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THE QUICKENING OF FIDUCIARY OBLIGATION: CANADIAN AERO SERVICES V. O'MALLEY

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Save for two decisions, one in the twelfth and one in the ninety-eighth year of its life, there would be little of real significance to comment upon in the work of the Supreme Court of Canada in company law. A primary reason for this is non-legal: a national commercial life of depth really only dates from the end of the Second World War, a period of little more than thirty years. As a result, the court has not been faced with a large number of company cases. And even in the recent past it has not been faced with many for two vital reasons. One is the rule in *Foss* v. *Harbottle*[1] which has all but blocked shareholder entry to the court room. The other is the enormous financial risk that a shareholder runs in commencing suit because of the Anglo-Canadian rule that the losing party must pay the other side's costs, including the costs of counsel, as well as his own.[2] Within the past few years, however, the climate for corporate litigation has changed dramatically. New corporations Acts federally[3] and in Ontario[4] and British Columbia[5] have reformed the rule in *Foss*

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[1] (1843), 2 Hare 461, 67 E.R. 189. See, generally, Beck. An Analysis of *Foss* v. *Harbottle*, in Ziegel, ed., Studies in Canadian Company Law, Vol. 1 (1967), p. 545; Wedderburn, Shareholders Rights and the Rule in *Foss* v. *Harbottle*, [1957] Camb. L.J. 194, [1958] Camb. L.J. 93.

[2] It is not often appreciated that the American rule is to the opposite effect. That is each party to the litigation, regardless of the outcome, bears his own counsel costs and the successful party recovers only a minor portion of his other costs. While it is true that the contingent fee has played the greatest role in spurring shareholder litigation in the United States, it is also true that the different rule as to costs would by itself make litigation a more rational and reasonable prospect.

[3] Canada Business Corporations Act, S.C., 1974-75, c. 33, ss 231-233.

[4] The Business Corporations Act, R.S.O., 1970, c. 53, s. 99.

[5] Companies Act, S.B.C., 1973, c. 18, s. 222.

v. *Harbottle* and provided relatively easy access to the court room. And with a single stroke, the English Court of Appeal in *Moir* v. *Wallersteiner (No. 2)*[6] has knocked down the costs barrier by ruling that a shareholder who acts reasonably in commencing a derivative action is entitled to be compensated for his costs by the true party in interest—the company, whatever the result of the action.

Thus it is appropriate that as the Supreme Court enters its second century it does so having recently, in *Canadian Aero Services Limited* v. *O'Malley*,[7] given a judgment that in the sweep of its language and in its fluid approach to the regulation of corporate fiduciaries, provides an essential lead for the entire Canadian judiciary as the gates of shareholder litigation begin slowly to open. The only other noteworthy company law decision was rendered by the court in 1887 in *North-West Transportation Co.* v. *Beatty*,[8] a decision that was soon forgotten when it was overruled by the Privy Council[9] and a contrary and vitally important principle established. But the reach of the language of *Canaero* may well call for a reconsideration of *Beatty* and the Supreme Court may yet have cause to re-establish the principle it first laid down in 1887. Further, the judgment in *Canaero* calls into question the decision of the Privy Council in *Burland* v. *Earle*,[10] breaks the boundaries of fiduciary duty out of the rigid lines that had been drawn from the judgment of the House of Lords in *Regal (Hastings)* v. *Gulliver*,[11] casts a shadow over the Supreme Court's decision in *Peso Silver Mines* v. *Cropper*,[12] raises doubts

[6] [1975] 2 W.L.R. 389, [1975] 1 All E.R. 849 (C.A.). There seems little doubt that the Canadian courts will follow the lead of the Court of Appeal in this case. The result is so sensible and functionally sound that it would be almost perverse not to. Moreover, the difficult procedural questions that are left to be worked out by the judgment in *Wallersteiner (No. 2)* have already been solved federally and in Ontario and British Columbia where, in each case, it is necessary to get the leave of a judge of the trial division to commence the derivative action. The judge must be satisfied that the shareholder is acting in good faith and that it is in the best interests of the company that the action be brought before leave may be granted. Thus the granting of leave satisfies the criteria laid down by the Court of Appeal in *Wallersteiner No. 2* and, absent some overriding consideration that arises during the trial, the trial judge should order that the plaintiff-shareholder be fully compensated whatever the outcome.

[7] (1973), 40 D.L.R. (3d) 371, rev'ing (1972), 32 D.L.R. (3d) 632 (Ont. C.A.), hereafter referred to as *Canaero*.

[8] (1887), 12 S.C.R. 598

[9] (1887), 12 App. Cas. 589 (P.C.).

[10] [1902] A.C. 83 (P.C.), rev'ing (1900), 27, O.A.R. 540 (Ont. C.A.).

[11] [1942] 1 All E.R. 378 (H.L.).

[12] (1966), 58 D.L.R. (2d) 1 (S.C.C.).

about the accepted dicta of the House of Lords in *Bell* v. *Lever Bros.*[13] that a director is free to compete with his company and puts into a hazardous position any person who acts as a director of interlocking firms.

Considering all that has been claimed for it, the facts and actual decision in *Canaero* are unexceptional. The plaintiff company was engaged in the business of topographical mapping and geophysical exploration. M was a director, president and chief executive officer of the company. Z was a director and executive vice-president and an acknowledged leader in the field of topographical mapping. The company first became interested in the possibility of an extensive aerial mapping project in Guyana in 1961 as a result of work done in nearby Surinam where conditions were similar. Both M and Z spent time in Guyana in 1961 and 1962 preparing preliminary projects and consulting with government officials. In 1962 and again in 1964 they did magnetometer and electromagnetic work in that country on a project which Canadian Aero Services undertook for the United Nations.

Work on the mapping proposal ceased because of political conditions in Guyana in 1962 but resumed again in 1965 when it appeared that the project might be funded under Canada's external aid programme. As a result, Z returned to Guyana and in July, 1965 submitted a proposal to that government for topographical mapping of the country—a proposal that it used in seeking Canadian government financing. Z recommended to his company that it purchase a new aerial measuring device to use on the project and it did so at a cost of $75,000.00. By early July, 1966 governmental negotiations concluded with the Canadian government agreeing to finance the project and to select the contractor with the concurrence of Guyana. M and Z were in contact with officials of both governments during this time and on July 15th, M wrote to the company's agent in Guyana saying that he felt "the job was a certainty"[14] for Canadian Aero Services.

