

COURT OF APPEAL FOR ONTARIO

CITATION: MEDlchair LP v. DME Medequip Inc., 2016 ONCA 168

DATE: 20160229

DOCKET: C60733

Feldman, MacPherson and Miller JJ.A.

BETWEEN

MEDlchair LP

Applicant (Respondent)

and

DME Medequip Inc., Allison Rolph, Ron Seiderer, and 2169252 Ontario Inc.

Respondents (Appellants)

David S. Altshuller and Jennifer Pocock, for the appellants

R.S.M. Woods and Peter Smiley, for the respondent

Heard: January 25, 2016

On appeal from the judgment of Justice Thomas J. McEwen of the Superior Court of Justice, dated July 14, 2015, with reasons reported at 2015 ONSC 3718.

Feldman J.A.:

[1] The respondent franchisor, MEDlchair LP, was successful on its application to enforce a restrictive covenant against the appellants, DME Medequip Inc. (its former franchisee) and related parties.

[2] On the appeal, the appellants raised a number of arguments that were rejected by the application judge. They also sought to introduce a significant amount of fresh evidence. The court called on the respondent on only one issue: whether the franchisor was entitled to enforce the restrictive covenant when its evidence was that it had no intention of opening another MEDlchair store within the protected geographic area.

[3] The outcome of the appeal turns on that issue.

Facts

[4] MEDlchair LP is a franchisor that operates a network of franchise stores that sell and lease home medical equipment. One of its franchise locations was in Peterborough, Ontario. It was owned and operated by DME Medequip Inc. (“DME”) for 20 years. DME’s latest franchise agreement was dated 2005 (the “2005 Franchise Agreement”).

[5] In 2008, the appellants, Ms. Rolph and Mr. Seiderer, incorporated the appellant 2169252 Ontario Inc. (“216”) to purchase the Peterborough franchise from the owners of DME. With the approval of the respondent, 216 purchased all of the shares of DME and entered into an Amending Agreement in respect of the 2005 Franchise Agreement. 216 guaranteed all of the obligations of DME and the individual appellants personally agreed to be bound by the 2005 Franchise Agreement, including the restrictive covenant. That covenant, which was to apply

on the termination of the agreement, prevented them from operating a similar store for 18 months within a 30-mile radius of their store or the nearest franchise store.

[6] The restrictive covenant reads as follows:

15.02 RESTRICTION

For a period of eighteen (18) months after the termination of this Agreement, Franchisee, its principals, officers, shareholders, directors, guarantors, personal covenantors, and the spouses and/or children thereof shall not either individually or in partnership, in conjunction with any person or persons, firm, association, syndicate, company or corporation as principal, agent, shareholder or in any manner whatsoever, carry on, or engage in, or be concerned with, or be interested in, or advise, lend money to, guarantee the debts or obligations of, or permit its name or any part thereof to be used or employed by, any person or persons, firm, association, syndicate, company or corporation engaged in any business similar to the business carried on by MEDlchair or any of its authorized Franchisees within an area of 30 miles of the nearest MEDlchair Store business in Canada or the MEDlchair Store business operated by Franchisee prior to termination of this Agreement.

[7] The appellants operated the franchise for two years, then renewed in 2010 for a further five-year term.

[8] In 2011, MEDlchair was at a peak size in Canada, with 50 franchisees that operated a total of 66 franchise and satellite locations, while MEDlchair operated four corporate stores, totalling 70 stores nationally. The last new MEDlchair franchise was opened in British Columbia in mid-2010.

[9] In June 2011, the MEDlchair franchise system was sold by its corporate owner, Lifemark Health Limited, to Centric Health Corporation. In early 2012, Centric also purchased Motion Specialties, a group of 24 corporate stores, mostly in Ontario, similar to the MEDlchair stores. One of those stores was in Peterborough, competing directly with the appellants' MEDlchair store.

[10] The appellants allege that, following these acquisitions, Centric focused its support on the Motion stores, rather than the MEDlchair stores. As Centric did not update its MEDlchair franchise documents, it was not able to sell any new MEDlchair franchises. The number of MEDlchair stores began to decline. The appellants have commenced a separate action against MEDlchair in respect of its alleged failure to support the system after 2012 and its increased support to the competitor Motion stores.

[11] In September 2014, Centric sold both MEDlchair and Motion Specialties to its current owner, Birch Hill Equity Partners.

[12] Having become very disenchanted with MEDlchair, the appellants did not renew their franchise agreement when it expired in January 2015. Instead, they removed the MEDlchair signage and continued to operate their business at the same premises with the same merchandise and the same employees. They advised their suppliers by email that they were carrying on business as usual under a new name, Living Well Home Medical Equipment.

