Cassels

Employer Wins $112,000 in Damages After Employee Resigned and Took a Client to a Competitor

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In a recent Alberta decision, *Catch Engineering Partnership v Mai*, the Court of King's Bench of Alberta was asked to determine whether an employee had breached the terms of his employment agreement when he quit, immediately solicited a client of his employer before his resignation was effective, lied about his intentions to his employer, then joined a competitor and began working for the client. The Court awarded $112,000 in damages to the employer, finding that the employee had breached both his non-solicitation and confidentiality clauses, which the Court found amounted to a "flagrant" breach of the employee's duty of good faith.

It is a welcome decision for many employers, who often face the challenge of enforcing restrictive covenants and confidentiality clauses after a former employee moves to a competitor and takes clients with them.

Background Facts

Binh Mai was an electrical engineer. He was hired by the Plaintiff, Catch Engineering Partnership (Catch) in February 2019 and entered into an employment agreement, as well as a confidentiality agreement, outlining the terms of his employment (the Agreements).

The Agreements contained the following non-solicitation clause:

During the term of this Agreement and for a period of twelve (12) months from the effective date of termination of employment, either by the Employee or CEP [Catch], the Employee shall not:

(a) intentionally act in any manner that is detrimental to the relations between CEP and CEP's clients, suppliers, contractors, employees or others; and

(b) Directly or indirectly contact or solicit any customers of CEP or any of its subsidiaries or affiliates with whom he or she has dealt during the twelve (12) months prior to his or her termination, for the purpose of inviting, encouraging or requesting any CEP customer to transfer from CEP to the Employee or the Employee's new employer, or to otherwise discontinue its patronage and business relationship with CEP,

and for a period of twenty-four (24) months from the effective date of termination of employment, either by

Employee or CEP, the Employee shall not:

(c) solicit, induce, recruit or encourage any of CEP's employee's or contractors that existed before or after entering into this Agreement.

The Agreements also contained a confidentiality clause, requiring Mr. Mai to maintain confidentiality over Catch's technical data, trade secrets, know-how, and other confidential information related to Catch's business, finances, accounts, and clients.

Once hired, Mr. Mai was seconded directly to Catch's client, CNRL, where he worked directly with the client in-house.

In December 2019, about 10 months into his employment relationship, Mr. Mai asked Catch to change his status from employee to independent contractor. After some negotiations, Catch accepted Mr. Mai's proposal, and the parties agreed upon Mr. Mai's new hourly rate as an independent contractor. However, Mr. Mai submitted his written notice of resignation the very next day, effective two weeks later (January 3, 2020). Three minutes after submitting his resignation notice, and while still employed by Catch, Mr. Mai emailed his supervisor at CNRL and asked if he could work for CNRL through another agency.

On December 18, 2019, the day after Mr. Mai had tendered his resignation and covertly solicited CNRL, Mr. Mai met with the President of Catch. The President advised Mr. Mai that his resignation could damage Catch's relationship with CNRL and asked Mr. Mai to reconsider. The President also reminded Mr. Mai of his non-solicitation covenant. Mr. Mai denied that he was contemplating working with CNRL after his departure, despite having already solicited CNRL the day before.

Mr. Mai immediately began reaching out to other agencies through which he could perform services for CNRL. On December 19, 2019, Mr. Mai again emailed his supervisor at CNRL, stating: "Based on the offers that I have received, I have decided that Noramtec would be the best represent me at CNRL. Please proceed with Noramtec as my decision."

Mr. Mai began working for Noramtec, one of Catch's competitors, on January 6, 2020. He immediately resumed providing services to CNRL, doing the exact same work he had previously performed at CNRL through Catch.

Is the Non-Solicitation Clause Enforceable and Did Mr. Mai Breach It?

The Court first considered whether the non-solicitation clause was enforceable, noting as usual that such clauses are presumptively void as being contrary to public policy, but can be justified where the scope of restricted activity is:

- narrowly focused on protecting a legitimate business interest;
- clear and unambiguous; and
- fair and reasonable, considering all the circumstances.

