DSF NEWS

DEVRY SMITH FRANK *LLP* NEWSLETTER **WINTER 2015 ISSUE**

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WHAT DSF CAN DO FOR YOUR START-UP BUSINESS

BY ELISABETH COLSON, B.A. (HONS.), LL.B. & ANTHONY-GEORGE D'ANDREA, STUDENT-AT-LAW | *JANUARY 22, 2015*

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When someone asks you what it takes to create a successful business, a few things might come to mind: ingenuity, entrepreneurial spirit, and a great marketing plan to make sure the public knows about the product or service you are offering.

While these may very well be necessary, many people don't immediately think of the equally important behind-the-scenes details, which can include: how the business should be structured, what operational contracts are required and how they should be drafted, how to properly paper hiring employees, how the business will obtain the necessary financing, and, if you will be leasing or buying the land on which the business premises are located, what kind of agreements should be in place.

These building blocks play a crucial role in getting your business on its feet at the outset. Forging ahead without a strong legal foundation can potentially hinder the growth of the business, and might give rise to legal troubles in the future.

DSF's lawyers ensure that your business has the legal framework necessary for a successful start. We are particularly proud of our work with our client Bonne O, the developer of a tank-free, "pre-mix" home carbonation system. DSF helped Bonne O with two successful rounds of private equity financing, advised Bonne O with respect to its key vendor contracts, and continues to ensure that Bonne O's interests are protected. Bonne O is now on its way to launching its product in May 2015. Check them out at: www.bonneo.com

Think your start-up business might be missing a few of the crucial building blocks? DSF's experienced corporate law team will make sure that your business has what it takes to succeed. Visit us at www.devrylaw.ca/business-law-corporate-law-services-acquisitions/.

BREACHING CONFIDENTIALITY PROVISIONS OF A SETTLEMENT AGREEMENT CAN COST YOU!

BY MARTY RABINOVITCH, B.A.H., LL.B. & JOANNE SCHIFFER, STUDENT-AT-LAW | *FEBRUARY 12, 2015*

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To discourage the disclosure of details of settlements to third parties, confidentiality provisions are often included in settlement agreements between an employer and a former employee. In *Northfield Metal Products Ltd. v Parsons* (1991), the Ontario Labour Relations Board stated that the purpose of confidentiality provisions is to protect the value of the settlement to the employer. Even if the specific amount of the payment is not revealed, the disclosure that a payment was made could diminish the employer's denial of liability and expose it to complaints from further employees.

In the November 3, 2014 decision of *Jan Wong v The Globe and Mail Inc.*, the Ontario Superior Court upheld the arbitrator's decision that Ms. Wong's book entitled *Out of the Blue* contained language that breached the confidentiality provision of her settlement agreement with her former employer, *The Globe and Mail Inc*. The court also upheld the arbitrator's decision to enforce the consequences of the breach, as set out in the settlement agreement. As a result of Ms. Wong's breach, she was required to repay $209,912.00 to her employer.

At the hearing, Ms. Wong maintained that it was her belief that she was prohibited only from revealing the specific amount that she was paid.

Ms. Wong's book included the following phrases:

"...I can't disclose the amount of money I received."

"I'd just been paid a pile of money to go away..."

"Two weeks later a big fat check landed in my account."

"Even with a vastly swollen bank account..."

The confidentiality provision provided that the parties agreed "not to disclose the terms of this settlement." The court found that the above phrases constituted a breach, since they made it clear that Ms. Wong received a payment from *The Globe and Mail Inc*.

Ms. Wong also unsuccessfully argued that the repayment clause was, in fact, a "penalty" clause and that in the circumstances of this case, it would be unfair and unconscionable to require her to repay the funds to *The Globe and Mail Inc.* The arbitrator found that the settlement agreement was freely entered into by experienced and sophisticated parties. There was evidence that Ms. Wong understood the terms of the settlement. In addition, she had months to negotiate and consider its terms and she was represented by an experienced labour lawyer.

A similar case, *Gulliver Sch., Inc. v Snay*, was decided in Florida in February 2014. The former headmaster of a private school, Snay, reached a settlement with his former employer, Gulliver, regarding a discrimination lawsuit. Within days of the parties reaching a settlement, Snay's daughter updated her Facebook status to say:

"Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

In this case, the settlement agreement also included a confidentiality provision which prohibited Snay from disclosing the terms of the settlement to anyone, with limited exceptions, and that the breach of this provision would result in the repayment of the money received by Snay. The Florida Third District Court of Appeal concluded that Snay was no longer entitled to receive the $80,000.00 payment in accordance with the settlement agreement due to the breach of the confidentiality clause.

While it may appear that the employers "won" the Jan Wong and Gulliver cases, the employers arguably did not receive the confidentiality that was bargained for. As an employer, it is important to be certain that the former employee understands what constitutes a breach of the confidentiality provision.

