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ONCE A DIRECTOR, ALWAYS A FIDUCIARY?

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I. INTRODUCTION

THE corporate director is subject to duties[1] of good faith and loyalty. As he stands in a *fiduciary* position *vis-à-vis* the company on whose board he sits, he is subject to strict obligations of self-denial.[2] Indeed, ensuring adherence to an absolute rule in this regard is justified by the need to control, albeit in a necessarily imperfect and arguably ineffective manner, the exercise of discretion by the director who stands in an undoubted position of power with respect to the company. A director therefore is obliged to avoid a conflict of interests and is prohibited from profiting from his office. What then of the *erstwhile* director?

The question whether ex-directors continue to be bound, post-release, by the fiduciary obligations that prohibit conflict and profit during the course of the directorship should, technically, not be difficult to answer. A simple answer would be in the negative. Lord Woolf M.R., sitting in the Court of Appeal in *Attorney-General* v. *Blake (Jonathan Cape Ltd.)*,[3] clearly thought so when he opined that English law does not "recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it".[4] The reason for this should be obvious—the basis for the imposition of these strict fiduciary obligations is borne of the need to exact loyalty from the

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[1] The corporate director and the duties he owes are currently under intense scrutiny. The tidal wave of corporate law reform initiatives set in motion with the launch by the Department of Trade and Industry (DTI, *Modern Company Law for a Competitive Economy* (1998)) had, at its core, a proposed statement of directors' duties. The reform cudgel was subsequently taken up by the independent Company Law Review Steering Group (CLRSG) formed of those with particular knowledge and expertise in company law matters. The CLRSG presented its Final Report (*Modern Company Law for a Competitive Economy: Final Report* (2001, URN 01/942 (vol. 1) and 01/943 (vol. 2)) ("Final Report") to the Secretary of State in mid-2001. The Government has, in its White Paper, *Modernising Company Law* Cm. 5553 ("MCL"), endorsed much of what was recommended by the CLRSG, with the exception of the proposed duty in relation to creditors: see MCL Vol. I, paras. 3.8–3.10.

[2] See S. Worthington, "Fiduciaries: When is Self-Denial Obligatory?" [1999] C.L.J. 500. See also R. Teele, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 Australian Business Law Review 99.

[3] [1998] Ch. 439.

[4] *Ibid.*, at p. 453.

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director. The relationship that the director has *vis-à-vis* the company is such as to give him "a special opportunity to exercise the power or discretion [conferred on him] to the detriment of the other person who is accordingly vulnerable to abuse by the fiduciary of his position".[5] Once that relationship is ended, so too necessarily is the duty of loyalty and its constituent principles. Yet, it cannot be disputed that an unstinting adherence to this principle will render the fiduciary obligation too easy to avoid. It should be obvious that to allow such restrictive connotations of the fiduciary rules to hold sway would merely pave the way for their manipulation. There is therefore judicial acceptance that a director's fiduciary obligation may continue even *after* he ceases to be a director. The scope and ambit of these continuing obligations are however not precisely delineated.[6]

The focus of this paper is the position of the *former* director *vis-à-vis* the extent of his continuing *fiduciary* obligations to the company. For the sake of completeness, however, the paper begins with a consideration, but in a penumbral manner, of the fiduciary obligations that are imposed on a *current* director. The paper then proceeds to consider the position of the ex-director and in this "after-office" context, puts forward the following propositions:

(i) The circumstances under which a director's fiduciary obligations survive termination of the directorship are and should remain limited. There are two primary reasons for this. First, fiduciary obligations are imposed to exact loyalty and control the exercise of discretion. Once the relationship demanding these constraints ends, it logically follows that so too must the appurtenant obligation. Second, the general policy against restraint of trade applies with equal force to directors.

(ii) This notwithstanding, there must be a policy in resignation cases to *prevent* the easy avoidance of a director's strict fiduciary obligations. My suggested approach here is for the courts to focus, at the first instance, on the specific

[5] *Per* Mason J. in *Hospital Products* v. *United States Surgical Corporation* (1984) 156 C.L.R. 41, 96–97.

[6] Notwithstanding this, it is interesting to note that a reference to the former director has crept into the draft statement of duties in the CLRSG's Final Report (see specifically Final Report, Principle 6, Annex C) and by that route, also into Schedule 2 to the proposed Companies Bill (see MCL—*Draft Clauses*, Cm 5553-II). This is rather a significant manoeuvre, as the original "trial draft" proposed by the CLRSG was *not* meant to apply to former directors (see CLRSG, *Modern Company Law for a Competitive Economy: Developing the Framework* (2000, URN 00/656) para. 3.44, n. 34). The on-going efforts with respect to the statement have focussed, and it is submitted rightly, on duties that should be imposed on directors *in the performance of their functions as directors*, leaving the position of the *former* director ensconced within the embrace of general law.

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company-fiduciary relationship, with particular emphasis on the disparate information structure as between the particular director and the company, and, with respect to that particular director, to utilise the device of a *presumption* against the director.

(iii) In addition, the law should recognise that there are some business opportunities that cannot and should not be exploited by ex-directors, no matter what the circumstances of their resignation. To ensure a disciplined approach towards the imposition of fiduciary liability in *this* regard, the courts should have resort to a tightly conceived doctrine of corporate opportunities, which will also, concurrently, confine the reach of the continuing obligation.

(iv) The doctrine I propose, in this context, is one that captures *only* those business opportunities in which the company has an "interest-or-expectancy". Beyond this, the former director should be free, unless contractually restrained, to compete with the company, the only other constraint being that he cannot utilise confidential information belonging to the company.

II. Once a Director

The Strict Ethic

The starting point must be Lord Herschell's famous admonishment that "it is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict".[7] The no-conflict rule, which requires a fiduciary to avoid situations in which his personal interest and his duty conflict, or may possibly[8] conflict, was referred to by Sir Frederick Jordan[9] as "rather a counsel of prudence than a rule of equity",[10] there being no breach of duty unless and until the fiduciary takes *advantage* of such a conflict. Thus it was in *Movitex Ltd.* v. *Bulfield* [11] that Vinelott J. said, "I do not think it is strictly accurate to say that a director of a company owes a fiduciary *duty*[12] to the company not to put himself in a position where his duty to the company may conflict with his personal interest or with his duty to another".[13] In *Plus Group Ltd.* v.

[7] *Bray* v. *Ford* [1896] A.C. 44, 50.
[8] In a real sensible manner: *per* Lord Upjohn in *Boardman* v. *Phipps* [1967] 2 A.C. 46, 124.
[9] F. Jordan, *Select Legal Papers* (Sydney 1983), 112.
[10] *Ibid.*, at p. 115.
[11] [1988] B.C.L.C. 104.
[12] His Honour referred to *Tito* v. *Waddell No. 2* [1977] Ch. 106 and thought that the no-conflict principle should be classified as a "disability" rather than a "duty": at pp. 119–120.
[13] *Ibid.*, at p. 125 (emphasis added).

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Pyke,[14] however, Sedley L.J. cautioned that whilst it is legally correct to draw a distinction between a director's putting himself in a position of conflict and his being in breach of fiduciary duty, "this does not mean that a director can cheerfully go to the brink so long as he does not fall over the edge". This is because the law "will take notice of a situation of impending or potential breach". The no-profit rule, on the other hand, renders a fiduciary liable to account for any gain which he obtained as a result of taking advantage of his fiduciary position, whether there was present a conflict of interests or not. The fiduciary position could have given the director access to valuable information or enabled cognizance of some business opportunity. Liability therefore depends on there being a connection or link between gain and office.

Much has been written[15] about the content of and relationship between the two inter-related yet distinct concepts in his Lordship's statement. Although there have been judicial statements suggesting that the no-profit doctrine or theme is part of the wider no-conflict rule,[16] it is perhaps more accurate to say that these are really independent rules, or, to use Professor Austin's imagery-laden phrase, outcrops on the fiduciary terrain.[17] This is simply because it is possible, on a particular set of facts, to impose liability on the basis of only *one* of these rules.[18] A director, who pursues a *public* call for tenders even though he well knows that his company is pursuing the same, will have allowed his personal interest to conflict with that of his company. The relevant rule is the no-conflict rule. If he is successful, he would have profited from the conflict. As the call was public, it was not his *position* that led him to the profit. Conversely, a director who pursues and profits from a

[14] [2002] EWCA Civ 370.

[15] See *e.g.* A.J. McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alberta Law Review 218; S.M. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 51 Canadian Bar Review 80, 89–90; R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn (ed.), *Equity and Commercial Relationships* (Sydney 1987), 146.

[16] See *e.g.* Lord Upjohn's statement in *Phipps* v. *Boardman* [1967] 2 A.C. 46, 123 that "a person in a fiduciary position must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict"; Lord Wilberforce's statement in *New Zealand Netherlands Society "Oranje" Incorporated* v. *Kuys* [1973] 2 All E.R. 1222, 1229 that "the obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness"; and Gibbs J.'s opinion in *Consul Development Pty. Ltd.* v. *DPC Estates Pty. Ltd.* (1975) 5 A.L.R. 231, 248 that "the rule that a person in a fiduciary position is not entitled to make a profit without the knowledge and assent of the person to whom the fiduciary duty is owed, is not limited to cases where the profit arises from the use of the fiduciary position or of the opportunity or knowledge gained from it. The basis of the rule is that a person in a fiduciary position may not place himself in a situation where his duty and his interest conflict".

[17] Austin, note 15 above, at p. 146.

[18] See examples cited in Austin, note 15 above, at p. 146, and McClean's discussion, note 15 above at pp. 223ff.

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contract which the company *cannot*, for valid reasons, secure has *not* placed himself in a position of conflict, as the company has no real interest in that contract. But, in the absence of disclosure and consent, he would be in breach of the no-profit rule if it was his *office* that led him to that profit.

These "outcrops" not infrequently cover the same ground. Indeed, when a fiduciary makes an unauthorised profit out of his office, he would have placed his personal interest ahead of his duty to his principal. Thus Professor Beck has observed that "in the majority of cases the judicial language mixes the two rules simply because conflict and profit are both present".[19] This significant overlap in coverage is due to the common fundamental injunction, which springs from the fount that is the duty of loyalty, and that is that a person in a fiduciary relationship must deny himself any advantage or benefit that might be of interest or relevance to the company. Each sub-rule then deals with the separate situations in which occasion for self-denial can arise. Thus, self-denial is necessary if there is a conflict of interests, and it is a failure to exert self-denial that results in an actual use of the fiduciary position to gain a benefit. Deane J. of the High Court of Australia[20] provided the following formulation of the nuances of these sub-rules:[21]

> ... what is conveniently regarded as the one "fundamental rule" embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage.[22]

Whilst there may arguably be room for a less rigid application of the no-conflict rule at least in the corporate context,[23] it is manifestly

[19] See note 15 above, at p. 90.
[20] *Chan* v. *Zacharia* (1984) 53 A.L.R. 417.
[21] *Ibid.*, at p. 433.
[22] Deane J.'s formulation was stated in terms of the liability to account. In this regard, it should be pointed out that where the conflict is fleshed out in the form of a contract entered into between the director and his company, the orthodox position in the UK is that the company's remedies do not include disgorgement, being restricted to rescission: see *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218. But this position is currently under siege: see S. Worthington, "Corporate Governance: Remedying and Ratifying Director's Breaches" (2000) 116 L.Q.R. 638, 665ff.
[23] Arguably this would explain why there is no absolute prohibition on a director not to compete with his company: see *London and Mashonaland Exploration Co.* v. *New Mashonaland*

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clear from the House of Lords' decision in *Regal (Hastings) Ltd.* v. *Gulliver*[24] that no such leeway is permissible in respect of the no-profit rule, and I would add, this same rigidity should also apply where the director has taken advantage of, and thus profited from, a conflict situation. In the oft-quoted words of Lord Russell, "the liability arises from the mere fact of a profit having, in the circumstances, been made".[25] This decision followed a line of trust cases, beginning with Lord Chancellor King's famously austere declaration in *Keech* v. *Sandford*[26] that the defendant trustee must hold the renewed lease on trust for the infant beneficiary, even though the landlord had refused to grant a new term to the infant and therefore the trustee's duty to the infant was incapable of performance, and even though the trustee had acted in unquestionable good faith. However, the trustee's gain could not have been realised but for his position as trustee, he thus remained liable to account for his gain. The main justification for the imposition of the harsh rule is the need to control the exercise of discretion by the fiduciary. A fiduciary is conferred discretion to act for the benefit of another; not only does he have the mandate to exercise individual discretion, but he is also able to affect the legal position of the beneficiary. Such relational traits leave the beneficiary vulnerable to abuse, as the very power held by the fiduciary that allows him to benefit the other, also allows him to "indulge his own interest and to injure"[27] that other.[28] The fiduciary obligation is therefore obviously prophylactic, because "human infirmity"[29] finds it difficult to resist temptation.

