Trying to limit your employees from post-employment activities? Your restrictive covenant better be specific, says Ontario Court of Appeal

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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*, 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.

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

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 maintained 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*, and found that the provisions found in CIGA were enforceable. Specifically, the applications 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*, where the Court held that

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.
- 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

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.