

## POST-EMPLOYMENT COMPETITION— CANAERO REVISITED

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*In the sixteen years since the Supreme Court of Canada's decision in Canadian Aero Services Ltd. v. O'Malley, the emerging law of fiduciaries has become one of the most significant trends in Canadian law. An important illustration of this trend is provided by the large volume of case-law which has developed concerning the obligations of departing employees to their former employers, particularly in regard to solicitation of customers. This article examines the development of the Canadian law in this area from its genesis in the late nineteenth century to today, concluding that its evolution since Canaero has been unsatisfactory and must be reconsidered. It recommends that fiduciary relationships should be limited to employees who exercise a significant degree of power and control over a company's operations, and that the scope of the obligation not extend to blanket solicitation of customers after departure, but depend on the nature, specificity and ripeness of the customer base, the knowledge held by the departing employee, and the type of solicitation.*

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*Depuis la décision de la Cour suprême du Canada dans l'affaire Canadian Aero Services Ltd. v. O'Malley il y a seize ans, le droit des fiduciaires s'est développé et est devenu l'une des tendances les plus marquantes du droit canadien. L'importance de la jurisprudence qui a maintenant trait aux obligations des employés envers les employeurs qu'ils ont quittés, particulièrement quand il s'agit de la sollicitation de clients, illustre bien cette tendance. Dans cet article l'auteur examine le développement du droit canadien dans ce domaine, depuis ses origines à la fin du dix-neuvième siècle jusqu'à nos jours, et en conclut que son évolution depuis Canaero n'a pas été satisfaisante et qu'il est nécessaire de la repenser. Il recommande que les rapports de fiducie s'appliquent seulement aux employés qui exercent un pouvoir important de décision et de contrôle dans la marche de la compagnie, et que l'obligation ne soit pas si générale qu'elle interdise toute sollicitation de clients après le départ de l'employé. Selon l'auteur, l'obligation devrait dépendre de la nature, de la spécificité et de l'état de développement de la clientèle, des connaissances de l'ancien employé et du genre de sollicitation.*

### Introduction

Sixteen years ago the Supreme Court of Canada delivered its judgment in *Canadian Aero Services Ltd. v. O'Malley*.<sup>1</sup> In that judgment the court expanded the emerging doctrine of corporate opportunity and for the first

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<sup>1</sup> [1974] S.C.R. 592, (1973), 40 D.L.R. (3d) 371.

time outlined broad principles governing the obligations of fiduciaries. In hindsight, *Canaero* can now be seen as the beginning of a revolution in Canadian law, during which our courts have applied equitable principles to a whole new set of relationships. The developing law of fiduciaries has spawned numerous articles, several texts and a panoply of reported cases in areas ranging from the obligations of the Crown to native peoples to the duties of commercial lenders to their customers.<sup>2</sup>

Nowhere is this revolution more apparent than in the voluminous caselaw which has developed since *Canaero* regarding the obligations of departing employees to their former employer. Following the lead of Estey C.J.H.C. in *Alberts v. Mountjoy*,<sup>3</sup> a lengthy lineup of judges, particularly in Ontario and the western provinces, has flourished the principles of *Canaero* with gusto in concluding that certain classes of departing employees owe fiduciary duties to their former employer which prevent them from soliciting its customers or employees.

The breadth and sweep of some of these decisions is startling. The departing employees are usually described euphemistically as "top" or "senior" management. However, employees occupying such undistinguished positions as messenger<sup>4</sup> or head of the hearing-aid department at a retail store<sup>5</sup> have been held subject to the same obligations as senior executives and managers. Many cases have gone well beyond the "ripening corporate opportunity" doctrine espoused by *Canaero* to enjoin solicitation of any of the former employer's customers.<sup>6</sup> Employees considered to be fiduciaries have been held to breach their obligations to their former employer by persuading other employees to join them, regardless of whether that occurs before or after departure.<sup>7</sup> Finally, employees who cannot by any means be classified as fiduciaries have been held to assume those obligations by joining the fiduciary in a new, competitive enterprise.<sup>8</sup>

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<sup>2</sup> See, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321; *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1986), 22 D.L.R. (4th) 410 (Ont. C.A.). Other important recent cases include *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14; *Hayward v. Bank of Nova Scotia* (1985), 19 D.L.R. (4th) 758 (Ont. C.A.). Texts in the area now include J.C. Shepherd, *The Law of Fiduciaries* (1981); M.V. Ellis, *Fiduciary Duties in Canada* (1988); T.C. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989).

<sup>3</sup> (1977), 79 D.L.R. (3d) 108, 16 O.R. (2d) 682 (Ont. H.C.).

<sup>4</sup> *Monarch Messenger Services Ltd. v. Houlding* (1984), 5 C.C.E.L. 219 (Alta. Q.B.); discussed *infra*, at footnote 95.

<sup>5</sup> *Hudson's Bay Co. v. McClocklin*, [1986] 5 W.W.R. 29 (Man. Q.B.); discussed, *infra*, at footnote 94.

<sup>6</sup> *Alberts v. Mountjoy*, *supra*, footnote 3; *White Oaks Welding Supplies v. Tapp* (1983), 149 D.L.R. (3d) 159, 42 O.R. (2d) 445 (Ont. H.C.), discussed, *infra*, at footnote 89.

<sup>7</sup> See, for example, *Re Berkey Photo (Canada) Ltd. v. Ohlig* (1983), 43 O.R. (2d) 518 (Ont. H.C.); *Investors Syndicate Ltd. v. Real Securities of Canada Ltd.* (1985), 6 C.P.R. (3d) 431.

<sup>8</sup> *Alberts v. Mountjoy*, *supra*, footnote 3, at pp. 116 (D.L.R.), 689 (O.R.).

It is the thesis of this article that the law in this area is evolving in a completely unsatisfactory manner and must be reconsidered. It will be found on close examination that *Canaero* was not intended to and does *not* support the extension of fiduciary obligations found in these cases. Moreover, sixteen years of experience since *Canaero* have not produced a simple synthesis of the principles according to which a fiduciary relationship will or will not be imposed in a given case, making it impossible for solicitors to give clients any degree of assurance as to what course to follow. Finally, the law in this area appears to run contrary to the general principle of law that an individual should be free to commit his labour where he sees fit. As warned in a very recent case, "[n]ot all managerial positions should lead to the imposition of the very high duty of a trustee lest the law commit a high proportion of employees in this province to slavery".<sup>9</sup>

It will be argued here that an examination of general principles in this area of the law leads to recognition that there is an inevitable conflict between a fundamental objective of the law of fiduciaries, namely, protection of the integrity of the business enterprise, and the valid concerns of our courts with economic efficiency and employee's rights. Moreover, the Canadian experience since *Canaero* can usefully be contrasted with the development of English law in recent years, and in particular with the 1985 decision of the Court of Appeal in *Faccenda Chicken Ltd. v. Fowler*,<sup>10</sup> which severely limits the obligations of a departing employee to the former employer. Finally, a new test will be proposed for when a fiduciary relationship is created between employer and employee, and some suggested solutions posited to problems which commonly arise in this area.

## I. The Development of the Canadian Law

### A. General Anglo-Canadian Principles pre-*Canaero*

The modern law regarding the obligations of departing employees began with a series of late nineteenth century English decisions. In those cases the courts held that a departing employee was entitled to set up business in competition with his former employer, and to use the general skill and knowledge he had gained during that employment.<sup>11</sup> He could not solicit any customer whose name he had obtained from materials taken or copied from his employer,<sup>12</sup> and an injunction would be granted to prevent him from doing so.<sup>13</sup> He could not however be prevented from

<sup>9</sup> *R.W. Hamilton Ltd. v. Aeroquip Corp.* (1988), 65 O.R. (2d) 345, at p. 353 (Ont. H.C.).

<sup>10</sup> [1987] Ch. 117, [1986] 1 All E.R. 617 (C.A.).

<sup>11</sup> *Louis v. Smellie*, [1895-99] All E.R. Rep. 875 (C.A.).

<sup>12</sup> *Helmores v. Smith* (1887), 35 Ch. D. 449 (C.A.).

<sup>13</sup> *Louis v. Smellie*, *supra*, footnote 11; see also, *Robb v. Green*, [1895] 2 Q.B. 315 (C.A.).

soliciting a customer whose name he happened to remember and whose address could be found from ordinary reference materials.<sup>14</sup>

Although the courts appeared to have reached a consensus on the extent of the obligation, there was no such consensus on its source. In *Helmores v. Smith*,<sup>15</sup> for example, Bowen L.J. concluded that the servant had been entrusted with a list of customers' names in confidence, and that it was part of the implied contract between master and servant that such information not be used to the master's disadvantage. In *Lamb v. Evans*,<sup>16</sup> on the other hand, Lindley L.J. referred to the obligation of good faith underlying the obligations of an agent to his principal. In *Robb v. Green*<sup>17</sup> Kay L.J. concluded that an injunction could be granted either on the ground of breach of trust or breach of contract. The latter would appear to have resulted from the employee's conduct *during* employment in copying such a list, rather than from the act of using it subsequently.<sup>18</sup>

Perhaps the widest definition of the obligations of a departing employee was given by Lindley L.J. in *Louis v. Smellie*:<sup>19</sup>

... the defendant was entitled to set up in business in the absence of ... [a restrictive covenant] in rivalry with his late employer. What he is not entitled to do is make an *unfair use* in the carrying on of such a rival business of information acquired by him while he was acting as clerk to the plaintiff. The difficulty lies in drawing the line.

The balance of the judgment, however, made it clear that Lindley L.J. considered the employee's obligations to flow from the implied term of honesty and good faith towards the employer laid down in *Lamb v. Evans* and other cases, not from a more general equitable principle.<sup>20</sup>

In two Canadian cases from the early part of this century, *Canada Bonded Attorney & Legal Directory Ltd. v. Leonard-Parmiter Ltd.*<sup>21</sup> and *Ice Delivery Co. Ltd. v. Peers*,<sup>22</sup> the English caselaw was adopted without significant analysis. *Ice Delivery* is unexceptional: in circumstances where employees had solicited customers prior to leaving their employer to set up their own business, they were held to have breached their contracts of employment and were liable for damages. An injunction was not awarded,

<sup>14</sup> *Louis v. Smellie*, *ibid.*, at p. 877, per Lindley L.J. And see also, *Wessex Dairies Ltd. v. Smith*, [1935] 2 K.B. 80 (C.A.).

<sup>15</sup> *Supra*, footnote 12, at p. 456.

<sup>16</sup> [1893] 1 Ch. D. 218, at p. 226 (C.A.).

<sup>17</sup> *Supra*, footnote 13, at p. 319. Note that damages were awarded on the basis of breach of contract, as discussed in Lord Esher M.R.'s judgment, at pp. 316-318.

<sup>18</sup> *Ibid.*, per Lord Esher M.R., and at p. 320, per Smith L.J. See also, *Wessex Dairies Ltd. v. Smith*, *supra*, footnote 14.

<sup>19</sup> *Supra*, footnote 11, at p. 876. (Emphasis added). See also the comments of Estey C.J.H.C. in *Alberts v. Mountjoy*, discussed *infra*, at footnote 70.

<sup>20</sup> *Ibid.*, at p. 877.

<sup>21</sup> (1918), 42 D.L.R. 342, 42 O.L.R. 141 (Ont. A.D.).

<sup>22</sup> [1926] 1 D.L.R. 1176, [1926] 1 W.W.R. 595 (B.C.C.A.).

however, on the basis of *Louis v. Smellie*,<sup>23</sup> since the employees had not taken or used a written customer list.

*Canada Bonded Attorney* is of somewhat greater interest. In a decision adopted as to the law by the other members of the Appellate Division of the Ontario Supreme Court, Riddell J. emphasized wording from the decision of Kekewich J. at trial in *Louis v. Smellie* suggesting that the courts would not enjoin a departing employee from using information which he could obtain "by an effort of memory".<sup>24</sup> It was this passage which appears to have led Estey C.J.H.C. in *Alberts v. Mountjoy*<sup>25</sup> to remark that "... the law of master and servant seems to apply a remedy against the departing employee with a poor memory, but none perhaps against one with a good memory". Subsequent English decisions, however, have held that an injunction will lie where the employee has deliberately memorized a list of names.<sup>26</sup>

A third, curious case from this period is the decision of Donovan J. in *Waite's Auto Transfer Ltd. v. Waite*.<sup>27</sup> Here the departing employee was also president, manager and director of the plaintiff company and had failed to resign his position as director on departure. It was held nevertheless that in the absence of evidence that he had taken away a written customer list he was entitled to solicit the plaintiff's customers. Donovan J. referred in part to *London and Mashonaland Exploration Co. v. New Mashonaland Exploration Co.*,<sup>28</sup> holding that directors could not be restrained from acting as directors of a competing company. He also concluded that the defendant's knowledge of the names and possible business connections of the company's customers could not be considered its property.<sup>29</sup>

*Waite's* is the first Canadian case to deal with the category of the "key" employee/officer/director which becomes so significant later on. It can be contrasted usefully with the subsequent Canadian cases which pre-date *Canaero*. In *State Vacuum Stores v. Phillips*,<sup>30</sup> for example, the

<sup>23</sup> *Ibid.*, at pp. 1177-1178 (D.L.R.), 596-597 (W.W.R.), per MacDonald C.J.A.

<sup>24</sup> *Supra*, footnote 21, at pp. 356 (D.L.R.), 157 (O.L.R.).

<sup>25</sup> *Supra*, footnote 3, at pp. 115 (D.L.R.), 688 (O.L.R.).

<sup>26</sup> See, for example, *Printers and Finishers Ltd. v. Holloway*, [1965] 1 W.L.R. 1, at pp. 4-5, [1964] 3 All E.R. 731, at p. 735 (Ch. D.); *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 10, at pp. 136 (Ch.), 625 (All E.R.). Cf. *Baker v. Gibbons*, [1972] 1 W.L.R. 693, at pp. 701-702, [1972] 2 All E.R. 759, at pp. 765-766 (Ch. D.).

<sup>27</sup> [1928] 3 W.W.R. 649 (Man. K.B.).

<sup>28</sup> [1891] W.N. 165 (Ch. D.), and see also, *Bell v. Lever Bros.*, [1932] A.C. 161, at p. 195 (H.L.), per Lord Blanesburgh. The decision in *Canaero* suggests that this law should now be reconsidered; see the discussion of this issue by S.M. Beck in *The Quickening of Fiduciary Obligation: Canadian Aero Services v. O'Malley* (1975), 53 Can. Bar Rev. 770, at pp. 787-792.

