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JUSTICE MATTERS

Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

What happens when a restrictive covenant is too.....restrictive

The British Columbia Court of Appeal, in a decision released this past summer, took the opportunity to remind employers that precision in drafting restrictive covenants (those of non-competition in particular) is a necessity.

In this particular case, an optical company operating retail stores and eye examination clinics had a non-competition covenant within contracts with its optometrists. The clause provided that:

> (a) for a period of 3 years following termination of the relationship,
>
> (b) the optometrist would not "carry on or be engaged in any part thereof or be employed by any such person or persons, company or corporation carrying on, engaged in, interested in or concerned with a business which competes with the [employer];
>
> (c) within 5 km of the location the optometrist worked from;
>
> (d) competition was defined as any entity that dispenses performs [sic] any sort or [sic] prescription or non-prescription optical appliances including eye glasses or sunglasses, vision correcting lenses and contact lenses, or is any optical retail dispensary, optometry clinic, an ophthalmology clinic, or any laser eye surgery centre and/or any location that performs optical refractions and/or complete or partial eye examinations or eye health assessments.

The optometrist left and set up an optometry practice 3.5 km away. The company brought an action to enforce the non-competition provision.

The trial judge held that the definition of "competition", as set out in (d) above, was too broad as it included non-prescription glasses which would include reading glasses and sun glasses and that the

company had no legitimate interest to protection in these areas.

Second, the scope of the activity restricted, as set out in (a) above, was ambiguous. Namely, it was not possible to say what was the nature of the connection required to compete "in conjunction with" another person, or whether someone was "concerned with" a business which competes with the company.

These findings were upheld on appeal.

The appellate court further declined to find there to be any error in the trial judge's refusal to read the covenant down and interpret it to mean that the optometrist was prevented from working in the area at a business which was in direct competition with the company. The court noted that the doctrine of notional severance is to be used sparingly. Further, to "blue pencil" was not available as the revision required far more than removal of words which were trivial and not part of the main purpose of the restrictive covenant.

The law in the area of restrictive covenants is continually moving forward. Employers should review their contract templates for necessary updates regularly and ensure that these provisions are appropriately drafted.

IRIS The Visual Group Western Canada Inc. v. Park 2017 BCCA 301 (CanLII)