

## THE OBLIGATIONS OF EX-EMPLOYEES IN QUEBEC EMPLOYMENT LAW

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As in the common law provinces, the Quebec courts have established a bulk of case law relating to the obligations of ex-employees bound by employment contracts. Distinctions are made between the obligations of key personnel and lower level employees, as in the other provinces. However, these principles are sometimes expressed differently and in accordance with civil law principles.

A recent decision (*BTG Canada Inc. v. Baumann*, J.E. 90-1703 (Que.Sup.Ct.)) of the Quebec Superior Court constitutes a good example of the civil law approach to interpreting the employment contracts of key employees in Quebec.

**Facts before the Court.** In the above-mentioned decision, a company called BTG Canada Inc. («BTG») sued a certain Baumann, an ex-employee. In its action BTG sought a permanent injunction and damages with a view to enforcing a restrictive covenant and to protecting confidential information or trade secrets relating to its business.

BTG was in the business of manufacturing instrumentation for the measuring of residual chemicals destined for pulp bleach plants, and of specialized equipment used for pulp control and monitoring.

Baumann was hired by BTG on July 1, 1986. The parties entered into an employment contract that included two enclosures, one being a non-competition agreement and the other an agreement incorporating additional terms and conditions of Baumann's employment. The restrictive

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covenant foresaw a two-year period during which the employee was to refrain from competing with BTG.

On August 1, 1987, Baumann decided to leave his employ and gave notice to BTG to this effect on August 10, 1987. The notice stated that his resignation would be effective on December 31, 1987. On October 2 of the same year, BTG decided to terminate Baumann's employment immediately, instead of waiting until December 31, 1987. The parties executed a termination agreement confirming the financial arrangements relative to the termination of Baumann's employment on October 9, 1987.

The court was presented with evidence to the effect that Baumann registered a «Declaration of Business Name» on September 23, 1987, in which he stated that he had carried on the business to be identified by the name in question since August 1, 1987. The name he chose clearly referred to activities similar to those he performed at BTG.

It appears also that Baumann was quite candid as to his behaviour during this period. He admitted to the court that during the week in which he had been terminated and signed the October 9, 1987 termination agreement, he had prepared an outline of the electronic circuitry necessary to develop a brightness residual meter. This meter was destined to the same market served by BTG.

Baumann worked on preparing a prototype of the apparatus in 1987 and published a brochure to introduce it to the market. The brochures were printed in June 1988 and sent to managers of pulp bleach plants. The names of the recipients were obtained by Baumann from a publication known as the *1988 Pulp and Paper Journal*.

Baumann attempted on three occasions to demonstrate and develop his apparatus by arranging to install it on the premises of major pulp and paper companies, free of charge. Each time the apparatus proved to be deficient. It was only on April 24, 1989, that he was finally able to close his first modest sale of a working version of the apparatus.

**Position of BTG.** Essentially BTG alleged that Baumann's entrepreneurial activities violated his obligation to refrain from competing as foreseen in the relevant enclosure. It also argued that Baumann was a key employee and as such owed BTG loyalty, good faith and avoidance of conflict of interest even after the termination of his employment.

**View of the Court: The Restrictive Covenant.** Unfortunately for BTG its restrictive covenant applied «in the event of termination of the agreement by the employee for any reason». In the light of a clause that restricted the rights only of Baumann and created an obligation only for Baumann, the court interpreted the clause in his favour, in accordance with the principles of interpretation of contracts of Quebec civil law. In effect, the court held that BTG terminated Baumann's employment when it asked for his resignation on October 2, 1987 and signed a termination agreement on October 9 of the same year.

**Baumann's status as a key employee.** Quebec jurisprudence recognizes the difference between the duties and obligations of an employee whose relationship with his or her employer can be described as one of «mandate» and that of an employee whose relationship with the employer is one of simple «lease and hire of personal services».

A key employee is one who acts as a mandatary. Given the rules applicable to contracts of mandate, the courts have resorted to the concept of duty or loyalty to measure the obligation of the employee who falls under such a description. The Quebec courts have followed the Canadian jurisprudence with respect to the concept of the duty of loyalty owed to an employer, not only by directors but also by senior managerial officers or top management officials of a company. This rule, known as the "Strict Ethic Rule", therefore applies in Quebec to certain key employees.

After discussing the jurisprudence with respect to the Strict Ethic Rule, the courts remind us that employees whose relationship with their employer is that of lease and hire of personal services, have a duty to their former employer only with respect to trade secrets and the confidentiality of customer lists. The court had, therefore, to decide whether Baumann was a simple employee, albeit an important one, or whether he was a mandatary of BTG, in which case he would owe the sort of fiduciary duty referred to above.