<sup>29</sup> *Supra*, footnote 27, at p. 655.

<sup>30</sup> [1954] 3 D.L.R. 621, (1954), 12 W.W.R. (N.S.) 489 (B.C.C.A.).

British Columbia Court of Appeal imposed a much higher standard of fidelity on a group of key employees. In that case the defendants were respectively western Canadian area manager, manager of the Vancouver branch and sales supervisor for the plaintiff company, which sold vacuum cleaning products countrywide. The defendants had secretly decided to incorporate a new company which would compete with the plaintiff and spent a considerable part of their time organizing that company before they were found out and dismissed. The trial judge concluded that no damages had resulted from any alleged breach of duty to their employer, since there was no evidence that they had given other than their best efforts to the plaintiff up until the time of their dismissal.<sup>31</sup>

In allowing an appeal and substituting an award of \$500.00 nominal damages, the Court of Appeal noted in passing that:<sup>32</sup>

The importance of the positions occupied by the defendants should be noted. They are not manual labourers as is the case in several of the authorities. They were the top men in the company's executive positions in western Canada; far from the head office in Toronto; and therefore enjoyed a measure of special confidence.

The court concluded that there was evidence ignored by the trial judge that the defendants had attempted to entice away salesmen and had advised the plaintiff's customers of their plans. It was also clear that in the weeks prior to their dismissal they were not devoting their complete efforts to the plaintiff. This evidence was sufficient to support an award of nominal damages.<sup>33</sup>

In the subsequent decision of *Tasco Telephone Answering Exchange Ltd. v. Ellerbeck*<sup>34</sup> MacDonald J. of the British Columbia Supreme Court also had occasion to deal with a key employee in a sales position. The defendant in that case had been manager of sales and advertising of the plaintiff telephone answering service. He left to set up a competing business and subsequently solicited a number of the plaintiff's customers either by personal calls or letters of solicitation. It was clear that he had not made use of a written customer list, although he was able to recall almost all of the plaintiff's customers' names from memory. He had however made use of a customer information card system almost identical to the one used by the plaintiff. In addition, the letter of solicitation offered a number of improvements which the defendant had developed as the result of complaints he had received while with the plaintiff.<sup>35</sup>

<sup>31</sup> *Ibid.*, at pp. 622-623 (D.L.R.), 490-491 (W.W.R.).

<sup>32</sup> *Ibid.*, at pp. 625 (D.L.R.), 493 (W.W.R.), per Sidney Smith J.A. *Cf. Protective Plastics Ltd. v. Hawkins* (1964), 49 D.L.R. (2d) 496, [1965] 2 O.R. 32 (Ont. Co. Ct.), where a mere salesman was held to a similar standard.

<sup>33</sup> *Ibid.*, at pp. 626-630 (D.L.R.), 494-499 (W.W.R.). In his dissent Sloan C.J.B.C. adopted the view of the trial judge that there was no law holding that a person could not think about leaving his employment or discuss it with someone else; *ibid.*, at pp. 621-624 (D.L.R.), 490-492 (W.W.R.).

<sup>34</sup> (1966), 57 D.L.R. (2d) 500, 55 W.W.R. (N.S.) 656 (B.C.S.C.).

<sup>35</sup> *Ibid.*, at pp. 508-511 (D.L.R.), 665-668 (W.W.R.).

McDonald J. had little difficulty in concluding, on the basis of the line of cases commencing with *Louis v. Smellie*, that the defendant was free to compete with his former employer and to canvass those customers whose names he could remember. He could also see nothing objectionable about the card system, concluding that the defendant was entitled to make use of the knowledge he had gained as to how such a business was carried on.<sup>36</sup> However, MacDonald J. did not reach the same conclusion in connection with the letter of solicitation, concluding that it made "unfair and improper use"<sup>37</sup> of information the defendant had acquired while employed in a confidential capacity. In particular, the nature of complaints about the plaintiff's services was confidential information which the defendant could not make use of after his employment had ended.<sup>38</sup>

### B. *The Decision in Canaero*

To place *Canaero* in context it is necessary to refer briefly to the line of cases regarding "corporate opportunities" which preceded it. That caselaw began with an eighteenth century trusts case, *Keech v. Sandford*,<sup>39</sup> where a lessor had refused to renew a lease in favour of an infant beneficiary of a trust, and the trustee thereupon renewed it for himself. King L.C. held that the defendant trustee held the lease as a constructive trustee for the infant beneficiary, despite evidence that he had acted in good faith throughout and that the trust had suffered no loss. The imposition of such a high standard appears to have been justified on the basis that it was a necessary deterrent to ensure that persons possessing such a degree of influence acted in the public interest.<sup>40</sup>

*Keech* and the cases which followed it led to the formulation of two legal rules: (1) that the trustee is not entitled to make a profit from his position; and (2) that the trustee must not place himself in a position where his interest and duty conflict.<sup>41</sup> In a series of cases in the years

<sup>36</sup> *Ibid.*, at pp. 503-509 (D.L.R.), 658-666 (W.W.R.).

<sup>37</sup> *Ibid.*, at pp. 511 (D.L.R.), 668 (W.W.R.).

<sup>38</sup> *Ibid.*, at pp. 507-508, 511-513 (D.L.R.), 664-665, 668-670 (W.W.R.). In concluding that the defendant breached a duty of confidence MacDonald J. returned to *dicta* in the nineteenth century cases suggesting that there was an implied term in the contract of employment that the employee would not afterwards make use of confidential information gained during that employment. The application of such a low threshold to the classification of information as confidential is surprising: if the employee's knowledge of the nature of customers' complaints is confidential, surely the names of those customers are equally so? As will be seen, in *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 10, the English Court of Appeal formulated a much higher standard.

<sup>39</sup> (1726), Sel. Cas.-T. King 61, 25 E.R. 223 (L.C.).

<sup>40</sup> *Ibid.*, at pp. 62 (Sel. Cas.), 223 (E.R.); and see also the discussion in E.J. Weinrib, *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at pp. 4-5.

<sup>41</sup> It has also been argued that the conflict rule is a broader rule of general application of which the profit rule is a mere corollary; see, for example, the dissenting opinion of Lord Upjohn in *Phipps v. Boardman*, [1967] 2 A.C. 46, at p. 123, [1966] 3 All E.R.

preceding *Canaero* the courts in Canada and England grappled with the problem of applying these rules to company directors who had taken advantage of a corporate opportunity connected in some way with the affairs of the company. In the leading case of *Regal (Hastings) Ltd. v. Gulliver*<sup>42</sup> the House of Lords divided on this issue. Lord Russell, for example, stressed that the corporate opportunity in question was acquired by reason of the fact that the defendants were directors of the company *and* in the execution of that office, concluding that as a result they were accountable for the profits they had made. Viscount Sankey, on the other hand, preferred to rest liability on the wider conflict of interest and duty principle.<sup>43</sup>

When the Supreme Court of Canada adopted *Regal* in *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd.*<sup>44</sup> and subsequently in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*,<sup>45</sup> it approved Lord Russell's judgment in particular. The result in *Peso* was completely unsatisfactory and has been subjected to much criticism.<sup>46</sup> Ironically, in the subsequent decision of *Phipps v. Boardman*<sup>47</sup> the House of Lords moved away from the position taken by Lord Russell in *Regal* in favour of the more general formula that a fiduciary is not allowed to enter into situations where his duty and interest may conflict.<sup>48</sup>

Such was the background to *Canaero*. The facts of the case are familiar to all Canadian lawyers and can be briefly stated here. The plaintiff carried on a topographical mapping and geophysical exploration business. The defendants O'Malley and Zarzycki had a long history with the company and at the time of the lawsuit held the positions of president and chief

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721, at p. 756 (H.L.), and the discussion of S.M. Beck, *The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered* (1971), 49 Can. Bar Rev. 80, at p. 90.

<sup>42</sup> [1942] 1 All E.R. 378 (H.L.).

<sup>43</sup> *Ibid.*, at pp. 379-383, per Viscount Stankey, and at pp. 383-391, per Lord Russell. To add to the confusion the other law lords gave short concurring opinions of their own, each with its own flavour although all tending to approve of the position taken by Lord Russell.

<sup>44</sup> [1958] S.C.R. 314, at p. 327, (1958), 12 D.L.R. (2d) 705, at pp. 726-727, per Locke J. See also *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257; in the latter case the court did not have to choose between the two formulations and referred to both.

<sup>45</sup> [1966] S.C.R. 673, (1966), 58 D.L.R. (2d) 1.

<sup>46</sup> See, in particular, the fascinating article by Beck, *loc. cit.*, footnote 41. Clearly, the corporate opportunity in question could not have come to the defendant Cropper except for his position as a company director, and the fact that the company could not afford it appears to put the case on the same footing as *Keech* and *Regal*, regardless of the decision of the board of directors not to pursue it.

<sup>47</sup> *Supra*, footnote 41.

<sup>48</sup> *Ibid.*, at pp. 105-106 (A.C.), 745 (All E.R.), per Lord Hodson, and at pp. 123-128 (A.C.), 756-759 (All E.R.), per Lord Upjohn (dissenting as to the result). See also, *Industrial Development Consultants Ltd. v. Cooley*, [1972] 1 W.L.R. 443, at p. 451, [1972] 2 All E.R. 162, at p. 173 (Assize), per Roskill J.



executive officer (O'Malley) and executive vice-president (Zarzycki). Both were directors of the company, although there was some dispute as to whether they had been properly appointed. In addition, both defendants, and particularly Zarzycki, had had extensive involvement in the pursuit by Canaero of a project for the topographical mapping and aerial photographing of parts of Guyana, to be financed through foreign aid supplied by the Canadian government. Up until July 25, 1966 they had actively pursued that project on behalf of Canaero. On August 16, 1966, however, they incorporated their own company, and three days later resigned their positions at Canaero. They then submitted their own proposal to the Canadian government for the Guyana project and were ultimately successful.<sup>49</sup> The plaintiff's subsequent action for breach of fiduciary duty was dismissed both at trial and in the Ontario Court of Appeal, largely on the basis of Lord Russell's judgment in *Regal* as adopted in *Peso*.<sup>50</sup>

In rendering the decision of the Supreme Court of Canada, Laskin J. began by noting that it did not matter whether O'Malley and Zarzycki had been properly appointed as directors. What did matter was that they were senior officers of the company, "top management" rather than mere employees, and as a result subject to similar duties to those owed to a company by its directors.<sup>51</sup> To emphasize that point Laskin J. noted that the two defendants were clearly agents of the company rather than servants: "their positions as senior officers . . . charged them with initiatives and with responsibilities far removed from the obedient role of servants."<sup>52</sup>

It followed, according to Laskin J., that the two defendants stood in a fiduciary relationship to Canaero, with corresponding obligations of loyalty, good faith and avoidance of conflict of duty and self-interest. Those obligations went at least as far as to preclude a director or senior officer from obtaining for himself any property or business advantage either belonging to the company or for which it had been negotiating, especially when that individual had participated in the negotiations.<sup>53</sup> Could the resignation of the two defendants before the acquisition of the corporate opportunity make a difference? Laskin J. held not, pointing out the pervasiveness of a "strict ethic" in this area of the law. Not only could a director or senior officer not usurp a "maturing" business opportunity which his company was pursuing, but:<sup>54</sup>

... he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for

<sup>49</sup> *Supra*, footnote 1, at pp. 595-605 (S.C.R.), 373-381 (D.L.R.).

<sup>50</sup> *Ibid.*, at pp. 594-595, 605-606 and 614-615 (S.C.R.), 372-373, 381-382, 386-387 (D.L.R.). See also the decision of the Ontario Court of Appeal, (1971), 23 D.L.R. (3d) 632, at pp. 634, 642, [1972] 1 O.R. 592, at pp. 594, 602.

<sup>51</sup> *Ibid.*, at pp. 605-606 (S.C.R.), 381 (D.L.R.).

<sup>52</sup> *Ibid.*, at pp. 606 (S.C.R.), 381 (D.L.R.).

<sup>53</sup> *Ibid.*, at pp. 606-607 (S.C.R.), 381-382 (D.L.R.).

<sup>54</sup> *Ibid.*, at pp. 607 (S.C.R.), 382 (D.L.R.).

himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

It is at this point that Laskin J. was faced with the decisions in *Regal* and *Peso*: surely this was not a case where the corporate opportunity could be said to be acquired in the course of the execution of O'Malley and Zarnycki's duties as employees of Canaero? Laskin J. noted in passing the conflict of interest and duty rule referred to by Lord Sankey in *Regal* as well as the profit rule relied on by Lord Russell in the same case. He suggested however that those principles grew out of cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and need not be considered "exclusive touchstones of liability". Moreover, recent cases provided instances where those principles had broken down. In *Phipps*, for example, the profit had not been gained at the expense of the company, nor was there an actual conflict of duty and self-interest.<sup>55</sup>

Laskin J. then revealed the policy considerations which must have had a considerable influence on his decision:<sup>56</sup>

What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

This is an updating of the strict ethic first articulated in *Keech* to an entirely new set of relationships, although for the same reasons.

Having thus articulated the principles which moulded his judgment, Laskin J. then turned his full attention to the decisions in *Regal* and *Peso*. First, he noted that it had been held since as early as the 1803 decision in *Ex p. James*<sup>57</sup> that a fiduciary's obligations might survive the tenure of his office; otherwise, resignation would be a simple means of evading those responsibilities. Second, the reliance by both the trial judge and the Court of Appeal on Lord Russell's judgment in *Regal* tended to obscure the difference between the survival of fiduciary duty after resignation and the right to use non-confidential information acquired during the course of employment. In Laskin J.'s view the question of the confidence of the

<sup>55</sup> *Ibid.*, at pp. 607-609 (S.C.R.), 382-384 (D.L.R.).

<sup>56</sup> *Ibid.*, at pp. 610 (S.C.R.), 384 (D.L.R.). The emphasis on the "degree of control" in the aforementioned passage suggests that Laskin J. would have agreed with the position taken later on in this article that such obligations should be limited to a fairly select group; see *infra*, at pp. 265-268.

