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THE SCOPE AND LIMITATIONS OF RESTRICTIVE COVENANTS

SINCE *RBC* AND *SHAFRON*

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Introduction

Every business has information integral to its success. Whether it is trade secrets, contacts or other confidential information, accessing this strategic information is appealing to a competitor seeking to encroach upon that business' market.

Employers try to protect business interests in part by placing restrictions on departing employees from competing, soliciting or using confidential information obtained in the course of their employment in subsequent endeavours. To achieve this, employers will typically insert a restrictive covenant, a non-competition and/or a non-solicitation clause, in an employment contract. These covenants are intended to prevent the former employee from exploiting trade secrets, general business goodwill or confidential information, or in many cases using their experience to work for a competitor in the same industry or initiate a competing venture. Whether a restrictive covenant is enforceable depends on the reasonableness of the clause. A balance must be struck between discouraging unnecessary restraint of trade and respecting the freedom to contract. A restrictive covenant is *prima facie* void on the grounds that it is a restraint on trade and contrary to public policy. The onus falls on the employer to justify the

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reasonableness and necessity of the covenant in question. As a result, the courts have been very cautious in enforcing post-termination restrictions.

This paper traces the modern law on restrictive covenants including the early decision in *Elsely*; the more recent articulations from the Supreme Court of Canada in *RBC* and *Shafron*; judicial pronouncements over the last couple of years; the different treatment of restrictive covenants in commercial contracts versus employment agreements; and we conclude with a list of considerations and tips for contract drafting.

Rewind to The Beginning: *Elsley v. J.G. Collins Insurance Agencies Ltd.*

The present-day law on restrictive covenants dates back to a 1978 decision of the Supreme Court of Canada in *Elsley v. J.G. Collins Insurance Agencies Ltd.*[2] The parties entered into an agreement for the purchase of the general insurance business owned by Elsley. The purchase agreement included a covenant that restricted Elsley from carrying on or being engaged in the business of a general insurance agency within the city of Niagara Falls for a period of ten years. The parties also entered into an employment agreement pursuant to which Elsley worked as a manager of Collins' general insurance business. The employment agreement included a restrictive covenant which would apply for a five year period after cessation of employment, as follows:

> 3. Subject to the restrictive covenants contained in the Agreement made between the Parties dated May 1, 1956, in consideration of the employment, the Manager shall not, while in the employ of the Company or of its successors and assigns, whether in the capacity in which he is now or in any other capacity, or during the period of five years next after he shall, whether by reason of dismissal, retirement or otherwise, have ceased to be so employed, directly or indirectly, and whether as principal, agent, director of a company, traveller, servant or otherwise, carry on or be engaged or concerned or take part in the business of a general insurance agent within the corporate limits of the City of Niagara. Falls, the Township of Stamford and the Village of Chippawa, all in the County of Welland; and in the event of his failing to observe or perform the said agreement, he shall pay to the said Company, its successors or assigns, or other the person or persons entitled for the time being to the benefit of the said agreement, the sum of One Thousand Dollars ($1,000.00) as and for liquidated damages, and the said Mrs. Elsley, wife of

[2] 1978 CanLII 7 (SCC)

> the Manager, by her signature hereto, agrees to observe and be bound by the aforesaid covenant.

After almost 17 years, the employment relationship was terminated. Shortly thereafter Elsley commenced his own general insurance business. A number of former clients of the Collins' company transferred their business to Elsley.

The Court articulated a number of factors to be considered in deciding whether a restrictive covenant in an employment contract is void as being a restraint on trade: (1) whether the employer has a proprietary interest worthy of protection; (2) whether the covenant is reasonable in terms of duration and geographic scope; and (3) whether the covenant restricts competition generally, or bars solicitation of the former employer's clients. The Court noted that the restrictive covenant in the sale agreement was exhausted. Although the Court held that the restrictive covenant in the employment agreement was valid as it was not broader than reasonably required to give adequate protection to Collins, it emphasized that a clear blanket restraint on freedom to compete or any unreasonable restraint will be held unenforceable. Justice Dickson emphasized that only where the nature of the employment is "exceptional" will a covenant prohibiting an employee from soliciting customers and establishing his own business be enforced.

