intended to address the tax revenue shortfall, the primary concern of this paper is to evaluate the legal obligations and function of HE agents in this new reality, where international student tuition fees are looked to as a means of filling the domestic tax revenue gap. Further, the global competition for international students is increasingly led by agent use as countries like Canada, China, and even Malaysia take steps to compete with long established international HE providers, United Kingdom (“UK”), Australia (“AUS”), and United States (“US”), in order to benefit from the predicted 7-million international students by 2020.

In the simplest terms, “[a]n agency relationship is a relationship in which one person, the “principal,” benefits when another person, the “agent” performs some task with care or effort.”


An “agent” in the education recruitment sector is sometimes refereed to as “representative”, “adviser”, “education adviser”, or “in country representative”. “Agent” is used throughout this paper, as it is the widely understood collective term. This paper is primarily concerned with the fiduciary obligations of agents operating within Canada; however, this discussion may, in certain circumstances, apply to agents operating on behalf of Canadian institutions in foreign jurisdictions.


China Scholarship Council states there were more than 290,000 international students studying in China in 2011, online: <http://en.csc.edu.cn/laihua/newsdetailen.aspx?cid=122&id=1399,%20accessed%20March,%202014>.

Malaysia 2020 Plan aims to see the country become a HE hub hosting 200,000 international students annually, online: <http://www.britishcouncil.org/cameron_richards.pdf>.

Altbach, supra note 5 at viii.

Although less developed in terms of agent use, a recent survey of the Canadian education sector revealed that approximately 50 universities and colleges and 78% of all respondents use agents to recruit international students.\textsuperscript{12} Yet, the multi-jurisdictional nature of agent use and the competitive recruitment environment has slowed efforts to develop a national regulatory framework.\textsuperscript{13} In fact, “[t]he question of whether and how to regulate education-agent use has been subsumed [in Canada] by a larger debate over the role that agents play in the immigration process”.\textsuperscript{14} Unfortunately, the question of regulation in Canada has failed entirely to consider the significant role and impact that agents representing foreign HE providers play in the education decisions of outbound Canadian students, and is solely concerned with agents representing Canadian universities abroad, a shocking oversight. Still, as will be argued, the absence of legislation does not preclude the application of common law, especially in respect of agents representing foreign universities in Canada.

The Canadian Bureau for International Education (“CBIE”)\textsuperscript{15} recently released a status report indicating a need for the number of Canadian students studying abroad to increase fivefold in order to compete in the fast developing global marketplace.\textsuperscript{16} To put that growth in context, the table below shows the top destination countries for Canadian students 2011/12.\textsuperscript{17}

\textsuperscript{12}Robert Coffey and Leanne M. Perry, “The Role of Education Agents in Canada’s Education Systems” (December 2013) Council of Ministers of Education, Canada (CMEC) at 1, online: <http://www.cmec.ca/Publications/Lists/Publications/Attachments/326/The-Role-of-Education-Agents-EN.pdf>.

\textsuperscript{13}Ibid., at 2.

\textsuperscript{14}Ibid., at 20.

\textsuperscript{15}“CBIE is a national organization dedicated to making Canada a global leader in international education. CBIE’s pan-Canadian membership comprises 150 colleges, institutes, universities, school boards and language schools, which enroll over 1.2 million students from coast to coast”, online: <http://www.cbie.ca/>.

<table>
<thead>
<tr>
<th>Rank</th>
<th>Destination</th>
<th>Number of Students</th>
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<tbody>
<tr>
<td>1</td>
<td>United States</td>
<td>25,978</td>
</tr>
<tr>
<td>2</td>
<td>United Kingdom</td>
<td>6,085</td>
</tr>
<tr>
<td>3</td>
<td>Australia</td>
<td>3,837</td>
</tr>
<tr>
<td>4</td>
<td>France</td>
<td>1,685</td>
</tr>
<tr>
<td>5</td>
<td>Ireland</td>
<td>705</td>
</tr>
<tr>
<td>6</td>
<td>United Arab Emirates</td>
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</tr>
<tr>
<td>7</td>
<td>Germany</td>
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<tr>
<td>8</td>
<td>Grenada</td>
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<tr>
<td>9</td>
<td>Poland</td>
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<td>10</td>
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If the CBIE target is to be met, the number of students pursuing an international education is set to rise dramatically, as is the impact agents have on Canadian students.

Many Canadian students pursuing an international education choose to work with a HE agent who provides professional expertise and guidance throughout the information gathering, selection and application process. Notably, there is rarely, if ever, a written agreement between

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the prospective student and the agent and, in Canada, typically no direct fee is charged for the service. Notwithstanding differences in form (e.g. agency disclosure and exclusivity), the substance or nature of the relationship is in many ways analogous to the dual-agency scenario that commonly occurs in the Canadian real estate industry. In both instances, the prospective student or homebuyer relies on the professional advice, guidance, and knowledge of an agent also representing the other party to the contract in making an application or purchase, as the case may be. In real estate, even though disclosed, “… dual agency is often criticized for the inherent conflict of interest it creates when an agent concurrently represents a vendor and purchaser, parties who hold adversarial-like aims in a transaction.” Although it would be inaccurate to view prospective students and universities as adversaries, there is certainly a transactional quality to the application process, not dissimilar to a real estate acquisition. To suggest otherwise would be naïve in light of the international higher education landscape.

A recent article by Chris Havergal, using data obtained under the Freedom of Information Act from 158 UK HE institutions, reveals that nearly every institution – excluding a few elite or specialist institutions – uses agents to recruit international students. In 2013-14 agents accounted for approximately 33% of all international (non-EU) student enrolment in the UK and

18 See e.g. An example of agency and dual agency (limited) disclosure, see Working with a Realtor®, online: <http://www.bcrea.bc.ca/docs/working-with-a-realtor-wwar.pdf>.


21 Drouillard, supra note 20 at 84.


were paid an average of £1,767 per student, amounting to nearly £87 million. A figure that has increased 16.5 per cent on the £74.4 million paid to agents in 2011-12.\textsuperscript{24} Other sources have estimated annual commission payments in the UK alone are as high as £120 million annually.\textsuperscript{25} Despite these discrepancies, it is clear that a sizeable, growing, and competitive market exists, which should not be surprising as, “[a]lmost all … UK universities … [and Australian universities]\textsuperscript{26} make explicit use of international student recruitment agents to achieve their objectives”,\textsuperscript{27} including their objectives in Canada.\textsuperscript{28}

Not surprisingly, the use of HE recruitment agents is a controversial topic within many institutions. Are agents truly necessary to reach enrolment targets? Is it ethically wrong for publically funded universities to pay commission to achieve enrolment targets? How can recruitment officers effectively monitor global agent networks? What factors should be considered when awarding new agent contracts? Notwithstanding these and many other valid concerns, this paper will focus on two separate but related problems that arise between the student and HE agent. First, a conflict of interest occurs as the result of incentive misalignment when the agent’s financial interest is advanced at the expense of the university, student, or both.\textsuperscript{29} Second, there is an absence of disclosure and fully informed consent in respect of the