<sup>57</sup> (1803), 8 Ves. 337, 32 E.R. 385 (Ch.).

information acquired by the two defendants O'Malley and Zarnycki in the course of their work for Canaero was irrelevant to the issue of breach of fiduciary duty. The fact that a cause of action might lie for breach of confidence or violation of copyright "... does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty".<sup>58</sup>

At the same time, according to Laskin J., it would be a mistake to "seek to encase the principle stated and applied in *Peso*, by adoption from *Regal (Hastings) Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices".<sup>59</sup> Nor was Laskin J. to be taken as espousing a rule or test of his own.<sup>60</sup>

In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

*Canaero* is unquestionably one of the Supreme Court of Canada's most important contributions to the law on fiduciaries, and it represents a turning point in Canadian courts' treatment of that subject. By effectively sweeping aside the narrow set of rules which had governed this area in favour of broad, powerful principles, the court gave a powerful signal to our judiciary that a new direction was needed. The response has been overwhelming: in the sixteen years since *Canaero* Canadian courts have extended fiduciary relationships to such relationships as between an Indian band and the Crown,<sup>61</sup> between a bank and its customer,<sup>62</sup> and between

<sup>58</sup> *Supra*, footnote 1, at pp. 616 (S.C.R.), 388 (D.L.R.); in the Supreme Court of Canada decision in *LAC Minerals, supra*, footnote 2, both Sopinka J. for the majority, at pp. 600-601 (S.C.R.), 64 (D.L.R.), on the fiduciary duty aspect of the case, and La Forest J. for the minority, at pp. 656-657 (S.C.R.), 35 (D.L.R.), appeared to agree that this was the case. Indeed, Sopinka J. went even further, holding that where a valid cause of action for breach of confidence existed there was no need to resort to the more drastic remedy of breach of fiduciary duty.

<sup>59</sup> *Ibid.*, at pp. 619 (S.C.R.), 390 (D.L.R.).

<sup>60</sup> *Ibid.*, at pp. 620 (S.C.R.), 391 (D.L.R.).

<sup>61</sup> *Guerin v. The Queen, supra*, footnote 2.

<sup>62</sup> *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce, supra*, footnote 2. See also, *Hayward v. Bank of Nova Scotia, supra*, footnote 2.

co-venturers.<sup>63</sup> As noted by McCamus, "the remarkable growth of fiduciary obligations in the law reports has become one of the most notable features of our jurisprudence . . .".<sup>64</sup>

For our purposes, however, while acknowledging the sweep of *Canaero* it is important to remember its limitations. *Canaero* is first and foremost a corporate opportunity case—a progeny, albeit a gifted and unusual one, of *Keech*, *Regal*, *Peso* and *Phipps*. The court's reasoning on the issue of whether O'Malley and Zarzycki were fiduciaries takes less than a full page of the judgment, and little guidance is provided on that issue. It appears in retrospect to have been so obvious that very little needed to be said.<sup>65</sup>

Moreover, in retrospect the manner in which the decision was structured appears unfortunate. Although Laskin J. emphasized a flexible approach to the *obligations* of a fiduciary, depending as indicated earlier on a lengthy list of factors, there was little in the judgment itself suggesting similar flexibility should be employed when considering the *creation* of a fiduciary relationship. As we shall see, this has led to a rather mechanical application of what has become known as the "top management" rule in a number of decisions regarding departing employees, in contrast to other developing areas where the courts have been careful not to attempt rigid characterization of the types of relationships leading to fiduciary obligations.<sup>66</sup>

Finally, it should be noted that *Canaero* deals with a corporate opportunity in the narrowest sense: a defined unique project about to come to fruition, which the corporation is particularly suited to serve and has been actively pursuing. Nothing could be more different from the usual situation in the marketplace, where the departing employee seeks to solicit a large number of customers who may not deal with the former employee on a regular basis, may have no relationship to speak of with that employee, and may be very vulnerable to competition from elsewhere. Indeed, in some cases solicitation of a customer may not involve a corporate opportunity at all, for example, cases where contracts are put out for tender.<sup>67</sup> The only guidance *Canaero* provides in that situation is Laskin J.'s comment that amongst the factors to be considered in determining whether a breach of fiduciary duty has occurred are "...the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relationship to it . . .".<sup>68</sup>

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<sup>63</sup> *LAC Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 2.

<sup>64</sup> J.D. McCamus, *The Recent Expansion of Fiduciary Obligation: Common Sense and Future Developments* (1987), 23 E.T.R. 301.

<sup>65</sup> See Beck, *loc. cit.*, footnote 28, at pp. 773-774, and in addition his comments on the Ontario Court of Appeal's decision, at p. 774, n. 18.

<sup>66</sup> See the discussion, *infra*, at pp. 247-251 and 253-254.

<sup>67</sup> See, for example, *Empire Stevedores (1973) Ltd. v. Sparringa* (1978), 19 O.R. (2d) 610 (Ont. H.C.), discussed *infra*, at p. 251.

<sup>68</sup> *Supra*, footnote 1, at pp. 620 (S.C.R.), 391 (D.L.R.).

C. *Après Canaero le déluge: Alberts v. Mountjoy and subsequent cases*

The first case in which the principles enunciated in *Canaero* fell to be applied to a departing employee was *Alberts v. Mountjoy*,<sup>69</sup> a much criticized decision of Estey C.J.H.C. which has nevertheless been followed or cited with approval in the majority of the cases decided since. *Alberts* concerned the general manager of an insurance agency, the defendant Mountjoy, who left the agency after a change in ownership to start a competing business, taking a more junior employee, the defendant Butts, with him. Both defendants then solicited and obtained the general insurance business of many of the customers of the plaintiff, and in particular those with whom they had been working prior to their departure. Indeed, the evidence was that by the end of the first month of operation the new business was obtaining 100% of its commission income from former customers of the plaintiff. There was little or no evidence, however, to suggest that any active steps had been taken by either defendant to subvert customers before their resignation.<sup>70</sup>

The judgment began with a brief summary of the law prior to *Canaero* regarding the right of a departing servant to compete with his master. Estey C.J.C. made passing reference to *Canada Bonded Attorney and Legal Directory Ltd. v. Leonard-Parmiter Ltd.*<sup>71</sup> and to a number of English authorities, concluding that it appeared that "... whether or not an ex-employee may solicit customers of his employer turns upon the narrow question as to whether or not the solicitation is from a list of customers or clients removed from the ex-employer's premises, as against solicitation based upon the memory of the ex-employee . . .".<sup>72</sup> He suggested, however, that there was some evidence in the authorities of a countervailing "principle within a principle" that the employer had a right to freedom from solicitation, pointing particularly to a passage in *Louis v. Smellie*<sup>73</sup> suggesting that a departing employee could not make "unfair use" of information acquired during his employment. According to Estey C.J.H.C. this area of the law was difficult to interpret and inconsistent: it appeared, for example, "to apply a remedy against a departing employee with a poor memory, but none perhaps against one with a good memory".<sup>74</sup>

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<sup>69</sup> *Supra*, footnote 3.

<sup>70</sup> *Ibid.*, at pp. 109-112, 119-120 (D.L.R.), 683-686, 692-693 (O.R.).

<sup>71</sup> *Supra*, footnote 21.

<sup>72</sup> *Supra*, footnote 3, at pp. 113 (D.L.R.), 687 (O.R.).

<sup>73</sup> *Supra*, footnote 11.

<sup>74</sup> *Supra*, footnote 3, at pp. 115 (D.L.R.), 688 (O.R.). As indicated *supra*, at footnote 26, this particular example of the inadequacies of the existing law appears to have been very much a straw man; Estey C.J.H.C. could have easily followed *Printers and Finishers Ltd. v. Holloway*, *supra*, footnote 26, in holding that deliberate memorization of names was also a breach of duty.

Having concluded that the existing law was unsatisfactory, Estey C.J.H.C. turned to consider whether the principles of *Canaero* had any application to the facts. Mountjoy was clearly the chief executive of the plaintiff insurance agency, which he had run on a day-to-day basis almost as a sole proprietor before the recent change in ownership. He was the "directing force" of the company and not on the same level as the employees examined in other cases.<sup>75</sup> Moreover, the nature of the business was also significant. Estey C.J.H.C. pointed to a discussion in *Stenhouse Australia Limited v. Phillips*,<sup>76</sup> a decision of the Privy Council, regarding the necessity for an insurance agent to cultivate and accumulate knowledge of the client's requirements over a long period of time in order to offer attractive terms, and referring to the "comparative fragility" of the relationship between customer and agency, making the risk of solicitation by former employees more serious. Estey C.J.H.C. concluded:<sup>77</sup>

Thus, the substantial business asset of the plaintiff, namely, its trade attachment with its clients, is a vulnerable asset exposed to the depredations of competition in all forms and particularly competition from ex-employees. Accordingly, it is not surprising to find a fiduciary duty arising in former employees for the protection of the undertaking of the former employer.

According to the judge, these circumstances called for the application of a "variation" of the law of corporate opportunity. Mountjoy had left with a "substantial natural advantage" which opened up the opportunity of taking over "a substantial trade asset of the plaintiff, that is, its relationship with its insurance clients". Clearly Mountjoy was "top management" and stood in a fiduciary relationship to the plaintiff agency. Equally clearly, the "vulnerable" and "exposed" asset of the plaintiff in this case was the opportunity to obtain renewal commissions when contracts for insurance came up for renewal in the future. Mountjoy was completely aware of the details of the nature and extent of the relationship of the plaintiff with each of its customers, and so to some extent was Butts. Moreover, although Butts might have escaped liability on his own, by joining Mountjoy and becoming associated in his business, he found himself "on the same level in law" and fixed with the same obligations. In the result, therefore, Estey C.J.H.C. held that there had been a breach of fiduciary duty by both defendants and awarded damages, consisting of the profits lost by the plaintiff in the two years following their departure.<sup>78</sup>

It is unfortunate that *Alberts* has become one of the most widely-applied decisions in this area of the law, as it is unsatisfactory in a number of respects. First, the decision deals harshly and unfairly with the pre-existing law. Although as indicated earlier, the nineteenth century cases

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<sup>75</sup> *Ibid.*, at pp. 116-117 (D.L.R.), 689-690 (O.R.).

<sup>76</sup> [1974] A.C. 391, [1974] 1 All E.R. 117 (P.C.).

<sup>77</sup> *Supra*, footnote 3, at pp. 116-117 (D.L.R.), 690 (O.R.).

<sup>78</sup> *Ibid.*, at pp. 116-120 (D.L.R.), 689-693 (O.R.).

differ on the source of the obligations of the departing employee, some stressing contract, some a duty of confidence and some a wider, equitable obligation, the principles themselves are clearly stated and not in any way contradictory.<sup>79</sup> Moreover, the “memory rule” is only absurd if one assumes a departing employee who deliberately memorizes customers’ names will escape liability. This need not however be the case; see, for example, the recent decision in *Faccenda Chicken Ltd. v. Fowler*<sup>80</sup> holding that such an employee would be in breach of his contractual obligations to his employer.

Second, it is extremely unfortunate that Estey C.J.H.C. chose to emphasize that Mountjoy was “top management” and as a result subject to fiduciary obligations. As has been pointed out by Downard, the words “top management” form so vague a standard as to be impossible to criticize in application with any precision.<sup>81</sup> In addition, in certain places in the decision, Estey C.J.H.C. seems almost to be suggesting that the very vulnerability of the employer to solicitation by the ex-employee leads to a fiduciary obligation, a dangerous concept, not supported by *Canaero*, but which, as we shall see, permeates a number of subsequent cases.<sup>82</sup>

A third criticism which can be levelled at *Alberts* is its treatment of the “corporate opportunity” doctrine. As noted earlier, *Canaero* suggested that among the factors to be considered in determining whether there was a breach of fiduciary duty were the nature of the opportunity, its ripeness and specificity. *Alberts* effectively broadens a maturing corporate opportunity to include the employer’s entire customer base, a considerable departure from *Canaero*. Moreover, although the decision makes numerous references to the unique nature of the insurance business, its principles appear equally applicable to any business whose “trade attachment with its clients” can be considered a vulnerable asset exposed to the “depredations of competition ... particularly competition from ex-employees”.<sup>83</sup> As Downard notes:<sup>84</sup>

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<sup>79</sup> *Supra*, footnote 4. Moreover, these principles were then restated very clearly by the Court of Appeal in *Wessex Dairies Ltd. v. Smith*, *supra*, footnote 14, and in particular Maugham L.J.’s judgment, at p. 89. The only unresolved issue was whether the employee had any super-imposed obligation with respect to confidential information, an issue which fell to be determined in the line of cases commencing with *Printers and Finishers Ltd. v. Holloway*, discussed *infra*, at pp. 260 *et seq.* Estey C.J.H.C. makes no references to these cases in his judgment.

<sup>80</sup> *Supra*, footnote 10, at pp. 136 (Ch.), 625 (All E.R.); see also the other cases discussed *supra*, footnote 26.

<sup>81</sup> P. Downard, *Post-Employment Competition and the Courts: An Unfortunate Curve in the Common Law* (1985-86), 6 Adv. Q. 361, at p. 367.

<sup>82</sup> *Supra*, footnote 3, at pp. 116-117 (D.L.R.), 689-690 (O.R.). And see the discussion *infra*, at pp. 249-251.

<sup>83</sup> *Ibid.*, at pp. 116-117 (D.L.R.), 690 (O.R.).

<sup>84</sup> *Loc. cit.*, footnote 81, at p. 370.

It is difficult to avoid the conclusion that if the future possibility of commissions in the insurance business is a "corporate opportunity", then any future possibility of revenue in any business may equally be a "corporate opportunity" and, indeed, any post-employment at all amounts to the taking of one. There is nothing in *Canaero* to support this view.

Two lines of authority have emerged in the Canadian caselaw since *Alberts*. The first or "broad" line of authority has enthusiastically adopted *Alberts* and has tended to apply fiduciary obligations to a wide range of employment relationships, without a great deal of regard for the factors outlined in *Canaero*. Thus, as we will see, a number of these cases have held that as long as the employee can be classified as "top" or "senior" management he is enjoined from solicitation of any kind. In addition, the extent to which the employer's business is vulnerable to attack has tended to play a role in the determination of whether the employee is a fiduciary, leading to the creation of a fiduciary relationship in some odd situations.

A second, "narrow" line of authority has tended to apply *Canaero* in a more tentative, restrictive fashion, often referring to *Alberts* only in passing or ignoring it altogether.<sup>85</sup> More recently, perhaps as a result of some of the excesses of the line of authorities referred to above, these cases have tended to emphasize the dangers inherent in imposing such a powerful remedy on the departing employee, worrying in particular about restrictions on economic freedom and mobility.

