

# Restrictive Covenants in Employment Contracts



One of the more controversial areas in employment law is the effect of restrictive covenants often found in employment contracts. These restrictive covenants can take various forms such as non-competition or non-solicitation clauses. Their basic effect is to prevent a departed employee from competing with his previous employer either through the use of information or technical knowledge acquired during the term of the employee's employment or approaching customers of his previous employer. There is an inherent conflict in the interests of the employer and the past employee which the Court struggles with when dealing with restrictive covenants and the court tries to strike a balance often to the dismay of one of the parties. The key interest of the employer that it seeks to protect through the use of a restrictive covenant typically is its existing client base and/or technical knowledge that the employee has gained access to during the course of his/her employment. On the other hand, the Court also recognizes an employee's inherent right to earn a livelihood. These conflicting interests can sometimes give rise to difficult issues when dealing with the interpretation of restrictive covenants contained in employment contracts. Two significant decisions of the Supreme Court of Canada establish the basic principles to be applied when dealing with restrictive covenants. Those cases are *Elsley v. J.G. Collins Insurance Agencies Ltd.* and *Shafron v. K.R.G. Insurance Brokers (Western) Inc.* The principles derived from those cases have been recognized and applied by courts in British Columbia on numerous occasions. They are as follows:

1. Restrictive covenants are by their very nature restraints of trade;
2. Restraints of trade are *prima facie* void as they are contrary to public policy;
3. As in most cases, there are exceptions to the rule in that restraints of trade may be justified if the restriction contained within them is reasonable;
4. In determining whether or not a restrictive covenant is reasonable, the court is to consider the geographical area to which it applies, the period of time for which it applies and the nature of the activity which is prohibited under its terms;
5. Typically, the Courts will apply more rigorous scrutiny when considering restrictive covenants contained in employment contracts because of the imbalance of power between the employer and the employee which is inherent in the employment relationship;
6. In order for a restrictive covenant to be valid, it must be drafted so as to protect a legitimate proprietary interest of the employer.

There have been numerous cases in British Columbia applying these principles to the

enforceability of restrictive covenants. As you can probably imagine, the cases are largely "fact-driven". Typically, the issue first rises shortly after the departure of an employee who uses his knowledge and/or technical expertise acquired during the course of his employment to approach and attempt to solicit customers of his previous employer. In that circumstance, the employer will often respond by applying to the court for an injunction to prevent the activity and enforcing the terms of the restrictive covenant. It is at that time that the court then will consider the facts against those principles established in *Elsley and Shafron*. If the court should find that the restrictive covenant has been breached it may issue an injunction to prevent further activity that is in violation of the covenant and may also award damages to the employer for the loss of business occasioned by the past employee's breach. Alternatively, the court may determine that, for instance, the geographical area encompassed by the restrictive covenant or the period of time for which it is to run is unreasonable and is therefore in restraint of trade. In that instance, the Court will refuse to uphold the terms of the restrictive covenant. As stated earlier, these cases are largely fact-driven and in many instances are difficult to predict as to how they will ultimately end.

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