Corporate Opportunities—Moving Away from the Strict Ethic?

The decision in *Regal (Hastings)* very clearly demonstrated the unrelenting nature and, some[30] have argued, inequitable severity of the rule which should then, yet others have argued,[31] perhaps be

Exploration Co. [1891] W.N. 165. See also *Holder* v. *Holder* [1968] Ch. 353 and the discussion thereof in G. Jones, "Unjust Enrichment and Fiduciary's Loyalty" (1968) 84 L.Q.R. 472, 489–491, and in A.J. McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alberta Law Review 218, 228–229.

24 [1942] 1 All E.R. 378.

25 *Ibid.*, at p. 386.

26 (1726) 25 E.R. 223.

27 D.A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" [1988] Duke Law Journal 879, 914.

28 Or as Lord Chancellor King put it, "I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to the *cestui que* use": (1726) Sel. Cas. t. King 61, 62, 25 E.R. 223.

29 *Ex Parte Bennett* (1805) 10 Ves. Jun. 382, 394, 32 E.R. 893, 897 (*per* Eldon L.C.)

30 See, *e.g.* G. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472. See also, L.C.B. Gower, *Gower's Principles of Modern Company Law*, 6th edn., by P.L. Davies (London 1997), 617, describing the result as "carrying equitable principles to an inequitable conclusion".

31 See J. Lowry & R. Edmunds, "The No Conflict-No Profit Rules and The Corporate Fiduciary: Challenging the Orthodoxy of Absolutism" [2000] J.B.L. 122; but cf. S.M. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 51 Canadian

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applied less resolutely to the director-fiduciary in a modern corporate context. Although it is true that most of these "protectionistic" statements were made in relation to trustees and "fashioned in a different age",[32] the concerns expressed are clearly also applicable to modern corporate directors, who are entrusted with wide discretionary powers for the conduct and management of the company's business.[33] Whilst the point has been made that there are many important functional differences between a director and a trustee,[34] it is generally undisputed that fiduciary constraints are of relevance to the corporate director. In the words of Danckwerts J.:

> ... directors ... are the persons who in fact control the corporation and decide what shall be done. It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property .... Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees.[35]

Nevertheless, it is argued, times have changed[36] and it is opportune now to consider a reformulation of the classic, rigid notion of the fiduciary obligation towards to a less absolute stance. A director does not assign to the company "100 per cent. of their energies, times, efforts and cumulative talents; they are not on call twenty-four hours a day".[37] It should therefore be recognised that there are profit-making activities which a director is free to pursue for himself, *even whilst still a director*. Some support for an application of the fiduciary principle that falls short of absolutism can be found in Bull J.A.'s judgment in the British Columbia Court of Appeal decision of *Peso Silver Mines* v. *Cropper*.[38] His Honour made the following comment regarding the "inflexible rule":

> ... in this modern day and country when it is accepted as common-place that substantially all business and commercial undertakings, regardless of size or importance, are carried on

Bar Review 80; M. Christie, "The Director's Fiduciary Duty Not to Compete" (1992) 55 M.L.R. 506.

[32] Lowry & Edmunds, *ibid.*, at p. 142.

[33] It is standard for the company's constitution to vest general managerial powers in the board. Thus, the directors "have absolute power to do all things other than those expressly to be done by the company": *per* Collins M.R. in *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* [1906] 2 Ch. 34, 42.

[34] L.S. Sealy, "The Director as Trustee" [1967] C.L.J. 83.

[35] *In re The French Protestant Hospital* [1951] Ch. 567, 570.

[36] Teele, note 2 above, at p. 100. See also Lowry & Edmunds, note 31 above. Also, by the same authors, "The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies" (1998) 61 M.L.R. 515.

[37] P.K. Chew, "Competing Interests in the Corporate Opportunity Doctrine" (1989) 67 North Carolina Law Review 435, 448.

[38] (1966) 56 D.L.R. (2d) 117.

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> through the corporate vehicle with the attendant complexities involved by interlocking, subsidiary and associated corporations, I do not consider it enlightened to extend the application of these principles beyond their present limits. That the principles, and the strict rules applicable to trustees upon which they are based, are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice and way of life.[39]

Clearly, there is a clash of competing policy interests here. The focus of the orthodox formulation of the fiduciary obligation is the exaction of loyalty from the corporate fiduciary. A rigid adherence to the classic rule will, in theory, free the company from speculating as to the director's loyalty and fair-dealing, and consequentially reduce monitoring costs. Maintaining the integrity of the fiduciary-company relationship is therefore primary.[40] This, of course, ignores the director's legitimate interests as an *individual* because application of and corresponding liability under the absolute rule depends neither on an examination of the circumstances surrounding the alleged breach nor on the equities of the case. Thus it was that the directors in *Regal (Hastings) Ltd.* v. *Gulliver*[41] had to disgorge the profit made from the sale of shares, simply because these shares were acquired by reason of their positions as directors, even though the company could not itself have made that profit and even though the directors had acted, in admittedly good faith, in the company's interest. It can readily be seen then that when applied to commercial information acquired by a director whilst a director, the absolute rule ensures that any entrepreneurialism on the part of the director will have to take a backseat—at least while the director is still a director. It has therefore been proposed[42] that English courts should look to America's corporate opportunity doctrine to alleviate the perceived inequities of a strict fiduciary principle.[43]

In the United States,[44] the corporate opportunities doctrine[45] regulates the circumstances under which a business opportunity is

[39] *Ibid.*, at p. 155.
[40] Chew, note 37 above, at p. 441.
[41] [1942] 1 All E.R. 378.
[42] Lowry & Edmunds, notes 31 and 36 above.
[43] Professors Lowry and Edwards were specifically advocating the line of business test espoused in the landmark decision of *Guth* v. *Loft, Inc.* 5 A. 2d. 503 (Del. Ch., 1939).
[44] It is not proposed to consider the American doctrine save in the briefest of fashions as there are already ample readily available material written on the subject. One commentator was prompted, by the volume of literature in the general area of fiduciary duties and the appropriation of business opportunities, to suggest "not entirely facetiously that an article on this topic is a prerequisite for academic advancement": R.G. Hammond, "Quantum Physics, Econometric Models and Property Rights to Information" (1981–1982) 27 McGill Law Journal 47, 62, n. 33.
[45] In this regard, see generally V. Brudley & R.C. Clark, "A New Look at Corporate Opportunities" (1981) 94 Harvard Law Review 998; E. Talley, "Turning Servile Opportunities

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considered a corporate asset so that a corporate fiduciary, such as an officer or director, may not exploit it for his own benefit, while still a fiduciary, without consent. The obvious corollary to this is that the director is free to exploit any business or commercial opportunity that does *not* fall within the definition of a "corporate opportunity". The strict rule applies only to business opportunities that are properly considered *corporate* opportunities. The challenge is coming up with an acceptable definition that achieves that optimum balance between competing interests.

As an indication of the magnitude of the task, the courts in the United States have come up with a number of tests for identifying whether the disputed project is a corporate opportunity. Of these, there are three traditional tests.[46] The restrictive "interest-or-expectancy" test, in its narrowest incarnation,[47] keeps out of bounds to corporate fiduciaries only those projects or opportunities to which the corporation has a present contractual right. The most widely used "line of business" test, as originally formulated in the seminal case of *Guth* v. *Loft, Inc.*, [48] is significantly wider. Under that test, corporate fiduciaries are precluded from pursuing any opportunity (1) that is "so closely associated with the existing business of [the corporation] and so essential thereto"[49] as to put the fiduciaries in competition with their corporation or (2) to which the corporation has "fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion".[50] To complete the traditional trilogy, there is the ephemeral "fairness" test,[51] which does not attempt to define a corporate opportunity as such, but leaves the courts to consider various factors to determine whether the fiduciary's actions were fair or not. In addition to these tests, there are a number of hybrids and composites[52] as well as the American Law

to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine" (1998) 108 Yale Law Journal 277; D.R. Landes, "Economic Efficiency and The Corporate Opportunity Doctrine: In Defense of a Contextual Disclosure Rule" (2001) 74 Temple Law Review 837.

46 See generally, P.K. Chew, *Directors' And Officers' Liability* (New York 1994), Ch. 5; see also Talley, *ibid.*, at p. 116.

47 *Lagarde* v. *Anniston Lime & Stone Co.* (1899) 29 So. 199 (Ala.).

48 (1939) 5 A. 2d. 503 (Del. Ch.).

49 *Ibid.*, at p. 513.

50 *Ibid.*, at p. 514.

51 *Durfee* v. *Durfee & Canning, Inc.* (1948) 80 N.E. 2d 522 (Mass.).

52 In *Miller* v. *Miller* (1974) 222 N.W. 2d 71 (Minn.), the court adopted a two-step test which utilised, consecutively, the line-of-business test as well as the fairness test. Thus, under this test, the fact that an opportunity falls within the corporation's line of business is not *per se* determinative of the outcome, which depends further on whether the fiduciary's taking of the opportunity is unfair to the corporation.

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Institute's reformulation of the doctrine into a disclosure-focused process.[53]

As should be obvious, it is not at all clear what the boundaries of *impermissible* conduct on the part of the fiduciary are, the answer depending on first, which test is adopted, and second, how the requirements of the particular test are interpreted by the relevant court. The corporate opportunity doctrine has therefore been, not unexpectedly, the frequent subject of criticism.[54] A cursory consideration of the prominent "line-of-business" test, for example, will provide a good indication of the measure of the difficulties involved.

It will be recalled that the essence of this test is whether the business opportunity or prospect falls within the company's line of business so as to throw the fiduciary into competition with the company. Obviously, which opportunities are reeled in by the test and considered out of bounds for the corporate fiduciary would be determined by how narrowly or broadly the court chooses to interpret a company's "line of business". This in turn depends on how the particular court conceptualises business opportunities which are "adaptable" to the company's existing business. In *Guth* v. *Loft, Inc.*,[55] the Delaware Supreme Court took the view that the acquisition of a *supplier* (and therefore not a directly competitive opportunity) was nevertheless within the company's line of business,[56] as this was an opportunity to which the company was capable of adapting its resources. The reach of this test is therefore potentially limitless, rendering virtually *all* opportunities as belonging to the company, as long as the company has sufficient financial resources.[57] Even so, the test has also been criticised as

[53] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994), para. 5.05. The ALI's definition of a corporate opportunity that must first be disclosed to and rejected by the corporation includes, in addition to a line-of-business formula, a source-of-information inquiry: *ibid.*, para. 5.05 (b).

