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Corporate Executives Who 'Moonlight' Beware

Alan Riddell and Kyle Van Schie



Today, an ever-increasing number of Canadians are choosing to work at more than one job, either out of financial necessity or to pursue a hobby which they enjoy. This past May, Statistics Canada reported that there are now approximately 946,000 Canadians who hold down more than one job. For many of those Canadians, the second job is running a part-time personal, or family, business after-hours or on weekends.

Employees who do this must be careful that their part-time job does not put them into a potential conflict of interest with their full-time job; otherwise, their full-time employer may have just cause to terminate them. In June, this was vividly highlighted when the CBC terminated the employment of Evan Solomon, the high profile journalist and host of "Power and Politics", after it was revealed in the Toronto Star that he was working part-time in a family art brokerage business in his free time.

In working after hours – or moonlighting – as a part-time art broker, Mr. Solomon earned significant commissions for helping to facilitate art deals with celebrities such as Bank of England Governor Mark Carney and Blackberry co-founder Jim Balsillie, whom he had met through his work at the CBC. The CBC fired Mr. Solomon on the grounds that his private business activities as an art broker had allegedly violated the CBC's written conflict of interest and ethics policies.

What does the law say about employee moonlighting?

Canadian employment law does not specifically preclude employees from moonlighting on the side by working for themselves or for another business after hours, unless this contravenes their employer's code of conduct or employment contract, or involves an inherent conflict of interest with the employee's day job. Where that moonlighting contravenes the code of conduct or the contract, or where there is an inherent conflict of interest, the employer may have just cause to terminate the moonlighting employee, without notice or pay-in-lieu of notice.

When will moonlighting involve an inherent conflict of interest?

Employees may be in a conflict of interest where they work after-hours for a competitor of their employer, or for someone with whom their employer does business. All employees have a duty to act in good faith and to be loyal to their employers. Working for a competitor or supplier, without their employer's knowledge or authorization, may potentially put them in breach of that duty.

Conflicts of interest can also arise in other ways, such as when an employee exploits a business opportunity which he learned of while working for his employer, or where he uses proprietary or confidential information which he acquired while in the course of his job, without obtaining prior authorization.

In addition, conflicts of interest can arise where the employee uses the employer's time or resources to further his own private business affairs, or alternatively where his private business results in absenteeism, persistent late arrival, lower productivity or scheduling issues which affect his employer.

A vivid illustration of this is provided by the recent decision of the British Columbia Supreme Court in *Patterson v. The Bank of Nova Scotia* 2011 BCPC 120 (CanLII). That case involved a bank employee who had been dismissed when she refused her employer's request that she quit her existing part-time job as a real estate agent. The Court found that her part-time real estate work placed her in a potential conflict of interest with her banking job because she stood to earn commissions from the purchase of new homes by her prospective real estate clients who *could* be seeking mortgages from the bank to buy the very homes which she was helping them acquire. The Court determined that her real estate work put her in breach of the bank's conflict of interest policies. It also determined that she was using her employer's time for her own business interests, as she was handing out business cards to bank clients during regular working hours at the bank. As a result, the Court concluded that by failing to quit her part-time real estate job, she gave the bank just cause to terminate her employment, without notice or pay-in-lieu of notice.

Even where the employee's moonlighting has not led to an *actual* conflict of interest, the mere *potential* of a conflict can amount to sufficient just cause to terminate the

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employee. This is because even a potential conflict of interest can justifiably cause an employer to lose trust and confidence in the employee. By way of example, if a bank employee grants a loan to an individual with whom she has some financial involvement, the bank may reasonably lose confidence in her even though it suffers no actual loss.

However, not every potential conflict of interest between two jobs will give rise to just cause for dismissal. The potential for conflict must be clear and unambiguous. It is largely irrelevant whether the employee herself understands there to be a conflict of interest. Instead, the court will look to the following factors to determine whether or not a potential conflict of interest gives rise to just cause for dismissal: the employee's education, honest belief, position with the employer, the seriousness of the conflict, whether the employer has specifically prohibited the outside work, whether there was any dishonesty, and whether the employer's resources were used in the secondary business.

When will moonlighting contravene the employer's code of conduct or employment agreement?