\begin{itemize}
  \item \textsuperscript{24}Ibid.
  \item \textsuperscript{25}Dan Thomas, “UK universities pay £120 million in agent commission” (July 31, 2013), online: <http://thepienews.com/news/uk-universities-pay-120m-in-agent-commission/>; see also e.g. Vincenzo, Christine Humphrey and Iona Yuelu Huang, “Managing International Recruitment Agents: Approaches, Benefits and Challenges”, (2014) British Council at 5, online: <https://siem.britishcouncil.org/sites/siem/files/field/files/Managing%20Education%20Agents%20Report%20for%20British%20Council.PDF>, which states that £60 million in annual commission was paid to agents in 2010/11, only one year prior.
  \item \textsuperscript{26}See e.g. <http://www.oztrekk.com/>; <http://komconsultants.com/>.
  \item \textsuperscript{27}Raimo, \textit{supra} note 25 at 1.
  \item \textsuperscript{29}See e.g. Vrinda Kadiyali, Jeffrey Prince and Daniel Simon, “Is Dual Agency in Real Estate Transactions a Cause for Concern?” (2008) Johnson School Research Paper Series No 08-07 at 2.
\end{itemize}
agent’s remuneration, which varies from institution to institution. In Part 1, I will provide an example of the university-agent and student-agent relationships. In Part 2, I will discuss the separate but related problems of incentive misalignment and informed consent that arise in the student-agent relationship and will consider how incentive misalignment and informed consent are addressed in the three largest and HE agent markets the legislative framework in AUS,\textsuperscript{30} the code of ethics in the UK,\textsuperscript{31} and the US Higher Education Act of 1965.\textsuperscript{32} Finally, in Part 3, I will consider which approach is suitable to prevent or reduce the opportunity for misconduct on the part of HE agents operating within Canada. I will argue that, in light of the factual similarities to real estate dual agency and following the Supreme Court of Canada (“SCC”) decision in Galambos v. Perez,\textsuperscript{33} an ad hoc fiduciary relationship exists between student and agent, and the protections provided by fiduciary law are preferable to the alternative approaches considered. Fiduciary law is an appropriate and equitable means to address the absence of a certain and predictable legal framework protecting Canadian students from unscrupulous recruitment methods, without producing injustice.\textsuperscript{34}

\begin{itemize}
  \item \textsuperscript{30} The Education Services for Overseas Students Act, 2000 (ESOS).
  \item \textsuperscript{31} ‘International Code of Ethics’ (The London Statement), online: \url{http://www.britishcouncil.org/organisation/press/landmark-international-code-ethics}.
  \item \textsuperscript{32} The Higher Education Act of 1965.
  \item \textsuperscript{33} Galambos v. Perez [2009] SCC 48.
\end{itemize}
1.1 The University-Agent Relationship

International universities looking to increase their Canadian student enrolment typically enter non-exclusive representative or agent agreements. The agreement is between the principal and education agent and gives the agent, among other things, the non-exclusive right to market the university and its courses, provide student counseling, assist with applications, and receive commission upon successful enrolments. Once contracted the agent begins the task of ‘selling’ in the respective market. In doing so, the principal’s interest – generally encompassing undergraduate and graduate degrees – are marketed or offered to the public.

An agent who contracts with a public or private HE provider is typically remunerated on a commission basis representing a percentage of the incoming student’s tuition.\(^{35}\) In addition to paying agents for successfully recruiting students, often ranging from 10-20% of first year tuition fees, it is not uncommon for additional bonuses related to enrolment volume, degree selection, or other benchmarks to be used by institutions when competing for students in a particular region. Agents are used both for “… their strategic commitment to international student recruitment and because of the distinctive roles and functions of agents.”\(^{36}\) The former in respect of the need or demand for increased international student enrollment and the latter in respect of “… the unique resources agents can bring, and the functions [and] services they provide for both universities and prospective students.”\(^{37}\) Importantly, none of the jurisdictions considered in this paper

\(^{35}\) Coffey, supra note 12 at 2.

\(^{36}\) Raimo, supra note 25 at 7.

\(^{37}\) Ibid.
permit HE providers to work with agents who are not under contract.\textsuperscript{38} As well, it would be unusual, and not likely to be commercially viable, for an agent to represent a single HE provider. Rather, the typical agent represents several HE providers, each with unique commission and bonus structures, agent screening and training methods, and agent support and marketing standards. All of which is designed to gain a competitive advantage over other HE providers, including those working with the same agent or group of agents in a particular market.

It is standard in most HE agent contracts to find terms requiring the agent, among other things:

\begin{enumerate}
\item to promote the University and its courses in a particular geographical area;
\item to provide student counselling and to assist suitably qualified applicants in completing appropriate application forms for admission to undergraduate and postgraduate courses at the University;
\item to train staff so as to be able to offer comprehensive, relevant, factually correct and appropriate counselling to prospective applicants;
\item to comply with admissions procedures and other relevant regulations;
\item to ensure that all duties are carried out with due care and that good relations are maintained with the particular University and current and prospective applicants; and
\item to ensure that the laws of the particular geographical region are complied with.\textsuperscript{39}
\end{enumerate}

Additionally, the typical HE agent contract restricts an agent from, among other things:

\begin{enumerate}
\item advertising or publishing any promotional material relating to the University without prior approval from the University;
\item assigning or sub-contracting any duties arising under the agreement without written consent from the University;
\item describing himself or herself as a representative of the University except as expressly authorised by the Agreement and in particular not to claim to be empowered to admit students to the University's courses;
\item conducting negotiations or signing contracts on behalf of the University; and
\end{enumerate}

\textsuperscript{38} Whether through legislation in Australia, the code of ethics in the United Kingdom, or self-imposed through contract law.

\textsuperscript{39} The example terms have been adapted from a sample of commercially sensitive agent contracts. Emphasis added.
5. acting in any way which may be detrimental to the University, its reputation or to the University's other agents.\(^{40}\)

Of particular relevance to this paper, which is focused on agents operating within Canada, is the obligation for the agent to comply with domestic law and the restriction from acting in any way that may be detrimental to the University. Unfortunately, despite the common use of agents globally and the size of the recruitment market in financial terms, there is insufficient data to assess the impact of agent recruitment methods, whether positive or negative. In particular, it is unknown whether misrepresentation, dishonesty, or fraud is a significant issue. However, in light of the potential and opportunity for self-interested gain in an unregulated Canadian jurisdiction, examples of misleading agent practices, and the power imbalance between agent and student in certain circumstances, there is sufficient cause to consider a proactive response.

\(^{40}\) *Ibid.*
1.2 The Student-Agent Relationship

As briefly mentioned in the introduction, Canadian students looking to study abroad often enlist the services of HE agents during the process. Generally, the student has no experience studying abroad and lacks the knowledge of how he or she should progress from application to enrolment, or simply prefers to have an agent do the work. The student looks to an agent to fill knowledge gaps and assist throughout the process. Not surprisingly the student expects the agent to provide accurate information regarding, among other things: available subjects, degree accreditation, scholarship opportunities, application fees, tuition, housing costs, and graduate employment prospects. Remarkably, not a single agent operating in Canada refers to the services provided as agent services and, similarly, none refer to their relationship with the HE providers as being that of an agent. Rather, they seem to have collectively chosen to (mis)represent themselves to the public as “education consultants”, “education advisors”, or even “admissions officer”.41 Although merely anecdotal, it appears agents have chosen to avoid using recognizable fiduciary language to avoid indicating the true nature of their relationship to HE providers, and students. Notwithstanding this observation, the typical agent led application will progress thorough most, if not all, of the stages below.

1.2(a) Engaging an Agent

Agent services are rarely provided to the student for a fee and most, if not all, HE providers prohibit the agent from charging students directly. This ‘free’ service often raises questions among students and is not uncommonly referred to in idiomatic terms, as ‘to good to be true’. If the agent’s service is free, how is that agent compensated and how much compensation does that agent receive? These separate but related issues are at the crux of this paper, specifically, the incentive misalignment that results from the commission fee per enrolment model and the lack of informed consent provided by the student. At this stage, it is sufficient to know that these issues do arise and have significant potential to harm Canadian students. Typically agents operating in

Canada use preemptive language in their advertisements and on their websites to avoid disclosing to students that commission is received per enrolment and that further bonuses may be received for reaching HE provider enrolment targets. For example, it is common for HE agents to claim they offer “… free service because … [they are] funded entirely by … partner universities … to represent them”.42 By never referring to commission, the agent is able to avoid scrutinizing follow up questions and establish a relationship of trust with students, as the HE provider’s official Canadian representative. What amount of commission is received? Does that amount differ between HE providers? Could that amount influence the advice and guidance provided? Many, if not most, students fail to consider these important questions while relying on an agent’s advice and guidance. This is not at all surprising so long as they remain unaware that ‘funded entirely by our partner universities’ actually means, ‘paid commission and possibly bonuses for your enrolment at one of our partner universities’.

