# Watch Your Back: Employee Ordered To Pay $112,320 In Damages For Soliciting His Employer's Client



In *Catch Engineering Partnership* v. *Mai*, 2023 ABKB 279, the Alberta Court of King's Bench awarded $112,320 in damages against a former employee who breached the non-solicitation provisions in his employment agreement.

**Summary**

Catch Engineering Partnership ("Catch") is a partnership that obtains a significant amount of its business by seconding engineers to companies that require contract workers.

Mr. Mai was hired by Catch as an engineer to provide services to one of the partnership's most significant clients, CNRL. When Mr. Mai was hired, he knew that Catch was relying on him to deliver on its contract with CNRL and used this knowledge to negotiate an additional $10,000 in salary.

After 10 months of service, on December 17, 2019, Mr. Mai resigned from employment with Catch, advising that his last day would be January 3, 2020. Only three minutes after tendering his resignation and while still an employee of Catch, Mr. Mai e-mailed CNRL advising of his resignation and asking if he could work for CNRL as a contractor through another agency. By December 19, 2019, Mr. Mai had secured a position with another technical services company and he commenced employment with that company on January 6, 2020. Through his new employment, he was seconded to CNRL to perform the same work as he had performed previously through Catch. As a result, CNRL ended its engagement with Catch.

Following these events, Catch filed a claim against Mr. Mai for breaching his employment agreement and, specifically, the non-solicitation provisions in the agreement.

Mr. Mai's employment was subject to a non-solicitation clause which prevented him from directly or indirectly contacting or soliciting any customer of Catch with whom he had dealt in the 12 months prior to the termination of his employment for the purpose of inviting, encouraging or requesting the customer to transfer its business

from Catch to another person or entity or otherwise discontinue its relationship with Catch. The clause was effective during Mr. Mai's employment and for 12 months following termination of employment.

In considering whether the non-solicitation clause in Mr. Mai's employment agreement was enforceable, the Court noted that non-solicitation provisions are in the nature of restrictive covenants and therefore presumed to be invalid unless they can be justified as reasonable in the circumstances. The policy basis for the presumption is that restrictive covenants, such as non-solicitation clauses, can prevent employees from utilizing their knowledge, skills and expertise to find alternative employment and often end up in an employment agreement in the context of a power imbalance between the employer and employee.

The Court then held that the non-solicitation clause in Mr. Mai's employment agreement was valid and enforceable. The Court relied on five factors to support its conclusion:

1. The nature of Catch's business required a way to protect the partnership's client relationships from employees who were directly engaged with those clients.
2. The non-solicitation clause was narrowly focused to protect only Catch's legitimate business interests. It did not otherwise interfere with the right of an employee like Mr. Mai to utilize his or her knowledge, skills and expertise in the job market. In Mr. Mai's case, the clause was specific to clients with whom he had worked and was restricted to the 12 months following the termination of his employment.
3. Mai's ability to go into the job market and find work was not unreasonably restricted.
4. The activity proscribed by the non-solicitation cause was clear and unambiguous.
5. There was no power imbalance in the negotiation of the terms of Mr. Mai's employment with Catch and indeed he had negotiated an additional $10,000 in salary at the time he was hired.

The Court concluded that Mr. Mai had clearly breached his non-solicitation obligations by soliciting CNRL's business, which resulted in the end of CNRL's relationship with Catch. The Court also concluded that Mr. Mai had violated the confidentiality provisions in his employment agreement and the duty of good faith he owed Catch. The Court ordered Mr. Mai to pay Catch $112,320 plus interest and legal costs.

### Takeaways

Non-solicitation clauses are often held to be unenforceable by courts for policy reasons, including the protection of vulnerable employees. It is critical for employers seeking to rely on such clauses to ensure the clauses are clear and unambiguous, narrowly focused to protect the business' interests, and do not improperly restrict the ability of employees to utilize their knowledge, skills and expertise to find work. It is advisable to seek advice from a capable employment lawyer or other HR professional.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

by Teodora Bardas
Roper Greyell LLP – Employment and Labour Lawyers