

TO: CLIENTS AND OTHER INTERESTED PARTIES

**RE: ROPER GREYELL NEWSLETTER –
JANUARY / FEBRUARY 2007**

CONTINUING EMPLOYEE DISHONESTY AS GROUNDS FOR DISMISSAL

Introduction

This newsletter focuses on the recent decision of the B.C. Supreme Court in *Proctor v. Wal-Mart Canada Corp.*¹

This is a noteworthy decision because it confirms that continuing employee dishonesty may, in appropriate circumstances, constitute grounds for summary dismissal of even a long-term employee.

Proctor v. Wal-Mart Canada Corp.

Facts

The 47-year old plaintiff, Vern Proctor, was a store manager and long-term employee of Wal-Mart Canada Corp.

Mr. Proctor was employed by Woolco from 1974 until 1994, when Woolco was purchased by Wal-Mart. In the last two years of his employment with Woolco, Mr. Proctor was co-manager of an Alberta store. He continued in that position after Wal-Mart took over, and oversaw the transition of the store from one company to the other.

In early 2000, Mr. Proctor was promoted to store manager of a Wal-Mart store in Saskatchewan. He held that position until mid-2001. From that time until late 2002, Mr. Proctor was store manager of another Wal-Mart store in Alberta.

In late 2002, Mr. Proctor was promoted to a much larger Wal-Mart store in Langley, British Columbia. He was responsible for 18 departments, and had four assistant managers and 345

¹ Madam Justice Wedge of the B.C. Supreme Court delivered her oral reasons for judgment on October 20, 2006. An official transcript of the reasons for judgment only became available at the end of January 2007.

associates reporting to him. Revenues generated by the Langley store were in the range of \$65 million annually.

As store manager, Mr. Proctor occupied a position of responsibility and trust. He was “the top managerial presence in the store on a day-to-day basis”. He was responsible for “enforc[ing] Wal-Mart policies and procedures, protect[ing] store assets, supervis[ing] the assistant managers in matters of employee hiring and discipline, and oversee[ing] all financial matters related to the operation of the store”.

In January 2003, Wal-Mart was informed that Mr. Proctor had charged certain personal office supplies to the store account, and that Mr. Proctor’s wife had purchased a pond kit for her garden at a significant discount.

On the basis of that information, Wal-Mart decided to review the record of Mr. Proctor’s discount purchases at the store.

Wal-Mart discovered that, on December 26, 2002, Mr. Proctor had purchased a Palm Pilot M130 (the “Palm Pilot”) at a much reduced price after, among other things, improperly taking advantage of a price “match”. By way of background, Wal-Mart has a policy of “matching” a competitor’s price if a customer brings to Wal-Mart’s attention that the competitor is offering a particular item of merchandise at a lower price.

Wal-Mart also discovered that Mr. Proctor had – on a number of occasions – breached the Wal-Mart “understocking” policy. That policy absolutely prohibits “employees taking merchandise from the shelf and placing it on hold elsewhere in the store for later purchase”. Breach of the understocking policy is considered by Wal-Mart to constitute serious misconduct.

Returning to Mr. Proctor’s purchase of the Palm Pilot, according to the cashier who processed the transaction, Mr. Proctor alleged that the item was being sold at Future Shop for \$299, which was \$100 less than Wal-Mart’s price. He told the cashier he wanted a price match. Mr. Proctor did not have any means of verifying the alleged Future Shop price. When the cashier asked whether she should call Future Shop for purposes of price verification, Mr. Proctor had told her that was not necessary. The cashier processed the transaction as directed.

After conducting a relatively lengthy and thorough investigation of allegations of misconduct against Mr. Proctor, Wal-Mart took the decision to summarily dismiss him.

The termination letter – which summarized the results of Wal-Mart’s investigation – read, in part, as follows:

“You instructed the courtesy desk associate to charge you a reduced price of \$299.85 based on a competition price that you quoted without the support of a flyer ... You instructed the courtesy desk associate to not verify the price with the competition. This is a flagrant, gross abuse of your authority as a Store Manager ... Our investigation revealed that the price that was quoted in the competition flyer was \$299.85 after a

manufacture[r]'s mail-in rebate. The original price was \$399.85 at the competition ... The \$100 off is a rebate for the customer at the manufacturer's expense, and your actions resulted in a direct loss of \$100 for the store and a resultant financial gain for you.

