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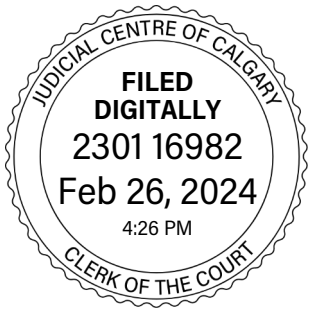
| COURT FILE NO. | 2301-16982 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED |
| | AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANDESTO ENTERPRISES CORP., D3 INFRASTRUCTURE SERVICES INC. and SAFE ROADS ALBERTA LTD. |

Clerk's Stamp

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| APPLICANTS | CHRIS BOKENFOHR and VOR ALLEM CONSULTING LTD. |
| RESPONDENTS | CANDESTO ENTERPRISES CORP., D3 INFRASTRUCTURE SERVICES INC., and SAFE ROADS ALBERTA LTD. |

DOCUMENT

**WRITTEN BRIEF OF THE APPLICANTS, CHRIS BOKENFOHR AND VOR ALLEM CONSULTING LTD.**


ADDRESS FOR SERVICE & CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 20231555

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## PART 1 OVERVIEW

1. This Bench Brief is submitted on behalf of Chris Bokenfohr ("**Mr. Bokenfohr**") and Vor Allem Consulting Ltd., previously 411850 Alberta Ltd. ("**Vor Allem**"). Vor Allem and Mr. Bokenfohr will collectively be referred to as the "**Applicants**".

2. This Bench Brief is in support of the Applicants' application seeking the Non-Competition, Non-Solicitation Undertaking (the "**Non-Competition Undertaking**") executed by Mr. Bokenfohr in favour of Batavi Venture Group Ltd. ("**Batavi**") as well as Candesto Enterprises Corp. ("**Candesto Corp**"), D3 Infrastructure Services Inc. ("**D3**"), and Safe Roads Alberta Ltd. ("**Safe Roads**") be declared void. Candesto Corp, D3, and Safe Roads will collectively be referred to as the "**CCAA Companies**".

3. Prior to May 2022: Mr. Bokenfohr owned 50% of the shares of Candesto Corp; Vor Allem owned 20% of the shares of D3; and Vor Allem owned 20% of the shares of Safe Roads (collectively, the "**Shares**").[1]

4. In late May 2022, the Applicants sold all Shares held in the CCAA Companies to Batavi by way of a share purchase agreement (the "**Share Purchase Agreement**").[2] Under the Share Purchase Agreement, Batavi and the CCAA Companies were to make significant financial payments to the Applicants. A term of the Share Purchase Agreement required Mr. Bokenfohr to execute the Non-Competition Undertaking.[3]

5. The CCAA Companies and Batavi[4] were in breach of the Share Purchase Agreement, and other resulting agreements (described in more detail below), when the CCAA Companies filed for court protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") and stated their intention to wind up operations.

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[1] Affidavit of Chris Bokenfohr sworn on February 26, 2024 ("**Bokenfohr Affidavit**") at paras 6, 7 and 9.

[2] Bokenfohr Affidavit at Exhibit A.

[3] Bokenfohr Affidavit at Exhibit A, p 8.

[4] Affidavit of Jan van Bruggen sworn on December 18, 2023 (the "**CCAA Affidavit**") at para 109.

## PART 2 FACTS

**Parties**

6. Mr. Bokenfohr, a professional engineer, has been the sole owner and operator of Vor Allem since 1992. Vor Allem is a corporation registered in Alberta and acts as Mr. Bokenfohr's holding company. Mr. Bokenfohr previously operated Candesto Enterprises Inc. ("**Candesto Inc.**"), a roadway signage, guardrail, and high-tension cable barrier installation company.

7. In January 2016, Mr. Bokenfohr was approached by William Francis Powell ("**Bill Powell**") for the purpose of forming a working relationship between Candesto Inc. and the group of companies Bill Powell was involved with. Mr. Bokenfohr's negotiations with Bill Powell led to the formation of the material terms and conditions of their working relationship. Thereafter:

   (a) Candesto Corp was established in November 2016 and Candesto Inc. sold its assets and work in progress to Candesto Corp. Mr. Bokenfohr and 1964740 Alberta Inc. ("**196 Inc.**") were equal (50%) shareholders of Candesto Corp;

   (b) Safe Roads was established in March 2016. Mr. Bokenfohr held 100% of Safe Roads shares in trust until December 21, 2018 when the common voting shares were distributed to 196 Inc. (60%), Vor Allem (20%), and Scott Welsh (20%); and

   (c) D3 was established in March 2017 and Vor Allem held 20% of D3's shares.[5]

8. Candesto Corp and D3 operated as roadway signage, guardrail, and high-tension cable barrier installation companies. Safe Roads was in the business of supplying and distributing road safety infrastructure supplies and materials. Safe Roads' primary customers were Candesto Corp, D3, and another non-arms length company, Barricades and Signs Ltd. ("**Barricades and Signs**").

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[5] Bokenfohr Affidavit at paras 5-7.

9. In or around October 2019, Barricades and Signs purchased Scott Welsh's shares in Safe Roads.[6] Batavi is also a shareholder of Barricades and Signs.[7]

10. Between November 2016 and January 2022, Mr. Bokenfohr was a director and the operating manager of the CCAA Companies.

**The CCAA Companies' Outstanding Loans**

11. From time to time, Vor Allem advanced funds to the CCAA Companies for their operational costs. Candesto Corp and Safe Roads continue to have outstanding loans owing to Vor Allem. More specifically:

    (a) As of September 10, 2021, Safe Roads was indebted to Vor Allem for $565,128.94; and

    (b) As of September 16, 2022, Candesto Corp was indebted to Vor Allem for $388,990.59,[8]

    (collectively, the "**Loans**")

**The Share Purchase Agreement**

12. In late May 2022, the Applicants agreed to the Share Purchase Agreement. In total, the Applicants were to receive, at minimum, $1,861,292.20 pursuant to the Share Purchase Agreement, Consulting Agreement, and Promissory Note (the "**Consideration**"). The express and implied financial terms of the Share Purchase Agreement included:

    (a) Batavi paying $125,000 at closing and $625,000 paid over a 5 year period commencing January 31, 2023;[9]

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[6] Bokenfohr Affidavit at para 8.

[7] CCAA Affidavit at para 24.

[8] Bokenfohr Affidavit at para 10.

[9] Bokenfohr Affidavit at para 13(a) and Exhibit A, p 2-3 and 8.

(b) Safe Roads would pay $250,000 to Vor Allem which was secured by way of a promissory note (the "**Promissory Note**");[10]

(c) Batavi and the CCAA Companies executing a consulting services agreement (the "**Consulting Agreement**") which required Batavi or the CCAA Companies to pay the Applicants a monthly consulting fee of $14,354.87 (inclusive of GST) for a period of 60 months;[11] and

(d) The CCAA Companies would repay the Loans to Vor Allem.[12]

(collectively, the "**Share Purchase Transaction**")

13. A term of the Share Purchase Agreement required Mr. Bokenfohr to execute the Non-Competition Undertaking that would be in effect for a period of 60 months, which he did.[13] The Non-Competition Undertaking was a standalone document in the context of the Share Purchase Transaction.

14. The Non-Competition Undertaking seeks to protect the CCAA Companies business activities by preventing Mr. Bokenfohr from engaging in "**Restricted Business**" or any aspect thereof, conducted or carried on, in whole or in part, from one or more locations within the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba. Restricted Business is defined in the Non-Competition Undertaking as "the business of providing services in competition to the CCAA Companies (and not Batavi)."[14] Mr. Bokenfohr is also restricted from soliciting the customers of the CCAA Companies and Batavi, although Batavi is a passive holding company and has no customers.[15]

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[10] Bokenfohr Affidavit at para 13(b) and Exhibit B.