1.2(b) Enquiry Stage

Although much of the information being sought at this stage is readily available directly from HE providers, online and in print, it can be a daunting task for students without prior knowledge or experience to navigate the material to find what is relevant for their specific needs. Students who know the subject area they want to study may still struggle to accurately assess or compare one HE provider against another. Further confusing the matter, it is common for similarly accredited degrees in different countries to be titled differently, for those degrees to be offered in accelerated formats, and for those degrees to have vastly different entrance requirements to Canadian institutions.43

42 See e.g. <http://ca.studyacrossthepond.com/about-us>.

Once those questions have been addressed, the student will look to the agent to explain the increasing number of domestic and international ranking tables. Typically a student will aim to attend the best regarded and highest ranked HE provider his or her credentials will enable. Determining which institution achieves that aim is no easy task as students cannot simply apply to an unlimited number of HE providers. In the UK for example, the number of institutions a student may apply to at the undergraduate level is limited to five. Elsewhere, the accumulation of application fees is likely to restrict the number of submissions. These limiting factors require that the agent assess credentials prior to the application to provide a professional opinion on which HE providers represent the student’s best chance to receive offers of admission. It is clear that even at this early stage in the student-agent relationship that a significant degree of trust and reliance exists in respect of the information the agent provides in addition to a lack of transparency in respect of the agent’s financial incentives.

1.2(c) Accreditation Information

A large percentage of the Canadians studying abroad do so in order to obtain professional degrees, with law, medicine, and business being the most popular subject areas. Not surprisingly then, degree accreditation is a vitally important factor in the application process. The student will look to the agent for assurance that the degree he or she plans to pursue will be recognized by the respective accreditation body and profession upon returning to Canada. More than that, the student will look to the agent for guidance as to what will be required in order to satisfy before the accreditation body that his or her international degree is equivalent to or sufficiently similar to its Canadian counterpart. It is not unusual for the student to request to speak with former students who have successfully entered their chosen profession and for an explanation of the accreditation information provided by the relevant body.

44 See e.g. <http://www.futureproject.ca/how-to-read-the-uk-university-rankings-that-matter/>.  
45 See e.g. <https://www.ucas.com/ucas/undergraduate/apply-and-track/filling-your-application>.  
Notably, most international HE providers will not and should not provide answers to these types of questions. To do so would expose the institution to potential liability for providing incorrect or misleading information to prospective students, to entice their enrolment. Falling short of legal liability, most responsible HE providers put the onus of satisfying international accreditation questions on the student in order to avoid damaging their reputation by providing misleading or inaccurate information.

Accreditation questions are very much connected to the student’s calculations of total cost and financing requirements. A student will often ask the agent to provide an estimate of the total time and money that will be required to earn the degree and satisfy any accreditation requirements upon returning to Canada. Due to the individual or case-by-case nature of the evaluation processes, 47 there is not usually a right or wrong answer to these questions. That is not to say agents do not have the opportunity to lead prospective students astray by presenting a best-case scenario as what they should expect. Considering the significant investment of both time and money, there should no doubt be protections available to students who rely on the advice of agents purporting to be, in some instances, accreditation experts. 48

1.2(d) Admissions Requirements

If a student who is considering an international education has not already begun to work with an agent, the confusion around admissions standards will often bring that about. Entry requirements are not typically provided in a recognizable or easily understood format. If a Canadian equivalent is provided, it is unlikely to be applicable to each province or territory within the country.


As a starting point, the prospective student’s credentials will need to be converted to the relevant country and institution equivalency. Depending on the program, there may also be a standardized admission test required for admission. And, on occasion, the student might have questions regarding his or her applicant category – if it is non-traditional – as possibly a mature applicant or someone with previous professional experience. Converting Canadian credentials is not an overly difficult task, but again, the student will look to the agent for assurance that he or she meets the stated requirements. The agent’s influence at this stage lies in the relationship with the HE provider. The agent is regularly receiving communication and information from partner institutions regarding enrolment targets, new courses designed for the Canadian or North American market,\(^49\) and whether stated requirements might be flexible and, if so, by how much.

Due to the contractual relationship, the HE provider will look to the agent for guidance or explanation when, for example: the HE provider is looking at transcripts from an institution it is unfamiliar with, an explanation of the various Grade Point Average (“GPA”) metrics in Canada, to confirm that a GPA weighting for each province or territory is accurate, or any number of other questions about the Canadian education system. The agent is expected to provide the HE provider with any information that may be relevant to the admission decision. Strangely, without disclosure and informed consent, the agent led student application places the agent in a position of trust and influence in respect of both the student and the HE provider, while at the same time providing an opportunity for the agent to further his or her own interest, at the expense of both.

\(^{49}\) See e.g. Canadian Constitutional Law at University of Sussex, <http://www.sussex.ac.uk/lps/internal/departments/law/ugcourses/2012/M1023U/41810>; Certificate in Canadian Legal Studies at Queen’s University Belfast, <http://postgradireland.com/course/15995>; Bachelor of Medicine and Bachelor of Surgery at University of Central Lancashire, <http://www.uclan.ac.uk/courses/bachelor_medicine_bachelor_surgery.php>.
1.2(e) Finance Questions

Students pursuing an international education will incur significant costs to do so. With most HE providers suffering from domestic revenue shortfalls due to funding cuts and declining enrolment numbers, international students provide a considerable boost towards maintaining the financial viability of an institution. In many instances, the equivalent degree, offered in Canada, but earned at an international HE provider, will cost the student 200-300 percent more. If purchasing a home is widely understood to be the largest investment most Canadians will make in their lifetime, an international education should be viewed as a very close second.

Students will look to the agent for advice on obtaining federal and provincial student loans, bank loans or lines-of-credit, and external and internal scholarship opportunities. In some instances, agents in Canada have incorporated financial services or expertise into their business models. Additionally, several agents have begun offering scholarships or the potential of scholarships to students who use their services, a clear enticement.

1.2(f) Preparing Applications

Most HE providers receive applications from international students electronically. In the UK, this process is, with only a few exceptions, outsourced to the University and Colleges Admissions Service (“UCAS”), a registered charity. UCAS operates separate application portals or websites for undergraduate and graduate applicants. Australian HE providers have outsourced the process even one step further, with the application often hosted on the agent’s

50 See e.g. <http://www.futureproject.ca/how-we-can-help/cambridge-global-payments/>.


52 See e.g. <https://www.ucas.com/>; <https://pgapp.ukpass.ac.uk/ukpasspgapp/login.jsp>.
own website or submitted by the agent via electronic mail.\textsuperscript{53} Notwithstanding the decision of which HE providers to submit applications to, completing the fields is a straightforward process that most Canadian students are capable of doing without much guidance. The same cannot be said about the supporting documents that must accompany each application.

The required supporting documents almost always include a personal statement or letter of intent, reference letter or letters, and official academic transcripts from every institution attended. Additionally, the application may require a writing sample, curriculum vitae, or standardized test results. The agent assists in assembling these documents and is often responsible for their timely and correct submission. Many agents will advertise their experience and knowledge in this area of the application process to persuade students to use the service.\textsuperscript{54} Some will even claim that students have an increased chance of receiving offers of admission if they apply through that agent,\textsuperscript{55} language that is explicitly prohibited by the agent-university representative contract.

1.2(g) Offers of Admission

How does a student decide between multiple offers of admission? In some instances the decision is obvious and the agent has little or no influence over the outcome. For example, when the student has been offered admission to his or her first choice. The deciding factor for these students tend to be things beyond the scope of the agent’s guidance or advice, an offer from a world-renowned and highly ranked institution, a specific degree course that is targeted for graduate recruitment by industry, or a generous offer of scholarship or bursary funding. For most students, the decision is far less obvious.