[54] See articles cited in note 45 above. See also Chew, note 37 above; H. Gelb, "The Corporate Opportunity Doctrine—Recent Cases and the Elusive Goal of Clarity" (1997) 31 University of Richmond Law Review 371, and also *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.* 661 A.2d 1146 (Me. 1995) in which the Supreme Judicial Court of Maine reviewed the different tests.

[55] (1939) 5 A. 2d. 503 (Del. Ch).

[56] The company Loft was mainly in the business of retailing soft drinks, including Coca-Cola, and the defendant Guth was its President and dominant director. While investigating alternative suppliers of soft drink syrup, the company considered Pepsi-Cola. The owner of the Pepsi-Cola syrup formula and trademark became bankrupt and Guth acquired these from the trustee in bankruptcy, formed the Pepsi-Cola Company, and became Loft's supplier. The court held that although Loft's business involved mainly the sale of a cola beverage, it nevertheless had a wholesale operation, albeit a limited one, which could be adapted to produce Pepsi-Cola syrup, and the Pepsi-Cola opportunity was therefore within Loft's line of business. The court arrived at this conclusion even though there was no evidence that it was part of Loft's corporate strategy to diversify into manufacturing cola syrup and even though there were significant differences between the wholesale and retail operations for soft drinks: see Chew, above note 54 at pp. 457–458.

[57] Chew, above note 37, at p. 458.

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being too *parochial* in its reach. In *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.*,[58] the corporation in question was a club whose business was to run a golf course. The impugned transaction was the purchase by Harris, the president of the Club, of property that was adjacent to the golf course. At trial, it was held that there was no corporate opportunity within the *Guth* test because the Club was not in the business of developing real estate.[59] The Supreme Judicial Court of Maine, however, thought that "the record would support a finding that the Club had made the policy judgment that development of surrounding real estate was detrimental to the best interests of the Club" and that "Harris's activities effectively foreclosed the Club from pursuing that option . . ."[60]

Indeed, a doctrinal focus on the concept of the corporate opportunity would be too narrow for the purposes of maintaining the fiduciary standard *vis-à-vis current* directors, and could have the undesirable consequence of detracting from the core policy behind the fiduciary obligation in the first place, that of exacting loyalty from the fiduciary. In the words of the Supreme Judicial Court of Maine, "corporate fiduciaries owe their whole duty to the corporation, and they are not to be permitted to act when duty conflicts with interest. They cannot serve themselves and the corporation at the same time."[61] It is respectfully submitted that any standard short of absolute stringency and rigidity will give rise to uncertainty and "will do no good, to say the least, to commercial morality".[62] More than half a century ago, a Harvard Law School don[63] doubted if the effective regulation of the fiduciary duties of corporate managers was practicable.[64] Professor E. Merrick Dodd pinpointed the difficulty as being rooted in the concept of "vicarious acquisitiveness" that is fundamental to the duty of loyalty imposed on director-fiduciaries. This concept forces the director to control the more natural self-regarding motive of acquisitiveness and redirect these impulses towards increasing the acquisitions of the shareholders, through the corporate vehicle.[65]

[58] 661 A. 2d 1146 (Me. 1995).
[59] *Ibid.*, at p. 1149.
[60] *Ibid.*
[61] *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.* 661 A. 2d 1146 (Me. 1995), 1150, citing *Camden Land Co.* v. *Lewis* 101 Me. 78 (1905), 97.
[62] Frederick Pollock, "*Derry* v. *Peek* in the House of Lords" (1889) 5 L.Q.R. 410, 422.
[63] E.M. Dodd, Jr., "Is Effective Enforcement of The Fiduciary Duties of Corporate Managers Practicable?" (1934–1935) 2 University of Chicago Law Review 194.
[64] It can be said that his view is vindicated by the recent spate of corporate failures in the US. Indeed, if a cynical view of the effectiveness of the law is taken, corporate law reform would be a total waste of effort! But the law has a wider, perhaps more noble, function, and that is to affect and shape the behaviour of relevant persons appropriately.
[65] Dodd, note 63 above, at p. 195.

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Professor Dodd however, did not suggest releasing directors from their fiduciary obligations.[66] Indeed, I would venture that it is *precisely* because of these inherent "psychological difficulties", that a strict standard is imperative. In *Peso Silver Mines*, Norris J.A., in his dissenting judgment, gave another compelling reason for the maintenance of the strict standard:

> With the greatest respect, it seems to me that the complexities of modern business are a very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or shield behind which fraud might be perpetrated. The argument is purely and simply an irrelevant argument of expediency as to what the law should be, not what it is. It might as well be said that such an argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits. ... The history today of the activities of many corporate bodies has disclosed scandals and loss to the public due to failure of the directors to recognise the requirements of their fiduciary position ....[67]

The difficulty with the US corporate opportunity doctrine as applied to the current director is the murkiness that it brings to this area of the law. Undoubtedly, the various, and different, formulations of the test are, as Roberts, J. explained, "merely attempts to moderate the potentially harsh consequences of strict adherence to that [policy of loyalty]" and "it is important to preserve some ability for corporate fiduciaries to pursue personal business interests that present no real threat to their duty of loyalty".[68] Indeed, it is this perceived "advantage" of the corporate opportunity doctrine, the ability to "moderate" the inequities engendered by the strict rule that led to calls[69] for its assimilation into English corporate law. With great respect, it is submitted that this is neither a convincing nor a valid reason to advance in favour of the assimilation into English corporate fiduciary law of the doctrine of corporate opportunity. If the moderation of the absolute fiduciary standard is the *only* reason, than assimilation of the doctrine should be strongly resisted. Where the *current* director is concerned, the policy applicable should be clear, "unbending and inveterate",[70] and that is that the standard of behaviour and

[66] *Ibid.*, at p. 207.
[67] (1966) 56 D.L.R. (2d) 117, 139.
[68] *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.*, 661 A.2d 1146 (Me. 1995), 1150.
[69] See note 36 above.
[70] Per Cardozo, J. in *Meinhard* v. *Salmon* 249 N.Y. 458, 164 N.E. 545, 546 (1928).

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fiduciary responsibility a director is held to is "not honesty alone, but the punctilio of an honor the most sensitive".[71] Adoption of a standard that falls short of the absolute detracts from the core rationale of imposing the fiduciary obligation in the first place, that of exacting undivided loyalty, and can only breed ambiguity and uncertainty, resulting in guessing games as to the boundaries of the corporate fiduciary's freedom of action. In this area at least, Brandeis J.'s observation that "it is more important that the applicable rules of law be settled than that it be settled right"[72] appears to make plenty of sense.

Does this put the corporate director in a commercially untenable position? A director accepts office on the basis of self-denial, but this does not preclude an individual director, if he should possess the bargaining power to do so, *contractually*[73] to retain the privilege to compete with the company, exploit opportunities in which the company may also be interested, or otherwise profit whilst still a director. It has also to be remembered, very importantly, that the standard is only severe if the director does not obtain the fully-informed consent of the company. If the standard is consistently harsh, there is little reason for directors not to be aware of it, and even less reason then for not ensuring that proper consent is obtained. Indeed, this was the approach adopted by the American Law Institute in its disclosure-based version of the corporate opportunity doctrine, which was endorsed by the Supreme Judicial Court of Maine in *Northeast Harbor Golf Club, Inc.*[74] In this regard, it should be pointed out that the CLRSG appeared to have adopted a process-focussed approach to the issue of directors' fiduciary duties.[75]

III. Always a fiduciary?

An Anti-Avoidance Policy?

There is another albeit diametrically-opposed but arguably more convincing reason why the courts *should* have resort to a doctrine

[71] *Ibid.*

[72] In *Burnet* v. *Coronado Oil & Gas Co.* 285 US 393, 406 (1932).

[73] See Chew, note 37 above, in which Professor Chew recommends, in the context of the American corporate opportunity doctrine, that there be express negotiations between companies and fiduciaries on their respective rights as an alternative means of resolving corporate opportunity disputes. In the absence of such an agreement, the courts should enforce the reasonable expectations of the company and the fiduciaries.

[74] 661 A. 2d 1146 (Me. 1995).

[75] In the CLRSG's Final Report, it was stated that a "key issue of principle" which had to be addressed is "the *process* for addressing directors' conflicts of interest, and *in particular* which company body—the board or the shareholders—should have the authority to permit a director to exploit … a business opportunity which he has encountered as a director": para. 3.21 (emphasis added).

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of corporate opportunity in the area of corporate fiduciary obligations, but in the context of *ex-directors* and their continuing fiduciary obligations.

The no-conflict principle which, as we saw earlier, requires the director to avoid situations of real or potential conflict between his personal interests and his duty to the company, is really only breached if the director takes advantage of the conflict. Thus, it can be easily envisaged that a director could indeed "cheerfully" go nearly to the brink, but resign before he "falls over", only taking advantage of the conflict when he is no longer a director, and therefore technically not subject to fiduciary obligations. The no-profit rule too has all the elements that would allow it to be similarly avoided with ease. It will be recalled that in *Regal (Hastings)*, Lord Russell required the profit to have arisen "by reason and in course of their office of directors".[76] Clearly an adherence to this rigid capacity-focused and thus temporally-limited approach will allow directors to escape liability by simply resigning from their positions.[77] From the perspective of the company then, this would be manifestly unjust. That this would be untenable was recognised by Hutchinson J. in *Island Export Finance Ltd.* v. *Umunna*[78] when he opined as follows:

> It seems to me that counsel's bold submission [that English law does not recognise any fiduciary duty after termination] cannot be right, amounting as it does to the contention that a director, provided he does nothing contrary to his employers' interests while employed, may with impunity conceive the idea of resigning so that he may exploit some opportunity of the employers and, having resigned, proceed to exploit it for himself. Such a suggestion has only to be stated to be seen to be unsustainable.[79]

The earlier case of *Industrial Development Consultants Ltd.* v. *Cooley*[80] illustrates the point. The facts can be briefly stated. The defendant Cooley, an architect, was the managing director of the plaintiff company, whose duties included new business procurement. He entered into negotiations with the Eastern Gas Board for a contract on behalf of the company but was unsuccessful. The court found that the company had only a ten per cent. chance of obtaining the contract. The Gas Board subsequently approached the defendant *in his personal capacity* for advice and it was then

[76] [1967] 2 A.C. 134, 145.

[77] Indeed, the rigid application of this test was relied on with great success by the directors in *Peso Silver Mines Ltd. (N.P.L.)* v. *Cropper* (1966) 58 D.L.R. (2d) 1 to escape liability.

[78] [1986] B.C.L.C. 460.

[79] *Ibid.*, at p. 480.

[80] [1972] 1 W.L.R. 443. See D.D. Prentice, "Directors' Fiduciary Duties—The Corporate Opportunity Doctrine" (1972) 50 Canadian Bar Review 623.