[11] Bokenfohr Affidavit at para 13(c) and Exhibit C.

[12] Bokenfohr Affidavit at para 13(d).

[13] Bokenfohr Affidavit at Exhibit E.

[14] Bokenfohr Affidavit at Exhibit E.

[15] CCAA Affidavit at para 24.

15. To date, the Applicants have only received the singular payment of $125,000 from Batavi at the closing of the Share Purchase Agreement[16] and no amounts from the CCAA Companies. Further, neither Batavi or the CCAA Companies have made any payments to the Applicants pursuant to the terms of the Consulting Agreement.[17]

16. The Promissory Note was to be paid either in installments upon Safe Roads' receipt of sale proceeds from the sale of its inventory or on January 31, 2024, whichever was later. Mr. Bokenfohr completed a count of Safe Roads' inventory for the purpose of determining the value of Safe Roads' shares in preparation for the Share Purchase Transaction. As of January 31, 2022, Safe Roads inventory was valued at $2,171,693.58.[18] As of October 31, 2023, Safe Roads' had no inventory and is now under court protection.[19]

17. Safe Roads and Candesto Corp remain indebted to Vor Allem for the full value of the Loans.[20]

**The CCAA Proceedings**

18. On December 20, 2023, the CCAA Companies filed an Originating Application (the "**CCAA Application**") with this Court seeking protection under the CCAA. The CCAA Companies were subsequently granted said protection by way of a CCAA Initial Order and an Amended and Restated Initial Order (the "**CCAA Orders**").

19. No proposed plan of arrangement was put forward at the CCAA Application.[21] During the CCAA Application, the CCAA Companies, through their counsel, confirmed to this Court that they are of the view that "the best -- the best approach

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[16] CCAA Affidavit at para 109; Bokenfohr Affidavit at para 16.

[17] Bokenfohr Affidavit at para 17.

[18] Bokenfohr Affidavit at para 15 and Exhibit D.

[19] CCAA Affidavit at para 45.

[20] Bokenfohr Affidavit at para 19.

[21] Bokenfohr Affidavit at Exhibit F, p 39, lines 34-38.

in these -- in these circumstances is to effectively cease operations and active business, but to wind up their affairs in -- in an orderly fashion."[22] The Affidavit filed in support of the CCAA Application confirmed that the CCAA Companies were unable to continue in active business and wished to wind up their affairs.[23]

20. The Affidavit filed in support of the CCAA Application further confirmed that Batavi had not paid the Applicants in accordance with the terms of the Share Purchase Agreement.[24]

21. Justice Johnston, in her oral reasons for granting the initial CCAA Orders, confirmed she was granting the CCAA Orders to allow the CCAA Companies to "focus on the solvent operations of the business and to pursue and orderly wind-down of the business."[25]

## PART 3 ISSUES

22. Should the Non-Competition Undertaking be declared void and unenforceable by Batavi and the CCAA Companies.

## PART 4 ARGUMENT

ARGUMENT

23. Restrictive covenants relating to competition generally take the form of non-competition and non-solicitation clauses. There is a distinction in scope between a restrictive covenant linked to a commercial agreement and a restrictive covenant linked to an employment contract:

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[22] Bokenfohr Affidavit at Exhibit F, p 12, lines 26-29.

[23] CCAA Affidavit at para 89.

[24] CCAA Affidavit at para 109.

[25] Bokenfohr Affidavit at Exhibit F, p 39, lines 34-38.

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
>
> A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment.

*Guay Inc. v Payette,* 2013 SCC 45 at para 5. **[Tab 1]**

24. The scope of these restrictive covenants will depend on the context in which the restrictive covenant was negotiated. In a commercial context, more flexibility and latitude is required when interpreting restrictive covenants. Restrictive covenants preventing a vendor from competing for a certain period of time following the sale of a business allows the purchaser to protect its investment by, amongst other things, allowing time for the purchaser to build strong ties with its new customers.

*Guay Inc. v Payette, supra* at para 37. **[Tab 1]**

25. The "bargain" negotiated by the parties must be considered in light of the wording of the obligations and circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of the restricted covenants were assumed.

*Guay Inc. v Payette, supra* at para 45. **[Tab 1]**

26. Restrictive covenants are used to enforce a party's legitimate business interests, whether that be trade secrets, customer lists, or other confidential information. Batavi required the Applicants be bound by the Non-Competition Undertaking as a term of the Share Purchase Agreement in order to protect the asset it was buying – the operations of the CCAA Companies. As such, it is clear the Non-Competition Undertaking arises from the Share Purchase Agreement transaction and to protect the legitimate business interests found in the clients, customers and market share of the CCAA Companies acquired in that transaction.

27. The Affidavit filed by the CCAA Companies, in addition to submissions made by their counsel at the CCAA Application, confirms the CCAA Companies have no intention of continuing in active business, are already insolvent and wish to wind up their affairs in an orderly fashion.[26] With the CCAA Companies ceasing to be involved in active business and pursing the winding up of their affairs, there is no Restricted Business to be protected by the Non-Competition Undertaking. Further, Batavi is a holding company that does not have any legitimate business interests.

28. As consideration for the Applicants execution of the Non-Competition Undertaking, Batavi paid $125,000 towards the Consideration. Notably, this amounts to 6% of the Consideration the Applicants bargained for in the Share Purchase Agreement, Consulting Agreement, and Promissory Note. Batavi made the initial $125,000 payment nearly 2 years ago. The Applicants do not anticipate receipt of any distribution to it of the amounts owed by the CCAA Companies under the Consulting Agreement, the Promissory Note, or the Loans given the CCAA Companies' confirmation that they will be ceasing operations and are not going to be sold as a going concern.

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[26] CCAA Affidavit at para 89.

29. In summary, the Applicants received almost none of the benefits (i.e., the Consideration) they bargained for in the Share Purchase Transaction and therefore should not be held to any burden arising from that same transaction.

30. Where the conduct of the purchaser in the operation of the acquired business has a direct relationship to the restrictive covenant obtained on the purchase, and where his behaviour in the conduct of that business raises grave issues of public policy, the Court may refuse to accord the relief to which he would otherwise be entitled. Where, for example, the covenantor has been required in the course of his employment by the purchaser to participate in a serious breach of the law relating to the conduct of the acquired business, the courts may well refuse the relief claimed because of such conduct and, in effect, release the covenantor from the obligations of the covenant.

*Doerner v. Bliss & Laughlin Industries Inc.,* [1980] 2 S.C.R. 865, at p. 876. [**Tab 2**]

31. The Applicants submit that it would be unfair and unjust to allow the CCAA Companies to enjoy the benefits of the Non-Competition Undertaking while not paying the Consideration pursuant to the terms of the Share Purchase Agreement, Consulting Agreement, and Promissory Note, notwithstanding the fact the CCAA Companies no longer have any legitimate business interests.

## PART 5 REMEDY SOUGHT

32. In light of the foregoing, the Applicants seek a declaration the Non-Competition Undertaking is void and of no force and effect as between the Applicants and the CCAA Companies, with the enforceability as between the Applicants and Batavi to be determined as between those parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, this 26th day of February, 2024.

**MCLENNAN ROSS LLP**

Michael D. Aasen / Taylor Campbell
Solicitors for the Applicants,
Chris Bokenfohr and Vor Allem Consulting Ltd.

## TABLE OF AUTHORITIES

# TAB 1

2013 SCC 45
Supreme Court of Canada

Guay inc. c. Payette

2013 CarswellQue 8646, 2013 CarswellQue 8647, 2013 SCC 45, [2013] 3 S.C.R. 95, 18 B.L.R. (5th) 175, 2013 C.L.L.C. 210-048, 235 A.C.W.S. (3d) 392, 363 D.L.R. (4th) 445, 448 N.R. 1, J.E. 2013-1588, D.T.E. 2013T-627

# Yannick Payette and Mammoet Canada Eastern Ltd., successor to Mammoet Crane Inc., Appellants and Guay inc., Respondent

McLachlin C.J.C., LeBel, Fish, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: January 23, 2013
Judgment: September 12, 2013
Docket: 34662

Proceedings: affirmed *Guay inc. c. Payette* (2011), 2011 QCCA 2282, 2011 CarswellQue 14220, D.T.E. 2012T-20, [2012] R.J.Q. 51 (C.A. Que.); reversed *Guay inc. c. Payette* (2010), 2010 QCCS 2756, 2010 CarswellQue 7487, Lemelin J.C.S. (C.S. Que.)