***RBC* and *Shafron*: A Refresher**

In 2008-2009 the Supreme Court of Canada dealt head-on with the issues of departing employees' rights to compete with their former employer; the legitimacy of non-solicitation and non-competition agreements; and the Court's role in construing these provisions in employment contracts; these were the cases of *RBC v. Merill Lynch* and *Shafron v. KRG Insurance Brokers*.

RBC v. Merill Lynch[3] was memorable for its facts: in November 2000 the branch manager of a RBC investment brokerage business in BC coordinated the departure of nearly all of the investment advisors to a competitor business run by Merrill Lynch. No notice was provided by the advisors, and in the period leading up to the mass exodus, many of RBC's records were

[3] 2008 SCC 54.

copied and transferred to Merrill Lynch. RBC sued the branch manager, the former employees, and Merrill Lynch seeking damages for a number of alleged wrongs including breach of fiduciary duty, breach of implied terms including not to compete and to provide reasonable notice, among others.

The Supreme Court of Canada made it clear that once the investment advisors left RBC, they were under *no* general duty *not* to compete with their former employer. There is no blanket prohibition on competition by a former employee. An employer's recoverable damages are limited to failure to give reasonable notice, and specific breaches of duties such as improper use of confidential information. This general freedom to compete may be restrained by the duty not to misuse confidential information, as well as duties arising out of a fiduciary status or a restrictive covenant. Justice McLachlin for the majority specifically declined to consider whether managerial employees have "quasi-fiduciary" duties. At paragraph 19, the Court summarized as follows:

> …The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.

The Supreme Court of Canada ultimately reinstated most of the trial judge's award, which assessed damages against the departing employees and found Merrill Lynch jointly and severally liable for the award.

A year later the Supreme Court of Canada released *Shafron v KRG Insurance Brokers (Western) Inc.*[4]: After selling the shares of his business, Shafron continued to be employed by KRG under a series of employment contracts for a period of over 10 years. Each successive employment agreement contained a restrictive covenant stating that if Shafron were to leave KRG for any reason except termination without cause, he would not be able to carry on or be employed in connection with the business of insurance within the "Metropolitan City of Vancouver" for a period of three years. After Shafron joined another insurance agency in Richmond, a suburb of Vancouver, KRG brought an action attempting to enforce the restrictive covenant and claiming that he had breached equitable and fiduciary obligations.

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[4] 2009 SCC 6

The Supreme Court started with the proposition that restrictive covenants are restraints of trade and generally contrary to public policy. However, parties have the freedom to contract and agree to terms that are reasonable. The term “Metropolitan City of Vancouver” in the non-competition clause was not a legally defined term and as a result caused the parties to disagree on its particular meaning. The Court held that an ambiguous or unreasonable clause in an employment contract is void. Further, the British Columbia Court of Appeal erred in trying "to resolve the ambiguity in the term "Metropolitan City of Vancouver" by reading down the covenant according to its notion of reasonableness and what it thought the parties might have intended".[5] The Court explained that it will not re-write or sever a clause in an agreement to assist the parties in general and the employer in particular:

> [33] Where the provision in question is a restrictive covenant in an employment contract, severance poses an additional concern. While the courts wish to uphold contractual rights and obligations between the parties, applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the courts will only sever the unreasonable parts or read down the covenant to what the courts consider reasonable.

As there was “no evidence that the parties unquestionably would have agreed to remove the word “Metropolitan” without varying any other terms of the contract or otherwise changing the bargain”, blue-pencil severance could not be applied. The Court did, however, leave open the possibility that blue-pencil severance *could* be applied to a restrictive covenant in very narrow circumstances:

> [36] I am of the opinion that blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.

The appeal was allowed, concluding that “Metropolitan City of Vancouver” was ambiguous and reversing the Court of Appeal’s error in re-writing the restrictive covenant.

