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Enforcing Restrictive Covenants: The StressCrete Case

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In Canada, restrictive covenants in employment agreements can be very difficult to enforce, particularly by way of injunctive relief. This is often because employers are unable to demonstrate that there is:

- a serious issue to be tried (typically because the covenant is too long in duration or poorly drafted, making it either ambiguous or overly broad and unreasonable); or
- irreparable harm that would occur to the employer if an injunction were not granted.

In a recent decision[1], the Superior Court of Justice in Ontario issued Stress-Crete Limited and Luminaire Company Inc. (collectively "StressCrete"), family-run businesses who manufacture and supply lighting solutions internationally, an injunction enforcing the non-solicitation covenant signed by its former employee Mr. Harriman. Mr. Harriman was StressCrete's Sales Manager of U.S. Northeast and Canada, until he resigned from StressCrete to join Cyclone, a direct competitor. Mr. Harriman had signed both a non-competition and a non-solicitation covenant with StressCrete.

Canadian Courts will generally not enforce a non-competition covenant where a non-solicitation covenant would be sufficient to protect an employer's legitimate proprietary business interest. Non-solicitation covenants stand a better chance, but can also be very difficult to enforce.

Mr. Harriman's non-solicitation clause prevented him, in part and for a period of 2 years, from "contacting any person, firm, corporation or governmental agency who was a customer of StressCrete at any time during [his] employment with StressCrete." The Court found this language to be sufficiently reasonable and unambiguous, which combined with the Court's conclusion that Harrison would attempt to solicit StressCrete clients, presented a serious issue to be tried.

On the issue of irreparable harm (harm which cannot be adequately quantified in monetary damages), the Court considered the fact that Mr. Harriman possessed intimate knowledge of how StressCrete goes to market, its pricing levels, price lists, sales reports and customer's lists, which knowledge would be used by

any competitor to undercut StressCrete in its bidding processes for work in Ontario. This unfair competitive advantage in pricing and product marketability would undermine StressCrete's ability to obtain further contracts for manufacture and distribution to its existing client base, constituting irreparable harm.

The Court issued an injunctive order prohibiting Mr. Harriman from soliciting or contacting any StressCrete employee, person, firm, business, corporation or governmental agency that was a client of Stress-Crete, for a period of 2 years.

This decision will be helpful to employers seeking to enforce restrictive covenants with their departing employees, particularly where the duration may be as long as 2 years. It is not known at this time whether Mr. Harriman will seek to appeal.

[1]*Stress-Crete v.Harriman*, 2019 ONSC 2773

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