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TRYING TO LIMIT YOUR EMPLOYEES FROM POST-EMPLOYMENT ACTIVITIES? YOUR RESTRICTIVE COVENANT BETTER BE SPECIFIC, SAYS ONTARIO COURT OF APPEAL

By: Randall Boessenkool, associate with Stikeman Elliott LLP. This article first appeared in the Stikeman Elliott CANADIAN EMPLOYMENT AND PENSION LAW BLOG. © Stikeman Elliott LLP. Reproduced with permission.

The Ontario Court of Appeal has recently reviewed the state of the law regarding restrictive covenants that impose limits on the activities of departed employees, and taken a conservative approach to their enforceability. In its decision in *Mason v. Chem-Trend Limited Partnership* [2011 CLC ¶210-005], the Court held that a restrictive covenant signed by an employee was unenforceable. In the midst of ongoing wrongful dismissal litigation, the employee brought a separate application to the court to determine whether and to what extent he was free to compete with his former employer. After being unsuccessful at first instance, the Court of Appeal allowed the employee's appeal. In its decision, the Appeal court found the restrictive covenants to be overly broad and ambiguous, and therefore unenforceable against the former employee. This decision is in line with recent Canadian decisions which have limited the application of restrictive covenants in the employment context.

Facts:

The employee, Tom Mason, was a 17 year employee of Chem-Trend Limited Partnership. Chem-Trend is a Michigan corporation in the business of formulating, manufacturing and selling release agents and related processing chemicals for use in the general rubber, tire, polyurethane, composites, thermoplastics and die casting industries for customers that operate around the world.

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At the time he was hired in 1992, Mason was required to sign Chem-Trend's Confidential Information Guide and Agreement (CIGA). CIGA contained a restrictive covenant which stated that the employee could not, for a period of one year following the termination of their employment

... engage in any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which I was an employee of the Company ...

Over his 17 year career at Chem-Trend, Mason was engaged in various positions in the United States and Canada as a technical sales representative. In this position, Mason acquired in-depth knowledge of the business of Chem-Trend, including proprietary and confidential information. It was accepted that Chem-Trend's operations were "extremely guarded and protected".

Although the one-year period referred to in CIGA had expired at the time of this litigation, the parties were engaged in ongoing litigation in Ontario and Michigan regarding the post-employment activities of Mason. Chem-Trend claimed that Mason breached the non-competition provisions of CIGA, while Mason main-

tained that the provisions of CIGA were unenforceable as being overly vague and ambiguous.

Decision of the Application Judge

The application judge followed the Supreme Court of Canada's decision in *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate* [1978] 2 S.C.R. 916, and found that the provisions found in CIGA were enforceable. Specifically, the application judge found that (i) the wording used in CIGA was not ambiguous and Mason understood what he was agreeing to when he signed; (ii) the geographic scope, although nearly unlimited, was reasonable due to the worldwide nature of Chem-Trend's business and its customers, and that the nearly full restriction on the activities of Mason were reasonable due to the Mason's access to information and technical knowledge about the industry; and (iii) that the one year temporal restriction was relatively short compared to other cases and balanced out the more onerous geographic and activity restrictions.

Decision of the Court of Appeal

The Court of Appeal overruled the application judge's finding that the restrictive covenant in CIGA was reasonable. The Court of Appeal looked to the recent Supreme Court of Canada decision of *Shafron v. KRG Insurance Brokers* [2009 CLC ¶210-010], where the Court held that

... although covenants in restraint of trade are contrary to the public policy in favour of trade, certain of such covenants will be upheld if they are found to be reasonable in the circumstances. Where the covenant is found in an employment contract it will be subjected to stricter scrutiny than where it is part of the consideration for the sale of a business.

Applying *Shafron* to the facts at hand, the Court found several issues with the reasonableness of the restrictive covenant in the CIGA:

- When examined as a whole, there were other provisions in CIGA that would protect Chem-Trend, particularly a covenant that protected trade secrets and confidential information.
- The prohibition of dealing with businesses who may be former customers was overly broad when considering Mason's 17-year tenure at Chem-Trend. The Court found a logical disconnect between a one-year restriction on competition which barred Mason from contacting any former employee from his 17-year tenure.

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- Mason was a part of the technical sales force of a large company, who operated in a limited sales territory. He was not of the category of employee (such as CEO or President) whose position would justify a broader prohibition on competition post-employment.
- It was not possible for Mason to know which potential customers he was prohibited from doing business with. Given the restriction was with all customers of a company with world-wide operations, there was no way for Mason to obtain a list of the company's customers. Chem-Trend's proposed solution that Mason could contact the company to enquire about individual customers and receive Chem-Trend's "permission" to deal with future customers was neither practical nor contemplated in CIGA.

