FIDUCIARY DUTIES AND CONFIDENTIALITY OBLIGATIONS UPON LEAVING EMPLOYMENT

These materials were prepared by Brian Scherman, QC, of Ballour Moss law firm, Saskatoon, Saskatchewan for the Saskatchewan Legal Education Society Inc. seminar, Current Issues in Employment Law, September 2002.
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UPON LEAVING EMPLOYMENT

INTRODUCTION

Every employee has a duty of good faith but the ordinary employee's obligation of good faith endures only so long as employment continues. After employment ends, the employee is free to compete fully with former employers including directly canvassing the former employee's customers. The ordinary employee is limited in post-resignation competitive activities only by:

i.) contractual obligations and the terms of any valid restrictive covenant surviving termination;
ii.) an obligation to preserve the confidentiality of "confidential" information; and
iii.) an obligation to not copy or memorize customer lists.

By contrast, the employee who stands in a fiduciary relationship is bound by a strict ethic which prevents the employee from pursuing for him or herself any property or business opportunity which either belongs to the employer or which the employer was actively pursuing. This ethic of the fiduciary duty continues to apply to such employees after resignation and after termination.

The lawyer advising a client (be it employer or employee) has a difficult task; especially when the employee lies somewhere in the continuum between the senior management personnel and the ordinary employee. Where does the ordinary obligation end and the fiduciary obligation begin? What knowledge or information is viewed in law as "confidential" and deserving of protection? The law respecting fiduciary duty and duty of confidence has seen significant development over the last two decades and the jurisprudential pendulum continues to move.

In this paper, I will:

1. show that fiduciary duty has extended toward the ordinary employee end of the spectrum;
2. demonstrate some judicial recoiling from the attribution of fiduciary duty to lower level employees; and
3. illustrate the broadening scope of the duty of confidence.
I will not discuss the remedies available for breach of fiduciary duty or breach of the duty of confidence. This topic would merit a paper unto itself.

I. THE NATURE OF THE FIDUCIARY DUTY

While certain relationships have always been held to be fiduciary in nature [e.g. principal and agent, trustee and beneficiary, the corporation and its directors] other relationships may be held to be fiduciary depending upon the context in which they arise. The Supreme Court of Canada has explored fiduciary principles on a number of occasions and has made it clear that it is the nature of the particular relationship between the parties that will determine whether it is fiduciary in nature.

In Frame v. Smith\(^1\), Wilson J. set out an analytical structure to guide the courts in identifying new fiduciary relationships. She found that relationships in respect of which fiduciary obligations have been imposed usually possess three general characteristics:

1. scope for the exercise of some discretion or power;
2. that power or discretion can be exercised unilaterally to affect the beneficiary's legal or practical interests; and
3. a peculiar vulnerability to the exercise of that discretion or power.

This "rough and ready guide" to the identification of new fiduciary relationships has been adopted in a number of cases including LAC Minerals Ltd v. International Corona Resources Ltd.\(^2\), Canson Enterprises v. Boughton & Co.\(^3\), M(K) v. M(H)\(^4\), and Hodgkinson v. Simms\(^5\).

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\(^1\) (1987), 42 D.L.R. (4\(^{th}\)) 81 (SoC.C.)
\(^2\) (1989), 61 D.L.R. (4\(^{th}\)) 14 (SoC.C.)
\(^3\) (1991), 85 D.L.R. (4\(^{th}\)) 129 (S.C.C.)
\(^4\) (1992), 96 D.L.R. (4\(^{th}\)) 289 (S.C.C.)
\(^5\) (1994), 117 D.L.R. (4\(^{th}\)) 161 (SoC.C.)
The Supreme Court has said that an application of the strict ethic to directors, officers and senior managers is recognition of the degree of control they have over the operations of the corporations which they serve. The ethic is intended, in the public interest to supplement, statutory regulation and to compel those who run corporations to comply with norms of exemplary behaviour. The fiduciary must never allow self-interest (including future self-interest) to conflict with the interests of the corporation they serve. By way of contrast, the ordinary employee is bound to observe the lesser obligation of good faith only for so long as employment continues. After employment ends, the ordinary employee is normally free to compete with former employers and, in so doing, to canvass former employer's customers or business initiatives.

Whether and when a fiduciary relationship will be found to exist is difficult to predict. But, once found to exist, the advice is easy. If an employee stands in a fiduciary relationship, the employee is bound by an ethic that prevents him or her from taking or using any property or business opportunity which either belongs to the employer or which the employer is actively pursuing. This strict ethic continues to apply to the employee even after resignation. Since an employer has a proprietary interest in its trade connections with its customers, the strict ethic may prevent the employee from directly soliciting his former employer's customers on his or her own behalf or on behalf of a new employer.

II. BREACH OF FIDUCIARY DUTY BY MANAGEMENT EMPLOYEES

A. CANADIAN AERO SERVICES LIMITED V. O’MALLEY

The seminal decision in the area is the Supreme Court of Canada decision in Canadian Aero Services Limited v. O’ Malley et al. It decided, for the first time, that a member of senior management may be precluded from competing with his former employer after resignation, notwithstanding the absence of a restrictive covenant.

The defendants O'Malley and Zarzycki were president and vice president, respectively, of the plaintiff, Canadian Aero Services Limited ("Canaero"). They were also directors, although these

6 (1973),40 D.L.R. (3d) 731 (S.c.c.)
were nominal positions. Directors’ meetings were never held and the real control of the plaintiff resided with the parent company, Litton Industries.

During the course of their employment with Canaero, O'Malley and Zarzycki had devoted time and effort to the pursuit of a particular corporate opportunity. During that time, they personally incorporated a new company. The new company was ultimately successful in its pursuit of the corporate opportunity which Canaero was pursuing. Canaero brought suit alleging breach of the fiduciary duty it was owed by O'Malley and Zarzycki. After losing at trial and in the Court of Appeal, the plaintiff was finally successful in the Supreme Court of Canada. Mr. Justice Laskin, speaking for the Court, stated, *inter alia*, that:

> [O'Malley and zarzycki] were ‘top management’ and not mere employees whose duty... consisted only of respect for trade secrets and for confidentiality of customer lists. O'Malley and Zarzycki stood in a fiduciary relationship to Canaero which... betokens loyalty, good faith and avoidance of a conflict of duty and self interest. [at 381]

> A senior officer... is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested on full disclosure of the facts) any property or business advantage either belonging to the company or for which it has been negotiating; and this is especially so where the director is a participant in the negotiations on behalf of the company. [at 381]

> ... this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated, a maturing business opportunity which his company is actively pursuing; 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 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. [at 382]

> Strict application [of the equitable principle] is simply recognition of the degree of control which their positions give them in corporate operations... It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are... an acknowledgement 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. [at 384]