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[5] at para. 47

Most Recent Interpretations of *RBC* and *Shafron*

Since *Shafron* and *RBC* there have been a number of cases interpreting the rules around the enforceability of restrictive covenants in employment agreements and the duties of departing employees. The cases below have been broadly categorized, but in most cases there are necessarily overlapping issues that fall within more than one of the sub-headings identified.

(a) *Departing Employees' Obligations – Confidentiality*

In *Service Corporation International (Canada) Ltd. (Graham Funeral Home Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*,[6] a long-serving manager resigned his employment to establish a competing funeral home business in a small community. The only other full-time employee, along with all part-time employees, resigned simultaneously and joined the new enterprise. Upon their departure, the employees took copies of 2/3 of the "pre-need" funeral services contracts, and were ultimately successful in transferring the contracts to the new business. There were no written employment agreements at issue, but the Court had to consider the nature and scope of the obligations of the two key employees following their resignation.

The Court affirmed the principle articulated in *RBC* that every employee, whether or not in a fiduciary relationship to the employer, owes a duty of fidelity or good faith to the employer which extends beyond active employment. The Court did not hesitate to conclude that the taking and using of confidential information was clearly a breach of the departing employees' duty of good faith and confidentiality:

> I find that Messrs. Nunes and Pottinger were in clear breach of their duty not to misuse confidential information obtained from their former employer. When a new employer benefits from the misuse of confidential information, that new employer is also liable for the former employer's losses, even if it had no direct knowledge of the employees' breach of duty: Clayburn Industries Ltd. v. Piper 1998 CanLII 6544 (BC SC), (1998), 62 B.C.L.R. (3d) 24 (S.C.). The case for liability of the new employer, NP, is particularly strong here because Mr. Nunes and Mr. Pottinger were not merely new employees, but the directing minds of NP, which clearly benefited from the transfer of business.

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[6] 2012 BCSC 586 (CanLII)

This case reinforces the principle that former employees are restrained from certain activities even in the absence of any written employment agreement or fiduciary relationship.

(b) ***Departing Employees' Obligations – Non-Solicitation***

In *Edward Jones v. Voldeng*[7], an employer sought an injunction against two former employees who left to join a competing investment advisor firm. Prior to commencing employment Voldeng signed an employment agreement that stated as follows:

> 11. For a period of six months following termination of this Agreement, you will not directly or indirectly solicit sales of securities and/or insurance business to or from any customer of Edward Jones or otherwise induce any said customer of Edward Jones to terminate his/her relationship with Edwards Jones, if you contacted or dealt with such customer during the course of, or by reason of, your employment with Edward Jones or if the identity of such person was learned by you by reason of your employment with Edward Jones. You further agree that, while in the employ of Edward Jones and for a period of six months after termination of employment with Edward Jones, you will neither confer nor discuss with any Edward Jones' employee the subject of leaving the employ of Edward Jones, nor shall you confer nor discuss with any Edward Jones' employee the subject of employment by a person or organization engaged in a similar, related, or competing line or lines of business. It is understood and agreed that the identities of and information concerning the customers of Edward Jones are confidential information, constitute a trade secret, and are the sole and exclusive property of Edward Jones.

A day after Voldeng and his assistant resigned from employment, Voldeng sent an email to a number of former clients announcing his departure and promising to touch base in the coming days. Evidence established that Voldeng subsequently called a number of clients and many transferred their investments to Voldeng's new employer, RBC.

Edward Jones obtained an interlocutory injunction that prohibited Voldeng from initiating any contact with any former client for six months. In the BC Court of Appeal the key issues were whether there was evidence of "irreparable harm" and whether the balance of convenience favoured granting the injunction. Voldeng successfully argued that the harm flowing from a breach of non-solicitation covenants differs from breaches of non-competition covenants. The BC Court of Appeal stated:

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[7] 2012 BCSC 497 (CanLII)

> [36] The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio. The evidence in this case illustrates the point. The respondent is able to state exactly the value of the accounts of Mr. Voldeng's former clients that have been transferred to RBC. As the chambers judge noted, the evidence before her showed that accounts totalling an approximate value of $4 million had been transferred to RBC. In a statement of facts filed on this appeal, the parties agreed that as of April 13, 2012, the respondent had received instructions to transfer client accounts with the approximate total value of $20.2 million. In my view, in this case the potential damages arising out of solicitation, being calculable, do not constitute irreparable harm.