\textsuperscript{54} See e.g. <http://www.futureproject.ca/how-we-can-help/application-guidance/>.

\textsuperscript{55} See e.g. <http://ca.studyacrossthepond.com/why-across-pond>.
After receiving multiple offers of admission, a student must compare HE providers that may truly only be differentiated by names and locations. Each one making grand claims about student satisfaction, teaching quality, research-led lectures, student safety, and low cost of living. As a trusted advisor, the agents helps weigh the *pro et contra* of each option. This might involve connecting the student with someone from the HE provider or a current student. More often it involves the agent sharing first hand knowledge that has been acquired through campus visits and agent conferences.

In some cases, as a result of differing commission and bonus structures between HE providers, one student’s enrolment decision could impact an agent’s revenue by more than $10,000. The issues resulting from that fact, of incentive misalignment and informed consent, will be considered more fully in Part 2. For now it is sufficient to understand that in the typical agent led application process, a student who relies on that agent for advice and guidance may, as a result of self-interested agent behavior, end up enrolling at the HE provider offering the most generous incentive package to the agent. This is not to suggest that every agent is guilty of this practice but equally it would be foolish to believe it is never a factor.
2.1 Agency Problems

Hopefully the examples in Part 1 have made it clear, the relationships between university-agent and student-agent are very much that of principal-agent. The described circumstances, where one party is acting as agent for another, whether for the HE provider or the student, quickly gives rise to agency problems. An agency problem occurs, “… whenever one person, the principal, engages another person, the agent, to undertake imperfectly observable discretionary actions that affect the welfare of the principal.”\textsuperscript{56} Put simply, “[a]gency problems are pervasive because no one has the skills necessary to do everything for oneself and because every undertaking has an opportunity cost.”\textsuperscript{57} In our example, when the student delegates tasks and responsibility regarding his or her education to the agent, he or she benefits from specialist knowledge and service. Unfortunately, these benefits come with the associated agency cost of becoming vulnerable to misconduct as the delegated tasks are not easily monitored and, as is the case, the student is not aware of the true nature of the agent relationship to the HE providers. As has been mentioned, this gives rise to circumstances where the agent may be tempted to put his or her own interests before that of the student. When that occurs, it is the “… losses and other inefficiencies resulting from this misalignment of interests [that] are called agency costs.”\textsuperscript{58}

Whether or not the student-agent relationship attracts legal recognition as being fiduciary, which I will argue it should, there remains the issue of agency costs. As in any agency scenario, the most efficient and productive relationships will aim to minimize the associated costs, which is in


\textsuperscript{57} Ibid.

\textsuperscript{58} Ibid.
fact the function of fiduciary obligations. With that in mind, and before we consider the various approaches to minimizing these costs, we will outline the two separate but related problems, which are the focus of this paper: incentive misalignment and informed consent.

2. 2 Incentive Misalignment

 Agents are likely to face considerable difficulty in determining who their client is, whether the HE provider, the student, or both. This is due in part to the way in which agency relationships may arise, other than by express agreement, as will be discussed below. As well, agents will certainly have competing or misaligned incentives, as the manner in which HE providers work with agents has become more sophisticated, whether in terms of how they work with them or in terms of the commissions offered to achieve enrolment targets. As noted in an article published by the Times Higher Education, “... commission payments inevitably lead to conflicts of interest”. This truism would be correct even if our focus were only the competing agent obligations to the HE providers. The potential for conflicts increases greatly when that same agent is also faced with the challenge of determining the obligations that are owed to students during the application process. Even though the nature of the student-agent relationship is not adversarial or even transactional, there remains an obvious conflict if the agent owes a duty of loyalty to both the university or universities and the student. This incentive misalignment is a serious concern and is no doubt a motivating factor for the agent to advance his or her own interest at the expense of the university, student, or both.

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59 Sitkoff, supra note 56.

60 Chang, supra note 20 at 3.

61 Will Archer, “Times Higher Education” quoted in supra note 20 at 3.

62 Kadiyali, Prince and Simon, supra note 30.
It must be recognized that when dealing with students, many if not most agents, create the impression by their words and conduct, that they are representing the student’s interest. Keeping in mind the agent has access to both parties’ confidential information, express or implied authority, and that reliance may have been induced, it is not difficult to see how an unscrupulous agent may direct or advise students to apply to and enroll at institutions offering more generous agent remuneration. With the variance between commission and bonuses among HE providers being so substantial, it would be foolish to believe agents are not motivated to enroll as many students as possible at the institutions offering the greatest financial reward. By way of example, the agent could achieve this by disclosing to the student confidential information about specific HE providers in order to direct that application elsewhere. Alternatively, the agent could withhold unpublished but relevant information about specific HE providers, so as not to discourage an application. Admittedly, these examples would not necessarily disadvantage the student’s academic or career prospects; however, the opportunity for self-interested financial gain should be obvious.63

2.3 Informed Consent

A second issue, closely related and in many ways more important than the first, is the absence of informed consent, primarily in respect of the agent’s remuneration. While incentive misalignment is likely to be the issue with the greatest potential to incentivize bad behavior, in the absence of informed consent, the student is unlikely to be aware of the competing incentives offered to the agent by HE providers. Even in the rare instance when a student is aware of the unequal or misaligned incentives, the manner in which consent is obtained becomes a relevant factor in determining whether that consent can be considered valid. Factors like the methods used to obtain the student and the agent’s ability or knowledge of how to advise the student, become relevant in determining if actual consent has been obtained.

63 See e.g. Coffey, supra note 12 at 29-31.
A simple parallel to the university-agent and student-agent relationships can be found in the Canadian real estate industry, which has chosen to address the matter of competing principals with what is referred to as ‘limited dual agency’. Limited dual agency requires disclosure, fully informed consent, and must be adhered to in order to be effective. Limited dual agency agreements essentially limit what can be disclosed between the agent and either party to the transaction. Unlike a real estate agent, HE agents neither disclose their fiduciary obligation to the HE providers to the student, nor obtain informed consent to act on behalf of both parties. Rather, the agent has generally induced student reliance through his or her express or implied authority and makes a secret and variable profit as a result. Notably, limited dual agency remains highly contentious and has been subject to much judicial and academic criticism. Setting that aside for the moment, the student-agent relationship would certainly take a positive step forward if it merely provided disclosure to students. With a better understanding of the true nature of the university-agent relationship, students would have the opportunity to give proper consideration to the advice and guidance they receive.

2.4 Approaches to the Issues

Each country discussed below has taken a different approach to managing and overseeing agents representing their HE providers. With the exception of the US, none have put in place formal controls to manage or oversee agents operating within their borders. In other words, none have sought to address incentive misalignment and informed consent for agents recruiting their own citizens. If agent misconduct was of no concern, this might be an acceptable approach for Canada to follow. Unfortunately, the opportunity for agents to make large profits in the absence

64 Working with a Realtor®, supra note 19.

65 DeJesus v. Sharif, 2010 BCCA 121 at 70-73 (“DeJesus”).

66 Working with a Realtor®, supra note 19.

67 Keech v. Sandford, [1726] EWHC Ch J76.

68 Summit Staging Ltd v. 596373 BC Ltd (cob Re/Max Westcoast), 2008 BCSC 198 at 63; DeJesus, supra note 65.
of regulation or meaningful oversight and examples – albeit difficult to quantify – of agent misconduct in Canada does not support a hands-off approach. Further, as should be noted, the absence of student complaints does not necessarily lead to the conclusion that agents are performing well or that agents are putting students’ interests ahead of their own. In the absence of informed consent in respect of the student-agent relationship and university-agent relationship, students are unable to identify when an agent has acted in a self-interested manner. Even if a student was suspicious that misconduct had occurred, he or she might not become certain until serious financial harm has followed. At that stage, what protections exist to remedy the harm and deter agent misconduct in future?