After your suspension, you attended at the competition, and asked them to provide a written quote stating that the price of the palm pilot was \$299.85. You specifically instructed that the quote should make no mention of the mail-in rebate. You then wrote on the quote yourself 'In-store special at this price, not mail-in rebate'."

As the termination letter makes obvious, the "central and primary reason for Mr. Proctor's termination" was "the purchase of the Palm Pilot **and the alleged dishonesty during the investigation**" [emphasis added].

As noted by the termination letter, during the course of Wal-Mart's investigation, Mr. Proctor:

- "attended at the competition, and asked them to provide a written quote stating that the price of the palm pilot was \$299.85";
- "specifically instructed that the quote should make no mention of the mail-in rebate"; and
- "wrote on the quote [himself] 'In-store special at this price, not mail-in rebate'".

Needless to say, Mr. Proctor went to great lengths to conceal his original misconduct in respect of the Palm Pilot and to frustrate Wal-Mart's investigation. He went so far as to manufacture evidence.

Throughout Wal-Mart's investigation, Mr. Proctor was evasive and far from forthright with his employer. For example:

- Mr. Proctor said he did not recall being asked by the cashier who processed the Palm Pilot transaction whether she should call Future Shop for purposes of price verification. He further maintained he had no recollection of telling the cashier that it was unnecessary to call Future Shop to verify the alleged price.
- Mr. Proctor suggested, on at least one occasion, that the Palm Pilot was being sold for \$299 at Future Shop. During the course of its investigation, Wal-Mart found that, in December 2002, Future Shop was not selling the Palm Pilot for that price. Mr. Proctor's response to that finding was that he may have seen the item on sale at Staples. Later still, he suggested the competitor that had the Palm Pilot on sale may have been Office Depot.
- In a written statement provided by Mr. Proctor during the course of Wal-Mart's investigation, he wrote, in part, the following:

“On Christmas Day, when the Boxing Day ads came out we checked Staples and noticed that the ... [Palm Pilot was] ... on sale for \$100.00 off ... I actually ... brought in the counter labels from Staples and showed them to Steve in Electronics telling him about the price difference.”

During its investigation, Wal-Mart learned that, in December 2002, Staples was not selling the Palm Pilot for \$299. Moreover, “Steve” – the employee in the electronics department to whom Mr. Proctor referred in his written statement – denied that he was given “counter labels from Staples”, told a competitor was offering the Palm Pilot for \$299, and instructed to “follow up on this information”.

- Notwithstanding that Mr. Proctor had been a Wal-Mart manager for many years, and that the Wal-Mart understocking policy was “central to Wal-Mart’s operations” and was “in writing, and ... clear and concise”, he disavowed knowledge of the policy.

In light of the foregoing, Wal-Mart formed the view that Mr. Proctor “repeatedly demonstrated a lack of integrity and trustworthiness such that he could not continue as an employee” and engaged in “conduct consist[ing] of sustained dishonesty going to the root of the employment relationship”. It was significant to Wal-Mart that Mr. Proctor occupied a “position of responsibility and trust as store manager”.

Mr. Proctor contended that Wal-Mart did not have just cause for dismissal. He commenced wrongful dismissal proceedings against Wal-Mart.

Law

Madam Justice Wedge canvassed the law relating to summary dismissal of an employee on the basis of dishonesty.

She began with the 2001 decision of the Supreme Court of Canada in *McKinley v. BC Tel*. In that decision, Mr. Justice Iacobucci – delivering the unanimous judgment of the Court – articulated the “test to be applied in determining whether employee dishonesty could be grounds for dismissal for just cause”. In particular, he stated the following:

“I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

As noted by Madam Justice Wedge, in *McKinley v. BC Tel*, the significant observation was

made that just cause for dismissal likely exists where the employee in question has engaged in theft, misappropriation or serious fraud.

Madam Justice Wedge then turned her attention to the 2006 B.C. Supreme Court case of *Poirier v. Wal-Mart Canada Corp.* In that case, the plaintiff was a store manager and an almost 15-year employee of Wal-Mart. He was summarily dismissed for manipulating payroll in order to make it appear he was keeping staff salaries within budget. The plaintiff received no personal financial gain from the payroll manipulations.

In *Poirier v. Wal-Mart Canada Corp.*, while the payroll manipulations probably – in and of themselves – constituted grounds for dismissal, the fact that the Plaintiff was “**dishonest and evasive during the course of [Wal-Mart’s] investigation provided further justification for termination**” [emphasis added].