On August 6th, M and Z incorporated T. Ltd. and shortly thereafter resigned their positions with Canadian Aero Services. On August 22nd, M informed the Canadian External Aid office of the formation of T. Ltd. and on August 23rd, five companies, including Canadian Aero Services and T. Ltd. were invited to bid on the Guyana project. T. Ltd. was named the contractor and entered into an agreement to carry out the programme for $2,300,000.00. Canadian Aero Services brought suit against M

[13] [1932] A.C. 161.

[14] *Supra*, footnote 7, at p. 377.

and Z alleging that they had breached their fiduciary duty to it by depriving it of "the corporate opportunity which it had been developing".[15] The action failed at trial and in the Ontario Court of Appeal but succeeded before the Supreme Court.

The above facts clearly resemble those in *Cook* v. *Deeks*[16] and the only wonder is that both the trial court and the Ontario Court of Appeal could have reached the conclusion that there had been no breach of fiduciary duty. Laskin J. (as he then was), speaking for a unanimous[17] Supreme Court, had little difficulty in deciding that senior officers and employees[18] such as M and Z could not spend a number of years developing a business opportunity for their company and then, when it was about to be realized, leave their employment and seize the opportunity for themselves:[19]

> ...the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzyski is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), 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.

The fact that M and Z had resigned their positions with the

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[15] *Ibid.*, at p. 373. T. Ltd. was also joined in the action as was one Wells, an Ottawa solicitor who joined in the incorporation of T. Ltd. and was a shareholder.

[16] [1916] 1 A.C. 554 (P.C.).

[17] Coram: Martland, Judson, Ritchie, Spence and Laskin JJ.

[18] The Ontario Court of Appeal were concerned that neither M nor Z had been properly appointed as directors. They concluded that as president and executive vice-president respectively they were merely employees. As such they owed no fiduciary duty to their company but were only held to the employee standard of not revealing trade secrets. This is clearly wrong, as Laskin J. pointed out. M and Z were the senior management officers of the company and acted as such (whether properly appointed or not). As senior management they were subject to the same fiduciary duties as directors. On this point, Laskin J. quoted from Gower, Modern Company Law (3rd ed., 1969), p. 518: "...these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity." Moreover, both the Ontario Business Corporations Act, *supra*, footnote 4, in s. 144 and the Canada Business Corporations Act, *supra*, footnote 3, in s. 117 now hold directors and officers to the same fiduciary standard.

[19] *Supra*, footnote 7 at p. 382.

company did not, in the circumstances, relieve them of their fiduciary obligations:[20]

> ... he is also precluded from so acting [taking for himself or diverting to an associate a maturing business opportunity] even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

There has been scant judicial discussion in the Commonwealth cases of the doctrine of corporate opportunity. And indeed there was little need for an elaboration of the parameters of the doctrine in *Canaero* as the facts fit comfortably into the line of cases dealing with directors who take for themselves opportunities that first came to them while acting, and because they were so acting, as directors. However, the view of the law taken by the trial judge and affirmed by the Court of Appeal compelled the Supreme Court to reconsider and reformulate the requirements for liability set out in the cornerstone case of *Regal (Hastings) Ltd.* v. *Gulliver*.[21] It is this reformulation, which moves the *Regal*

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[20] *Ibid.* On this point the decision is similar to that given by Roskill J. in *Industrial Development Consultants Ltd.* v. *Cooley*, [1972] 2 All E.R. 162, [1972] 1 W.L.R. 443. The opportunity which the defendant appropriated came to his knowledge when he was a director of the plaintiff company and his subsequent resignation did not terminate his fiduciary duty. The decision in *Cooley* is also a full answer to the rather strange idea advanced by the Ontario Court of Appeal in *Canaero* that M and Z were able to take up the opportunity in question not because of any information that came to them while working for Canadian Aero Services, but because of "their own personal education, skill and knowledge". Surely this is to say no more than that they would have not been engaged in the topographical mapping business but for their skill and knowledge whether employed by someone else or self-employed. It has no bearing on the question of whether they breached their fiduciary duty by taking up an opportunity which, in the utilization of their personal skills, they first worked on and developed while in the employ of Canadian Aero Services. So it was in *Cooley* where the defendant managing director occupied that position because of his architectural and engineering skills and was approached while still acting in that capacity to use those skills for another in competition with his own company. For a discussion of *Cooley* see Prentice, (1972), 50 Can. Bar Rev. 623. It may be that the Ontario Court of Appeal was simply making the point that if M and Z were considered to be employees rather than officers or directors they were only subject to the disability of not using trade secrets after they had left their employment. As a matter of law, that is correct but it is an antiseptic view of the facts in *Canaero*. See the discussion in footnote 18.

[21] *Supra*, footnote 11. The principles of *Regal* were first adopted by the Supreme Court in *Zwicker* v. *Stanbury*, [1952] 3 D.L.R. 273.

doctrine out of narrow and rigid lines and substitutes a flexible and more spacious standard, that gives the judgment in *Canaero* its great importance. In his judgment at trial, Grant J. stressed the requirement of *Regal* that the benefit or advantage must be obtained "by reason and in course of their office of directors".[22] As M and Z did not use any confidential information in gaining the Guyana contract and as they had resigned and had not therefore obtained it "in the course of their duties [as senior officers or directors]"[23] they were under no liability to account. Laskin J. held this last point to be "too narrowly conceived",[24] and said that it was:[25]

> . . . a mistake, . . ., to seek to encase the principle stated and applied in *Peso*, by adoption from *Regal (Hastings) Ltd.* v. *Gulliver*, in the straight jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices.

The importance of this holding cannot be over-emphasized for in the two previous cases in which the Supreme Court adopted the *Regal* principle, *Peso Silver Mines Ltd.* v. *Cropper*[26] and *Zwicker* v. *Stanbury*,[27] Lord Russell's test of "by reason and in course of their office of directors"[28] had been particularly relied upon by the court. Indeed, it was the rigid application of this test that allowed the directors in *Peso* to escape liability.[29] But more than freeing the criterion of liability from the constraints of "benefits acquired in the course and execution of their office", Laskin J's. judgment, by refusing to limit liability to information acquired while acting as a director, has left room for the development of a realistic doctrine of corporate opportunity.