> [It is not necessary] to look for substantial resemblances [between proposals]. Their presence could be a factor to be considered but is not a *sine qua non*. [at 388]

> Honesty of purpose is [not] a defence... This is fundamental in the enforcement of fiduciary duty where the fiduciaries are acting against the interest of their principal. [at 389]
Whether a fiduciary duty survives the resignation of a fiduciary depends on all the circumstances including position held, the nature of the corporate opportunity, the manager's relationship to the corporate opportunity, its ripeness, its specificness 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 the information was special or indeed, even private, [the lapse of time after resignation], [and whether the employment was terminated by] retirement, resignation or discharge. [at 391]

[The plaintiff does not have to establish what profit it lost.] It is entitled to compel the faithless fiduciaries to answer for their default according to their gains. [at 392]

Although Canaero dealt with a single contract for which the employer had been negotiating, Laskin J. did not limit the strict ethic to that situation alone. Rather, he refers to any property or business advantage either belonging to the company or for which it had been negotiating. It was, therefore, inevitable that these principles would be applied to protect the goodwill which exists between an employer and its clientele where there is an expectation that the employer will enjoy repeat business from its clients if its goodwill or trade attachments are left undisturbed. The case which extended Canaero in this direction is Alberts v. Mountjol.

B. ALBERTS V. MOUNTJOY

Mountjoy was the plaintiffs general manager and a member of the Board of Directors. Butts was a salesman. Mountjoy was responsible for running the insurance business on a day-to-day basis. He did not have authority to hire and fire. Mountjoy resigned and set up a new insurance business with Butts. They solicited the plaintiffs clientele and as a result obtained the general insurance business of those clients. The clients they solicited were generally those with whom the defendants had been working while in the plaintiffs employ.

Chief Justice Estey (as he then was), had the following to say about the responsibilities of Mountjoy and the duties for which he and Butts were liable:

Mountjoy, insofar as day-to-day operational matters are concerned, managed the business as a sole proprietor. He did not have authority to hire and fire or interfere with the capital assets of the business. (at 686)

7 (1977), 16 O.R. (2d) 682 (ant. H.C.)
An ex-employee is not entitled to make unfair use of information acquired in the course of his employment nor may he use confidential information so acquired to advance his own business at the expense of that of his former employer. [at 689]

[The Court noted that in the insurance business the substantial asset of the plaintiff, its trade attachment with its clients, are a vulnerable asset particularly to competition from ex-employees.] [at 690]

In these circumstances, a variation of the law relating to corporate opportunity has its application. Mountjoy left with a substantial natural advantage which opened up to him the opportunity of taking over for his own profit a substantial trade asset of the plaintiff, that is, its relationship with its clientele. [at 690]

The vulnerable asset of the plaintiff was the opportunity to obtain renewal commissions when the contracts of insurance of the plaintiff's clientele came up for renewal in the future. That attachment, left undisturbed, represented the earning power of the plaintiff. [at 691]

Liability to account does not depend on proof of *malafides*. [at 692]

Honest intention in this branch of the law is no defence; nor is justification on the grounds of the real or imaginary mistreatment accorded or threatened by the new management of the plaintiffs. [for example, reorganizing the office, staff and business while Mountjoy was away]. [at693]

Mountjoy could have quite properly advertised or announced the formation of his business. [at 693]

By reason of the trade attachment between the plaintiff and its clientele, each insurance client was viewed as a business opportunity and vulnerable assets analogous to the government contract that was being pursued by Canaero. Therefore, while Mountjoy was entitled to set up business in direct competition with his former employer, he was not entitled to directly solicit his employer's clientele because of the substantial advantage with respect to those clients which his employment had given him. That advantage arose because of his knowledge of the names and needs of the clientele and the personal relationship which Mountjoy had been able to develop by working with these clients. The case recognizes the confidential nature of client information and the employer's right to protect its goodwill.

III. EXTENSION OF THE PRINCIPLES IN CANAERO AND ALBERTS V. MOUNTJOY
Depending upon the nature of the business, the management level employee may either be entrusted with pursuing a few projects at any one time or be entrusted with developing his or her employer's business by creating or servicing a large number of clients. In either event, the employee can be seen as creating and nurturing a business opportunity for the employer and be precluded by virtue of a fiduciary obligation from seeking to obtain that business opportunity for him/herself, or for another employer, if she/he does so by unfair means.

The additional issues for consideration thus become:

(a) identification of who are senior or key employees impressed with a fiduciary duty;

(b) what constitutes "unfair means".

Direct solicitation and use of information obtained during the fiduciary's former employment are two forms of conduct commonly held to be unfair.

In *W.J. Christie & Co. Ltd. v. Greer and Sussex Realty & Insurance Agency Ltd.*\(^8\), for example, the Manitoba Court of Appeal, following the decision in *Alberts v. Mountjoy*, had this to say about direct solicitation of insurance business clients by former management level employees:

> The direct solicitation of clients by Greer after his resignation constitutes a breach of fiduciary duty redressable in damages. [at 39]

> There is nothing to prevent an ordinary employee from terminating his employment and normally that employee is free to compete with his former employer... But it is different for a director/officer/key management person who occupies a fiduciary position. [at 40]

> Upon his resignation and departure that person is entitled to accept business from former clients but direct solicitation is not permissible. Having accepted a position of trust the individual is not entitled to allow his self-interest to collide and conflict with fiduciary responsibilities. The direct solicitation of former clients traverses the boundary of acceptable conduct. [at 41]

In *White Oaks Welding Supplies v. Tapp*\(^9\) the Ontario High Court was dealing with a business that supplied gas and cylinders into the welding trade. The business was extremely competitive

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\(^8\) (1981), 4 W.W.R. 34 (Man.e.A.)

\(^9\) (1983), 149 D.L.R. (3d) 159 (Ont. H.C.)
with customers being constantly won or lost [unlike the insurance agency situation where the Courts have apparently accepted the premise that the customers tend to stay with their agent]. The defendant, Tapp, was not a director but rather a sales manager with day-to-day responsibility for sales. While he was not a director and had no title such as President or Vice-President that would designate him as an officer of the company; the Court nonetheless found that he was one of the executives of the business and was the kind of senior officer upon whom a fiduciary duty lay. Accordingly he was found in breach of his fiduciary duty when he solicited a number of the accounts with customers with whom his former employee was doing business.

The Tapp case was an important extension of the principles found in Canaero and Mountjoy for two reasons:

1. there was no deliberate plotting to take over an opportunity of the plaintiff company for which the defendants had been negotiating as in Canaero; and

2. there did not exist the peculiarly sensitive relationship between the clientele of a general insurance agency and its general manager as was found in Mountjoy.