Counsel: Éric Hardy, Pierre Duquette, Vincent Rochette, for Appellants
Mario Welsh, Gilles Rancourt, Gwenaelle Thibaut, for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts; Employment; Public

**Related Abridgment Classifications**

Commercial law
VI Trade and commerce
VI.4 Restraint of trade
VI.4.b Restrictive covenants
VI.4.b.iv Particular situations
VI.4.b.iv.B Sale of business
VI.4.b.iv.B.1 General principles

Commercial law
VI Trade and commerce
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VI.4.b Restrictive covenants
VI.4.b.iv Particular situations
VI.4.b.iv.B Sale of business
VI.4.b.iv.B.2 Whether covenant reasonable

**Headnote**

Commercial law --- Trade and commerce — Restraint of trade — Restrictive covenants — Particular situations — Sale of business — General principles

Crane rental company purchased assets of business operated by contractor YP in Montreal area — Sale agreement included non-competition clause, which applied throughout Quebec, and non-solicitation clause — YP was hired by company but was later dismissed without serious reason — YP and seven of most experienced employees of company were then hired by competitor of company — Company instituted legal proceedings against YP — Trial judge found that non-competition clause was unlawful because territorial scope was unreasonable and that non-solicitation clause was unlawful because it did not limit term of prohibition or territory and activities to which it applied, and company appealed — Majority of Court of Appeal held that, in light of rules applicable to sale of business, both clauses were reasonable and lawful — Dissenting judge, however, noted that non-competition and non-solicitation clauses had to be interpreted on basis of rules governing labour relations — According to

  

dissenting judge, given wrongfulness of dismissal, restrictive covenants at issue did not apply, pursuant to art. 2095 of Civil Code of Quebec — YP appealed to Supreme Court of Canada — Appeal dismissed — Circumstances in which restrictive covenants were negotiated and wording of clauses clearly favoured conclusion that restrictive covenants were negotiated essentially in connection with sale of business and should therefore be interpreted on basis of commercial law — Therefore, protection provided for in art. 2095 of Code did not apply.

Commercial law --- Trade and commerce — Restraint of trade — Restrictive covenants — Particular situations — Sale of business — Whether covenant reasonable

Crane rental company purchased assets of business operated by contractor YP in Montreal area — Sale agreement included non-competition clause, which applied throughout Quebec, and non-solicitation clause — YP was hired by company but was later dismissed without serious reason — YP and seven of most experienced employees of company were then hired by competitor of company — Company instituted legal proceedings against YP — Trial judge found that non-competition clause was unlawful because territorial scope was unreasonable and that non-solicitation clause was unlawful because it did not limit term of prohibition or territory and activities to which it applied, and company appealed — Majority of Court of Appeal held that, in light of rules applicable to sale of business, both clauses were reasonable and lawful — Dissenting judge, however, noted that non-competition and non-solicitation clauses had to be interpreted on basis of rules governing labour relations — According to dissenting judge, given wrongfulness of dismissal, restrictive covenants at issue did not apply, pursuant to art. 2095 of Civil Code of Quebec — YP appealed to Supreme Court of Canada — Appeal dismissed — Evidence showed sale agreement was entered into following lengthy negotiations between well-informed businesspeople who were on equal terms and were being advised by legal and accounting professionals — In light of unique nature of crane rental industry, territory to which non-competition covenant applied was not broader than was necessary to protect legitimate interests of company — In context of modern economy, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete — Therefore, Court concluded that both clauses were lawful.

Droit commercial --- Échange et commerce — Restriction au commerce — Clauses limitatives — Situations particulières — Vente d'une entreprise — Principes généraux

Compagnie de location de grues a acheté les actifs d'une entreprise exploitée par l'entrepreneur YP dans la région de Montréal — Convention de vente incluait une clause de non-concurrence, s'appliquant sur tout le territoire du Québec, et une clause de non-sollicitation — YP a été recruté par la compagnie, mais a par la suite été congédié sans motif sérieux — YP et sept des employés les plus expérimentés de la compagnie ont alors été embauchés par un concurrent de la compagnie — Celle-ci a entamé des procédures judiciaires à l'encontre de YP — Juge de première instance a conclu que la clause de non-concurrence était illégale parce que sa portée territoriale était déraisonnable et que la clause de non-sollicitation était illégale parce qu'elle ne contenait pas de limitation quant à la durée de l'interdiction ni quant au territoire et aux activités visées, et la compagnie a interjeté appel — Juges majoritaires de la Cour d'appel ont conclu, au regard des règles applicables en matière de vente d'entreprise, que les clauses étaient toutes deux raisonnables et légales — Juge dissidente, de son côté, a fait remarquer qu'il fallait interpréter les clauses de non-concurrence et de non-sollicitation sous l'éclairage des règles régissant les relations de travail — Selon la juge dissidente, compte tenu du caractère abusif du congédiement, les clauses restrictives en cause ne s'appliquaient pas, en vertu de l'art. 2095 du Code civil du Québec — YP a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Circonstances dans lesquelles les clauses restrictives ont été négociées de même que le libellé de ces dernières militaient clairement en faveur de la conclusion selon laquelle les clauses restrictives ont été négociées essentiellement dans le cadre de la vente d'une entreprise et devaient donc être interprétées à la lumière du droit commercial — Par conséquent, la protection conférée par l'art. 2095 du Code ne s'appliquait pas.

Droit commercial --- Échange et commerce — Restriction au commerce — Clauses limitatives — Situations particulières — Vente d'une entreprise — Détermination du caractère raisonnable de la clause

Compagnie de location de grues a acheté les actifs d'une entreprise exploitée par l'entrepreneur YP dans la région de Montréal — Convention de vente incluait une clause de non-concurrence, s'appliquant sur tout le territoire du Québec, et une clause de non-sollicitation — YP a été recruté par la compagnie, mais a par la suite été congédié sans motif sérieux — YP et sept des employés les plus expérimentés de la compagnie ont alors été embauchés par un concurrent de la compagnie — Celle-ci a entamé des procédures judiciaires à l'encontre de YP — Juge de première instance a conclu que la clause de non-concurrence était illégale parce que sa portée territoriale était déraisonnable et que la clause de non-sollicitation était illégale parce qu'elle ne contenait pas de limitation quant à la durée de l'interdiction ni quant au territoire et aux activités visées, et la compagnie a interjeté appel

  

— Juges majoritaires de la Cour d'appel ont conclu, au regard des règles applicables en matière de vente d'entreprise, que les clauses étaient toutes deux raisonnables et légales — Juge dissidente, de son côté, a fait remarquer qu'il fallait interpréter les clauses de non-concurrence et de non-sollicitation sous l'éclairage des règles régissant les relations de travail — Selon la juge dissidente, compte tenu du caractère abusif du congédiement, les clauses restrictives en cause ne s'appliquaient pas, en vertu de l'art. 2095 du Code civil du Québec — YP a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Preuve démontrait que la convention de vente a été conclue après de longues négociations entre des gens d'affaires avertis, agissant à armes égales et conseillés par des professionnels du droit et de la comptabilité — Vu la nature particulière de l'industrie de la location de grues, le territoire visé par la clause de non-concurrence n'excédait pas les limites nécessaires pour protéger les intérêts légitimes de la compagnie — Économie moderne ne limite plus la clientèle d'un point de vue géographique, ce qui témoigne généralement du caractère obsolète d'une limitation territoriale dans une clause de non-sollicitation — Par conséquent, la Cour a conclu que les deux clauses étaient légales.