In a previous article[30] the question was posed whether if the facts of *Regal* were that one of the directors happened to hear of an available theatre and personally took a lease of it when he knew his company was looking for another location,

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[22] *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, footnote 11, at p. 386, per Lord Russell of Killowen.

[23] (1970), 61 Can. Pat. Rep. 1, at p. 39.

[24] *Supra*, footnote 7, at p. 387.

[25] *Ibid.*, at p. 390.

[26] *Supra*, footnote 12.

[27] *Supra*, footnote 21.

[28] *Supra*, footnote 22.

[29] For a criticism of the various applications of this test in *Peso* see Beck, The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered (1971), 49 Can. Bar Rev. 80, at pp. 105-114. The directors in *Zwicker* were clearly acting as directors in taking the opportunity for themselves and there was no difficulty in applying the *Regal* test.

[30] *Ibid.*, at p. 107.

should he not be held to be a constructive trustee of the lease? The answer given, on the state of the Anglo-Canadian law at that time, was that he probably would not be but it was suggested "that he should be liable even if the knowledge of the availability of the theatre did not come to him in his capacity as director . . . [H]e is a fiduciary and if the circumstances are such that the interests of his principal call for protection, he should be required to look first to those interests rather than to his own".[31] This is the position that the growth of the corporate opportunity doctrine has led to in the United States and as Laskin J.'s judgment presages a similar development in Canada, it is proposed to look briefly at the American experience.[32]

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[31] *Ibid.*

[32] For a discussion of the American case see Note, Corporate Opportunity (1960-61), 74 Harv. L. Rev. 765. It has been suggested that the decision in *Industrial Development Ltd.* v. *Cooley*, *supra*, footnote 20, now allows the English law on corporate opportunity to be formulated in a manner similar to the American doctrine, see Prentice, *op. cit.*, footnote 20, at pp. 628-630. As welcome as Roskill J.'s judgment is in that case, the facts and the decision do not fully support the broad proposition. When the defendant was approached by the Eastern Gas Board he was the managing director of the plaintiff company. The work the Eastern Gas Board wished the defendant to leave his employment to undertake was work the plaintiff had previously, although unsuccessfully, been interested in securing. Even accepting that it might be said that the defendant was approached in his private capacity, he still, at that time, was the managing director of a company that had been interested in that particular contract and however slim the plaintiff's chances were of securing it, it was the defendant's duty, once he learned the project was again active, to use his best efforts to secure it for the plaintiff rather than to use his best efforts to secure it for himself while still employed as managing director. It may be that the representative of the Eastern Gas Board first, from his point of view, approached the defendant in his private capacity in the sense that he did not at the time of the initial contact know that the defendant was employed by the plaintiff, nor that the plaintiff has been interested in the particular project. But, as Roskill J. rightly pointed out, as long as the defendant occupied his position with the plaintiff he "had one capacity and one capacity only . . . managing director of the plaintiffs" and information which came to him in that capacity "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 . . ." (at p. 173, All E.R.). This, indeed, has overtones of the American corporate opportunity doctrine and has the great merit of recognizing, as do the American cases and as does Laskin J.'s judgment in *Canaero*, that information that directors and officers receive does not come marked for them in different capacities. The corporate opportunity doctrine requires that information that fairly ought to be given to the company must be so given before a fiduciary may personally exploit it, regardless of how, when, where or why the fiduciary first acquired it.

A series of cases in the Delaware courts illustrate the expansion of the corporate opportunity doctrine. The leading early case is *Guth* v. *Loft*[33] in which an "interest" or "expectancy" test was formulated. The rule was said to be that if an opportunity comes to a director in his individual capacity and is one,[34]

> ... which by its nature falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest, the officer is prohibited from permitting his self-interest to be brought into conflict with the corporation's interest and may not take the opportunity for himself.

In *Johnston* v. *Greene*,[35] the Delaware Supreme Court reaffirmed the principle of *Guth* v. *Loft* but made it clear that "for the corporation to have an actual or expectant interest there must be some tie between that property and the nature of the corporate business".[36] By 1966, the same court reaffirmed the basic rule but said that the fundamental question to be determined in all such cases is:[37]

> ... whether or not the director has appropriated something for himself that, in all fairness, should belong to his corporation. The determination of this question is always one of fact to be determined from the objective facts and surrounding circumstances.

Thus the "interest" or "expectancy" test was said to have been replaced by a broader "fairness" test. It will be appreciated how far this is from a limiting test of "in the course and execution of their office". One further American case well illustrates the reach of a court's equitable jurisdiction in applying a standard of fairness.

In *Rosenblum* v. *Judson Engineering Corporation*[38] the defendants were directors and officers of a company that manufactured tools for automobile wheel alignment. One of the defendants personally acquired a licence to manufacture a new wheel balancing machine and a partnership was formed to which the licence was transferred. It was accepted that the opportunity did not come to the defendant directors in their capacity as directors of the plaintiff, that the plaintiff had no present interest or expectancy in the new business, that the new business was not essential to its present needs and was not directly competitive with it. Yet, applying the corporate opportunity doctrine, the

[33] (1939), 5 A. 2d 503 (S. C. Del.).
[34] *Ibid.*, at p. 511.
[35] (1956), 21 A. 2d 919 (S. C. Del.).
[36] *Ibid.*, at p. 924.
[37] *The Equity Corporation* v. *Milton* (1966), 221 A. 2d 494 (S. C. Del.).
[38] (1954), 109 A. 2d 558 (S.C.N.H.).

court imposed a constructive trust on the partnership. In so doing, the court rejected the present interest or expectancy test as being "too lax a conception of the requirements of fiduciary loyalty".[39] It also noted that bad faith, in the sense of using corporate funds or resources, or confidential information, or information gained while acting as directors or officers was not essential to the establishment of liability:[40]

> The fact that a business opportunity is itself of such a nature that under the particular circumstances of the case it should fairly belong to the corporation is sufficient to establish a duty ... to acquire it for the corporation.