The BC Court of Appeal concluded that Voldeng's solicitation did *not* constitute irreparable harm because Edward Jones was able to calculate its precise financial loss. In doing so, the Court cautioned that while most improper solicitations may result in calculable damages, "it must not be assumed that all will." This case is cautionary tale for employers who want to take immediate action via injunction against a former employee.

(c) *Departing Employee's Obligations – Non-Competition*

In *Enerflow Industries Inc. v Surefire Industries Ltd.*,[8] Dean Pryor ran the shop floor at Enerflow, an oil field service firm. Pryor signed a non-disclosure and non-competition agreement in 2008:

> For good consideration and as an inducement for Enerflow Industries Inc. to employ Dean Pryor, the undersigned Employee hereby agrees not to solicit staff with intentions to employ and not to directly or indirectly compete with the business of the Company and its successors and assigns during the period of employment and for a period of two years following termination of employment and notwithstanding the cause or reason for termination.
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> The term "not compete" as used herein shall mean that the Employee shall not own, manage, operate, consult or to be employee [sic] in a business substantially similar to or competitive with the present business of the Company or such other business activity in which the Company may substantially engage during the term of employment.
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> ...
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> This agreement as well as employee fiduciary responsibilities is mandatory for employment with Enerflow Industries Inc.

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[8] 2013 ABQB 196 (CanLII)

In 2011 Pryor took a job with a competitor, Surefire Industries. Enerflow sued Pryor personally as well as his new employer, and together they brought an application for a summary trial. Pryor took the position that the non-compete was overly broad and not enforceable. The Court noted that there was no geographic restriction in the non-compete, and held that this was an onerous and unreasonable restriction on Pryor and was thus unenforceable. Further, the activity it aimed to restrict was too broad and would interfere with his ability to obtain employment.

With respect to the allegation of breach of fiduciary obligations by Pryor, the Court looked beyond the wording of the agreement at the facts surrounding his employment, citing *RBC* as authority for the principle that an employee's title does decide whether the elevated obligations of a fiduciary should apply. Here, Pryor did not have the level of authority or control over his employer's operation to justify the imposition of a fiduciary obligation. In the result, all claims against Pryor and his new employer were dismissed.

(d) *Overly Broad Clauses*

In *Mason v. Chem-Trend Limited Partnership*,[9] the Ontario Court of Appeal considered the enforceability of an expansive restrictive covenant in the employment contract of a long-serving employee terminated without cause. Mason was a technical salesperson for Chem-Trend, an American-based company selling chemicals to the rubber and plastics industry, for 17 years. The covenant in question provided that Mason would not, "*for a period of one year following the termination, directly or indirectly, for my own account or as an employee or agent of any business entity, engage in any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which I was an employee of the Company, or take any action that will cause the termination of the business relationship between the Company and any customer, or solicit for employment any person employed by the Company*.[10]

The Court of Appeal agreed with the lower court decision that the wording of the restrictive covenant was unambiguous, but did not agree that the covenant was reasonable.[11] First,

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[9] 2011 ONCA 344

[10] at para. 3

[11] para. 18-19

preventing the appellant from dealing with *any* customer of Chem-Trend during his 17 years of employment would make it impossible for him to identify with whom he was permitted to do business. Second, the appellant's position in the company of a sales person was not comparable to an executive who would have significant knowledge of Chem-Trend's client base. The Court of Appeal held that the covenant was unenforceable as it was ambiguous and overly broad.

