The Supreme Court of Canada’s approach to recognizing fiduciary relationships has been the subject of considerable derision in other common law jurisdictions. The Australian courts have been particularly critical, suggesting, for example, that the Canadian law is marked “by assertion rather than analysis and, whilst it may effectuate a preference for a particular result, it does not involve the development or elucidation of any accepted doctrine.” Its extension of protection to non-economic interests, especially in cases of sexual abuse, has been characterized as results- or remedy-driven, and a distortion of the traditional bases for finding fiduciary obligations.

This paper will analyze some of the more highly-criticized Canadian decisions on fiduciary relationships with a view to determining the factors that led the Supreme Court to adopt its unorthodox approach. At least two of the sexual abuse cases were influenced by feminist scholarship, whether introduced by interveners or by members of the bench. A third unconventional case, McInerney v MacDonald, found that a doctor’s fiduciary duties included an obligation to provide patients with full access to their medical records. While the Charter of Rights and Freedoms was not directly applicable in any of these situations, it is difficult to ignore the Charter rights to equality (section 15) and security of the person (section 7) that underlie the decisions. Moreover, the Supreme Court had already exhibited its openness to unconventional fiduciary relationships when it recognized the Crown’s fiduciary duty toward Aboriginal peoples. Taken together, these cases demonstrate the Supreme Court’s willingness to use fiduciary obligations to promote certain social goals and to govern relationships that are considered sufficiently valuable to merit enhanced legal protection.

I will argue that this version of instrumentalism by the Supreme Court of Canada is not as unprincipled as some have suggested. The Charter has given the Canadian courts an important role in terms of social policy, especially in protecting the more vulnerable members of society. The courts have used fiduciary concepts to achieve parallel goals in the sphere of private law. This may mean that the Canadian approach to fiduciary relationships differs from that in common law jurisdictions where the courts have a less political role. However, the increasing influence of human rights instruments means that other jurisdictions may soon have to address similar issues, and the Canadian approach to fiduciary relationships may ultimately prove instructive.