The Court pointed to Tapp's encyclopedic knowledge of the plaintiffs customers, his unrestricted access to information concerning customers and his personal contacts with and responsibility for a large number of the plaintiffs customers as evidence confirming his status as a senior employee standing in a fiduciary relationship. As such, the Court held [at 163] that Tapp's obligation "was to refrain, not from competition but from deliberately soliciting customers of the plaintiff, other than the part of the general customer public to whom general solicitation might be made." The Court also confirmed that liability did not depend upon proof of mala fides.

Moore International Canada Inc. v. Carter\(^\text{10}\) is a B.C. Supreme Court decision involving employees pursuing specific opportunities for which their employer had been negotiating. Carter

\(^{10}\) (1982), 40 B.C.L.R. 322 (S.C.)
was a nominal director and vice president of the plaintiff and general manager of its B.C. operations. Ross was a senior salesman. Carter and Ross went to work for a competitor and it was found by the Court that they both breached their fiduciary duties to Moore by diverting to the new employer the opportunity to supply dry kilns to three customers that they had been pursuing during their employment with Moore. Mr. Justice Legg stated:

In my opinion, the top management official is entitled after his resignation to accept business offered by former potential customers of his former employer provided that he does not solicit that potential customer. He is entitled after his resignation to assist his new employer who is already pursuing a business opportunity which his former employer was pursuing provided that he does not use information concerning that business opportunity obtained during his former employment or his position with his former employer to obtain the business for his new employer. [at 344]

In 57134 Man. Ltd. v. Palmer11, the Court was dealing with a business which sold packaging and wrapping materials together with accessory items to retail stores. Palmer was not an officer or director but he did manage the day to day activities of the plaintiff's Vancouver branch and had 4 salespersons, 2 warehouse men and an agent working under him. He was, nevertheless, personally responsible for 80% of the branch's sales which he generated by spending approximately two weeks out of every month making sales calls. He resigned in circumstances where he had been instructed by his employer to produce a plan to reduce the size and expenses of the Vancouver branch. He took a job with a competitor and persuaded fellow employees to join him at the competitor. He copied and removed client lists and directly solicited the plaintiffs clients.

In its decision, the Court concluded that the fact that Palmer did not have an official title and that his activities were closely supervised by the employer did not detract from a finding that he was a fiduciary. The Court stated [at 359]:

[T]he imposition of the sort of fiduciary duty found in Canadian Aero Service Ltd. v. O'Malley is not to be tested so much by what the defendant did not do with the former employer, as suggested by defence counsel before me, but rather by what he did. Nominal titles are not determinative. The court must examine the actual level of functions and responsibility held by the employee. [at 359]

11 (1985), 65 B.C.L.R. 355 (S.C.)
The Court also rejected the argument that this case was distinguishable from cases such as Canaero because Palmer had not gone off to create his own independent firm, but rather had accepted a position with a competitor firm. Indeed, the Court went so far as to find Palmer's employer vicariously liable for Palmer's breach of fiduciary duty and held [at 378]:

[Smith Paper] intended that Palmer should solicit his former customers. Smith cannot plead ignorance of the law that Palmer's fiduciary duty to [the plaintiff] prevented him from direct solicitation of them. It was a party to Palmer's breach of fiduciary duty to [the plaintiff]... Moreover, Palmer's wrongful solicitation and wrongful use of [the plaintiff's] confidential documents and his wrongful diversion of some of [the plaintiff's] orders to Smith's account, completed when Palmer was at Smith, were tortious acts done in the course and scope of Palmer's employment by Smith. Smith gained benefit from them. Smith is, therefore, vicariously liable for Palmer's actions while he was employed by it. [at 378]

In E.J. Personnel Services Inc. v. Quality Personnel12 the Ontario Court used the concept of peculiar vulnerability introduced in Frame v. Smith13 to extend fiduciary duty to the non-managerial employee. Here Justice Callaghan stated [at 176]:

Where an employer by the nature of his business is particularly vulnerable to loss by the soliciting of that employer's clients, an employee stands in a fiduciary relationship to the employee and owes a duty to the employer not to solicit those clients after leaving the business. The majority of the cases cited involve senior employees exercising managerial roles; see Edgar T. Alberts Ltd. et al v. Mountjoy et al ...... Having regard to the nature of the plaintiff's business which is fundamentally a small, sole proprietorship and having regard to the manner in which that business is organized it may well be that Mary Lou Poloniato [the defendant] is an employee in a fiduciary relationship. While her salary was minimal and she was paid a commission, and while some of her duties were clerical, it is clear on the material before me that she had access to the very crucial information essential to the operation of the plaintiff's business, namely, its customers, customer contact persons and phone numbers and a personal relationship with those clients. I do not think that the size of the business dictates whether or not a fiduciary duty is owed. That duty flows from the nature of the responsibilities assumed by the employee.

Quantum Management Services Ltd. v. Hann14 was a case that further reduced the threshold to make an employee a "key employee". Here, two so called "placement directors" (employees of a personnel agency who dealt directly with clients to provide properly qualified, temporary

12 (1985),6 C.P.R. (3d) 173 (Ont. H.C.)
14 (1989),69 O.R. (2d) 26 (Ont. H.C.)
secretarial and clerical placements) had come to know the client's needs, preferences and rates acceptable. They resigned and went to work for a new corporation set up by a competitor. The evidence indicated that most of the business generated by the new employer was with former clients of the plaintiff.

Although neither of the defendants took a customer list with them, the Court was satisfied that the defendants had committed to memory the names of their exclusive clients, the context of the business of those clients, the clients' needs, the clients' preferences and the rates that the clients were willing to pay. The Court, holding the defendants to be fiduciaries; considered this to be the exploitation of confidential information. It appeared that the information had simply committed to the defendants' memories in the normal course of employment. Despite the fact that the Court did not find that the memorization had been deliberate with a view to setting up a new business, it held that the memorization of this information was tantamount to physically carrying away a client's list.