The Court made some notable comments on the geographic scope of the restrictive covenant which are relevant to the increasingly globalized economy[12]:

> [20] The application judge recognized that the respondent has trade secrets, confidential information and trade contacts that are entitled to protection. These included not only product [page78] information, but information about customers' needs and pricing arrangements with the company that give it a competitive advantage. **Because of the worldwide nature of the business entities in issue, he found the lack of any spatial limit in the restrictive covenant to be appropriate.** He also observed that the temporal limit on competition of one year is relatively short compared to some other covenants that have been upheld. [**emphasis added**]

The British Columbia Court of Appeal recently dismissed an employer's appeal of an order of the Supreme Court of Canada deciding not to enforce a non-competition clause in an employee's contract with a veterinary clinic. In *Rhebergen v. Creston Veterinary Clinic Ltd.*[13], the plaintiff was a veterinarian and started working at the Creston Veterinary Clinic in January 2010. She entered into an "associate agreement" that included a clause which did not prohibit her from setting up a competing practice, but required her to pay a fixed sum of $150,000, $120,000, and $90,000 in the event she did so within one, two or three years of termination of the contract, respectively. The plaintiff took the position that the clause was in all respects a restrictive covenant and was unreasonable as the temporal restriction was too long and the geographical scope was overly broad. She further asserted that the term "sets up a veterinary practice" in the non-competition clause was ambiguous, and contrary to public policy.

The defendant took the position that the impugned clause was not a restrictive covenant or a non-competition clause "in the true sense" as it does not prevent the plaintiff from practicing veterinary medicine within the defined radius or from soliciting the defendant's clients. Rather, it

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[12] Contrast with *Enerflow Industries Inc. v Surefire Industries Ltd*., *supra*, where the Court found the lack of geographic restriction to be unreasonable.

[13] 2014 BCCA 97

put a price tag on doing so. The Court concluded that the non-competition clause was unenforceable for a number of reasons. First, the Court followed the principle in *Shafron* holding that notional severance does not apply to restrictive covenants in employment contracts. The phrase "sets up a veterinary practice" can have several different meanings and is therefore ambiguous and unreasonable. Courts will not "fix" a restrictive covenant to make it reasonable and enforceable. Second, with respect to the nature of the activities prohibited, the Court held that this case did not fall into the "exceptional category" articulated in *Elsely* justifying a non-competition clause. The clause imposed an unreasonable restraint on trade, even if the terms were not ambiguous. Third, on the issue of temporal scope, the Court found that the duration of the clause was 2.5 times longer than the duration of the plaintiff's employment and as a result was too long.

A majority of the Court of Appeal dismissed the employer's appeal holding that the non-competition clause was unreasonable and constituted a restraint of trade. The reasons also noted the *Shafron* principle that overbroad clauses will not be read-down by Court to meet the test for reasonableness, illustrated further in the cases below.

(e) ***No "Blue-Pencil" and Notional Severance***

In *Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc*.[14], the Ontario Superior Court considered the issue of whether a non-solicitation covenant in an employment agreement was enforceable in terms of content, temporal and spatial scopes. Dent Wizard Canada (DWC) and its US parent company Dent Wizard International (DWI) were in the business of providing paintless dent repair services to insurers and other customers. The individual respondent, Robert Pietrantonio headed up DWC until the mid-2000s. In 2007 Pietrantonio signed a Termination Agreement with DWC which required him to continue to work for a period of two years, followed by a two-year salary continuance period. The Termination Agreement included restrictive covenants prohibiting him from competing with the company, and from soliciting employees and customers for a period of two years following the end of his salary continuance period in 2011.

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[14] [2011] O.J. No. 994 (Ont. Sup. Ct.)

In 2010 Pietrantonio was enjoying semi-retirement and planning vacations to Europe. At that time Pietrantonio received several phone calls from DWI's Vice-President and Operations Manager. Following those conversations Pietrantonio decided to establish a new company, Catastrophe Solutions International Inc. ("CSI"), where he would be the president and sole shareholder. DWI's Operations Manager decided to join CSI after resigning due to discontent with the company's head office decisions.

