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Feature

Restrictions Cut Both Ways: Be Precise and Reasonable

The Difficulties of Drafting Enforceable Restrictive Covenants

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Employers often have concerns that departing employees may compete against the employer and/or solicit the employer's customers or employees. One way to mitigate this worry is through contractual protections.

However, such protections pitch the employer's interest in protecting its proprietary interest against the employee's freedom to earn a living. Courts have generally tried to balance the interests of the two parties, and *Hired Resources Ltd. v. Lomond*, 2019 SKQB 195 ("*Hired Resources*"), is a recent decision from Saskatchewan which dealt with such issues. In that case, the court refused to grant an interlocutory injunction restraining a former employee. Most notably, the decision provides a review of the framework that courts often use to assess the enforceability of restrictive covenants.

A Sliding Scale of Scrutiny

Although non-competition and non-solicitation provisions are often presented together, they are treated differently under the law. Non-solicitation provisions, which prohibit the departing employee from actions such as soliciting business from former clients, are more likely to be enforceable than non-competition clauses, which preclude the departing employee from working for a competing employer. Furthermore, the courts are more accepting of restrictive covenants that constitute part of the agreed-upon terms in the sale of a business than when such covenants are included in an employment relationship, the logic being that there is inequality of bargaining power in an employment relationship and employees therefore need greater protection.

Reasonableness is Key

In attempting to establish a balance between the parties' interests, the court will look to see if the restrictive covenants are reasonable in the circumstances of the case, which will be unique in each situation. It is up to the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. The court in *Hired Resources* cited *GFL Environmental Inc. v. Burns*, 2017 SKQB 147, which pointed out the following criteria required to establish reasonableness:

- The impugned provision protects the legitimate proprietary interest of the employer;
- The restraint is not too broad in terms of temporal or spatial features; and
- The restraint is not unreasonably restrictive.

However, the reasonableness assessment cannot even begin until the terms of the covenant are clear. In the Supreme Court of Canada decision, *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 ("*Shafron*"), the Court confirmed that if the terms of the covenants are ambiguous, it will be unable to demonstrate the reasonableness of the covenant. As a result, an ambiguous restrictive covenant will be *prima facie* unenforceable. Specifically, the court in *Hired Resources* added that ambiguity in what is prohibited as to activity, time or geography, can render the provision unreasonable.

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Ambiguity is the Enemy

The court in *Hired Resources* identified several ambiguities in the covenants, and ultimately found the covenants to be unreasonable. In this decision, the employer provided temporary staffing services to its clients, and the employee was an operations manager when he was employed with the employer.

In the non-solicitation provision, the court reviewed the provision that the employee would not "accept the patronage" of "any customer, prospective customer, client or prospective client" of the employer or "any of its affiliates."

The court found that "accept the patronage" would prohibit the employee from providing any services of any kind, and not just the services provided by the employer, to the prohibited persons. The court used the example that if the employee performed as a labourer with any of the prohibited persons, he would have violated the provision even though he was not offering services offered by the employer.

The court also found "prospective customer" and "prospective client" to be overbroad, because even the clients unknown to the employer upon the employee's departure could still be "prospective customers". This essentially changes the non-solicitation provision into a non-competition provision. As discussed above, non-competition provisions are even less likely to be reasonable than non-solicitation provisions.

The court further found that prospective clients of "any of its affiliates" to be uncertain. The court referred to similar ambiguities in another recent Saskatchewan decision *Knight Archer Insurance Ltd. v. Dressler*, 2019 SKQB 30, where the restrictive covenants referred to "partner companies", which was undefined. Without a proper definition, the clients of "partner companies" are not clearly identified. Although the employee may know who some of the employer's partner companies were in the course of their employment, the court will likely conclude that the employee is not completely aware of the entire scope of the employer's business and would know all the partner companies, especially when the employer is a large organization.

Another issue with the non-solicitation provision was the lack of geographic certainty. Because the court could not determine with any certainty the geographic areas in which the employer operated its business or the geographic areas in which it wished to restrict the employer's solicitation, it decided that the provision had to fail. Citing *Shafron*, the court stated that there is little room for the court to read a geographic restriction into a negative covenant. It also stated that the court cannot rewrite the agreement when nothing demonstrated the parties' mutual understanding when they entered the contract as to what geographic area the restrictive covenant covered.

Due to the ambiguities above, the court found that the non-solicitation provision was invalid.

Key Takeaways

The lesson for employers is that while restrictive covenants are often a very useful tool, if employers plan to restrict the employee's ability to compete against the employer or solicit the employer's customers or employees, it should be clear in particular on the temporal scope, geographic scope and scope of activities that are prohibited. Every term that can be defined with precision should be defined. Once the ambiguity issues are dealt with, the employer will still need to consider whether the prohibitions are reasonable. The reasonableness of the terms will be dependent on the unique factual circumstances and employers should consult their legal professional to mitigate the risk of having an unreasonable provision and being left without the desired protection.

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