What is striking about the *E.J. Personnel Services Inc.* and *Quantum Management* decisions are that the Court held that the defendants were senior employees despite the fact that their position were largely that of order takers. As such, they were precluded from doing what the ordinary employee is entitled to do; namely, solicit their former clients. The justification appears to be the concept of peculiar vulnerability flowing from knowledge of customer preferences and other knowledge. The Court, in *Quantum Management*, noted that by virtue of the organization of the plaintiff, the defendants had the exclusive right to deal with certain clients and, as such, developed a unique relationship with clients and had direct access to crucial, confidential information with respect to this client. The Court held [at 34]:

> While acknowledging that Hann and Taaffe were not 'top management' in the general sense of that expression, I am, nevertheless, satisfied that they were senior employees in relation to their exclusive clients - no other employees could deal with Hann's or Taaffe's clients…. Therefore, both Hann and Taaffe had a duty not to solicit or deal with former customers of Quantum with whom they had exclusive placement rights within a reasonable period time after quitting Quantum's employ.
Another Ontario decision, *Canadian Industrial Distributors Inc. v. Dargue* enunciated the principle that the reasons surrounding the defendants' departure from the previous employment are irrelevant. In that case, the Court found that the plaintiffs' treatment of the individual defendants prior to their departure was, in some respects, "reprehensible". Nevertheless, Justice MacPherson stated [at 30]:

> Employee dissatisfaction does not obviate the requirement that the employee comply with the legal duties imposed by his or her employment status, be that status fiduciary or employee. Employee dissatisfaction does justify resignation from the job and a search for a new position including one with a competitor (subject to any limitation in an employment contract). But the law imposes duties on the employee with respect to the manner in which the departure is accomplished, and the conduct of the employee after the departure. These legal duties must be complied with, no matter how unhappy the employee is, or how *bona fides* [sic] are his intentions with respect to his next position. As Estey J. said in *Edgar T. Alberts v. Mountjoy*...:

> Honest intention is in this branch of the law no defence; nor is justification on the grounds of the real or imaginary mistreatment accorded or threatened by the new management of the plaintiffs.

Thus, in Ontario, at least, it appears that ordinary or low level employees may be held as having a unique relationship with clients on behalf of their employers and be subject to fiduciary duties even in circumstances where they leave for new employment when treated badly by their employers.

In light of these decisions, where does the fiduciary duty end? Do not most businesses expect their employees to learn their customers' preferences? Does information gleaned in the ordinary course of employment make even the ordinary employee a fiduciary?

**IV. THE PENDULUM SWINGS BACK - AT LEAST IN SASKATCHEWAN**

Following the decision in *E.l. Personnel Services Inc.* [supra], the expansion of who was a fiduciary employee was challenged. M.V. Ellis, J. in *Fiduciary Duties in Canada* (Toronto: Carswell's 1988) (Updated May, 1996 at p. 16-10) states:

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The approach [in *E.J. Personnel*] is not supportable based on the absence of the specific or implied reposing of trust in the employee. The nature of fiduciary responsibility is extremely high - 'the highest the law knows' - and it should not be applied indiscriminately. Further, proximity to corporate information does make an employee a fiduciary...

In *Provincial Plating Limited v. Steinkey and Aerostar Bumper and Automotive Inc.* Klebuc, J. picked up on this criticism. Justice Klebuc stated, at para. 23, that he was inclined to agree with Ellis' criticisms; but that, in the context of an application for an interim injunction, he could not decide whether these cases went too far.

In *Provincial Plating*, the defendant was a minority shareholder, director and secretary/treasurer of Provincial Plating. It appears, however, that the scope of his authority as a director and secretary/treasurer was severally limited. The majority shareholder was his brother. The defendant had been the sales manager but the relationship between the brother shareholders deteriorated to the point that the defendant was advised that he was a mere sales representative and had no responsibility for the management of staff. The relationship further deteriorated when his brother threatened to throw him out the door. The defendant resigned as a director and employee, incorporated a new company and went into direct competition with Provincial Plating.

Litigation followed, including an application by Provincial Plating for an interim injunction against the defendant. The Court granted the request for an injunction on the basis that it had been made out that there was a serious issue to be tried, that there was the potential of irreparable injury to Provincial Plating and that the balance of conveniences favoured granting the injunction. In the course of reaching that decision, Justice Klebuc discussed the tests to be applied in determining whether a fiduciary duty was owed and reviewed all of the leading authority discussed in this paper and others. His discussion of the law provides a good summary.

[16] It is well established at common law that absent a contractual obligation, a departing employee may establish a business in direct competition with his former employer. He may also apply knowledge and skills acquiring while in the employer's service in his business with the exception that he may not make 'unfair use' of information acquiring during his employment, nor may he use confidential information so acquired to advance his own business at the expense of his former employer. Merely calling on former

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customers does not constitute 'unfairly' dealing with the former employer. The applicable principles are extensively reviewed in Alberts (Edgar T.) Ltd. et al v. Mountjoy (1977), 16 O.R. (2d) 682 (H.C.) and Genesis Canada Inc. v. Hill (1994), 56 C.P.R. (3d) 419 (Ont. Gen. Div.)

[18] The essential elements for the creation of a fiduciary obligation are fully canvassed in International Corona Resources Ltd. v. LAC Minerals Ltd. [1989] 2 S.C.R. 574; 101 N.R. 239; 36 O.A.C. 57; 61 D.L.R. (4th) 14; 35 E.T.R. 1; 44 B.L.R. 1. Of particular note are the observations of Sopinka J., at pp. 598-599 where he observes that while there is no set formula for determining whether a fiduciary relationship exists in a particular circumstance, there are characteristics that 'so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide.' Mr. Justice Cameron in Baskerville et al v. Thurgood (1992), 100 Sask. R. 214 (C.A.), at p. 227, enumerated those 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.'

[20] The 'control and authority' test outlined in Canaero (sometimes described as the 'top management' test) has been materially expanded to impose a fiduciary duty on lower level employees including those with little control or authority, but whose functions are or were essential to the employer's business (sometimes described as the 'key personnel' test). See: Mountjoy, supra; Quantum Management Services Ltd. v. Hann (1989), 69 O.R. (2d) 26 (H.C.), affd. (1992), 11 O.R. (3d) 639 (C.A.); Demarco Agencies Ltd. v. Merlo (1984), 48 Nfld. & P.E.I.R. 227; 142 A.P.R. 227 (Nfld. Dist. Ct.); Hudson's Bay Co. v. McClocklin, [1986] 5 W.W.R. 29; 42 Man. R. (2d) 283 (Q.B.). In Mountjoy, Estey, C.J.H.C., as he then was, concluded that a fiduciary duty may arise where the ex-employee held a position with a business whose 'substantial business asset ... , namely its trade attachment with its clients, is a vulnerable asset exposed to the depredations of competition ... particularly competition from ex-employees.' In his reasons he, at p. 689, quoted with approval Stenhouse Australia Ltd. v. Phillips, [1974] 1 All E.R. 117 (P.C.), where Lord Wilberforce at p. 122 discussed the elements necessary to impose a fiduciary duty on a broker employed by an insurance brokerage firm:

'In the business of insurance and insurance broking, as the evidence in this case shows, a successful enterprise depends on a number of factors which vary according to the nature of the customer, or client, with whom business is done. The more varied or diversified the business of the client, and the larger the amount of insurance to be placed, the more likely is it that he will look around the market for himself in order to obtain the best terms. With a less diversified business, the likelihood grows that, while he is satisfied with the service he gets, he will keep his business, at least for a period, with the same insurer, and place it through the same broker. The advice and guidance, based on collation of
information, by the broker, will be more valuable in such a case, to both broker and customer. *In either case, in order to obtain and to retain business it is necessary to cultivate and accumulate knowledge of the client's requirements and of his record, so as to be able to offer him attractive terms.* . . .

