Case In Point

Appellate Court Finds Non-Compete Clause Unreasonable and Overly Broad

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In a recent decision regarding the enforceability of a restrictive covenant, Donaldson Travel Inc. v. Murphy, the Ontario Court of Appeal upheld the decision of a motion judge that the restrictive covenant at issue constituted an unenforceable non-compete clause. More particularly, the Court of Appeal affirmed the motion judge's conclusion that, in order to be valid, a restrictive covenant must not be overly broad and must be limited to that which is required for the employer's protection.

In this instance, the Court of Appeal specifically agreed that because the restrictive covenant was a non-compete clause, rather than a non-solicitation clause, the lack of limitations with respect to the duration and scope of the covenant rendered it unreasonable and therefore unenforceable. The clause at issue read as follows:

[The personal respondent] agrees that in the event of termination or resignation that she will not solicit or accept business from any corporate accounts or customers that are serviced by Uniglobe Donaldson Travel, directly, or indirectly.

At the summary judgment motion, the plaintiff had taken the position that this covenant was a valid non-solicitation clause that restricted only the personal respondent's ability to solicit the plaintiff's clients. The motion judge did not agree with this assertion, and instead emphasized the breadth of the phrase "will not *accept* business from *any* corporate accounts or customers." The motion judge found that the term "*accept* business" was equivalent to a restriction on conducting business, which constitutes a non-compete clause and not a non-solicitation clause.

As a result, in order to be enforceable, the motion judge reiterated that the non-compete clause would need to be reasonable as between the parties. Typically, this includes a temporal and geographical limitation with respect to the scope of the clause. In this case, the clause contained no temporal limitation and it restricted the personal respondent from accepting business from *any* of the plaintiff's clients, regardless of whether she had contact with the client while employed by the plaintiff, and for any kind of business. In this instance, where no exceptional circumstance had been identified that would justify such a covenant, the motion judge found it to be unenforceable.

This decision was upheld by the Ontario Court of Appeal, which, as noted above, agreed the covenant constituted a non-compete clause and found no reason to interfere with the motion judge's conclusion.

Of note, the motion judge also found that the plaintiff's allegation that the defendant had disclosed confidential information to her new employer was without merit. The disclosure of the annual volume of work performed by defendant while in the employ of the plaintiff was not of the "quality of confidence" to support a finding that there had been a breach of confidence. The Court of Appeal upheld this conclusion.