Restrictive Covenants

Agreements Restricting Competition

Contract Clauses Intended to Restrict Employee Opportunity and Freedom of Vocation Are Often Deemed Unenforceable

Employers will often require employees to enter into terms whereby the employee agrees to refrain from competitive activities subsequent to the employment. These terms, generally framed as 'non-competition' or 'non-solicitation' clauses, are often struck down or applied in a very limited fashion by the courts. The reasoning for jurisprudence that is very cautious when asked to enforce restrictive convenant is that such limiting clauses tend to conflict with public policy and general expectation that employees should be free to continue and pursue a chosen vocation and that the public should also have freedom of choice within a free market. Of course, employers quite reasonably also wish to pursue protection from activities infringing upon the money and efforts expended in business development. These conflicting concerns are addressed by a balancing mechanism established within the common law an were articled in ***Shafron v. KRG Insurance Brokers (Western) Inc.***, [2009] 1 S.C.R. 157, where the Supreme Court said:

> Restrictive covenants give rise to a tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade. In the seminal decision of the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, this tension was explained. At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free. Lord Macnaghten stated, at p.565:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

However, recognition of the freedom of the parties to contract requires that there be exceptions to the general rule against restraints of trade. The exception is where the restraint of trade is found to be reasonable. At p. 565, Lord Macnaghten continued:

> But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. [Emphasis added.]

Therefore, despite the presumption that restrictive covenants are prima facie unenforceable, a reasonable restrictive covenant will be upheld.

As for in what circumstances the use of an employer's customer list by a former employee crosses the line and becomes violation of an infringement upon the rights of the employer, such was made clear in ***OIBC v. KO***, 2018 ONSC 4612 where it was said:

> [19] It is well-established law that an employee cannot take an employer's customer list with them and use it to solicit customers. However, in an effort to draw an appropriate line, the law does permit a former employee to solicit customers from memory: *Alberts v. Mountjoy (1977)*, 1977 CanLII 1026 (ON SC), 16 O.R. (2d) 682 (O.H.C.J.); *Benson Kearly & Associates Insurance Brokers Ltd. v. Valerio*, [2016] O.J. 3476 (S.C.J.).

> [20] An added layer of complexity is that in *Tomenson Saunders Whitehead Ltd. v. Baird*, [1980] O.J. No. 386, Keith J. held that where insurance salesmen took personal diaries with them that had the names of clients and telephone numbers in them, he held this did not amount to misuse of confidential information when those salesmen, in their new positions, solicited past clients of the employer. Keith J. reasoned that they were entitled to take their diaries which also had other personal information in them, and found that no doubt they could have reconstructed the list from memory and have found the customers' numbers in a phone directory. The reasoning and conclusion of Keith J. in Tomenson was approved of by the British Columbia Court of Appeal in *Barton Insurance Brokers Ltd. v. Irwin (1999)*, 1999 BCCA 73 (CanLII), 170 D.L.R. (4th) 69 at para. 38. Nordheimer J. (as he then was) also relied on the judgment and found that in the case before him, the information of names, addresses, and telephone numbers of clients transferred to the former employee's computer could not be reasonably characterized as confidential given that this information would have been readily available to the defendant without the computer list and he could have easily recreated it: *Edac Inc. v. Tullo*, 1999 CanLII 14868 (ON SC), [1999] O.J. No. 4837 (S.C.J.). See also *Professional Court Reporters v. Carter*, [1993] O.J. No. 673 (O.C.J.G.D.) at para. 35; *Penncorp Life Insurance Co. v. Edison*, [2008] O.J. No. 3763 (S.C.J.).

Statutory Duty Mandates

Additionally, and especially in respect of employees subjected to service mandates within certain professions, an employee who is solicited by a former client may be statutorily required to provide assistance. The body of cases published upon CanLII.org indicates that this commonly occurs with insurance professionals whereas an employment agreement may state that solicitation, competition, or even acceptance, of the former employer's customers is forbidden; however, service mandates imposed statutorily conflict with the contractual provisions by mandating that the professional provide assistance. With insurance personnel, among other mandates, this circumstance can arise in respect of automobile insurance whereas the ***Compulsory Automobile Insurance Act***, R.S.O. 1990, c. C.25 states that:

> **Obligations of agents**

> 5 An agent shall,
>
> > (a) provide to an owner or lessee of a motor vehicle who is a resident of Ontario an application for automobile insurance; and
>
> > (b) submit to an insurer a completed application for automobile insurance,
>
> when requested to do so by the owner or lessee of a motor vehicle.

Further in respect of insurance brokers, at least in Ontario, the statutory obligation to assist may arise with the ***Code of Conduct*** prescribed by the general regulations to the ***Registered Insurance Brokers Act***, R.S.O. 1990, c. R.19, being specifically R.R.O. 1990, Regulation 991 at section 14, Item 10 which states:

> 10. A member shall make the member's services available to the public in an efficient and convenient manner which will command respect and confidence and which is compatible with the integrity, independence and effectiveness of the member's vocation.