



LABOUR + EMPLOYMENT LUNCH N'LEARN: BUSINESS PROTECTION

Presented By:

Michael Watt, Partner

Derek Frenette, Partner

Iman Hosseini, Associate

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11:00am – 12:00pm PST



YOUR **PERSPECTIVE** OUR **FOCUS**™



INTRODUCTION

- | | |
|---|--|
| 1 | Hot legislative + case law updates |
| 2 | Current vaccine policy thinking + tips |
| 3 | Employee obligations |
| 4 | Introducing restrictive covenants |
| 5 | Enforcement |
| 6 | Q&A |



HOT LEGISLATIVE AND CASE LAW UPDATES

HOT LEGISLATIVE AND CASE LAW UPDATES



PHOs – Gathering and Events / Food and Liquor
Serving Premises - 10/09/2021



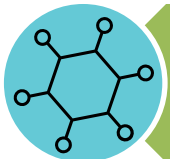
Vaccine passport requirement



Exclusion of staff from orders



Deduction of CERB from dismissal damages
(*Hogan and Iriotakis* cases)



COVID caused layoff as dismissal (*Taylor* and
Coutinho cases)



CURRENT VACCINE POLICY THINKING + TIPS

CURRENT VACCINE POLICY THINKING + TIPS



Everybody's doing it!

But is it legal? – reasonably necessary for workplace

Need to recognize and accommodate medical and religious restrictions

Dealing with the remaining unvaccinated staff



EMPLOYEE OBLIGATIONS

Common Law Duties

Duty of loyalty, fidelity and good faith

- Implied term of the employment contract
- Owed by all employees, regardless of fiduciary status

Includes:

- Serve faithfully and honestly
- Not to compete with employer during employment (but not after departure, subject to enforceable non-compete)
- Not to misuse confidential information, disclose trade secrets, etc. (continues after employment, except general knowledge and skills acquired)

Common Law Duties

Fiduciary Duty

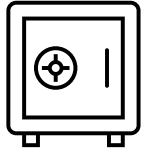
- Act with good faith and fidelity
- Act in the employer's best interest
- Avoid conflict of interest situations
- Avoid solicitation of an employer's customers
- Refrain from taking corporate opportunities
- Make full and frank disclosure
- May compete with former employer – if done “fairly”
- Competing vs. “merely planning” to compete (*Genesis Fertility Centre Inc. v Yuzpe*, [2019 BCSC 233](#))

WHO IS A FIDUCIARY?

- Employee has scope for the exercise of some discretion or power
- Can unilaterally exercise that power or discretion to affect the legal or practical interests of employer
- Employer is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power (*Frame v Smith*, [1987] 2 SCR 99)
- **Traditionally:**
 - Senior officers, directors, and top management
- **New approach:**
 - Extended to “key employees”
 - Highly skilled technical employees who are crucial to employer’s direction and guidance essential to employer’s business, making employer particularly vulnerable to competition upon departure
 - “Intimate knowledge” of and access to confidential information (*GasTOPS Ltd v Forsyth*, [2009] OJ No 3969)

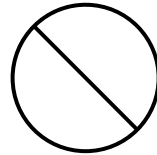
Contractual

Restrictive Covenants



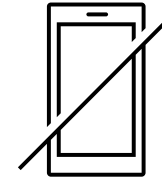
Confidentiality

- Expressly prohibit disclosing confidential information to third parties during or after employment



Non-competition

- Prevent establishing or joining a competing business upon termination or resignation
- Prevent establishing a competing business



Non-solicitation

- Prohibit contacting former customers or former colleagues

EMPLOYEE OBLIGATIONS

WJ Packaging Solutions Corp v. Park, 2021 BCSC 316

FACTS

- Employer (“WJP”) – broker between customers requiring packaging (“C”) and manufacturer in Korea (“D”)
- Employee (“Park”) – “Customer Service Representative”
 - Fluent in English and Korean
 - acted as liaison between C and D
 - Very valuable employee (9 years at WJP)
- No employment contract!
- Provided notice of resignation
- Employer insisted on Non-Disclosure, Non-Competition, and Non-Solicitation (“NDA”) in exchange for five years’ salary (“Resignation Payment”)
- Employee signed, received \$610,000 and left
- After departure,
 - Park was approached by C and D, but turned down opportunities
 - C awarded the primary portion of packaging needs directly to D
 - Park signed a Consultant Agreement with C
- WJP sued Park for breach of contract (NDA) and breach of fiduciary duty