In October 2004, a crane rental company purchased the assets of a business operated by contractor YP and a partner in the Montreal area. To ensure a smooth transition in operations, the parties agreed to include a provision in their sale agreement in which YP undertook to work full-time for the company for six months. The sale agreement provided that YP was bound by a non-competition clause, which applied throughout the province of Quebec, and a non-solicitation clause. At the end of the six-month transitional period, YP and the company agreed on a contract of employment which was later renewed for an indeterminate term. On August 3, 2009, YP was dismissed without a serious reason. A few months later, YP and seven of the most experienced employees of the company were hired by a competitor of the company. The company instituted legal proceedings against YP. The company successfully brought a motion seeking an interlocutory injunction.

The trial judge found that the territorial scope of the non-competition clause was unreasonable and therefore unlawful. The trial judge also found that the non-solicitation clause was unlawful because it did not limit the term of the prohibition or the territory and activities to which it applied. The trial judge therefore dismissed the motion for a permanent injunction. The company appealed.

The majority of the Court of Appeal first held that the restrictive covenants, which were provided in the sale agreement, were not part of the contract of employment, and that the reference in the sale agreement to the date of termination of employment served only to establish the start of the period during which the non-competition and non-solicitation clauses were to be in effect. Accordingly, in light of the rules applicable to the sale of a business, not the law applicable to contracts of employment, the majority found that both clauses were reasonable and lawful, under the circumstances. The dissenting judge, however, noted that, if the non-competition and non-solicitation clauses were considered to be still in existence, they had to be interpreted on the basis of the rules governing labour relations. Hence, there was no reason to deny YP the protection of the Civil Code of Quebec against unjust dismissals. According to the dissenting judge, given the wrongfulness of the dismissal, the restrictive covenants at issue did not apply, pursuant to art. 2095 of the Code. YP appealed to the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Wagner J. (McLachlin C.J.C., LeBel, Fish, Rothstein, Cromwell, Karakatsanis JJ. concurring): The rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment. The inclusion of non-competition and non-solicitation clauses in a contract for the sale of a business is usually intended to protect the purchaser's investment. Thus, the rules for restrictive covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a sale of a business. Article 2095 of the Code is applicable to a non-competition clause only if the clause is linked to a contract of employment. Here, the circumstances in which the restrictive covenants were negotiated and the wording of the clauses clearly favoured the conclusion that the restrictive covenants were negotiated essentially in connection with the sale of a business and should therefore be interpreted on the basis of commercial law. Therefore, the protection provided for in art. 2095 of the Code did not apply.

Whether non-competition and non-solicitation clauses in a contract for the sale of a business are reasonable must be determined on the basis of the rules that govern freedom of trade, not on the rules applicable to contracts of employment. Hence, a restrictive covenant should be considered lawful unless it is established on a balance of probabilities that its scope is unreasonable. Here, the evidence showed that the sale agreement was entered into following lengthy negotiations between well-informed businesspeople who were on equal terms and were being advised by legal and accounting professionals. In light of the unique nature of the crane rental industry, the territory to which the non-competition covenant applied was not broader than was necessary to protect

  

the legitimate interests of the company. Furthermore, in the context of the modern economy, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete. Hence, the failure to include a territorial limitation in the non-solicitation clause did not support a finding that the clause was unreasonable. Therefore, the Court concluded that both clauses were lawful.

En octobre 2004, une compagnie de location de grues a acheté les actifs d'une entreprise exploitée par l'entrepreneur YP et un associé dans la région de Montréal. Afin d'assurer une transition harmonieuse des opérations, les parties ont convenu d'insérer à leur convention de vente une stipulation précisant que YP s'engageait à travailler pour la compagnie à temps plein pendant une période de six mois. La convention de vente prévoyait que YP était assujetti à une clause de non-concurrence, s'appliquant sur tout le territoire de la province de Québec, et à une clause de non-sollicitation. À l'expiration de la période transitoire de six mois, YP et la compagnie ont convenu d'un contrat de travail à durée déterminée, lequel a été reconduit pour une durée indéterminée. Le 3 août 2009, YP a été congédié sans motif sérieux. Quelques mois plus tard, YP et sept des employés les plus expérimentés de la compagnie ont été embauchés par un concurrent de la compagnie. Celle-ci a entamé des procédures judiciaires à l'encontre de YP. La compagnie a demandé et obtenu une injonction interlocutoire.

Le juge de première instance a conclu que la portée territoriale de la clause de non-concurrence était déraisonnable et, par conséquent, illégale. Le juge de première instance a également conclu que la clause de non-sollicitation était illégale parce qu'elle ne contenait pas de limitation quant à la durée de l'interdiction ni quant au territoire et aux activités visées. Le juge de première instance a donc rejeté la demande d'injonction permanente. La compagnie a interjeté appel.

Les juges majoritaires de la Cour d'appel ont d'abord conclu que les clauses restrictives, lesquelles étaient prévues à la convention de vente, ne faisaient pas partie du contrat d'emploi et que la référence à la date de cessation d'emploi dans la convention de vente ne servait qu'à établir le début de la période pendant laquelle les engagements de non-concurrence et de non-sollicitation étaient en vigueur. Aussi, au regard des règles applicables en matière de vente d'entreprise, et non sous l'éclairage du droit applicable en matière de contrat de travail, les juges majoritaires ont conclu que les clauses étaient toutes deux raisonnables et légales, dans les circonstances. La juge dissidente, de son côté, a fait remarquer qu'il fallait interpréter les clauses de non-concurrence et de non-sollicitation, à supposer qu'elles étaient encore en vigueur, sous l'éclairage des règles régissant les relations de travail. Ainsi, il n'y avait aucune raison de priver YP des protections accordées par le Code civil du Québec à l'encontre des congédiements injustes. Selon la juge dissidente, compte tenu du caractère abusif du congédiement, les clauses restrictives en cause ne s'appliquaient pas, en vertu de l'art. 2095 du Code. YP a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Wagner, J. (McLachlin, J.C.C., LeBel, Fish, Rothstein, Cromwell, Karakatsanis, JJ., souscrivant à son opinion) : Des règles différentes s'appliquent aux clauses restrictives en matière d'emploi selon qu'elles se rattachent à un contrat de vente d'entreprise ou à un contrat de travail. Les clauses de non-concurrence et de non-sollicitation incluses dans un contrat de vente d'entreprise ont habituellement pour fonction de protéger l'investissement de l'acheteur. Ainsi, les règles prévues à l'égard des clauses restrictives en matière d'emploi ne s'appliquent pas avec la même rigueur et la même intensité lorsque les obligations sont assumées dans le cadre d'un contrat commercial. Seule une clause de non-concurrence se rattachant à un contrat de travail entraîne l'application de l'art. 2095 du Code. En l'espèce, les circonstances dans lesquelles les clauses restrictives ont été négociées de même que le libellé de ces dernières militaient clairement en faveur de la conclusion selon laquelle les clauses restrictives ont été négociées essentiellement dans le cadre de la vente d'une entreprise et devaient donc être interprétées à la lumière du droit commercial. Par conséquent, la protection conférée par l'art. 2095 du Code ne s'appliquait pas.

