Restrictive Covenants: Conflicting Views in the Court of Appeal

Restrictive covenants have become commonplace in employment contracts and our courts have had many opportunities to pronounce on the validity or invalidity of specific clauses. Accordingly, one might expect to find in the recent cases a degree of unanimity with respect to certain basic questions concerning clauses of this nature. Two recent decisions of the Court of Queen's Bench indicate that no such unanimity exists.

In *Canadian Factors Corp.* v. *Cameron*,[1] the Court of Appeal upheld a covenant prohibiting employment in a related enterprise anywhere in Canada for five years. In very similar circumstances, in *Beneficial Finance Co. of Canada* v. *Ouellette*,[2] a covenant not to engage in any competitive business "in any city or the environs or trade territory thereof in which I have been located or employed within one year prior to such termination" was held to be invalid.

Although the facts in the two cases were remarkably similar, neither the court nor counsel in the *Ouellette* case appear to have referred to the earlier *Cameron* decision. Both decisions involved bare majorities, a five-man bench sitting on the two cases. Finally, no judge was a member of both benches and, accordingly, the views of ten members of the Court of Appeal are available for study — although not all the judges wrote notes.

Cameron was office manager and assistant to the president of Canadian Factors Corp. at the time of his departure. Within a month of his resignation, he was engaged by Business Factors Corporation, a close competitor. Ouellette, manager of the loan department in the Ville Emard branch of Beneficial Finance Co. of Canada, left that Company to join Alliance Finance Corporation in a similar capacity, in the City of Montreal. It appears, in both cases, that the employee resigned with the *intention* of taking employment with a competitor.

To practitioners and litigants alike, one of the fundamental questions with respect to restrictive covenants is whether such clauses are presumed to be valid or *prima facie* invalid, as contrary to public order and good morals. The answer to this question will determine

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[1] [1966] B.R. 921.
[2] [1967] B.R. 721.

where the evidentiary burden lies, a matter of the utmost importance in this area.[2a] Five of the ten judges who sat in these two cases believe restrictive covenants to be *prima facie* valid while the remaining judges either expressly or impliedly applied the presumption of invalidity.

The following opinions were expressed in the *Cameron* decision. Casey, J., held that:

> It was open to defendant to plead that the restrictive covenant was contrary to public order without being obliged to allege and prove new facts, that is, facts not already alleged in the declaration. But to do so he would have been obliged to establish a text of law or a rule of jurisprudence to the effect that all such restrictions are, *prima facie* at least, contrary to public order and for that reason invalid.
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> This he could not do. There is no such text of law nor has any such rule been established by decisions that are authoritative, reasoned and constant.[3]

Rinfret, J., after an exhaustive review of the leading English and Canadian cases, concludes that no presumption of illegality exists.

> Le fardeau de la preuve reposait sur ses épaules (Cameron) d'établir son allégation puisque c'est lui qui opposait la nullité du contrat et demandait son extinction (art. 1203 C.C.) ...
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> Je n'ignore pas non plus que, d'après une certaine jusrisprudence, il existerait une présomption d'illégalité à l'encontre des contrats en restriction du commerce et de l'emploi.[4]

Badeaux, J., concurred with the opinions of Casey and Rinfret, JJ. The dissenting judges in the *Ouellette* case, Pratte and Rivard, JJ. adopt the same view, which Pratte, J., expressed in the following way:

> Dans notre droit, la liberté de contracter n'est limitée que par la loi, l'ordre public et les bonnes moeurs (art. 13, 990 et 1062 C.C.). Or, aucun texte ne prohibant des conventions restrictives de la liberté du salarié, il s'ensuit que ces conventions sont licites, à moins qu'elles ne contredisent quelque principe d'ordre public.
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> La liberté de contracter étant la règle, les conventions sont présumees licites...[5]

The effect of the opposite view, that taken by Brossard and Montgomery, JJ., in the *Cameron* case as well as Owen, J., speaking

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[2a] The problem regarding the "burden" is, in the case of restrictive covenants, further complicated by the fact that there is considerable confusion regarding *what* must be alleged and proved to discharge the burden at all, i.e. does one discharge the burden with proof of facts, purely and simply, and, if so, what kind of facts must be proved?

[3] At p. 924.

[4] At p. 929.

