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THE SUPREME COURT OF CANADA RENDERS A DECISION ON RESTRICTIVE COVENANTS CONTAINED IN AN ASSET SALE AGREEMENT

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On September 12, 2013, in *Payette* v. *Guay inc.*[1], the Supreme Court of Canada rendered a decision which will be of interest to anyone involved in a transaction for the purchase or sale of assets. The Court shed some light on the interpretation of clauses restricting employment and post-employment competition which are contained in an agreement providing for the sale of assets but which, incidentally, includes an employment contract.

Following a detailed analysis of the wording of the asset sale agreement and the circumstances surrounding its negotiation, the Supreme Court confirms that the clauses in dispute are not related to an employment contract but rather to a sale agreement. According to the Court, the essence of the principal obligations set out in the primary contract do not relate to an employment relationship insofar as such a relationship is merely incidental to the sale agreement.

But that is not all: Justice Wagner, writing for the Court, confirms that in order for a non-solicitation clause negotiated as part as an asset sale agreement to be valid, it does not need to be limited in its territorial application.

Here are his reasons:

- The object of a non-solicitation clause is narrower than that of a non-competition clause.
- The non-solicitation clause creates obligations which are less restrictive than those created by a non-competition clause.
- While not specified, the territorial scope of the clause can easily be circumscribed by conducting an analysis of the target customers.
- The modern economy and new technologies no longer allow for the geographic limitation of a customer base.

Accordingly, a non-solicitation clause contained in an asset sale agreement cannot be automatically invalidated due to the absence of a territorial limitation.

This decision will be assessed further in an upcoming publication.

[1] 2013 S.C.R. 45.