L'analyse du caractère raisonnable de clauses de non-concurrence et de non-sollicitation dans le cadre de la vente d'une entreprise doit être fondée sur les règles qui régissent la liberté de commerce, non sur les règles applicables aux contrats de travail. Ainsi, une clause restrictive devrait être considérée comme étant légale à moins que l'on puisse établir, par une preuve prépondérante, qu'elle est déraisonnable quant à sa portée. En l'espèce, la preuve démontrait que la convention de vente a été conclue après de longues négociations entre des gens d'affaires avertis, agissant à armes égales et conseillés par des professionnels du droit et de la comptabilité. Vu la nature particulière de l'industrie de la location de grues, le territoire visé par la clause de non-concurrence n'excédait pas les limites nécessaires pour protéger les intérêts légitimes de la compagnie. De plus, l'économie moderne ne limite plus la clientèle d'un point de vue géographique, ce qui témoigne généralement du caractère obsolète d'une limitation territoriale dans une clause de non-sollicitation. Ainsi, l'omission d'inclure une limite territoriale à la clause de non-sollicitation ne permettait pas de conclure au caractère déraisonnable de cette dernière. Par conséquent, la Cour a conclu que les deux clauses étaient légales.

  

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POURVOI formé par un ancien employé à l'encontre d'une décision publiée à *Guay inc. c. Payette* (2011), 2011 QCCA 2282, 2011 CarswellQue 14220, D.T.E. 2012T-20, [2012] R.J.Q. 51 (C.A. Que.), ayant infirmé la décision du juge de première instance selon laquelle les clauses restrictives prévues dans le contrat de vente d'une entreprise étaient déraisonnables et illégales.

***Wagner J.*** **(McLachlin C.J.C. and LeBel, Fish, Rothstein, Cromwell and Karakatsanis JJ. concurring):**

**I. Overview**

1 Restrictive covenants relating to employment and competition have been an integral part of the civil law for many years now. They generally take the form of non-competition and non-solicitation clauses. In Quebec, both the courts and the legislature have, after acknowledging the underlying rationale for such covenants, placed limits on them.

2 The interpretation of restrictive covenants requires the application of different rules depending on whether the covenants are found in commercial agreements or in contracts of employment. These rules will be more generous in the commercial context, but much stricter in the context of contracts of employment or service.

3 The scope of a restrictive covenant depends on the context in which the covenant was negotiated. This has long been recognized in positive law. For example, the legal framework applicable to contracts of employment takes account of the imbalance of power that generally characterizes an employer-employee relationship, and it is designed to protect employees. In relationships between vendors and purchasers in the commercial context, on the other hand, there is ordinarily — with some exceptions — no such imbalance. In such cases, much more flexibility and latitude is required in interpreting restrictive covenants in order to protect freedom of trade and promote the stability of commercial agreements.

4 This appeal provides a clear illustration of how the scope of a restrictive covenant will vary with the nature of the relationship between the parties to the contract and the context in which the covenant was made. It raises important issues relating to the interpretation of covenants limiting employment and competition that are set out in a contract for the sale of assets that leads, on an accessory basis, to the formation of a contract of employment.

5 In *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 (S.C.C.), Dickson J. commented eloquently on the importance of distinguishing the scope of a restrictive covenant linked to a commercial agreement from the scope of one linked to a contract of employment:

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
>
> A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. [p. 924]

6 The appeal in the instant case concerns the system of rules applicable to the agreement between the parties. If the contract at issue is a contract of employment, the specific rules provided for by the legislature in the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), in respect of such contracts apply. If it is a contract for the sale of assets, those specific rules do not apply. To determine whether the restrictive covenants must be interpreted in light of the rules applicable to commercial contracts or the rules applicable to contracts of employment, it will be helpful to clearly identify the reason why the covenants were negotiated by considering, *inter alia*, their wording as well as their context.

7 In this case, the appellants' principal submission is that the respondent cannot avail itself of the restrictive covenants at issue, because it dismissed the appellant Payette without a serious reason in the context of a contract of employment. The

  

respondent, Guay inc., argues that these covenants were negotiated in the context of a commercial agreement and that they took full effect upon the termination of Mr. Payette's employment. According to the respondent, the protection afforded to employees by art. 2095 *C.C.Q.* in the event of dismissal without a serious reason does not apply to the restrictive covenants in the agreement in question.

8 In the alternative, the appellants add that the restrictive covenants at issue are unlawful because they are overly broad as to their term and to the territory to which they apply.

9 For the reasons that follow, I am of the opinion that, in a commercial context, restrictive covenants such as these are lawful and must be interpreted in a manner consistent with the intention of the parties and the obligations to which the covenants give rise, unless it is shown that they are contrary to public order, for example because they are unreasonable with respect to one of the parties. The effect of disregarding the existence of such clauses solely because they appear in an agreement that preceded the formation of a separate contract of employment would be to negate the foundations of and the rationale for the obligations of non-competition and non-solicitation provided for in the clauses, while at the same time discounting the intention of the parties.

## II. Facts and Judicial History

### *A. Review of the Facts*

10 The respondent, Guay inc., is a crane rental company. It operates some 20 establishments across Quebec. It has expanded its presence in the Quebec market by purchasing several small competitors over the years. In so doing, it has become the leader in its industry.

11 The appellant Yannick Payette and his partner, Louis Pierre Lafortune, controlled several companies that were also in the crane rental business ("Groupe Fortier"). In October 2004, the respondent purchased Groupe Fortier's assets for $26 million, including $14 million in cash, which was paid to the companies controlled by Mr. Payette and his partner.

12 To ensure a smooth transition in operations following the sale of Groupe Fortier's assets, the parties agreed to include a provision in their sale agreement in which the appellant Payette and his partner undertook to work full time for the respondent as consultants for six months. The parties also reserved the option of subsequently agreeing on a contract of employment under which Mr. Payette and his partner would continue to work for the respondent. The agreement of sale provided that Mr. Payette and his partner were bound by non-competition and non-solicitation clauses that read as follows:

> [TRANSLATION]
>
> **10.1 Non-competition -** In consideration of the sale that is the subject of this offer, each of the Vendors and the Interveners covenants and agrees, for a period of five (5) years from the Closing date or, in the case of the Interveners, for a period of five (5) years from the date on which an Intervener ceases to be employed, directly or indirectly, by the Purchaser, not to hold, operate or own, in whole or in part, directly or indirectly and in any capacity or role whatsoever, or in any other manner, any business operating in whole or in part in the crane rental industry, and not to be or become involved in, participate in, hold shares in, be related to or have an interest in, advise, lend money to or secure the debts or obligations of any such business or permit any such business to use the Vendor's or the Intervener's name in whole or in part. The territory to which this non-competition clause applies for the above-mentioned period of time is the province of Quebec.
>
> **10.2 Non-solicitation** — Moreover, each of the Vendors and the Interveners covenants and agrees, for a period of five (5) years from the Closing date or, in the case of the Interveners, for a period of five (5) years from the date on which an Intervener ceases to be employed, directly or indirectly, by the Purchaser, not to solicit on behalf of the Vendor or the Intervener, or on behalf of others, and not to do business or attempt to do business, in any place whatsoever, in whole or in part, directly or indirectly and in any manner whatsoever, with any of the customers of the Business and the Purchaser on behalf of a crane rental business. In addition, the Vendors and the Interveners shall not solicit or hire (unless an employee is dismissed or resigns without any solicitation by the Vendors or the Interveners), in any way whatsoever, directly or indirectly, as an employee or a consultant, or in any other capacity whatsoever, any of the employees, officers, executives

  

> or other persons (hereinafter collectively referred to as the "Employees" for the purposes of this article) working for the Business or the Purchaser on the date this offer to purchase is presented or on the Closing date, and shall not attempt in any way whatsoever, directly or indirectly, to encourage any of the said employees to leave their employment with the Business or the Purchaser. For greater certainty, the parties agree that steps taken by the Vendors to collect accounts receivable shall not be interpreted as a breach of the non-competition and non-solicitation provisions of this offer to purchase; [A.R., vol. X, at pp. 147-48]

13 On May 26, 2005, at the end of the six-month transitional period following the "Closing date" for the sale, the appellant Payette and the respondent, Guay inc., agreed on a contract of employment for a fixed term that was optional and separate. This contract, which provided that Mr. Payette's employment as operations manager for Groupe Fortier was to terminate on August 31, 2008, was renewed beyond that date for an indeterminate term.