DWC and DWI brought an application for declarations that the respondent breached the restrictive covenants, for permanent injunctions and damages. Justice Brown dismissed the application and held that the facts of the case resembled *Shafron.* Despite the fact that the Termination Agreement was entered into seven years after the sale of DWC to DWI, Justice Brown concluded that since the restrictive covenants arose from a contract of employment and not from the sale of a business, the covenants were subject to more rigorous scrutiny. Justice Brown held that the total six year period (from 2007 to 2013) of restriction following his resignation as a senior executive of DWC was an unreasonable attempt by DWC to protect its trade connections.[15] The Court held that because Pietrantonio was not materially involved in DWC's hail storm business for several years before the Termination Agreement was signed and not asked by DWC to perform services after March 31, 2007, the restrictive covenant was an unreasonable attempt by DWC to protect its trade connections. Further, citing *Shafron*, it was not open to the Court "to mitigate the effects of employer over-reach by engaging in notional or "blue pencil" severance" as the wording in issue was material and part of the main purport of the restrictive covenant.[16]

In *Veolia ES Industrial Services Inc. v. Brulé*, [2012] O.J. No. 1183 (C.A.), a non-competition clause prohibited the defendant from competing with the plaintiff for two years following termination for cause; or for two years commencing January 2007 after termination without cause or by the defendant. After giving notice to his employer that he was terminating his employment, Brule incorporated his own company Clean Water Works Inc., which was not initially intended to engage in similar business as Veolia. When Clean Water Works business waned, Brule submitted a bid on a public tender in competition with Veolia, and was ultimately

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[15] para. 66

[16] para. 20

successful over Veolia. Veolia sued Brule and Clean Water Works for the gross profits lost as a result of not being awarded the tender. At issue was the term "commencing on January 1, 2007" in the non-competition clause. The trial judge found that Brule breached the non-competition covenant by bidding on the tender and that severing the phrase would produce the result that the parties had intended. Damages for breach of Brule's non-competition covenant and breach of fiduciary duty were awarded in the sum of $465,000.

The Court emphasized that rectification of a contract is to be used with great caution. In accordance with *Shafron*, blue-pencil severance is only available if after a part is severed what remains can "fairly be said to be a sensible and reasonable obligation in itself and such that the parties would unquestionably have agree do it without varying any other terms of the contract or otherwise changing the bargain."[17] Further, blue-pencilling should only be used in cases to sever merely trivial or technical parts of an invalid covenant, not forming part of the main implication of the clause.[18] The phrase "commencing January 1, 2007" was held not to be trivial and there was evidence that the parties would not have agreed to sever these words without varying the terms of the contract or changing their bargain. The Court of Appeal allowed Brule's appeal and overturned the trial judge's decision holding that the non-competition covenant was unenforceable.

(f) ***Indeterminate Time Frame***

The Court of Appeal has made it clear that restrictive covenants that are indeterminate in terms of time frame are unreasonable. In *Martin v. ConCreate USL Limited Partnership*,[19] the central issue on appeal was whether the duration of the general non-competition and non-solicitation covenants in an agreement was ambiguous or otherwise unreasonable and therefore unenforceable. The covenants had been entered into by Martin in connection with a previous sale of the business by Martin and other stakeholders, after which he stayed on as President. Later, Martin's employment was terminated and he established a competitive business. The enforceability of the restrictive covenants thus became an issue.

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[17] para. 21 citing *American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C.C.A.), at pp. 305-306:

[18] para. 21

[19] 2013 ONCA 72

Martin was the President and a minority shareholder of ConCreate and a related business, Steel Design & Fabricators. As part of the sale of the Martin's businesses to TriWest, he signed a limited partnership agreement and employment agreement that contained three types of restrictions: a general non-competition covenant, a restriction on soliciting, and a prohibition on the use of any non-public information pertaining to ConCreate. Martin's employment was terminated less than six months after the closing of the sale transaction. Eight days after being terminated, Martin started a company, which employed a number of former ConCreate employees. Of note, two of the employees were former members of ConCreate's management team. ConCreate brought an action against Martin for breach of the restrictive covenants and his fiduciary duties. In response, Martin applied for a declaration that the covenants were void and unenforceable as being restraints on trade.

