

PUBLICATION

Post-Employment Obligations to your Employer

Spencer T. Chimuk

November 21, 2018

Employees and senior or “key” employees in particular, need to be aware that just because their employment has ended, that does not necessarily mean that all obligations to their former employer have ended as well. In Alberta, it is likely that certain obligations continue for as long as 12-18 months after termination of employment.

While most employees understand that they need to meet their obligations as set out in their employment contract, there are some common law obligations which apply to all employment relationships. For example, all employees are deemed to owe their employer a duty of good faith and loyalty during the currency of the employment relationship. This general duty includes obligations that most people would understand to be implicit, such as not competing with your employer or not disclosing any trade secrets or confidential information. What many people may not realize, however, is that some common law obligations of employees continue even after termination of the employment relationship.

For most employees, their post-employment obligations will be limited. A former employee typically will not be restricted from soliciting a former employer’s clients or competing with the former employer, unless there is a clause to that effect in their contract. On the other hand, a former employee does have a continuing obligation not to abuse trade secrets or confidential information, such as taking a customer or client list.¹

While post-employment duties for most employees are quite limited, there are more expansive duties for senior management or other “key” employees who are deemed to owe their employer a fiduciary duty to act in their employer’s best interests. The post-employment duties for fiduciary employees include: (i) not taking advantage of maturing business opportunities, (ii) not actively soliciting the business of specific customers and (iii) not disclosing confidential information or abusing any trade secrets or customer lists.² Notably, post-employment fiduciary duties do not apply in cases of wrongful dismissal.³

One of the interesting questions raised by post-employment duties is how long the employee is beholden to their former employer. The Courts in Alberta have held that post-employment duties shall continue for a “reasonable time” after termination of employment, but what exactly does that mean?

In each case, the Court will conduct a factual analysis to determine what is appropriate in the circumstances. That analysis includes things such as the nature of the position held by the former employee, the nature of the

business of the former employer, and the conduct of the parties. But the duration of post-employment duties may be much longer than you think.

In both *CRC-Evans Canada Ltd. v. Pettifer*, 1997 CarswellAlta 136⁴ and *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, 1996 ABCA 169, the Court determined that a period of 12 months after termination was an appropriate duration for a fiduciary employee's obligations to their former employer. Both cases dealt with issues around solicitation and competition.

In *Alberta Care-A-Child Ltd. v. Payne*, 2005 ABQB 561, the Court looked at this issue through the lens of some former service providers in foster care who set up a competing business and were actively soliciting other employees and clients. In that case, the Court found that the fiduciary obligations of the former employees lasted for 18 months after termination of employment. Indeed, a period of 18 months seems to be a likely outer limit for the duration of post-employment obligations.⁵

¹ *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240 at para 25.

² *Physique Health Club Ltd. v. Carlsen*, 1996 ABCA 358.

³ *ADM Measurements Ltd. v. Bullet Electric Ltd.*, 2012 ABQB 150 at para 143.

⁴ confirmed in *CRC-Evans Canada Ltd. v. Pettifer*, 1998 ABCA 191.

⁵ *R.J.V. Gas Field Services Ltd. v. Baxandall*, 2003 ABCA 170 at para 29.