14 It is common ground that the respondent dismissed Mr. Payette on August 3, 2009 without a serious reason. A few months later, on December 16, 2009, the respondent entered into an agreement under which it paid $150,000 in compensation to Mr. Payette and his partner. That same day, Mr. Payette asked the respondent, in light of the non-competition and non-solicitation clauses at issue, whether it had any objection to his accepting a job with a company not involved in the crane rental business. The respondent replied that it did not object to this.

15 On March 15, 2010, contrary to the intention he had initially expressed, the appellant Payette began a new job with Mammoet Crane Inc. ("Mammoet") as operations manager at that company's place of business in Montréal. Mammoet is an international company and a competitor of Guay inc. that does business in, among others, the crane rental and transportation industries. A few days later, the respondent lost seven of its most experienced employees to Mammoet.

16 On April 27, 2010, the respondent filed a motion in the Quebec Superior Court for an interlocutory injunction under which the appellant Payette would be required to comply with the restrictive covenants in the October 2004 agreement for the sale of assets by not working for Mammoet.

17 On April 29, 2010, Lacroix J. ordered the interlocutory injunction sought by the respondent. The terms of the order were subsequently renewed, by means of safeguard orders, until the hearing of the case on the merits.

***B. Judgment of the Superior Court, 2010 QCCS 2756 (C.S. Que.)***

18 After conducting a three-step analysis, the Superior Court dismissed the respondent's action on the merits. First of all, Lemelin J. concluded that the restrictive covenants were in effect when the respondent instituted its proceedings in April 2010. In his view, the wording of the clauses and the evidence showed that the parties, too, had believed that the covenants applied after August 3, 2009, the date when the appellant Payette was dismissed. In other words, the term of the non-competition and non-solicitation clauses had started running upon the termination of Mr. Payette's employment with the respondent, Guay inc., on August 3, 2009.

19 Next, Lemelin J. found that the wording of the October 2004 sale agreement supported the conclusion that a contract of employment had been formed on the "Closing date" for the sale. As a result, the rule laid down in art. 2095 *C.C.Q.* applied in this case: Guay inc. could not rely for its own benefit on the restrictive non-competition and non-solicitation clauses, since it had dismissed Mr. Payette without a serious reason.

20 Finally, the judge considered whether the restrictive covenants at issue were valid in light of the rule laid down in the second paragraph of art. 2089 *C.C.Q.*, according to which a stipulation of non-competition must be limited, as to time, place and type of employment, to whatever is necessary for the protection of the employer's legitimate interests. In Lemelin J.'s opinion, the term provided for in the non-competition clause, clause 10.1, of five years after the termination of the employment relationship was reasonable.

21 However, the territory to which clause 10.1 applied was held to be too broad.

  

22 Lemelin J. found that the non-competition clause was unlawful because it applied outside the territory in which the sold business operated. Clause 10.1 applied throughout the province of Quebec even though the market served by Groupe Fortier was limited to the Montréal area. On this basis, Lemelin J. held that the territorial scope of clause 10.1 of the agreement for the sale of assets was unreasonable and that the clause was therefore unlawful.

23 As for the validity of clause 10.2, the non-solicitation clause, Lemelin J. found that it was a [TRANSLATION] "hybrid" non-competition and non-solicitation clause because of the words "do business or attempt to do business". Although a "pure" non-solicitation clause is not unlawful solely because it does not contain a geographic limitation, the same is not true of a hybrid non-competition and non-solicitation clause. Noting that clause 10.2 of the agreement for the sale of assets did not limit the term of the prohibition or the territory and activities to which it applied, Lemelin J. found that it, too, was unlawful.

24 Lemelin J. therefore dismissed the application for a permanent injunction, and in so doing he authorized the appellant Payette to compete with the respondent, Guay inc., for his new employer, Mammoet.

***C. Judgment of the Quebec Court of Appeal, 2011 QCCA 2282, [2012] R.J.Q. 51 (C.A. Que.), Chamberland, Thibault and Morin JJ.A.***

25 The majority of the Court of Appeal set aside the Superior Court's judgment and ordered a permanent injunction, requiring the appellants to comply with clauses 10.1 and 10.2 of the October 2004 agreement until August 3, 2014.

*(1) Reasons of the Majority*

26 Chamberland J.A., writing for the majority, began by noting that the respondent, Guay inc., no longer disputed the facts that the appellant Payette had been its employee and that it had dismissed him without a serious reason. He then considered the two main issues raised by the appeal: (1) the legal characterization of the non-competition and non-solicitation clauses; and (2) whether those clauses were valid in light of the applicable legal rules.

27 On the legal characterization of the clauses, Chamberland J.A. found that the obligations they created had essentially been assumed in the agreement for the sale of assets. The restrictive covenants were not part of the contract of employment, since their purpose was to protect the substantial investment made by Guay inc. when it purchased Groupe Fortier's assets. Chamberland J.A. also stated that the reference in the agreement for the sale of assets to the date of termination of employment served only to establish the start of the period during which the non-competition and non-solicitation clauses were to be in effect.

28 Chamberland J.A. then considered the validity of clauses 10.1 and 10.2 in light of the rules applicable to the sale of a business, not the law applicable to contracts of employment, and found that both clauses were reasonable and lawful. Acknowledging that the territory to which clause 10.1 applied — the province of Quebec — was very large, he nonetheless found that this geographic scope was necessary and justified because of the mobility of the equipment used in the crane rental industry. As for clause 10.2, Chamberland J.A. rejected the trial judge's characterization of it as a "hybrid" clause, and concluded that it must be found to have the scope the parties intended it to have.

29 For these reasons, Chamberland J.A. found that the respondent, Guay inc., had discharged its burden of proof and established that it was entitled to require the appellants to comply with the covenants the parties had agreed on in clauses 10.1 and 10.2 for five years after the dismissal of the appellant Payette, that is, until August 3, 2014.

*(2) Dissenting Reasons*

30 Thibault J.A. agreed with the trial judge's reasons and would have dismissed Guay inc.'s appeal. In her view, Chamberland J.A. was wrongly focusing on the [TRANSLATION] "reason" that had led the parties to agree on the non-competition and non-solicitation clauses rather than on the reality, namely that they had entered into a contract of employment that was separate from and independent of the circumstances of the sale of assets in 2004. In Thibault J.A.'s view, the trial judge's approach [TRANSLATION] "reflects reality" (para. 118), as the parties had, in May 2005, entered into a new contract of employment unrelated to the original transaction. If the non-competition and non-solicitation clauses were considered to be still in existence,

  

they therefore had to be interpreted on the basis of the rules governing labour relations. As a result, there was no reason to deny the appellant Payette the protection provided for in the *Civil Code of Québec* with respect to contracts of employment, especially since the contract in this case was accessory and independent.

31 More importantly, Thibault J.A. added that the trial judge's reasons had the advantage of adequately protecting [TRANSLATION] "all participants where the sale of the assets of a business involves an accessory contract of employment" (para. 121): the purchaser was protected from any competition for five years after the closing date for the sale of assets, and the employee was protected from unjust dismissal by the employer.

32 Finally, Thibault J.A. also stated that, in this case, the application of art. 2095 *C.C.Q.* would safeguard the public interest, foster free competition and further the right of employees to earn a living, in addition to being consistent with the jurisprudence of the Court of Appeal to the effect that the rules on restrictive covenants relating to employment apply where there is a genuine contract of employment. Furthermore, in her view, the courts have never ruled out the possibility that restrictive covenants may be hybrid in nature when [TRANSLATION] "a contract for the sale of assets is accompanied by a contract of employment" (para. 129). Thibault J.A. concluded that, pursuant to art. 2095 *C.C.Q.*, the restrictive covenants at issue did not apply, because the wrongfulness of the dismissal was not in dispute.

