

Edward Jones (respondent/plaintiff) v. Randy Voldeng, Brenda Jarvis and RBC Dominion Securities Inc. (appellants/defendants)
(CA039848; 2012 BCCA 295)

Indexed As: Edward Jones v. Voldeng et al.

British Columbia Court of Appeal
Chiasson, D. Smith and Neilson, JJ.A.
July 3, 2012.

Summary:

An investment advisor and his assistant left their employment at a national brokerage firm and joined a competitor. The brokerage firm sued the investment advisor, his assistant and the competitor. The brokerage firm alleged that the investment advisor breached a restrictive covenant in his employment agreement by soliciting the firm's customers. The firm applied for an interlocutory injunction.

The British Columbia Supreme Court, in a decision reported [2012] B.C.T.C. Uned. 497, granted the interlocutory injunction restraining the investment advisor from soliciting the brokerage firm's clients (paras. 1 and 2) and restraining all the defendants from using, copying, disclosing or conveying any non-public information which the advisor and his assistant learned or acquired during their employment with the brokerage firm, etc. (paragraphs 3 and 4). The brokerage firm appealed.

The British Columbia Court of Appeal allowed the appeal in part. The court held that the chambers judge erred in determining that the brokerage firm would suffer irreparable harm by the investment advisor improperly soliciting his former clients and erred in prohibiting him from any contact with his former clients. The court varied the chambers judge's order by deleting the paragraphs 1 and 2, and left the remainder undisturbed.

Injunctions - Topic 1600

Interlocutory or interim injunctions - General principles - General principles respecting grant of interlocutory or interim injunction - The British Columbia Court of Appeal stated that "It is clear that considerable flexibility is required when considering an interlocutory injunction. A rigid categorical analysis is eschewed" - See paragraph 53.

Injunctions - Topic 1802

Interlocutory or interim injunctions - Requirement of irreparable injury - What constitutes - [See all **Injunctions - Topic 1805**].

Injunctions - Topic 1805

Interlocutory or interim injunctions - Requirement of irreparable injury - Covenants not to compete (incl. non-solicitation clauses) - An investment advisor with a national brokerage firm joined a competitor and so advised his clients - Within a few weeks, customer accounts of \$20.2 million were transferred to the competitor - The brokerage firm sued the investment advisor, alleging a breach of a non-solicitation clause in the

employment agreement - The brokerage firm obtained an interlocutory injunction restraining solicitation and initiation of contact with the brokerage firm's clients - The investment advisor appealed - The British Columbia Court of Appeal allowed the appeal - There was a serious issue to be tried - However, the chambers judge erred in finding that there was irreparable harm - Rather, in this case, the potential damages arising out of solicitation, being calculable, did not constitute irreparable harm - The court rejected the argument that irreparable harm was established by the magnitude of the loss - The balance of convenience favoured the investment advisor - See paragraphs 15 to 56.

Injunctions - Topic 1805

Interlocutory or interim injunctions - Requirement of irreparable injury - Covenants not to compete (incl. non-solicitation clauses) - The British Columbia Court of Appeal discussed what constituted irreparable harm for purposes of an interlocutory injunction analysis respecting enforcement of a non-solicitation clause in an employment contract - The court stated that "The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio ..." - Thus, where potential damages arising out of solicitation were calculable, they did not constitute irreparable harm - See paragraphs 35 and 36.

Injunctions - Topic 1805

Interlocutory or interim injunctions - Requirement of irreparable injury - Covenants not to compete (incl. non-solicitation clauses) - The British Columbia Court of Appeal stated that "Non-competition covenants restrict a departing employee from seeking business generally. It usually will not be possible to tell whether business is lost to the employee's new employer as a result of prohibited competition as opposed to legitimate competition. Such damages, not being calculable, generally do constitute irreparable harm. To similar effect are actions which may damage the reputation of a former employer, or the general use of confidential information. It is important to recognize that, while these propositions may be true generally, the circumstances of each case must be considered. That is, while most improper solicitations may result in calculable damages, it must not be assumed that all will" - See paragraphs 37 and 38.

Injunctions - Topic 5971

Particular matters - Restrictive covenants - Covenant not to compete (incl. non-solicitation clauses) - [See all **Injunctions - Topic 1805**].

Cases Noticed:

6180 Fraser Holdings Inc. et al. v. Ali et al., [2012] B.C.T.C. Uned. 247; 2012 BCSC 247, dist. [para. 13].

MD Management Ltd. v. Dhut, [2004] B.C.T.C. Uned. 234; 2004 BCSC 513, dist. [para. 13].

Tracy v. Instaloes Financial Solutions Centres (B.C.) Ltd. et al. (2007), 246 B.C.A.C.