EMPLOYEE OBLIGATIONS

WJ Packaging Solutions Corp v. Park, 2021 BCSC 316

Non-Competition and Non-Solicitation

b. The Employee covenants and agrees that for a period of five (5) years following her resignation, the Employee shall not, directly or indirectly, whether individually or in partnership or jointly or in conjunction with any person or persons, as principal, agent, shareholder, officer, employee or in any other manner whatsoever:

i. solicit any person or entity who was a customer of the Company during the Employee's employment, and with the Employee had dealings in the course of such employment, to:

1. purchase or otherwise obtain products, technology or services of a nature of kind that are developed, manufactured or sold by the Company, from any person or entity other than the Company, or
2. transfer their business from the Company to the Employee or to any other person or entity; or

ii. sell, directly or indirectly, assist any other person or entity to sell, products, technology or services of a nature and kind that are developed, manufactured or sold by the Company, to any person or entity who was a customer of the Company during the Employee's employment with the Company, and with whom the Employee had dealing in the course of such employment;

iii. carry on any business, or be engaged or employed in an executive, management, design, engineering, marketing or sales capacity in any business, that competes with the Company in

1. any Canadian province

...

In which the Company conducts the Business."

WJ Packaging Solutions Corp v. Park, 2021 BCSC 316

Did Park owe a fiduciary duty to WJP?

- Park had no inside knowledge or discretion to exercise
- Only valuable "inside" information Park had was what WJP charged C, but had no input into pricing
- Even if some limited form of fiduciary duty existed, it was irrelevant to circumstances because WJP and C and D continued their relationship for more than one year after Park left WJP
- Any fiduciary relationship would have expired before Park went to work for C, by which time C had moved away from WJP
- Business relationships change, thus fiduciary obligations are subject to reasonable shelf life
- Fiduciary duty, even if it existed, would not have continued for five years set out in NDA; one year is reasonable period
- Park did not have fiduciary duty to WJP

EMPLOYEE OBLIGATIONS

WJ Packaging Solutions Corp v. Park, 2021 BCSC 316

Did Park breach the NDA?



One purpose of NDA was to prohibit Park from selling same services to C that WJP had been providing to C while Park was employed there



Under CA, Park sold services to C that WJP had previously sold to C during time she worked for WJP



Park had breached NDA







Nominal damages of \$500 were awarded to WPJ





ENFORCEABILITY

Restrictive Covenants

Often Unenforceable

-  Overreach in geographical, temporal and activity restrictions
-  Broader than is necessary to protect interests
-  Unreasonable restraint on trade
-  Ambiguous

Drafting Tips

-  Appropriate in scope (justifiable)
-  Focus on the particular proprietary interests worthy of protection
 - draft narrowly; avoid overly broad language, blanket prohibitions
-  Reasonable as between the parties with reference to the public interest
-  Ensure terms of restraint are clear, certain and not vague



INTRODUCING RESTRICTIVE COVENANTS

INTRODUCING RESTRICTIVE COVENANTS

Start of Employment or Sale of Business



- Considerations for employer or purchaser



- Need to protect proprietary interest – business knowledge, or relationships



- Reasonable in length, area and scope



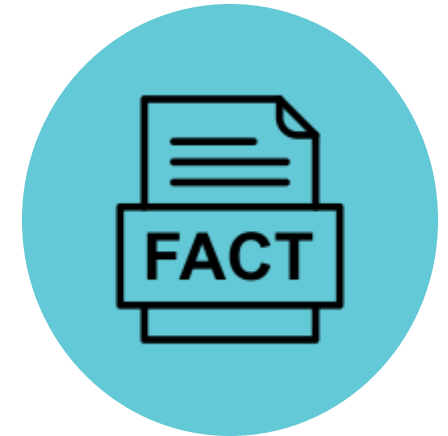
- Different test for employer versus commercial deal