2.4(a) Australia

Australia, more so than any other country considered in this paper, has taken a view of international student recruitment through the lens of entrepreneurship. For this reason, agents throughout the globe tend to view Australia as the benchmark for successful engagement with HE providers and the enrolment of international students. The provision of education services “… ranks as one of the country’s top five exports, contributing AUD $18.3 billion to the Australian economy in 2010.”69 Australia is also the leader in the percentage of international students among the overall student population, with one in four students being international.70 None of these figures should be surprising in the light of Australia’s early adoption, if not creation, of HE agents in the 1960s, when IDP Education Ltd. (“IDP”) was founded by a collection of Australian universities as one of the first education agencies.71 The commercial success and impact of IDP has not been insignificant. In 2015, 50 percent of IDP’s equity was

69 Coffey, supra note 12 at 16.

70 Ibid.

listed on the Australian Stock Exchange, and today has a market capitalization of more than AUD $1 billion.\textsuperscript{72}

Despite being a global leader in HE agent student recruitment, “… incidents of mistreatment of students (by agents and HE providers) led to the passage of the Education Services for Overseas Students Act (“ESOS”).\textsuperscript{73} ESOS is the most comprehensive legislative framework in the world in respect of international HE recruitment. It establishes positive obligations intended to safeguard student welfare that HE providers must meet, and provides “guidelines that govern the relationship that institutions have with agents and holds them accountable for agent misconduct.”\textsuperscript{74} Under ESOS, HE providers must:

1. use agents that are knowledgeable about the Australian education system;
2. when hiring agents, always use written contracts that include a process for institutional monitoring of agent activities;
3. provide agents with current, accurate information about the institution;
4. not contract with or accept students from agents they believe are engaging in dishonest practices;
5. terminate their contract with any agent who they suspect is engaging in dishonest practices;
6. take immediate action if they become aware of any agent engaging in activities that are false, misleading, or unethical.\textsuperscript{75}

ESOS requires that HE providers must not accept students from an agent they believe to be operating in violation of the Act. In reference to incentive misalignment and informed consent, ESOS fails to address the issues. However, in addition to ESOS, in 2003, “… Australian


\textsuperscript{73} Supra note 31.

\textsuperscript{74} Coffey, supra note 12 at 17.

\textsuperscript{75} Ibid.
Education International (a government agency) partnered with International Education Services (IES) and Professional International Education Resources (PIER) (a subsidiary of IES) to develop a free on-line agent-training course, which debuted in 2006.”

Agents who pay the required fee and complete the course successfully receive a certificate and will be listed as a “Qualified Education Agent Counsellor” the Qualified Education Agent Counsellors Database (“QEACD”). QEACD “… is the most comprehensive education agent database in the world, with over 4,200 listed agents and a monthly website view of more than 39,000 users.” As the Australian government does not endorse agents, being named to this list simply means an agent has successfully completed the course. There is no evidence to suggest that agents who have completed this course are less likely to breach ESOS or have students complain about unethical or self-interested practices.

One of the strengths of Australia’s legislative approach is that agent misconduct has the real potential to impact the HE provider. Without delving into what might constitute a breach of ESOS, it is important to note that the Minister may, where there are reasonable grounds, impose conditions, suspension, or cancellation of the HE providers ability to enroll international students. This is no doubt an incentive for both agents and HE providers to conduct themselves in a manner that at least aims to put the interests of students ahead of their own. Whether or not that is achieved is another question entirely, as is the issue of eliminating misconduct on the part of agents representing foreign HE providers, recruiting Australian students.

76 Ibid.

77 See e.g. <http://www.pieronline.org/qeac/>.

78 See e.g. <http://www.pieronline.org/products/agent_training>.

79 Supra note 31 at section 83.
2.4(b) United Kingdom

As noted by, Raimo, Humfrey, and Huang,\(^80\) the UK Government’s Industrial Strategy for International Education estimates that education exports were worth £17.5 billion to the UK economy in 2011 and that the largest contributor to that figure was the nearly 500,000 inbound (non-UK domiciled) students studying on undergraduate and postgraduate degree programs at UK universities.\(^81\) Those inbound student account for approximately £3.9 billion in tuition fees and £6.3 billion in living expenses.\(^82\)

The question is how does the UK ensure the HE agents representing its world renowned universities are acting ethically? The UK answer to that question has been The London Statement,\(^83\) which seeks to curb unscrupulous behavior among the at least 3,600 agents representing HE providers throughout the globe.\(^84\) The London Statement sets out seven principles that agents are meant to adhere to, “…in an effort to ensure they practise responsible business ethics, providing current, accurate and honest information to prospective students so they can make informed choices.”\(^85\)

1. Agents and consultants practise responsible business ethics.

\(^{80}\) Raimo, supra note 25 at 4.


\(^{83}\) Supra note 31.

\(^{84}\) Ibid., at 37.

2. Agents and consultants provide current, accurate, and honest information in an ethical manner.
3. Agents and consultants develop transparent business relationships with students and providers through the use of written agreements.
4. Agents and consultants protect the interests of minors.
5. Agents and consultants provide current and up-to-date information that enables international students to make informed choices when selecting which agent or consultant to employ.
6. Agents and consultants act professionally.
7. Agents and consultants work with destination countries and providers to raise ethical standards and best practice\(^{86}\)

All of the above to be underpinned by “… an ethical framework that also lays great stress on professionalism, integrity, objectivity, transparency and confidentiality.”\(^{87}\) Not surprisingly, the UK intended the London Statement to be a joint statement that would guide HE recruitment practices throughout the commonwealth, and in the US. This ambition was not well received, with the final group of signatories including only Australia, Ireland, and New Zealand, in addition to the UK. Had the London Statement been adopted globally it might have provided a sufficient basis for monitoring agent conduct in respect of outbound student recruitment in Canada. That is not the case and similarly to Australia, the UK is primarily concerned with agents representing their HE providers abroad and not with agents operating within the UK.

2.4(c) United States of America

Agent use in the US continues to stir up controversy among the domestic and international HE sector. Education and legal norms oblige HE providers “… to privilege student welfare, even if it means directing them to another institution that better matches their needs and interests.”\(^{88}\) Notwithstanding this fact, in September 2014, the National Association for College Admission

\(^{86}\) Supra note 85.

\(^{87}\) Ibid.

\(^{88}\) Coffey, supra note 12 at 18.
Counseling (“NACAC”) International Advisory Committee, which “… is an organization of more than 15,000 professionals from around the world dedicated to serving students as they make choices about pursuing postsecondary education”, released its amended best practices guide,89 “… intended to expand on and illustrate the key principles of accountability, transparency, and integrity that are at the centre of NACAC’s newly released policies on international agents.”90 The newly released policy on education agents, proposes that “[m]embers who choose to use incentive-based agents when recruiting students outside the US will ensure accountability, transparency and integrity.”91

Unfortunately, there is not yet an elaboration on what measures should be taken in order to ensure the recruitment methods of HE agents are, in fact, carried out with accountability, transparency, and integrity. While it is clear that international agents will now begin to play an expanded role in international recruitment for HE providers in the US, commission-based domestic student recruitment remains illegal under US law.92 In other words, no HE provider, based in the US or otherwise, is permitted to use agents for the purpose of recruiting US students. The confidence NACAC has in agents to meet the targets of accountability, transparency, and integrity is certainly questionable, so long as agent use by foreign and domestic HE providers remains illegal. Hopefully, agents and institutions alike will have the benefit of expanded training, support, and practice guidance from NACAC, to help shape effective working relationships with one another and ensure the interests of students are protected. It is far too early to comment on whether agent use by HE providers in the US will


91 Supra note 89 at 3

effectively address the separate but related issues of incentive misalignment and informed consent. However, one benefit of being the last (and largest HE provider) Western nation to begin working with agents is the ability to learn from the successes and failures of others.