The "broad" application of *Canaero* can be considered to have begun with *W.J. Christie & Co. Ltd. v. Greer*,<sup>86</sup> a 1981 decision of the Manitoba Court of Appeal and the first appellate decision to consider *Alberts*. On the facts, the defendant Greer was an officer, director and senior executive of the plaintiff company and therefore clearly subject to fiduciary obligations. What is significant is that the court blindly followed *Alberts* in concluding that direct solicitation of customers by the fiduciary was completely forbidden, without any consideration of the nature of the corporate opportunity being usurped.<sup>87</sup> In fact, in giving the decision of the court Huband J.A. gave the widest definition yet of the obligations of the departing fiduciary:<sup>88</sup>

There is nothing to prevent an ordinary employee from terminating his employment and normally that employee is free to compete with his former employer. The right to compete freely may be constrained by contract. It would be improper too for an employee to purloin trade secrets or confidential information, including customer lists. But it is different for a director/officer/key management person who occupies a fiduciary position. Upon his resignation and departure, that person is

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<sup>85</sup> A number of cases have suggested that *Alberts* should be confined to the special circumstances of the insurance industry; see, for example, *Star Linen Supply Ltd. v. Elite* (1979), 45 C.P.R. (2d) 143 (Ont. H.C.).

<sup>86</sup> (1981), 121 D.L.R. (3d) 472, [1981] 4 W.W.R. 34 (Man. C.A.).

<sup>87</sup> *Ibid.*, at pp. 473, 477-478 (D.L.R.), 35-36, 40-41 (W.W.R.).

<sup>88</sup> *Ibid.*, at pp. 477 (D.L.R.), 40-41 (W.W.R.). (Emphasis added).



entitled to accept business from former clients, but direct solicitation of that business is not permissible. Having accepted a position of trust, the individual is not entitled to allow his own self-interest to collide and conflict with fiduciary responsibilities. *The direct solicitation of former clients traverses the bounds of acceptable conduct.*

No mention is made here of the weighing of various factors regarding the nature of the corporate opportunity outlined in *Canaero*; nor is the justification given in *Alberts* for the extension of fiduciary obligations to prohibit general solicitation (the "vulnerability" of the insurance business) ever referred to. The casual use of "key management person", an even more vague standard than "top" management, is also noteworthy.

*White Oaks Welding Supplies v. Tapp*<sup>89</sup> is another excellent example of the broad application of fiduciary obligations following *Alberts*. In *White Oaks* the plaintiff carried on a welding gas supply business and the defendant Tapp had been the company's sales manager, with responsibility for a number of salesmen and servicemen as well as certain office employees. Tapp had almost complete responsibility for sales and reported directly to the owner. When he resigned to form a competing business and subsequently solicited customers, the inevitable action was brought for breach of fiduciary duty.<sup>90</sup>

In his careful decision Osler J. noted that this was not a case such as *Canaero* where there had been a deliberate plotting to take over a corporate opportunity, nor was there the particularly sensitive arrangement between a general insurance agency and its general manager found in *Alberts*. But, he continued:<sup>91</sup>

Nevertheless, the defendant, with his encyclopaedic knowledge of the plaintiff's customers, his unrestricted access to all customer lists and information concerning those customers, and his personal contact with . . . customers, was a senior employee with a fiduciary relationship to his employer . . . [he was under an obligation] to refrain . . . from deliberately soliciting customers of the plaintiffs, other than as part of the general customer public to whom general solicitation might be made.

As in *Christie*, Osler J.'s decision in *White Oaks* does not analyse the nature of the corporate opportunity sought but simply assumes that the fiduciary cannot solicit customers generally.<sup>92</sup> In addition, the decision

<sup>89</sup> *Supra*, footnote 6.

<sup>90</sup> *Ibid.*, at pp. 160-162 (D.L.R.), 446-448 (O.R.).

<sup>91</sup> *Ibid.*, at pp. 163 (D.L.R.), 449 (O.R.).

<sup>92</sup> See also, *Tri-Associates Insurance Agency v. Douglas* (1985), 15 C.C.L.I. 61 (Ont. H.C.). Cf. *Re Berkey Photo (Canada) Ltd. v. Ohlig*, *supra*, footnote 7, where White J. concluded that even a member of "top" management could solicit customers on termination if there was no misuse of confidential information such as trade secrets or customer lists. Although White J. attempted valiantly to reconcile the case-law his synopsis, *ibid.*, at pp. 530-532, is difficult to follow and in places just wrong (e.g. his assertion that for competition by a former employee to be a breach of fiduciary duty where there is not misuse of confidential information there must be acts committed before the cessation of employment forming part of the conduct complained of). See the discussion, *infra*, at pp. 270-271.

suggests that the *creation* of a fiduciary relationship depends at least in part on the vulnerability of the business to solicitation by the departing employee. On that reasoning it is easy to see why subsequent cases, particularly those involving small corporations, have imposed fiduciary obligations on employees who could not in any way be considered part of the larger corporate decision making process.

The more notable cases in this area include *E.J. Personnel Services Inc. v. Quality Personnel Inc.*,<sup>93</sup> where the court held that a part-time salesperson whose duties were mainly of a clerical nature was a fiduciary, and *Hudson's Bay Co. v. McClocklin*,<sup>94</sup> where fiduciary obligations were imposed on the manager of a department store's hearing-aid department. Similarly, in *Monarch Messenger Services Ltd. v. Houlding*,<sup>95</sup> the court appears to have imposed fiduciary obligations on a messenger for a courier service, although the decision is premised upon a breach of duty of confidence. And in *DeMarco Agencies Ltd. v. Merlo*<sup>96</sup> the court concluded that a salesman for health and beauty products was a fiduciary. More recently, in the 1987 decision in *Engineered Sound Systems Ltd. v. Dattel Ltd.*,<sup>97</sup> fiduciary obligations were imposed on a mere salesman who played a minimal role in corporate decision-making. In all of these cases the vulnerability of the employer's customer base to attack appears to have impelled the finding of a fiduciary relationship.

*E.J. Personnel* is clearly the most important of these cases. In an oft-cited passage,<sup>98</sup> Callaghan J. commented as follows:<sup>99</sup>

Where an employer by the nature of its business is particularly vulnerable to loss by the soliciting of that employer's clients, an employee stands in a fiduciary relationship to that employer and owes a duty to that employer to not solicit those clients after leaving the business.

No support is offered for this sweeping statement other than *Alberts*, and Callaghan J. was careful to point out that the majority of cases involved senior employees exercising managerial roles. The implication, nevertheless, is that almost any employee is potentially a fiduciary, depending on the vulnerability of the employer's customer base to attack. Not only is this a considerable extension of *Canaero*, it also makes inroads on the well-

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<sup>93</sup> (1985), 6 C.P.R. (3d) 173 (Ont. H.C.).

<sup>94</sup> *Supra*, footnote 5.

<sup>95</sup> *Supra*, footnote 4.

<sup>96</sup> (1984), 142 A.P.R. 227, 48 Nfld. & P.E.I.R. 227 (Nfld. D.C.).

<sup>97</sup> (1987), 22 C.P.C. (2d) 241 (Ont. D.C.); varied (1987), 10 W.D.C.P. 223 (Ont. H.C.). Shapiro D.C.J. concluded that the company's president discussed many policy issues with the salesman, who was taken into the company's confidence and was therefore more than just an "ordinary" salesman; see, *ibid.*, at p. 248.

<sup>98</sup> See, e.g., *Gemologists Int'l Inc. v. Gem Scan Int'l Inc.* (1986), 9 C.P.R. (3d) 255 (Ont. H.C.); *Quantum Management Services Ltd. v. Hann*, unreported decision of the Ontario High Court released April 14, 1989, referenced as, [1989] O.J. No. 542.

<sup>99</sup> *Supra*, footnote 93, at p. 176.

established common law rule that the ordinary employee is perfectly free to compete with his former employer and solicit its business.<sup>100</sup>

The dangers inherent in this reasoning are well-illustrated in the latest example of the "broad" line of authority, the decision in *Quantum Management Service Ltd. v. Hann*.<sup>101</sup> The defendant Hann was a "placement director" with a personnel placement agency and was at the most senior level in the placement division of the company, with exclusive access to individual clients. She performed however no managerial functions and was paid a salary of only \$12,500.00 base plus five per cent commissions. Nothing in the facts suggests that she occupied a senior status within the company's structure or a position of responsibility. Nevertheless, Ewaschuk J. concluded that Hann's exclusive access to customers made her the "senior employee" for those customers, and therefore subject to the same obligations at law as O'Malley and Zarzycki in *Canaero*!<sup>102</sup>

With respect to the second or "narrow" line of authorities, an early example is *Empire Stevedores (1973) Ltd. v. Sparringa*.<sup>103</sup> The defendant Sparringa had been a vice-president of the plaintiff stevedoring company, but had not been involved in the solicitation of stevedoring contracts and appears to have had no significant involvement in executive activities. After leaving the company and setting up a competing enterprise he successfully bid for a large stevedoring contract which the plaintiff had obtained from a municipality the previous year. The plaintiff applied for an interlocutory injunction restraining Sparringa and his new company from soliciting the plaintiff's actual or potential customers. In dismissing the motion, Saunders J. concluded that there was considerable doubt as to whether Sparringa was top management. In addition, the stevedoring contract in question was one which the plaintiff was seeking to obtain in the ordinary course of business and which every year it had to bid on against an unknown number of bidders. As a result, the nature of the corporate opportunity was substantially different from *Canaero*.<sup>104</sup>

In a second decision from the same period, *Tomenson Saunders Whitehead Ltd. v. Baird*,<sup>105</sup> the defendants had been account executives of the plaintiff insurance broker, one of whom had been given the designation "vice-president", although it was clear that this was a courtesy title only. The two left the plaintiff to start a competing business and appear to have taken great pains to ensure that no customers had any idea of their plans prior to their resignation. As in *Alberts*, the evidence suggested that the employer's business was particularly vulnerable to solicitation by ex-

<sup>100</sup> See the discussion, *supra*, footnote 4.

<sup>101</sup> *Supra*, footnote 98.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Supra*, footnote 67.

<sup>104</sup> *Ibid.*, at pp. 611-612, 614-615.

<sup>105</sup> (1980), 7 C.C.E.L. 176 (Ont. H.C.).

employees as a result of the marketing methods it employed, which emphasized the personal relationship between one account executive and the customer. Nevertheless, although Keith J. quoted extensively from *Alberts*, it is clear that he disagreed with that part of the decision focusing on the vulnerability of the customer base, holding instead that the plaintiff must be taken to have accepted the risk of solicitation. In addition, Keith J. concluded that the defendants were not top management, but rather simply salesmen, and as such not subject to fiduciary obligations.<sup>106</sup>

A thoughtful analysis of the factors to be considered in determining whether an employee can be characterized a fiduciary is found in *Mercury Marine Limited v. Dillon*.<sup>107</sup> The defendant Dillon had been regional sales manager of the plaintiff's Winnipeg distribution centre, which distributed the plaintiff's products across a number of provinces. Dillon had amassed considerable information about the plaintiff's marketing strategy across this territory, although he did not appear to have an intimate personal relationship with the plaintiff's dealer customers.<sup>108</sup> What appeared to influence Henry J. in his decision that the plaintiff had not established a strong *prima facie* case on this point sufficient to permit the granting of interlocutory relief was the role played by the defendant Dillon in corporate decision-making.<sup>109</sup>

On the evidence before me, Dillon, while having important responsibilities, was not part of senior management in the present context. He was one of some 15 regional managers and his responsibility was sales. He was not one of the policy-making group—he was accountable to and reported to that group at headquarters where company policy decisions were made. His role was to analyze performance of the company in his region and recommend improvements as well as to forecast future sales and future prospects of the competitors. . . . I think it a strong probability that, subject to further evidence at trial, he would not be found to be in the class of persons who owe a fiduciary duty to the plaintiff as his employer. At most his position is borderline.

Another significant recent decision focusing on the role played by the employee in the organization's decision-making process is *Dialadex Communications Inc. v. Crammond*.<sup>110</sup> The defendant Crammond had been the manager of the advertising sales department of the plaintiff, which produced a directory of telex users similar to a telephone book. Her responsibilities were "considerable" and included supervision of approximately twenty-five employees and participation in a corporate management committee. Crammond had left the company to set up her own business, and planned to produce a telefacsimile directory, an idea the plaintiff had

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<sup>106</sup> *Ibid.*, at pp. 180-184, 185-189.

<sup>107</sup> (1986), 11 C.P.C. (2d) 235 (Ont. H.C.).

<sup>108</sup> *Ibid.*, at pp. 239-240.

<sup>109</sup> *Ibid.*, at pp. 240-241, and see also, *EM Plastics & Electrical Products Ltd. v. Alliance Solar Supply Inc.* (1988), 23 C.P.R. (3d) 55 (Ont. H.C.), adopting the reasoning employed in *Mercury Marine*.

<sup>110</sup> (1987), 34 D.L.R. (4th) 392, 57 O.R. (2d) 746 (Ont. H.C.).

been considering. It does not appear, however, that she proposed to solicit the plaintiff's customers directly.<sup>111</sup>

Potts J. concluded first that the nature of the corporate opportunity was far from that considered in *Canaero*. Here, the plaintiff had taken no active steps to pursue the telefacsimile directory idea and the market already contained a competing directory. In addition, Crammond did not leave Dialadex to pursue the opportunity and did not develop the idea until some months afterwards. Potts J. concluded: "[t]he 'opportunity' in question was far from 'ripe' and its nature much less specific than the opportunity taken by O'Malley in *Canaero*."<sup>112</sup> Second, and perhaps more important, Crammond was not a fiduciary. Returning to *Canaero* and Laskin J.'s remarks regarding officials exercising a degree of control above day-to-day accountability, Potts J. was unable to conclude Crammond came within that category.<sup>113</sup>

Even giving the facts a reading in favour of the plaintiff far beyond what I believe they deserve, Ms. Crammond held no such responsibility. Her decisions concerning her own department were ultimately supervised by two levels above her and by the management committee on which she sat. The minutes of the meeting of that committee, provided by the plaintiff in its supporting affidavit, showed that considerable portions of the decision-making power of the executive rested with the president and general managers and not with the committee itself. Even if I am wrong in this interpretation, decisions were made by the committee as a whole and not by Ms. Crammond. She was very much accountable not only to her superiors but to that committee.