The immateriality in *Rosenblum* of there not being bad faith in the sense of not using confidential information is extremely important. The idea that the information that a director makes use of must be confidential to the company for liability to attach is one that has bedevilled the Anglo-Canadian cases.[41] It is not the least of the merits of Laskin J's. judgment in *Canaero* that it also clears up this point. In *Canaero*, the trial judge concluded that M and Z had not used confidential information acquired while they had been employed by Canadian Aero Services to gain the Guyana contract and whether considered to be directors or employees they would only be liable after they had resigned, given the trial judge's strict application of the test in *Regal*, if they had used such information. As to this Laskin J. said:[42]

> The view taken by the trial judge, and affirmed by the Court of Appeal, tended to obscure the difference between the survival of fiduciary duty after resignation and the right to use non-confidential information acquired in the course of employment and as a result of experience. I do not see that ... the question of the confidentiality of the information acquired by M and Z in the course of their work for *Canaero* ... is relevant to the enforcement against them of a fiduciary duty. The fact that breach of confidence ... may itself afford a ground of relief does not make [it] a necessary ingredient of a successful claim for breach of fiduciary duty.

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[39] *Ibid.*, at p. 563.

[40] *Ibid.* The same broader approach was approved by the Supreme Court of Massachusetts in *Durfee* v. *Durfee & Canning, Inc.* (1948), 80 N.E. 2d 552. The court approved the statement in Ballentine on Corporations (1946), p. 204, that "... the true basis of the doctrine should not be found in any expectancy or property interest concept, but in the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection. This calls for the application of ethical standards of what is fair and equitable to particular sets of facts". See also *Production Mach. Co.* v. *Howe* (1951), 99 N.E. 2d 32 (S. C. Mass.) in which this standard was applied.

[41] For a criticism of this notion see Beck, *op. cit.*, footnote 29, at pp. 109-112.

[42] *Supra*, footnote 7, at p. 388.

The corporate opportunity doctrine, which asks the broader equitable question of whether, on a consideration of all the facts, the interests of the corporation justly call for protection, sweeps aside the legal question of whether there is a property right in information. It was this latter question that concerned all of the judges in *Phipps* v. *Boardman*.[43] At the trial, Wilberforce J. referred to what the trustees learned as "essentially the property of the trust".[44] In the Court of Appeal, Lord Denning, M.R., spoke of the "*information or knowledge* which [the agent] has been employed . . . to collect or discover, *or which he has otherwise acquired*, for the use of his principal" as being "the property of his principal . . .".[45] In the House of Lords, Viscount Dilhorne,[46] Lord Hodson[47] and Lord Guest[48] agreed that knowledge acquired while acting for the principal could be regarded as the principal's property. In his dissent, a dissent which found favour with the Ontario Court of Appeal in *Canaero*, Lord Upjohn remarked that "in general, information is not property at all",[49] but agreed that if the information acquired were confidential or was acquired "in a fiduciary capacity" and was "capable of being used . . . *to injure* the trust"[50] an action would lie. An almost identical position was taken by Cartwright J., speaking for a unanimous Supreme Court, one year prior to *Phipps* v. *Boardman*, in *Peso*:[51]

> There is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any information by reason of his office.

It is suggested that all of the above formulations reduce to asking whether the fiduciary has put himself in a position where his duty and his interest conflict, subject to the limiting qualification that he must have been acting in his official capacity when the information came his way.[52] One rationale put forward

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[43] [1967] 2 A.C. 46.

[44] [1964] 2 All E.R. 187, at p. 204.

[45] [1965] Ch. 992, at pp. 1018-1019 (emphasis added by Lord Denning).

[46] *Supra*, footnote 43, at pp. 89-90.

[47] *Ibid.*, at p. 107.

[48] *Ibid.*, at p. 115.

[49] *Ibid.*, at p. 127.

[50] *Ibid.*, at pp. 128-129 (emphasis added by Lord Upjohn).

[51] *Supra*, footnote 12, at p. 10.

[52] This leaves aside, for the moment, Lord Upjohn's requirement that the information must have been capable of injuring the principal. This

for the "information is property" point is that for a shareholders' derivative action to proceed there must be an allegation of fraud, that is an appropriation of corporate property. This requirement would be satisfied if the information were confidential or could otherwise be said to belong to the corporation. But, as Laskin J.'s judgment makes clear, an action will lie whenever there has been a taking of property, including an opportunity, that in equity belongs to the corporation. It is the opportunity seized that is the property, in its widest sense, not the information used, whether confidential or not. The notion of a taking of corporate property was only, in effect, a procedural device to let a minority shareholder through the barrier of *Foss* v. *Harbottle* and into the court room. With the reform of *Foss* v. *Harbottle*,[53] it would be preferable if notions of corporate property were dropped altogether. The crux of the matter is the proper scope of fiduciary obligation and it is on that which the courts should concentrate.[54] Which is not to say that confidential information may not be considered to be corporate property for wrongful use of which, as an insider trading, an action will lie to recover the profit gained.[55]

In sum, what the argument over property finally reduces to, as do most arguments about property, is whether there are legitimate interests that call for the protection of the law. The problem with respect to the corporate opportunity doctrine is to define the limits of the corporation's interest in such a way that directors and officers are given viable guidelines for their conduct. But clear definition is simply not possible, or desirable, when one is dealing with the interaction of human conduct and an infinite variety of commercial situations. And this is the conclusion that Laskin J. came to when, after noting that what

view is clearly not in accord with the law, whatever its merits, and will be discussed *infra*. See, *e.g.*, *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, footnote 11. The decision in *Phipps* itself is, of course authority against this proposition, as is *Industrial Development Consultants* v. *Cooley*, *supra*, footnote 20, at pp. 175-176 (All E.R.). "It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director". *Furs Ltd.* v. *Tomkies* (1936), 54 C.L.R. 583, per Rich, Dixon and Ewatt, JJ., at p. 592.

[53] *Supra*, footnotes 3, 4 and 5.

[54] The judgment of Gibbs J., in the Australian High Court in *Consul Development Pty. Ltd.* v. *DPC Estates Pty. Ltd.* (1975), 5 A.L.R. 231, at pp. 248-252 takes this broader approach. For a critical essay on the development of fiduciary obligation by the courts see Weinrib, The Fiduciary Obligation (1975), 25 U. of T. L. J. 1.

[55] *Diamond* v. *Oreamuno* (1969), 248 N.E. 2d 910 (N.Y.C.A.). See also Gower, *op. cit.*, footnote 18, p. 547.

emerges from the American cases is "an imprecise ethical standard"[56] he warned that in holding that "there was a breach of duty by M and Z that survived their resignations, I am not to be taken as laying down any rule of liability to be read as if it were a statute".[57] Rather "in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it".[58]

The most that Laskin J. felt he could sensibly provide as guidelines for the lower courts once the boundaries "applied in *Peso*, by adoption from *Regal (Hastings) Ltd.* v. *Gulliver*"[59] had been loosed, was to generalize about the factors to be considered:[60]

> The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its 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....

