## Conclusion

The existence of a duty of fidelity on the part of all employees, unionized or not, is firmly established in Canadian law. Arbitrators sitting under collective agreements have long recognized this duty, applying it largely as defined and developed in the courts. This duty can take various forms. The classic one doubtless relates to the prohibition on competition with the employer and protection of its public image or products. Conflicts of interest have been consistently held to come within the range of conduct prohibited by the duty of fidelity. Arbitrators have generally been unsympathetic to arguments based on lack of a formal prohibition against conduct contrary to this duty, agreeing with the arbitrator in *Re Wosk's Ltd.*[49] that its observance is such a self-evident part of the employment relationship that it requires no formal expression. In this area employment law in Canada imposes standards on employees somewhat stricter than those in the United States.

Breaches of this duty frequently attract severe disciplinary responses from employers, with dismissals commonly imposed. Arbitrators, with a few notable exceptions, have generally upheld discharges. Nor is there any tendency in the more recent case law to relax this duty; many of the important statements of its scope in arbitral case law have come within the past decade. Thus, we do not anticipate that Canadian arbitrators in the foreseeable future will apply any looser conception of what the morals of the marketplace in employer-employee relationship ought to be than they have in the past.

## LABOR PERSPECTIVE

ALVIN L. GOLDMAN*

Matthew Finkin's paper and Roy Heenan's comment stress the contemporary reliance on the concept of implied contractual obligations as the method by which courts have imposed the worker's duty of loyalty to the employer. But an adequate justification has not

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[49]13 L.A.C.3d 64 (Dorsey, 1983).

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[**Editor's Note:** The union attorney scheduled to present the labor perspective was unable to attend the Academy meeting. As a result, Program Chair Alvin Goldman substituted and role-played in order to complete the panel.]

been given for judicial importation of this set of duties on the parties' contract. The significance of examining that justification is dramatized by a story told to me about 15 years ago by a law student.

We had discussed the employee's duty of loyalty in class. After class the student stopped by my office to continue the discussion. She was roughly in her mid-30s and explained that she had spent most of her early years as a farm laborer in California. As I recall her account, she started by describing a small group of workers who were in the fields tending lettuce or a similar crop, when a single-engine plane slowly flew overhead. Several of the laborers were looking at the unusual sight when the plane released a cloud of droplets onto the field where they were working. Soon, everyone was coughing, eyes were tearing, and skin was burning. They ran to a water trough and were washing away the oily coating when a foreman came by and expressed anger that they had left their work. My student explained: "I never found out what that stuff was, but within a few days the skin on some exposed parts was peeling. It left mottled marks in some places." Then, showing the splotched skin on the back of her knuckles, she stated: "I was in my early teens that day. The marks never went away. I don't know whether they are precancerous. But you tell me, what duty of loyalty did I owe that grower?"

Roy Heenan has explained how in Canada the employee's duty of loyalty has evolved from imposing fiduciary standards upon higher level managers. British-derived legal systems separate the law of contracts from the law of status. Fiduciary standards are part of the law of status. They are imposed where a relationship—whether established by birth, law, or contract—places a person or entity in a position of special dependence upon the fair, honest exercise of another person's or entity's (the fiduciary) integrity, knowledge, or power. They are not imposed in ordinary contractual relationships. Moreover, fiduciary duties often cover some, but not all, aspects of a relationship. For example, a bank owes fiduciary duties respecting some aspects of its relationship with a customer, while other aspects are governed by ordinary contractual standards.

The duty of loyalty does bear a close resemblance to fiduciary standards. As Mr. Heenan suggests, it carries an expectation of faithfulness. In ordinary discourse we assume a duty of loyalty on the part of citizens to their country, on the part of family members to each other, on the part of alumni to the institutions that provided their education, and on the part of members to voluntary associations and the like. Why do we assume that duty of loyalty? Is

it not because the welfare of the participants is interdependent and because the participants have a history and continuing expectation of mutual support, common goals, and a shared destiny? When these expectations have a close relationship with reality, living up to the duty of loyalty serves the function of increasing the prospect that the parties' expectations will be realized. In a sense, adhering to the duties of loyalty becomes a mutual investment in long-term, common goals.

Although for some people the concept of loyalty is an abstraction that constitutes an absorbing, powerful, emotional force devoid of its functional purpose, upon reflection most would, I think, acknowledge that, even in those situations where we most readily assume a duty of loyalty, this duty does not exist under specific circumstances. For example, should we assume that an abused spouse or child owes a duty of loyalty to the abusing spouse or parent? Should we assume that the citizens of a nation where governmental power is wielded to exploit and repress the many for the benefit of a few owe a duty of loyalty to lay down their lives for the motherland? Or, is it more appropriate to impose the duty of loyalty only if it has been earned? I submit that a sound system of principles governing relationships does not blindly impose a duty of loyalty, but rather limits it to situations where those seeking loyalty have earned their claim to it. Otherwise, the concept becomes an abstraction divorced from its purpose.

If we accept the above reasoning, an employee's alleged disloyal conduct should be condemned only if it violates a specific provision of the collective agreement or if the overall nature of the relationship demonstrates that the employer has earned the expectation of employee loyalty. To determine whether the employer has earned the employees' loyalty, an arbitrator appropriately might look to the benefits bestowed, either through the collective agreement or the employer's customary conduct. Do these sources demonstrate dedication to maintaining a long-term relationship with a shared destiny? For example, to what extent have the employees been provided with a decent standard of living, with job and income security, with opportunities to enhance their position in the enterprise through such processes as training and internal promotions? Similarly, we might inquire as to whether there is profit sharing and whether there is consultation or joint decisionmaking respecting matters affecting working conditions and the like. In other words, labor arbitrators should not follow the too frequent pattern of judicial imposition of the duty of loyalty as though it automatically

were an attribute of employment. Instead, arbitrators should evaluate these claims in light of the functional justification for the duty and insist upon proof that implying the duty is appropriate under the circumstances of the particular employment relationship.

Finally, in assessing charges that an employee's conduct breached the duty of loyalty to the employer, we should continue to be sensitive to the fact that an employee can be faced with conflicting duties of loyalty—such as duties to the government or to the family. These conflicts require reasonable accommodations of the sort that both Matthew Finkin and Roy Heenan have described. When balancing the competing demands involved in such cases, it may be helpful for the arbitrator to remember that, in a society which respects individual dignity, it is appropriate for an employer to rent a worker's time, effort, skill, knowledge, and intelligence, but not the worker's soul.