In summary, the Court of Appeal stated that

[a]fter conducting the balancing process between the rights of the respondent to protect its trade secrets and customer information, and the public interest in free and open competition, in the context of the agreement as a whole and the role of the appellant in the company as a salesman, I conclude that the complete prohibition on competition for one year is overly broad as well as unworkable in practice and makes the restrictive covenant unreasonable and unenforceable.

The appeal was allowed and a declaration was granted that the restrictive covenant found in CIGA was unreasonable and thus unenforceable against Mason.

Our Views:

This case sets a standard for the enforceability of restrictive covenants in Ontario. The Ontario Court of Appeal provided the following summary of the governing principles when considering whether a restrictive covenant in a contract of employment is unreasonable and therefore unenforceable. When drafting such covenants, employers should be aware of the following principles:

- To be enforceable, the covenant must be "reasonable between the parties and with reference to the public interest."
- The balance is between the public interest in maintaining open competition and discouraging restraints on trade on the one hand, and on the other hand, the right of an employer to the protection of its trade secrets, confidential information and trade connections.
- "The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances."
- In that context, the three factors to be considered are, 1) did the employer have a proprietary interest entitled to protection? 2) are the temporal or spatial limits too broad? and 3) is the covenant overly broad in the activity it proscribes because it prohibits competition generally and not just solicitation of the employer's customers?

We note that this list is not exhaustive, and legal advice should be sought before implementing any restrictive covenants to ensure enforceability in the employment context.

PROGRESS OF LEGISLATION

Nova Scotia

Labour Board Act In Force

The remaining sections of Bill 100, the *Labour Board Act*, S.N.S. 2010, c. 37, which merges six labour and employment boards into one, came into force on June 30, 2011.

As reported in LABOUR NOTES issue 1421, the sections of the Act which merged the Labour Relations Board, the Civil Service Employee Relations Board, the Highway Workers' Employee Relations Board, and the Correctional Facilities Employee Relations Board into a single "Labour Board" came into force on February 8, 2011.

Effective June 30, the Occupational Health and Safety Appeal Panel and the Labour Standards Tribunal have also been merged into the Labour Board.

The intention of the Act is to create a more streamlined and efficient process, and to provide more consistency among decisions. A full-time chair of the Board is appointed for a five-year term and existing arbitrators rotate as cases come up for arbitration.

Bill 100 received first reading on November 19, 2010, second reading on November 23, and third reading and Royal Assent on December 10.

Quebec

Correction: Legislation To Restructure Certain Government Bodies

Bill 130, *An Act to abolish the Ministère des Services gouvernementaux and to implement the Government's 2010-2014 Action Plan to Reduce and Control Expenditures by abolishing or restructuring certain bodies and certain funds*, S.Q. 2011, c. 16, received Royal Assent on June 13.

In the previous issue of LABOUR NOTES, we incorrectly indicated that, under this Act, the activities of the Commission de l'équité salariale would be taken over by the Commission des normes du travail. This provision was contained in the original Bill, but was removed from the final version.

The other two restructurings we reported are contained in the final version of the Act:

- The Conseil consultatif du travail et de la main-d'œuvre will be integrated into the Ministère du Travail. The assets and personnel of the Conseil will be transferred to the Ministère, which will assume the Conseil's obligations and continue the examination of any complaints.
- The activities of the Conseil des services essentiels will be taken over by the Commission des relations du travail. The Commission will acquire the Conseil's rights and continue any matters pending before the Conseil. The term of the members of the Conseil will end when Bill 130 comes into force; however, members may be qualified for appointment as commissioners of the Labour Relations Division of the Commission.

These two restructurings will come into effect on October 1, 2011.

Bill 130 received first reading on November 10, 2010, second reading on February 16, 2011, third reading on June 8, and Royal Assent on June 13.

Saskatchewan

Human Rights Amendments In Force

The Saskatchewan Human Rights Code Amendment Act, 2010, S.S. 2011, c. 17, came into force on July 1, 2011. The Act intends to make the human rights complaints process more timely and flexible by streamlining the process for dealing with complaints and allowing more cases to be resolved without going to litigation.