(emphasis added).

[21] Unlike in Mountjoy, the departing employee in Demarco had no management responsibilities but had a 'selling territory' and accounts which amounted to at least 50 percent of the employer's business and territory. The court concluded the employee had a fiduciary obligation to the employer essentially because he was a high volume producer. A similar conclusion was arrived at in Hudson's Bay Co. v. McClocklin where the ex-employee had headed the employer's hearing aid department. There the court concluded that although the ex-employee had a few management responsibilities, a fiduciary duty attached for the reasons given at p. 34:

'Some of the principal factors in this case which indicate to me the fiduciary relationship are: the key position occupied by the defendant in the hearing aid department; his long and close personal association with the plaintiffs hearing aid customers; his personal knowledge of them and access to their personal records and needs; . . .'

Hudson's Bay was subsequently applied in EII Ltd. v. Dutko et al., [1997] MJ. No. 225, May 6, 1997.

[22] The key personnel test was expanded in *EJ Personnel Services Inc. v Quality Personnel Inc.* (1985), 6 C.P.R. (3d) 173 (Ont. H.C.), to take into account the employer's vulnerability in deciding whether a fiduciary obligation rested with the employee although the nature of the employer's business did not of necessity require the imposition of a trust on the employee. There an employee who worked at a nominal salary and whose duties were primarily of a clerical nature was held to be a fiduciary because she had access to the employer's customers, customer contact persons, phone numbers and had developed a personal relationship with those clients. At p. 176 the court set out the principles applied in finding a fiduciary duty:

'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 the employer and owes a duty to the employer to not solicit those clients after leaving the business . . .'

[23] The validity of Delmarco, Hudson's Bay and *EJ Personnel* is persuasively questioned by M.V. Ellis, J., in *Fiduciary Duties in Canada* (Toronto: Carswell, 1988) updated May 1996, at p. 16-10:

". . . The approach [in *EJ Personnel*] is not supportable based on the absence of the specific or implied reposing of trust in the employee. The nature of fiduciary responsibility is extremely high - 'the highest the law knows' - and it should not be applied indiscriminately. Further,
proximity to corporate information does not make an employee a fiduciary. . ."

Following the reasoning of Ellis, the selling of common commercial products by an employee, be they pencils or car bumpers, will rarely give rise to a fiduciary duty unless the employee also has significant management authority, or control or discretion in the procurement, marketing and pricing of the product. In like manner, sales volumes and size of sales territory by their very nature do not reflect a trust relationship of the kind outlined in Mountjoy, but rather the employer's decision not to protect its business by way of a restrictive covenant or other measures. While I am inclined to agree with Ellis, I need not determine the validity of the challenged decisions for the purposes of the application before me.


'It is clear that the generic relationship between employer and employee does not per se give rise to fiduciary responsibilities . . .

'In general, the relationship becomes elevated to the fiduciary level when the employer reposes trust and confidence in the employee on a continual basis, relying upon the employee in reaching business decisions. It is the trust and reliance transferred by the employer which gives the employee the power, and in some cases, the discretion, to make business decisions, on the employer's behalf. . . .'

Another interesting Saskatchewan decision that bucks the expansionary trend is Mr. Justice Noble's decision in *WSG Group Associates Inc. v. Cheryl Tuck-Tallon*17. This decision involved an attempt by the plaintiff to obtain an interlocutory injunction restraining a former manager of the Saskatoon office of an insurance business. The plaintiffs position was that the defendant had been hired to market and maintain ongoing relationships with clients and agents, to hire and fire staff and generally manage the Saskatoon office. Differences arose between them and she was fired for cause. There was evidence that, on her termination, she removed client files, correspondence and a rolodex containing contact information for clients and agents, which she attempted to redirect from the plaintiff to herself and she directly solicited the business of significant clients.

The plaintiffs position was that the defendant was a key employee. On the basis of decisions such as *E.J. Personnel Services Inc.* and others quoted above, one would have thought Mr.
Justice Noble would come to the conclusion that the defendant was a 'key employee' with fiduciary duties and therefore the *prima facie* case for the issuance of the injunction had been made out. One would have also probably predicted that the fact of her removing client information and directly soliciting the clients was unfair competition. Finally, one would have thought that the question of whether she was fired for cause or not would be irrelevant to the issue of breach of fiduciary duty. But in declining to so find, Mr. Justice Noble stated the following:


'An officer or manager will not be saddled with a fiduciary duty under Canadian Aero Services unless the position he occupied contains the power and the ability to direct and guide the affairs of the company. A title mayor may not match reality per se. It is superficial and as such of little interest or assistance to the court. The job content is what the trial judge must define in light of all the evidence and of all reasonable inferences derived from it. A judgment call thereupon follows in the nature of a finding of fact as to whether the defendant was an agent or an employee.'

Later, Smith J., after noting that each case must tum on its own facts said this:

'. . . In all cases in which a fiduciary duty was imposed, the transgressor clearly applied a directing hand to the business. In W.J. Christie & Co. Ltd. v. Greer (1981), 121 D.L.R. (3d) 472, 59 C.P.R. (2d) 127, [1981] 4 W.W.R. 34 (Man. c.A.), the defendant Greer was described as property manager, manager of the insurance department, a director, officer and senior management employee. Estey, C.J.H.C. (as he then was), in Alberts v. Mountjoy, supra, at pp. 685-6, invoked equity against a general manager who was on the board of directors: '[H]e was the . . . chief executive . . . who . . . managed the business as a sole proprietor.' It is little wonder that there was imposed a fiduciary duty upon him.'

[14] As I indicated earlier this policy dispute together with the plaintiff's view that the respondent had become a very difficult person to get along with seems on the evidence to be the reason she was fired. In my opinion the evidence does not establish that the respondent was a "key" employee of the plaintiff's operation in Saskatoon. She did have some managing duties with respect to the Saskatoon office but even there she was limited in her responsibilities because she was required to work with a liaison officer at all times such as June Losey and Terry Campbell.

[15] Even if I am wrong in reaching that conclusion I am satisfied that as the respondent argues, any fiduciary or contractual breach of her duty to the plaintiff expired when she was terminated without notice or warning and notwithstanding the plaintiff's position that
she was fired for cause because that issue cannot be resolved on the contradictory evidence before me as to the reasons she was fired.

