

ers, whereby the unionized receive a lesser degree of protection for claims of conscience than the nonunionized.⁸⁴ This “collar gap” could widen if developing federal preemption policy precludes the unionized from pursuing state claims.

MANAGEMENT PERSPECTIVE

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Two main contrasts emerge between the American employee’s duty of loyalty treated in Matthew Finkin’s paper and that of Canadian employees. The first is that Canadian law, drawing its inspiration from English common law and French civil law, pitches the employee’s duty of loyalty and fidelity higher than in the United States. The second is that this duty of employee loyalty and fidelity has been imposed initially by the courts and followed, sometimes reluctantly, by arbitrators under collective agreements.

What is the “Duty of Loyalty”?

It is useful, before discussing the case law, first to define the duty of loyalty as it is known in Canada. Basically, Canadian tribunals recognize the obligation of the employee to work in the employer’s interest and not to act so as to harm the employer’s business. The duty of loyalty is often referred to as the duty of “fidelity” or of “faithfulness and honesty.” It includes, but is not limited to, an avoidance of conflict of interest. However defined, it is based on the simple premise that, if employees accept wages, they must work wholly in the employer’s interest, because it is readily understood that an employer would not pay the wages otherwise.

Arbitrator Ross Kennedy summarized the common law duty:

It is an established principle of the common law governing an employer/employee relationship that “an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer’s business.” This has been held to be an implied term of any collective agreement unless it is explicitly excluded (citation omitted).

⁸⁴ Compare *Bishop v. Federal Intermediate Credit Bank of Wichita*, 908 F.2d 658 (10th Cir. 1990) (bank president cannot be discharged because of content of testimony before committee of U.S. Senate, applying Oklahoma law) with *R.P. Richards, Inc.*, *supra* note 75.

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In the private sphere, the result of this rule is that it is generally an unacceptable conflict of interest for an employee to enter into business in competition with his employer.¹

As we shall see, the Canadian courts have had occasion recently to consider this duty, starting with senior officers and followed by managerial and other employees. In general, the courts and arbitrators have been insistent that standards of honesty and loyalty toward the employer must be maintained.

Canadian Court Decisions

The fundamental modern statement of the employee's duty of loyalty and fidelity in Canadian common law is the Supreme Court of Canada's decision in *Canadian Aero Services v. O'Malley*.² The Supreme Court there dealt with the case of two senior executives of a corporation who resigned, then immediately afterwards formed a business of which they were the principal shareholders. They successfully bid against their former employer for certain aerial surveying work. The Court held Canadian Aero Services' ex-employees liable for damages for loss of this contract because they had acted in a fiduciary relationship to their former employer while in its service. The Court expressly founded the defendants' liability on their breach of the rules governing fiduciaries in the law of trusts, holding that senior employees, or those acting in a managerial capacity, were bound by duties of "loyalty, good faith and avoidance of a conflict of duty and self-interest" and that:

[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 where it was his position with the company rather than a fresh initiative led him to the opportunity which he later acquired.³

In *Bank of Montreal v. Ng*,⁴ the Supreme Court dealt with a similar problem of the scope of managerial employees' duty of loyalty arising under Quebec's civil law. The text writers in the civil law

¹ *Re Regional Municipality of Hamilton-Wentworth*, 18 L.A.C.2d 46 (1978).

² S.C.R. 562 (1974), 40 D.L.R.3d 371 (1973).

³ *Id.* at 381-382 D.L.R.

⁴ 2 S.C.R. 429 (1989).

tradition have long held that employees owe a duty to carry out their obligations under an employment contract in good faith. A classic statement of this is found in Durand and Vitu, *Traité de Droit du Travail*.⁵

Building on this tradition in the *Bank of Montreal* case, the Supreme Court held that a currency trader, who had made secret profits for himself and for private clients in the course of his employment, was liable for these profits to the bank, even though it had not suffered any losses as a result of the employee's illicit acts. The court held that the employee was in the position of a mandatary under the civil law, who was bound to turn over any profits from his mandator's property to it. Further:

