

Quebec court strikes down non-competition clause

In a number of *FOCUS* articles, we have stressed the importance of avoiding overly broad terms when drafting restrictive covenants in employment contracts. 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. The consequence of placing too onerous a restriction in the clause is that it will likely be nullified in court.

This was the case in *Positron Public Safety Systems Inc. v. Cardoso* (August 3, 2005), a decision of the Quebec Superior Court. The case involved an attempt by Positron to obtain an injunction against Cardoso, a former employee, and his new employer, CML Emergency Services, in order to enforce a non-competition agreement. . The legal principles that the Quebec courts apply in these cases are virtually identical to those found in the rest of Canada.

The clause in question read as follows:

"You recognize that in performing the duties of your employment, you will occupy a position of trust and confidence and will gain experience, be exposed to knowledge and develop skills and expertise in, among other things, the development, production and use of technology, processes and methods, specifications, integration plans, business plans, business models, and graphical user interface style and behavior which are unique or exclusive to Positron.

You therefore agree that so long as you are employed or paid by Positron and for a period of fifteen (15) months thereafter, you shall not directly or indirectly engage or be engaged in any capacity or in any manner whatsoever, in any activity for or on behalf of any person, firm, entity, or business enterprise in Canada or in the United States of America which is in direct competition with Positron in which or for whose benefit you use any of the experience, skills, expertise or knowledge that is unique or exclusive to Positron, that you gain or acquire while in the employ of Positron."

Cardoso left his position with Positron after expressing frustration with a number of aspects of the job. After he tendered his resignation, Positron reminded Cardoso of the covenant he had signed. Cardoso entered into negotiations with the employer to have the covenant restricted to simply protecting Positron's legitimate interests. He offered to not compete on three specific projects for a year and CML promised that it would not encroach on any opportunities that were proprietary to Positron. Despite this, Positron declined to release Cardoso and commenced legal proceedings against him.

Positron argued that the covenant should be enforced against Cardoso or, if the clause was held to be unlawful, that Cardoso was in breach of his duty of loyalty to Positron. Cardoso and CML countered that the agreement was unenforceable, as it went further than necessary to protect Positron's legitimate business interests. Cardoso also argued that his position at Positron was not as essential as the employer had made out and that the clause

could not be enforced against him because Positron had given him good reason to leave his position.

AN "IMMORAL" SCHEME

The Court noted that Positron's evidence about the nature of the threat to its interests posed by Cardoso was vague: it had supplied no information about any appropriation by Cardoso of its proprietary rights or clients. By contrast, the Court accepted Cardoso's evidence that many of the product lines offered by Positron and CML were different. Moreover, it noted that most of the contracts in the emergency systems business were awarded through open tender and not because of personal connections with suppliers. The Court then went on to characterize Positron's explanation of the nature of the interest that was at stake as "puzzling". Positron had stated that it is awarded contracts when the tenders contain product specifications that are unique to Positron, thus ensuring that no other bidders can supply the products. Accordingly, there are no "real" tenders. The Court expressed the view that this practice did not amount to a legitimate business interest worthy of protection:

"The argument, then, is that the agreement is there to protect [Positron] against Cardoso trying to rig tenders for a competitor because he knows how to do it and has the contacts to do it. [The Quebec Civil Code] states that to be valid, a non competition agreement must be "... necessary for the protection of the legitimate interests of the employer". Protecting a scheme which is basically immoral is not a legitimate interest."

AGREEMENT NOT VALID, DUTY OF LOYALTY NOT BREACHED

The Court questioned whether the purpose of the agreement was to protect Positron's market, noting that, while the agreement prohibited Cardoso from working with competitors based in North America, most of Positron's competitor's were located elsewhere. Moreover, while the agreement restricted Cardoso from engaging in virtually all activity with a competitor, he had been assigned specific territories during his employment with Positron, not the entire world. In view of this, the Court held that the territory covered by the agreement was unwarranted.

Finally, the Court rejected the assertion that Cardoso was in breach of his duty of loyalty to Positron. The fact that he may have had access to confidential information did not amount to proof that he was being disloyal and provided no basis for an injunction. At most, the case for an injunction amounted to little more than a request that Cardoso refrain from breaking the law.

In the result, Positron's motion for an injunction was dismissed.

In Our View

Employers with legitimate business interests to protect from departing employees should exercise care in drafting covenants restricting competition. As we have pointed out in past *FOCUS* Alerts (see "[Ontario Court of Appeal: restrictive covenant unenforceable](#)" and "[The effective employment contract](#)" on our Publications page, and "[Ontario court orders subcontractor to pay damages to consulting firm for breach of confidentiality](#)" on our What's New page), employees have the right to earn a living apart from the employer, and such covenants should go no further than necessary to protect the employer's interests. The covenant in this case repeated a common mistake: it imposed too sweeping a restriction on

the employee and was so ambiguous in its wording that it caused the judge to question its true purpose.

Positron sought leave to appeal the lower court's decision. The Quebec Court of Appeal denied leave, stating that the motions judge had committed no error in ruling that the clause was unenforceable.

For further information, please contact **Jock Climie**, who represented CML Emergency Services, at (613) 940-2742.

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