Formerly Bill 160, the changes made by the Act will:

- allow more complaints to be dealt with by alternative dispute resolution processes, such as mediation;
- eliminate the Human Rights Tribunal;
- transfer the Human Rights Tribunal's powers to the Saskatchewan Court of Queen's Bench, which will hear complaints that cannot be resolved by alternative dispute resolution methods;
- allow the Human Rights Commission to seek more information about a complainant before commencing the complaint resolution process;
- allow the Chief Commissioner to require the parties to attempt mediation before holding a hearing;
- allow the Chief Commissioner to dismiss a complaint, where the complainant refuses to accept a reasonable offer of settlement made by the respondent; and
- reduce the limitation period for filing a complaint, from two years to one year.

Bill 160 received first reading on November 29, 2010, second reading on May 10, 2011, third reading on May 16, and Royal Assent on May 18. It was proclaimed in force on July 1, 2011.

Recent Cases

NOTE: The full text of these cases can be found in the "New Matters" tab division of Volume 5 at the paragraph number indicated at the end of each summary.

Non-competition and non-solicitation clauses were too broad

• • • **British Columbia** • • • Brownlee was employed as a project manager at Phoenix Restorations. His two main

clients, who were a major component of Phoenix's business, accounted for 80 per cent of Brownlee's work. His employment contract contained non-competition and non-solicitation provisions. Brownlee gave notice of his intention to resign his position as project manager, and

began working for Belfor as a project manager managing restoration projects. After resigning, Brownlee attended the offices of his two major clients from Phoenix, and provided them with doughnuts, coffee, mugs, and hockey tickets. Phoenix applied for an injunction to enforce the non-competition and non-solicitation clauses in Brownlee's contract.

The application for injunctive relief was dismissed. The non-competition clause was much broader than any legitimate proprietary interest of Phoenix. It prohibited Brownlee from working for anyone in the insurance restoration business, even though Phoenix was only involved in a specific section of that market. It also prevented Brownlee from working in a substantially similar business, even if it did not compete with Phoenix. As a result, Phoenix failed to establish a *prima facie* case that the non-competition clause would be enforced. With respect to the non-solicitation clause, the provision prohibited solicitation of actual clients or customers of Phoenix, as well as customers or prospective clients or customers with whom Brownlee had no dealings. Therefore, the provision was broader than necessary to protect Phoenix's legitimate proprietary interest.

Phoenix Restorations Ltd. v. Brownlee,
2011 CLC ¶210-029 (B.C.S.C.)

Employer not required to release e-mails which had no relation to business affairs

••• Ontario ••• The City of Ottawa allowed employees to use e-mail for personal purposes, although it retained the right to monitor the e-mail system. O'Connor, who worked as a solicitor for the City, used his work e-mail address to send and receive e-mails related to volunteer work he did for the Children's Aid Society. Dunn requested the disclosure of all e-mails, letters, and faxes sent or received by O'Connor to and from anyone at the Children's Aid Society. The City refused to release the information, claiming that the communications did not relate to O'Connor's duties as a solicitor and, therefore, were not within the City's custody or control. When Dunn appealed to the Information and Privacy Commissioner, an arbitrator determined that the e-mails were within the custody and control of the City. The City brought an application for judicial review.

The application for judicial review was allowed. The intent of the legislature in enacting the *Privacy Act* was to enhance democratic values by providing citizens with access to government information. Interpreting the term "custody or control" to include private communications of employees unrelated to government business would do

nothing to advance the purpose of the legislation. This issue was not addressed by the arbitrator in her decision. The documents were not in the care and control of the City. The Children's Aid Society was not an agency subject to freedom of information legislation, and O'Connor was not subject to having his personal documents seized and passed over to any member of the public requesting them. Their communications did not have any connection to the functioning of the government or the business affairs of the City of Ottawa. Therefore, the arbitrator erred in law in finding that the records were within the custody or control of the City of Ottawa.

City of Ottawa v. Ontario (Information and Privacy Commissioner), 2011 CLC ¶210-030 (Ont. S.C.J.)

Board does not have authority to relieve a party of the statutory obligation to bargain

••• Canada ••• On May 20, 2010, the Board issued an interim order certifying the union as the bargaining agent for a unit of 38 aircraft maintenance engineers, apprentices, and avionics technicians employed in the Emergency Medical Services Division of Canadian Helicopters. The Board retained jurisdiction to reconsider the bargaining unit after determining issues with respect to the status of eight managers. On May 27, 2010, the union gave the employer notice of bargaining. Canadian Helicopters claimed that the notice to bargain was premature, given the unresolved issues, and asked the Board to suspend collective bargaining until after the Board made its final determination with respect to the managers.

