FASKEN MARTINEAU

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EMPLOYER NEWS

Regional Newsletter - Labour, Employment, Human Rights and Public Law

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FASKEN NEWS

DATE:
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FLASH TRAINING:
Psychiatric evaluations: the legal and the psychiatric perspectives

PRESENTED BY:
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Martin Tremblay, Psychiatrist

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LEGISLATIVE NEWS

On May 1, 2009, the minimum wage in Quebec will increase to $9.00 per hour.

For employees earning tips, the minimum wage will be set at $8.00 per hour.

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NON-COMPETITION CLAUSES: DON'T BE LEFT OUT IN THE COLD

The Supreme Court of Canada has recently handed down a decision that may have major consequences on employers who rely on non-competition clauses for the survival of their business. In *Shafron* v. *KRG Insurance Brokers (Western) Inc*.,[1] the Court reviews the principles that should guide the drafting of non-competition clauses, and specifies that ambiguous or unreasonable clauses are null and inapplicable. The Court also points out that tribunals cannot amend abusive clauses to make them reasonable. In such cases, employers are left without any protection.

THE FACTS

In 1987, Mr. Shafron sold his business, an insurance company, to KRG Insurance Brokers Western Inc. ("KRG"). He worked for KRG for over 13 years. His periodically renewed employment contract contained a non-competition clause forbidding him to compete with KRG for a period of three years within the "Metropolitan City of Vancouver".

In December 2000, when his contract was about to expire, Shafron left his employment to work as an insurance salesman with a competing agency in Richmond, a suburb of Vancouver.

KRG commenced an action against Shafron, claiming the latter was in breach of the non-competition clause the parties had agreed to by working for a competitor within the "Metropolitan City of Vancouver."

JUDGMENT OF THE SUPREME COURT OF CANADA

The Court emphasized that the reasonableness of a non-competition clause must stand up to a rigorous test and be assessed based on its **geographical scope**, the **period of time in which it is effective**, and the **extent of the activity sought to be prohibited**. An ambiguous clause will necessarily be unreasonable, since the party invoking it will be unable to demonstrate that it is reasonable without first establishing its meaning.

[1] 2009 SCC 6.

Moreover, allowing tribunals to rewrite unreasonable clauses would, in the Court's opinion, create uncertainty as to an employee's obligations. In other words, a court could not rule, for instance, that a two-year non-competition clause is excessive and reduce it to a 12-month period to make it reasonable. Either the clause is valid or it is null.

Here, the Supreme Court ruled that the expression "Metropolitan City of Vancouver" is ambiguous and does not sufficiently pinpoint the territory in question. As a result, the Court declared the clause null and KRG was left with no protection against any competition Shafron might wage against it.

CONCLUSION AND CONSIDERATIONS

The Supreme Court expresses by this ruling just how important it is to choose specific and clear terms in non-competition clauses. It emphasizes the importance of being vigilant to ensure that the clause is neither ambiguous nor unreasonable in terms of its geographical scope, temporal scope and targeted activities, for if the clause is ambiguous, it will necessarily be unreasonable.

Last February 11, the Superior Court of Québec handed down a similar conclusion in *TQS* v. *Pelletier*.[2] Referring to the Supreme Court decision, the Superior Court considered that the non-competition clause at issue was clearly exaggerated in order to protect the interests of the employer. TQS wound up without any protection against the potential competition of its employee. The Supreme Court ruling is therefore all the more relevant in that Québec courts are following suit and analyzing non-competition clauses severely.

Québec employers need to be more prudent when drafting their non-competition clauses to avoid being left out in the cold without any protection whatsoever.

For more information, please do not hesitate to contact the author of this newsletter or one of the members of our *Labour, Employment, Human Rights and Public Law* practice group.

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FASKEN MARTINEAU SYMPOSIUM

The 1st Fasken Martineau Symposium offered to corporate counsel is to be held on May 12, 2009 and will allow them to choose from nine workshops covering the latest legal developments in seven areas of practice.

This training which has been accredited by the Quebec Bar under the Règlement sur la formation continue obligatoire des avocats, will allow participants to choose from nine workshops covering the latest legal developments in seven areas of practice.

Louis Bernier has accepted to act as president of the Symposium. Julie Cuddihy and Bernard Synnott will present a workshop on the employment contract while Guy Dion and Benoit Turmel will update you on the issue of constructive dismissal.

For more information on the workshops being offered, please consult our *Web site*.

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[2] 2009 QCCS 597.

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