Nowadays, many employment contracts contain a 'no-conflict' clause expressly prohibiting employees from engaging in certain other forms of employment. A breach of that clause can constitute just cause for termination of the employee's employment.

In addition, employers often require their employees to sign codes of conduct containing provisions which explicitly limit their secondary employment options. If signed by the employees, for good and valuable consideration, such provisions become an integral part of their employment contract. Should the employees subsequently contravene those provisions, the employer may have the legal right to terminate their employment without notice or pay-in-lieu of notice.

What will likely happen to Evan Solomon?

Should Mr. Solomon grieve his employer's decision to dismiss him, an arbitrator would first need to determine if his art brokerage activities contravened the CBC's conflict of interest policies, as alleged by the CBC in the media. If such contravention of the policies did indeed occur, then the arbitrator would have to decide whether the termination was an appropriate form of discipline in view of all the relevant circumstances of Mr. Solomon's situation.

It is distinctly possible that the arbitrator might choose to reinstate Mr. Solomon to his job at the CBC, and substitute a lesser form of discipline, for two reasons. Firstly, the wording of the CBC's Code of Conduct, forbidding employees to "use their positions to further their personal interests," is vague and potentially ambiguous, thereby making it possible for Mr. Solomon to argue that no reasonable employee would conclude that it prohibited him from selling art after-hours.

Secondly, it is not yet clear that Mr. Solomon's art brokerage activities ever had the potential to conflict with his work as host of *Power and Politics*, either by influencing his choice of whom to invite onto the show or what questions to ask of them. Based on the evidence revealed thus far in the media, it would appear that neither Mark Carney, nor Jim Balsillie appeared on *Power and Politics* either during, or after, the time Mr. Solomon was selling them art. As a result, his moonlighting activities may not have had any significant potential to conflict with his duties as host of his show.

Ultimately, whether the CBC is ordered to reinstate Mr. Solomon to his job will depend partly on (i) whether any of his immediate superiors at the CBC were previously aware of his after-hours business dealings, and (ii) whether he ever tried to conceal, or mislead the CBC about, those business dealings. If it is eventually revealed that one or more of his supervisors were aware of his private business activities and did nothing to stop him, then the CBC will likely be deemed to have acquiesced to Mr. Solomon's breach of the CBC's conflict of interest policies – a factor that would almost certainly guarantee his reinstatement to his former job. On the other hand, if the arbitrator determines that he was dishonest with the CBC, this would likely result in the dismissal being upheld because deliberately misleading one's employer, on a material fact, is a breach of trust, which is integral to the employment relationship.

As an employer, what steps can you take to reduce potentially harmful moonlighting by your employees?

As an employer, there are several ways you can prevent your employees from engaging in private business activities which conflict with your company interests. These include:

- (i) Inserting a 'no conflicts' clause into your company's employment agreement template;
- (ii) Drafting conflict of interest guidelines for your employees; and
- (iii) Creating a code of conduct which clearly defines what outside business activities your employees may and may not engage in.

To be enforceable, such documents must be clear and unambiguous. They must also be clearly communicated to, and then agreed to, by the employees. To be legally binding on current employees, it may be necessary to provide fresh financial consideration to those employees at the time that they sign the code of conduct, or guideline, or revised employment agreement. This is because in Canadian employment law, significant changes to an employee's employment obligations, even if done with the employee's consent, are not generally enforceable against him in the absence of fresh consideration.

Given the inherent difficulty of enforcing codes of conduct and conflict of interest guidelines, a prudent employer will enlist the help of an experienced employment lawyer to assist with the drafting and execution of such documentation.

As an employee, what steps can you take to reduce the risk of being terminated as a result of your private business activities after-hours?

A wise employee who wants to engage in personal business activities on the side will discuss these with his employer. While the law does not require employees to disclose their personal business activities to their employer, it is prudent to do so. Such a discussion may quickly satisfy the employer that there is no serious potential for a conflict of interest to arise between the two jobs. Moreover, once the employee has fully and truthfully disclosed his personal business activities to the employer, and the employer does not forbid him from continuing with them, the employer will be precluded by its inaction from subsequently claiming that those activities amounted to a conflict of interest, and that they constitute just cause for dismissal.

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