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RESTRICTIVE COVENANTS: ONE SIZE DOES NOT FIT ALL

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In a recent decision of the Ontario Court of Appeal, *Mason* v. *Chem-Trend Limited Partnership*, [2011] O.J. No. 1994 (C.A.), employers have once again been reminded that one size does not fit all when it comes to restrictive covenants.

While the decision comes out of another province, it does emanate from a superior court. It is, therefore, persuasive authority in British Columbia and should be taken into account when dealing with cases involving similar facts.

Background facts

Tom Mason was an employee of Chem-Trend Limited Partnership for 17 years. He was fired from his job as a technical sales representative allegedly for just cause.

Chem-Trend is an American company in the business of formulating, manufacturing and selling certain chemical products, and has customers around the world.

Mr. Mason's sphere of responsibility changed over the course of his employment. He was first responsible for the province of Ontario. He then moved to the United States where he was assigned responsibility for eight states. In 2011, he returned to Canada and was handed responsibility for the entire country in addition to certain U.S. states.

As a technical salesperson, Mr. Mason acquired knowledge about Chem-Trend and its products and customers. He learned what products the customers used and what prices they paid.

At the outset of his employment, Mr. Mason was required to sign an agreement containing the following restrictive covenant:

> I agree that if my employment is terminated for any reason by me or by the Company, I will not, for a period of one year following the termination, directly or indirectly, for my own account or as an employee or agent of any business entity, *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*, or take any action that will cause the termination of the business relationship between the Company and any customer, or solicit for employment any person employed by the Company.
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> [Emphasis added.]

After Mr. Mason was dismissed from employment, he brought a court application to determine whether the restrictive covenant was enforceable and to what extent, if any, he was free to compete against Chem-Trend.

Ontario Superior Court of Justice

The restrictive covenant was determined by the Ontario Superior Court of Justice to be enforceable.

The application judge found the covenant was unambiguous in its wording. Mr. Mason, the judge found, understood what he was agreeing to when he signed the agreement.

In considering the reasonableness of the restrictive covenant, the application judge took into account the geographic scope of the restriction, the activity that was restricted and the time period of the restriction. In concluding that the covenant was reasonable and, in effect, that Mr. Mason could not engage in any activity that would be in competition with Chem-Trend's business, the judge highlighted, among other things, that:

(a) Chem-Trend had confidential information that was entitled to protection;

(b) the operations of Chem-Trend and its customers extended throughout the world;

(c) Mr. Mason had significant information about the company's business as well as technical knowledge of the industry; and

(d) a one-year temporal restriction was short relative to restrictions in other cases.

Mr. Mason was, needless to say, unhappy with the decision of the Superior Court of Justice. He appealed.

Ontario Court of Appeal

The appeal was allowed. The restrictive covenant was found by the Ontario Court of Appeal to be unreasonable and, therefore, unenforceable.

In delivering the unanimous judgment of the Court, Madam Justice Kathryn Feldman provided a thorough review of the law relating to the enforceability of restrictive covenants. She confirmed that covenants in restraint of trade are contrary to public policy, and will only be enforceable if they are reasonable in all of the circumstances. Restrictive covenants contained in employment agreements will be more rigorously scrutinized than covenants that form part of the consideration for the sale of a business.

In considering enforceability of a restrictive covenant, the first question to be asked is whether the covenant is ambiguous. If the covenant is ambiguous regarding the geographic scope of the restriction, the activity that is restricted and the time period of the restriction, it will be unreasonable and unenforceable.

Madam Justice Feldman agreed with the application judge that the restrictive covenant contained in the agreement signed by Mr. Mason was clear, understandable and unambiguous. She, however, held that the application judge erred when he found that the restriction contained in the restrictive covenant was not overly broad. She reasoned, in part:

(a) Mr. Mason was a sales representative and "not the president or chief financial officer, where there may be more justification for a broader prohibition on competition after such a highly placed employee leaves the company".

(b) The agreement signed by Mr. Mason contained a separate covenant governing post-employment use and disclosure of Chem-Trend's confidential information. That provided "significant protection" for the company.

(c) Under the covenant, Mr. Mason was prohibited from dealing with "any business entity which was a customer of the Company during the [17-year] period in

which [he] was an employee of the Company". Madam Justice Feldman explained that this was unreasonable:

> [Mr. Mason] was an employee for 17 years. The company has worldwide operations with customers, many of which also operate in many countries. The restriction is not limited to [Mr. Mason's] own customers over that period, but includes all customers of the company during that period … [Mr. Mason] neither knows nor has he any access to a list of all of the company's customers, a list which is very large. Therefore, [he] has no way to know whether any particular potential contact he may wish to make, either is or was during the last 17 years, a customer of the company.

Conclusion

Mason v. *Chem-Trend Limited Partnership* provides an important reminder to employers. A "one size fits all" approach is not appropriate when crafting a restrictive covenant. Apart from the need for the covenant to be clear, understandable and unambiguous, it must also be reasonable in all of the circumstances.

The geographic scope of the restriction, the activity that is restricted and the time period of the restriction must be carefully tailored, taking into account the particular role of the employee, his or her sphere of responsibility and his or her knowledge of the employer's business and customers.

The golden rule is not to overreach. Here are some pointers:

(a) An employer can contract for greater protection against senior executives or, as Madam Justice Feldman put it, "highly placed employees". It will be difficult to enforce a restrictive covenant against a mere sales representative.

(b) Remember that the shorter the time period of the restriction, the better.

(c) Restrict employees from dealing with customers with whom they dealt in, for example, the six to twelve-month period preceding cessation of the employment relationship. Do not restrict them from dealing with all past and present customers of the employer.

(d) If a non-solicitation provision on its own will provide adequate protection for the employer, do not attempt to contract for more.

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