

# OPPORTUNITIES AND RESTRICTIONS

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Canada is a land of opportunity. We believe that an individual should be free to pursue any job, profession, trade or calling. We also believe that if you work hard, you should be able to reap your work's just rewards. This is the entrepreneurial spirit that drives our economy. Most of the time this is done through small businesses; one or two principals starting an enterprise and then employing a few individuals to work for them.

This creates a dilemma. For the business to function effectively, the employees may need access to the employer's trade secrets, customer lists, pricing lists and business strategies. There is the inherent risk, however, that these employees, driven by the same entrepreneurial spirit that caused the employer to go into business in the first place, may leave the employer to find work with a competitor or to start up a new business. In doing so, they might use the information and skills gained against the former employer. How does the law strike a balance between protecting the employer's business interests, while allowing an employee to pursue his or her own dreams?

## **Where There Is No Agreement**

In the absence of a contract on point, a departing employee is free to establish a business in direct competition with his or her former employer, or work for the former employer's competitor. The employee is not granted total freedom of action. He or she cannot make "unfair use" of information acquired during the employment, nor can he or she use confidential information acquired to advance his or her interests at the expense of the former employer. "Unfair use" is not clearly defined. Courts have held, however that merely calling the former employer's customers from memory is not "unfair" dealing.

Whether or not something is confidential information may also be a difficult question to determine. Such things as trade secrets, secret processes, exclusive supply arrangements, special business practices and strategies or unique services have been found by courts to constitute confidential information. Factors in determining whether the information is confidential include:

- If the employer keeps the information secret;
- If the employer allows limited access to the information within the company;
- If the information is known by the employer's competitors;
- If the information is of value to the employer's competitors;
- The ease of duplication of the information;
- The effort expended by the employer to produce the information; and
- If the information is communicated to the employee in confidence.

It is clear, however, that knowledge, skills and experience acquired while employed by the former employer is not confidential information, and the former employee is free to use these things in competition with the former employer.

## **Where There Is An Agreement**

To avoid these rules, the employer and employee are free to modify their relationship such that, upon termination of the contract, the employee is restricted from certain business activities. This type of an agreement is commonly called a restrictive covenant. Restrictive covenants usually restrain the former employee from soliciting the former employer's customers and from competing with the former employer in business within a defined area and for a particular period of time.

There are several factors to bear in mind with restrictive covenants. To begin with, a restrictive covenant must be reasonable. Courts have held that contracts which restrain trade, such as a restrictive covenant, are against public policy and void, unless found to be reasonable.

In order to be reasonable, a restrictive covenant must meet certain requirements. First, the restrictive covenant must protect a legitimate proprietary interest. In other words, the employer must be trying to protect something through the restrictive covenant, such as confidential information, and not merely trying to prohibit competition with a former employee.

Second, the restrictive covenant should not go further than necessary in protecting the employer's interests and it should be reasonable as to time and place. For example, if an employer sold Saskatoon Berry pies with a unique recipe exclusively in Saskatoon, it would be unreasonable to prohibit the former employee from carrying on any type of food related business throughout all of Saskatchewan for a period of five years. In all cases, the particular nature of the employer's business will determine the requisite time, space and reach of the restrictive covenant.

One matter of note is that if the employer wrongfully terminates the employment contract, it is unlikely that the employer can rely on it to prohibit the former employee's activities after termination.

In conclusion, courts will balance the employer's rights against a reluctance to overly restrict employees'. A prior agreement can help the parties themselves better define that balance.

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