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COURT OF APPEAL FOR ONTARIO

GOUDGE, CRONK AND JURIANSZ JJ.A.

B E T W E E N :	)	
	)	
IT/NET INC.	)	**Leonard Cameron**
	)	**For the appellant**
	)	
Respondent	)	
	)	
- and -	)	
	)	
LEN CAMERON	)	**Jock Climie**
	)	**For the respondent IT/NET Inc.**
	)	
Appellant	)	
	)	
	)	**Heard: October 11, 2005**

On appeal from the judgment of Justice Bernard Joseph Manton of the Superior Court of Justice dated October 28, 2003.

GOUDGE J.A.:

[1] The respondent IT/NET is a consulting firm that offers information management services to various departments of the federal government. In the spring of 2000 it contracted with the Department of National Defence (DND) to provide certain specific services, for a term that ultimately concluded on May 31, 2000. It also contracted with the appellant Len Cameron to provide those services. As a result, Cameron worked on contract with IT/NET at DND until May 31.

[2] Cameron's contract included a non-solicitation and non-competition clause and a duty of confidentiality clause. When DND reposted to fill the position starting June 1, Cameron allowed FPC, a competitor of IT/NET, to submit a bid for the contract that included his resume. FPC was successful, and Cameron returned to the position although he was now working on contract with FPC. As a result, IT/NET sued Cameron for breach of contract. The trial judge found that he had breached both of the clauses referred to, and awarded IT/NET damages of $80,000 and costs of $47,267.64. This is the appeal from that judgment.

[3] For the reasons that follow, I would allow the appeal. In brief, I conclude that the restrictive covenant restricting competition and solicitation is unreasonable in these circumstances and therefore unenforceable. I also conclude that, on these facts, the appellant did not breach the confidentiality clause in his contract.

[4] The facts relevant to the issues are not significantly disputed. The respondent is one of the number of companies in the business of supplying individuals to the federal government to perform specialized technology services. In response to a "request for proposal" (RFP) from a government department, the respondent would seek an individual who matches the qualifications sought and, with that individual's permission, submit a response to the RFP including the individual's resume. If successful, the respondent would enter a contract with the client department and would then enter a parallel contract of service with the individual.

[5] Here the respondent's contract with DND was to provide a UNIX System Administrator for a period of months ending first on March 31, 2000 and later extended to May 31, 2000. Part way through the contract, the respondent replaced the individual it had initially found to provide this service with the appellant.

[6] At that point, the appellant signed a contract of service with the respondent which contained the following clauses:

> 4. NON-SOLICITATION & NON-COMPETITION: The Subcontractor agrees that during this Agreement period, and for a period of 12 months after its termination, that s/he will not, directly or indirectly, on anyone's behalf (including, company, partnership, person or self):
>
> 4.1. offer or cause to be offered, or to recommend, the offering of employment or subcontract services, to any employee or Subcontractor of IT/NET.
>
> 4.2. he/she will not attempt to solicit business from any IT/NET clients or prospects without the written consent of IT/NET. The intent of this clause is to reasonably protect the goodwill of IT/NET while at the same time not unduly limiting the ability of the Subcontractor to continue in the practice of his/her profession.
>
> 5. DUTY OF CONFIDENTIALITY: The Subcontractor agrees and acknowledges that s/he has a fiduciary duty to

> comply with the duties found in this clause. The Subcontractor will not at any time, including after the termination of this contract, directly or indirectly, divulge to anyone (including, company, partnership, person or self) either:
>
> 5.1 any name, address or requirement or any customer of the IT/NET;
>
> 5.2 any process, method or device of IT/NET or other information whether of the foregoing character or not, acquired as a result of his service;
>
> 5.3 any of the financial affairs of IT/NET.

[7] The appellant's original contract was for a period of 11 days only, from March 20 to March 31, 2000. Subsequently, he signed a second contract extending his assignment to April 30 and then a third, expiring May 31, 2000, matching the extension given to IT/NET by DND. However, because of a dispute over the length of employment that IT/NET had originally promised him, the appellant made clear that he did not intend to work for it after May 31, and he refused to have his name submitted to DND by the respondent in response to any new RFP for the period from June 1 onward.