**III. Issues**

33 The appeal to this Court raises two issues:

1. Did the Court of Appeal err in denying the appellant Payette the protection provided for in art. 2095 *C.C.Q.*?

2. In the alternative, did the Court of Appeal err in finding that the stipulations of non-competition and non-solicitation in clauses 10.1 and 10.2 of the agreement for the sale of assets were reasonable?

34 I will consider each of these issues in turn.

**IV. Analysis**

***A. Did the Court of Appeal Err in Denying the Appellant Payette the Protection Provided for in Article 2095 C.C.Q.?***

*(1) Application of the Protection Provided for in Article 2095 C.C.Q.*

35 The rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment. This has long been recognized to be the case: *Elsley*; *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.); and *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 (S.C.C.).

36 The application of different rules in the context of a contract of employment is a response to the imbalance of power that generally characterizes the employer-employee relationship when an individual contract of employment is negotiated, and its purpose is to protect the employee.

37 These rules have no equivalent in the commercial context, since an imbalance of power is not presumed to exist in a vendor-purchaser relationship. The inclusion of non-competition and non-solicitation clauses in a contract for the sale of a business is usually intended to protect the purchaser's investment. In limiting the vendor's right to compete with the purchaser and preventing the vendor from working for a competitor of the purchaser for a certain time after the transaction, such clauses enable the purchaser to protect its investment by building strong ties with its new customers [TRANSLATION] "without fearing, for a given period, competition from the vendor" (C.A. reasons, at para. 62), which had previously established a relationship with its customers, suppliers and employees.

  

38 In this Court's decision in *Shafron*, my colleague Rothstein J. referred to what is now a cardinal rule, that parties negotiating the sale of assets have greater freedom of contract than parties negotiating a contract of employment. He made the following comment:

> The absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business. [para. 23]

39 Thus, the common law rules for restrictive covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a commercial contract. This is especially true where the evidence shows that the parties negotiated on equal terms and were advised by competent professionals, and that the contract does not create an imbalance between them.

40 Although *Shafron*, like *Elsley* and *Doerner*, was decided under the common law, the same principles apply in Quebec civil law. To alleviate the imbalance that often characterizes the employer-employee relationship, the Quebec legislature has enacted rules that apply only to contracts of employment and are intended to protect employees. Article 2095 *C.C.Q.* is one of them:

> **2095.** An employer may not avail himself of a stipulation of non-competition if he has resiliated the contract without a serious reason or if he has himself given the employee such a reason for resiliating the contract.

41 In 1993, before the coming into force of the new *Civil Code of Québec*, the Minister of Justice stated that the purpose of art. 2095 *C.C.Q.* was to introduce into Quebec civil law [TRANSLATION] "a rule of fairness in the employer-employee relationship, restoring a balance between the parties that is frequently negated or jeopardized by their respective economic power": *Commentaires du ministre de la Justice: Le Code civil du Québec — Un mouvement de société* (1993), at p. 1317.

42 Article 2095 *C.C.Q.* is applicable to a non-competition clause only if the clause is linked to a contract of employment. This means that, before enquiring into whether a non-competition clause or a non-solicitation clause is valid, the court must identify the type of juridical act to which the clause in question is linked. In the instant case, the Court of Appeal correctly drew a distinction between the interpretation of restrictive covenants contained in a contract for the sale of assets and the interpretation of such covenants contained in a contract of employment.

43 On this point, the analytical approaches taken by Chamberland J.A., writing for the majority of the Court of Appeal, and Thibault J.A., dissenting are poles apart. The first is a contextual approach under which it is necessary to assess the circumstances in which the obligations were assumed. Its focus is on determining what the parties intended while at the same time considering the wording of the disputed provision. The second is instead a literal approach according to which the determination of the parties' intention and the context in which the obligations were assumed are of secondary importance. For the reasons that follow, I am of the opinion that the analytical approach of Chamberland J.A. must prevail.

*(2) Contract to Which the Non-competition and Non-solicitation Covenants are Linked*

44 It is common ground that the agreement for the sale of assets in this case is a hybrid one. The agreement gave rise to two separate juridical acts within a single framework. The first of these acts, the commercial contract, evidenced the sale of Groupe Fortier's assets for $26 million and also provided for the possibility of forming a contract of employment between the appellant Payette and the respondent Guay inc., which was in fact done. The question before the Court is whether, given the existence of these two juridical acts, the restrictive covenants in clauses 10.1 and 10.2 apply to the contract of employment and the termination thereof, or only to the agreement for the sale of assets. The Court of Appeal was divided on this question. According to the dissenting judge, the clauses at issue had to be interpreted from the perspective of the contract of employment of May 26, 2005, separately from the master agreement of October 3, 2004. The majority, on the other hand, held that these clauses were part of a series of obligations that were closely related to the sale of the business, and that their existence and purpose were therefore relevant only in light of the parties' commercial undertakings.

  

45 To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is, in my view, important to clearly identify the reason why the covenant was entered into. The [TRANSLATION] "bargain" negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed.

46 In this case, the evidence shows that the reason why the appellant Payette agreed to the obligations of non-competition and non-solicitation related to the sale of his business to Guay inc. (contract for the sale of assets), not to his post-sale services as a consultant for or employee of Guay inc. (contract of employment). The obligations of non-competition and non-solicitation cannot be dissociated from the contract for the sale of assets. This conclusion is supported both by the wording of the obligations at issue and by the factual context that explains and justifies the acceptance of such obligations.

**(a) Wording of Article 10 of the Agreement for the Sale of Assets**

47 If the words of the clauses at issue and of the article in which they appear are read consistently, it can be seen that the parties considered the underlying reason for the restrictive covenants to be the sale of assets. Clause 10.1 begins with the words [TRANSLATION] "*[i]n consideration of the sale* that is the subject of this offer" (emphasis added). As well, in clause 10.4, the appellant Payette [TRANSLATION] "acknowledges that the covenants of non-competition and non-solicitation provided for in this article are reasonable as to their term and to the persons to whom and the territory to which they apply, *having regard to the consideration provided for herein*": A.R., vol. X, at p. 148 (emphasis added). Thus, the actual language of the parties' agreement confirms that the existence of the restrictive covenants is closely related to the conditions for the sale of the assets, which were negotiated and accepted by the appellant Payette as a "vendor", not as an "employee". This means that the restrictive covenants were essentially accepted by Mr. Payette in consideration of the substantial advantages he would be deriving from the transaction, not of his potential status as an employee. All that must be done is to give the words used by the parties their ordinary meaning and avoid an overly simplistic interpretation of the context in which the parties negotiated these covenants.

48 In this regard, it will be helpful to return to one of the reasons the dissenting judge gave in support of her position. In her view, the application in this case of the rule provided for in art. 2095 *C.C.Q.* would enable all the parties to protect their legitimate interests. I respectfully disagree. What is the point of a non-competition covenant if it is to apply only while the debtor of the obligation is employed by the creditor of the obligation, and why would such a covenant suddenly become irrelevant simply because a contract of employment is entered into later? It is self-evident that a non-competition covenant such as this will have its full effect upon termination of the employment of the person who gave the covenant. Any other conclusion would mean that the effect of a subsequent contract of employment would be to implicitly and automatically renounce all earlier covenants regarding competition and solicitation. I cannot accept such a conclusion, especially since the circumstances that favoured the obligations of non-competition and non-solicitation in this case were for all practical purposes the same at the time the appellant Payette left the company upon being dismissed.

**(b) Context of the Agreement for the Sale of Assets**

49 In this case, the majority of the Court of Appeal rightly noted that, in the context of the October 2004 agreement for the sale of assets, the purpose of the obligation of non-competition was basically to protect the assets acquired by the respondent, Guay inc., in return for the $26 million it paid to the vendors. The main point of the sale transaction for the respondent was to acquire the vendors' goodwill, skilled employees and customers. If the respondent had not obtained the protection in question, the transaction would never have taken place. There is therefore a direct causal connection between the restrictive covenants and the sale of the assets.