The Court in *Poirier v. Wal-Mart Canada Corp.* found it important that the plaintiff occupied a position of responsibility and trust. As highlighted by the Court, the plaintiff “was trusted to work with a high degree of autonomy and **to report truthfully and completely to those in positions senior to his**” [emphasis added].

Madam Justice Wedge also made reference to the 1991 B.C. Supreme Court case of *Chisamore v. Molson Brewery of Canada Ltd.* In that case, the plaintiff – who was a distribution superintendent for the defendant employer – was summarily dismissed because, among other things, he had given away beer to an employee. The distribution superintendent position was a significant position with a starting salary of \$55,000 per year and supervisory responsibility for many employees.

In *Chisamore v. Molson Brewery of Canada Ltd.*, in upholding the dismissal of the plaintiff, the Court stated the following:

“In this case, [the plaintiff] was dismissed **because he had been less than frank and honest when he was asked** first by [the personnel manager and then by the brewmaster and production manager] whether any beer had been given out for work done at the warehouse. It may have been wrong of him to give out beer at all, but that is not why he was dismissed and indeed I would not have considered that of itself cause for dismissal ... However, **when [the brewmaster and production manager] asked directly whether any beer had been given out and [the plaintiff] answered ‘no’ he breached the implied duty of faithfulness and honesty he owed to his immediate superior.**”

[Emphasis added.]

Decision

Madam Justice Wedge concluded that Wal-Mart had just cause to dismiss Mr. Proctor.

A reading of *Proctor v. Wal-Mart Canada Corp.* makes one thing clear. The judge's conclusion was founded largely on the fact Mr. Proctor persisted in his dishonest conduct.

In light of the fact Mr. Proctor was a long-term employee of Wal-Mart, Madam Justice Wedge opined that his original misconduct in respect of the Palm Pilot may not have constituted grounds for summary dismissal.

However, as noted by the judge, Mr. Proctor did much more than "quietly [taking] advantage of a fictitious discount". He engaged in continuing dishonesty when confronted with allegations of misconduct and throughout the course of Wal-Mart's investigation. More specifically, he:

- made efforts "to conceal his original misconduct";
- told "multiple untruths to Wal-Mart management"; and
- "attempted to obstruct [Wal-Mart's] investigation by manufacturing evidence".

As a consequence, Mr. Proctor "systematically destroyed" the "trust reposed in him by Wal-Mart":

As Madam Justice Wedge put it, Mr. Proctor "spun a web of lies ... which could only be supported by falsely implicating rank-and-file employees for whom he was responsible and a third party who was unwittingly involved in Mr. Proctor's misconduct".

As a side note, Madam Justice Wedge found Mr. Proctor's disavowal of knowledge of the Wal-Mart understocking policy to be "startling". It appeared to her that he was "the only person who did not understand the importance of the understocking policy". The judge ruled it was "improbable that Mr. Proctor did not know and understand the policy or appreciate its importance to his employer".

Conclusion

Proctor v. Wal-Mart Canada Corp. makes it clear that continuing employee dishonesty is serious misconduct, and may constitute grounds for dismissal of even a long-term employee. This is particularly so where the employee occupies a position of responsibility and trust.

To use the language of *McKinley v. BC Tel*, continuing employee dishonesty may well constitute the type of conduct that gives "rise to a breakdown in the employment relationship", "violates an essential condition of the employment contract", "breaches the faith inherent to the work relationship", or "is fundamentally or directly inconsistent with [an] employee's obligations to his or her employer".



Please do not hesitate to contact any member of our firm if you have questions regarding *Proctor v. Wal-Mart Canada Corp.* or the issue of continuing employee dishonesty as grounds for dismissal, or if you wish to have information on any other employment or labour law issue.

Lawyer contact information can be obtained by telephoning us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

COUNSEL FOR WAL-MART CANADA CORP.

Counsel for the defendant employer in *Proctor v. Wal-Mart Canada Corp.* were Gregory J. Heywood, a partner with Roper Greyell LLP, and Marino J. Sveinson, an associate lawyer with our firm.

Greg and Marino advise and represent clients in employment and labour relations matters. They also provide advice and representation with regard to human rights issues in the workplace. Greg and Marino have appeared on behalf of clients before all levels of court in B.C. and a wide variety of other adjudicative and administrative bodies.

Greg can be contacted by telephone at (604) 806-3841. He can also be reached by e-mail at gheywood@ropergreyell.com. Marino's telephone number is (604) 806-3875. His e-mail address is msveinson@ropergreyell.com.

For more information about Greg and Marino and our other lawyers, please visit the firm's website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *