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Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Our office will be closed during the holiday season from the afternoon of December 23, 2011 to December 28, 2011 inclusive and we will be closed January 1, 2012. Our office is open during regular business hours on December 29 and 30, 2011, and January 2, 2012.

We wish you all the best this holiday season and a safe and happy New Year!

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz by phone at 930-3630, or email at gbentz@stillmanllp.com.

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP LegalEye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

ALTERNATIVE DISPUTE RESOLUTION UPDATE

by Jim Chronopoulos

Many of our readers might remember our article a year ago introducing the alternative dispute resolution (ADR) requirement mandated under the new *Alberta Rules of Court*. At the time there was some debate in the legal community as to what extent the requirement was going to be enforced by the courts. After all, as many pointed out, forcing an ADR process on unwilling participants seemed counterproductive and even contrary to having their day in court. It seemed that it was only a matter of time before someone challenged the courts on the application of the ADR requirement. Such was the case of *IBM Canada Limited vs. Michael Kossovan, Alfred Schmitke and 1256145 Alberta Inc.*

Background

IBM Canada Limited (IBM) alleged that the defendants perpetrated a fraud in the amount of $278,000.00 against IBM while working for the company. IBM alleges that the defendants conspired to receive contracting work using a false resume and, once they received the contract, fraudulently billed and received payment for work they never performed. The defendants flatly deny the lawsuit and claim that IBM received a benefit from their work. The action progressed through the Questioning stage in litigation where IBM submits it was able to elicit key admissions in support of their lawsuit. IBM now seeks to waive the ADR requirement and have the matter proceed to Trial so judgment may be rendered.

The parties' positions

IBM submits that the ADR requirement should be waived for the following reasons:

1) IBM feels it has a strong case and, as a result of the defendant's admissions, feels confident of obtaining judgment of full indemnity;
2) IBM takes the position, as a matter of corporate policy, that it will simply not settle a case involving fraud for less than full or near full indemnity;
3) IBM submits that the defendants are unlikely to have resources to satisfy a judgment of $278,000.00 plus costs, and
4) Forcing the parties to attend ADR would be a waste of resources and time which is antithetical to the philosophy of the Rules of Court.

In summary IBM argues that there is no realistic chance of the matter settling for near-full indemnity. The defendants deny that IBM's reasons are enough to waive the ADR requirements and wish to attend ADR.

INSIDE:

A survey of the jurisprudence

Prior to submitting reasoning for his judgment, Justice Mahoney provided a survey of the law on the ADR requirement as it has been interpreted in other Canadian jurisdictions with similar provisions. The survey, as it turns out, was a taste of things to come. To highlight a few of the Justices references:

1) The Ontario Superior Court addressed the appropriateness and futility in having mediation in the cases where sexual assault, indecent assault and other such torts are alleged to have been committed. The concern for the survivor was that being in the same room as the accused party would cause psychological harm. In refusing the survivor's request the Ontario court noted that it was possible to find a mediator trained to address the needs of the parties where assault is an issue (for example, by conducting the mediation with the parties in separate rooms).
2) The Saskatchewan Court of Queen's Bench failed to grant an ADR exemption based on a strong or persuasive claim. Put otherwise, even if the Court was inclined to grant summary judgment for the Plaintiff, it would not grant an exemption from mandatory ADR in the same circumstances.
3) The Saskatchewan Court of Queen's Bench found that, even if all the parties consented to an exemption from mediation, the consent was not a compelling enough reason for the Courts to grant an exemption.

In summary Justice Mahoney concluded "Though exemption will be addressed on a case by case basis, the threshold for obtaining them is high and parties can assume that they are used sparingly".

Analysis

Given the above review, it is not surprising that IBM lost its application to waive the ADR requirement. As part of his reasoning, Justice Mahoney pointed out that ADR processes often yields consent judgments which are equally enforceable as a judgment obtained at Trial. In addition, his Lordship found that IBM's position that it would not settle for anything short of "full or near full" indemnity indicated some "wiggle room" and justified an ADR to explore the scope of the wiggle room. ADR, he goes on, is also used to negotiate payment schedules which benefit both parties in both saving the need to go to court and controlling the judgment enforcement. Finally, it was pointed out that even if the parties where unable to reach a settlement, it still does not mean that the ADR has been a futile endeavour. Many other benefits may be obtained. For example, the parties may narrow down or agree to issues making the trial more efficient. As Justice Mahoney puts it "A good faith commitment to a process that may ultimately resolve the dispute, or shorten trial time and reduce heavy trial costs is never a futile endeavour"

Conclusion

Although the mandatory ADR was a controversial change in the *Rules of Court*, there are compelling reasons for why it is here to stay. Moreover, there are rulings across Canada that all speak to the difficulty in avoiding the requirement. The traditional view that a mandatory ADR is an oxymoron no longer holds water and, as Justice Mahoney puts it, "this is not the new millennium view nor the view of the legislature when enacting the New Rules." In the end the spirit of the ADR requirement was perhaps best captured by the ancient Chinese military strategist Sun Tzu when he wrote, "The best victory is when the opponent surrenders of its own accord before there are any actual hostilities...It is best to win without fighting."