In a recent decision of the Ontario Superior Court Zesta Engineering Ltd. v. Cloutier\textsuperscript{18} further judicial backtracking occurred. While this decision continued to adopt the key employee concept; the result exposes employers to the loss of the protect of the fiduciary ethic if a fiduciary employee is terminated without reasonable cause and without reasonable notice.

In Zesta, the Court considered a claim by the employer, Zesta, against former senior managerial employees. Zesta terminated these employees, alleging that they were planning to set up a new company competing with Zesta, using confidential information of Zesta and soliciting Zesta’s customers. This, Zesta quite predictably regarded as cause. However, the Court concluded on the facts that Zesta had wrongfully dismissed the employees because the evidence did not support the conclusion that the employees were involved in setting up a competing business while they were employed. The Court then held that because the employer had breached the employment agreement and wrongfully dismissed the employees, the employees were relieved of any further fiduciary duties. The reasoning was that the employer repudiated the employment contract when they unlawfully terminated it and thus, the employees were entitled to accept the repudiation and be relieved from all further obligations under the contract.

In General Bill Posting Company Limited v. Atkinson\textsuperscript{19} the House of Lords held that a wrongfully terminated employee is entitled to treat the dismissal as repudiation of the contract which relieves him of the restrictive covenants contained in the contract. Other courts and authors have questioned the wisdom of this decision and whether it should operate to relieve a wrongfully terminated employee from fiduciary duties as opposed to contractual obligations. To date, Zesta Engineering Ltd. v. Cloutier and WSG Group Associates Inc. v. Cheryl Tuck-Tallon are the only Canadian authorities that I am aware of that are directly on point.

\textsuperscript{18} [2001] O.J. No. 621
\textsuperscript{19} [1909] A.c. 118 (H.L.)
THE CONCLUSIONS TO BE DRAWN ON THE SCOPE OF FIDUCIARY DUTY

Even in Saskatchewan, it appears that the scope of fiduciary duty is no longer limited to top management personnel and has been broadened to include "key employees". But, at least two judges of the Saskatchewan Court of Queen's Bench appear to be of the view that the courts in other Canadian jurisdictions have gone too far in classifying lower level employees as fiduciaries. We do not know where the line will be drawn in the future. The subsidiary questions of whether there is peculiar vulnerability and what is "unfair" competition are inherently unpredictable. The decision of the Courts, in a particular case, will not be capable of confident prediction. We can only be aware of the range of possibilities and make our best call.

The likelihood of a court determining that an employee is impressed with fiduciary obligations following departure is dependent upon a number of factors. As Laskin J. noted in Canaero [at 391], it would be "reckless" to attempt an exhaustive enumeration of these factors. It remains the particular facts of each situation which will govern the application of the principle. Nevertheless, as Judge J.R.M. Gautreau has stated, in Demystifying the Fiduciary Mystique\(^\text{20}\) [at 7]:

\[\text{Whether or not we can settle on a universal, all-purpose definition of fiduciary relationship, we can at least go this far. A fiduciary relationship will occur where a person undertakes, either expressly or by implication, to act in relation to a matter in the interests of another, in a manner that is defined or understood by them, and is entrusted with a power to affect such interests. The other person relies on or is otherwise dependent on this undertaking, and, as a result, is in a position of vulnerability to the exercise of such power; and the first person knows, or should know, of such reliance and vulnerability. The nature and circumstances giving rise to the undertaking are such that loyalty and good faith are intrinsic elements of the consequent duty.}\]

VI. CONFIDENTIALITY AND OTHER OBLIGATIONS

Historically, most contracts of employment were oral in nature. As a result, there has developed within the law, various implied contractual terms. Unlike a commercial contract, the relationship

\(^{20}\) (1989), 68 Can. Bar Rev. 1
between an employer and an employee is fluid and dynamic. In *Campbell v. MacMillan Bloedel Ltd*\(^{21}\), the Court stated at pp. 690-1:

> In my view, it is not correct to compare the fluid relationship that exists between master and servant to other commercial contracts. The relations between master and servant are, at best, uncertain and change from time to time in accordance with circumstances and the conduct of the parties. The court, as a general rule, when called upon to interpret an ordinary commercial contract is bound to concern itself with the terms of the agreement as they are spelled out therein, and cannot go outside the four corners of the agreement. Such is not the case with a agreement made between master and servant. Such an agreement is not reduced to writing and, moreover, the terms of the bargain between the parties are determined by the conduct of the parties during the term of employment, and not by conscious negotiation and agreement between the parties.

In other words, the court does not apply the principles of contract law as though in a vacuum, but reviews the history of the relations between the parties in its entirety so as to arrive at a rational solution in each particular case. The relationship of master and servant in the modern corporate world cannot be determined as though that relationship consisted of a single contract with fixed terms and conditions.

A. **CONDITION OF FAITHFUL SERVICE/IFIDELITY**

Absent a written or express employment contract, the following terms are implied by law into all employment contracts: the requirement of both the employer and the employee to give reasonable notice of termination of employment; the duty of faithfulness of the employee to the employer and the duty of the employee to maintain the confidentiality of the employer’s trade secrets\(^{22}\). All of these can of course be altered by the express terms of an employment contract.

B. **CONFIDENTIAL INFORMATION**

The doctrine of duty of confidence has been used in addition to the contractual duty, or in substitution for it when the contract is found to be unenforceable or void in some respect. In *Wessex Dairies Ltd. v. Smith*\(^{23}\), the English Court of Appeal was of the view that even if the

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\(^{23}\) [1935] 2 K.B. 80
express restraining clause in the employee's contract of employment might be void, the employee's implied duty of fidelity still applied to provide the necessary restraint. In *Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd.* 24, the Court used the equitable doctrine of confidence to place an obligation on an employee when the contractual limitation was inelegantly worded. In *Investors Syndicate Ltd. v. Versatile Investments Inc.* 25 the Ontario Court of Appeal held that despite an express covenant being void for restraint of trade, the employee was nonetheless in breach of his fiduciary duty as an agent of his former employer and could be restrained under that duty from disclosing client lists or other confidential information.

In *Faccenda Chicken Ltd. v. Fowler* 26, the plaintiff company was engaged in the business of marketing fresh chickens. The sales manager managed a method of selling fresh chickens from refrigerated vans on specified routes within defined areas. Each van salesman received sales information regarding the customers' names and addresses, the limits of the routes, quantity and quality of the goods and prices charged. Subsequently, the sales manager left the plaintiff's employment and set up a similar competing enterprise. Eight employees of the plaintiff joined this new business. None of the former employees were subject to restrictive covenants. The plaintiff brought an action for damages for breach of contracts of employment and conspiracy. The plaintiff's claims were dismissed at trial and by the Court of Appeal.