2.4(d) Canada

Unlike the three countries discussed above, agent use in Canada has not elicited the same level of debate or concern in regards to agent conduct or student welfare. Rather, at the provincial and federal level, the desire for Canada to become a leader in the knowledge based economy – mentioned in the introduction – has created an environment where HE providers are mandated to achieve:

1. a greater number of international students studying in Canada;
2. an increased share for Canada of the international student market; and
3. a greater number of international students choosing to remain in Canada as permanent residents after graduation.93

Similarly to Australia, Canada has developed an online agent-training course to “… provide agents with an introduction to Canada as a destination country for educational opportunities. Topics include a survey of Canada’s education systems; information on scholarships, study permits, student work permits, and post-graduation work permits”,94 among other things. This is a much softer approach than the ESOS Act in Australia, as agents who complete the course are neither accredited nor licensed and there are no penalties for agent misconduct. In many ways the agent-training course appears designed to promote Canada to agents as the premier option for international students, who will in turn disseminate this view of Canada to the students they advise.

93 Coffey, supra note 12 at 19.

94 Ibid.
Notwithstanding the absence of penalties for agent misconduct, the aim of educating agents about the Canadian education system is worthwhile. But, even if achieved, does nothing to protect Canadian students from unscrupulous agents operating within Canada, which is the focus of this paper. With the exception of Manitoba, none of the provinces or territories have bothered to address the issue of HE agent management or oversight. In 2013, Manitoba passed *The International Education Act* (“IEA”), which has two main purposes:

1. to protect international students attending educational institutions in the province from potential fraud and negligence, and
2. to promote Manitoba’s reputation as a high quality destination for international study by providing a measure of quality assurance through the IEA.

Again, there is no mention of protecting students in Manitoba from agents representing HE providers from other countries. Despite the glaring absence of concern for agents operating within Canada, there should surely be protections available in the event Canadian students fall victim to agent misconduct. Rather than adopt the US approach of illegality or relying on other country’s legislation or codes of ethics, fiduciary law is the best option to protect Canadian students, by addressing the issues of incentive misalignment and informed consent and encouraging a socially valuable service.

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95 *The International Education Act*, C.C.S.M. c. 175.

3.1 Fiduciary Obligations

That a fiduciary must always act in the best interest of his or her principal sums up the essential duty flowing from a fiduciary relationship. Fiduciaries must never allow their own interests, or the interests of any other, directly or indirectly, to conflict with the interest of the principal, in the absence of disclosure and fully informed consent. Despite the straightforward summation, the challenge of defining the fiduciary concept is quickly illustrated by a cursory reading of the case law and academic commentary. Moreover, the process of filling that definition with any substance is far more difficult. Notwithstanding, Canadian common law has long recognized two established fiduciary categories, *per se* and *ad hoc*.

3.2(a) *Galambos v. Perez*

The *per se* fiduciary category recognizes long established relationships as being fiduciary in nature, such as the relationship between doctor and patient or solicitor and client. These relationships “… are considered to give rise to fiduciary obligations because of their inherent

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97 This section has been adapted from, Shawn Lestage, “The Fiduciary Obligations of Higher Education Agents: A Close Examination of the Facts” (unpublished), selected for Asper INTLaw 2015 at University of Winnipeg, Robson Hall Faculty of Law.


100 Rotman, *supra* note 18 at 80.

101 *Galambos, supra* note 33.
purpose or their presumed factual or legal incidents.”

They “… have as their essence discretion, influence over interests, and an inherent vulnerability.”

Quite bluntly, “… [i]f the relationship between the parties is on the list, then, the relationship is per se fiduciary.”

Importantly, even where a relationship is presumed to be fiduciary because it is on the per se list, it “… is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party.”

Oddly, some relationships, such as the relationship between a real estate agent and principal have been recognized as both ad hoc and per se fiduciary. Unfortunately, the case law does not provide much insight to help in determining which category was applicable. Rather than elaborating on which category was applicable in the circumstances, the courts appeared satisfied to move forward with an analysis of the purported breach. This might be viewed as creating confusion, as “… the question of whether a fiduciary duty is owed cannot be answered simply by looking at the formal legal label attached to the relationship between the parties.”

However, in light of the student-agent relationship discussed in Part 1, the lack of a formal category or legal label cannot be understood to limit potential fiduciary obligations arising between the parties. To be clear, the

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102 Galambos, supra note 33 at 36; Lac Minerals Ltd v. International Corona Resources Ltd. [1989] 2 SCR 574 (“Lac Minerals”) at 646.


105 Hodgkinson, supra note 103.

106 See e.g. RK Holdings Corp v Koyl Commercial Real Estate Services Ltd, 2000 SKQB 77, MacAuley v LeClair, 61 OTC 344; Knoch Estate v Jon Picken Ltd, 4 OR (3d) 385.

107 See e.g. Alwest Properties Ltd v Roppelt, 1998 ABQB 1027; Lee Estate v Royal Pacific Realty Corp, 2003 BCSC 911; DeJesus v Sharif, 2010 BCCA 121.

108 Drouillard, supra note 20 at 87.

preciseness of the analogy between the real estate agent and education agent it not overly important but it is useful insofar as it provides a reference to consider the potential fiduciary relationship between a student and HE agent. A relationship, which on balance, should be viewed as belonging to the *ad hoc* fiduciary category.\(^{110}\)

Unfortunately, as concerns the certain protection of students, the relationship between a student and HE agent is not *per se* fiduciary. Similarly to real estate agents, education agent relationships have, neither in fact nor in law, the capacity of legal agency.\(^{111}\) The scope of their authority is generally limited to the activity discussed in Part 1. In law, this is best defined as a broker-client relationship, which, as was established in *Hodgkinson* is not *per se* fiduciary and requires further examination to determine whether an *ad hoc* fiduciary relationship exists, on the facts.\(^{112}\) Keep this in mind as we consider the *ad hoc* fiduciary relationship set out in *Galambos*.

Ad hoc fiduciary relationships do not fall within the traditional *per se* fiduciary categories. Instead, they may arise out of the substance or nature of the particular relationship.\(^{113}\) Prior to the SCC’s decision in *Galambos*, it was unclear whether the test for *ad hoc* fiduciary relationships required, among other things, a mutual understanding that the fiduciary would act in the principal’s best interests, or whether establishing a reasonable expectation to this effect by the principal alone would suffice.\(^{114}\) This occurred through two legal errors at the British Columbia

\(^{110}\) *Hodgkinson*, supra note 103.

\(^{111}\) *Foster*, supra note 98 at 2-3; see also William F. Foster, *Agency Law in Canada*, 2\(^{nd}\) Ed. (Toronto, Carswell Thompson, 1994) at 95-115.

\(^{112}\) *Hodgkinson*, supra note 103 at 44.

\(^{113}\) *Frame*, supra note 99 at 60.

Court of Appeal ("BCCA"). First, it was considered sufficient to find an *ad hoc* fiduciary relationship to exist solely “… on the basis of a power-dependency relationship, coupled with a *unilateral* reasonable expectation by the plaintiff that the defendant would act in her best interests”.

Second, that an *ad hoc* fiduciary relationship could arise where the purported fiduciary had *no discretionary authority* to affect the legal or practical interests of the principal or client unilaterally.

Previously in *Lac Minerals*, an earlier SCC decision, it had been affirmed that it is the nature or substance of the relationship, not the special category of the actors involved, which gives rise to fiduciary obligations. In that instance, the SCC highlighted as an indispensible factor, that “… [t]he beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.” As such, it was not overly shocking when Cromwell J. in *Galambos* reversed the lower BCCA decision on both points, providing clarity as to the appropriate test for an *ad hoc* relationship. First, that it is essential to all *ad hoc* fiduciary relationships, including those involving elements of power-dependency, that the fiduciary undertake to exercise a discretionary power in the vulnerable party’s best interests, impliedly or expressly. Second, that although the presence of such a discretionary power is not sufficient to give rise to an *ad

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118 *Lac Minerals, supra* note 102 at 30; see also *Guerin v. Canada*, 1984 2 SCC 335 at 99.