In *Barrie Police Services Board v Barrie Police Association*, 2013, a former employee breached the confidentiality provision of a settlement agreement. In this case, the settlement agreement did not set out any consequences for a breach. The arbitrator nevertheless ordered the former employee to repay the money he received under the settlement. The arbitrator concluded that the former employee had deliberately breached the confidentiality provision and found that this remedy was necessary to act as a deterrent for similar future breaches.

To strengthen the effectiveness of the confidentiality provisions in settlement agreements, employers should consider the following:

1. Include a provision that sets out the consequences for a breach of the confidentiality provision.

2. Have a lawyer review the confidentiality clause to ensure that the consequences for a breach will be construed as a reasonable enforcement mechanism, and not as a "penalty" clause (the latter of which would require proof of damages).

3. Ensure that the former employee obtains independent legal advice throughout the negotiation process and that there is evidence that the former employee understands the terms of the settlement.

4. Ensure that the confidentiality clause is specific and addresses the types of situations which would constitute a breach.

WEAR A SEATBELT - IT'S THE LAW!

BY MARC G. SPIVAK, B.COMM., B.C.L., LL.B. | *FEBRUARY 11, 2015*

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A recent survey found that the top reasons people didn't wear seatbelts were: forgetfulness, discomfort, and the fact that they were just driving a short distance. In the event of a collision, the decision not to wear a seatbelt can put more than yourself and your passengers in danger.

Upon impact, unbelted passengers become projectile objects and increase the risk of injury and death to other occupants of the vehicle by 40%. In a frontal collision, an unbelted rear-seated passenger sitting behind the belted driver increases the risk of the driver's fatality by 137% when compared to collisions where the rear-seated passenger is belted and does not hit the back of the driver's head.

But perhaps more importantly, not only is the safety of the driver and passengers in the one vehicle jeopardized, but also that of the occupants of other vehicles. These individuals could end up coming into contact with a body after it is propelled through the windshield and onto another car or roadway.

In a claim for personal injuries resulting from a motor vehicle accident, any person may have their compensation reduced by anywhere up to 50% for failing to wear a seatbelt. This is because insurers consider the injured person partially at fault for failing to wear their seatbelt.

If these statistics did not scare you enough, Ontario's *Highway Traffic Act* also has provisions governing the use of seat belts. The Act requires all persons in motor vehicles to wear seat belts. The Act also places an obligation on the driver to ensure all young passengers are wearing their seat belts. In the event a police officer has reason to believe that a passenger is contravening the Act and not wearing their seatbelt, the officer can ask that individual to provide identification. In addition, every person who contravenes or fails to comply with the seat belt provisions is guilty of an offence and on conviction of that offence is liable to a fine of no less than $200.00

A correctly worn seat belt not only helps to contain occupants in their seats, but also allows most of the collision forces to be applied across the chest and the pelvic region. A properly fitted shoulder belt should lie securely across the chest and shoulders, and the lap belt should lie securely across the upper thighs or pelvis. While a properly worn seat belt no doubt is effective in minimizing a person's injuries in a collision, many newer vehicles go that extra step by adding seatbelt pretensioners that tighten up the slack in the belt during a collision.

As a personal injury lawyer for many decades, I would never let anyone ride in my car without first ensuring their utmost safety by checking to make sure they are wearing a securely fastened seat belt. I encourage you to do the same.

DSF IN THE COMMUNITY

ELDAD GERB : FUTURE BENCHER?

Eldad Gerb has submitted an application to become a Law Society bencher in the upcoming election. The Law Society of Upper Canada is governed by a board of directors (a.k.a. benchers) who, through their committee work and convocation meetings, set policy and determine other matters related to the governance of Ontario's lawyers and paralegals. The next bencher election is April 30, 2015. All lawyers in Ontario will be eligible to vote from April 13 to April 30, 2015. Good luck, Eldad!

COMMUNITY SERVICE AWARD

Robert Adourian, an active member of the Armenian Community, received a Community Service Award from St. Mary Armenian Apostolic Church of Toronto in January.

WELCOME TO DSF!

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MI YOON
Law Clerk/Assistant

Mi Yoon joins our Commercial Litigation group. She brings several years of experience as Commercial Litigation Assistant/Clerk.

UPCOMING EVENTS

*HR/EMPLOYMENT SEMINAR

FEBRUARY 26, 2015– INTERCONTINENTAL TORONTO YORKVILLE

ANNUAL SPRING MEETING (ASM)

MAY 7-9, 2015– METRO TORONTO CONVENTION CENTRE, SOUTH BUILDING, BOOTH #125

To register for this event and for more information, please contact Joanna Esposito at *416-446-5819* or *joanna.esposito@devrylaw.ca

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