[13] These actions by the appellants led the respondent to apply to the court to enforce the restrictive covenant. The appellants took the position that the covenant was not enforceable or that they were not in breach, but the application judge found that the covenant was enforceable and that the appellants were in breach.

Issues on the Appeal

[14] Since the decision of the application judge, the parties have continued to litigate. The appellants brought an unsuccessful motion for a stay pending appeal. The respondent has moved for contempt, taking issue with the extent of the appellants' attempts to comply with the judgment by trying to make their business operations dissimilar to those of a MEDiChair franchise.

[15] For the purpose of those proceedings, a significant further record was generated. The appellants now ask this court to treat that record as fresh evidence on the appeal, or as new evidence that has arisen after the decision, but which is relevant to the appeal. Otherwise, the appellants raise the same issues and make the same arguments on the appeal as on the application.

[16] As a result, there are four issues on the appeal: 1) should the court admit and consider the fresh evidence; 2) did the application judge err by holding that MEDiChair was not required under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, to provide the appellants with a franchise disclosure

document when they originally purchased the franchise; 3) did the application judge err by holding that the term “similar to” in the restrictive covenant was not ambiguous; and 4) did the application judge err by finding that the restrictive covenant was reasonable in scope, having regard to the legitimate or proprietary interest that MEDlchair was entitled to protect?

[17] As I have already noted, the court called on the respondent only on the last issue. I will deal briefly with the first three.

Analysis

(1) Should the court admit and consider the fresh evidence?

[18] The appellants seek to introduce two categories of fresh or new evidence on the appeal. The first consists of the attempts by the appellants to modify their business following the decision under appeal, in order to try to make it sufficiently dissimilar to the MEDlchair business to comply with the covenant, and the negative response of the respondent to those attempts. The second category is further details from the respondent about the declining state of the MEDlchair franchise system at the time of the application and since.

[19] The court did not call on the respondent to address the issue of the admissibility of this evidence on the appeal. The evidence does not meet the

Palmer criteria.¹ With the limited exception of the current state of the MEDlchair franchise system, all of the other proposed fresh evidence could have been obtained by cross-examination of the respondent's deponents – Mr. Lucas, Director of Franchise Operations, and Ms. Ekels, President of MEDlchair – and put before the application judge.

[20] These two individuals could have been cross-examined by the use of hypotheticals regarding the extent of the changes that would make a business dissimilar to a MEDlchair franchise store. And further questions of Ms. Ekels on the state of the MEDlchair franchise system at the time of the application would have elicited the same evidence that was later obtained from her cross-examination on the affidavit she filed in response to the stay motion. Her answers were direct and straightforward.

[21] The fresh evidence also suggests that the MEDlchair franchise system has declined further since the hearing of the original application. However, the application judge took cognisance of the fact that the system “may be experiencing difficulty” in deciding whether the restrictive covenant was reasonably necessary to protect the legitimate or proprietary interest of the

¹ The Supreme Court of Canada articulated the following four criteria for the admission of fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775: (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

respondent. For the reasons discussed below, that evidence was sufficient for a proper consideration of that issue.

(2) Was MEDIchair required under the *Arthur Wishart Act* to provide a franchise disclosure document?

[22] Sections 5(1) and (4) of the *Arthur Wishart Act* require a franchisor to provide a prospective franchisee with a “disclosure document” that contains prescribed information about the franchise at least 14 days before a franchise agreement is signed or payment is made. However, in a number of cases described in s. 5(7) of the Act, a franchisor is exempted from that obligation. One is where the grant of the franchise by a franchisee “is not effected by or through the franchisor”: s. 5(7)(a)(iv).

[23] Section 5(8) then elaborates on the exemption by describing two factors that do not, in and of themselves, indicate that a grant by a franchisee is effected by or through a franchisor – namely, where:

(a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or

(b) a transfer fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

[24] The application judge found that the respondent did not provide the disclosure document in accordance with ss. 5(1) and (4) of the Act. Although the evidence was in dispute, the application judge proceeded on the basis that the

documentation that the respondent provided to the appellants when they were buying the franchise from its previous owners did not contain a copy of the 2005 Franchise Agreement, which was a required part of the disclosure document. The legal issue before him, therefore, was whether the respondent came within the statutory exemption in s. 5(7)(a)(iv), as explained in s. 5(8), which turned on the extent of the respondent's involvement in the transaction when the franchise was sold to the appellants.