119 *Hodginkson, supra* note 103 at 35.

120 *Frame, supra* note 99 at 60. The last factor of assessment provided by Wilson J.. The first two factors were, the fiduciary has scope for the exercise of some discretion or power, and the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.

121 *Galambos, supra* note 33 at 73.

hoc fiduciary duty, its absence will negate such a finding. In other words, a unilateral expectation that the purported fiduciary or defendant will act in plaintiff’s best interest is not sufficient to find the existence of an ad hoc fiduciary relationship. Additionally, ad hoc fiduciary relationships cannot exist where there is no discretionary power.

3.2(b) Applying Galambos to the Student-Agent example

Applying the SCC’s ad hoc requirements to the example student-agent relationship in Part 1, it is my view that if adjudicated, would result in a finding of a fiduciary relationship. There is no doubt an imbalance of power between the prospective student and the agent, including discretion. The agent possesses far more knowledge about the HE providers’ admission standards, practices, and processes and is the trusted in-country representative. As well, the agent has varying degrees of influence over the student application process as a result of the non-exclusive agent relationship with the HE providers. Additionally, the student cannot generally contact the university to discuss any aspect of his or her application that might be pertinent to an admission decision, whereas it is not uncommon practice for an agent to do so on the student’s behalf, to explain transcripts or identify mitigating factors, among other things. At this stage, the student has no choice but to rely on the trust and confidence that he or she has placed in the agent. Moreover, the relationship between the student and agent, in many cases, comes about through an advertisement of the agent’s influence, power, or ability to help the student gain successful admission or that the student might receive scholarship funding from the agent. The agent’s express and voluntary undertaking includes expertise and advice regarding, among other things: course selection, university rankings, degree accreditation, and submission deadlines. As

123 Galambos, supra note 33 at 84.

124 Ibid., at 67 & 74.

125 The express nature of the power should be clear from the student-agent example discussed in Part 1.

126 The student may of course apply directly to the HE providers but as has been discussed, the agent has induced the student’s reliance by promoting expertise and authority, whether impliedly or expressly. The agent may have also offered the student a financial enticement, whether scholarship, application fee waiver, or both.
well the agent has express or implied power or authority over, among other things: personal statements, letters of reference, academic transcripts, and application submission. Thus, a reasonable expectation on the part of the student is created through the agent’s own undertaking to act on the students behalf and in the students best interest, as the HE providers official Canadian representative.

As mentioned in Part 2, fiduciary obligations are intended to reduce agency costs, and in the student-agent example, to address the issues of incentive misalignment and informed consent. This is the case because “[t]he fiduciary relationship … obligates someone to drop, or sacrifice, or postpone their own interests for those of the beneficiary, and that cannot be something that is reasonable to find unless the fiduciary does so knowingly.”127 In the student-agent example, the agent in fact does so knowingly, making it reasonable to find the existence of an ad hoc fiduciary relationship. Even if the particular facts of a student-agent relationship fall short of an express undertaking that results in reasonable reliance, Cromwell J. stated that “… [r]elevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary’s loyalty.”128 The key factor in my view, is that the student-agent relationship almost always comes about through inducement on the part of the agent in respect of his or her authority, expertise, or both.

Returning briefly to the issue of dual agency, if the HE agent has, as I have argued, undertaken fiduciary obligations for both parties to the HE application, the issue of competing obligations and loyalties arises.129 Where the duties of dual agency are present; the agent is expected to be loyal to two adversarial principals in order to maximize their competing interests in the same


128 Galambos, supra note 33 at 79.

129 Foster, supra note 98 at 233-244.
transaction. Without further exploring the issues and criticisms of dual agency, which is another paper altogether, the question remains, which approach reduces agency costs most and protects Canadian students from unscrupulous agent practices?

3.3 Which approach is best?

Should Canadian students be left to rely on unenforceable codes of ethics or legislation drafted in a foreign jurisdiction for the benefit of foreign HE providers? Should Canada adopt the US approach, permitting HE providers to use agents elsewhere in the world while making it illegal for agents to recruit Canadian students? Or, should agent regulation be a matter for domestic law, fiduciary obligations? Keeping in mind that the goal is to reduce agency costs, incentive misalignment and informed consent, in weighing the options I will limit consideration to four factors: the cost of implementation, the ability to monitor agent activity, the ability to punish misconduct, and the effectiveness in promoting the growth of a socially valuable activity.

3.3(a) Codes of ethics or legislation

The first option, agent codes of ethics or legislation drafted in foreign jurisdictions, has been the default option in Canada and elsewhere, save the US. The cost of implementation in Canada for this option is nil. However attractive that may appear, if the codes and legislation cannot be enforced in Canada, what purpose or value do they provide? It could be argued that the HE providers are responsible for enforcement, and in some cases this may be true; however, it is important to keep in mind that the primary concern in foreign jurisdictions is to meet enrollment targets. Similarly to the HE agent facing competing or misaligned incentives, international HE providers may consider, even if not stated, meeting enrolment targets to be more important than agent conduct or student welfare. At best, there is a clear tension that may or may not result in harm to Canadian students. At worst, foreign HE providers face little to no consequence for

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130 Drouillard, *supra* note 20 at 89.
turning a blind eye to the recruitment practices of their agents in Canada, to the detriment of Canadian students.

Whether HE providers turn a blind eye or not, it is surely difficult to monitor agent practices in hundreds of recruitment markets. HE providers do not have the resources to effectively monitor their agents and cannot reasonably be expected to do so. This might be less of a concern if student complaints were an effective means of raising issues with the HE providers. The reality is that, without disclosure and consent, the student may never be aware that the agent has wrongfully advanced his or her own interest. That being the case, the HE provider’s evaluation of a successful agent is limited to increasing enrolment numbers and the absence of student complaints.

With regards to punishing agent misconduct, the student might do so by exercising his or her choice not to use a particular agent, or any agent at all. This seems unlikely, especially where the student has been enticed by the agent, whether through scholarship opportunities, assistance with personal statements, application fee waivers, or some other ‘free’ benefit. Again, the student who has not been made aware of potential conflicts of interest on the part of the agent would have no reason to consider how misconduct might be punished. The HE provider certainly has the ability to cancel agent contracts as a form of punishment, should misconduct or breach become known. This is very rare, which is the likely result of ineffective agent monitoring or, more pessimistically, unwillingness to discipline an agent who is meeting or exceeding enrolment targets.

Finally, as it concerns the ability of foreign codes of ethics or legislation to promote a socially valuable activity, there is no substantive evidence for or against. Though it can be concluded that without the ability to effectively monitor agent activity or punish misconduct, the activity itself cannot truly be identified as socially valuable, with any certainty. To label it as such and to then encourage the promotion of that activity, it would seem a minimum requirement that it be monitored and that misconduct be effectively punished. Ultimately, as should be clear at this,
foreign codes of ethics and legislation are the status quo, which is failing Canadian students, HE providers, and agents.

3.3(b) Prohibit agent activity

The US approach is certainly unique and appears to remove the need to consider the cost of implementation. As well, there would be no need to monitor non-existent agent activity within Canada and there would be no misconduct, actual or perceived, needing to be deterred. Further, with no agent activity there should presumably be no misconduct to punish. But, in an increasingly globalized world, the US approach is difficult to justify. Allowing Canadian HE providers to use agents to their own advantage while making it illegal for foreign HE providers to do the same in Canada would be shockingly insular. More than that, as Canada has recently decided to become a major player in the growing knowledge based economy it would seemingly invite competing nations to implement a similarly insular and counter-productive approach. The US is without question the global leader in HE provision, both in terms of quality and quantity, and as such has been able to restrict agents operating in country without consequence. The same outcome cannot reasonably be expected in Canada and would fail to promote the furtherance of a socially and commercially valuable activity.