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that the defendant realised that, if he could expedite his release from the plaintiffs, he stood a good chance of obtaining for himself a valuable contract with the Gas Board. It should be pointed out that if Mr. Cooley did nothing at all after his contact with the Gas Board, it is unlikely that his failure to communicate the fact that the Gas Board had separately approached him will, *in itself*, amount to a breach of fiduciary duty. Mr. Cooley however then lied[81] about his ill-health, promptly resigned and secured the Gas Board contract. Roskill J. held that the defendant was accountable to the plaintiffs, because "from the time he embarked upon his course of dealing with the Eastern Gas Board ..., he embarked upon a deliberate policy and course of conduct which put his personal interest as a potential contracting party with the Eastern Gas Board in direct conflict with his pre-existing and continuing duty as managing director of the plaintiffs". The fact that the defendant made no illicit profit *during* his term did not prevent the liability to account from arising, for he *did* exploit a conflict situation, albeit an exploitation that achieved fruition only *after* resignation, and because he had taken *advantage* of a conflict situation, the fact that the company's chances of securing the contract was slim was considered irrelevant.

It is arguable that the case does *not* stand for the proposition that a director's fiduciary obligations *survive* resignation *per se*, but rather that resignation will not terminate these fiduciary obligations if, but for the resignation, the acts of the director, *taken in totality*, would amount to a breach of his obligations of loyalty. In this sense, therefore, the fiduciary obligations can be said to "survive" termination. It must, however, be borne in mind that the rationale here is to *prevent* the use of resignation as a device to evade the strict fiduciary obligations. In the recent case of *CMS Dolphin Ltd.* v. *Simonet*,[82] Lawrence Collins J. observed that the decision in *Industrial Development Consultants Ltd.* "lays considerable emphasis on Mr. Cooley's breaches of fiduciary duty prior to his release from the company, in particular his failure to inform the company of the information that the Eastern Gas Board was back on the market".[83] Whilst Roskill J. thought that information received by the defendant Cooley while still managing director which was "of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his *duty* to pass on to the plaintiffs",[84] it is submitted that the wrong laid not in the failure to

[81] Roskill J. found that the defendant's representation of ill health was untrue to his knowledge and therefore dishonest: [1972] 1 W.L.R. 443, 445.
[82] [2001] 2 B.C.L.C. 704.
[83] *Ibid.*, at para. [90].
[84] [1972] 1 W.L.R. 443, 451. See also Prentice, note 80 above, at p. 626.

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communicate, but in the fact that the defendant had "[guarded] it for his own personal purposes and profit," thereby putting himself in "the position when his duty and his interests conflicted".[85] The fact that the Eastern Gas Board contract was only obtained after resignation did not exonerate the defendant from the liability to account as the benefit obtained merely "perfected the wrong", so to speak. Thus, although the principle in *Industrial Development Consultants Ltd.* does *not* require that the director be *already* in breach of his fiduciary obligations *prior* to resignation, there must nevertheless be some concrete link between the acts or omissions of the director *during the course of his directorship*, and his resignation and the subsequent accrual of the benefit. The latter must complete the wrong, the seeds of which germinated while the director was still a director.

Roskill J. did not have to resort to corporate opportunity terminology to impose liability on Cooley, indeed it was not necessary as Cooley was contemptibly disloyal. However, Roskill J's judgment, in particular his reference to the "duty" of director to pass on to the company, information which was "of concern to the [company] and was relevant for the [company] to know",[86] has been relied upon by commentators[87] as providing the roots for the development of an English counterpart to the American corporate opportunity doctrine. The Supreme Court of Canada, on the other hand, did utilise corporate opportunity language in its "important decision"[88] in *Canadian Aero Services Ltd.* v. *O'Malley.*[89]

The defendants, O'Malley and Zarzycki were, for many years since the 1950s, officers and senior employees[90] of the plaintiff Canaero, a company that was engaged in topographical mapping and geophysical exploration. Whilst so employed, they were intimately involved in the pursuit by Canaero of an extensive aerial mapping project in Guyana, to be financed through foreign aid supplied by the Canadian government. Up until late July 1966, the defendants pursued the project on behalf of Canaero. In mid-August, however, they incorporated Terra Surveys Limited, resigned their positions at Canaero very shortly thereafter, and pursued successfully, through their company, the contract for the Guyana

[85] *Ibid.*, at p. 453.
[86] Note 84 above.
[87] See Prentice, note 80 above, at pp. 629–630; and also R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987), 149, 150.
[88] *Per* Hutchinson J. in *Island Export Finance Ltd.* v. *Umunna* [1986] B.C.L.C. 460, 478.
[89] (1974) 40 D.L.R. (3d.) 371.
[90] There was some question whether the defendants were properly appointed as directors. Grant J., the trial judge, with whom the Supreme Court of Canada agreed, held that they were senior managerial officers and by that reason, were in a fiduciary relationship with the plaintiff company.

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project. The plaintiff's action for breach of fiduciary duty failed at trial and in the Ontario Court Appeal, but succeeded before the Supreme Court of Canada. Laskin J., speaking for a unanimous Court, held that:

> ... O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company ..., any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.[91]

Hutchinson J. observed in *Island Export Financing Ltd.* v. *Umunna*[92] that this formulation of a director's fiduciary duty is "absolutely in accord with the line of authority exemplified by *Regal (Hastings) Ltd.* v. *Gulliver*".[93] Indeed, the decision may be explained on the same basis as *Industrial Development Consultant Ltd.*, that the breach of fiduciary duty had its roots in the defendants' behaviour *while still employed at Canaero*, when they, clearly in contemplation of using the valuable information acquired by virtue of their positions, caused the incorporation of the company with the intention of acquiring, and through which they did later successfully acquire, the Guyana contract. However, the decision goes further. Laskin J. admonished:

> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law .... [T]his 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[94] where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired ....[95]

There was at that time in Canada, and as is still currently the case in the UK, no independent fully fleshed-out doctrine that

[91] (1974) 40 D.L.R. (3d.) 371, 382.
[92] [1986] B.C.L.C. 460.
[93] *Ibid.*, at p. 479.
[94] See note 151 below and accompanying text.
[95] (1974) 40 D.L.R. (3d.) 371, 382.

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applies specifically to the exploitation of business opportunities by directors. Whatever corporate opportunity "doctrine" as there is exists as a "supplemental adjunct"[96] to the existing fiduciary duty of loyalty expressed in terms of the no-conflict and no-profit[97] sub-rules. However, Laskin J.'s resort to corporate opportunity language was "compelled"[98] by the restrictive view of fiduciary obligations taken by the trial judge and the Ontario Court of Appeal. At trial, the plaintiff's action failed because Grant J. considered that, as the defendants had already resigned, the Guyana contract cannot be said to have been obtained "in the course of their duties" as directors or senior officers. The Court of Appeal, although disagreeing that the defendants were fiduciaries, nevertheless concurred that the strict rule in *Regal (Hastings)* applied *only* in cases where the defendants "entered into and *completed* the impugned transactions while still retaining their positions as directors".[99] Laskin J. considered this view of a director's fiduciary obligations to be "too narrowly conceived", and that it would be "a mistake ... to seek to encase" the principle in *Regal (Hastings)* "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". Laskin J. thought that a reformulation of the existing principle was necessary "to *maintain* its vigour in the new setting"[100], not dilute it, and further observed that "an updating of the equitable principle whose roots lie in the general standards ... [of] loyalty, good faith and avoidance of a conflict of duty and self-interest"[101] is necessary because of new fact situations and that:

> 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 accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is ... an acknowledgement of the importance of the corporation in the life of the community and

[96] J. Lowry & R. Edmunds, "The No Conflict-No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism" [2000] J.B.L. 3.

[97] Professor Austin referred to the no-profit rule, as opposed to the no-conflict rule, as the Commonwealth's equivalent of the US corporate opportunity doctrine: see R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987), 149. But see E.G. Orlinsky, "Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability" (1999) 24 Delaware Journal of Corporate Law 451 which explains the doctrine as being applicable to a conflict of interests situation.

[98] S.M. Beck, "*The Quickening of Fiduciary Obligation: Canadian Aero Services* v. *O'Malley*" (1975) 53 Canadian Bar Review 771, 775.

[99] *Per* Mackay J.A. in (1972) 23 D.L.R. (3d) 632, 642 (emphasis added).

[100] *Canadian Aero Service Ltd.* v. *O'Malley* (1974) 40 D.L.R. (3d.) 371, 383 (emphasis added).

[101] *Ibid.*, at p. 384.

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> of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.[102]

His Honour therefore concluded that "O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project".[103]

In both *Industrial Development Consultants Ltd.* and *Canaero*, there clearly existed, prior to the director's resignation, an *identifiable* business opportunity in which the company is interested, although there was no certainty of securing it. The director, in conceiving the idea of securing that opportunity for his own benefit, would, with respect to his duty of loyalty, be in a position of conflict. Thus although the actual benefit (*i.e.* the profit) was realised only *after* the director has resigned, the conflict was nevertheless present whilst the director was *still* a director. To allow the director to escape liability because he is no longer a director, as the lower courts in *Canaero* did, would be to allow the director to sidestep his fiduciary restraints by taking the simple expedient of resignation. Resort to corporate opportunity analysis is therefore useful, as Laskin J. amply demonstrates, in providing an easily-digestible ground for liability. A corporate opportunity does not cease to be one, and the company does not stop being interested in it, just because the director has resigned. In this sense, therefore, corporate opportunity nomenclature is more flexible, and allows a more expansive consideration of the connection between profit and office that will found liability.

But how should "corporate opportunities" be defined then? Whilst Roskill J. did not attempt to delineate the scope of a former director's fiduciary obligation by reference to corporate opportunities, Laskin J. considered that in order for a business opportunity to qualify as a corporate opportunity that may be protected against exploitation by an ex-fiduciary, it needs not only to be "maturing", but also "actively pursued" by the company. Both factors do not lend themselves easily to circumscription, describing as they do qualities that fall to be assessed on a sliding scale. At what point do we consider a company's interest in an opportunity sufficiently matured, and how "active" must the active pursuit be?

[102] *Ibid.*
[103] *Ibid.*, at p. 390.

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In *Canaero*, the fact that the company was not positively certain of securing the contract did not preclude the business opportunity from being considered "maturing". On the facts, the obtaining of the Guyana contract depended on the Canadian Government deciding to finance the project under its external aid policy, which was, at that time, to prefer Canadian-controlled firms. As Canaero was controlled by an American company,[104] it was not at all a certainty that Canaero would secure the contract, although Laskin J. thought that "there was ... no certain knowledge ... that the Guyana project was beyond Canaero's grasp". In contrast, MacKay J.A. of the Ontario Court of Appeal thought that:

> ... Guyana was not a customer of the plaintiff, it was at best a potential customer, and even as a potential customer not one that was exclusive to the plaintiff. It was open to anyone to solicit or do promotional work to endeavour to obtain a contract for any prospective survey work. Moreover, the defendants [through their company, Terra Surveys Limited] ... and all other companies engaged in this work, learned of the opportunity for obtaining the contract by being invited by a department of the Canadian Government to attend a briefing session and submit proposals ....[105]

To MacKay J.A., Canaero's interest in the project was not such as should deserve legal protection. With respect, this interpretation of the facts ignored the nature of Canaero's business, which involved not only "bidding on projects ripe for realisation, but ... also embracing suggestion and development of projects for which they would later seek approval and contracts to carry them out".[106] About a month prior to O'Malley's resignation, he had himself written to Canaero's Guyana agent saying that he "felt the job was a certainty for Canaero".[107] It is also significant that Canaero's interest in promoting the project began as far back as 1961. At the time of the defendants' actions, therefore, Canaero's interest in the Guyana project can be said to be nearing fruition. But the same cannot be said of the interest that the company, Industrial Development Consultants Ltd. had in the Eastern Gas Board contract. In fact, as pointed out earlier, Roskill J. could not give the company a greater than ten per cent. chance of securing the opportunity. It is therefore not at all unlikely that Mr. Cooley would have *escaped* liability on the *Canaero* test of corporate opportunities.