It may be objected that these criteria are too generalized and that an "inprecise ethical standard" is too vague a guide to conduct and therefore unfair. Are not corporate executives and their advisors entitled to demand from the law some reasonably certain rules of permissible conduct? The merit of the *Regal* test was that it provided just such a relatively certain standard. This argument is only superficially attractive for the corporate opportunity doctrine is really no more vague or difficult to apply than the *Regal* test while at the same time recognizing the functional reality of commercial life. Information that directors and officers receive does not come marked for them in their different capacities. They are men who are engaged in a particular business and they receive information relevant to that business because of that fact, whether the information is received in their offices, in the boardroom or on the golf course. A corporation is not a receptacle of information apart from its senior management; directors and officers are almost invariably the pipeline through which information is filtered to directorial management as a whole. The corporate opportunity doctrine requires that if the corporation has a present interest in the opportunity, or an

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[56] *Supra*, footnote 7, at p. 385.
[57] *Ibid.*, at p. 391.
[58] *Ibid.*, at p. 390.
[59] *Ibid.*
[60] *Ibid.*, at p. 391.

expectancy in the sense that it is an opportunity that it has begun to look for, or is an opportunity in which it has no present interest or expectancy but is one in which it might reasonably be expected to be interested given its present line of business, then the fiduciary must present it to the corporation for its consideration prior to exploiting it himself. Uncertainty is simply and quickly resolved by fully informing the corporation and abiding by its independent decision. If it be objected that this may make the directors and officers[61] the only persons who may not exploit the opportunity the answer, once again, is that the opportunity would, in most instances, never have come their way but for the positions they occupy, whether it came to them while acting in that position or not, and their first duty is to look to the interests of their company.[62]

The broad principles enunciated in *Canaero*, and it is clear from the judgment that a unanimous Supreme Court was intentionally articulating general principles, clearly have implications beyond the immediate decision. The court's own decision in *Peso*[63] notwithstanding Laskin J.'s careful distinguishing of it, particularly must be reconsidered. *Peso* was distinguished[64] on the grounds that the company was continuously being offered mining properties, the claims in question were not essential to the success of the company and, most importantly, because of a finding of good faith rejection of the claims by the company. This decision has been criticized in a previous article[65] and it is sufficient to highlight the essential facts that call for its reinterpretation in light of *Canaero* and its abandonment of the *Regal* test.

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[61] In the United States the fiduciary duties owed by directors and officers has been extended to controlling shareholders; see *Pepper* v. *Litton* (1939), 308 U.S. 295; *Pearlman* v. *Feldmann* (1955), 219 F. 2d 173 (2nd Cir.); *Jones* v. *Ahmanson* (1969), 460 P. 2d 464 (Cal. S. C.). This makes eminent good sense and recognizes the reality of corporate control. Those who are in a position to control and run a corporation's affairs should be held to be in a fiduciary relationship regardless of whether they have been elected to an office or prefer to have their nominees so elected.

[62] It must be emphasized that the corporate opportunity doctrine does not impose an affirmative obligation on directors in the sense that they would be in breach of duty for not passing information on to the corporation as opposed to actually exploiting it. For a discussion of this point see Prentice, *op. cit.*, footnote 20, at pp. 626-627.

[63] *Supra*, footnote 12.

[64] *Supra*, footnote 7, at p. 390. The main use of the *Peso* decision by counsel for the defendants was to show a recent reaffirmation of the test in *Regal* by the Supreme Court. The abandonment of this test by the court has been dealt with in the text above and on this point at least, *Peso* must be considered to be overruled.

[65] Beck, *op. cit.*, footnote 29.

The controlling shareholders, directors and officers, in concert with the company's geologist, formed a group to purchase the claims in question six weeks after their rejection by the company. The principal reason given for rejection was insufficient capital. The person in charge of finances was the controlling director. Among the reasons given for the purchase were that "we [Peso Silver Mines] were achieving good results" and "we wanted to protect the interests of the company [Peso]".[66]

These facts raise the corporate opportunity doctrine in its most difficult context—the taking up of the opportunity by the controlling directors after rejection, albeit in good faith, by the company. Is it ever possible for a court to determine good faith on such facts? When financial inability is the reason for rejection and the board, or some part of it, is responsible for financial policy, is not the task almost impossible?[67] A court cannot do more than guess in judging individual motivations and actions in such a complex corporate situation and it should not set itself the

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[66] *Ibid.*, at p. 99.

[67] The soundest approach to financial inability is that taken by the U.S. Court of Appeals for the Second Circuit in *Irving Trust* v. *Deutsch* (1934), 73 F. 2d 121, at p. 124: "The defendant's argument that the fiduciary principle can have no application where the corporation is unable to undertake the venture is not convincing. 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."

Moreover, the opportunity itself might be sufficient to generate a new supply of funds. The best approach for the courts to take might be to require the board to take every reasonable step to enable the company to take advantage of the opportunity including a showing of reasonable and diligent efforts to raise the necessary funds. See, generally, Note, Financial Inability as a Defence under the Corporate Opportunity Doctrine (1951), 29 Kentucky L.J. 229.

Financial inability is a species of the impossibility defence—a defence that was rejected, in the particular circumstances, in both *Canaero* and *Industrial Development Consultants Ltd.* v. *Cooley, supra,* footnote 20. In *Canaero* the defence was that as Canadian Aero Services was a wholly-owned subsidiary of an American company it was extremely unlikely that the Canadian External Aid office would award the contract to it in line with its known policy. In *Cooley* the defence was that the Eastern Gas Board had previously refused to grant the contract to the plaintiff company and its chances of subsequently so doing were accepted as being less than ten per cent. In both cases the court said, in effect, that it did not lie in the mouth of the fiduciary to say that it was unlikely or impossible for the company to exploit the opportunity when it was his first duty to bend his every effort to make its exploitation possible rather than take it up himself. The decision in *Phipps* v. *Boardman, supra,* footnote 43, is to the same effect.

