

Ontario Court of Appeal: restrictive covenant unenforceable

In our article on "[The effective employment contract](#)", we stressed that, when a restrictive covenant is drafted, care must be taken that it goes no further than necessary to prevent harmful activities by former employees. Otherwise the clause will likely be nullified in court. Such clauses must respect the balance between an employer's right to protect its business interests and an employee's right to earn a living in his or her chosen field. (See also "[Ontario court orders consultant to pay damages to consultant placement firm for breach of confidentiality](#)".)

The consequences of drafting an overbroad restriction on a former employee's activity can once again be seen in *Lyons v. Multari*, a decision by the Ontario Court of Appeal issued on September 21, 2000. The defendant, Multari, was an oral surgeon in Windsor whose employment contract with Lyons, another oral surgeon, included a non-competition clause which read: "Protective Covenant. 3 yrs. - 5 mi.". The clause meant that Multari was barred from opening another competing office within three years of termination anywhere within five miles of Lyons' office.

Multari left his practice with Lyons after about 17 months. Some six months later, he set up another oral surgery practice 3.7 miles from the site of Lyons' office, thereby breaching the terms of the restrictive covenant. Lyons sued, claiming damages for breach of contract.

TRIAL JUDGE: REFERRAL PRACTICE A PROPRIETARY INTEREST WORTHY OF PROTECTION

Lyons was successful at trial, winning over \$70,000 in damages for losses sustained in the first year following Multari's departure. The trial judge held that the covenant was enforceable, as Lyons had a proprietary interest worth protecting - his referral practice, built up over a long period of time, and based on a group of dentists who by custom referred clients to him.

The judge also held that the restriction was not overly broad, and did not preclude Multari from practising at all. There were other areas of Windsor in which Multari could still set up a practice, and nothing stopped him from seeking referrals from within the five-mile area, as long as his office was not located there. Multari appealed.

THE REASONABLENESS OF A RESTRICTIVE COVENANT

The Court of Appeal began its consideration of the issues by noting that the general rule is that non-competition clauses in employment contracts are void because they serve as restraints to trade. The exception to this general rule is when the covenant is reasonable as between the parties and reasonable in the public interest.

The Court then quoted extensively from *Elsley v. J.G. Collins Insurance Agencies Ltd.*, a 1978 decision of the Supreme Court of Canada. In *Elsley*, the Court held that the determination of whether a restrictive covenant is reasonable rests largely on three factors:

- whether the employer has a proprietary interest worthy of protection;
- whether the temporal and spatial restrictions are too broad; and
- whether the covenant restricts competition generally, or merely bars solicitation of the former employer's clients.

The Court of Appeal held that Lyons succeeded on the first two points, agreeing with the trial judge that a client base did constitute a proprietary interest worthy of protection, and holding that the 5 mile/3 year restriction was not overly broad. Lyons' case foundered, however, on consideration of the third factor.

AN EXCEPTIONAL CASE?

Generally speaking, the Court stated, courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect the employer's interest. However, in exceptional circumstances, the nature of the employment may justify a covenant prohibiting the employee not only from soliciting the employer's customers, but also from establishing a competing business. The question, therefore, was whether this case was one of those exceptional circumstances. The Court held it was not.

Noting that it was true that the two litigants were equals in terms of their contractual relations, the Court nevertheless concluded that Multari did not play a special role that could have justified a broader restriction. Quoting from *Friesen v. McKague*, a 1992 decision of the Manitoba Court of Appeal, the Court stated that a non-competition clause should be enforced "where the nature of the employment will likely cause customers to perceive an individual employee as the personification of the company or employer". Here, the Court pointed out, Multari was a junior associate in a practice in which Lyons was the dominant figure.

Nor was there any confidential information that required protection. While Multari did know the names of the dentists referring the clients he had treated, a simple non-solicitation clause could have dealt with this issue.

Summing up, the Court stated that, while Lyons did have a legitimate interest to protect, the Lyons-Multari relationship was not exceptional, and the proper balance between their respective interests could have been struck by means of a non-solicitation clause.

In Our View

Employers should carefully consider the nature of the interests needing protection when drafting a restrictive covenant. The irony in this case appears to be that Lyons' ultimate and legitimate objective - to restrict Multari from soliciting referrals from his base of referring dentists - was not even properly addressed in the covenant that the Court held was unenforceable. As noted by the trial judge, nothing in the covenant kept Multari from setting up business outside the five mile limit and then soliciting the very referrals Lyons was seeking to protect. In other words, not only was the covenant overly broad and therefore unenforceable, it also appears to have been ineffective in protecting Lyons' proprietary interest.

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