The request for a suspension was dismissed, and the parties were ordered to commence collective bargaining. Section 50 of the *Canada Labour Code* imposes a strict obligation to commence collective bargaining once a notice to bargain has been given. No exceptions were included in the section and, therefore, the Board did not have the authority to relieve a party of the statutory obligation to bargain. Even if the Board did have the authority, it would decline to do so in this case. Interim certification orders are issued in order for collective bargaining to start for those employees clearly within the scope of a bargaining unit. If the Board excused parties from the obligation to bargain on behalf of employees covered by the certification order while deciding secondary issues, the purpose of issuing interim certification orders would be defeated.

Canadian Helicopters Limited v. Office and Professional Employees International Union, 2011 CLC ¶220-031 (C.I.R.B.)

Failure to hold leadership convention was a breach of union's contract

● ● ● **Ontario** ● ● ● Garda Security provided security services at Toronto area airports. Their screening officers were unionized employees. A number of employees were dissatisfied with the union representing them. The National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") assisted the employees in forming a new union, the Canadian Airport Workers Union ("CAWU"), and the employees in attendance at the meeting appointed themselves as officers. The CAWU, along with the CAW, began a campaign to displace the current union as the bargaining agent. CAW believed that the two unions would merge once a collective agreement was reached. Two years later, the CAWU was certified as the bargaining agent and a collective agreement was signed. Given that there had been no leadership election after three-and-two-thirds years from the establishment of the CAWU, a number of members of CAWU brought an action against the union and its executive for a mandatory injunction requiring CAWU to conduct an election.

The action was allowed, and the CAWU was ordered to conduct leadership elections. A number of the executive members attempted to amend the original Constitution privately. Under the original Constitution, amendments required a vote of the union's members; given that this did not occur, there was no lawful amendment. Under the original Constitution, the term of office of the first leaders began with the founding of the CAWU and continued to the first meeting of the National Convention, which had not yet occurred. The first National Convention was required to be held within 12 months of the conclusion of the first collective agreement. The "conclusion" of the collective agreement occurred when the union and the employer signed it. Therefore, the CAWU breached its contract with the members by not holding a leadership election. The fact that the employees received assistance from the CAW did not dirty their hands. The target of their action was not achieving the CAWU's merger or amalgamation with the CAW.

Adi v. Datta, 2011 CLC ¶220-032 (Ont. S.C.J.)

Amalgamated union required majority support to include non-unionized employees in larger bargaining unit

● ● ● **Saskatchewan** ● ● ● A number of school districts were amalgamated into one district, Prairie South School Division No. 210 ("Prairie South"). A different local of the Canadian Union of Public Employees ("CUPE") had represented each of the seven districts prior to amalgamation,

with each district governed by a separate bargaining agreement. After the amalgamation, the seven locals were amalgamated into CUPE, Local 5506. Despite this, the seven bargaining units governed by different bargaining agreements remained in place. Therefore, CUPE applied to the Board to regulate the situation. The Board declared Prairie South to be the successor and employer of the seven districts, and approved the amalgamation of the locals into one union. The Board found that the existing bargaining units were appropriate, and that the union required majority support to include non-unionized employees in a larger bargaining unit. CUPE's application for judicial review was dismissed. CUPE appealed.

The appeal was dismissed. The Board determined that it may require a union to provide evidence of majority support from non-unionized employees before declaring a bargaining unit including non-unionized employees. Stability required majority support from non-unionized employees. This interpretation was not unreasonable.

Canadian Union of Public Employees, Local 5506 v. Prairie South School Division No. 210, 2011 CLC ¶220-033 (Sask. C.A.)

A twisted ankle does not give rise to human rights protections

● ● ● **Ontario** ● ● ● Kalam, a Muslim born in Pakistan, twisted his ankle at the end of a workday at the Brick Warehouse. He did not work his next three scheduled shifts since his doctor had recommended three days off work. Upon his return to work, he was asked about his absence. He was then informed that his performance was not adequate, and he was terminated. Kalam brought a human rights complaint, alleging discrimination on the basis of disability. He subsequently added discrimination on the basis of creed and ethnic origin, claiming that he had requested a prayer room and received no response from management.

The complaint was dismissed. Kalam did not have a disability at the time the decision was made to terminate him. A turned ankle limiting mobility for three days is not the kind of personal characteristic that can result in human rights protection. Also, there was not sufficient evidence that his absence was a factor in the decision to dismiss him. There were more significant concerns related to his effectiveness as a commissioned salesperson that informed the non-discriminatory decision to dismiss him. In addition, there was no evidence that the decision to terminate him was based on creed or place of origin.