Mr. Baumann was given the title of Technical Manager of BTG. His duty was to ascertain that the equipment sold by BTG was properly installed and started up at the customer's bleach plant. It was also his responsibility to implement control strategies to meet the specific requirements of the customer. However, Mr. Baumann had no control over subordinates. Baumann was, therefore, charged with lending technical support to the sales force of BTG and after the sale of equipment was concluded or closed, his responsibility was to ensure that the equipment was properly installed, started up and that the appropriate control strategies required by the customer were provided. He spent more than 50% of his time in the bleach

plants of BTG's customers and was his employer's principal contact with its customers.

The court stated clearly that no evidence was adduced to demonstrate that Baumann had any responsibilities for customer contact other than technical support, or that he had established a personal relationship with the customers to the extent that he could have made BTG particularly vulnerable to loss by Baumann's soliciting them after his departure.

The court held that the evidence was to the effect that Baumann was not a senior management officer or part of the "top management" of BTG, nor was he in a position where he had a degree of control or authority in the corporate operations of his employer. In fact, one of the reasons Baumann left his employment was that he found that the tasks assigned to him were well below the training he had received and his qualifications and competency as an engineer. The court drew an inference from the fact that Baumann's duties were taken over by a service technician as further evidence that he never held a position within BTG that would impose upon him the fiduciary duty described in the jurisprudence.

The civil law concept of mandate was then discussed by the court. A mandate under Quebec law is a contract by which a person "commits a lawful business" to the management of another who undertakes to perform it. As such, it was clear from the evidence to the court that BTG did not commit to Baumann the management of a lawful business.

The court went on to consider the implied terms of the contract of lease and hire of personal services that Baumann signed. It was recognized by the court that in such contracts, there exist implied obligations to the effect that an employee must act in good faith and with fidelity in relation to his or her employer. The implied obligations of loyalty and trust assume that the employee will not take the employer's property in any form, be it trade secrets, goodwill or other material things such as plans, lists of customers, or things of that nature.

These principles are similar to those found in the common law jurisdictions and have been recognized as being applicable in Quebec by the Quebec courts. In fact, the Honourable Justice Lesyk, who rendered the BTG decision, made extensive reference to common law decisions in setting out his working definition of the concepts of trade secrets and confidential information, which of course must include the essential elements of secrecy or confidentiality in order that they be afforded protection.

Furthermore, the court cited common law jurisprudence to the effect that the duty to refrain from using or divulging trade secrets does not prevent a person

from using general skill and knowledge acquired during his or her employment. The rationale being that both the employee and the general public are entitled to benefit from the employee's acquired general skill and knowledge. It has also been established in Quebec case law that the employer or the person who invokes a restrictive covenant has the onus or burden of proof to establish the confidential nature of specific information and/or trade secrets that relate to their business in any particular case. This duty was inferred from the basic principles of evidence found in the *Civil Code* of Quebec.

The court concluded that the residual chemical analyzers and brightness transmitters sold by BTG are well-known to the relevant trade and had been on the market for quite some time. They could not, according to the court, be held to be the exclusive property of trade secrets of BTG. BTG was unable to prove any "objective" knowledge belonging to it as opposed to "general" knowledge.

As to Baumann's development of his own apparatus, the court stated that he was entitled to use all his skills or knowledge to manufacture a brightness residual sensor. This includes his personal aptitude, skill, his manual and mental abilities, his formal academic training at the Swiss Federal Institute of Technology and his previous experience and knowledge acquired during his previous employment with Buss in Switzerland. This finding of the court was also based on jurisprudence from the common law. The judge stated that all of this knowledge, information, skill and prior experience constituted subjective knowledge, and that Baumann had not violated any express or implied obligation arising out of his contract of lease and hire of personal services with BTG.

As to Baumann's soliciting his former employer's customers, the court cited common law jurisprudence to the effect that such solicitation is legal when those names are obtained through memory or through a trade directory.

**Conclusion.** An important distinction must always be made between the obligations of a former employee hired under a contract of lease and hire, and those of one who may be described as a key employee. The obligations of the latter are governed by the rules of mandate in Quebec civil law. Quebec courts often rely on common law principles in deciding the obligations of former employees, but phrase them differently and in accordance with concepts foreseen by the *Civil Code*.

Companies hiring key employees in Quebec should not, however, take for granted that all of the common law principles applicable to such contracts will receive the same kind of application in Quebec as they would in the

other provinces and as such, should detail the obligations of the parties with respect to termination in an adequate manner.

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