FIDUCIARY OBLIGATIONS IN THE EMPLOYMENT RELATIONSHIP

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While an employment relationship does not necessarily create a fiduciary duty between the employer and the employee, changes in the Canadian economy and the organization of many workplaces has created more emphasis on this equitable principle. In particular, the "flattening" of the management structure in many organizations and the attempts to empower employees has created more control and involvement in key business decisions. Titles are less important than actual duties and responsibilities in determining whether an employee is a fiduciary. As one court has noted: "the relationship becomes elevated to the fiduciary level when the employer reposes trust and confidence in the employee on a continual basis, relying upon the employee in reaching business decisions." See: *Sure-Grip Fasteners Ltd. v. Allgrade Bolt &Chain Inc.* (1993), 45 C.C.E.L. 276 (Ont. Ct. Gen. Div.). What has also been identified is that fiduciary relationships are "marked by vulnerability in that the fiduciary can abuse the power or discretion given him or her to the detriment of the beneficiary." See: *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

A fiduciary relationship exists in the employment context when the employee has scope for the exercise of discretion or power, and can exercise this power or discretion to affect the employer's interests: the greater the discretion the greater the scope of the fiduciary duties. While attempting to determine whether an employee is a fiduciary or not has been extensively canvassed in Canadian jurisprudence, the extent of the obligations where the employee is held to be a fiduciary are somewhat more nuanced and difficult to ascertain when advising clients. In this paper I have attempted to briefly outline the key obligations

once there has been a determination that there is a fiduciary relationship. I have focussed on the former employee since this is the point at which these issues seem to arise with the greatest frequency. I also have to issue a caution: this topic was assigned not chosen, and in my view the law in this area is extremely fact specific. The general principles can really be captured by my colleague Mia London's admonition: be nice and play fair.

I. The Duration of the Obligations

It is widely recognized that the fiduciary duty exists not only during the employment relationship, but that it survives the termination of the employment relationship. The question often asked is how long does the duty extend. The answer, invariably, is that the duty to extends for a "reasonable" period of time. There really is not any way to develop a more refined approach because the courts look at the facts of each case separately and attempt to balance the interests of the employer and employee. What is clear is that the obligations are not indefinite. Some courts have suggested that the period of time should mirror the reasonable notice period that is appropriate for the terminated employee, but that is certainly not an approach that has been widely adopted.

There is also some lack of clarity with respect to the issue of whether the obligations continue after a termination where the employer has not acted fairly and appropriately. It has been held that there must be some "mutuality of duty", and that if the employer does not act in accordance with these understandings then this conduct "significantly alters any duties and responsibilities" which the employee might have had of a fiduciary nature. See: *Gestion Trans-Tek Inc. v. Lampel* [2001] O.J. 1061 (S.C.J.). To put it simply, courts are loathe to require terminated employees to be fair to their former employer when the employer has chosen not to act in a like manner.

II. Competition

Absent any agreement restricting competition after employment is terminated, competing

with a former employer does not constitute a breach of a fiduciary duty. It has also been held that an employee who is a fiduciary can, while still employed by his or her employer, engage in planning to compete against his or her employer after he or she terminates employment. The employee is also under no obligation to inform the employer of his or her intention to take part in such activity after departing from the employer. See: Aust et al, *Executive Employment Law* (Toronto: Butterworths, 1993) at 10.62.

Such a scenario is to be distinguished from the use of confidential information to assist in competing directly with one's employer. As with contractual restrictions on an employee's ability to compete against his or her employer after departing, the courts attempt to balance the ability of employees to generate an income and engage in commercial activity with the need to protect the employer from being prejudiced as a result of the advantages the employee has gained from his or her employment.

III. Solicitation

Courts have almost universally held that a departed employee cannot solicit business or work opportunities from clients or customers of the former employer. A departing employee who sends a communication to former clients and customers advising that his or her employment has been terminated may not be viewed as soliciting, but as always in these kinds of matters the inquiry is likely to be quite fact specific. Counsel to a fiduciary need to clearly advise clients about what they can and cannot do in this respect.

IV. Providing Notice to the Employer

Where the employee is a fiduciary the mere act of resigning without providing sufficient notice to the employer may breach the fiduciary obligations owed to the employer. In *Sanford Evans List Brokerage v. Trauzzi* [2000] O.J. 961 (S.C.J.), the Ontario Superior

Court of Justice concluded that the failure of a senior member of management who had been employed for 25 years should have provided notice of his intention to resign of at least six months. The employer was entitled to any damages resulting from the fact that only one month of notice was provided. Counsel need to be alive to the potential that a departing employee may be responsible if his or her resignation does not provide sufficient time for the employer to find a suitable replacement, and if damages result from these events.