FIRM NOTES

Stillman LLP's 7th annual Super Bowl Bowling Extravaganza was held on Friday, October 21 2011. The event was again an enormous success, raising approximately $30,000.00 (net after expenses) for the Skills Society, a local charitable organization. The Society provides community support to children and adults with developmental disabilities and adults with acquired brain injuries.

To all of the participants, sponsors, donors and volunteers, we once again wish to express our appreciation for all your help and support in putting on this great event and supporting such a worthwhile cause. A special thank you also goes out to all the volunteers from the Skills Society as well for all their hard work in helping make this year's event a great success.

We would like to extend a hearty welcome to Deanna Bischoff, our new office manager as of November 1, 2011, and Beverly Newman as a family law paralegal.

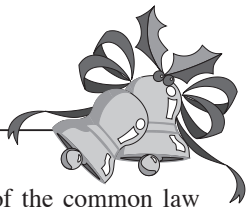
Congratulations to Jim Chronopoulos of our office upon his appointment to the Edmonton Subdivision and Development Appeal Board for 2012.

CAUSE CÉLÈBRES

Globex Foreign Exchange Corporation v. Kelcher, 2011 ABCA 240: "Post-Employment Obligations"

By Ara McKee

When employees leave their jobs, they take with them valuable knowledge relating to their former employment that may create a disadvantage for the former employer should the former employee engage in a competing business. The common law has addressed this issue by imposing a duty on former employees not to misuse confidential or proprietary information of their former employer. Employers often use non-solicitation agreements, or non-competition agreements, as a way to further prevent former employees from using knowledge gained through their employment to compete against or solicit customers from the former employer. In using these agreements, the employer has to strike a balance between protecting the interests of the business and restricting employees post-employment activities. In drafting non-solicitation or non-competition agreements, employers must be careful not to be overly broad at the risk of the agreement being found unenforceable. The recent Alberta Court of Appeal case of *Globex Foreign Exchange Corporation v. Kelcher* addresses these issues in analyzing the use of customer lists created by employees post-employment.



In this case, three employees of Globex were subject to non-competition and non-solicitation covenants in their employment contracts, which limited their post-employment activities for a certain period of time. Sometime after leaving the employment of Globex, the former employees engaged in activities, such as contacting clients of the former employer, which were prohibited by the non-competition and non-solicitation covenants. Globex took action against these former employees for breach of their restrictive covenants and breach of their common law duty not to misuse confidential or proprietary information. A Court of Queen's Bench decision was decided in favour of the former employees. It was then appealed to the Court of Appeal by Globex. The appeal decision considers the enforceability of non-solicitation agreements and the common law duty not to misuse confidential or proprietary information post-employment.

Enforceability of Non-Solicitation Agreements:

In this case, the court recognizes the power imbalance inherent in the employer-employee relationship and states that, for this reason, restrictive covenants such as non-solicitation and non-competition agreements, should be more closely scrutinized. The court found that the non-solicitation agreements in this case were ambiguous and overly broad in preventing the former employees from contacting Globex's customers in relation to their current businesses. The wording of the non-solicitation agreement was found to be overly broad in that it prohibited the former employees from "soliciting customers in any manner whatsoever, in any business or activity for any client of Globex". In an attempt to protect its interests, Globex overly restricted the former employees activities resulting in the agreements being found unenforceable.

Breach of Employee Duty:

A former employee has a duty not to misuse confidential or proprietary information of the former employer post employment. In this case, Globex argued that the employees had breached this duty in five ways; (1) by developing sales and risk strategies identical to that of Globex, (2) by using a client brochure package identical to that of Globex, (3) by establishing a series of satellite offices, (4) by making and using a list of former clients and (5) by doing business with former clients. The court found that the making and using of a list of former clients was the only potential breach by the employees. In analyzing whether this constituted a breach of the employee duty not to misuse confidential information, the court had to decide whether the list of customers was considered confidential information. A complicating factor was that the former employees made the list from memory post-employment and there was no evidence that the employees had taken confidential information when they left. The court set out conflicting authority demonstrating the unsettled and fact dependent nature of this area of law. The court found that, in certain circumstances, customer lists made from memory post-employment were confidential and therefore a breach of the employee duty. However, in this case, there was an intention by the former employees to comply with the non-solicitation agreements and the former employees had good reason to believe that the restrictions placed on them no longer applied. Based on these reasons, the court found there was no breach of the common law obligation on the employees not to misuse confidential information post-employment.