A final, very recent decision adopting the narrow view of *Canaero* is that of Southey J. in *R.W. Hamilton Ltd. v. Aeroquip Corp.*<sup>114</sup> Here the judgment stressed that *Canaero* should not be applied "willy nilly" in cases in which means far less disruptive of freedom to pursue economic activity existed to enforce the rights of victims of allegedly reprehensible behaviour (for example, a non-competition clause).<sup>115</sup> Southey J. also pointed to the distinction between an agent and an employee made in *Canaero*. In his view an officer or manager could not be "saddled" with a fiduciary duty unless "... the position he occupies contains the power and the ability to direct and guide the affairs of the company". In all cases in which a fiduciary obligation was imposed, "the transgressor clearly applied a directing hand to the business".<sup>116</sup>

In determining that the employee in question (a customer service manager carrying on limited managerial functions) was not subject to

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<sup>111</sup> *Ibid.*, at pp. 393-395 (D.L.R.), 748-750 (O.R.).

<sup>112</sup> *Ibid.*, at pp. 398 (D.L.R.), 753 (O.R.).

<sup>113</sup> *Ibid.*, at pp. 402 (D.L.R.), 756 (O.R.).

<sup>114</sup> *Supra*, footnote 9.

<sup>115</sup> *Ibid.*, at p. 350.

<sup>116</sup> *Ibid.*, at pp. 350-351. The merits of a distinction based on agency are discussed, *infra*, at pp. 265-266.

fiduciary obligations, Southey J. concluded in part as follows:<sup>117</sup>

In my view, the approach of the courts has struck a balance between the need for compelling persons who occupy such high positions in the business or corporate worlds that the law should prevent the few who could easily succumb to the temptation of serving two masters from so doing, and freedom of trade. They should be made to conform to a high standard of ethical behaviour even if by doing so the courts may appear to be encroaching upon the requirements of freedom of trade. Not all managerial positions should lead to the imposition of the very high duty of a trustee less the law commit a high proportion of employees in this province to slavery.

To conclude, what we have seen in these two lines of authorities is a fundamental difference on the application of the principles of *Canaero* to the departing employee. The result has been, as noted by Downard, to leave the law "rudderless",<sup>118</sup> making it virtually impossible to predict whether a given set of facts will lead to a judicial finding that a fiduciary relationship exists or how far its obligations extend. This is particularly disturbing because of the resort by many employers to the remedy of the interlocutory injunction, which requires in most cases only a finding of a "serious issue to be tried".<sup>119</sup> Given that the outcome of an interlocutory injunction often concludes a lawsuit, the law relating to departing employees is beginning to resemble a game of judicial roulette, with none of the participants having any idea of which chamber is loaded.

In attempting to find a way out of this judicial morass, the first question to be answered is one of principle: when *should* a fiduciary obligation be imposed on a departing employee? The answer requires consideration of a more general thesis of the fiduciary obligation, as well as the decision in *Canaero* itself. It will also require recognition of the competing principle so well-enunciated in *Aeroquip* of the employee's right to earn a living.

## II. Identification of the Fiduciary

### A. Examining the Underlying Principles

It is common for our courts to refuse to define a fiduciary relationship or limit its scope, on the basis that such a broad equitable doctrine must be allowed to evolve naturally as circumstances warrant. In *Lloyds Bank Ltd. v. Bundy*,<sup>120</sup> for example, Sachs L.J. warned that such a relationship must not be circumscribed by reference to defined limits. Everything depended on the particular facts of the case; it was "neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line ... where a relationship that does not entail that

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<sup>117</sup> *Ibid.*, at p. 353.

<sup>118</sup> *Loc. cit.*, footnote 81, at p. 362.

<sup>119</sup> See, *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 80 D.L.R. (3d) 725, 17 O.R. (2d) 505 (Ont. Div. Ct.).

<sup>120</sup> [1975] Q.B. 325, [1974] 3 All E.R. 757 (C.A.).

[fiduciary] duty passes into one that does . . .".<sup>121</sup> In similar fashion, Dickson C.J.C. noted in *Guerin v. The Queen*<sup>122</sup> that it was the nature of the relationship, not the category of actor, which gave rise to fiduciary duties, and repeated the opinion often expressed in the case-law that the categories of cases in which fiduciary obligations arose should not be considered closed.

All that said, however, the law requires at least a working hypothesis to guide its evolution. In his classic article, *The Fiduciary Obligation*, E.J. Weinrib<sup>123</sup> has identified the hallmark of a fiduciary relation as being one where "the relative legal positions are such that one party is at the mercy of the other's discretion". The fiduciary obligation, according to Weinrib, is the law's "blunt tool" for the control of discretion:<sup>124</sup>

The wide leeway afforded to the fiduciary to affect the legal position of the principal in effect puts the latter at the mercy of the former, and necessitates the existence of a legal device which will induce the fiduciary to use his power beneficently.

The imposition of such a high standard on the fiduciary is obviously meant to act as a general deterrent; it then follows that the *bona fides* of the fiduciary in a particular case is irrelevant. As Weinrib comments, the operation of the fiduciary principle "circumvents the need for inquiring into the good faith of the agent's behaviour by concentrating on the *possibility* that delegated discretion may be influenced by consideration of personal advantage".<sup>125</sup> A critical element, moreover, in this analysis is the scope of the discretion exercised, and Weinrib urges that this be closely examined:<sup>126</sup>

. . . the existence and extent of the fiduciary obligation is itself co-extensive with the scope of the discretion that can be exercised. What is crucial is the ambit of the discretion not the capacity of the profiteer. Once the former is determined so that the conduct of the supposed fiduciary either falls within it or stands outside it, the latter becomes superfluous.

Recently this categorization of the fiduciary relationship has been criticized on the basis that not all fiduciaries exercise a discretion.<sup>127</sup> For example, the classic illustration of the errand boy bound to bring back the change is one where the task has rigidly defined limits, as is the case of an express trust, and there are other examples, such as the "bank manager" cases, where there is no discretion to act in a recognized sense, but rather

<sup>121</sup> *Ibid.*, at pp. 341 (Q.B.), 767 (All E.R.).

<sup>122</sup> *Supra*, footnote 2, at pp. 384-385 (S.C.R.), 341 (D.L.R.), referring to *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385, at p. 392, [1972] 1 O.R. 465, at p. 472 (Ont. C.A.), per Arnup J.A.

<sup>123</sup> *Loc. cit.*, footnote 40, at p. 7.

<sup>124</sup> *Ibid.*, at pp. 4-5.

<sup>125</sup> *Ibid.* (Emphasis added).

<sup>126</sup> *Ibid.*, at p. 9.

<sup>127</sup> See, for example, J.R. Gautreau, *Demystifying the Fiduciary Mystique* (1989), 68 Can. Bar Rev. 1.

a role involving the giving of advice and guidance.<sup>128</sup> This has led to a more elaborate formulation of the relationship based on the existence of a power or discretion, most recently expressed by J.R. Gautreau as follows:<sup>129</sup>

A fiduciary relationship will occur where a person undertakes, either expressly or by implication, to act in relation to a matter in the interests of another, in a manner that is defined or understood by them, and is entrusted with a power to affect such interests.

The difficulty with this formulation is that it is over-broad, and potentially applies to almost any type of relationship. The errand boy is an excellent example: if he does not come back with our change, do we really need to unfold the full panoply of equitable remedies available against the fiduciary who abuses his position?<sup>130</sup> Surely this cheapens the fiduciary relationship to the point where it becomes a catch-all remedy for any sort of purported injustice, regardless of the real relationship between the parties. The focus on discretion, on the other hand, limits the creation of such a relationship to those cases where there is a scope for the exercise of independent judgment.

Gautreau and others are also too dismissive of the uses to which the word "discretion" can be put. In the bank manager cases, for example, while there is no discretion given to act in a legal sense there is certainly a discretion in the sense of an independent judgment being relied upon.

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<sup>128</sup> The former example is taken from *Re Coombs; Coombs v. Coombs*, [1911] 1 Ch. 723, at p. 728 (C.A.), per Fletcher Moulton L.J.; the latter two are from Gautreau, *loc. cit.*, footnote 127, at p. 4.

<sup>129</sup> *Ibid.*, at p. 7. Since this article was written, the Supreme Court of Canada has released its decision in *LAC Minerals*, *supra*, footnote 2. In that decision, the judgments of both Sopinka and La Forest J.J. adopted the following passage from the judgment of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136, (1987), 42 D.L.R. (4th) 81, at p. 99, outlining the essential characteristics of a fiduciary relationship:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

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

Where the two judgments differed, however, was on the emphasis to be placed on the last factor, Sopinka J. concluding that it was indispensable (and not present on the facts of the case), La Forest J. concluding that it was a relevant, but not necessary characteristic. See, *ibid.*, Sopinka J., at pp. 599-600 (S.C.R.), 63 (D.L.R.), and La Forest J., at pp. 662-663 (S.C.R.), 39-40 (D.L.R.).

<sup>130</sup> In *LAC Minerals*, Sopinka J. appears to have been of the same view, suggesting for example that "Equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords"; *ibid.*, at pp. 596 (S.C.R.), 61 (D.L.R.). His judgment attempts to do so by focusing on the element of "vulnerability" and establishing that it was not present on the facts in what he considered to be an arm's length commercial transaction.



Similarly, in the case of an express trust the trust deed is unlikely to provide for all eventualities and a scope for independent judgment will always exist. It can be argued, then, that discretion in the sense of an independent judgment which can affect the position of the principal is at the heart of almost all fiduciary relationships.

Moreover, in a persuasive argument Weinrib suggests that there is another principle at work in this area of the law, what he calls the "secondary" or "penumbral" principle of protection of the integrity of commercial organizations or the principal's "mechanism of commerce".<sup>131</sup> Weinrib gives as an example *Pre-Cam Exploration and Development Ltd. v. McTavish*,<sup>132</sup> where an employee of a mining engineering firm retained by the plaintiff to take magnetometer readings of lands it had staked took the required readings, but during the process came to realize that adjoining land contained mineral deposits and quit his firm to stake it for himself. In *Pre-Cam* the discretion was conferred within a narrow scope and the defendant did exactly what he was paid to do. Nevertheless, he was held liable to account to the plaintiff for his profits. Although the purported rationale for the decision was the plaintiff's use of confidential information, its real basis appears to have been the fact that the claims had been staked as a result of an activity undertaken on behalf of the plaintiff. "In effect the employee was an element in the plaintiff's commercial apparatus, and to the extent that the court intervenes it safeguards the integrity of the plaintiff's business structure."<sup>133</sup>

Weinrib offers other examples of cases where the courts have gone beyond the control of discretion to protect the integrity of the business relationship, for example in dealing with third parties offering a bribe to an agent; the decision of La Forest J. in *LAC Minerals Ltd. v. International Corona Ltd.*<sup>134</sup> provides a more recent illustration. It can also be argued that this analysis offers a conceptual basis for the golden rules of conflict and profit which run through the case-law: the conflict rule points to the untainted manner in which the fiduciary must exercise his discretion, and the profit rule is the verbal formula through which the principal's business structure is protected. The former can be categorized as the core of the fiduciary obligation, with the latter occupying a penumbral position.<sup>135</sup>

It is of course obvious that the secondary or penumbral policy of protection of the business enterprise is the dominant motivating factor in the departing employee cases. Clearly this accounts for the tendency in many of the decisions to go beyond *Canaero's* emphasis on corporate

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<sup>131</sup> *Loc. cit.*, footnote 40, at pp. 9-15.

<sup>132</sup> [1966] S.C.R. 551, (1966), 57 D.L.R. (2d) 557.

<sup>133</sup> Weinrib, *loc. cit.*, footnote 40, at p. 11.

<sup>134</sup> *Supra*, footnote 2.

<sup>135</sup> Weinrib, *loc. cit.*, footnote 40, at pp. 13-16.

opportunity to enjoin solicitation in general. More importantly, it accounts for the focus on the vulnerability of the employer's customer base to attack, and the resulting willingness to lower the standard applied in *Canaero* to employees much further down the corporate hierarchy.

It is also here that we find the explanation for the concern which permeates a number of the most recent decisions that the law in this area is developing in such a way as to fetter an employee's right to earn a living. As Weinrib points out, the safeguarding of the principal's commercial structure interacts with a competing policy, the need to provide economic incentive in the market place. "Here the courts must navigate a delicate course between the encouragement of co-operative mechanisms of business enterprise and the encouragement of profit-making by individual entrepreneurs."<sup>136</sup> Economic incentive in this context means the ability or right of an employee to earn a living where he can, a concept which our courts have traditionally treasured. It is these two competing policy goals which meet head on in the departing employee cases.

#### B. *The Contrast with Faccenda Chicken and other modern English cases*

The concept that an employee has a right to earn a living is certainly not foreign to our law. Relatively recently the Supreme Court of Canada reaffirmed the long-existing common law rule holding that covenants restraining post-employment competition are *prima facie* void as against public policy.<sup>137</sup> At least part of the rationale for this rule is the necessity to encourage economic efficiency through mobility of the work force. From the employee's perspective, the ability or right to earn a living has been placed recently on a constitutional dimension with the inclusion of mobility rights in the Charter of Rights and Freedoms.<sup>138</sup>

At the same time, one of the most striking features of the development of Canadian law regarding departing employees since *Canaero* has been the extent to which our courts have appeared to have abandoned this principle. On the facts of *Canaero*, of course, there was no need for recognition of such a concept: the theft of a maturing corporate opportunity could not by any conceivable means be justified by concerns about promoting an employee's right to make a living. In *Alberts* and the cases which follow it, on the other hand, such considerations immediately come to mind—will an employee ever feel free to leave his employer to start his own business if he cannot take with him the benefit of all the personal relationships with customers he has spent his years with the company building up?

It is fascinating to contrast *Alberts* and subsequent Canadian decisions with the approach taken by the English courts in recent years in this area.

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<sup>136</sup> *Ibid.*, at p. 18.

<sup>137</sup> *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, (1978), 83 D.L.R. (3d) 1.

<sup>138</sup> Constitution Act, 1982 (U.K.), Part 1.

The English law has developed considerably since *Robb v. Green*,<sup>139</sup> although it has completely ignored the burgeoning fiduciary doctrine of Canadian law in favour of an approach which emphasizes the extent of the duty of fidelity implied in the contract of employment.

It will be remembered that in the nineteenth century cases the basis for the finding regarding solicitation of customers and the use of customers lists was, alternatively, implied contract, breach of trust, or a wider equitable principle.<sup>140</sup> The twentieth century found the English courts inclined more and more to implied contract. In the leading case of *Wessex Dairies Ltd. v. Smith*,<sup>141</sup> where a dairyman spoke to customers in the last days of his employment to ask them to transfer their business to him in future, the Court of Appeal had little difficulty in holding that the employee had breached the implied term of his contract of employment that he would serve his master with good faith and fidelity. A similar finding was made in *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.*,<sup>142</sup> where the Court of Appeal concluded that it was a *prima facie* breach of contract for the respondents to work during their spare time for a competitor, even in circumstances where confidential information was not being misused.