[104] Canaero was a wholly-owned subsidiary of Aero Service Corporation, which was a United States company, which in turn, with all its subsidiaries, came under the control of another United States company, Lytton Industries Inc.: (1974) 40 D.L.R. (3d) 371, 373.
[105] (1972) 23 D.L.R. (3d) 632, 648.
[106] (1974) 40 D.L.R. (3d.) 371, 375.
[107] (1974) 40 D.L.R. (3d.) 371, 377.

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Perhaps the issue in these cases is really *not* about corporate opportunities at all. It is reasonably clear from the general tenor of both the judgments of Roskill J. and Laskin J. that the courts are concerned primarily with *preventing* the avoidance of the fiduciary obligations of a director. The concern here is the maintenance of the strict ethic and, as a necessary extension thereto, the prevention of any attempt to evade it by simply resigning. Perhaps it is *this* anti-avoidance reason, rather than any property interest in the opportunity, or in the knowledge[108] of the opportunity, which is the crux of the after-office liability in these cases. Seen from this perspective, too narrow a focus on the concept of corporate opportunities could be distracting. For example, a doctrinal focus could result in the inevitable question being raised as to whether an opportunity is and can be a *corporate* opportunity by reference to the inability of the company to exploit it. It is this argument that forms the basis of the negative corollary[109] to the line-of-business test, which, it will be recalled, includes as an element the financial ability of the company to take advantage of the opportunity. There are however well-grounded policy reasons why corporate inability should not be allowed to exclude the application of the strict fiduciary principle. It will be difficult to verify alleged corporate inabilities given that it is the director himself who has command of the relevant facts relating to the company's finances.[110] Further, if "directors are permitted to justify their conduct on such a theory there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity of profit will be open to them personally".[111] The problem is deciding *when* a director is resigning in order to avoid his obligations. In *Canaero*, Laskin J. considered this satisfied if the director's resignation "may fairly be said to have been *prompted or influenced* by a wish to acquire for himself"[112] the very opportunity that is sought by the company. In *Industrial*

[108] See issues raised in *Phipps* v. *Boardman* [1967] 2 A.C. 46 and particularly Lord Upjohn's dissent at p. 127 where his Lordship opined that "in general, information is not property at all" as "it is normally open to all who have eyes to read and ears to hear". See also R.P. Austin, "Constructive Trusts" in *Essays in Equity*, ed. P.D. Finn (1985), 224–225 and A.S. Weinrib, "Information and Property" (1988) 38 University of Toronto Law Journal 117, 124 & 126.

[109] This negative corollary has been embraced in a number of jurisdictions in the United States: see V. Brudley & R.C. Clark, "A New Look at Corporate Opportunities" (1981) 94 Harvard Law Review 998, 1020ff.; and E. Talley, "Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine" (1998) 108 Yale Law Journal 277, 291.

[110] *Per* Roberts J. in *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.*, 661 A. 2d 1146 (Me. 1995), 1149.

[111] *Per* Swan J. in *Irving Trust* v. *Deutsch* (1934) 73 F. 2d 121 (2nd Cir.), 124. See also *Northeast Harbor Golf Club, Inc.* v. *Nancy Harris et al.*, 661 A. 2d 1146 (Me. 1995), 1149, where Roberts J. observed that the "reliance on financial inability will also act as a disincentive to corporate executives to solve corporate financing and other problems".

[112] (1974) 40 D.L.R. (3d.) 371, 382.

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Development Consultants Ltd., Roskill J. was clearly influenced by the director's lack of bona fides in securing his release from the company. But matters of the mind are notoriously difficult to prove, and as the saying goes, "the Devil knows not the heart of Man". What if there are several reasons that prompted the resignation and the "guilty" motivation was but one. How do we assess that *this* motivation was the primary one?

It is submitted that a more plausible approach is to focus *not* on the company-*opportunity* relationship, which would be demanded by a corporate opportunity analysis, but on the company-*fiduciary* relationship. It should be iterated here that the hallmark of a fiduciary relationship is the conferment of a wide discretion on the fiduciary to affect the legal position of the beneficiary. The imposition of the fiduciary obligation is the "blunt tool"[113] used by the law to control the exercise of this discretion, in an attempt to persuade the director to exercise the discretion beneficently, free from the influence of considerations of personal advantage. In the corporate context, this wide discretion is necessarily accompanied by the control wielded by the director-fiduciary over information channels or flows. The company has no other access to relevant information, and therefore potential business opportunities as well as the company's financial capability to tackle the opportunity, except through its directors. Indeed, directors have been described as organisational gatekeepers,[114] whose role it is to evaluate new business prospects and to recommend those that the company should pursue against those which it should not. These directors are therefore in the position to manipulate and distort information, both about a disputed project as well as about the company's financial capacity, just so as to prevent the company from securing the project. In such cases, verification as to the capability of the company to exploit the project is clearly difficult. Seen from this perspective, the fact that Cooley received the information in his private capacity cannot be considered to be of any import, as Roskill J. himself recognised, and this must be correct for as Professor Beck has perceptively pointed out,[115] "information that directors and officers receive does not come marked for them in their different capacities". In a similar manner, whether the "opportunity" comprised in the information has been *rejected* by the board, even if the rejection was found to be bona fide, should not be relevant.[116]

[113] E.J. Weinrib, "The Fiduciary Obligation" (1975) 23 University of Toronto Law Journal 1, 4.
[114] Talley, note 109 above at p. 282. See also S.M. Beck, "The Quickening of Fiduciary Obligation" (1975) 53 Canadian Bar Review 771, 782.
[115] Beck, *ibid.*, at p. 782.
[116] See discussion on *Peso Silver Mines (N.P.L.)* v. *Cropper* (1966) 58 D.L.R. (2d) 1 below, note 122 and accompanying text.

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It is submitted that it is the presence of this informational asymmetry[117] between the director and his company, and the corresponding control that the director wields over the transmission of that information to the company, which provides the basis for an extended *scope* of the fiduciary obligation owed by the particular director, one that should extend *beyond* resignation. This is because the ability to control dictates a commensurately more extensive obligation. It was Professor Weinrib who observed that:

> [t]he 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.[118]

The following possibilities come to mind. First, a director could be *the* controlling director in the company wielding considerable power over the company's affairs and operations. Second, a director, although not the controlling director, nevertheless has significant control over a particular customer, client or opportunity. Third, the director has little individual control and discretion. In the first two cases, resignation should not terminate the director's fiduciary obligation to respect the company's priority in attempting to capture any business opportunity information of which came to the director prior to his resignation. In the last case, I would submit that the director's fiduciary obligations terminates on his resignation, and unless the company is able to establish that it has a tangible interest in the impugned business opportunity, it should have no legal right to prevent *this* ex-director from seeking to acquire that opportunity for himself. This last aspect is discussed in the next section. This suggested approach would also allow the resigning *outside* or non-executive director to be treated differently from the resigning full-time director. For the former, it is at least arguable that the scope of the fiduciary obligation imposed should be less extensive and should thus terminate on the director's resignation.[119]

A consideration of the decided cases lends support to this analysis. In *Industrial Development Consultants Ltd.*, Cooley had the informational upper-hand, being the company's representative in the negotiations with the prospective contractor. In fact, the court found that Cooley's appointment as the company's managing

[117] See Talley, note 109 above who utilises disparate informational structures in corporations and assigns great significance to informational asymmetries in the analysis of the corporate opportunity doctrine.

[118] Weinrib, note 113 above, at p. 9.

[119] Subject to the discussion in the next section.

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director was specifically to help the company in the procurement of new business in the public sector, particularly in connection with the various gas boards.[120] The scope of Cooley's discretion *vis-à-vis* relevant "opportunities" was thus necessarily wide, and because discretion and obligation are correlative concepts,[121] the fiduciary obligation imposed on him to be loyal must therefore extend beyond resignation *as regards information relating to those opportunities*. The same conclusion may be arrived at with reference to the facts of the Canadian case of *Peso Silver Mines (N.P.L.)* v. *Cropper*.[122] It will be recalled that the Peso board's rejection of an offer of mining claims because of strained finances was found to be in good faith. The Supreme Court of Canada held that the subsequent acquisition of these claims by the managing director of Peso, *whilst still director*, without shareholder approval was not a breach of fiduciary duty as the company's interest in the claims has ceased. I do not propose to dispute the correctness of the decision in *Peso*, except to observe that, after *Canaero*, this may well be doubted, especially since, as discussed above, there is much to be said for maintaining a strict rule against *current* directors.[123] However, let us *assume* that Cropper had resigned and only exploited the rejected opportunity thereafter but without first disclosing and seeking the approval of the company. Should he be considered to have breached his duty of loyalty? The answer would depend on an examination of the position Cropper held in the company. On the facts,[124] Cropper was not only the managing director in charge of the company's exploration policy and finances, but he was also effectively in control[125] of the company. Indeed, it was *through him* that Peso was offered the opportunity. The ambit of Cropper's discretion is clearly extensive, so too must the fiduciary obligation that is imposed on him.

Clearly the inquiry here is necessarily one that is fact-based, and the very legitimate criticism may be advanced that this opens up more holes than it closes. My response is two-fold. First, the inquiry focuses on the specific director's relationship with the company prior to his resignation. As such, the director himself should be aware of his own position of control, which is itself readily observable and capable of being independently verified. Second, I would suggest that

[120] [1972] 1 W.L.R. 443, 445.
[121] Weinrib, note 113 above, at p. 5.
[122] (1966) 58 D.L.R. (2d) 1.
[123] In this regard, see S.M. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 51 Canadian Bar Review 80.
[124] In this regard, Professor Beck's detailed consideration of the facts is particularly useful: *ibid.*, at pp. 93–100.
[125] Together with his colleagues and co-promoters, who with Cropper took up the claims after the rejection: *ibid.*, at p. 96.

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once the position of control is established, a *presumption* of impropriety should arise where such a director exploits, after he resigns and without prior disclosure to the company, any opportunity, business advantage or other information, which is of use to the company, and which can be readily identified as being useful to the company prior to his resignation.

How long should the obligation last? Clearly, there must be a limit to the duration of this post-resignation obligation. As the focus of the approach suggested here is the need to prevent the *avoidance* of fiduciary obligations through the device of resignation, it would be logical to suggest that the severity of the problem has an *inverse* relationship with the length of time after resignation. Thus, the longer the period, the less acute the problem. In the decided cases, the exploitation of the impugned business opportunity have all occurred shortly after the director's resignation, and if I were to suggest a time frame, I think that it would be reasonable for the fiduciary obligations to extend beyond resignation for a period of up to one year.[126] A former director must eventually become a layman as far fiduciary law goes,[127] and it is submitted that this should perhaps be sooner rather than later.

As for the type of situation in which the presumption may be *rebutted*, the facts of the recent Court of Appeal decision in *Plus Group Ltd. and Others* v. *Pyke*,[128] although not a resignation case, provide a useful illustration. The director in question had an excellent working relationship with the single most important customer of the company. He knew however that the customer was unhappy with the company. The director then proceeded to successfully court the customer for his own competing business. The Court of Appeal was one in *exonerating* the director from liability. The peculiar facts of the case, according to the court, justified the unanimous decision. The transgression by the director occurred during a time when he was effectively excluded from management by the only other director and shareholder, who also denied him access to relevant financial information, stopped his monthly drawings against his loan account with the company, and booted him out of his office. The court found that the defendant director was a director only in name. Brooke L.J. referred to Lord Upjohn's caution in *Phipps* v. *Boardman*[129] that "the facts and

[126] See also P.C. Wardle, "Post Employment Competition—Canaero Revisited" (1990) 69 Canadian Bar Review 233, 274, suggesting that Canadian authorities on the fiduciary obligations of former *employees* extend on average for a period of one year after resignation.
[127] R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn (ed.), *Equity and Commercial Relationships* (Sydney 1987), 180.
[128] [2002] EWCA Civ 370. Noted in [2003] C.L.J. 42.
[129] [1967] 2 A.C. 46.