The Court of Appeal held that the covenants were not ambiguous and since it was expected that the Company would service nationwide, the geographic scope was reasonable. However, the duration of the restrictions was unreasonable. Since the duration depended on the consents of third parties and the fact that there was no fixed limit of duration, the restrictive covenant was unreasonable. The Court's decision acknowledges the appropriateness of restrictive covenants entered into in connection with a business sale (discussed in more detail in a later section of this paper), but the Court held that particular covenants in this case are not enforceable because they lack a clear, outside limit to the duration of the non-competition and non-solicitation period.

(g) ***Not a Restrictive Covenant***

In *Blackberry Limited v. Marineau-Mes*[20], Marineau-Mes had an employment agreement with the company which required six months' prior written notice of termination of employment if he wished to resign, during which time he would continue to provide active service to the Company. In December 2013 Marineau-Mes was offered a job with Apple which was expected to start within two months and he immediately gave written notice of his resignation to his employer.

Blackberry brought an application to enforce the terms of the employment agreement and require Marineau-Mes to work for the full six months before leaving. One of Marineau-Mes' responses

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[20] *BlackBerry Limited v. Marineau-Mes*, 2014 ONSC 1790 (CanLII)

was that the six-month notice period in the contract was equivalent to a non-compete covenant and void as against public policy. He also relied on *RBC* for the proposition that he is entitled to leave work and compete during the notice period, and Blackberry's only remedy is an action for damages.

The Court found in favour of Blackberry, ruling that the notice period is *not* the equivalent of a non-compete clause when it is clear that the Company needs his services for his transition out of the Company. The Court also noted that even if it could be construed as a non-competition clause, it was neither offensive nor overreaching and issued a declaration in favour of Blackberry that the employment agreement is binding on the parties and that Marineau-Mes is obligated to provide six months' prior written notice of his resignation.

This case is notable because it clarifies that although there is no general prohibition on competing with a former employer during a notice period (as held in *RBC*), an employer can enforce a working notice period clause rather than sue for damages in appropriate cases.

The Enforceability of Restrictive Covenants in the Commercial Context

It has long been recognized that the rules applicable to restrictive covenants differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment.[21] In *Elsley*, Dickson J. emphasized the importance of this distinction because the balance of bargaining power in these scenarios differs. In the context of negotiating an employment agreement, the imbalance of bargaining power between the employer and employee can lead to oppression and deny the right of the employee to exploit the knowledge and skills obtained during employment.[22]

In the commercial context, however, there is no presumption of an imbalance in bargaining power between a vendor and purchaser since the parties have greater freedom to contract. This principle was affirmed in a 2013 decision *Payette v. Guay*[23] where the Supreme Court of Canada

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[21] *Elsley*; *Shafron; Doerner v. Bliss & Laughlin Industries Inc.*, 1980 CanLII 50 (SCC),

[22] p. 924

[23] 20013 SCC 45

held that the rules surrounding restrictive covenants relating to employment do not apply with the same rigour or intensity in the context of a commercial contract.

In *Payette*, both the appellant and the respondent were involved in the crane rental business. Payette with his business partner controlled several companies ("Groupe Fortier"). The respondent agreed to purchase Groupe Fortier's assets and Payette agreed to work full time for the respondent as a consultant for a six month period following the transaction. The Agreement of Purchase and Sale included a non-competition and non-solicitation clause, restraining Payette and his business partner from competing with Groupe Fortier for a period of five years following employment. Payette's employment was continued beyond the initial six months, but was terminated a few years later without cause, and he accepted new employment with Mammoet Crane as Operations Manager. Within days after Payette started his new job, Groupe Fortier lost seven of its most experienced employees to Mammoet. As a result, the respondent filed a motion for an interlocutory injunction to require Payette to comply with the restrictive covenant in the Agreement of Purchase and Sale. The Superior Court dismissed the respondent's action for a permanent injunction, but this decision was overturned by the Quebec Court of Appeal. The majority considered the validity of the clauses in light of the rules applicable to the sale of a business, not the law applicable to contracts of employment, and found that both clauses were reasonable and lawful.