It may be objected here that the "rather vague duty"<sup>143</sup> of good faith and fidelity imposed upon an employee is similar in nature if not in degree to that imposed on fiduciaries generally. This appears to be the view taken by P.D. Finn,<sup>144</sup> who points out that at the time of the fusion of equity and law there was a desire on the part of some judges, and particularly Bowen L.J. (who sat on *Helmores v. Smith*<sup>145</sup> and *Lamb v. Evans*<sup>146</sup>) to mirror in the common law through the medium of implied contract the obligations imposed by equity upon persons in fiduciary capacities. Finn goes further and suggests that at least with respect to the duty of confidence the extent of the ex-employee's obligations remain the same whether general equitable principles are relied upon or the device of implied contract.

Although these observations have much merit, the device of implied contract, whether an illegitimate equitable offspring or not, is firmly embedded in English jurisprudence on the subject.<sup>147</sup> Moreover, it has led to two significant differences from the obligations relating to fiduciaries.

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<sup>139</sup> *Supra*, footnote 13.

<sup>140</sup> *Supra*, footnote 4.

<sup>141</sup> *Supra*, footnote 14.

<sup>142</sup> [1946] Ch. 169, [1946] 1 All E.R. 350 (C.A.).

<sup>143</sup> *Ibid.*, per Lord Greene, at pp. 174 (Ch.), 353 (All E.R.).

<sup>144</sup> P.D. Finn, *Fiduciary Obligations* (1977), pp. 132-135.

<sup>145</sup> *Supra*, footnote 12.

<sup>146</sup> *Supra*, footnote 16.

<sup>147</sup> See, for example, the comments on this point in *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 10, at pp. 135 (Ch.), 625 (All E.R.).

First, the emphasis on contract has logically meant that the obligation ceases upon termination of the contract, unless there can be implied into the contract itself a term which survives discharge. Second, the implied term connotes, at least in theory, consideration of what the parties' expectations were at the time the contract was entered into; in the law of fiduciaries, on the other hand, such considerations are generally considered irrelevant. Consideration of expectations leads inevitably to a weighing of the employer's interest in confidential information against the employee's interest in unrestrained mobility of his labour.

The expectations of the parties played a large role in *Printers & Finishers Ltd. v. Holloway*,<sup>148</sup> where for the first time the English courts had to consider directly the extent to which information not committed to paper could be utilized by an employee after resignation. The plaintiffs carried on a flock printing operation, and the evidence was that while their plant was peculiar to them and could not be bought on the open market, flock printing involved a number of steps which must be taken by any such printer and one could buy on the market a complete plant containing those steps. The plaintiffs sought an injunction which, *inter alia*, would have restrained the defendant from making any use of or disclosing any information regarding the process of operating their plant and machinery.<sup>149</sup>

In his judgment, Cross J. began by suggesting that the mere fact that confidential information was not embodied in a document but carried by the employee in his head should not be a reason against granting an injunction. If the information in question could be regarded as a "separate part" of the employee's "stock of knowledge", which the ordinary man would recognize "to be the property of his old employer and not his own to do as he likes with", an injunction would lie.<sup>150</sup> This case however went far beyond that, because the injunction sought would have had the effect of preventing the employee from using for the benefit of his new employer anything peculiar to the plaintiff's operations. Cross J. clearly recognized the fetters this would place on the departing employee, stating that it would put him in "an impossible position".<sup>151</sup> He concluded therefore that such relief could not be granted:<sup>152</sup>

Recalling matters of this sort is, to my mind, quite unlike memorizing a formula or list of customers or what was said (obviously in confidence) at a particular meeting. The employee might well not realize that the feature or expedient in question was in fact peculiar to his late employer's process and factory; but even if he did such knowledge is not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant, and I do not think that any man of average intelligence and honesty would think that there was

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<sup>148</sup> *Supra*, footnote 26.

<sup>149</sup> *Ibid.*, at pp. 734-735 (All E.R.).

<sup>150</sup> *Ibid.*, at pp. 5 (W.L.R.), 735 (All E.R.).

<sup>151</sup> *Ibid.*, at pp. 5 (W.L.R.), 736 (All E.R.).

<sup>152</sup> *Ibid.*, at pp. 6 (W.L.R.), 736 (All E.R.).

anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer. The law will defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary man.

Subsequently, in *United Sterling Corp. v. Felton*,<sup>153</sup> Brightman J. restated the principles applied in *Holloway* in the language of implied contract. In his view there was a clear distinction between the obligation of fidelity incumbent on an employee during his employment and the more restrictive obligation owed by the ex-employee. Absent a restrictive covenant, the ex-employee's only obligations might be not to make use of or to disclose information imparted in confidence by his employer.<sup>154</sup> According to Brightman J. it really made no difference whether such an obligation was properly based on an implied term of the contract of employment or on principles of equity independent of contract.<sup>155</sup>

There is no fundamental impossibility, as it seems to me, in implying in a contract of employment, in suitable circumstances, an obligation on the employee not to abuse, after his employment has ended, confidences imparted during the course of his employment. If the circumstances are such that such a contractual obligation ought to be implied, I do not see any logical reason why the obligation should differ from that which equity would impose on general equitable principles.

Although on its facts *Holloway* dealt with a different issue, it raised the question of whether in some circumstances confidential information to be regarded as the property of the employer could include names, addresses and information regarding customers. In addition, *Holloway* was decided at a time when the equitable duty of confidence had re-emerged as a distinct cause of action in English law.<sup>156</sup> The stage seemed set, therefore, for an argument that the law as far back as *Robb v. Green*<sup>157</sup> should be reinterpreted to hold that information of any kind whatsoever regarding an employer's customers possessed by a departing employee, whether oral or written, should be considered confidential and not to be used.

A similar argument was in fact advanced in *Faccenda Chicken Ltd. v. Fowler*.<sup>158</sup> The facts in *Faccenda Chicken* will immediately appear familiar to anyone who has studied the Canadian cases. The plaintiff carried on a business of breeding, raising, slaughtering and selling chickens and had hired the defendant Fowler some years before as sales manager. Over the years Fowler had built up a substantial sales operation in which itinerant refrigerated vans would offer daily fresh chickens to butchers, supermarkets

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<sup>153</sup> [1974] R.P.C. 162 (Ch. D.).

<sup>154</sup> *Ibid.*, at pp. 166-167.

<sup>155</sup> *Ibid.*, at p. 167.

<sup>156</sup> See, for example, *Cranleigh Precision Engineering Ltd. v. Bryant*, [1965] 1 W.L.R. 1293, [1964] 3 All E.R. 283 (Q.B.D.); *Saltsman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), [1963] 3 All E.R. 413n (C.A.).

<sup>157</sup> *Supra*, footnote 13.

<sup>158</sup> *Supra*, footnote 10.

and catering establishments within certain defined areas. Customers put in standing weekly orders but were permitted to depart from them depending on their needs.<sup>159</sup>

Late in 1980 Fowler was arrested on a charge of stealing some of the company's chickens (he was later acquitted). He immediately resigned his employment and approximately six months later he started his own business of selling fresh chickens from refrigerated vehicles in the same area, with the help of a number of other employees who had left the plaintiff to join him. The new business was subsequently extremely successful in attracting customers, and the plaintiff's business plummeted correspondingly. Faccenda Chicken thereupon sued Fowler, his company and the other employees; its claims were dismissed at trial and subsequently were appealed to a panel of the Court of Appeal consisting of Kerr, Neill and Nourse L.J.J. The plaintiff's case throughout was that Fowler and the other defendants had wrongfully made use of confidential "sales information" acquired while in the employment of the plaintiff and said to include names and addresses of customers, most convenient routes to be taken to reach customers, the usual requirements of customers, time of deliveries and prices.<sup>160</sup>

In giving the judgment of the court Neill L.J. began by re-emphasizing that where a contract of employment existed the obligations of the parties were to be determined according to that contract. Absent any express terms, the obligations of the employee with respect to use and disclosure of information were the subject of implied terms. During employment those obligations were included in the implied term imposing a duty of good faith and fidelity. Although Neill L.J. did not feel it necessary to expand on the limits of that duty, he noted that "the duty of good faith will be broken if the employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorizes such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer . . .".<sup>161</sup>

According to Neill L.J., the implied term imposing an obligation on the employee after employment ended was "more restricted in its scope".<sup>162</sup> It included at least an obligation not to disclose information such as secret processes or designs or methods of construction and other information

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<sup>159</sup> *Ibid.*, at pp. 128-129 (Ch.), 620 (All E.R.).

<sup>160</sup> *Ibid.*, at pp. 129-133 (Ch.), 620-623 (All E.R.).

<sup>161</sup> *Ibid.*, at pp. 136 (Ch.), 625 (All E.R.). Although *Wessex Dairies Ltd. v. Smith*, *supra*, footnote 14, and *Robb v. Green*, *supra*, footnote 13, were cited in support of this proposition, as noted earlier, the earliest English case to conclude that deliberate memorization of names was forbidden was the 1964 decision in *Printers and Finishers Ltd. v. Holloway*, *supra*, footnote 26; see the discussion *supra*, at footnote 6.

<sup>162</sup> *Ibid.*

"of a sufficiently high degree of confidentiality as to amount to a trade secret".<sup>163</sup> It did not, however, extend to all information acquired by the employee during employment, and in particular did not cover "... information which is only 'confidential' in the sense that an unauthorized disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith".<sup>164</sup>

How then to determine whether a particular piece of information fell within the implied term so as to prevent its use or disclosure after termination of employment? According to Neill L.J. a number of factors had to be considered. First, the nature of the employment, and particularly the degree to which the employee was exposed to confidential information and could be expected to understand its sensitive nature. Second, the nature of the information itself: "In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*".<sup>165</sup> Third, whether the employer impressed on the employee the confidentiality of the information. Fourth, whether the relevant information could be isolated easily from other information the employee was free to use.<sup>166</sup>

Neill L.J. then proceeded to state a *caveat* to the ruling and in so doing revealed what appears to have been the motivating force behind the decision, namely a concern that employees be free to earn their living without restrictions.<sup>167</sup>

These then are the principles of law which we consider to be applicable to a case such as the present one. We would wish to leave open, however, for further examination on some other occasion the question whether additional protection should

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.* To support this last observation Neill L.J. quoted, *ibid.*, at pp. 136 (Ch.), 626 (All E.R.), an observation made by Cross J. in a note to *Printers and Finishers Ltd. v. Holloway* (*supra*, footnote 14, at p. 738 (All E.R.)):

In this connexion one must bear in mind that not all information which is given to a servant in confidence and which it would be a breach of his duty for him to disclose to another person during his employment is a trade secret which he can be prevented from using for his own advantage after the employment is over, even though he has entered into no express covenant with respect to the matter in hand. For example, the printing instructions were handed to [the first defendant] to be used by him during his employment exclusively for the plaintiffs' benefit. It would have been a breach of duty on his part to divulge any of the contents to a stranger while he was employed, but many of these instructions are not really "trade secrets" at all. [The first defendant] was not, indeed, entitled to take a copy of the instructions away with him; but in so far as the instructions cannot be called "trade secrets" and he carried them in his head, he is entitled to use them for his own benefit or for the benefit of any future employer.

<sup>165</sup> *Ibid.*, at pp. 137 (Ch.), 626 (All E.R.).

<sup>166</sup> *Ibid.*, at pp. 138 (Ch.), 627 (All E.R.).

<sup>167</sup> *Ibid.*, at pp. 138-139 (Ch.), 627 (All E.R.).

be afforded to an employer where the former employee is not seeking to earn his living by making use of the body of skill, knowledge and experience which he has acquired in the course of his career, but is merely selling to a third party information which he acquired in confidence in the course of his former employment.

Given the principles outlined above, the eventual outcome of the case is unsurprising. Neill L.J. noted that the "sales information" contained some material the plaintiff conceded was not confidential if looked at in isolation. The information about prices, which it was argued was clearly confidential, could not easily be severed from the rest of the package. Nor was any of the sales information something which could be regarded as "plainly secret or sensitive", although Neill L.J. acknowledged its worth to the company. In addition, the sales information was not restricted to senior officers but was quite widely known amongst van drivers and secretaries. Finally, none of the staff had ever been told any of this information was confidential. The defendants accordingly were not bound from using the information after their employment ended and the appeal was dismissed.<sup>168</sup>

A number of observations may be made about the decision in *Faccenda Chicken*. First, the Court of Appeal clearly rejected the argument that the law of confidence relating to employees was merely part of the general law of confidence, and that the scope of the duty imposed by the implied term was coextensive with the obligations which equity would impose in the absence of contract. In *Saltsman Engineering Co. Ltd. v. Campbell Engineering Co.*,<sup>169</sup> for example, Lord Greene had referred to confidential information in the broad sense of having "... the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge". The duty imposed by *Faccenda Chicken* on the departing employee, on the other hand, only applies to "trade secrets or their equivalents".

Second, it is clear that only in an exceptional case could solicitation of the former employer's customers ever breach the obligations imposed on an employee after termination. Although the court clearly contemplated that in certain circumstances information regarding prices could have the requisite degree of confidence, it is difficult to see when information regarding names and addresses alone of customers could do so. Moreover, it is difficult to see when such information could be regarded as "easily isolated" from other information the employee was free to use. The court emphasized that the "sales information", for example, was necessarily acquired by the salesmen to do their work and could quickly be committed to memory;<sup>170</sup> the same would arguably hold true for the more limited category of names and addresses of customers.

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<sup>168</sup> *Ibid.*, at pp. 139-140 (Ch.), 627-629 (All E.R.).

<sup>169</sup> *Supra*, footnote 156, at p. 415.

<sup>170</sup> *Supra*, footnote 10, at pp. 140 (Ch.), 628 (All E.R.).



A third observation is the obvious one that the result in *Faccenda Chicken* is a dramatic departure from current Canadian law.<sup>171</sup> On the reasoning employed in *Alberts v. Mountjoy*<sup>172</sup> and the "broad" line of authority discussed earlier Fowler certainly would have been held to be a fiduciary, on the basis of the vulnerability of the *Faccenda Chicken* business to attack by him, and the other employees would have been held to the same obligation in law as a result of having joined him. *Faccenda Chicken*'s action for breach of fiduciary duty would have succeeded, and on the facts, a Canadian court likely would have awarded injunctive relief before trial. The difference in outlook appears to result from the greater emphasis placed in the English law on the right of the employee to "seek to earn his living by making use of the body of skill, knowledge and experience"<sup>173</sup> which he acquires during the course of his career. As will be argued below, it appears to be time that this factor was given more weight in Canadian law.

