

SCC CLARIFIES AMBIGUITIES IN EMPLOYMENT AGREEMENTS

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Traditionally, the law provides employers with two ways of protecting themselves from business risks associated with departing employees: the law of contract and the common law. In highly competitive industries, employers frequently use employment contracts with restrictive covenants to protect their legitimate business interests from employees who may, at some point, resign and depart. Restrictive covenants can take the form of confidentiality clauses, non-solicitation clauses and non-competition clauses. Recently, questions about the utility of such contractual clauses have arisen. Employers' efforts to protect themselves have been repeatedly thwarted by former employees' claims that such efforts at protection were "unreasonable". And the law in Canada is clear: to be effective, restrictive covenants must be "reasonable" in their scope—and they must be unambiguous.

By their very nature, restrictive covenants are restraints on trade. Consequently, Canadian courts, acting in the public interest and in favour of the free market, have been cautious when giving effect to them. The scope of restrictive covenants must cover not only the relevant subject matter (e.g. intellectual property, types of business or customer lists) but also the length of time for which they apply and the geographic area which they affect. If an employer is determined to insert a clause in a covenant that goes further than what is needed to protect its business interests, it is unlikely the courts will uphold it. Likewise, if the covenant contains ambiguous terms, it will fail.

The most far-reaching tool in the restrictive covenant arsenal is the non-competition clause, the purpose of which is to prohibit departing employees from competing directly with their former employers. Such a clause, when given effect, bars departing employees from beginning employment with a direct competitor or from starting a business that will compete directly with their former employer's. The net effect is that the departing employee cannot use his or her skills within the employer's industry for a certain period of time. Such a clause is, potentially, a complete restraint on trade and the courts will only uphold such restrictions in the clearest cases.

Despite a recent shift in favour of employers in these cases (as evidenced by recent decisions of the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31* and *Honda Canada Inc. v. Keays*), it has now been made clear that the pendulum has not swung so far that courts will remedy or “fix” a poorly drafted restrictive covenant on behalf of an employer seeking to enforce it. In its recent decision, *Morley Shafron v. KRG Insurance Brokers (Western) Inc. (KRG)*, the Supreme Court of Canada (SCC) has clarified the law with respect to the courts’ role in rectifying an ambiguous restrictive covenant.

The facts informing the *KRG* decision are simple enough. In 1987, the employee, Morley Shafron, sold his insurance agency to the employer, KRG. Some time after the sale of his business, Mr. Shafron executed a contract of employment containing a non-competition clause that restricted him from competing with KRG’s business in the “Metropolitan City of Vancouver”. (Alert readers will quickly note the error: “Metropolitan City of Vancouver” is not a proper entity and, as such, the purported geographic scope is ambiguous. “Metro Vancouver” as an official political and geographic name only came into existence in 2007.) In 2001, Mr. Shafron left KRG to join a brokerage in Richmond, a suburb immediately south of the City of Vancouver and within the Greater Vancouver area. On learning of his departure, a significant number of KRG’s clients moved their business to Mr. Shafron’s new employer. KRG sued Mr. Shafron to enforce the restrictive covenant.

At trial the judge held that the restrictive covenant was unenforceable because “Metropolitan City of Vancouver” was not a “recognized location” and so the clause was ambiguous, unreasonable and unenforceable. The B.C. Court of Appeal disagreed, overturning the decision and finding that the restrictive covenant was enforceable. The Court of Appeal took it upon itself to remedy the defective clause finding that, while potentially ambiguous, “Metropolitan City of Vancouver” should, in the context of this particular contract, be properly construed as the City of Vancouver and the municipalities directly neighbouring it.

The Supreme Court of Canada disagreed, unanimously, with the Court of Appeal. In doing so, it addressed the issue of whether, in the context of an employment contract, a court can itself resolve an ambiguous term. Can it, in other words, render a term reasonable that, on its face, is ambiguous—and, therefore, an unreasonable restriction? The SCC decision restates the law: in order to be reasonable, a restrictive covenant must be unambiguous. It went on to find that this particular restrictive covenant was unenforceable and, to find otherwise, would be tantamount to inviting employers to draft ambiguous restrictive covenants .

Despite a clear trend in favour of employers in other employment-related SCC judgments over the past several months, the *KRG* decision shows that the Court will not remedy a poorly drafted, overly broad or ambiguous clause in a restrictive covenant to make it effective. Such clauses must be

drafted with due attention paid to the specific facts and details informing the employment relationship, particularly as they relate to time and geography. Further, as employment relationships change, employers are well advised to revisit the terms of restrictive covenants from time to time to ensure that they remain reasonable.