The fiduciary obligation recognized in these circumstances in the common law translates in the civil law into terms of good faith and loyalty of the employee to the employer and the avoidance of conflict of interest including seeking an advantage which is incompatible with the terms of employment.⁶

These principles have been applied in numerous other cases. Two may be noted here as illustrating the scope of the duty of loyalty and fidelity and the range of employees to which it will apply in Canadian common law. In *Helbig v. Oxford Warehousing*,⁷ a senior employee, who became involved with his employer in a dispute over the patent rights to a device which he had invented, was held to have given cause for termination. The court held that he was a fiduciary and thus had to use "all his energy, ability and imagination in the best interests of the company, and if he is successful in developing a business opportunity he does so for the benefit of the company exclusively." In *Quantum Management Services v. Hahn*,⁸ the Ontario Court of Appeal held a former employee in a personnel agency liable to her former employer for its loss of profits for a time after she left it to establish a rival agency. Under Quantum's rules, she had been the only person who could deal with specified clients which she had obtained. Virtually all the clients at the new business were her former ones at Quantum, and the Court of Appeal held that this was "unfair exploitation" of confidential information, justifying the imposition of liability. (It may be noted that the trial judge had imposed liability on the further basis that

⁵Durand & Vitu, *Traité de Droit du Travail* (Paris, 1950) (Addition).

⁶2 S.C.R. (1989) at 443.

⁷51 O.R.2d 421, 20 D.L.R.4th 112 (Ont. C.A. 1985), *leave to appeal to S.C.C. refused*, 52 O.R.2d 754 n. (1986) (citation at 51 O.R.2d 430).

⁸69 O.R.2d 26 (H.C.J. 1989), *appeal dismissed*, 11 O.R.3d 639 (Ont. C.A. 1992).

the defendant's unique access to the clients in question made her a fiduciary within the *Canadian Aero Services*⁹ principle, despite her relatively low position in the employer's organization; the Court of Appeal expressly refrained from ruling on the correctness of this holding.¹⁰

Canadian courts have thus established high standards of loyalty and fidelity, particularly for senior executives and for managerial employees, but extending to all. They have done so in part because of the practical power which such employees have over the operation and the assets of the businesses which employ them and in part, as the British Columbia courts have put it, to ensure that "the morals of the marketplace" do not become too "mobile."¹¹ The courts, and labor arbitrators following their lead, have applied versions of these duties to employees covered by collective agreements.

Labor Relations Tribunals

It is well established in Canadian common law that employees governed by a collective agreement owe their employer a duty of good faith and fidelity. In a leading case, *Regina v. Fuller, ex parte Earles & McKee*,¹² the Ontario Court of Appeal upheld the trial judge, who had refused to issue a writ of certiorari against the decision of an arbitration board. The board had decided that certain actions by the grievors, in support of a legal strike against the employer by members of another bargaining unit, justified the employer's discontinuing payment for certain fringe benefits for the grievors. The grievors' actions took the form of cooperating with the strikers, urging a consumer and advertising boycott of the employer, a daily newspaper. The board held the employer's actions justified because the grievors had breached the principle that "an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may

⁹*Supra* note 2.

¹⁰11 O.R.3d, at 640. Other examples of common-law cases involving lower ranking employees may be seen in *Beya v. Irving Oil Ltd.*, 8 C.C.E.K. 128 (N.B. Q.B. 1985) (foreman); *Pulsifier v. G.T.E. Sylvania*, 48 N.S.R.2d 423 (N.S. C.A. 1983) (salesman); and *Hughes v. R.T. Holman Ltd.*, 40 Nfld. and P.E.I.R. 190 (P.E.I. S.C. 1982) (store clerk). Civil law courts, even before the *Bank of Montreal* case, *supra* note 4, had often given a similarly wide scope to the duty of loyalty, based on *Canadian Aero Servs.*, *supra* note 2. See, e.g., *National Fin. Brokerage Centre v. Investors Syndicate*, 9 C.P.R.3d 497 (Que. C.A. 1986); *Les Entreprises Rock Ltée v. Les Habitations C.J.C.*, R.J.Q. 2671 (Que. S.C. 1986).