[8] In an effort to obtain employment following the expiry of his contract with IT/NET at the end of May, the appellant contacted FPC, a competitor of the respondent, and sent it a copy of his resume. When FPC and certain specified others in the industry received an RFP from DND seeking to fill the position beginning June 1, 2000, it responded with a bid submitting Cameron as the person who would do the work.

[9] Not surprisingly, FPC was successful. It obtained a contract that ultimately was extended to November 30, 2003. This is consistent with the evidence that a bid including as the proposed service provider the person who has been doing the work is very likely to be selected. IT/NET was therefore left without a contract with DND to fill the position as it had up to May 31.

[10] The trial judge found that, because the respondent had nurtured its relationship with DND, it had a proprietary interest in its client which was capable of protection through a restrictive covenant. He concluded that by giving FPC permission to submit his name with its response to DND and by providing FPC with the information required to prepare that response, the appellant had breached the clause prohibiting solicitation and

competition. He went on to find that by giving the necessary information to FPC to bid for this contract, the appellant had also breached his duty of confidentiality.

[11] The trial judge then awarded damages equivalent to the profit that the respondent would have made had it been awarded the contract from DND for the period from June 1, 2000 to November 30, 2003, rounded down to $80,000 as requested by counsel for the respondent. However, he dismissed both the claim for punitive damages and the appellant's counterclaim for misrepresentation. None of these findings are in issue in this appeal.

ANALYSIS

[12] The appellant challenges both the finding that he is liable for breach of the restrictive covenant and the finding that he breached the confidentiality clause of his contract.

[13] Turning first to the restrictive covenant, the respondent does not dispute that as the party seeking to rely on it, it must establish the reasonableness of the clause as between the parties. It must show that it has a proprietary interest entitled to protection, that the temporal or spatial features of the clause are not too broad, that its terms are clear and certain, not vague and ambiguous, and that, in all the circumstances, the restriction is reasonably required for the respondent's protection. If not, or if the appellant can then show that the clause is contrary to the public interest, it will not be enforced. See *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] 2 S.C.R. 916.

[14] In this case, the trial judge found, based on the evidence, that the respondent had a proprietary interest in its client DND that was capable of protection through a restrictive covenant. That is a finding which cannot be attacked in this court.

[15] However, the trial judge made no further analysis and came to no conclusion about whether the restrictive covenant was reasonable as between the parties. Nor did he make any reference to *IT/NET Ottawa Inc. v. Berthiaume* [2002] O.J. No. 4256, although that case was decided less than a year earlier and was brought to his attention. It involved this very respondent and the identical restrictive covenant. In a full and well-reasoned judgment, Aitken J. concluded that the restrictive covenant was unreasonable and therefore unenforceable. I agree with her conclusion.

[16] As Aiken J. said in *Berthiaume, supra*, in the circumstances of this case, a restrictive covenant would be entirely reasonable if it simply prohibited a contractor in Cameron's position from assisting a competitor to obtain a contract with a client of IT/NET to fill the very position he had occupied with that client because of his contract with IT/NET. By allowing the competitor to put in a bid including his name, the

contractor would be taking unfair advantage of the links he had been permitted to develop with the client because of the relationship IT/NET had nurtured with that client. This is the proprietary interest that was focused on by Mr. Braskow, the President and CEO of IT/NET, when he gave evidence about his understanding of the purpose of the restrictive covenant. He put it this way:

> All I'm asking is, from all our contractors, is we make a tremendous investment and to have people honour it. The good news is, again, is 99.9 percent of people understand that and monitor that, and they don't go back to the same job, to the same client, they don't solicit or compete.

[17] However, clause 4 goes considerably beyond what is needed to protect this proprietary interest. The language of clause 4.2 prevents the contractor from soliciting business from *any* IT/NET client or prospect, not just from the client where the contractor has been placed. This prohibition applies whether or not the contractor knows that the target of his solicitation is an IT/NET client or prospect or whether he has any prior relationship with that client or prospect due to his work for IT/NET.

[18] Moreover, the clause has no spatial limitation. It would apply throughout Canada not just in the city or to the branch of the department of the government in which the contractor has been working.