task. If directors or senior officers wish to take up the opportunity then the requirement stipulated by Laskin J. in *Canaero*, "... approval of the company ... properly manifested upon full disclosure of the facts ..."[68] should be fulfilled. In the case of controlling directors, "approval of the company" must be interpreted to mean approval by the shareholders if it is to have real meaning. The rejection of an opportunity by a company is one thing; the subsequent acquisition of that opportunity by directors or senior officers is quite another and must be dealt with on its own terms. The same requirement of full disclosure and independent approval would also apply to *Canaero's* expanded concept of corporate opportunity. That is, a fiduciary should be required to present the opportunity to the corporation prior to exploiting it himself if it is one "which in fairness should belong to the corporation",[69] whether the corporation was then aware of it or not.[70]

Full disclosure to the company and independent approval by it raises the question of the principle in *North-West Transportation* v. *Beatty*.[71] It was the decision of the Privy Council that a director was entitled to use his votes *qua* shareholder, in this case controlling shareholder, to approve his own contract with the company. Moreover, the holding of *Pender* v. *Lushington*[72] that a shareholder is entitled to exercise his vote "from motives or promptings of what he considers his own individual interest" was reaffirmed. But as Laskin J. noted in *Canaero* in commenting on fiduciary obligation in the context of the modern corporation "... new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting".[73] And *Canaero* may well require the Supreme Court to reformulate the principle of *North-West Transportation* by reverting to its original holding of 1887 that:[74]

> ... fair play and common sense alike dictate that if the transaction and act of the directors are to be confirmed it should be by the

[68] *Supra*, footnote 7, at p. 382.

[69] *Ibid.*, at p. 385, quoting from Slaughter, The Corporate Opportunity Doctrine (1964), 18 Southwestern L.J. 96 .

[70] Even after full disclosure to and rejection by the corporation, the fiduciary may still be banned from taking up the opportunity if there has been a significant change in circumstances prior to the time of the fiduciary's action which might affect the corporation's decision. This might well have been the case in *Peso* where because the company "was achieving good results" its controlling directors wished to protect adjacent claims.

[71] *Supra*, footnote 8.

[72] (1877), 6 Ch. D. 70, at p. 76 (C.A.).

[73] *Supra*, footnote 7, at p. 383.

[74] *Supra*, footnote 8, per Ritchie C.J., at p. 604.

> impartial, independent, and intelligent judgment of the disinterested shareholders, and not by the interested director himself who should never have departed from his duty.

It is difficult to appreciate the case against this holding notwithstanding that the Privy Council decision that overruled it has stood for almost one hundred years.[75] Certainly a director *qua* shareholder is entitled to the same rights as his fellow shareholders, including the right to the unfettered exercise of his vote. But when the company, through its shareholders, is being asked to pass on the conduct of one of its fiduciaries, the answer surely must be uninfluenced by the power of the fiduciary himself. In what other fiduciary situation, whether it be trustee—cestui que trust, principal-agent or solicitor-client, would the law allow the fiduciary to be seen to influence and even control the decision of the principal? The fact that the director is also a shareholder should not blind the court to the fact that in the particular context he is a fiduciary who is asking permission or absolution. As such he ought not to be allowed to use his votes to influence or control the decision. If the director involved is not part of the control group, whether of directors and senior officers or shareholders, then disclosure to and unanimous approval by his fellow directors seems an adequate precaution. There is no need for independent shareholder approval. Where the director is part of the control group, or if he is not but there is dissenting opinion among his fellow directors, then the requirement should be that the matter must be placed before the general meeting.[76] If it is objected

[75] The case for the Privy Council decision is that where the majority are disenfranchised the minority will be allowed to rule. In the modern context this does not take account of the reality of management control of the proxy machinery in the public company. And why should the minority decide other than what is in the best commercial interests of the company as a whole? In the private company there is a good deal to be said for minority rule where the matter is one concerning the fiduciary obligations of the majority. Most importantly, the decision of the Privy Council was premised on the defendant's good faith and the commercial soundness of the transaction. The majority will not be allowed to use its votes where to do so would be fraudulent or oppressive and this is said to be a sufficient check on the majority. It may be asked why shareholders should be forced to the uncertainties and expense of derivative actions to be protected from an overreaching majority?

[76] It might be objected that such a requirement is impractical in the sense that the opportunity will no longer be available by the time a shareholders' meeting is held. This might well be the case but again the answer is that such a procedure will act as a useful check on fiduciaries being tempted to take up such opportunities. If, once again, this puts them in the position of being the only persons not able to take up the opportunity the answer is that their position is one that entails

that this is a naive requirement in the sense that in the public company the directors will control the shareholder vote in any event through control of the proxy machinery, the answer is that the requirement of full, public disclosure is the essential check, not the fact of the vote itself. Here the aphorism that "sunlight is the best disinfectant" rings true.

The decision of the Privy Council in *Burland* v. *Earle*[77] also requires reconsideration in light of *Canaero*. Indeed, it could well be argued that *Burland* failed to survive the House of Lord's decision in *Regal*. In *Burland*, the president and general manager of the company purchased a plant in a related business "with the idea of immediately selling it to [his] company".[78] The plant was purchased for $21,000.00 and resold to the company for $60,000.00. In holding the president liable to account, the Ontario Court of Appeal ruled that:[79]

> The desirability of the company acquiring the property being apparent, what was the duty of the president and general manager? Surely to endeavour to acquire it for the company and not to purchase it for himself.

The Privy Council disagreed and held that because there was "no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company"[80] no liability to account attached. The corporate opportunity doctrine is not circumscribed by any notion of "commission or mandate to purchase" and it is clear that whether one applies a present-interest or expectancy test, or a more general test of fairness, that the holding in *Canaero* would now require a different and more equitable result on facts similar to those in *Burland*.

The broadening of the standard of fiduciary obligation in *Canaero* raises particular problems for interlocking and competing

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obligations that must be discharged and like other fiduciaries, such as trustees, certain commercial activities may be foreclosed to them as a result. The other side of this coin is that directors and senior officers occupy positions of power and prestige in society which carry privileges and monetary and psychic rewards that well compensate for such minor disabilities that they may be under as fiduciaries.

[77] *Supra*, footnote 10. In fact, *Burland* is most often cited for its discussion of *Foss* v. *Harbottle*, *supra*, footnote 1, rather than for the actual decision.

[78] *Ibid*., at p. 560 (O.A.R.).

[79] *Ibid*., at p. 540, per Moss J.A., at p. 561.

