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Ontario Court of Appeal Rules Non-Competition Clause Unenforceable

Allison Taylor

Employers will be disappointed to hear the results in the recent Court of Appeal decision in *Mason v. Chem-Trend Limited Partnership*, in which an employee, after being terminated for cause, asked the court to declare the restrictive covenant in his employment contract unenforceable. Although unsuccessful in the first instance, his appeal was allowed by the Court of Appeal on May 3, 2011.

First Hearing of the Application

At the initial hearing, the court noted that the employee had acquired detailed knowledge about the employer and its customers and products which was well beyond the scope of his own personal geographic territory, in the course of attending annual sales and product meetings, but that the employer's operations were "extremely guarded and protected" and that the employer had no access to current or older customer lists or to compound lists or formulas.

The Judge looked at the (inherently global) geographic scope and the temporal scope of the covenant and held that they were reasonable. He also held that a covenant restricting activity in competition with the employer was justifiable by virtue of the employee's access to information about the employer's business and his technical knowledge of the industry.

On Appeal

The Court of Appeal, while recognizing that the employer had trade secrets, confidential information and contacts that it was entitled to protect, held that the Judge had erred in concluding that the complete prohibition on competition was not an overly broad restriction.

The court noted that there was a confidentiality provision in the employment contract protecting trade secrets and confidential information. In addition, it noted the excessiveness of

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restricting the ability to seek business from anyone who had ever been a customer of the employer during the seventeen year tenure of the Appellant.

Moreover, not having access to customer lists of the employer, the employee had no way of knowing with whom he was restricted from dealing. Accordingly, the restriction was not only ambiguous in this respect but, for all intents and purposes, restricted any type of competition whatsoever as a result.

Finally, because the employee was not a member of upper management, a broad proscription on competition could not be justified. The Court therefore concluded that for a salesman, keeping in mind the public interest in open competition, the covenant was not enforceable.

It is clear that at the initial hearing, the Judge was overly influenced by the technical skills of the employer, basing his analysis on what amounted to skills gained from years in the industry as opposed to specific knowledge of highly sensitive technical or strategic information on behalf of the employer which could not be protected by the confidentiality clause.

For a salesperson, even one invited to sales and product meetings and given information about the employer's general plans and direction, it would be very rare indeed for a clause to be sufficiently limited so as to successfully preclude competition altogether. Certainly a clause which restricted competition as broadly as this one was, in the writer's view, inevitably destined for unenforceability.

What this case indicates, however, is not only that such clauses remain the subject of litigation but also that an employer can be drawn into litigation even without seeking themselves to enforce such a clause, if it casts the net too widely and if the employee requires the certainty of a declaration that the covenant is not binding.

Lessons for Employers

Employers should ensure that their restrictive covenants are not excessive and are reasonable in scope. Most importantly, if the covenant chosen by Chem-Trend had been a non-solicitation covenant rather than a non-competition covenant, it is more than probable that, since such covenants are more normally enforceable, litigation would not have ensued.

On the contrary, while the employee would have joined a competitor, he would likely have avoided the prohibited activity for a year, thus permitting the employer to consolidate its position with its customers. Overreaching not only denied the employer the opportunity to protect its business but cost $25,000 all-inclusive in legal fees payable to the employee, as well as the fees it paid to the employer's own counsel.

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