Absent any express terms the Court stated the following principles applied:

(a) While the employee remains employed there is an implied duty of good faith or fidelity on the employee. That duty of good faith will be broken if an employee makes or copies a list of customers of the employer for use after his employment or deliberately memorises such a list.

(b) Except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employee.

(c) Information which is of a sufficiently high degree of confidentiality as to amount to a trade secret such as secret processes of manufacture, chemical formulae, etc.,

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24 [1963] 3 All E.R. 402 (Ch.D.)
26 [1986] 1 All E.R. 617 (C.A.),

(67156)
cannot be lawfully used for anyone's benefit even after the employee has left his or her employment.

(d) Not all information which is given to an employee in confidence is a trade secret. In order to determine whether any such information is a trade secret so as to prohibit its use or disclosure after an employee's employment has ceased the following factors need to be considered:

(i.) the nature of the employment;

(ii.) the nature of the information itself; and

(iii.) whether the employer impressed upon the employee the confidentiality of the information. In this regard the attitude of the employer towards the information is a relevant consideration.

The court made it clear that if an employer is concerned about features in a process which can be fairly regarded as a trade secret, the proper way for the employer to protect itself is by exacting covenants from its employees restricting their field of activity after their employment instead of asking the court to extend the general equitable doctrine to prevent the breaking of confidence beyond all reasonable bounds. Canadian law does not appear to adopt this view.

In LAC Minerals, supra, the Supreme Court of Canada adopted the test for breach of confidence set down in Coco v. A.N. Clark (Engineers) Ltd. at 47-48. To succeed in establishing a breach of confidence a plaintiff must satisfy three requirements:

(a) the information must have the necessary quality of confidence about it;

(b) the information must have been imparted in circumstances in which an obligation of confidence arises;

(c) there must have been a misuse of that information to the detriment of the confider.

An action for breach of confidence relies on contract, equity, and property as the jurisdictional basis to "enforce the policy of the law that confidences be respected." (LAC Minerals, supra, per

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27 [1969] 2 R.P.C. 41
Sopinka J. at 74). It is also seen as part of the law of restitution (*LAC Minerals, supra*, per La Forest J. at 45).

A comprehensive expression of the rule is found in David Vaver's 1989 lecture at Osgoode Hall:

> If B acquires information that it agrees, knows, or ought reasonably to know is A’s confidential information, B owes A a duty (redressable by all the remedies available for the commission of a common law or equitable wrong) not to use or disclose the information, for at least as long as the information is not generally known, for a purpose other than the one for which A allowed it to be used or disclosed, unless public policy justifies B’s acts or equitable reasons bar A from claiming against B.


C. **CADBURY SCHWEPPES V. FBI FOODS LTD.**

The new leading case in Canada on breach of confidences is the Supreme Court of Canada's decision in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*

Cadbury Schweppes had licensed its trademark and formula for "Clamato" juice to Caesar Canning and, in the process, communicated confidential information regarding its recipe and manufacturing process. Caesar subsequently entered into a contract with FBI Foods to manufacture Clamato and passed on this confidential information.

The licensing agreement left Caesar Canning (and therefore FBI Foods) free to compete in the juice market after termination. It provided only that Caesar Canning would no longer have the right to use the trademark "Clamato" and would not, for a period of 5 years, manufacture or distribute any product which included, among its ingredients, clam juice and tomato juice.

Cadbury Schweppes notified Caesar Canning that the agreement would terminate in 12 months. At that point, Caesar Canning, working from the list of ingredients, but omitting clams or other seafood, developed a competitive product called "Caesar Cocktail" and began marketing it immediately, after the licensing agreement terminated. After some procrastination, Cadbury

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[28] [1999] 1 S.C.R. 142
Schweppes took action against FBI Foods (who had purchased the business and assets of Caesar Cocktail) for breach of confidence.

While the breach of confidence application was a context of a commercial relationship [as distinct from an employment relationship], the principles established by this judgment are applicable to employment relationships. Mr. Justice Binnie, delivering judgment on behalf of the full court, undertook an extensive analysis of breach of confidence actions and the jurisdictional basis: therefore. The Court held:

1. The action for breach of confidence has been characterized as *sui generis*. This *sui generis* characterization was adopted to recognize the flexibility that has been shown by courts in the past to uphold confidentiality and craft remedies for its protections [Para 27 and 28].

2. Actions in breach of confidence and for breach of fiduciary duty are distinct and independent. A fiduciary relationship is not required to give rise to confidentiality obligations and strong evidence will be required before a breach of confidential information situation is metamorphosed into one of a fiduciary relationship. [Para. 29 and 30].

3. In breach of confidence actions, the court's concern is for the protection of a confidence which has been created by the disclosure of confidential information. While the disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse; such vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of contractual terms, express or implied. The law will supplement the contractual relationship by importing a duty not to misuse confidential information. In the ordinary case, this does not elevate the breached duty to one of fiduciary duty.

4. In relation to presence or absence of contractual terms, the Court said:
36. Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: 337965 B.C. Ltd. v. Tackama Forest Products Ltd. (1992), 91 D.L.R. (4th) 129 (B.C.C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v. The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12, at p. 27:

... the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

37. The appellants argue that if contractual provisions can altogether negate the duty of confidence otherwise arising, they should equally be capable of limiting, expressly or by implication, the compensation payable. The appellants say the respondents got exactly what they bargained for, namely a competitive post-termination environment in which Clamato could lose market share to Caesar Canning's successor product that met the contractual criteria of being free of clam broth.

38. This analysis is correct so far as it goes, but it leaves out of consideration the fact the respondents did not bargain for the unfair competition of having their own know-how, imparted in confidence, used against them. The contract cannot reasonably be read as negating the duty of confidence imposed by law. The contractual context, while it may place important parameters on what compensation would be appropriate, does not assist the appellants in their effort to eliminate the compensation altogether.

5. Characterization of confidential information as property is controversial. The courts in Canada have been at pains to emphasize that the action is rooted in the relationship of confidence, rather than in characterization of "information" as property [Para. 41].

6. Breach of confidentiality is the "gravamen" of the complaint [Para. 48]. It is the unauthorized use of the information to the detriment of the party communicating it that makes the cause of action complete [Paras. 52 and 53].