[25] The application judge found that the respondent had very little involvement in the sale of the franchise and was therefore exempt from the disclosure requirement. The respondent merely gave its required approval for the transfer, took a transfer fee, and obtained personal covenants from Ms. Rolph and Mr. Seiderer to be bound by the 2005 Franchise Agreement, as well as a guarantee from the appellant numbered company for DME's obligations under the 2005 Franchise Agreement.

[26] The application judge rejected the appellants' further argument that once the respondent gave some disclosure, it was then obliged to give the full statutory disclosure. He also found that the appellants must have been aware of the 2005 Franchise Agreement, and could have requested a copy if they did not receive one.

[27] On appeal, the appellants submit that the application judge should have followed a number of cases where a different conclusion was reached on different facts: see *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2011 ONCA 467, 336 DLR (4th) 234; *2147191 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2014 ONSC 3442, aff'd 2015 ONCA 116; *Mapleleaf Franchise Concepts, Inc. v. Nassus Framework Ltd.*, 2011 ABQB 594; and *Second Cup Ltd. v. Niranjana* (2007), 39 B.L.R. 4th 73 (Ont. S.C.). We do not agree. Those cases are distinguishable. The application judge in this case applied the law to the facts as he found them. We see no error in his approach or in his conclusion.

(3) Is the restrictive covenant ambiguous in its use of the term “similar to” as a description of the prohibited business activity?

[28] The application judge gave fairly short shrift to this issue, given that the appellants had merely changed the name of their business, but otherwise carried on exactly as they had before. He also noted that the appellants had extracted the same restrictive covenant from the former owners of DME when they purchased the franchise, making their argument that the language was ambiguous an untenable one in the circumstances.

[29] The application judge also referred to and agreed with the observation of Wilton-Siegel J. in *Invescor Restaurants Inc. v. 3574423 Ontario Inc.*, 2011 ONSC 1609, 85 B.L.R. (4th) 12, at para. 57, aff'd 2012 ONCA 387, 100 B.L.R. (4th) 173, that courts regularly address restrictive covenants where the standard

is a “similar” business. See e.g. *Pacific Northwest Cruiseshipcenters Ltd. v. Super Cruise World Travel (Delta) Inc.* (1991), 38 C.P.R. (3d) 528 (B.C.S.C.); and *Jamani v. Subway Franchise Systems of Canada, Ltd.*, 2008 ABQB 677, 53 B.L.R. (4th) 128.

[30] The appellants argue that because a) there is no definition of the MEDlchair business in the 2005 Franchise Agreement, b) its business covers a variety of products, and c) different franchise outlets may offer different products, it is impossible to know what would constitute a similar business.

[31] The application judge dealt with this argument. He found that the respondent has “a method of operation, goodwill, products, and services that it has a legitimate interest in protecting from similar operations specializing in the sale or rental of home medical equipment.” In other words, the similarity is found by comparing not only the product line, but also the method of operation, including whether the appellant was trading on the goodwill of the MEDlchair operation from which it had benefitted over the years.

[32] Again, the court did not call on the respondent on this issue. We see no error of law or misapprehension of the factual record that would cause this court to interfere with the conclusion reached by the application judge that the term “similar” in the restrictive covenant is not ambiguous in the context of MEDlchair’s business.

(4) Is the restrictive covenant reasonable in scope for the purpose of protecting the legitimate or proprietary interest that the respondent is entitled to protect?

[33] The basic principles governing the courts' approach to the enforceability of covenants in restraint of trade have been set out clearly in two cases from the Supreme Court of Canada, *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, and most recently, *Payette v. Guay*, 2013 SCC 45, [2013] 3 S.C.R. 95. Both cases also address the difference in approach when the clause is contained in a contract for the sale of a business versus an employment contract. Although the test is essentially the same, courts will give more scrutiny to the reasonableness of a restrictive covenant in the employment context, while applying a presumption of validity to such clauses where they have been negotiated as part of the sale of a business.

[34] The test was described by Dickson J. (as he then was) as follows in the *Elsley* case, at pp. 923-4:

The principles to be applied in considering restrictive covenants of employment are well-established. They are found in the cases above-mentioned and in such familiar authorities as the *Nordenfelt* case, *Mason v. Provident Clothing and Supply Co.* and *Attwood v. Lamont*. Of more recent vintage: *Scorer v. Seymour-John* and *Gledhow Autoparts Ltd. v. Delaney*. A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in

discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable." The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.

It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.

The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills

obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employer. [Footnotes omitted.]

[35] In *Payette*, at para. 58, Wagner J. concluded that in the commercial context – i.e. the sale of a business – the courts will treat a restrictive covenant as lawful unless it is shown on a balance of probabilities to be unreasonable.

