SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

British Columbia Court of Appeal Upholds Three-Year Employment Commitment in Asset Purchase Agreement Despite Early Termination Provision in Employment Agreement *~ A Tangled Tale of Imprecise Drafting*

Arash Farzam-Kia
July 2026

When a purchaser acquires a business and retains as an employee a C-suite executive of the seller, the transaction does not end on closing. The parties must also manage the ongoing employment relationship. In *Facility Condition Assessment Portfolio Experts Ontario Ltd. v Bouchard*,[1] the subsequent breakdown of the employment relationship gave rise to a costly clash between a fixed-term employment agreement and a post-sale non-compete.

The decision reminds us that, in any transaction where there are several moving parts (commercial and employment-related, for example), if the various agreements do not align, commercial terms may impact the interpretation of employment terms, creating unintended ambiguity and employment liability.

This is precisely why, whenever our team is brought into a commercial transaction to advise on the employment or labour aspects, we ask for an opportunity to review **all** the commercial and employment-related agreements and documents. We know from experience, there is often hidden liability, only a skilled employment lawyer will identify.

What happened in the BC case?

Joseph Bouchard sold his engineering consulting business to Facility Condition Assessment Portfolio Experts Ontario Ltd. ("FCAPX"). To facilitate the deal, the parties executed three agreements: 1. Asset Purchase Agreement, 2. Non-Solicitation and Confidentiality Agreement, and 3. Employment Agreement.

The Asset Purchase Agreement included a three-year consulting guarantee and a three-year "restrictive covenant" barring Bouchard from competing against FCAPX within a 100-kilometer radius of where FCAPX carried on business.

The Employment Agreement provided that FCAPX could terminate Bouchard's employment: (i) at any time, for cause, or (ii) at any time, without cause, "with notice, or pay in lieu of such notice, and

[1] 2026 BCCA 89.

any severance pay required by the *Employment Standards Act.*" Significantly, the Employment Agreement stated that the terms and conditions of the Asset Purchase Agreement would "supersede any related/relevant clause" in the Employment Agreement.

The Non-Solicitation and Confidentiality Agreement provided that Bouchard would not "directly or indirectly solicit, interfere with or endeavour to entice away" any of FCAPX's current or prospective customers or clients within a 100-kilometer radius.

Almost two years after the sale, the employment relationship broke down, and FCAPX terminated Bouchard's employment. FCAPX provided Bouchard with his minimum statutory entitlements to termination pay and benefits in accordance with the Employment Agreement. Bouchard then proceeded to perform work for former FCAPX clients, in violation of the non-compete agreement.

Both parties sued each other:

- Bouchard sued FCAPX for breach of the employment contract, alleging he was guaranteed employment for three years.
- FCAPX sued Bouchard for breach of his non-compete agreement.

The trial judge allowed both claims in part, finding:

- The parties had agreed to a three-year fixed-term of employment and FCAPX breached that agreement when it terminated Bouchard. He was therefore entitled to his salary for the remainder of the three year term.
- Bouchard breached his non-competition agreement. FCAPX was therefore entitled to damages for its lost profits resulting from the breach.

Both parties appealed, and the British Columbia Court of Appeal dismissed both appeals, agreeing with the trial judge.

The Court of Appeal decision

Fixed-term contract enforceable

Because the Asset Purchase Agreement "superseded" the Employment Agreement, the court held the early termination provision in the Employment Agreement did not apply. Instead, Bouchard was entitled to the benefit of the three-year guarantee under the Asset Purchase Agreement. The court found this interpretation aligned with the parties' intent, as it was unlikely Bouchard would agree to the three-year non-compete agreement without the corresponding guarantee of three years of employment.

No duty to mitigate

The parties agreed Ontario law would govern. In Ontario, when an employer ends a fixed-term employment agreement, unless there is a valid early termination provision, the employee is entitled to receive what they would have been paid under the full length of the contract, and there is no deduction for mitigation. This Ontario approach is different from British Columbia where mitigation earnings would be deducted.[2]

Non-compete agreement enforceable

In the employment context, a non-compete agreement is often found unenforceable because it is considered overly restrictive and prevents an employee from making a living. However, a non-compete agreement in the context of the sale of a business is different. Courts consider this a commercial restraint without the same concerns for an employer/employee power imbalance.[3]

The non-compete in the Asset Purchase Agreement was therefore assessed as a covenant within a commercial contract and the court held "the restriction or agreement to not compete is itself part of what is being sold." FCAPX was therefore entitled to damages for its lost profits resulting from the breach.

Key takeaways and best practices

These are not straight-forward issues, and the cost of getting it wrong can be significant. Shameless plug aside - best practice is to work with experienced employment counsel, with a sophisticated understanding of the intersection between commercial transactions and employment and labour law. We understand…

- **Overlapping agreements rarely end well.** In a commercial transaction, it is not uncommon to have employment terms as part of the deal, both within the commercial documents and as stand-alone agreements. The risk is that if the terms do not align, a court will adopt an interpretation that seeks to achieve harmony among them all. This may result in a commercial term impacting the interpretation of an employment term, creating ambiguity and unintended employment liability.

- **Separate employment agreements from commercial agreements.** In most cases, there is no need to include employment-related concepts in a commercial agreement. Keep the concepts consistent but separate.

- **A non-compete can [still] be a significant tool to protect a buyer in a commercial transaction.** Unlike in the traditional employment context, a non-compete agreement in the context of a purchase and sale is more likely to be enforceable. This is an important tool to protect the purchaser's interests. Even in Ontario (and under pending amendments to the *Canada Labour Code*), an enforceable non-compete is permitted if a purchaser acquires a business and retains as an employee a C-suite executive of the seller.

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[2] The court noted that even if British Columbia law applied, the outcome may not have changed. This is because FCAPX sought enforcement of a non-compete that prevented Bouchard from earning income during the same period. When an employee cannot compete against a former employer, it is more difficult for an employer to argue the employee failed to mitigate.

[3] In Ontario, the law goes even further. A non-compete is prohibited under the *Employment Standards Act* with limited exceptions, including when a purchaser acquires a business and retains as an employee a C-suite executive of the seller.

- **A fixed term employment agreement has its risks.** A fixed term agreement may be an attractive option in certain circumstances. However, unless the agreement includes an enforceable early termination provision, in some Canadian jurisdictions (*e.g.*, Ontario), a wrongfully dismissed employee will be entitled to liquidated damages for the balance of the term, with no duty to mitigate.

- **Choice of law matters**. In this BC decision, the parties agreed Ontario law applied, and the Ontario rule with respect to mitigation was less advantageous to the buyer than British Columbia's rule. While there may have been commercial reasons to choose Ontario law, employment considerations may have been overlooked, to the detriment of the buyer.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

Arash Farzam-Kia *is a lawyer with* ***Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers****. Arash can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.*