[19] Finally, parts of the clause are far from clear. For example, it is unclear whether the concept of "clients or prospects" references the present, or the past as well, or also includes those who may become prospects over the life of the contract. The attempt to clarify the clause by expressing the intent to be the reasonable protection of IT/NET's goodwill simply adds ambiguity. Is it only goodwill due to the contractor's work with the client or does it encompass goodwill however created?

[20] In summary, I conclude that the restrictive covenant set out in clause 4 of the appellant's contract is not reasonable as between the parties, given the protection reasonably required by IT/NET. It is therefore unenforceable and the finding of the trial judge that it was breached must be set aside.

[21] The appellant's second argument attacks the finding that he breached his obligation of confidentiality set out in clause 5 of his contract. Here too there is no essential dispute on the applicable law. The respondent acknowledges that the analysis of this issue is guided by the language of the contract, informed by the elements of breach of confidence set out in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, namely, that the information conveyed was confidential, that it was

communicated in confidence and that it was misused by the party to whom it was communicated.

[22] Without elaboration, the trial judge concluded that the appellant breached this clause by giving FPC confidential information he obtained while employed by IT/NET. He gave no indication of what that information was or why he considered it to be confidential. Nor did he make reference to *Lac Minerals*, *supra*.

[23] In my view, the trial judge's finding is one of mixed fact and law, since it results from an application of the legal concept of confidentiality to the facts. However, even subjecting it to the most deferential standard of review, I conclude that the finding represents palpable and overriding error. There is simply no evidence that the appellant conveyed to FPC information acquired as a result of his service with IT/NET that could be considered confidential.

[24] FPC learned of the reposting by DND of the appellant's position not from the appellant, but because it was on the circulation list for RFPs circulated by DND. Nor is there any evidence that FPC learned either the rate of pay the appellant was receiving from IT/NET or what IT/NET was charging DND for the appellant's services. The evidence from DND was that the fact that the appellant was the incumbent in the position being reposted is information that any competitor could obtain from DND simply by inquiring. Hence, this fact cannot be said to be confidential to IT/NET.

[25] What is left is the evidence that the appellant assisted FPC to complete its bid to DND by filling in the matrix portion of FPC's response. That response was an exhibit in the trial and a review of it reveals that the appellant simply provided a listing of the relevant skills and qualifications he had accumulated not just at DND but over his career for each of the mandatory qualifications for the position listed by DND in its RFP. That is all the help he gave to FPC in completing its bid.

[26] In my view, by doing this the appellant was simply reciting his own skills and qualifications. He was not reciting information he received. To characterize his own skills, even just those acquired at DND, as "information" conveyed to him as a result of his service with IT/NET is to stretch the notion of "information" beyond what it can reasonably have been intended to mean in this context. The clause targets facts conveyed in confidence to the contractor, not the technological skills acquired by him in the DND workplace, particularly where there is no evidence that there is anything secret about these skills.

[27] Were it otherwise, the clause would forever prevent him from divulging to anyone for any purpose the experience he had acquired at DND. The consequence of such an interpretation would effectively turn the clause into one restraining his future

employment, a restrictive covenant far more sweeping and unreasonable than the express provision in clause 4 of his contract.

[28] I therefore conclude that the finding that the appellant breached his duty of confidentiality cannot stand.

[29] The respondent raises another argument to sustain the judgment. It says that the appellant owed it a duty of good faith that he breached on the facts of this case.

[30] I cannot agree that such a duty arises here. In *Transamerica Life Inc. et al. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.) this court made clear that Canadian courts have not recognized a stand alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. Unlike *TSP-Intl Ltd. v. Mills*, [2005] O.J. No. 616 (Ont. Sup. Ct.), in this case the appellant was bound by the two clauses of his written contract considered above. There is no room to import a separate duty of good faith where both express clauses have been complied with.

[31] In summary, despite Mr. Climie's thorough and forceful argument, the appeal is allowed. The conclusion that the appellant breached his contract is in error. Paragraphs 1 and 3 of the judgment appealed from are set aside, and an order is substituted dismissing the action with costs to the appellant, to be assessed on a partial indemnity basis. Costs of the appeal to the appellant in the amount of $3,000 inclusive of disbursements and G.S.T.

RELEASED: January 19, 2006 "STG"

"S.T. Goudge J.A."
"I agree E. A. Cronk J.A."
"I agree R. Juriansz J.A."