[36] Whether a restrictive covenant in a franchise agreement should be viewed and treated as it is in a contract of employment because of an imbalance in bargaining power, or as it is in the sale of a business is the subject of recent ongoing debate. See Peter J. Klarfeld & Mark S. VanderBroek, “Law on Covenants Against Competition Shifts Toward Greater Enforceability by Franchisors” (Fall 2011) *Franchise LJ* 76; and Jennifer Dolman, Adam Ship, Rebecca Hall-McGuire & Tyler Wentzell, “Governing Principles & Recent Trends in the Enforcement of Restrictive Covenants in Franchise Agreements” (2014) *Advocates’ Q* 448.

[37] Although this case involves a restrictive covenant in a franchise agreement, I do not need to decide what level of scrutiny properly applies, because the focus of the inquiry is not the reasonableness of the extent of the temporal or territorial restrictions. Instead, it is whether there is a legitimate interest of the franchisor in this case that is entitled to the protection of the

covenant. The requirement of a legitimate protectable interest is common to both levels of scrutiny.

[38] As Wagner J. explained in *Payette*, the test for reasonableness is whether the clause is “limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted”: para. 61 (citation omitted; emphasis added). See also *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.), at p. 224: “In all the cases the entitlement of a party to a contract to enforce a restrictive covenant is based in the protection of a legitimate or proprietary interest such as the goodwill of a business which has been purchased or the confidential information peculiar to employment.”

[39] The respondent has a legitimate or proprietary interest to protect in the goodwill in its MEDlchair system, including the trade secrets, method of operation, contacts and other benefits that are obtained by a franchisee. However, the purpose of the restrictive covenant is to protect that interest only for a limited time and within a defined territory.² After the specified period, that interest is no longer protected by the covenant. Similarly, during the period, that interest is only protected within the defined territory.

² Other clauses in the 2005 Franchise Agreement also address the protection of trade secrets (5.03), goodwill (10.03), and rights on termination (13.03(a)).

[40] These limitations are necessary to achieve the purpose of the restrictive covenant – namely, to prevent the appellants from competing with the franchisor or another franchisee within the protected territory when they leave the franchise system. Therefore, as Wagner J. stated in *Payette*, at para. 65, “A non-competition clause that applies outside the territory in which the business operates is contrary to public order.” See also *McAllister v. Cardinal*, [1965] 1 O.R. 221 (H.C.), where the court refused to enforce a non-competition covenant covering a greater area than where the purchased business actually operated.

[41] The question that arose squarely on the evidence before the application judge was whether the respondent was entitled to protect its interest in the franchise system as a whole, in a territory where it had made a deliberate decision not to operate a MEDChair franchise store because the corporate parent, Birch Hill, was already operating a competing Motion store within that territory.

[42] Mr. Lucas was straightforward on this point in his cross-examination:

820. Q. So you have no prospective franchisee in the pipeline [in Peterborough]?

A. I have leads all over for major – major store areas.

821. Q. Is Peterborough one of those store areas?

A. Well, Birch Hill doesn't want to have conflict areas, so they – because there is a Motion store there, they wouldn't – they wouldn't put – I believe they wouldn't put a store in where there's a conflict area.

822. Q. So the answer is as long as there is a Motion store there there's no plan to open [a] new MEDlchair store in Peterborough?

A. I believe that's the case.

[43] Ms. Ekels also gave relevant evidence on this issue. In her affidavit, she explained, at para. 6, that the restrictive covenant "safeguard[s] the integrity of the entire franchise system, for the benefit of franchisor and the franchisees alike."

[44] In cross-examination, she was questioned about the contents of that paragraph in the context of this case:

13. Q. And you state:

"Covenants such as the Restrictive Covenant" – and I don't think there's any doubt what we are talking about here in terms of my clients' MEDlchair franchise agreement; I think it's section 15.02 – "allow the franchisor to locate a new franchisee in what had been the former franchisee's territory without having to worry that the former franchise will use the knowledge, experience, and contacts built up while a franchisee to compete against the newcomer."

So that's the rationale?

A. Right.

14. Q. And Mr. Lucas has told us though that there are no plans to put a new MEDlchair franchise in Peterborough.

A. Correct.

15. Q. So the desire of the franchisor to locate a new franchisee in the former territory is, in this case, irrelevant?

A. Yes.

16. Q. And then the last part says:

“They also” – “they” meaning the restrictive covenant I assume – “they also prevent the former franchisee from placing itself close to an existing franchise and then using its knowledge, experience, and contacts to compete unfairly with the existing franchisee. In this way, covenants such as [the] Restrictive Covenant safeguard the integrity of the entire franchise system, for the benefit of franchisor and the franchisees alike.”

