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Restrictive Covenants involving sale of a business: *Payette v. Guay Inc.*, 2013 SCC 45

[Chris Beneteau](#)

The Supreme Court of Canada recently reiterated that restrictive covenants that arise in the context of the sale of a business will be treated differently and more generously than those that arise in the context of a contract of employment. While the case arose under the Civil law of Quebec, it clearly has implications for the Common law regimes in the rest of Canada.

Facts

Yannick Payette and his partner controlled several companies in the crane rental business and sold the assets of those companies to Guay Inc. for \$26 million in October 2004. The purchase agreements contained non-competition and non-solicitation clauses which would apply for a period of five years running from the date on which Payette and his partner ceased to be employed directly or indirectly by the purchaser. The non-competition clause precluded Payette and Lafortune from being employed or otherwise involved in the crane rental industry anywhere in the province of Quebec throughout the five-year period, while the non-solicitation clause precluded them from soliciting or “do[ing] business or attempt[ing] to do business” with any of their former customers or the customers of Guay Inc. during the same period.

The terms of the purchase agreement also included a provision that Payette and his partner would stay on with Guay Inc. as contractors for a period of 6 months after which there was the possibility of a further employment relationship. Payette was in fact employed by Guay Inc. through what became an employment contract of indefinite duration. He was dismissed without cause on August 3, 2009. A few months later, he and his partner were paid \$150,000 in compensation in resolution of the termination of their employment. In March 2010, Payette began working for a direct competitor of Guay Inc., Mammoet Crane Inc.

Guay Inc. sought and obtained an interlocutory injunction against Payette requiring compliance with the aforementioned restrictive covenants until the hearing of the case on its merits, which proceeded all the way to the Supreme Court of Canada.

Writing for a unanimous panel of seven judges, Justice Wagner noted: “... that the criteria for analyzing restrictive covenants in a contract for the sale of assets will be less demanding and that the basis for finding such covenants to be reasonable will be much broader in the commercial context than in the context of a contract of employment.” He noted that, unlike an employment contract, there was no imbalance of power between the parties in a commercial context where the parties should be free to agree to reasonable contractual terms as they saw fit to facilitate the sale of the business assets.

Non-competition Clause

In considering the non-competition clause, Justice Wagner concluded that the five-year term of the clause was not unreasonable and that the territorial scope, the province of Quebec, was not overly broad despite the fact that Guay Inc. did business primarily in Montreal. He noted the unique nature of the crane rental industry meant that cranes would go to wherever construction sites are located, and the territory to which the non-competition clause applied was no more broad than was necessary to protect the legitimate interests of Guay Inc.



Non-solicitation Clause

The Court determined that the non-solicitation clause was valid despite the fact that, in addition to the requirement not to contact or directly solicit, it also required Payette not to “do business or attempt to do business” with former clients, which was described as a “non-competition component”. The Court nevertheless found that the substance of the clause was that of non-solicitation of Guay Inc.’s clients and that the failure to include a territorial limitation in the non-solicitation clause was not fatal since that requirement applies only to non-competition clauses.

Ultimately, the Court found the restrictive covenants to be enforceable and upheld the lower court’s decision granting injunctive relief.

Takeaways

Aside from reiterating the fact that restrictive covenants will be more generously interpreted and enforced in the sale of a business than in an employment contract, the Court provided two takeaways worthy of note.

First, the Court reinforced the importance of context in evaluating the enforceability of restrictive covenants. Restrictive covenants in the context of a sale of a business or assets are given greater leeway in terms what is reasonable than in the context of an employment relationship. Even where an employment relationship occurs following the conclusion of the sale of a business, if the restrictive covenants are found to arise from the sale of the business rather than from the subsequent employment relationship, such covenants will be more likely to be enforced.

A second takeaway, which may be more significant because it appears to be novel, is the apparent broadening of the scope of what constitutes a “non-solicitation” clause. The Court determined that a general restriction against doing business with former clients was a non-solicitation clause with a “non-competition component”, but not an outright non-competition clause. The significance of this finding, in addition to the relaxation of the requirement for a territorial limitation, is that non-competition clauses are typically subject to much greater scrutiny and, in the employment context, are generally only enforceable against fiduciary or key employees. Broadening the scope of what constitutes a non-solicitation clause could have the effect of extending the restriction against “doing business” with former clients to lower level employees, something which has typically been rejected as being overly broad and unenforceable. It remains to be seen how the lower courts will react to this hybrid type of clause, particularly in situations not involving the sale of a business.

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