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circumstances of each case must be carefully examined to see *whether a fiduciary relationship exists in relation to the matter of which complaint is made*" and Sedley L.J. thought that the defendant's duty to the company had been "reduced to vanishing point" by the inexplicable action of his co-director. Thus, if the director had *resigned* prior to seeking the custom of the customer, he should, *a fortiori*, not be liable.

This analysis could also provide an alternative explanation to the decision in *Island Export Finance Ltd.* v. *Umunna*.[130] The defendant Mr. Umunna was the managing director of the plaintiff company which was suing him for breach of fiduciary duty in connection with his pursuit, after his resignation, of a contract with a client of the company's. Hutchinson J. had found on the facts that the defendant Mr. Umunna was "managing director more in name than in substance. He remained without authority to commit the company unless he first consulted Mr. Lewis,[131] to whose authority he was subject ... Mr. Umunna, despite his title as managing director, was never in fact employed by the company".[132] In these circumstances, it is not illogical to conclude that the scope of Mr. Umunna's fiduciary obligations should be considerably less extensive than someone in, say, Mr. Cooley's position, and is therefore terminated, subject to the discussion in the next section, by his resignation without more.

Corporate Opportunities and Post-Office Obligations

What then of the director, like Mr. Umunna for example, who neither controls the company's operations nor was involved in the company's pursuit of any particular opportunity, who acted with propriety during his term and therefore cannot be said to have been disloyal, but who nonetheless resigned and subsequently made use of information acquired whilst a director to compete with the company and for his own benefit? Are there situations in which *he* may be made liable to account for the use of such information and on what basis?

It is important to note here that the CLRSG's draft statement of the director's fiduciary no-profit obligation[133] extends the disclosure requirement to a *former* director. Whilst compliance with the process is undoubtedly feasible for someone who is still a director, one may legitimately query first whether this is *practicable* for a director who has been released from his position, and second

[130] [1986] B.C.L.C. 460. See also note 151 below and accompanying text.
[131] Who controlled the plaintiff company.
[132] [1986] B.C.L.C. 460, 468.
[133] See note 6 above.

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but perhaps more importantly, whether *principle* allows this to be so demanded of *all* ex-directors. Subject to the discussion in the preceding section, it is submitted that *some* precision can be achieved if one attempts to define, by reference to a sharply delineated doctrine of corporate opportunity, those opportunities that can *never* be exploited by ex-directors without the fully informed approval of the company.

In a sense, this issue cannot be entirely removed from that of confidentiality of information, for the ability to exploit a corporate opportunity must depend on prior knowledge thereof, and it is not improbable that this knowledge may possess that necessary quality of confidence to secure protection. The two concepts should not, however, be conflated—where there *is* breach of confidence, this should found a ground of action that is *separate* from any breach of fiduciary duty. Laskin J. made this patently clear when he said:

> I do not see that either the question of the confidentiality of the information acquired ... or the question of copyright is relevant to the enforcement against [the defendants] of a fiduciary duty.[134] The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.[135]

It is appropriate at this juncture to make a small digression that will allow us to consider in brief, a basis of non-fiduciary liability that has a much longer lineage in English law, and one which depends, to a significant extent, on the nature of the information in question.

Confidential information

The concept of information is one that sweeps from the specific to the general. It is clear that *employees* are prohibited, quite apart from any express contractual restraints, from using (or perhaps more accurately, misusing) trade secrets or confidential information of the employer-company even following termination of employment.[136] In *Faccenda Chicken Ltd.* v. *Fowler*,[137] the Court of Appeal based the obligation of the employee as to the use or disclosure of information *after* his release from employment on an *implied* term of his contract of employment which was "more

[134] At trial, Grant J. found that O'Malley and Zarzycki had not used confidential information in their pursuit of the Guyana contract. As such, since they had resigned and, on the narrow conceptualisation accorded to *Regal (Hastings)* by Grant J., they could not be made liable to account.

[135] (1974) 40 D.L.R. (3d) 371, 388.

[136] *Faccenda Chicken Ltd.* v. *Fowler* [1987] Ch. 117; *A.T. Poeton (Gloucester Plating) Ltd.* v. *Horton* [2001] F.S.R. 14.

[137] [1987] Ch. 117.

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restricted in its scope"[138] than the implied term which imposed a general duty of good faith and fidelity. Whilst this term clearly covered, minimally, information such as "secret processes of manufacture such as chemical formulae ... or designs or special methods of construction ... and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret", the obligation does not extend to "all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith".[139] Although the decision in *Faccenda Chicken* relates purely to "cases of master and servant",[140] these principles apply equally to directors serving the company under express or implied contracts of service, and who are therefore also employees.[141] Indeed, the mere fact that an employee was also *concurrently* a director of the employer-company should not add anything to the cause of the ex-employer suing in breach of confidence. In *Dranez Anstalt* v. *Zamir Hayek*,[142] Evans-Lombe J. opined that:

> [a] director of a company who resigns and leaves the employment of that company can be in no worse position than an employee so far as his future exploitation of skills and information acquired by him while he was a director. If an employee in the same position as the director cannot be restrained from using information so acquired by him, it must make no difference that the employee was in fact a director of the relevant employer.[143]

Aside from *contract*, there appears to be a parallel obligation in *equity*, although not rooted in fiduciary principles, which arises when information is communicated in circumstances of confidence. The relationship between the two bases is not clear, but the *substance* of the obligation does not seem affected. Directors, as much as employees, are subject to the duty of confidence, which is clearly a continuing duty which survives termination of the

[138] *Ibid.*, p. 136.

[139] *Ibid.* The Court of Appeal went further to hold, and in this respect disagreeing with the trial judge Goulding J., that even the use of an *express* restrictive covenant will not be effective to protect such types of confidential information falling short of a trade secret after employment: at p. 137. But see *Systems Reliability Holdings plc* v. *Smith* [1990] I.R.L.R. 377, 384; and *Balston Ltd.* v. *Headline Filters Ltd.* [1987] F.S.R. 330, 347–348.

[140] [1984] I.C.R. 589, 598.

[141] *Cranleigh Precision Engineering Ltd.* v. *Bryant* [1965] 1 W.L.R. 1293; *Thomas Marshall Ltd.* v. *Guinle* [1979] Ch. 227; *Dranez Anstalt* v. *Zamir Hayek* [2002] 2 B.C.L.C. 693.

[142] [2002] 2 B.C.L.C. 693.

[143] *Ibid.*, at para. [75]. The decision was reversed on appeal [2002] EWCA Civ 1729, [2002] All E.R. 377 *viz.* claims by beneficiaries of a "side letter" which contained undertakings on the part of the defendant, and does not affect this quote.

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underlying relationship. Protection however is accorded only in respect of information that has *not* somehow become the employee's[144] or the director's[145] own. This undoubtedly raises difficult problems of differentiation, which are beyond the scope of this paper. It suffices to say here that the accepted[146] test appears to be that formulated by Cross J. in *Printers and Finishers Ltd.* v. *Holloway*:[147]

> The mere fact that the confidential information is not embodied in a document but is carried away by the employee in his head is not ... of itself a reason against the granting of an injunction to prevent its use or disclosure by him. If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer, and not his own to do as he likes with, then the court, if it thinks that there is a danger of the information being used or disclosed by the ex-employee to the detriment of the old employer, will do what it can to prevent that result by granting an injunction.[148]

Thus, even if the director does nothing improper whilst a director, but resigns and then uses *confidential* information that properly belongs to the company, he is likely to be liable either in contract or in equity. What then of information that does *not* have that necessary quality of confidence in this sense? It is not inconceivable that information falling within this sphere is nevertheless commercially valuable to the company, information such as lists of potential customers, connections and business opportunities, which, in the hands of an ex-insider acting in competition, can prove extremely detrimental to the company's commercial viability. In *Faccenda Chicken*, commercially important sales information, comprising information relating to the modus operandi of the company, customers and their requirements and the prices charged were held not to constitute confidential information. Whilst an *employee* without more is not to be prohibited from using such information after he leaves the employ of the company, it is perhaps not unreasonable to expect a little more of *directors*. It is at this juncture that we must return to the issue of corporate opportunities.

[144] P.D. Finn, *Fiduciary Obligations* (Sydney 1977), 150. This would fall within class 2 in Goulding J.'s classification in *Faccenda Chicken* [1984] I.C.R. 589, 599, *i.e.* "information which the servant must treat as confidential ... but which once learned necessarily becomes part of his own skill and knowledge applied in the course of his master's business". This class cannot be protected after termination of the employment.

[145] *Island Export Financing Ltd.* v. *Umunna* [1986] B.C.L.C 460, 482.

[146] *FSS Travel and Leisure Systems Ltd.* v. *Johnson* [1999] F.S.R. 505, 513.

[147] [1965] R.P.C. 239.

[148] *Ibid.*, at p. 255.

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Corporate opportunities—circumscribing criteria

Business opportunities must abound in the course of a company's commercial lifespan. But which of these should qualify as *corporate* opportunities, such that even an ex-director continues to be under an obligation to respect the company's priority, as against him, with respect thereto? What criteria or test should circumscribe "corporate opportunities" in this context? In *Canaero*, Laskin J. considered that in order for a business opportunity to qualify as a corporate opportunity that may be protected against exploitation by an ex-fiduciary, it needs not only to be "maturing", but also "actively pursued" by the company. But clearly not all *potential* business opportunities are "maturing" or "actively pursued" by the company. The question is clearly one of degree. At what point do we consider the opportunities to be sufficiently matured to be protected against exploitation by former directors? The continued custom of existing clients, for example, could classify as potential *business* opportunities especially if the company has more than a passing interest in maintaining continuity. But should such opportunities be considered *corporate* opportunities subject to protection against ex-fiduciary exploitation, especially where the customer base is large and irregular, where the business environment is highly competitive and there is no certainty of contract renewals, or where the contracts are readily terminable, or are obtained by tender? To affirm so would be to curtail effectively competition by ex-directors. Let us return to the decision of Hutchinson J. in *Island Export Finance Ltd.* v. *Umunna*.[149]

The defendant, Umunna, was the managing director of I.E.F. Ltd., on whose behalf he had secured a contract with the postal authorities of the Cameroons for the supply of postal boxes. The defendant subsequently resigned and within three months of his resignation, obtained two orders for his own company from the same postal authorities. I.E.F. brought an action for an account of profits alleging that the defendant still owed it a fiduciary duty notwithstanding his resignation. Hutchinson J., accepting that the principles established in *Canadian Aero Service Ltd.* v. *O'Malley*[150] are representative of English law, was of the view that the fiduciary duty of a director *can* continue after resignation, but that on the facts of the present case before him, did not. His Lordship found that there were other suppliers competing with I.E.F. for the custom of the postal authorities, and although I.E.F. "naturally hoped and expected" that they would be successful in obtaining

[149] [1986] B.C.L.C. 460.
[150] (1974) 40 D.L.R. (3d) 371.

