

Limits on enforceability of restrictive covenants

A recent decision of the Ontario Court of Appeal once again illustrates the high threshold that must be met before a restrictive covenant in an employment agreement will be enforced.

In *Mason v. Chem-Trend Limited Partnership*, [2011] O.J. No. 1994, the employee, Mason, had for 17 years been a technical sales representative employed by a company carrying on the business of manufacturing and selling chemicals used in the rubber and related industries for customers around the world. When hired by Chem-Trend, Mason was required to sign a three-page agreement that contained 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."

After his employment was terminated, Mason sued Chem-Trend for wrongful dismissal and brought a separate application seeking a declaration that the covenant was unenforceable, which failed at first instance. The court accepted Mason's evidence that he had worked in a very specific part of the operation and did not know and had no access to Chem-Trend's entire list of past and present customers. However, notwithstanding the onerous geographic and activity restrictions, the restrictive covenant was found to be reasonable, given that: (1) Chem-Trend's business was global; (2) Mason had a high degree of technical knowledge regarding the business of Chem-Trend; and (3) the term of the covenant was only one year.

The Court of Appeal reversed the decision. Justice Feldman, for a unanimous court, reiterated the principles governing restrictive covenants established in *J.G.*



LINDA FUERST

“ [T]he short duration of a covenant will not compensate for the excessive breadth of a complete prohibition on competition.

Collins Insurance Agencies v. Elsley, [1978] S.C.J. No. 47 and recently considered by the Court of Appeal in *H.L. Staebler Co. v. Allan*, [2008] O.J. No. 3048:

■ To be enforceable, a covenant must be reasonable, both between the parties and from the viewpoint of the public interest; ■ The covenant must strike a balance between the public interest in maintaining open competition and discouraging restraint on trade on the one hand, and, on the other, the right of an employer to the protection of its trade secrets, confidential information and trade connections; and ■ Whether a restrictive covenant is valid or not can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances.

Justice Feldman considered the three key factors to be considered in assessing a restrictive covenant: (1) Did the employer have a proprietary interest entitled to protection? (2) Are the temporal or spatial limits too broad? (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?

While agreeing that Chem-Trend had a proprietary interest entitled to protection, Justice Feldman held that the application judge had erred in finding the restrictive covenant to be valid. She reasoned:

(1) The agreement includes other provisions that provide important protections for Chem-Trend, such as a separate clause prohibiting use or disclosure by Mason of any trade secrets or confidential information belonging to Chem-Trend during or

after his employment with Chem-Trend.

(2) The one-year prohibition on dealing with all businesses that may be former customers of Chem-Trend is not consistent with allowing Mason to compete freely after the covenant expires. If the rationale behind the prohibition is that, after one year, Mason's information about Chem-Trend's customers may no longer be current, then the prohibition on dealing with all former customers is even less justifiable.

(3) Mason was part of the technical sales force for a large company responsible for a limited sales territory and yet he was prohibited from not just soliciting former customers but dealing with them in any manner in competition with Chem-Trend. Given his responsibilities, there was no justification for such a broad prohibition.

(4) As Mason was an employee of Chem-Trend for 17 years and Chem-Trend has worldwide operations with customers, it would not be possible for Mason to know with which potential customers he is prohibited from doing business. Accordingly, the restriction on dealing with any business entity which was a customer of Chem-Trend during the term of his employment was ambiguous in its "practical implementation."

Justice Feldman concluded that the effect of the covenant was a complete prohibition on competition with Chem-Trend for one year, which was overly broad, unworkable in practice, unreasonable and unenforceable.

An important lesson of *Mason* is that the short duration of a covenant will not compensate for the excessive breadth of a complete prohibition on competition. In addition, non-solicitation clauses must be drafted with sufficient specificity to allow employees to understand their scope and thereby avoid inadvertent breach. Finally, the decision reflects the courts' continuing reluctance to enforce the blunt instrument of a covenant not to compete against former employees. At the time of writing, Chem-Trend's application for leave to appeal was pending in the Supreme Court. ■

Linda Fuerst is a commercial litigator and a partner at Lenczner Slaght Royce Smith Griffin LLP in Toronto.



We want to hear from you!
Email us at: tlw@lexisnexis.ca

New Edition!

Butterworths®

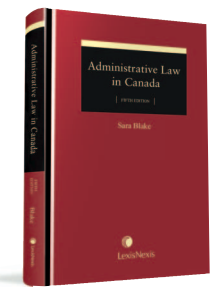
Administrative Law in Canada, 5th Edition

Sara Blake

Winner of the 2009 SOAR Medal

"The aim of this book is to unravel the mysteries and complexities of Administrative Law so that they may be understood by all."

—From the Foreword



\$130 + tax
Approx. 324 Pages
Hardcover | November 2011
ISBN: 9780433458401

The Latest Rules of the Game

Since 1992, *Administrative Law in Canada* has helped tribunal members and participants across Canada to understand the roles they play and the rules that tribunals must follow. In the fifth edition, author Sara Blake explains the latest developments relating to the powers and procedures of the many and varied public officials, boards and agencies that exercise statutory authority. Advice and insights apply to municipal, environmental, immigration, labour and employment, professional discipline, and all other areas of administrative law.

Whether you serve on a tribunal, appear in proceedings before tribunals or make decisions pursuant to statutory powers, you'll find information to make your job easier:

- Where do I find the rules of the game?
- What kind of notice or disclosure should be given to the affected parties?
- What evidence should a tribunal consider in making its decision?
- How does the tribunal make its decision?
- What is the scope of the tribunal's decision-making powers?
- How should I proceed if I believe a tribunal may be biased against me?
- How do I apply to a court for judicial review of a tribunal decision?
- Which standard of review applies?
- What judicial remedies may be awarded?

Order Today! Take advantage of the 30-Day Risk-Free[†] Examination.
Visit www.lexisnexis.ca/bookstore or call 1-800-668-6481

LexisNexis®

Please quote Reservation Code 3306 when ordering.

† Pre-payment required for first-time purchasers.

Price and other details are subject to change without notice. We pay shipping and handling if payment accompanies order.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Butterworths is a registered trademark of Reed Elsevier (U.K.) Limited and its affiliated companies. Other products or services may be trademarks or registered trademarks of their respective companies. © 2011 LexisNexis Canada Inc. All rights reserved.

THE LAWYERS WEEKLY

FOCUS NEXT WEEK

• Criminal Law • Immigration

LexisNexis®