¹¹*Jewitt v. Prism Resources*, 110 D.L.R.3d 713, 715 (B.C. S.C. 1980), *aff'd*, 127 D.L.R.3d 190 (B.C. C.A. 1981). See also *Bank of Montreal*, *supra* note 4, at 441: "The obligation . . . rests, at least in part, in the simple moral principle that 'the perpetrator of a wrongful act should not profit thereby, as that would encourage wrongdoing.'"

¹²70 D.L.R.2d 108 (Ont. C.A. 1968).

harm his employer's business."¹³ In the board's view this was an implied term of the collective agreement. The trial judge and the Ontario Court of Appeal agreed, the latter holding that the common law established this duty, which was "inherent in and attaches to the relationship of master and servant." Absent an express exclusion of this principle in the collective agreement, the board was within its jurisdiction to imply it.

Many labor relations tribunals have taken a similar position. The British Columbia Labour Relations Board, sitting in review of an arbitration board's decision under the British Columbia Labour Code, confirmed that an employee who had made accusations of serious inefficiencies in her employer's operations had given just cause for discipline and upheld the board's decision maintaining her discharge.¹⁴ This duty of loyalty has also been invoked by arbitration boards, in upholding a reprimand for library employees who had publicly criticized a library policy on access to the periodicals reading room,¹⁵ and in maintaining the discharge of an employee who had strongly and repeatedly criticized the company's management both to other employees and in public.¹⁶

This arbitral and labor relations board case law is in accord with the Supreme Court of Canada's major decision in this area, *Fraser v. Public Service Staff Relations Board*.¹⁷ In *Fraser* an audit manager at Revenue Canada had repeatedly criticized important government policies in the news media, including radio call-in programs and television and newspaper interviews. Initially moderate, his criticisms rapidly became highly vitriolic; he compared the government and the prime minister to the Polish military government which took power in 1980 and to the Nazis. The Public Service Staff Relations Board adjudicator upheld the discharge after a warning and suspension had failed to make Fraser moderate his attacks. On judicial review, the Supreme Court upheld the adjudicator's decision.

The Supreme Court essentially relied on two grounds in coming to its conclusion. The *first* was that Fraser's criticisms, although not directed at policies administered by the department for which he worked, were job-related because they could reasonably cause distrust of the government which employed him. Moreover, Fraser's criticisms would inevitably interfere with the public perceptions of

¹³*Id.* at 111-12.

¹⁴*William Scott & Co.*, 1 Can. L.R.B.R. 1, 7 (B.C. L.R.B. 1977).

¹⁵*Re Simon Fraser Univ.*, 18 L.A.C.3d 361, 367-68 (Bird, 1985).

¹⁶*Re Lord & Burnham Co.*, 24 L.A.C. 218, 222-23 (Hanrahan, 1972).

¹⁷2 S.C.R. 455 (1985).

an impartial civil service, loyally carrying out the policies of the government. The *second* was that Fraser's "sustained and highly visible attacks on major Government policies . . . displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government."¹⁸

These same basic principles have been followed by adjudicators under public service collective bargaining schemes, although a number of their decisions show a reluctance to put them fully into effect. In one case an immigration officer was discharged for providing departmental information to an opposition member of Parliament, who promptly disclosed it to the news media and used it as the basis for an attack on the minister of employment and immigration in the House of Commons. Reasoning that the grievor's criticism was not as prolonged or as visible as in *Fraser*, the adjudicator ordered the grievor returned to work after an eight-month, time-served suspension, although he found the grievor's actions disloyal and not protected by his right of freedom of speech found in the Charter of Rights & Freedoms.¹⁹ Another employee had written a series of letters to the editor of his local newspaper, attacking the government and its candidate in the general election, which was then in progress. The employee identified himself as a member of an opposition party. The adjudicator found that some of the letters constituted "work" for a political party, something expressly forbidden under the Public Service Employment Act, which governed the grievor's employment. Nonetheless, the adjudicator found that a three-month suspension, rather than the dismissal imposed by the employer, was an appropriate penalty. He reasoned that the employee's "transgression" was not serious enough to warrant dismissal.²⁰

Interestingly, adjudicators and arbitrators have reached different conclusions in public-sector and quasi-public-sector cases, where they have relied on the duty of loyalty inherent in *any* employment rather than on the public servant's duty of public political neutrality. In *Re Ministry of the Attorney General, Corrections*

¹⁸*Id.* at 470.