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further orders, there was no such assurance at all. Additionally, the defendant's resignation was not, the court found, prompted primarily by the desire to appropriate the postal call boxes business. His Lordship observed that it would be "naïve" to suggest that Umunna did not, when he resigned, contemplate soliciting the business of the Cameroons postal authorities, but that the exploitation of this opportunity was not a "primary or indeed an important motive" in Umunna's resignation.

Hutchinson J. was careful to stress that the survival of a director's fiduciary obligations beyond resignation does not mean that former directors will be accountable for profits as long as it was information acquired while they were directors that led them ultimately to acquire the impugned business.[151] He observed that:

> It would ... be surprising to find that directors alone, because of the fiduciary nature of their relationship with the company, were restrained from exploiting after they had ceased to be such, any opportunity of which they had acquired knowledge while directors. Directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position. It is one thing to hold them accountable when, in the graphic words of Laskin J., "they entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra"; but it is an altogether different thing to hold former directors accountable whenever they exploit for their own or a new employer's benefit information which, while they may have come by it solely because of their position as directors of the plaintiff company, in truth forms part of their general fund of knowledge and their stock-in-trade.[152]

Balston Ltd. v. *Headline Filters Ltd.*[153] is another first instance decision in which it was alleged that a director had resigned to

[151] Hutchinson J. was qualifying Laskin J.'s statement that a director is precluded after resignation from usurping a maturing business opportunity which his company is actively pursuing if his resignation is prompted by a wish to acquire the same "or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired". His Honour thought that "literally construed, this last part of the formulation could justify holding former directors accountable for profits whenever information acquired by them as such led them to the source from which they subsequently, perhaps as a result of prolonged fresh initiative, acquired business. If it is intended to mean that, it is far more widely stated than the facts of the case require, but I do not believe that that is what was intended.": [1986] B.C.L.C. 460, 481. See *CMS Dolphin Ltd.* v. *Simonet* [2001] 2 B.C.L.C. 704, para [91] in which Lawrence Collins J., agreeing with Hutchinson J., observed that "there must be some relevant connection or link between the resignation and the obtaining of the business" and also *Balston Ltd.* v. *Headline Filters Ltd.* [1990] F.S.R. 385, 411–412 in which Falconer J. also agreed with Hutchinson J.

[152] [1986] B.C.L.C 460, 482 (references excluded).

[153] [1990] F.S.R. 385.

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divert a corporate opportunity comprised in the continued custom of an existing customer. Here, the defendant Head was an employee and director of the plaintiff company, Balston, which manufactured and sold glass micro-filter tubes. About a year before he resigned, Head was already unhappy, to the knowledge of his employers, with his situation at Balston as he felt that he had been downgraded within the company structure. During this time, he contemplated setting up business in competition with the plaintiff but did not concretise his plans. He later resigned from his directorship[154] and was subsequently approached by one of Balston's customers, who was disappointed with Balston's decision to increase the price of and ultimately discontinue the manufacture of, a particular product. It was only subsequent to this initial contact that Head "set about making active preparations for his company to commence" manufacture of those products, one of the aims of which was to supply to that customer. The plaintiff alleged that Head's intention to compete with the company placed him in a position of conflict, and his failure to disclose the intention was therefore a breach of his fiduciary duty. It was further contended that Head had diverted a maturing business opportunity in soliciting Balston's existing customer. Agreeing with the observations of Hutchinson J. in *Island Export Finance Ltd.*, Falconer J. held that Head had not breached the fiduciary obligation to avoid a conflict whilst he was still a director. He opined that the conflict contemplated by the no-conflict principle:

> . . . must be one with a specific interest of the company . . . to whom the fiduciary duty is owed, as, for example, maturing business opportunity, as in *Canaero*, or the plaintiff's interest in the contract secured by the defendant in the *I.D.C.* case, or a contract falling within the first class of contracts[155] in Lord Blanesburgh's dichotomy in *Bell* v. *Lever*,[156] or the use of some property or confidential information of the company which has come to a director as such . . . In my judgment an intention by a director of a company to set up business after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity . . ..[157]

His Lordship held further, but without detailed consideration, that there was no maturing business opportunity of Balston that

[154] Although he remained an employee for a further two months.
[155] *I.e.* contracts in which the company is also interested.
[156] [1932] A.C. 161.
[157] [1990] F.S.R. 385, 412.

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Head had resigned to acquire. Balston did not, on the evidence, have a monopoly in this particular business as there were alternative suppliers of the tubes[158] to which the customer could turn. If Head was still a director when he solicited the customer, he would undoubtedly, on the authority of *Regal (Hastings)*,[159] have been under the strict obligation not to place his own personal interests ahead of the company's without full and proper disclosure. But he had resigned as director, and, in his case, no longer subject to the full brunt of these fiduciary rules. It is important to note that Head's job scope as a director (he was appointed "technical director") was fairly limited,[160] and although he was subsequently appointed "deputy managing director", the evidence was that the appointment was "rather more window dressing than functional" and that it was "a matter of prestige for ... Head rather than an indication of change in management of responsibilities".[161] The fiduciary obligations applicable to Head who had resigned cannot therefore be co-extensive with the necessarily strict obligations that bound him while he was still director.

On the facts of *Balston*, Head's ability to secure the contract with Balston's customer, the alleged maturing business opportunity, was due in no small part to Balston's own acts. On the evidence,[162] the customer had been given the impression by Balston that it was no longer interested in manufacturing the relevant products. From Balston's perspective then, it was no longer "actively pursuing" the opportunity comprised in the potential renewal of contract. This raises a difficult question—if Balston did not indicate as it did, and like I.E.F. "naturally hoped and expected" further contract continuity, would this tilt the balance in favour of the company, especially since the customer had a "long history"[163] of working with Balston? It cannot be denied that Laskin J.'s two factors are interdependent to some extent, in the sense that active pursuit may render an opportunity maturing.[164] In *Canaero* itself, it could very well be the very active and well-laid pursuit of the project by Canaero that led Laskin J. to conclude that the opportunity there was "maturing". Even in *Island Export Finance Ltd.*, although Hutchinson J. did not think that hopes and expectations could translate into ripening opportunities, it was nevertheless significant

158 *Ibid.*, at p. 397.
159 It is significant that the court found him to be in breach of his duty of *fidelity* as an employee in actively competing with the plaintiff for the contract.
160 Specifically, he was responsible for quality control, new product development, product specifications and the writing of technical aspects of sales literature: [1990] F.S.R. 385, 389.
161 [1990] F.S.R. 385, 391.
162 [1990] F.S.R. 385, 397.
163 *Ibid.*, at p. 398.
164 Although the converse is not necessarily the case.

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that, at the time of Umunna's resignation, the company was not *actively seeking* further contracts with the postal authorities. In *Balston*, the customer was evidently interested in renewal, for it would not otherwise have been unhappy with Balston's decision. Would the business opportunity now be considered maturing such that an ex-director is prevented from "poaching" the customer? The question really is whether, and indeed should, fiduciary obligations extend to post-directorship competition?

The general tenor of Falconer J.'s judgment, and that as well of Hutchinson J.'s in *Island Export Finance Ltd.*, suggests rather strongly that post-directorship competition should not be unduly restrained through the imposition of continuing fiduciary obligations. Support for this basic position can also be gleaned from Laskin J.'s reasoning in *Canaero*. Laskin J. thought that the "right to compete with one's former employer unless restricted by contract"[165] was a "different point"[166] from the question whether fiduciary obligations survive the tenure of the office.[167] The not-unlikely inference is that Laskin J. did *not* intend his conceptualisation of continuing fiduciary obligations to affect the rights of departing directors to compete. But, what the defendants did there clearly went *beyond* the right to compete.

It follows from the foregoing that a tighter conceptualisation of "corporate opportunity" would be required, not only to *affix*, but also to *limit*, liability for breach of fiduciary duty. We find assistance in Lawrence Collins J.'s decision in the recent first instance decision of *CMS Dolphin Ltd.* v. *Simonet*.[168] His Lordship adopted a *restrictive* view of "corporate opportunities" when he held that the fiduciary obligation continued only *vis-à-vis* those

[165] (1974) 40 D.L.R. (3d) 371, 388.

[166] *Ibid.*, at p. 387.

[167] Laskin J. quoted the following passage from the American case of *Raines* v. *Toney* 313 S.W. 2d 802 (S.C. Ark. 1958) which was relied upon by Grant J., the trial judge, to conclude that the defendants in *Canaero* were *not* in breach of their fiduciary obligations (at p. 809):

> It is ... a common occurrence for corporate fiduciaries to resign and form a competing enterprise. Unless restricted by contract, this may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. They cannot while still corporate fiduciaries set up a competitive enterprise ... or resign and take with them the key personnel of their corporations for the purposes of operating their own competitive enterprise. But they can, while still employed, notify their corporation's customers of their intention to resign and subsequently go into business for themselves, and accept business from them when offered to them. But they can use in their own enterprise the experience and knowledge they gained while working for their corporation. They can solicit the customers of their former corporation for business unless the customer list is itself confidential.

Laskin J. was of the opinion that this passage had no relevance to the question before him. See also the discussion of the case in P. Downard, "Post-Employment Competition and the Courts: An Unfortunate Curve in the Common Law" (1985–6) 6 Advocates' Quarterly 361, 369.

[168] [2001] 2 B.C.L.C. 704.

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business opportunities which are akin to *corporate assets*. His Lordship opined, after an illuminating review of the authorities, as follows:

> In my judgment, the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated *as if it were property* of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.[169]

The brief facts of *CMS Dolphin* are as follows: The defendant Simonet was the managing director and shareholder of the plaintiff company. The arrangement was that Simonet was to run the business of the company whilst the other shareholder, Ball was to arrange for financing. Throughout, however, the company was under-funded and this led to tensions between the two principal players. Subsequently, Simonet resigned and set up business in competition with the company. Following his resignation, all the staff of the company, to whom Simonet had effectively offered jobs, left the company and joined Simonet. He also persuaded post-resignation, principal clients of the company, which he had introduced to the company, to transfer their business to his new set-up. The court found that the work done by Simonet's new outfit was "a clear continuation of the work being undertaken" by the company.[170] On the facts, it is quite clear that what amounted to "maturing business opportunities" were the "actual" contracts that the company had, which were diverted by Simonet to his own newly set up company. In a sense, what Simonet did resembles what was done by the defendants in *Cook* v. *Deeks*,[171] except that there, the defendants did not bother to resign. Lawrence Collins J. therefore had little difficulty in finding for the company.

Reformulating corporate opportunities

This view of "corporate opportunity" is similar to, and arguably even more restrictive than the "interest-or-expectancy" test

[169] *Ibid.*, para. [96] (emphasis added).

[170] *Ibid.*, paras. [73], [77], [78].

[171] [1916] 1 A.C. 554 (P.C.). Here, the company had over the years established very good relations with the customer with whom it had more than satisfactorily performed several construction contracts. These contracts were all negotiated in the same way and by one of the defendants. The last contract was similarly negotiated but in the final stages, the defendants appropriated the contract for themselves. The Privy Council found the defendants "guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves ..." *ibid.*, at p. 563.