In actual practice, the US approach has not succeeded in preventing agents from recruiting American students. Several of the commission-based agents operating in Canada can also be found recruiting and advising students in the US. How can this be? By making it illegal, foreign HE providers and their agents have come up with creative contractual language, removing all reference to the services being provided as agent or recruitment services, to avoid

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being considered agents. Clearly the value or reward of international student enrolments outweighs the potential cost or risk of breaking US law. It remains to be seen whether this approach will stand up to judicial scrutiny. Avoiding illegality by referring to agent activity as something other than what it actually is certainly exposes HE providers and agents to considerable risk in respect of the US government, who would presumably be inclined to consider the facts of the relationship and not the label attached to it. Moreover, should this approach ultimately be found to be illegal, the offending HE provider will be in violation of US Title IV of the HEA,\textsuperscript{133} which prohibits “commission-based recruitment of students eligible for federal financial aid”\textsuperscript{134}. The penalty for violation is the cancellation of federal funding for all students enrolled at the offending HE provider.\textsuperscript{135} More than that, if an attempt to prohibit agent activity fails to have the intended effect, it negates the conclusion that monitoring activity and punishing misconduct are non-factors. Should prohibition fail, as it has in the US, both issues become much greater concerns in respect of protecting student welfare. Finally, were Canada to adopt the US approach, it is likely to invite the similar creativity on the part of HE providers and agents and would do nothing to promote what is and should be a socially valuable service.

3.3(c) Education agents as fiduciaries

Fiduciary law gives students the ability to trust the advice and guidance they receive from agents and subsequently rely upon, and gives agents a clear guide as to what is to be expected from them in respect of Canadian students. Notwithstanding the potential costs of litigation involving student and agent, there is no cost to implement fiduciary obligations as they feature prominently in Canadian law and are commonplace in similar agency relationships, as discussed in Part 2. However, ensuring that agents (the HE providers they represent) and students are fully informed about the nature of fiduciary relationships would require investment and thoughtful implementation, presumably from the federal government. Otherwise, there is limited proactive

\textsuperscript{133} Supra note 33.


\textsuperscript{135} Ibid.
misconduct reducing value in considering the student-agent relationship to be ad hoc fiduciary. More than that, the nature of ad hoc fiduciary obligations is that they are determined according to the particular facts of the relationship. While one student-agent relationship might be found to be fiduciary in nature that does not mean another student-agent relationship, with dissimilar facts, will attract the same obligations. It could be argued that the uncertainty of knowing when an agent is acting as a fiduciary would require more formal legal protections; however, the potential of being considered a fiduciary is likely to motivate agents to err on the side of caution in putting student interests ahead of their own. If the risk of being found to have breached a fiduciary duty is not sufficient, it is likely that the risk of having university-agent agreements terminated will be. The ability of HE providers to terminate agreements without cause is commonplace, and as such, the risk of losing institutional clients who would presumably sever ties to avoid reputational damage, should have the effect of proactively improving agent conduct.

Admittedly, monitoring agent activity is a considerable challenge but the ability to proactively monitor agent activity is not the primary concern where the relationship is considered to be fiduciary in nature. If a student, aware of the fiduciary obligations owed to him or her by the agent, were to bring a claim for breach, it would be dealt with according to the facts and in reference to established categories of fiduciary law. The court would consider the facts of the relationship to determine whether they were sufficient to give rise to fiduciary obligations. One downfall in this approach is that – similar to implementation – it is entirely reactive and could be difficult for the student to prove certain types of agent misconduct. Still, an agent providing disclosure to students and receiving consent from the same would be forced to provide advice and services in a manner that can withstand judicial scrutiny, should a student claim the agent has breached a fiduciary obligation. From the perspective of international HE providers, this would mean their Canadian agents would be held to a standard far exceeding any code of ethics or legislation and, as a result, the reputation of those institutions in Canada would not be at risk due to an inability to effectively monitor agent conduct.

Undeniably, the issue of incentive misalignment is not entirely eliminated by fiduciary obligations and further consideration in respect of dual-agency is required. In the real estate
industry, dual-agency is only permitted where both principals have provided consent. When the agent is acting for both parties to a transaction the information that can be disclosed to either party in respect of the other is limited. However, the purchase and sale of real property is very much an adversarial transaction and the disclosure of certain information could very easily advantage one party over the other. The agent assisted HE application is not adversarial, it is not a negotiation, and it should not require the same limiting of disclosure when acting for both parties. Whether or not the student uses the services of an agent, he or she is required to disclose all academic information, criminal history, and financial resources, among other things. What should be required in respect of dual-agency is the disclosure of any and all commissions and bonuses that each HE provider is offering for the successful recruitment and enrolment of students.

Fiduciary obligations provide the best mechanism for students seeking redress for agent misconduct. As with monitoring agent activity, neither a foreign code of ethics nor legislation is able to compensate a student for what could potentially be significant financial harm. The ability of the court to hold agents accountability for self-interested conduct would be no different than any other ad hoc fiduciary scenario. As such, agents would have no choice but to put the principal’s interest ahead of their own, disclose any and all information that the principal may consider relevant, and avoid making secret profits. The ability to enforce consequences for misconduct would also ensure the reputation of HE providers is protected and would increase transparency in an otherwise opaque industry.

Lastly, recognizing the student-agent relationship as being fiduciary is the best means of promoting a socially valuable activity. The agent’s task in respect of the student is to help him or her achieve the best possible HE outcome. The agent’s obligation throughout that process is to put the student’s interest ahead of his or her own. Selfish agents, or agents who want to make the most money from commission payments as possible, might direct the student to apply and enroll
at a HE provider that is not the best possible outcome for that student. Fiduciary law, more than any of the other approaches considered, minimizes the agent’s ability to act in the selfish manner described. There are real and significant consequence for selfish or lazy conduct that, in turn, promote trust and reliance between the parties involved, certainty as to what is required, and ultimately, promotes this socially valuable and ‘free’ service among Canadian students.

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136 Posner, supra note 11 at 12.
Conclusion

With an increasing number of agents representing international HE providers contracting with agents to recruit Canadian students and the increasing global competition to meet or exceed enrolment targets, it is important that Canada adopt a thoughtful approach to HE agent activity. The current approach or lack thereof, ignoring agent activity in Canada entirely, cannot be justified and is certain to fail Canadian students, if it hasn’t already.

The purpose of this paper was to focus on two separate but related problems that arise between the student and HE agent. First, the conflict of interest that occurs as the result of incentive misalignment, when the agent’s financial interest is advanced at the expense of the university, student, or both. Second, the absence of disclosure and fully informed consent in respect of the agent’s remuneration, which varies from institution to institution. In Part 1, I provided an example of the university-agent and student-agent relationships. In Part 2, I discussed the separate but related problems of incentive misalignment and informed consent that arise in the student-agent relationship and considered how incentive misalignment and informed consent are addressed by the largest HE provider jurisdictions. Finally, in Part 3, I considered the merits of each approach.

This paper determined that, in light of the factual reality of the student-agent relationship and following the SCC’s decision in Galambos, that an ad hoc fiduciary relationship exists between student and agent, and that the protections provided by fiduciary law are preferable to the alternative approaches considered. Fiduciary obligations are the most effective means of reducing agency costs and promoting a socially and commercially valuable service.

137 Vrinda, supra note 30.
Finally, this paper is written at a time when Canadian students are exceedingly vulnerable to HE agent misconduct and when nothing is being considered at a provincial or federal level to ensure their protection. In light of the over 40,000 Canadian students choosing to pursue an international education each year, fiduciary law provides immediate and certain protection that will enable students to continue and increasingly seek out and rely upon HE agents with confidence that their interests are protected.
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