### C. A Proposal for Identification of the Fiduciary Departing Employee

Although it is certainly true that the categories of fiduciary relationships are never closed, the courts and the bar cannot work in a vacuum, and to refuse to articulate principles which can be applied in a more or less predictable manner to a given set of circumstances is, with all due respect to the comments of Sachs L.J. in *Lloyds Bank Ltd. v. Bundy*<sup>174</sup> to the contrary, irresponsible. The vague, uncertain "top management" standard used up to now in Canadian cases is unsatisfactory, and has led to the wide chasm which separates the two lines of authorities discussed earlier. A new standard is desperately needed.

In attempting to articulate that standard, however, it is worth recognizing that little help can be gained from *Canaero* itself, aside from the obvious conclusion that the court considered certain senior officers of a corporation to owe fiduciary obligations to the corporation similar to those owed by directors. As indicated earlier, *Canaero* is primarily a corporate opportunity case, and the conclusion that O'Malley and Zarnycki were fiduciaries took up little space in the judgment. True, Laskin J. did refer to the "apt" distinction between agents and servants, pointing out that the responsibilities of the two defendants as senior officers were far removed from "the obedient role of servants".<sup>175</sup> This, however, does not

<sup>171</sup> This point has not been made in the few Canadian cases to refer to *Faccenda Chicken* up to now, presumably because the case does not purport to deal with the obligations of a fiduciary; see, for example, *Cline v. Don Watt & Associates Ltd.* (1986), 15 C.C.E.L. 181 (Ont. D. Ct.); *Coin-A-Matic (Pacific) Ltd. v. Saibil* (1986), 13 C.C.E.L. 59 (B.C.S.C.) where *Faccenda Chicken* is referred to briefly.

<sup>172</sup> *Supra*, footnote 3.

<sup>173</sup> *Faccenda Chicken*, *supra*, footnote 10, at pp. 139 (Ch.), 627 (All E.R.).

<sup>174</sup> *Supra*, footnote 120.

<sup>175</sup> *Supra*, footnote 1, at pp. 606 (S.C.R.), 381 (D.L.R.).

provide much of a guide: an employee can be both servant and agent at the same time, and the scope of the discretion granted to an agent can vary widely.<sup>176</sup>

This is not to say that *Canaero* is completely silent on the issue. The emphasis on "senior" or "top" management suggests that the court would have been somewhat surprised (to say the least) to find its reasoning applied to a hearing-aid salesman. Indeed, it can be suggested fairly that the types of corporate officers Laskin J. had in mind were those at the highest levels. For example, in speaking of the "strict ethic" prescribed in this area of the law Laskin J. stated:<sup>177</sup>

Strict application against directors and seniors management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings.

The emphasis here on control suggests that Laskin J. would not have been uncomfortable with Weinrib's conclusion that it is the scope of the discretion held which is the most important factor in determining a fiduciary relationship.<sup>178</sup>

When we go beyond *Canaero*, however, to examine the modern English and Canadian caselaw, other considerations come into play. In particular, the cases suggest a fundamental conflict between protection of the integrity of the business enterprise and promotion of the unfettered ability of labour, referred to by Fridman in another context as "the collective need or desire of society as a whole, the public, that men should be free to go and live as they please, not made into slaves of any degree or sort...".<sup>179</sup> As we have seen, it is the tension between these two objectives which is largely responsible for the emergence of two lines of authority since *Canaero*. Moreover, it is arguably the lack of recognition of the second objective of unrestricted mobility of labour which has led to some of the excesses in the line of cases which follow *Alberts v. Mountjoy*.<sup>180</sup>

A further consideration in attempting to formulate a new standard is that such a broad, powerful equitable tool be reserved for situations where its use is justified. Application of fiduciary principles to the departing

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<sup>176</sup> There have been attempts to utilize the distinction between agents and servants to this area; see, for example, *R.W. Hamilton Ltd. v. Aeroquip Corp.*, *supra*, footnote 9, at pp. 350-351. F.M. Reynolds, *Bowstead on Agency* (15th ed., 1985), pp. 18-19, comments that the controversy over the distinction between agent, servant and independent contractor is "somewhat sterile", pointing out that some employees have agency powers of varying degrees while others have none at all.

<sup>177</sup> *Supra*, footnote 1, at pp. 610 (S.C.R.), 384 (D.L.R.).

<sup>178</sup> *Loc. cit.*, footnote 40, at p. 9.

<sup>179</sup> G.H.L. Fridman, *The Law of Contract* (2nd ed., 1987), p. 368.

<sup>180</sup> *Supra*, footnote 3.

salesperson, just to give one example, is akin to using a sledgehammer to crack a walnut. It is neither wise nor necessary to extend the courts' equitable jurisdiction to such situations.

It is submitted then that the "top management" role be replaced by a new standard, as follows:

*The departing employee will only be subject to fiduciary obligations towards his former employer if that employee exercises a significant measure of power and control over the employer's operations.*

This standard has a number of advantages. First, it recognizes that the most important factor in identifying the fiduciary is the scope of the discretion exercised; thus, for example, it would prevent the application of fiduciary obligations to an employee who may be extremely valuable to the corporation and whose departure may leave it vulnerable to attack, but whose discretionary powers are channeled into relatively narrow confines. At the same time, this formulation is not as narrow as others which have been proposed; it includes, for example, persons who could not be seen as the "directing hand" of the business.<sup>181</sup> Such an approach is consistent with that taken in *Canaero* itself, however, and recognizes the diffusion of power in the modern corporation. It also avoids the trivialization of the fiduciary which has taken place since *Alberts*. By emphasizing that the measure of power and control exercised must be significant it would likely cut out the "key" salesperson or manager in all but the rarest cases.

Most importantly, perhaps, this formulation readdresses the imbalance between the competing policies of integrity of the business organization and an employee's right to unfettered mobility of his labour. As has been often noted in the caselaw, such a result does not leave the employer without a remedy—it can protect itself by a carefully drafted restrictive covenant.<sup>182</sup> In addition, as already discussed, the common law is not completely silent and will protect the employer to the extent that the departing employee uses written customer lists (or deliberately memorizes such a list prior to departure) or discloses trade secrets.<sup>183</sup>

Nevertheless, such a result would be to reduce the application of the "strict ethic" of the fiduciary by our courts to the highest echelons of the corporate hierarchy and would likely reduce significantly the amount of litigation in this area. The simplest justification for such a restriction of the law is the obvious one: the necessity for redressing the present

<sup>181</sup> As suggested in *R.W. Hamilton Ltd. v. Aeroquip Corp.*, *supra*, footnote 9, at p. 351.

<sup>182</sup> See, for example, *Aeroquip*, *ibid.*, at p. 350.

<sup>183</sup> *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 10, at pp. 136 (Ch.), 625 (All E.R.). It is respectfully submitted that the comments of Riddell J. in *Canada Bonded Attorney*, discussed *supra*, in the text, at footnotes 21-26, regarding persons who memorized customer lists must now be considered overruled by *Faccenda Chicken*.

imbalance between the interests of employer and employee. As Downard notes:<sup>184</sup>

... reasons of policy do not justify the extension of vague fiduciary obligations to post-employment competition. In this context the needs of the employer must be balanced against the need for a cautious approach to economic freedom, the avoidance of undue expansion of the employer's power over the employee during the life of the employment relationship, and the facilitation of economic efficiency through the freedom of employees to move to that work in which they are most productive.

### III. *The Obligations of the Departing Employee Cum Fiduciary*

Assuming then that the creation of a fiduciary relationship is limited to a relatively small group of departing employees, as suggested immediately above, what are the obligations of those employees on departure? As outlined earlier, *Canaero* did not deal with blanket solicitation of customers but rather with a particular type of ripening corporate opportunity. Moreover, as the court was careful to point out, the nature and the extent of a senior officer's fiduciary duties could not be reduced to a simple rule, but instead depended on a number of delineated factors, which it was careful to say were not exhaustive.<sup>185</sup> This has led to a consideration of a number of issues in subsequent caselaw, the most important of which are discussed immediately below. Obviously one simple answer, à la *Canaero*, is that no one factor is determinative and that every case depends on its own facts. Nevertheless, some suggested resolutions of these issues are proposed as well.

#### A. *Is the Fiduciary Prohibited from any Solicitation of Customers?*

As noted earlier, the conclusion in *Alberts v. Mountjoy*<sup>186</sup> that an insurance agency's complete customer base was a "corporate opportunity" was premised on the peculiar features of that industry, and in particular the "comparative fragility" of the relationship between the company and its client, which made its trade attachment a "vulnerable asset exposed ... particularly [to] competition from ex-employees". The "peculiarly sensitive" relationship between an insurance agency and its clientele has been adopted in a number of other cases, including a decision of the Ontario Court of Appeal.<sup>187</sup>

<sup>184</sup> *Loc. cit.*, footnote 81, at p. 376.

<sup>185</sup> *Supra*, footnote 1, at pp. 620 (S.C.R.), 689-690 (O.R.).

<sup>186</sup> *Supra*, footnote 3, at pp. 116-117 (D.L.R.), 689-690 (O.R.).

<sup>187</sup> See, for example, *Investors Syndicate Ltd. v. Versatile Investments Inc.* (1983), 149 D.L.R. (3d) 46, 73 C.P.R. (2d) 107 (Ont. C.A.); *Investors Syndicate Ltd. v. Real Securities of Canada Ltd.*, *supra*, footnote 7; *National Financial Brokerage Center Inc. v. Investors Syndicate Ltd.* (1986), 9 C.P.R. (3d) 497 (Que. C.A.); *Investors Syndicate Ltd. v. Vandenberg* (1986), 10 C.C.E.L. 153 (Ont. H.C.); *Tri-Associates Insurance Agency Ltd. v. Douglas*, *supra*, footnote 92.

As has been pointed out earlier, however, these characteristics are hardly unique to the insurance industry<sup>188</sup> and widen the meaning of "corporate opportunity" far beyond what was contemplated in *Canaero*. Moreover, the degree of maturity or ripeness of the opportunity was almost completely ignored in *Alberts v. Mountjoy*<sup>189</sup> (presumably on the basis that since all of the agency's contracts would inevitably come up for renewal they were all sufficiently ripe). In consequence, some subsequent decisions have gone further in holding that as a general rule any solicitation of customers after departure is forbidden.<sup>190</sup>

What *Canaero* appears to require, nonetheless, is an evaluation of the strength of the various factors enumerated therein by Laskin J., while bearing in mind his admonition that the list is not exhaustive. The three most important of these are the nature, specificity and ripeness of the corporate opportunity. There may be certain customers whose business cannot be said to be a corporate opportunity at all; for example, the contract up for tender in *Empire Stevedores (1973) Ltd. v. Sparringa*.<sup>191</sup> If the customer makes only occasional purchases, purchases from a number of suppliers, or makes his decision based primarily on price (as compared to loyalty or quality of service), arguably the probability of that customer's continued business is not large enough to warrant its classification as a corporate opportunity.<sup>192</sup> Moreover, if an argument is to be advanced (such as in *Alberts*) that the customer base as a whole is a corporate opportunity which demands protection, the lack of specificity suggests that the other elements referred to in *Canaero* must be present to a greater degree. Finally, "ripeness" must mean more than just the expectation that the business will be renewed at some point in the future—it denotes an immediate prospect; hence in one case the limitation on an injunction against solicitation to customers who had dealt with the corporation in the preceding eight months.<sup>193</sup>

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<sup>188</sup> See the discussion in Downard, *loc. cit.*, footnote 81, at pp. 369-370.

<sup>189</sup> *Supra*, footnote 3.

<sup>190</sup> See the discussion of *W.J. Christie & Co. Ltd. v. Greer*, *supra*, footnote 86, and *White Oaks Welding Supplies v. Tapp*, *supra*, footnote 6, *supra*, the text at footnotes 86-92.

<sup>191</sup> *Supra*, footnote 67.

<sup>192</sup> In commenting on the facts of *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, *supra*, footnote 45, in his decision in *Canaero*, *supra*, footnote 1, at pp. 618-619 (S.C.R.), 389-390 (D.L.R.), Laskin J. noted that the acquisition of this particular corporate opportunity could not be said to be "essential" to the company's success. This suggests that he would have been comfortable with the type of analysis suggested here. Note that it may be necessary to consider economic evidence analyzing the customer base as a whole to answer satisfactorily this question in any particular case.

<sup>193</sup> *G.T. Precision Welding (Ontario Ltd.) v. Nelligan* (1984), 3 C.P.R. (3d) 511 (Ont. H.C.).

A fourth, obvious factor also referred to in *Canaero* is the degree of knowledge possessed by the fiduciary. Unfortunately up to this point there has been a tendency to consider this at the threshold level of determining whether the departing employee is a fiduciary; as pointed out earlier, this is both illogical and contrary to the procedure followed in *Canaero* itself.<sup>194</sup> In determining the scope of the post-employment obligation, however, it is necessary to consider closely the links between the employee and the customer. Is there a significant and personal relationship between the departing employee and the customer, such as would give rise to a "substantial natural advantage"<sup>195</sup> if that employee approaches it for business? What about knowledge of the company's pricing or costing policies? Although as we have seen such information has been held not to be trade secrets justifying protection in the case of the non-fiduciary,<sup>196</sup> knowledge of such by the fiduciary increases the likelihood that he will be able to use his relationship with the customer to his advantage.

Two other factors have been considered in subsequent cases, although they are not mentioned in *Canaero* itself. One is the form of the solicitation. It has been held that solicitation of the former employer's customers may not be objectionable if it is part of a general solicitation of the public.<sup>197</sup> A good example would be a promotional flyer mailed out to all purchasers of a particular product in a given area. Since that form of solicitation does not usually depend for its success on the employee's links to his former employer it does not appear to be a breach of fiduciary duty.<sup>198</sup> A similar finding has been made in cases where the customer has contacted the former employee, rather than the other way around.<sup>199</sup>

A further factor which has often been referred to is whether the departing employee took any active steps prior to resignation in breach of his obligations. In *Re Berkey Photo (Canada) Ltd. v. Ohlig*<sup>200</sup> the court went further and suggested that this factor is a condition precedent: "for competition by a former employee to be a breach of fiduciary duty where there is not misuse of confidential information, there must be acts committed before the cessation of employment which formed at least a part of the wrongful conduct complained of." Hence the emphasis in a number of

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<sup>194</sup> *Supra*, at pp. 247 and 249-251.