¹⁹*Re Treasury Bd. (Employment & Immigration)*, 31 L.A.C.3d 156 (Cantin, 1987).

²⁰*Re Brewer*, 27 L.A.C.2d 201 (Frankel, 1980). This case law must now be read in the light of the Supreme Court's decision in *Osborne v. Canada (Treasury Bd.)*, 2 S.C.R. 69 (1991), where the Court held that the section of the Public Service Employment Act in question in *Brewer* was contrary to the "freedom of expression" guaranteed in the Charter of Rights. What effect this will have on the constitutional convention regarding political neutrality of public servants, or on a public employer's reliance on the employee duty of loyalty as a restraint on criticism of government policy, remains an open question.

Branch,²¹ for example, the arbitrator upheld the dismissals of two corrections officers who had raised serious allegations of corruption, incompetence, and criminal activity on the part of officials of the British Columbia prison system. The allegations were made in the news media over a period of several months, and the grievors were dismissed after repeating and expanding their allegations during a second television interview. They had been explicitly warned after their first appearance that repetition of the allegations in public could result in disciplinary action. The arbitrator held that discharge on the ground of breach of the grievor's oaths of secrecy could not be supported because it was not sufficiently clear that the oaths covered the information in question. But he upheld the dismissals because the grievor's conduct, in making their criticisms public without exhausting internal channels and without verifying the accuracy of their criticisms, was in breach of their duty of loyalty and fidelity. The arbitrator observed that:

. . . the duty of fidelity does require the employee to exhaust internal "whistle blowing" mechanisms before "going public." The internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. . . . Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.

The reason why the duty of fidelity requires an employee to verify his information and exhaust available channels to remedy their [*sic*] complaints is to avoid what happened in this case. The employer and its management personnel must be protected against employees making impromptu, unsubstantiated, specious critical statements about the manner in which the enterprise is conducted.²²

In the same vein, an arbitrator upheld the transfer from one town to another of an employee who had sent letters to the editor attacking the employer's stance in collective bargaining. The arbitrator found the language in the letters "defamatory in that it went beyond the bounds of fair comment." These letters justified the transfer of the grievor from a relatively small town where he was the employer's chief public spokesman. The arbitrator held "there is simply no way that he can maintain credibility on behalf of the employer having made the statement he has."²³

²¹3 L.A.C.3d 140, 163-67 (J.M. Weiler, 1981). The somewhat different case of union officials who publicly attack their employers in the course of their union duties is touched on *infra*.

²²*Id.*

²³*Re Ins. Corp. of B.C.*, 3 L.A.C.3d 355, 358 (Ladner, 1981) (employer was crown corporation). See also *Re Wainwright School Div. No. 32*, 15 L.A.C.3d 344 (Laux, 1984), where

Arbitrators have applied a noticeably different standard to attacks by union officials on their employers, when related to collective bargaining or contract administration. In *Re Burns Meats Ltd.*²⁴ the arbitration board held that union stewards' statements made in the course of their union duties were protected, unless knowingly or recklessly false. The board accordingly quashed the discharge of a steward who had accused the employer's senior management of a "disgusting and contemptible" lack of integrity and blatant violation of employee rights over a seniority question, because the steward did not know his statement to be false. Conversely, a one-day suspension of the president of a transit company union, for writing a series of letters to the editor of the local newspaper highly critical of the mayor and city council, was upheld in *Re Brampton (City)*.²⁵ Although following the standard set out in *Re Burns Meats*, the arbitrator held that the grievor's statements were based on incorrect knowledge. Moreover, the grievor had deliberately bypassed the employer's and the collective agreement's channels for dealing with the very issues covered in his letter. This attempt to bring the political influence of persons not involved in the administration of the collective agreement to bear on collective bargaining issues, the arbitrator held, was an insubordinate "attempt to undermine the authority of those persons involved in the management of the operations and the administration of the collective agreement," which was not shielded by the grievor's union office.