7. There is a relatively low threshold for the kinds of information that may be the subject of a matter of breach of confidentiality. As Justice Binnie put it at Para. 75:

75 There is a further more general objection to the respondents' formalistic approach. Equity has set a relatively low threshold on what kinds of information are
capable of constituting the subject matter of a breach of confidence. In Coco v. A.N. Clark (Engineers) Ltd., supra, Megarry J., at p. 47, considered that "some product of the human brain" applied to existing knowledge might suffice. A similarly expansive concept was adopted in Lac Minerals at p. 610 by Sopinka J., quoting Lord Greene M.R. in Saltman Engineering Co. v. Campbell Engineering Co. (1948), 65 R.P.C. 203 (C.A.), at p. 215. Gurry in Breach of Confidence, supra, gives instances of information which were protected from disclosure because they were otherwise inaccessible, despite the fact that they possessed little or no actual value, including the commercial disastrous invention for rearing pigs at issue in Nichrotherm Electrical Co. v. Percy, supra. He concludes, at p. 82:

It would seem, therefore, that the nonsensical nature of information is not to be regarded as a barrier to confidentiality, but, rather, as a factor which the court will take into account in the exercise of its discretion whether to grant equitable relief, or as a factor affecting the quantum of any damages which may be in question.

If the Supreme Court is prepared to imply confidentiality obligations into commercial agreements that were documented; [where it was open to the parties to stipulate terms regarding confidentiality], then it appears probable that the Courts will also imply such terms into oral employment agreements and written employment agreements that have not expressly or by implication negatived confidentiality obligations. The approach of Faccenda Chicken is not accepted in Canada. If the duty of confidence is to be re-ordered by an employment contract, it must be done expressly. Further, it appears clear that the confidential information is not limited to that category of information known in law as "trade secrets"; but is much wider. If the duty of confidence is to be limited [in the employees interests] to trade secrets, then employment contracts need to expressly so provide.

In R.L. Cram Ltd. v. Ashton29, the Ontario Court of Appeal adopted the following definitions of "trade secrets"based on American authorities:

(a) A trade secret is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it.

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A trade secret is a plan or process, tool mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it.

The term trade secret, as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.

A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret.

In 1988, the Uniform Law Conference adopted a model Canadian draft statute, called the Uniform Trade Secrets Act. In this statute, s. 1(1) sets out the following definition:

"Trade secret" means any information that

(a) is, or may be, used in a trade or business,
(b) is not generally known in that trade or business,
(c) has economic value because it is not generally known, and
(d) is the subject of efforts that are reasonable under the circumstances to prevent it from becoming generally known.

The same model statute provides a further explanation in s.1(2):

. For the purposes of the definition trade secret "information" includes information set out, contained or embodied in, but not limited to, a formula, pattern, plan, compilation, computer program, method, technique, process, product, device or mechanism.

The model Canadian statute has not yet been enacted by any province.
The Supreme Court of Canada clearly envisages the duty of confidentiality extending beyond trade secrets. If something is a "trade secret" there is an obligation of confidentiality regardless of the relationship. Within the broader category of "confidential information" the issues are whether the information is in fact "confidential" and whether a duty of confidence arises in the circumstances.

VII. RESTRICTIVE COVENANTS

Express restraints may be legitimately placed by contract upon the employee's use of confidential information [both trade secrets and other "confidential" information] gained while in the former employ, and upon his or her activities in relation to customers of the former employer. These restraints, however, must be reasonable in terms of their geographical extent, duration in time, and the scope of the activities which they prohibit. In Nordenfelt v. The Maxim Nordenfelt Guns & Ammunition Co. Ltd.30, Lord Macnaghten stated at p. 565:

> The public have an interest in every person's carrying on his trade freely: so has the individual. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a significant justification, and indeed, it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public.

However, an employee has a right to utilize his or her own stock of skill and knowledge following the cessation of his or her employment. This principle was stated in Steinhouse Australia Ltd. v. Phillips (1973)31 at pAOO (A.C.):

> For while it may be true that an employee is entitled - and is to be encouraged - to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.
In Herbert Morris Ltd. v. Saxelby\textsuperscript{32}, Lord Shaw summarized this position as follows at p.714:

Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge - these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability - all of those things which in sound philosophical language are not objective, but subjective - they may and they ought not to be relinquished by a servant; they are not his master's property; they are himself.

In Elsley v. J.G. Collins Insurance Agencies Limited\textsuperscript{33}, the respondent agreed to purchase the business of a competitor owned by Elsley. The agreement contained a covenant on the part of the vendor that it would not for ten years carry on or be engaged in the business of a general insurance agency in the area in question with liquidated damages stipulated at $1,000 for each and every breach. By another agreement, Elsley was employed as a manager of the respondent's operation and subject to a covenant not to become engaged in the business of a general insurance agent while employed or during a five year period after cessation of his employment. Liquidated damages for breach of this covenant were set. After 17 years, Elsley resigned and recommenced his own general insurance business.

The court ordered that Elsley be restrained from carrying on the business of general insurance agent within the defined area and ordered him to compensate the respondent on the basis of all contracts of general insurance sold within the relevant period.

With respect to the restrictive covenant, the court stated at p.923:

A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power.

\textsuperscript{32} [1916] 1 A.C. 688 (B.L.)
\textsuperscript{33} [1978] 2 S.C.R. 916 (S.C.c.)
The court made a distinction between restrictive covenants contained in an agreement for the sale of a business and one contained in a contract of employment. With respect to the former, the court stated that so long as the time during which, and the area within which, the noncompetitive covenant is to operate is reasonable, the courts will normally give effect to the covenant (at p.924). With respect to restrictive covenants contained in contracts of employment, the court stated at p.924:

A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employer.

Thus, restrictive covenants contained in employment contracts are subject to greater scrutiny than restrictive covenants arising in commercial contracts. To survive the restrictive covenant must be limited to protecting trade secrets, confidential information and trade connections. But, given the Court's willingness to imply confidentiality obligations, it would appear that restrictive covenants that define confidentiality obligations broadly (as long as reasonable) will be upheld.

VIII. CONCLUSIONS TO BE DRAWN ON THE DUTY OF CONFIDENTIALITY

The traditional techniques for an employer to protect confidential knowledge were confidentiality agreements and restrictive covenants. In the absence of contractual restrictions, non-fiduciary employees may have felt entitled to exploit, for their own benefit, knowledge developed by their former employees. However, the Supreme Court of Canada decisions in LAC Minerals and Cadbury Schweppes have established that:

1. the categorization of information as "confidential" has a low threshold; and
2. the courts will imply duties of confidentiality into commercial agreements including employment agreements where it seems appropriate.
Accordingly, every departing employee has a duty to respect and preserve his or her previous employers' confidences. This duty is not dependent upon the existence of a fiduciary duty. The concerned employer has a powerful tool to enforce that duty by an action for breach of confidence.

The Supreme Court would appear to be signaling in *Cadbury Schweppes* that, it is not necessary to expand the scope of fiduciary duty beyond the senior employee given the scope of the duty of confidence.