Commentary:

This case highlights the obligations placed on both the employer and employee post-employment regarding use of knowledge gained during employment. While it is prudent practice for the employer to protect the interests of the business by the incorporation of non-solicitation and non-competition agreements into its employment contracts, care must be taken to avoid being overly broad so as not to compromise enforceability.

On the other hand, a former employee must be cognizant not only of the terms of any non-solicitation or non-competition agreement but also of the common law obligation not to misuse confidential or proprietary information, including knowledge of the former employer's customers.

As an employer seeking to incorporate restrictive covenants in employment agreements or as a departing employee seeking employment in competition with a former employer, it is advisable to seek the advice of a lawyer regarding the legal implications of post-employment obligations.

AS WE SEE IT

THE NEW CODE OF CONDUCT
By Alison Mazoff

On November 1, 2011, the Law Society of Alberta enacted a *New Code of Conduct* (the "*New Code*") to replace the previous *Professional Code of Conduct* (the "*Old Code*"), first enacted in 1995. Both Codes govern members of the Law Society, whether or not they are in Alberta, or any lawyer who is not a member of the Law Society, but who is practicing in Alberta. The *New Code* has been introduced mainly as a response to the "globalization of the legal profession": many lawyers have practices that extend into multiple jurisdictions both nationally and internationally. The Law Society of Alberta has modeled the *New Code* after the *Federation of Law Societies of Canada Model Code of Conduct* because ethical consistency facilitates and supports the cross-jurisdictional practice of law. The *New Code* further seeks to reassure the public that the self-regulating legal profession is meeting client's needs through promoting a uniform ethical standard throughout Canada.

What has Stayed the Same

The *New Code* preserves most of the ethical content, commentary, cross referencing and legal referencing of the *Old Code*. The *New Code* continues to advance the same two principles that underlay the *Old Code*, those being that a lawyer is expected to establish and maintain a reputation of integrity, and that a lawyer's conduct should be above reproach.

What has Changed

The *New Code* highlights and devotes an entire chapter to the first of the above mentioned principles, integrity. The *Old Code* had a series of rules which were drafted to ensured lawyers conducted themselves with integrity , but did not specifically articulate integrity as integral to the lawyer's personal character or relationships with others. The *New Code* has replaced these rules with the above mentioned chapter, which specifically defines integrity and distinguishes it from competence, but insists that both are essential to the practice of law.

There has been a change in the Code pertaining to solicitor-client confidentiality: the *Old Code* allowed lawyers discretion in disclosing confidential information when a client communicated the intention to commit any sort of crime. The *New Code* eliminates lawyer's discretion in regards to breaking confidentiality to report a crime: It demands that lawyers only report clients for potential crimes that put an identifiable group or person in imminent danger of death or bodily harm. If the crime does not involve bodily harm to another, the lawyer is not allowed to disclose the confidential information.

The *New Code's* most significant change is its organization and formatting. This change in appearance reflects the *New Code's* holistic approach to lawyers' conduct.
The *New Code* is written in plain language, dropping much of the *Old Code's* reliance on "legalese" and traditional structure: The definition and interpretation sections that made the *Old Code* cumbersome to read are now gone. Instead, the *New Code* incorporates the definition sections into each chapter in which the defined term is used. This makes it quicker and easier to look up terms.

The *New Code* condenses the *Old Code's* 15 chapters into 6 chapters that are reflective of lawyers' relationships. It has mostly achieved this through condensing 7 of the *Old Code's* chapters: "The Lawyer as Advocate", "The Lawyer as Advisor", "The Lawyer as Negotiator", "Confidentiality", "Conflicts of Interest", "Fees", and "Withdrawal and Dismissal", into one chapter called "Relationship to Clients". This change will help clients navigate the Code more easily and help them identify issues that may arise between them and their lawyer.

Conclusion

The New Code maintains the content and commentary of the Old Code while re-organizing the information and shifting its role-based focus on lawyers' conduct to a holistic one. Further, the reduction in the number of chapters, simplification of formatting and plain language drafting make it more accessible to lawyers and clients alike.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various parts of the United States.

The firm has a well established network of agents in Canada, includingVancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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