[80] *Supra*, footnote 10, per Lord Davey, at pp. 98-99. Lord Davey also remarked that "a person with a more generous regard for the company of which he was president would have been disposed to give the company the benefit of his purchase". A "more generous regard for the company" may now be said to be the touchstone of the corporate opportunity doctrine.

directors. The vertical interlocking problem is primarily taken care of by statutory provisions that require a director to declare his interest and refrain from voting in any transaction in which he is interested. The new Canada and Ontario Business Corporation Acts have improved these provisions by requiring that the director be acting honestly and in good faith *and* that the transaction be in the best interests of the corporation.[81] It is in the case of horizontal interlocking, either in a parent-subsidiary situation,[82] or through being a director of a competing company, or otherwise engaging in a competing business that the greatest difficulties are caused by an expansive doctrine of corporate opportunity.

The extraordinarily difficult situation which directors with conflicting obligations may find themselves in is illustrated by what actually occurred in *Peso Silver Mines*. Cropper, the controlling director, and his associates purchased the claims which were rejected by the Peso company. A new public company, Mayo Silver Mines, was financed to develop these claims. Cropper was then in the position of being a director and officer, and in this case the dominant figure and person in charge of finances, of two public companies with undeveloped silver properties in the same area in the Yukon. How was he to conduct himself if attractive claims were offered to him that were near the properties of both companies? Surely it can make no difference whether the offer came while he was in the office of one or the other companies or, indeed, came during the course of a social occasion. The old *Regal* test may be of some help if in fact one of the two companies was actually interested in or negotiating for the properties. That company should clearly have a prior claim on Cropper's loyalties with respect to that opportunity and it would be a breach of duty for him to place it in the other company. But if there was no prior interest the position is almost insoluble.

[81] Canada Business Corporations Act, *supra*, footnote 3, s. 115; Ontario Business Corporations Act, *supra*, footnote 4, s. 134. If the director declares the nature and extent of his interest and does not vote and the other criteria are met, the contract is not voidable by reason only of the director's interest therein. Neither statute requires an annual report to the shareholders of those transactions in which the directors have been interested in during the year. This information would be a useful addition to the information circular that must accompany the mandatory proxy solicitation and would have the merit of informing the company in general meeting of those occasions on which its fiduciaries have been excused from their duty by their fellow fiduciaries.

[82] *Levien* v. *Sinclair Oil Corp.* (1969), 261 A. 2d 911, is a good example of the legal difficulties posed for a parent company when it engages in the same business as a subsidiary which has minority shareholders.

Are there degrees of interest which would give one of the companies a prior claim; should the opportunity be offered to both companies so that they might compete for it?[83] And even apart from opportunities the position is difficult. How does Cropper act in an even-handed manner in raising money for the development of both companies when there will only be a limited amount of capital available for the development of properties in the same area? To ask these questions is to question the accepted position that directors are free to engage in a competing enterprise.

The first case which held that a director is free to act as a director or otherwise be concerned in a competing business was *London and Mashonaland Exploration Co.* v. *New Mashonaland Corporation Co.*[84] The case was one in which it was sought to restrain a dummy director who had never acted as a director or attended a board meeting of the plaintiff company from acting as a director of the rival defendant company. In dismissing the motion, Chitty J. said that there was nothing in the plaintiff's articles which prevented a director from acting as a director of another company nor was there any allegation that confidential information was about to be disclosed. Seen from the perspective of cases like *Canaero*, *Regal* and *Phipps* v. *Boardman*, this brief 1891 decision seems to be too narrowly conceived. The matter is not one of prohibition in the articles or the imminence of disclosure of confidential information but is one of the more pervasive equitable injunction that a fiduciary must not put himself in a position where his duty and his interest may conflict.[85]

A different result was reached in the little noted case of *Re Thomson.*[86] Clauson J. held that it was a breach of duty for

[83] Some of the possibilities are discussed in Note, Corporate Opportunity, *op. cit.*, footnote 32, at pp. 770-771.

[84] [1891] W.N. 165.

[85] The clearest example of an unthinking application of *London and Mashonaland Exploration* is the decision of the Manitoba King's Bench trial division in *Waite's Auto Transfer Ltd.* v. *Waite*, [1928] 3 W.W.R. 649. The defendant who was a director, president and manager of the plaintiff trucking company, left his employment with that company but did not resign as president or director. He set up a competing business and canvassed and secured some of his former customers. In refusing to issue a restraining injunction, Donavan J. relied on *London and Mashonaland Exploration* and further held that the defendant's knowledge of and business connections with former customers could not be considered "... to be property or money or material [of the plaintiff company]". It is not necessary to belabour the obvious inadequacies of Donavan J.'s decision and it is sufficient to suggest that it cannot possibly survive the judgment in *Canaero.*

[86] [1930] 1 Ch. 203.

a trustee to open a business competitive with that run by the trust and indicated that he would be prepared to issue an injunction.[87] In so holding, he relied on the leading company law case (as did Laskin J. in *Canaero*) of *Aberdeen Ry. Co.* v. *Blaikie*[88] and Lord Cranworth's classic formulation that "... no [fiduciary] ... shall be allowed to enter into engagements in which he has, *or can have*, a personal interest conflicting, *or which may possibly conflict*, with the interests of those whom he is bound to protect".[89]

Another judgment cited in support of the principle that a director may engage in competing activities is the dicta of Lord Blanesburgh L.C. in *Bell* v. *Lever Bros.*[90] The issue was not directly before the House of Lords and Lord Blanesburgh cited *London and Mashonaland Exploration*[91] to emphasize that not only could a director enter into a contract outside the scope of his employment in which his company was not interested (which he conceived to be the instant case) but that he could go further and even be a director of a rival concern:

> ... and what he could do for a rival company, he could ... do for himself.[92]

The facts which Lord Blanesburgh used to make his point were not even the facts of the case. The vital clause which included directors' acts in the corporate agreements was put aside for the purpose of his Lordship's discussion. It was only this clause that, in his view, rendered the defendants liable.[93] Lord

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[87] The wrongs complained of had been remedied after the writ was issued. For the purpose of costs, Clauson J. had only to determine whether the defendant was entitled to the right he claimed which was to open a competing business. *Re Thomson* was cited with approval by Gibbs J. in the Australian High Court in *Consul Development Pty. Ltd.* v. *DPC Estates Pty. Ltd.*, *supra*, footnote 54, in terms which make it clear that he would regard it as a breach of fiduciary duty for a director to join a competing firm.