<sup>195</sup> *Alberts v. Mounjoy*, *supra*, footnote 3, at pp. 117 (D.L.R.), 690 (O.R.).

<sup>196</sup> See the discussion, *supra*, at pp. 262-263, regarding *Faccenda Chicken Ltd. v. Fowler*, *supra*, footnote 10. See also, *Genesta Manufacturing Ltd. v. Babey* (1984), 48 O.R. (2d) 94 (Ont. H.C.), where the court concluded that the plaintiff's business procedures and certain "know-how" required to produce dies and lighting profiles were not trade secrets, and their use could not be enjoined after employment had ended.

<sup>197</sup> *309925 Ontario Ltd. v. Tyrrell* (1981), 127 D.L.R. (3d) 99 (Ont. H.C.).

<sup>198</sup> The same would not be true, of course, of a letter or flyer in the nature of an announcement directed exclusively at the former employer's customers.

<sup>199</sup> *309925 Ontario Ltd. v. Tyrrell*, *supra*, footnote 187, at pp. 107-108.

<sup>200</sup> *Supra*, footnote 7, at p. 531.

the cases on the scrupulous steps taken prior to departure not to advise customers or other employees of the departing employee's plans.<sup>201</sup>

Clearly, in *Canaero* Laskin J. was influenced by the calculated way in which the defendants made their plans and then resigned in order to carry them to fruition. Indeed, Laskin J. suggested in one passage that whether the departure of the employee is influenced by the wish to acquire a corporate opportunity is a significant consideration.<sup>202</sup> Nevertheless, the motive behind the employee's departure is a far different thing from an actual breach of the fiduciary's obligations before departure, and there is nothing in *Canaero* itself to suggest that the latter should be a precondition to a finding of breach of fiduciary duty *after* departure.<sup>203</sup>

*B. Is it Relevant Whether Employment Ended as a Result of Discharge Rather Than Resignation?*

In *Canaero*,<sup>204</sup> Laskin J. referred to one of the factors at play as being "the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge". This could mean one of two things. First, it could mean that the obligations of the fiduciary are higher for one who resigns specifically to pursue a corporate opportunity as compared to one who leaves for another reason. There is some support for this in the decision itself—clearly Laskin J. was infuriated at the thought that a corporate fiduciary might attempt to circumvent deliberately his responsibilities by resignation.<sup>205</sup> Nevertheless, the line of authority preceding *Canaero* is clear that a fiduciary's obligations do not depend on any notion of *bona fides*. Indeed, in *Phipps v. Boardman*<sup>206</sup> a solicitor for a trust whose *bona fides* does not appear to have been in question was held to have to account to the trust for a profit he had made.

A second, more logical possibility is that it is somehow unfair to penalize a person who has been dismissed from employment (or forced to resign) from finding another position, regardless of whether that position involved conduct which would otherwise be objectionable. This appears to have been an important factor in *309925 Ontario Ltd. v. Tyrrell*,<sup>207</sup>

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<sup>201</sup> An excellent example of this is *Tomenson Saunders Whitehead Ltd. v. Baird*, *supra*, footnote 30.

<sup>202</sup> *Supra*, footnote 1, at pp. 607 (S.C.R.), 382 (D.L.R.). This can be questioned, nonetheless: the corporate opportunity cases make it clear that as a general rule the *bona fides* of the fiduciary is irrelevant, and one would have thought the same would hold true where there is *mala fides*.

<sup>203</sup> Indeed, there are a number of cases, of which *Alberts v. Mountjoy*, *supra*, footnote 3, is a good example, where breach of fiduciary duty was found despite little or no evidence of wrongdoing before departure.

<sup>204</sup> *Supra*, footnote 1, at pp. 620 (S.C.R.), 391 (D.L.R.).

<sup>205</sup> *Ibid.*, at pp. 607 (S.C.R.), 382 (D.L.R.).

<sup>206</sup> *Supra*, footnote 41.

<sup>207</sup> *Supra*, footnote 197.

a decision of Trainor J. of the Ontario High Court. The facts in *Tyrrell* were bizarre and involved a falling out between employer and employee after the employer wrote to the employee's wife complaining about a "body odour". The defendant subsequently resigned after concluding that he could not continue under the "cloud" created by his employer. Trainor J. was clearly sympathetic to the employee's position, finding that he did not resign as a result of a selfish desire to capture a developing corporate opportunity, and that he acted in the best interests of the corporation up until the date of resignation. In addition, Trainor J. held that the defendant had not breached his fiduciary obligations, although there was clear evidence that as soon as he resigned he had advised one of the plaintiff's key customers of the availability of his services. Trainor J.'s finding on this point suggests that he was strongly influenced by the events which preceded the resignation.<sup>208</sup>

The result in *Tyrrell* suggests that a termination without cause and without compensation in lieu of notice would have an effect on the scope of the fiduciary's obligations after termination.<sup>209</sup> Certainly the balancing of interests referred to earlier comes down more heavily in favour of the employee's right to unhampered mobility of his labour in such a situation. In addition, it should be remembered that fiduciary obligations are imposed by equity, not by law, and are subject to the more general rule that a person who seeks an equitable remedy must come to the court with clean hands. It appears therefore unlikely, except in the rarest of circumstances, that an employer who dismisses a fiduciary without cause will have any remedy if that person subsequently solicits his customers.

A final point of interest in this area is the question of an unaccepted resignation. There is authority to suggest that while an employer cannot force an employee to refuse to work, it can refuse to accept a resignation, in which case the other covenants of the employment contract, including the obligation of good faith and fidelity, are still enforceable during the reasonable notice period, or, alternatively, during the balance of the term of a fixed period of a contract.<sup>210</sup> Although *Canaero* holds that fiduciary obligations do not cease or terminate automatically with the employment relationship, it can certainly be argued that those obligations are less extensive after termination, just as was held in *Faccenda Chicken v. Fowler*<sup>211</sup> with respect to the obligations of good faith and fidelity implied in the contract of employment itself. The prudent employer, therefore, faced with a senior employee resigning to start a competing business, might well advise the employee that it refuses to accept his resignation immediately and intends

<sup>208</sup> *Ibid.*, at pp. 103-105, 107-109.

<sup>209</sup> See also, *Cline v. Don Watt & Associates Communications Inc.*, *supra*, footnote 171, where the court appears to have accepted this conclusion in *obiter*.

<sup>210</sup> See, for example, *Thomas Marshall (Exports) Ltd. v. Guinle*, [1979] Ch. 227, [1978] 3 All E.R. 193 (Ch. D.).

<sup>211</sup> *Supra*, footnote 10.



to hold him to all of the obligations implied in the contract of employment, as well as his full fiduciary obligations, until the reasonable notice period has lapsed or, in the case of a definite term contract, the term has expired.

### C. *What is the Position of the New Employer?*

It is clear that the departing employee cannot shield himself from attack by use of a corporate vehicle. In a number of cases, beginning with *Alberts v. Mountjoy*,<sup>212</sup> the new company has been joined as a party defendant and found liable to injunctive relief or damages or both. The basis for such a holding has varied from the device of constructive trust (employed in *Canaero* itself) to a theory of agency or vicarious responsibility, or a recognition that the new employer is the *alter ego* of the fiduciary.<sup>213</sup>

What if the fiduciary joins a competitor? Clearly the new employer would be liable vicariously for its employee's acts, including damages for breach of fiduciary duty.<sup>214</sup> In addition, the new employer would have to respect any injunctive order made against the fiduciary employee. In *Engineered Sound Systems Ltd. v. Datel Ltd.*<sup>215</sup> it was argued that injunctive relief should extend even further, to the new employer's other salespeople, on the basis that otherwise the fiduciary would be able to circumvent the injunction by passing on his knowledge of the former employer's customers to others in the new employer's organization. Although the injunction asked for was refused, this was only because the new employer agreed to respect the order made against the fiduciary and to keep full and complete records of all sales until trial, so that the plaintiff would have a remedy in damages for any acts taken to thwart the injunction in the interim.<sup>216</sup> The case raises the possibility, then, that an employer hiring a person subject to fiduciary obligations towards a competitor may be in a worse position than if it had not hired that person at all.

### D. *How Long Should the Obligation Last?*

The authorities have generally recognized that fiduciary obligations only extend for a reasonable period of time after termination of the relationship.<sup>217</sup> This makes good sense, given that the rationale for the

<sup>212</sup> *Supra*, footnote 3.

<sup>213</sup> *Canaero*, *supra*, footnote 1, at pp. 621 (S.C.R.), 391-392 (D.L.R.); *Alberts v. Mountjoy*, *supra*, footnote 3, at pp. 120-121 (D.L.R.), 693-694 (O.R.); *57134 Manitoba Ltd. v. Palmer* (1984), at pp. 305-306 (B.C.S.C.), upheld by the British Columbia Court of Appeal in an unreported decision summarized (1989), 9 Lawyers Weekly No. 5, at p. 6.

<sup>214</sup> *57134 Manitoba Ltd. v. Palmer*, *ibid.*, (B.C.C.A.) per Esson J.A.

<sup>215</sup> *Supra*, footnote 97.

<sup>216</sup> *Ibid.*, at pp. 245-247 (22 C.P.C. (2d)). The author acted for the "new employer" and is familiar with the argument advanced on behalf of the plaintiff, which was not fully outlined in the decision.

<sup>217</sup> See, for example, *G.T. Precision Welding (Ontario) Ltd. v. Nelligan*, *supra*, footnote 193, at p. 515.

extension to begin with was the need to prevent the use of resignation as a device to evade fiduciary obligations. The problem becomes less acute the longer the period after resignation.

It also appears that there is a developing consensus as to what the appropriate length of time is. For example, in *White Oaks Welding Supplies v. Tapp*<sup>218</sup> Osler J. awarded damages for only a period of one year after termination, on the basis at least in part that competition in the plaintiff's business was very severe and the lack of any high degree of customer loyalty dictated such a limit. In *G.T. Precision Welding (Ontario) Ltd. v. Nelligan*,<sup>219</sup> the court extended an injunction initially granted at the first application for the period of the shorter of one and a half years or trial. In *Genesta Manufacturing Ltd. v. Babey*,<sup>220</sup> a case where the employee was held not to be a fiduciary but had taken a written customer list and used it to solicit customers, a period of one year was used to calculate damages. Similarly on appeal in *Engineered Sound Systems Ltd. v. Datel Ltd.*<sup>221</sup> an injunction awarded initially until trial was varied to extend only for a period of one year.

It appears, therefore, that the *average* period for which a fiduciary's obligations to his former employer will extend is one year. At the same time, the period will vary depending on the facts of each particular case and, in particular, depending on the vulnerability of the employer's customer base to outside competition and the likelihood of repeat business.

### *E. Can the Fiduciary Solicit Employees After Departure?*

As early as *Canada Bonded Attorney & Legal Directory Ltd. v. Leonard-Parmiter*<sup>222</sup> the courts awarded injunctive relief to prevent the enticement of other employees by the employee who departed to set up a competing business. *Canaero* does not discuss that issue and leaves open the full ambit of post-employment obligations of the fiduciary. In a number of decisions since, however, the courts have granted injunctions preventing the departing fiduciary from inducing any employee of the former employer to breach his or her contract of employment, although the reasoning used to reach that result is unclear.<sup>223</sup>

During employment, of course, the fiduciary's obligations to the corporate include a duty of utmost loyalty and good faith. In *DCF Systems*

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<sup>218</sup> *Supra*, footnote 6, at pp. 181, 453.

<sup>219</sup> *Supra*, footnote 193, at p. 517.

<sup>220</sup> *Supra*, footnote 196, at p. 110.

<sup>221</sup> *Supra*, footnote 97 (W.D.C.P.). Cf., *Commercial Transport (Northern) Ltd. v. Watkins* (1983), 22 B.L.R. 249 (Ont. H.C.) where an injunction was awarded until trial, on the basis that the *status quo* should be preserved.

<sup>222</sup> *Supra*, footnote 21, at p. 358.

<sup>223</sup> See, for example, *Re Berkey Photo (Canada) Ltd. v. Ohlig*, *supra*, footnote 7; *Investors Syndicate Ltd. v. Real Securities of Canada Ltd.*, *supra*, footnote 7.

v. *Gellman*,<sup>224</sup> for example, the court concluded that the defendant fiduciary had an obligation to his employer to advise it immediately of plans other employees had formed to gain control of the corporation and to advise it as soon as he decided to join the group. It is clear that in taking such a concerted approach to depart the employees in question were breaching their contracts of employment. The question is whether such a strict standard is appropriate after resignation, especially considering the existence of another remedy, the tort of inducing breach of contract.

It is also somewhat surprising that none of the cases have considered whether the employees who were solicited actually breached their contracts of employment or whether they gave reasonable notice of their intentions to join the departing fiduciary. If the fiduciary had not induced a breach of contract one might wonder whether his conduct deserves any form of censure. After all, as outlined earlier, the law generally encourages unrestricted mobility of labour and the solicited employees are presumably leaving because it is in their own interests to do so. In addition, the employer is not as vulnerable here as in the area of customer solicitation and is better able to protect itself, whether by use of an appropriate restrictive covenants or simply by negotiation at the time of departure.

### Conclusion

The decision of the Supreme Court in *Canaero* revolutionized Canadian law, and the reverberations of the case have not subsided yet. In the law relating to departing employees, however, the applicable principles have become vague and uncertain, despite the needs of practitioners and courts alike for firm guidelines. Two lines of authority have emerged, one of which, following the decision of Estey C.J.H.C. in *Alberts v. Mountjoy*, has extended the nature and scope of the fiduciary relationship well beyond that contemplated by *Canaero*, and a second which has been more cautious and has sought more guidance from the decision itself.

It has been the thesis of this article that the second line of authority is more consistent with the principles developed in *Canaero* itself and with the underlying policy considerations at work in this area of the law. It has been suggested that the fiduciary relationship should be limited to employees who exercise a significant degree of power and control over a company's operations and that the scope of the obligation not extend to blanket solicitation of customers after departure, but depend on the nature, specificity and ripeness of the customer base, the knowledge held by the departing employee, and the type of solicitation. These recommendations require a significant reappraisal of the authorities following *Alberts*. It has been suggested here that these authorities ignore the important policy objective recognized by the courts that where possible employees be able to move freely between employers and to use in their new employment the knowledge and skills gained in the old.

<sup>224</sup> (1978), 5 B.L.R. 98 (Ont. H.C.).