296; 406 W.A.C. 296; 2007 BCCA 481, refd to. [para. 19].
Onkea Interactive Ltd. v. Smith et al. (2006), 232 B.C.A.C. 226; 385 W.A.C. 226; 2006 BCCA 521, refd to. [para. 20].
Belron Canada Inc. v. TCG International Inc. et al. (2009), 279 B.C.A.C. 142; 473 W.A.C. 142; 2009 BCCA 577, refd to. [para. 23].
R.T. Investment Counsel Inc. v. Werry et al. (1999), 8 B.C.T.C. 183; 46 B.L.R.(2d) 66; 87 A.C.W.S.(3d) 1021 (S.C.), refd to. [para. 34].
RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al., [2000] B.C.T.C. 976; 2000 BCSC 1750, refd to. [para. 34].
BMO Nesbitt Burns Inc. v. Young et al., [2003] B.C.T.C. Uned. A14; 2003 BCSC 2076, refd to. [para. 34].
Prodigy Wealth Management Corp. v. James (Raymond) Ltd. et al., [2005] B.C.T.C. Uned. 869; 2005 BCSC 1863, refd to. [para. 34].
Aurum Ceramic Dental Laboratories Ltd. v. Hwang, [1998] B.C.T.C. Uned. 87 (S.C.), refd to. [para. 34].
ATB Securities Inc. v. RBC Dominion Securities Inc. et al., [2008] A.R. Uned. 636; 2008 ABQB 392, refd to. [para. 34].
Research Capital Corp. v. Yorkton Securities Inc. et al. (2002), 329 A.R. 190; 2002 ABQB 957, refd to. [para. 34].
BMO Nesbitt Burns Inc. v. Ord et al., [2007] O.T.C. Uned. D90 (Sup. Ct.), refd to. [para. 34].
MD Management Ltd. v. Campbell et al., [2010] O.T.C. Uned. 2315; 2010 ONSC 2315, affd. 2010 ONSC 6373 (Div. Ct.), refd to. [para. 34].
Nesbitt Burns Inc. v. Lange et al., [2000] O.T.C. Uned. 113 (Sup. Ct.), refd to. [para. 34].
Investors Group Financial Services Inc. v. Smith, [1994] N.S.J. No. 466 (S.C.), refd to. [para. 34].
RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al. (2007), 235 B.C.A.C. 126; 388 W.A.C. 126; 275 D.L.R.(4th) 385; 2007 BCCA 22, refd to. [para. 43].
Imperial Sheet Metal Ltd. et al. v. Landry et al. (2007), 315 N.B.R.(2d) 328; 815 A.P.R. 328; 2007 NBCA 51, refd to. [para. 43].

Counsel:

J. Forstrom, for the appellants;
V. Dixon, for the respondent.

This appeal was heard at Vancouver, B.C., on May 22, 2012, by Chiasson, D. Smith and Neilson, J.J.A., of the British Columbia Court of Appeal. The following judgment of the Court of Appeal was delivered by Chiasson, J.A., on July 3, 2012.

Appeal allowed in part.

Editor: Elizabeth M.A. Turgeon

Injunctions - Topic 1802

Interlocutory or interim injunctions - Requirement of irreparable injury - What constitutes
- An investment advisor with a national brokerage firm joined a competitor and so advised his clients - Within a few weeks, customer accounts of \$20.2 million were transferred to the competitor - The brokerage firm sued the investment advisor, alleging a breach of a non-solicitation clause in the employment agreement - The brokerage firm obtained an interlocutory injunction restraining solicitation and initiation of contact with the brokerage firm's clients - The investment advisor appealed - The British Columbia Court of Appeal allowed the appeal - There was a serious issue to be tried - However, the chambers judge erred in finding that there was irreparable harm - Rather, in this case, the potential damages arising out of solicitation, being calculable, did not constitute irreparable harm - The court rejected the argument that irreparable harm was established by the magnitude of the loss - The balance of convenience favoured the investment advisor - See paragraphs 15 to 56.

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- The British Columbia Court of Appeal discussed what constituted irreparable harm for purposes of an interlocutory injunction analysis respecting enforcement of a non-solicitation clause in an employment contract - The court stated that "The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio ..." - Thus, where potential damages arising out of solicitation were calculable, they did not constitute irreparable harm - See paragraphs 35 and 36.

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Injunctions - Topic 5971

Particular matters - Restrictive covenants - Covenant not to compete (incl. non-solicitation clauses) - An investment advisor with a national brokerage firm joined a competitor and so advised his clients - Within a few weeks, customer accounts of \$20.2 million were transferred to the competitor - The brokerage firm sued the investment

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