Court Declines to Prevent Vice-President from Joining Competitor Despite Breaches of Fiduciary Duties

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Employers wanting to protect themselves from post-employment competition by senior executives will want to heed the B.C. Supreme Court's decision in *Telus Communications Inc. v. Goldberg*, 2018 BCSC 1825.

Facts

Mr. Goldberg was employed by Telus as a vice president for nearly 13 years. The Court's reasons for judgment explain that in the last year or so of his employment, he became concerned about his prospects of advancing to the senior vice-president level and so, in June 2018, he began discussions with Rogers Communications. By August 2018, Mr. Goldberg decided to leave Telus and take a position with Rogers Media. Mr. Goldberg did not disclose to Telus that he was having serious discussions with Rogers Media, and during this time, continued to participate in Telus' strategic planning. Moreover, when Mr. Goldberg discussed with Telus the prospect of his leaving in August 2018, he told Telus that he would need a severance package to tide him over until he found another position, despite the fact that he had secured employment with Rogers Media. After the parties failed to reach agreement, in part because Telus wanted Mr. Goldberg to agree to new non-competition obligations, Mr. Goldberg resigned to take up the position with Rogers Media.

Telus commenced an action against Mr. Goldberg and sought an interlocutory injunction to enforce a non-competition clause in his employment contract to prevent him from competing for a period of one year. Telus also argued in the alternative that Mr. Goldberg had breached his fiduciary duties and ought to be prevented from competing unfairly, even in the absence of the non-competition clause.

Reasons for Judgment

The Court first considered the non-competition covenant and found that Telus had failed to establish a strong *prima facie* case that the covenant was reasonable and enforceable. In particular, the Court was troubled by the overbroad nature of the covenant, which prohibited Mr. Goldberg from taking a managerial role in any company that was in competition with Telus or any of its present or future affiliates. The Court found this particularly problematic given that Telus is a multi-billion dollar company whose products include wireless, voice data, internet protocols, entertainment video and television services, whereas Mr. Goldberg's employment was confined to

telecommunications. Simply put, the Court concluded that the covenant was "the product of overzealous drafting."

The Court then considered whether Mr. Goldberg ought to be restrained from competing unfairly because of the fiduciary duties he owed to Telus. To that end, the Court found that he had breached his fiduciary duties by actively pursuing a termination payment while negotiating the terms of his new employment at Rogers Media, and that he had owed Telus frank and full disclosure about his employment situation.

Nevertheless, the Court court held that Mr. Goldberg's breaches of his fiduciary duties ought not to disqualify him from being able to pursue his career with Rogers Media, because they did not go so far as to constitute unfair competition. Accordingly, Telus' application to restrain Mr. Goldberg's employment with Rogers Media was dismissed.

Takeaways

The Court's decision provides two important reminders. First, it illustrates how rare the case will be when an employee — even a vice president who has breached fiduciary duties — will be prevented from competing with their former employer in the absence of an enforceable non-competition covenant. Second, that it is critical that non-competition covenants are drafted as narrowly as possible to protect the company's legitimate business interests, with consideration given to the employee's specific job duties. All too often, non-competition covenants are drafted to apply as broadly as can be conceived and, consequently, fail to protect an employer against the most direct forms of post-employment competition.

By

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