And given that my clients have – and I don’t believe it’s in dispute – have opened their store in the precisely same location that they were formerly located, even though there was a move many years ago, there is no current apprehension or concern that’s relevant to this case about my clients moving and placing themselves close to any other MEDlchair franchisee, closer than they are today?

A. Right.

[45] The issue whether MEDlchair had anything to protect in the Peterborough area that was covered by the restrictive covenant was squarely raised before the application judge, who described the argument as follows, at para. 28:

[T]he respondents argue that the restrictions are not reasonable as MEDlchair has been in decline: it has seen a number of its locations closed, many franchisees, including the Whitby location, are operating on a month-to-month lease, and there is no indication that MEDlchair will open a store in Peterborough. The respondents therefore submit that there is no evidence demonstrating that it is reasonable to enforce the

temporal and spatial scope of the restrictive covenant to protect the reasonable interests of MEDlchair. In essence, there is nothing to protect.

[46] The application judge rejected this submission. In his view, the appellants had had the benefits of being in the franchise system. While he acknowledged that the franchisor may have been experiencing difficulties and that there were no plans to open a Peterborough store, he held that those factors did not make the scope of the restrictive covenant unreasonable. The application judge gave more weight to another factor, which was “the integrity of the franchise system, which would be significantly compromised if franchisees were simply allowed to walk away from the terms of the Agreement if MEDlchair was unable to establish that another store was going to open in the same area.”

[47] In my view, however, it is clear from the quoted evidence that by deciding not to operate in Peterborough, MEDlchair effectively acknowledged that it has no legitimate or proprietary interest to protect within the defined territorial scope of the covenant. Nor has the respondent attempted to suggest that it would be entitled to enforce the MEDlchair restrictive covenant in order to protect its interest in another business, Motion, owned within the same corporate group.

[48] The application judge erred in law by focusing on the effect of non-enforcement on the MEDlchair franchise system as a whole, without regard to the reasonableness of the restrictive covenant to protect the franchisor’s

legitimate or proprietary interest within the temporal and territorial scope of the covenant.

[49] One further issue that must be considered when addressing the reasonableness of the restrictive covenant is timing. In this case, it was only as a result of circumstances that arose after the franchise agreement was entered into that the respondent lost or abandoned its interest in the protected Peterborough territory. In *Tank Lining*, this court stated, at p. 225:

Reasonableness is determined in the light of circumstances existing at the time the contract is made which, of course, includes the parties' expectations of what "might possibly happen in the future": *Cheshire and Fifoot's Law of Contract*, 9th ed. (1976), p. 378 and [*Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (C.A.)], p. 145.

[50] In *Tank Lining*, the restrictive covenant covered the whole of Canada, while the parties only had business in some provinces when the agreement was terminated. The appellant in that case argued that there was no Canada-wide business to protect, making the restriction unreasonable. But the court held that the reasonable expectation at the time the parties made their agreement was that the tank lining business would expand across Canada, and "the test of reasonableness applie[d] to that expectation": p. 227.

[51] As the reasonableness of the covenant will be interpreted based on the parties' anticipated expansion of the business when they entered into their agreement, it should similarly be interpreted to take account of the parties'

expectations at that time with respect to the future continued operation of the franchise in the territory. In this case, the clause was reasonable on the assumption and understanding that MEDlchair would want to continue to operate in the protected Peterborough area, but not if it did not. In *Allegra of North America and Allegra Corp. of Canada v. Russell Sugimura*, (August 26, 2008), Milton, CV-08-21790-00 (Ont. S.C.), where the franchisor did not intend to open another franchise location within the territory covered by the restrictive covenant, the court effectively applied the same principle. It refused to enforce the covenant where Allegra had nothing left to protect within the geographic area.

[52] In response to the application judge's concern about the need to enforce the covenant for the benefit of the viability of MEDlchair's franchise system as a whole, in my view, the answer is that the clause has not been struck down as generally unreasonable or unenforceable. It is not ambiguous, nor are the temporal or territorial boundaries unreasonably broad. However, the restrictive covenant is unreasonable as between these two parties in the circumstances of the particular Peterborough franchise because MEDlchair does not have a legitimate or proprietary interest to protect within the territorial scope of the covenant.

Disposition

[53] For these reasons, I would allow the appeal, set aside the judgment below, and dismiss the application. Costs of the appeal to the appellant fixed at \$10,000, inclusive of disbursements and HST, which amount reflects a reduction of \$7,000 because of the unnecessary fresh evidence motion.

Released:
"FEB 29 2016"
"KF"

"K. Feldman J.A."
"I agree MacPherson J.A."
"I agree B.W. Miller J.A."