The Court had no difficulty finding the non-solicitation clause to be clear and reasonable in the circumstances. Catch had legitimate business interests that required protecting. Their business model involved providing skilled technical workers to companies like CNRL who require contractors. Catch expended time and resources to develop and maintain its relationships with their its clients. Therefore, the Court found that it must have some way to protect those relationships from being appropriated by their employees.

In addition, the Court noted that a non-solicitation clause was only included in the employment contracts of those employees who had integrated relationships with Catch clients. The non-solicitation clause was limited to only Catch customers with whom the employee worked in the last 12 months of their employment with Catch. The duration of the restriction was also limited in time to 12 months.

Mr. Mai argued that the non-solicitation clause was unenforceable because it did not include a geographic location. However, the Court found that the clause was reasonable, notwithstanding the absence of a geographical restriction, because it only prohibited Mr. Mai from soliciting the single Catch client to whom he had been seconded. The Court also noted that given the prevalence of remote work in today's society, geographical restrictions are, in many cases, obsolete.

The Court also found it persuasive in assessing reasonableness that Catch opted for a non-solicitation clause, as opposed to the more restrictive non-competition covenant.[1]

The Court concluded that Mr. Mai clearly and unequivocally invited CNRL to discontinue its engagement with Catch and contract Mr. Mai's ongoing services through his new employer, in direct violation of the non-solicitation clause.

Did Mr. Mai Breach the Confidentiality Clause?

With respect to the confidentiality clause, the Court found that Mr. Mai used confidential information about the time-sensitive nature of his work with CNRL and the positive feedback CNRL had provided to Catch about his performance to lure CNRL's business away from Catch. As a result, he had also breached the confidentiality clause in the Agreements.

Did Mr. Mai Breach his Duty of Good Faith to Catch?

In determining whether Mr. Mai's conduct amounted to a breach of his duty of good faith, the Court noted as follows:

Employees like Mr. Mai who are seconded to the clients of their employers are in a unique position. They are integrated into the business of the client and for the most part, they are treated like employees of the client. Regardless of this arrangement, the duty of good faith requires that the employee discharge their duties to their employer faithfully and honestly and that they not act in a manner contrary to their employers' interests. Employers like Catch are particularly vulnerable when their employees breach the duty of good faith to undermine the business relationship between their employer and the client.

The Court also pointed out that Mr. Mai had repeatedly lied under oath during his examination for discovery when he denied having any intention, at the time of his resignation from Catch, to continue providing services to CNRL. The Court stated: "Mr. Mai went far beyond simply looking for alternate employment while still employed. He engaged in a calculated course of action designed to benefit himself at the expense of his employer, all while still employed and drawing a salary from Catch." Considering all the circumstances, the Court found Mr. Mai's actions amounted to a "flagrant breach of the duty of good faith."

What are Catch's Damages?

The Court found that but for Mr. Mai directly soliciting CNRL's business away from Catch and then lying to Catch about his intentions, CNRL would have continued its business relationship with Catch.

For 2020, the year that Mr. Mai resigned, the Court awarded Catch its full loss of profits (projected income from its contract with CNRL less estimated expenses that would have been associated with Mr. Mai's employment or his replacement). For 2021, the Court applied a 25% discount to Catch's projected profits on the CNRL account and a 50% discount for 2022 to account for contingencies. The Court declined to award damages beyond 2022, as it was too speculative given the passage of time. In total, the Court awarded Catch $112,320.00, plus prejudgment interest and its costs of the litigation.

Key Takeaways for Employers

This decision provides some comfort for employers who are often faced with an uphill battle to enforce a non-solicitation clause after an employee departs and takes clients with them, in contravention of their contractual non-solicitation obligations. Although our courts remain of the view that restrictive covenants are presumptively void, this decision confirms our courts' willingness to uphold an appropriately drafted restrictive covenant that is fair and reasonable in the circumstances. In addition, the Court's approach in this case to the difficult task of assessing and quantifying Catch's damages, even though mathematical precision was impossible and some speculation was required, highlights the economic value to employers in

investing in well-drafted restrictive covenant agreements.

We will continue to follow case law across Canada involving breaches of restrictive covenants, particularly in Ontario where the more restrictive non-competition covenant has been statutorily barred save for limited exceptional circumstances.

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[1] Note that non-competition covenants are now statutorily banned in Ontario, subject to only a few narrow exceptions.