Competition and Conflict of Interest

Canadian labor arbitrators have invariably held that employees who engage in competition with their employers, or who have placed themselves in situations of conflict of interest, may be disciplined. Indeed, with a few notable exceptions, arbitrators normally uphold the imposition of severe disciplinary measures, including discharge, for such conduct. An early instance of this may be seen in *Re Pepsi-Cola Canada*,²⁶ where the arbitration board held

a school secretary wrote to members of a home and school association in her capacity as parent of a child in the school system, making comments critical of the school board, her employer. The arbitration board upheld the issuance of a letter of reprimand because: "while the words used would not be particularly objectionable if uttered by an ordinary resident of the community, they do go beyond propriety when used by an employee holding a position of school secretary," *id.* at 352.

²⁴26 L.A.C.2d 379, 386-87 (M.G. Picher, 1980).

²⁵7 L.A.C.4th 294 (Brown, 1989) (citation at 321-22).

²⁶18 L.A.C. 105, 105-06 (Hanrahan, 1967).

that the company had just cause to discharge a soft drink company sales representative who had obtained a beneficial interest in some of the soft drink machines he was servicing on his employer's behalf. The board held that the employee had breached his duty of fidelity, a matter intrinsic to the employer-employee relationship. Because he had also shown his awareness of wrongdoing by an attempt to conceal his activities from the company, the board held that no written rule was needed to support disciplinary actions. Another arbitration board held that an employee, whose moonlighting job involved using his technical skills for his employer's main competitor, had given cause for discipline because "[he] must have known . . . that they [the grievor and another employee] were not 'playing the game' with their employer."²⁷ The board, however, rescinded the employee's discharge, ordering that he be given a chance to choose a job with either the competitor or the employer.

More recent decisions have continued to apply these principles. In *Re Wosk's Ltd.*²⁸ the board observed:

A rule against untrustworthiness and conflict of interest need not be promulgated by an employer. Like honesty, it is assumed to be part of the foundations of the relationship. In some relationships the element of trust that goes with the work situation is minimal, but in every case the employee is expected to be honest so that the workplace need not become a prison but can be a place that fosters co-operative labour relations and industrial democracy.²⁹

The board upheld the discharge of an employee who planned to open a store to compete directly with his employer in selling electrical appliances. Another arbitration board, in dealing with a similar situation, ordered that the grievors be given one week to choose between their competing enterprise and their continued employment. It rejected the argument that "free enterprise" entitled employees to compete with their employers in their off hours.³⁰

²⁷*Re Arborite Co., Continental Diamond Fibre Div.*, 15 L.A.C. 48, 110-11 (Little, 1964).

²⁸13 L.A.C.3d 64 (Dorsey, 1983).

²⁹*Id.* at 73.

³⁰*Re Woodward Stores*, 28 L.A.C.3d 59 (Fraser, 1987). One arbitrator has opined that arbitrators, unlike the courts, will discipline only for "direct" competition with an employer. *Re Poli-Twine*, 35 L.A.C.2d 123, 127 (Wiles, 1988). With respect, we do not consider that the cases may be so interpreted. While most have involved working for a competitor engaged in the same type of business as the employer, the language does not allow unionized employees any greater scope to compete with their employers than that enjoyed by nonunionized ones. *Cf. Re Grey's Dep't Stores*, 4 L.A.C.2d 111 (Palmer, 1973), where the board held that a men's clothing salesman doing this type of work for a competitor of his employer may be disciplined, though he had not attempted to solicit any of the employer's customers for the competitor.

