Duty of Loyalty and Non-competition: What are your Rights and Duties to Protect your Interests?

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During Major Symposium in Montréal held on June 4, our colleagues Michel Desrosiers and Ariane Villemaire discussed the employees' duty of loyalty under the Civil Code of Québec.

In their presentation, they discussed the case of *Xit Télécom Inc. and Madysta Constructions Ltée v. Beaumier et al.*[1] on the scope of injunction orders that the Superior Court recently issued pursuant to the legal duty of loyalty (article 2088 of the Civil Code of Québec).

On June 5, 2019, the Court of Appeal upheld these orders, prohibiting two former employees from doing business with their former employer's customers and becoming the owners of a business in competition with their former employer.

Background

Two key employees, a vice-president of engineering and a head of business development (the "Defendants"), prepared for almost 12 months the launch of a business that would compete with their current employer, while they were employed by the latter.

While still employed, the Defendants solicited their employer's customers, suppliers and employees in order to persuade them to join their new business project. They also made disparaging comments to customers and employees about their employer and its CEO.

Finally, they attempted to illegally appropriate business opportunities they had learned about during their employment. Once the situation was discovered, the employer quickly dismissed the Defendants and took steps to obtain safeguard and injunction orders against them.

The debate

On the sole basis of the legal obligation of loyalty (article 2088 C.C.Q.), rather than under restrictive

clauses provided for in the employment contract, the Superior Court granted the employer interim injunction and safeguard orders in December 2018 and January 2019.

In March 2019, the Superior Court issued interlocutory injunction orders for a maximum period of nine months, prohibiting the Defendants from:

> Using confidential information;
> Soliciting customers, subcontractors and employees;
> Doing business with customers appearing on a list filed under seal;
> Investing, partnering in or otherwise becoming the owner of a business in competition with that of the employer.

The Superior Court, in its reasons, noted that:

> [TRANSLATION] [26] The Court cannot see how it could, at this time, allow the defendants to conduct business with customers to whom they made disparaging comments about the plaintiffs, without thereby giving them free rein to unfairly compete with their former employer. For the past year, until December 20, 2018, said customers who would "solicit" the services of the defendants have been receiving negative messages about the plaintiffs. **Allowing the defendants to supposedly respond to the requests of said customers would amount to allowing them to reap the benefits of their unfair competition**. This cannot be allowed. (Our emphasis)

The Court of Appeal[2] agreed with the arguments raised by Carl Lessard and Ariane Villemaire, members of our Labour and Employment Law group. It dismissed the appeal and concluded that the orders were consistent with the principles already recognized by the Court of Appeal[3] :

> [TRANSLATION] [7] Indeed, although in principle the duty of loyalty provided for in article 2088 CCQ must not be interpreted as preventing an employee from competing with his or her former employer, **the fact remains that jurisprudence tends to prohibit conduct such as that alleged against the appellants in this case, including slander tactics, benefiting from privileged relationships with customers, and active solicitation of customers during the period of employment**. (Our emphasis)

The Court of Appeal also concluded that the Superior Court's decision was reasonable in setting the duration of the prohibitions at nine months given the particular facts of the case.

What it means

This decision is of great practical interest because it emphasizes that article 2088 of the C.C.Q. prohibits **unfair competition** with a former employer. Orders may thus be issued on the basis of this provision to protect the rights of employers when such unfair competition takes place during employment despite the absence of valid restrictive clauses.

However, this decision also confirms the general principle that the duty of loyalty does not prohibit legal competition with a former employer in the absence of a non-competition clause.

Thus, employers should continue to protect their legitimate interests by including non-competition, non-solicitation and confidentiality clauses in employment contracts when the circumstances so require.

Our Labour and Employment Law group is available to assist you in drafting, analyzing and defending the means available to employers to protect their rights and business activities.

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1. 2019 QCCS 1446
2. *Beaumier c. XIT Télécom inc. , 2019 QCCA 1000*

3. *Citing Concentré scientifiques Bélisle inc. c. Lyrco Nutrition inc.,* ***2007 QCCA 676***