[5] At p. 728.

for the majority in *Ouellette*,[6] is made very clear in the following statement by Montgomery, J.:

> It will be seen that plaintiff had the burden of establishing that it was reasonable for it to restrain defendant from approaching its clients and prospects for a term of five years and from taking employment with any other factoring concern or business with a similar purpose for the same period.[7]

Since the burden of introducing evidence in cases of this nature will always be difficult to discharge, it is important that parties either contemplating or already involved in litigation know where it lies.

To further cloud the issue, two of the judges derive quite opposite conclusions from a reading of the same cases, primarily the English decision in *Nordenfelt* v. *Maxim-Nordenfelt Guns & Ammunition Company Limited*.[8] Rinfret, J., if the writer correctly understands him, cites the case as a watershed in the history of restrictive covenant law, whence the view emerged that such clauses were not presumed to be invalid but must be tested according to the facts of the particular situation. Montgomery, J., on the other hand, cites the *Nordenfelt* case, in particular the decision of Lord Macnaghten, to support *prima facie* invalidity.

A third view was expressed regarding the position of the common law decisions in this sphere. Brossard, J., concludes that we should cease our reliance on these decisions, on the grounds that the Quebec jurisprudence is sufficiently mature to answer such questions, and that the law of England[9] differs in a material respect from our own.

The restrictive covenant was struck down in the *Ouellette* case because the area involved was "not defined or described with sufficient certainty." This result was achieved notwithstanding the fact that Ouellette was in clear and wilful breach of the spirit, and, in the minority's view, of the letter of his contract and notwithstanding the fact that he took employment on the island of Montreal. The majority was not prepared, it is submitted, to view the clause in the light of the facts. In the writer's opinion, the approach adopted by Pratte, J., dissenting, was more appropriate to the circumstances; on the question of the area of operation of the clause, he says:

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[6] It must be pointed out that Owen, J., does not expressly adopt the view of *prima facie* invalidity but he does cite with approval from the judgment *a quo*, which does take that view.

[7] At p. 944.

[8] [1894] A.C. 535.

[9] In permitting the court to determine whether an equilibrium exists between the obligation and the consideration received for it.

> (L)e juge a eu raison de dire que la désignation qui en est faite ne permet pas de le délimiter avec précision. Néanmoins, une chose est certaine: le mot "environs", en français comme en anglais, signifie les lieux circonvoisins. Aussi, on peut dire, sans crainte d'errer, que le territoire prévu comprend au moins la ville de Montréal et toutes les municipalités qui lui sont adjacentes.[10]

It is the writer's opinion that, when dealing with restrictive covenants in employment contracts, the courts should interpret, where necessary, and also consider the actions of the parties. This flexibility has been adopted in cases involving the sale of a business. In *Sabourin* v. *La Compagnie de Pain National de Hull,*[11] Rivard, J., commented as follows:

> Son intention de ne s'y point conformer paraît dans toute sa conduite. Il a peut-être cru se conformer strictement à la lettre du contrat qui le liait, mais il éludait délibérément l'esprit.[12]

In *Cook* v. *Brisebois,*[13] Lynch, J., basing his opinion on both English and French authorities, upheld the validity of a perpetual injunction although the covenant in question was not restricted in terms to a particular locality. Although Lynch, J., would have limited the application of the injunction to a smaller area than that afforded by the judge who had issued the injunction in the first place, what is significant is that he was willing to read into the covenant a restriction as to applicability when it was apparent from the context that the intention of the parties to the contract was to restrain the vendor from soliciting former customers and other persons in the very neighbourhood in which the business had originally been carried on.[14]

The valid principle of imposing stricter conditions when dealing with restrictive covenants in employment contracts may be upheld without completely ruling out the type of thinking demonstrated in the above two cases.

Finally, the actual decisions in the two cases indicate a very great disparity in judicial opinion, a disparity which can only lead to continued uncertainty in the drafting of restrictive covenants and in their application. It is to be hoped that the Supreme Court of Canada, in its decision on the *Cameron* appeal, will answer the fundamental question relating to the burden of proof and provide some guidelines to what is "reasonable" in such clauses.

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[10] At p. 728.
[11] (1923), 29 R.L. n.s. 342 (B.R.).
[12] *Ibid.*, at p. 345.
[13] (1899), 16 C.S. 46.
[14] *Ibid.*, at p. 49.
* Of the Bar of the Province of Quebec.