The case may be different where part-time employees are involved. The arbitrator in *Re Food Group*³¹ substituted for discharge a suspension until the grievor satisfied the employer that he was no longer working for a competitor one day per week. The grievor was a part-time employee working an average of 30 hours per week. The arbitrator based his decision on the employer's express rule against part-time employees working for competing grocery stores, finding that the prohibition had been brought to the grievor's attention. The arbitrator added, however, that in a part-time employment relationship there is no "implicit" rule which "prohibits an employee from seeking other employment." Other, perhaps less obvious, breaches of the employee's duty of fidelity have been held grounds for discipline. In *Re CJCH 920/C100 FM Division of CHUM Ltd.*³² the arbitrator held that a radio announcer who acted as "the voice" (station identification announcements and miscellaneous promotional work) of a television station owned by a competing broadcaster could be dismissed by the radio station for conflict of interest. As "the voice" of the television station, the arbitrator reasoned, the grievor's job was to increase viewership and, indirectly, advertising revenue in a small and fiercely competitive market. This was to the "potential or actual detriment of the company," contrary to a noncompetition clause in the collective agreement.

Arbitrators have generally been sensitive to conflicts of interest involving civil service employees. In *Re The Queen and the Nova Scotia Government Employees' Ass'n*³³ an engineer employed by the Department of Highways was suspended for one week for writing a letter to senior departmental officials and threatening to go to the minister, when the department imposed certain requirements on the street plan of a subdivision where he was involved. The arbitrator held that the grievor was in a conflict of interest, even though in the circumstances the conflict was not an economic one: "Pressing his advocacy to the point of ridiculing the department and fellow employees in the department and of threatening Ministerial action put the grievor into a clear conflict of interest and constituted a breach of his obligation to his employer."³⁴ More severe penalties have been imposed in other cases of public service conflicts of interest where the possibility of financial gain was

³¹30 L.A.C.3d 250, 255-56 (Stanley, 1987).

³²172 L.A.C.4th 1, 12-13 (Outhouse, 1990).

³³25 L.A.C.2d 7 (Christie, 1980).

³⁴*Id.* at 9-10.

involved. An official whose duties consisted of providing free consulting services to small businesses was discharged for becoming a partner in a business venture with one of the Ministry's clients.³⁵ The arbitration board held that the grievor knew the partnership inevitably involved him in a conflict of interest, which caused damage to the Ministry's reputation "as a disinterested party offering professional information to private business clients." This fact was sufficient to ground a discharge without requiring the Ministry to prove actual harm. Similarly, an official, who performed real property evaluations for municipal tax purposes in a region of Ontario, was held properly discharged after his election to a council of a municipality, even though he did no property assessments there. The arbitration board found that the type and quantity of information which the grievor naturally and necessarily learned in the course of his employment put him in a position of conflict of interest between his employment and his elected office.³⁶

One arbitrator, however, found discharge too severe for a land use planner employed by a regional government, who had branched out into landscape architecture in association with a private firm. The firm prepared plans sometimes requiring his approval as land use planner, although he refrained from approving those he had prepared himself. While accepting that by this conflict of interest the grievor had breached the duty of fidelity owed his employer, the arbitrator reversed the discharge because the employer had not proved actual damage to its reputation; the matter had received minimal publicity, and the grievor had honestly not realized that there was a conflict of interest. Instead, the arbitrator substituted a time-served suspension for the discharge.³⁷ This result is obviously anomalous in view of the case law and is not readily defensible in view of the facts in the case. Sanctions for other forms of employee corruption have been upheld as proper. *Re Consumers Gas Co.*³⁸ involved an employee who had been directing to a competitor customer orders from his employer's installation department. Unsurprisingly, the competitor had been paying the employee for his services. The arbitration board found that the

³⁵*Re Van der Linden*, 28 L.A.C.2d 352 (Swinton, 1981) (citation at 359-60).

³⁶*Re Hallborg*, 22 L.A.C.2d 289, 292 (Weatherill, 1979). On the Ministry's consent, the discharge was varied to offer the grievor the choice of either resigning his municipal office or accepting transfer to another assessment region if he wished to return to his employment.

³⁷*Re Hamilton Wentworth*, 18 L.A.C.2d 46, 58-60 (Kennedy, 1978).

³⁸1 L.A.C.2d 304 (Brown, 1972).

grievor's conduct constituted a blatant disregard for his duty of fidelity and responsibility as an employee of the company and upheld the discharge. A city drainage inspector who solicited drain clearance work for a friend (sharing in both the work and the profits) also had his grievance against his suspension dismissed.³⁹ The arbitrator said:

The steering of information as a tipper is sufficient for the employee's duty of fidelity to the corporation to have come into conflict with the employee's actions. It is not necessary that there has been a financial gain.⁴⁰

The arbitrator found that the grievor's monetary gains aggravated the seriousness of his conduct.

