

COURT OF APPEAL FOR ONTARIO

**RE: IT/NET INC. (Plaintiff/Respondent) – and – SERGE
BERTHIAUME (Defendant/Appellant)**

BEFORE: GILLESE, BLAIR and JURIAN SZ JJ.A.

**COUNSEL: Graham E. S. Jones
for the appellant**

**P. Jock C. Climie
for the respondent**

HEARD: January 25, 2006

On appeal from the judgment of Justice Catherine D. Aitken of the Superior Court of Justice dated November 4, 2002.

ENDORSEMENT

[1] IT/NET INC. sued Mr. Berthiaume alleging that he had breached the non-competition, non-solicitation and confidentiality provisions of his contract with IT/NET. The trial judge held the non-competition and non-solicitation clauses to be unenforceable. That determination is not under appeal. However, she found that Mr. Berthiaume had breached his duty of confidentiality and awarded damages for breach of contract. Mr. Berthiaume appeals.

[2] The trial judge found that Mr. Berthiaume exploited four pieces of “confidential” information, namely:

- (i) he became aware of SXID’s need for someone to fill the position he was in;
- (ii) he learned when the IT/NET-SXID contract was coming up for renewal;
- (iii) he learned how much IT/NET had bid for the contract he was filling; and,
- (iv) he learned about the technical aspects of IT/NET’s proposal to SXID.

[3] The information listed as items (i) and (ii) above was information belonging to SXID. It was known not only to Mr. Berthiaume but also to the Canadian government.

The government made the information known more widely by putting out a detailed request for proposal and actively soliciting service providers who might be interested in obtaining the contract with SXID. At least seven service providers other than IT/NET and Pertinax were asked to bid for the contract, provided with information on the position that Mr. Berthiaume had filled, and told that the contract was coming up for renewal. Information items (i) and (ii) were not confidential.

[4] With respect to the information listed as item (iii), Mr. Berthiaume was aware of how much IT/NET bid for the contract in 1998, as IT/NET had disclosed that information to him, but he was not aware of how much IT/NET might bid for the contract in 2000. It is not enough, however, that Mr. Berthiaume was aware of confidential information, it must also have been misused. While there is no evidence that Mr. Berthiaume told Pertinax how much IT/NET bid for the contract in 1998, there is a dispute over whether the information he gave to Pertinax would have enabled Pertinax to make that calculation. However, Pertinax bid the maximum amount allowed of \$525 per day, so even if Pertinax could have made the calculation based on the information Mr. Berthiaume gave them, such information gave Pertinax no competitive edge.

[5] It was uncontroverted that Mr. Berthiaume never saw or learned of the contents of any of IT/NET's proposals to DFAIT, except for the part of the proposals that he had completed. Thus, the "technical aspects" of IT/NET's proposals referred to in item (iv) above, must refer to the section in each proposal that had been completed by Mr. Berthiaume. The section of the proposals that Mr. Berthiaume completed was a listing of his skills and qualifications. That section was unaltered by IT/NET. Accordingly, this is not a case like *Calian Technology Ltd. v. Frederickson*, [2004] O.J. No. 1004 (S.C.J.) where the employer took the employees' resumes and, using the information on the resumes, extensively cross-referenced that information with respect to evaluation criteria and the statement of work in order to demonstrate compliance with the requirements in the request for proposals. In its proposals, IT/NET did nothing more than include the part that Mr. Berthiaume had completed relating to his skills and qualifications. Mr. Berthiaume provided Pertinax only with information on his skills and qualifications. Knowledge of his own experience and qualifications cannot be said to be confidential information or property of IT/NET's. As it was his information, Mr. Berthiaume was entitled to provide it to Pertinax.

[6] Having decided that there was no breach of the duty of confidentiality, we need not address the other issues raised by the appellant in respect of costs and the quantum of damages.

[7] Accordingly, the appeal is allowed and the action dismissed. The appellant shall have costs of the appeal fixed at \$10,000, inclusive of disbursements and GST. He is

entitled, as well, to costs of the trial. If the parties are unable to agree on those costs, they shall be assessed.

“E. E. Gillese J.A.”

“R. A. Blair J.A.”

“R. G. Juriansz J.A.”