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originally espoused in *Lagarde* v. *Anniston Lime & Stone Co.*[172] by the Alabama Supreme Court. "Interest" refers to projects over which the company has an existing contractual right which in *Lagarde* was the option to purchase a leased portion of a limestone quarry. "Expectancy", on the other hand, refers to projects which are likely, given current rights, to mature into contractual rights at some future date, or which, in the words of Sharpe J., grow out of an existing right.[173] It has to be remembered, however, that the American doctrine is still part of the director's duty of *loyalty*,[174] which therefore rightly applies only whilst he *remains* a director. The struggles with defining the scope of what should fall *within* the doctrine and therefore *beyond* the reach of corporate fiduciaries lie in different policy spheres from the considerations that should affect how the scope of the concept is defined for *ex*-directors. Whilst the "interest-or-expectancy" test has been criticised as under-inclusive[175], indeed almost "redundant" as it does not "add much to pre-existing rights under other common law doctrines",[176] it is precisely these characteristics that will help confine the concept of corporate opportunity in post-resignation cases and ensure that the law does not move anywhere close to committing ex-directors to slavery.[177] It is an important policy of the law to discourage restraints on trade and to protect the ability of persons to compete on an equal footing with their ex-employers. This has wider implications on the market place as it will affect the mobility of labour and talent. As Hutchinson, J. has observed,[178] there is no reason why this policy should not also apply to directors. Nevertheless, I would argue that the original "interest-or-expectancy" test *is* too narrow. I would argue for the "expectancy" component of the test to be extended to *include*, but *only* to this extent, opportunities in which the company is almost *certain* of fruition. A mere *expectation* of fruition would be insufficient. In the

[172] (1899) 29 So. 199 (Ala.). In *Lagarde*, the company had a one-third interest in a limestone quarry and an option to acquire a second third. It was interested to acquire the last third but negotiations with the owner were not successful. Directors, who purchased the two-thirds, were held to have misappropriated a corporate opportunity only with respect to that third subject to the option, as the company had an existing interest in it, but with respect to the last third, "no expectancy of value springs from the alleged fact that complainant 'has been negotiating for and endeavouring to purchase' that interest at diverse undesignated times": *ibid.*, at p. 201.

[173] *Ibid.*, at 201. An example could be an expectancy of renewal which grows out of a lease: R.P. Austin, "Fiduciary Accountability for Business Opportunities" in P.D. Finn (ed.), *Equity and Commercial Relationships* (Sydney 1987), 154.

[174] P.K. Chew, *Directors' And Officers' Liability* (New York 1994), 92.

[175] E. Talley, "Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine" (1998) 108 Yale Law Journal 277, 292.

[176] *Ibid.*, n. 42.

[177] To borrow a phrase of Smith J. in *RW Hamilton Ltd.* v. *Aeroquip Corp.* (1988) 22 C.P.R. (3d.) 135, 143 (Ont. H.C.J.).

[178] *Island Export Finance Ltd.* v. *Umunna* [1986] B.C.L.C. 460, 482.

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United States Court of Appeals, Second Circuit decision of *Abbott Redmont Thinlite Corporation* v. *Redmont*,[179] the issue was couched as whether the company had a "tangible expectancy" in the business opportunity.

The facts of and holding in that case are instructive. The defendant Redmont was president[180] of the plaintiff company, whose business consisted of furnishing and installing glass block skylights. Its modus operandi for the sale of lights was to contact the design architect for construction projects and attempt to convince him/her to write its products into the design. The plaintiff would discover what projects were in the course of design through trade journals. Whilst employed by the plaintiff, Redmont had contacted and convinced architects for five projects to include the plaintiff's product specifications into each of these projects. At this time, the plaintiff was the sole distributor in the Metropolitan New York area of the products in question, and once the products were written into the design, it was "almost a certainty"[181] that the plaintiff will get the contract. Before the contracts were awarded, the supplier of glass blocks used in the plaintiff's products announced that it was discontinuing the production of the blocks. Redmont was told that he would have to take a salary cut and he resigned shortly thereafter. He then found another supply of roof and top-lights and contracted for work on the five projects. Oakes J. held that Redmont had breached his fiduciary duty. He said:

> Although Redmont had left the employ of Abbott at the time he contracted with the general contractors for these projects, he was taking advantage of a corporate opportunity which he had helped obtain for Abbott and which would have almost certainly been Abbott's but for Redmont's departure. Redmont ... had *an obligation which carried over after he left Abbott not to exploit projects which would have clearly brought profits to Abbot but for his competition* ...[182]

The issue was whether the plaintiff had a tangible expectancy in the five contracts and whether Redmont had violated his fiduciary duty by "diverting that expectancy to his own profit".[183] The

[179] (1973) 475 F. 2d 85 (N.Y.).
[180] It is not apparent from the report whether the defendant was a director, but clearly he was an officer of the company who was subject to fiduciary obligations.
[181] (1973) 475 F. 2d 85, 88.
[182] *Ibid.*, at p. 87 (emphasis added). In *Canaero*, Laskin J. considered that the "liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract": (1974) 40 D.L.R. (3d.) 371, 392. It is submitted that, on the suggested test, it would be necessary for the plaintiff company to prove this. It must be remembered that the defendants in *Canaero* would have been liable anyway, even *without* any resort to corporate opportunity analysis.
[183] (1973) 475 F. 2d 85 (N.Y.), 87.

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learned judge considered that "[t]he degree of likelihood of realisation from the opportunity is ... the key to whether an expectancy is tangible"[184] and that on the facts, it was almost a certainty that the plaintiff would get the final subcontracts to install its lights. Although it was conceded that occasionally the architect's specifications would be changed, this happened very rarely. Thus, it was "not merely an 'expectancy', but almost a certainty that Redmont's work on these five deals would secure the final contract"[185] for the plaintiff. Further, this high degree of likelihood is:

> combined here with the fact that Redmont benefited by information as a result of his employment at Abbott—knowledge of the details of the specifications, knowledge of the contractor's requirements, knowledge of Abbott's probable costs—which made Abbott peculiarly vulnerable to his competition on the specific deals here in question.[186]

Interestingly, the court found that, notwithstanding its tangible expectancy in the contracts, the plaintiff had in fact "abandoned" four of the five opportunities. Apparently the plaintiff's orders for top-lights would have been met before its supplier halted the latter's glass block business if it had submitted shop drawings to the supplier by a certain date. The plaintiff failed to so, prompting Oakes J. to conclude that it therefore "cannot complain of any loss by misappropriation of its 'opportunity' since it would have abandoned the opportunity in any event".[187] This conclusion must be correct for a contrary result would almost be tantamount to binding, in perverse manner, the *customer* to the plaintiff. Extrapolating from this leads us logically to the conclusion that an opportunity, in *this* sense, that has been *rejected* in good faith by the board of directors, should also be considered "abandoned" and thus available for exploitation by a director who has resigned without more.[188]

Beyond corporate opportunities?

The decision in *Canaero* allows for a wider and more expansive conception of the fiduciary duty that survives resignation. It is not improbable that Laskin J. himself could have had this in mind when he opined that "[a]s in other cases in this developing branch

[184] (1973) 475 F. 2d 85 (N.Y.), 88.
[185] *Ibid.*
[186] (1973) 475 F. 2d 85 (N.Y.), 89 (references omitted).
[187] *Ibid.*
[188] Unless, of course, there is use of confidential information. On the facts of *Peso*, the defendant was approached, after the company's rejection of the offer, by the consultant geologist retained by the company, a Dr. Aho, who suggested the possibility of a group being formed to acquire the claims. The offeror had originally approached Dr. Aho, who had suggested that he offer the claims to the company.

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of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it".[189] Although Laskin J. did caution that in holding, on the facts, that there was a breach of fiduciary duty by the defendants which survived their resignations, he was "not to be taken as laying down any rule of liability to be read as if it were a statute", he did not attempt to delineate nor restrict the scope of the duty beyond stating that:

> [t]he 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 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 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 . . .[190]

The potential for expansion was indeed seized upon by a line of Ontario cases, beginning with the much criticised decision of Estey C.J.H.C. in *Alberts* v. *Mountjoy*,[191] in which a manager and salesman of a general insurance agency were held liable for breach of fiduciary duty for soliciting and obtaining, after they had left the plaintiff's employ, the general insurance business of many of the plaintiff's clients. Purportedly applying the principles stated by Laskin J., Estey C.J.H.C. considered that the manager was subject to fiduciary duties as he was "top management" and that he was thereby precluded, *even after resignation*, from obtaining for himself without the approval of the plaintiff, any business advantage of the plaintiff, which, on the facts, was comprised in the "opportunity to obtain renewal commissions when the contracts of insurance of the plaintiff's clientele came up for renewal in the future".[192] Although the salesman, being a defendant of "lower rank" might have "claimed immunity from the duties attaching to a fiduciary, he lost that advantage in joining with [the manager] in the new business venture, which successfully diverted the business opportunity of his former employer and fixed him with the same fiduciary duty as [the manager]".[193]

[189] (1974) 40 D.L.R. (3d.) 371, 390
[190] (1974) 40 D.L.R. (3d.) 371, 390–391.
[191] (1978) 79 D.L.R. (3d) 108.
[192] *Ibid.*, at p. 117–118.
[193] *Ibid.*, at p. 116.

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Surely this decision goes some way beyond Laskin J.'s theory of the "maturing business opportunity" that is "actively pursued". As one commentator observed, "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 competition at all amounts to the taking of one".[194]

The "breadth and sweep" of *Alberts* and its progeny[195] have therefore been described as "startling",[196] leaving the law "rudderless" and casting "a chill upon the willingness of the well-advised employee to become a master of his or her own economic fate".[197] The temptation to expand the scope of post-directorship fiduciary duties beyond a tightly delineated concept of corporate opportunity should be strongly resisted if freedom of employment and encouragement of competition are to remain viable economic precepts.

IV. Conclusion

There is little doubt that directors are subject to fiduciary duties, and the reasons for the imposition of a strict and absolute rule are fairly clear: loyalty and trust are ideals of behaviour that are difficult to demand and to monitor. However, once the directorship terminates, care must be exercised in deciding whether these duties should nevertheless continue. It is the submission of this essay that fiduciary obligations should "survive" termination, although in limited circumstances. Specifically, once a director has resigned and it is alleged that he has exploited information that can be distinctly traced to or linked with the acts of the ex-director prior to resignation, then whether the director should be made liable must depend on an inquiry into his role in the company and therefore the corresponding scope of his discretion prior to his resignation. This then determines whether his duty to *respect* the company's priority, as against him in connection with the advantage that he has obtained, extends beyond his resignation.

Fiduciary law should also recognise the company's priority against the ex-director, irrespective of his role in the company, with

[194] P. Downard, "Post-Employment Competition and the Courts: An Unfortunate Curve in the Common Law" (1985–1986) 6 Advocates' Quarterly 361, 370.

[195] See discussion in P.C. Wardle, "Post Employment Competition—Canaero Revisited" (1990) 69 Canadian Bar Review 233, 248ff.

[196] Wardle, *ibid.* at p. 234.

[197] P. Downard, "Post-Employment Competition and the Courts: An Unfortunate Curve in the Common Law" (1985–1986) 6 Advocates' Quarterly 361, 362. See also P.Y. Atkinson & R.A. Spence, "Fiduciary Duties Owed by Departing Employees—The Emerging 'Unfairness' Principle" (1983–1984) 8 Canadian Business Law Journal 501.

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respect to those business opportunities that may properly be termed "corporate opportunities", and prevent the ex-director from usurping the same. The concept of the corporate opportunity, which may be subject to this continuing obligation, should be confined only to those business opportunities in which the company already has an interest, or in the fruition of which the company has a real and almost certain expectancy.

Fiduciary law treads a fine line here and it is submitted that a robust adherence to the approach outlined in this essay will help maintain that careful balance between the company's interests and the needs of ex-directors to compete effectively, and thereby prevent the descent into confusion.

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