In a few instances, however, arbitrators have seemingly forgotten the existence of the employee's duty of fidelity. Perhaps the most striking examples are arbitrations under the adjudication provisions of the Canada and Quebec labor codes, which provide for the adjudication of wrongful dismissal claims by nonunion employees by arbitrators, who have the power to reinstate employees. Under the Quebec Labour Code, an arbitrator ordered the reinstatement of the employer's director of promotion and publicity after his dismissal for accepting a second free vacation trip from a company he dealt with on the employer's behalf, after he had been explicitly warned against such conduct earlier when he had accepted the first vacation. The arbitrator found dismissal excessive and ordered the employee reinstated after a four-month suspension, with full back pay for the remainder of the nearly two-year period between the dates of the dismissal and the arbitrator's decision. After an application for evocation (judicial review) of the arbitrator's decision had been initially rejected by the Quebec Superior Court, the Quebec Court of Appeal quashed the arbitrator's decision on the basis that it was patently unreasonable. The employer, the court held, was justified in putting an end to the contract of employment.⁴¹

The Supreme Court of Canada allowed an appeal from this decision.⁴² The judges carefully refrained from endorsing the arbitrator's decision. (One opinion observed: "I am far from certain that I would have decided as the arbitrator did.") However, the Court held that the decision was protected from judicial review

³⁹ *Re Toronto (City)*, 20 L.A.C.4th 159 (McLaren, 1992).

⁴⁰ *Id.* at 168-169.

⁴¹ *Control Data Can. v. Lalancette*, C.A. 129 (Que. 1983).

⁴² *Blanchard v. Control Data*, 2 S.C.R. 476 (1984).

because it was not patently unreasonable.⁴³ With respect, it appears to us that the Court showed an excessive deference to an arbitral opinion clearly at odds with both arbitral case law in similar situations and well-settled law governing individual employment relationships. The employer's dismissal decision was amply supported by the case law and the common sense the Court of Appeal had found so lacking in the arbitrator's decision.⁴⁴ Given the Supreme Court's recent willingness to consider the correctness of decisions by administrative tribunals when deciding on their reasonableness, it is doubtful that the result in *Control Data* would be the same today.⁴⁵

Sitting under the Canada Labour Code, an arbitrator came to an extraordinary conclusion on another conflict-of-interest case, involving Chayer, an accountant employed by a bank, who obviously knew about its security system. She lived with a man with two prior convictions for armed robbery. She was dismissed after police found her common law spouse and a number of other men in her apartment, counting the money from an armed robbery which they had just committed at the branch where she worked. Arms and ammunition were also found there. The armed robbery was the second one committed at the branch by Chayer's common law spouse in three weeks. The arbitrator found that Chayer had given no cause for discipline and ordered her reinstated with full compensation for lost wages. The Federal Court of Appeal quashed this decision on judicial review,⁴⁶ holding that Chayer's personal situation, that is, her continued association with a bank robber, fell within the common-law rule that employees who engage in action incompatible with the due and faithful discharge of their duties may be dismissed. This justified Chayer's discharge, regardless of whether her actions involved conflict of interest as usually understood in employment law.⁴⁷

She betrayed her duty to her employer by continuing to associate with a person so apparently dedicated to playing Robin Hood for his own benefit. Nothing more is required for incompatibility with the interests of her employer.⁴⁸

⁴³*Id.* at 481, 499–500.

⁴⁴*Supra* note 41 at 134, 135.

⁴⁵On this administrative law issue, see, e.g., *Canada (A.G.) v. P.S.A.C.*, 1 S.C.R. 614 (1991); *National Corn Growers v. C.I.T.*, 2 S.C.R. 1324 (1990).

⁴⁶*C.I.B.C. v. Boisvert*, 2 F.C. 431 (C.A. 1986).

⁴⁷*Id.* at 456–57.

⁴⁸*Id.* at 461.

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

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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

⁴⁹13 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.]