INTRODUCING RESTRICTIVE COVENANTS

Mandeville Holdings Inc. v. Santucci, 2021 ONSC 4321

FACTS:

- Investment advisor moved to new firm in 2014
- Operated as separate business with staff and expenses under corporate umbrella
- Paid \$390K for purchase of book of business and agreed to 2 year non-solicitation covenant
- In 2020 left for competitor



INTRODUCING RESTRICTIVE COVENANTS

Mandeville cont'd

DECISION:

- Restrictive covenants considered as commercial contract, ie. no imbalance of power
- 2 year non-solicitation upheld, non-compete too broad
- Other challenges to reasonableness, clarity and enforceability dismissed



INTRODUCING RESTRICTIVE COVENANTS

Labrador Recycling Inc. v. Folino 2021 ONSC 2195



Brokerage for scrap aluminum



7 years of employment, left to operate competitor



Contract prohibited solicitation of customers for 1 year



Clause found to be unenforceable, and no injunction granted

Introducing Covenants During Employment

- Reasons to introduce – departure of employee or planning for sale
- Will employees accept new restrictions?
- Consideration – how much will be required and in what form?





ENFORCEMENT OF RESTRICTIONS

ENFORCEMENT OF RESTRICTIONS

Difference between court and arbitration processes

Court Process

- Filing a claim
- Preliminary remedies
 - Injunction
- Remedies after trial
 - Injunction
 - Breach of contract
 - Breach of fiduciary duty
 - Other remedies

Arbitration Process

- Arbitration versus Court process
 - Public vs. confidential
 - Cost/speed
 - Enforcement of orders
- Arbitration agreement
- *New Arbitration Act*
 - Expanded jurisdiction
- Costs



ENFORCEMENT OF RESTRICTIONS

Demand letter and court injunction

Demand Letter

- Often the only measure taken
- “Warning shot” without significant legal fees or litigation commitment
- Preliminary letter upon resignation/termination
- Limited utility: client/customer determination
- Do demand letters work?

Court Injunction

- Interlocutory injunctions:
 - Serious question
 - Irreparable harm
 - Balance of convenience
- Permanent injunctions:
 - Establish legal right
 - Appropriateness of the remedy
 - Other remedies
 - Irreparable harm/balance of convenience
- Mandatory or “positive” injunctions



ENFORCEMENT OF RESTRICTIONS

Damages and expected self-help remedies

Damages

- Breach of contract
 - Loss flowing naturally and directly
- Disgorgement of profits
- Accounting of profits
- Exemplary damages (punitive/aggravated)
- Breach of fiduciary duty
- Alternative damages:
 - *Rhebergen v. Creston Veterinary Clinic*, 2014 BC Court of Appeal

Self-Help Remedies

- Discussions with clients
- Letter at termination
- Competition
- Contractual terms – setting expectations
- Controls over confidential information:
- *Valley First Financial Systems Ltd. v. Trach*, 2004 BC Court of Appeal





Q&A

HOUSEKEEPING



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- If you dialed in today via phone (and did not join online with your email) and would like to receive the materials mentioned above, please contact Sara at shabibovic@ahbl.ca after the presentation with your email address.

THANK YOU

Contact



Michael Watt

Partner

T: 604 484 1733 | mwatt@ahbl.ca



Derek Frenette

Partner

T: 604 484 1780 | dfrenette@ahbl.ca



Iman Hosseini

Associate

T: 604 484 1725 | ihosseini@ahbl.ca

OFFICES

Vancouver

TD Tower
2700 – 700 West Georgia Street
Vancouver, BC V7Y 1B8
Canada

T: 604 484 1700

Toronto

TD Canada Trust Tower
2700 – 161 Bay Street, PO Box 508
Toronto, ON M5J 2S1
Canada

T: 416 639 9060

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