Kalam v. The Brick Warehouse L.P., 2011 CLC ¶230-023 (Ont. H.R.T.)

Characterization of income replacement benefits as earnings was reasonable

• • • **Canada** • • • Steel left his employment and began receiving Employment Insurance benefits on July 29, 2007. After a car accident in December 2007, Steel received a lump-sum payment from his insurer in May 2008, as income replacement. Steel claimed that he was entitled to a write-off of these benefits because of the significant delay he experienced in receiving Employment Insurance benefits after leaving his employment. The Commission determined that the income replacement payment constituted earnings, and allocated these earnings to the period from December 2007 to June 2008. Since Steel was unable to return to similar work after the accident, his claim was transformed to a sickness benefit claim, with a maximum period of 15 weeks. The Commission requested repayment of benefits totalling \$9,115. The Board of Referees upheld the decision of the Commission. The Umpire confirmed the Board's finding with respect to the allocation of income replacement benefits as earnings, although it disregarded

concessions made by the Commission in reducing the overpayment amount and agreeing that Steel was entitled to regular benefits up to the date of his motor vehicle accident. Steel brought an application for judicial review.

The application for judicial review was allowed, in part. There was no evidence that Steel had made a proper request for a write-off. Therefore, there was no basis for the Commission to make a determination that the request was denied. Without a decision by the Commission, there was no basis upon which the Board or the Umpire could decide the issues Steel raised concerning a write-off of his indebtedness. The Umpire did not err in affirming the Commission's characterization of the income replacement benefits as earnings. As a result of the Commission's concessions before the Umpire, the Umpire erred by affirming the Commission's quantification of the overpayment, and the overpayment should have been reduced to \$6,146.

Steel v. Attorney General of Canada, 2011 CLC ¶240-005 (F.C.A.)

Q & A

When are anti-nepotism policies permissible?

No one wins when employers play favourites. That said, anti-nepotism policies are not without their risks. While human rights legislation in Ontario¹ and Saskatchewan² specifically permits employers to discriminate against an individual who is the spouse, child, or parent of one of their current employees, such an exemption is very much the exception to the rule.

Generally speaking, personnel decisions made on the basis of an employee's marital or family status are *prima facie* discriminatory. However, this is not to say that an employer cannot implement and rely on an anti-nepotism policy. Where an employer can demonstrate that the policy is (1) rationally connected to the performance of the job; (2) adopted in an honest and good faith basis; and (3) reasonably necessary to accomplish the relevant workplace purpose, the employer's actions will be justified.

Applying these principles, an anti-nepotism policy that simply imports a blanket prohibition on the hiring of employees' relatives is unlikely to be enforceable. Instead, courts and tribunals require a more nuanced approach. Anti-nepotism policies have been considered to be valid where the familial relationship could create a potential conflict of interest. This potential conflict of interest could occur, for example, when one family member might have to discipline or evaluate his or her relative. Where an employer has concerns about two family members working together, it should consider whether the current work arrangements can be modified in a way that will result in only minimal disruption, such as rescheduling one of the employees, or transferring an employee to a comparable position where a conflict of interest would not exist.

Notes:

¹ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 24(1)(d).

² *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 16(11).

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶26 *et seq.*

Cost of Living – Up

The Consumer Price Index figure, on the 2002 = 100 time base, was **120.6** for May 2011, up 3.7% from the May 2010 figure of 116.3. On a monthly basis, the May 2011 figure was up 0.7% from April 2011. On the 1992 = 100 time base, the May 2011 All-items figure was **143.5**.

Industrial Production – Up

The preliminary, seasonally adjusted figure of industrial production for the month of March 2011, in chained 2002 dollars, was estimated at \$256,018 million, up 5.2% from the revised March 2010 figure of \$243,304 million.

Weekly Earnings – Up

The average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level in April 2011 were \$876.44, up 3.5% from \$846.52 in April 2010, according to a preliminary estimate based on a sample survey of reporting units.

For March 2011, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level, were \$876.53, up 4.1% from \$841.74 in March 2010, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment – Down

In May 2011, the seasonally-adjusted number of unemployed persons totalled 1,374,100, down 50,000 from April 2011, with an unemployment rate of 7.4% of an active labour force of 18,682,700. The employment level in May was 17,308,700.

Strikes and Lockouts – Down

For major collective bargaining agreements (those with 500 or more employees), in March 2011, there were 43,620 person days lost from 3 work stoppages, compared to 138,670 person days lost from 4 work stoppages reported for March 2010.