The Supreme Court of Canada confirmed that a non-competition covenant in a commercial context will be found to be lawful and reasonable provided that it is "limited, as to its term and to the territory and activities to which applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favor it was granted."[24] The Court explained that in the commercial context restrictive covenants are generally lawful, unless contrary to public order.[25] However, the covenant must still be interpreted in a manner consistent with the obligations to which the covenant gives rise and with the intention of the parties.[26] Further, the Court confirmed the *Shafron* presumption of an imbalance of power in the employee/employer relationship, in contrast to a vendor/purchaser relationship. As such, restrictive covenants

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[24] at para. 61

[25] para. 9

[26] para. 9

negotiated in an employment agreement will be treated differently than when negotiated in the commercial sale of a business or assets. The Supreme Court of Canada's decision in *Payette* has been followed in commercial litigation disputes.[27]

Fonkalsrud v. Boxall[28] is illustrative of the operation of non-competition agreements in the context of small, independent business owners in a subcontractor situation, where "reasonableness" may be measured against a less exacting standard than in the employment context. The plaintiff was the owner of a therapy and wellness clinic in downtown Regina. The defendant was a registered massage therapist who worked at the clinic and signed a "Therapist Agreement" containing the following clause: "the therapist agrees not to work or provide services of any kind similar to those provided from the Premises within a 1 kilometre radius of the Premises upon termination of this Agreement for a period of two years." After nearly six years of working together the defendant left and soon established her own massage clinic.

The plaintiff sought damages against the defendant for breach of the non-competition clause in the Therapist Agreement. The defendant disputed the plaintiff's claim and argued that the plaintiff had no valid proprietary interest to protect, but even if she did, the clause was unenforceable because the spatial and temporal scope of the non-competition clause is overly broad. More importantly, the defendant alleged that the clause is against public policy as its sole purpose is to place a restraint on trade and eliminate competition.

The Court noted that the Therapist Agreement was not an employment agreement, but rather an agreement between a sole proprietor and an independent contractor. The Court was satisfied that the clients originally developed by the plaintiff (and eventually transferred to the defendant) constitute trade connections to which a proprietary interest attaches. The Court held that the spatial features of the clause were not overly broad. The Court considered *Shafron* and whether it was necessary to "blue line" the agreement to reconsider the clause in the context of a walking distance rather than as the "crow flies radius" to resolve ambiguity but found no ambiguity to exist. In the result, the Court upheld the non-competition clause and found the defendant in breach, and ordered damages in the amount of $20,000 payable to the plaintiff.

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[27] See for example *EOS Transport Inc. v. Alta Pacific Transport Ltd.*, 2013 BCSC 2033 (CanLII)

[28] 2013 SKPC 116

What Should Employers Do?

Drafting restrictive covenants requires the same thoughtfulness and simplicity applicable in any good legal drafting. The case law provides some guidance as to what will be considered ambiguous and unreasonable and how courts will resolve these contractual disputes, but employers should start from the premise that such covenants are void on their face. Here are some factors to reflect on and pointers for drafting:

- Consider what legitimate business interests need protection and how this can be achieved;
- Determine if a non-competition clause is in fact necessary, where a non-solicitation and/or non-disclosure clause would otherwise provide adequate protection;
- Be precise about the duration of the restrained activity: do not leave the period of time for the restrictive period to run contingent on any future events, open-ended, or for longer than is strictly necessary, and it should be proportionate to the duration of the employment. The time period should be easily understood by anyone reading the clause;
- Be clear about the activity that is restrained and who it applies to: list the type of activity or activities that are prohibited during the relevant period, including examples where helpful. An employee reading the clause must be able to know what type of activity is prohibited and/or what persons may not be solicited;
- The geographical scope of the restrained activity should be defined according to objective and commonly understood factors, if appropriate;
- Ensure that the restrictive covenant does not unnecessarily restrain an employee from using her experience, skills and talent in the future; and,
- If the employee is also party to a commercial contract, ensure that the non-competition and/or non-solicitation clause is also contained in the commercial agreement.