[88] (1854), 1 Macf. 461, [1843-60] All E.R. Rep. 249 (H.L.).

[89] *Ibid.*, per Lord Cranworth L.C., at p. 252 (All E.R. Rep.). (Emphasis added.)

[90] *Supra*, footnote 13.

[91] *Supra*, footnote 84.

[92] *Supra*, footnote 13, at p. 195.

[93] Lord Blanesburgh clearly was of the opinion that the directors either had to cause injury to their company or make use of its property or confidential information before they could be held liable for breach of duty. See his discussion of this point at pp. 175 and 194, *ibid.* I have attempted to show in the text above that this is an erroneous view of the law and not in accord with the judgments in *Regal*, *Phipps*, *Canaero* or *Industrial Development Consultants Ltd.* v. *Cooley*. As to acting for a rival company, Lord Blanesburgh seemed to have forgotten that earlier in his judgment (at p. 172, *ibid.*) he characterized the defendants' position

Atkin, however, took a position that was more in accord with current understanding of fiduciary duties and considered that the directors had violated their trust apart from the particular clause.[94] And what the directors could not do for themselves, they certainly could not do for a rival concern. Neither Lord Atkin nor any of the other judges who heard the case considered the question of a director acting in a competitive capacity.

The thinly reasoned and brief judgment on a motion in *London and Mashonaland Exploration*, picked up in casual dicta by a single law lord in *Bell* v. *Lever Bros.*, seems an extremely slender foundation upon which to have built such a broad exception to the precepts of fiduciary obligation. Clauson J.'s position in *Re Thomson*, based as it was on the accepted principles of *Aberdeen Ry.* v. *Blaikie*, is surely the correct one, particularly in light of the more recent judgments of the House of Lords in *Regal* and *Phipps* v. *Boardman* and of the Supreme Court in *Canaero*. It may be that commercial usage makes it impractical to suddenly restrain the practice of vertical interlocks, particularly in the parent-subsidiary situation. But those who are party to such interlocks should be aware of their tenuous legal position and of the constant danger of being in breach of their duty to either, or both, of their masters.[95] At the least, a company's articles should allow such interlocks on the approval of the

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in working for both Levers and Niger as "... serving two masters ... a position as impossible today as it ever was".

[94] Lord Atkin did not mention the director's clause in the agreement but described their conduct, rightly it is suggested, in terms which imply liability apart from the clause and in terms which suggest what his answer would be to the question of a director acting for a rival company: "The appellants were acting in a business in which their employers were concerned; their interests and their employers' conflicted; ..." at p. 213, *ibid.*

[95] Some of the worst effects of *London and Mashonaland Corporation* have been lessened by s. 210 of the English Companies Act, 1948, c. 38. S. 210 is replicated and strengthened in s. 234 of the new Canada Business Corporations Act, *supra*, footnote 3. S. 210 is also copied in s. 221 of the British Columbia Companies Act, *supra*, footnote 4. The Ontario Business Corporations Act, 1970, does not contain any provision similar to s. 210. The legislative committee which prepared the report on which the new Ontario Act was based rejected s. 210 for the lame reason that it would result in the courts "getting into business". Now that such jurisdictions as England, Canada (federally), Australia, South Africa, India and Ireland have s. 210 provisions, it is to be hoped that Ontario will follow suit and amend its Act to include this important protection for shareholders.

In *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*, [1959] A.C. 324, Lord Denning was referred to Lord Blanesburgh's dicta in *Bell* v. *Lever Bros.* that a director could join the board of a rival company,

shareholders in each specific instance before a director is permitted to be interested in a competing enterprise.

Conclusion

The reach of Laskin J.'s judgment in *Canaero* is greater than an expansion of the corporate opportunity doctrine. For it is a judgment that, as befits the role of a country's Supreme Court, leaves ample room within broad guidelines for the lower courts to work out a jurisprudence of individual and corporate conduct commensurate with the needs and realities of a complex corporate economy. In one passage in particular, a passage which must be seen in the light of the court's controversial decision in *Peso*, Laskin J. lays the necessary foundation for jurisprudential development in this area.

In the judgment of the British Columbia Court of Appeal in *Peso*[96] Bull J.A. and Norris J.A., both attempted to formulate a general policy approach to corporate litigation. Bull J.A. was of the view that in a time when "substantially all business . . . [is] carried on through the corporate vehicle with the attendant complexities involved by interlocking, subsidiary and associated corporations . . ." that it would not be enlightened to extend equity's "salutary" rules. Moreover, care must be taken "to interpret them in the light of modern practice and way of life".[97] In his dissent, Norris J.A. considered that it was the very complexities of modern business that called for strict application and reinterpretation of the equitable rules:[98]

> With great 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 perpetuated. . . .

In giving the unanimous judgment of the Supreme Court in *Peso*, Cartwright J. did not refer to this policy split. In *Canaero*, Laskin J. deliberately picked up the theme and placed the court unequivocably on Norris J.A.'s side:[99]

> . . . what these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict

to which he replied: "That may have been so at that time. But it is at the risk now of an application under s. 210 if he subordinates the interest of the one company to those of the other".

[96] (1966), 56 D.L.R. (2d) 117 (B.C.C.A.).

[97] *Ibid.*, per Bull, J.A., at pp. 154-155.

[98] *Ibid.*, per Norris, J.A., at p. 139.

[99] *Supra*, footnote 7, at p. 384.

> of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

In this passage and in his warning that his judgment was not to be read as laying down rules to be applied as if it were a statute[100] but rather that the standards of fiduciary duty "must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively"[101] there are echos of Cardozo J.'s classic judgment almost half a century earlier in *Meinhard* v. *Salmon*.[102] In that case, Cardozo J. spoke of equity's "animating principle" that "refuses to confine within the bounds of classified transactions its precepts of a loyalty that is undivided and unselfish. The standard of loyalty . . . is without the fixed divisions of a graduated scale".[103] From that case the courts of the United States have gone on to create a jurisprudence of fiduciary obligation commensurate with the needs of an ever-expanding, ever-more complex corporate economy. As the Supreme Court of Canada enters its second century the spirit of its judgment in *Canaero* can play the same pivotal role in fostering such a development in Canada.

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[100] *Ibid.*, at p. 391.
[101] *Ibid.*
[102] (1928), 164 N.E. 545 (N.Y.C.A.).
[103] *Ibid.*, per Cardozo J., at pp. 547-548.