50 I conclude that, in addition to the wording of the clauses at issue and of the article in which they appear, the circumstances in which they were negotiated clearly favour an interpretation that gives effect to the restrictive covenants and is based on the rules of commercial law rather than on those applicable to contracts of employment, which include art. 2095 *C.C.Q.*

  

51 Finally, it is important to note that, as of the date of his dismissal, the appellant Payette was no longer working for Guay inc. under the October 2004 agreement. Rather, he was doing so under the contract of employment of April 29, 2005, which had been accepted on May 26 of that year. This distinction is relevant for two reasons. First, the fact that there was a separate contract governing the employer-employee relationship between the two parties that did not contain restrictive covenants undermines the argument that the restrictive covenants in the October 2004 agreement are not enforceable. It also shows that such covenants did not form an essential aspect of the negotiations that resulted in the contract of employment. This corroborates the conclusion that the restrictive covenants were negotiated essentially in connection with the sale of Groupe Fortier's assets and must therefore be interpreted on the basis of commercial law.

**(c) Reference to Termination of Employment in Clauses 10.1 and 10.2 of the Agreement for the Sale of Assets**

52 In the case at bar, the reference in the restrictive covenants to termination of employment cannot be disregarded. These covenants were to be in effect for five years after the date of termination of employment. The appellants argue that, on this basis alone, art. 2095 *C.C.Q.* must apply to the non-competition covenant. The respondent counters that the only purpose of the reference to termination of employment in the restrictive covenants of the agreement for the sale of assets was to make them determinable, enforceable and final. This argument was accepted by Chamberland J.A., who noted that the relevance of the reference to termination of employment was limited to determining the start of the period when the non-competition and non-solicitation covenants were to be in effect. I agree with this conclusion, which is consistent with the factual context in which the covenants were negotiated and reflects the coherent and pragmatic approach that must be taken in reviewing such clauses.

53 In *Groupe Québécor Inc. c. Grégoire* (1988), 15 Q.A.C. 113 (C.A. Que.), the Quebec Court of Appeal considered the scope of a non-competition clause similar to the one at issue here. In that case, Mr. Grégoire, a shareholder in a family business, had sold his shares to Québécor but had remained in the purchaser's employ after the sale. Like Mr. Payette in the instant case, he had agreed, under a clause in the contract for the sale of shares, not to compete with Québécor as long as he remained [TRANSLATION] "an employee of QUEBECOR INC., or GROUPE QUEBECOR INC., or any of its subsidiaries, and for a period of five (5) years thereafter" (para. 28). Mr. Grégoire argued that the reference to his status as an employee implied that his non-competition covenant applied only while he was in fact an employee. The Quebec Court of Appeal held that the restriction was related to the sale of his shares to Québécor and not to his post-sale employment. It stated that the reference to Mr. Grégoire's employment [TRANSLATION] "was only a guidepost for establishing the period during which the non-competition covenant was to remain in effect": *Grégoire*, at para. 36.

54 Shortly after this, the Court of Appeal added:

> [TRANSLATION] What the purchaser wanted was to ensure that members of the Grégoire family would not be able to take advantage of their special relationship with L'ECLAIREUR to subsequently become its competitors.
>
> . . . . .
>
> In any event, I am of the opinion that the record contains no evidence to suggest that the non-competition covenant might have been motivated by anything other than the sale of the business.
>
> I have considered whether the restrictive covenant might have been hybrid in origin. No support for this can be found in the evidence.
>
> . . . . .
>
> His employment therefore had nothing to do with his non-competition covenant.
>
> If the trial judge had engaged in an exhaustive analysis of the evidence in order to determine what the non-competition covenant was associated with, he could not, in my view, have reached any conclusion other than the one he reached taking a shortcut. The facts support his conclusion.
>
> (*Grégoire*, at paras. 39-50)

  

55 Like the Quebec Court of Appeal in *Grégoire*, this Court found in *Doerner* that a reference in a restrictive covenant to termination of employment did not change the essence of the covenant, namely that of an obligation accepted in connection with the sale of assets and not with a contract of employment. Such a reference does not have the effect of associating the obligation imposed in a restrictive covenant with another type of contract.

56 The restrictive covenants in the case at bar relate to an agreement for the sale of assets. The ordinary meaning of the words used and the circumstances of the agreement support the argument that the covenants were made in relation to the sale of the assets. As a result, the scope of the clauses must be interpreted on the basis of the rules of commercial law, and the protection provided for in art. 2095 *C.C.Q.* therefore does not apply to the restrictive covenants of the October 2004 agreement.

***B. Did the Court of Appeal Err in Finding that the Stipulations of Non-competition and Non-solicitation in Clauses 10.1 and 10.2 of the Agreement for the Sale of Assets Were Reasonable?***

57 With respect, I am of the opinion that the Superior Court erred in law in relying on the rules applicable to contracts of employment when enquiring into whether the two restrictive covenants at issue were reasonable. Article 2089 *C.C.Q.*, which imposes stricter rules and reverses the employee's burden of proving that a restrictive covenant in a contract of employment is unreasonable, does not apply in this case. The burden of proof was therefore on the vendor, the appellant Payette, to prove that the covenants were in fact unreasonable on the basis of the criteria applicable in commercial law. He failed to discharge that burden.

*(1) Reasonableness of Stipulations of Non-competition and Non-solicitation in a Contract for the Sale of Assets*

58 Whether non-competition and non-solicitation clauses in a contract for the sale of assets are reasonable must be determined on the basis of the rules that govern freedom of trade so as to favour the application of such restrictive covenants: *Burnac Corp. c. Entreprises Ludco Ltée*, [1991] R.D.I. 304 (C.A. Que.). This means that the criteria for analyzing restrictive covenants in a contract for the sale of assets will be less demanding and that the basis for finding such covenants to be reasonable will be much broader in the commercial context than in the context of a contract of employment. I am therefore of the opinion that, in the commercial context, a restrictive covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable.

59 The appellants argue that clauses 10.1 and 10.2 of the agreement for the sale of assets are unlawful because they are overly broad as to their term and to the territory to which they apply. In my opinion, the appellants are wrong. Let me explain.

60 It is important to note at the outset that the appellant Payette acknowledged that his covenants were reasonable in clause 10.4 of the agreement at issue. This Court is not bound by his acknowledgment, however, since it has to determine whether the covenants in question are valid. The acknowledgment is nevertheless an additional factor, and an indicator that is both relevant to and useful for the assessment of whether the covenants are reasonable, and hence valid. What, then, are the reasonable limits of the covenants in issue?

*(2) Non-competition Covenant (Clause 10.1)*

61 In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: *TRM Copy Centers (Canada) Ltd. v. Copiscope Inc.* [1998 CarswellQue 4722 (C.A. Que.)], 1998 CanLII 12603. Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.

62 To properly assess the scope of the obligation of non-competition (and that of non-solicitation), it is also necessary to consider the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the

  

resources to which they had access at that time. Here, the evidence showed that the October 2004 agreement, which had a substantial value of $26 million, was entered into following lengthy negotiations between well-informed businesspeople who were on equal terms and were being advised by legal and accounting professionals. Even Thibault J.A., in her dissenting reasons, acknowledged that all those involved were experienced businesspeople and that the negotiations had been conducted on an equal footing. There was therefore no imbalance of power between the appellant Payette and the respondent, Guay inc., and Mr. Payette was capable of fully appreciating the extent of the obligations by which he agreed to be bound.

**(a) Term**

63 A non-competition clause in a commercial contract must of course be limited as to time, or it will be found to be contrary to public order and a court will refuse to give effect to it. See, for example, *Yvon Beaulieu Well Drilling Ltée c. Marcel Beaulieu Puits artésiens Ltée*, [1992] R.J.Q. 2608 (C.S. Que.); see also *Allard v. Cloutier* (1919), 29 Que. K.B. 565 (Que. K.B.), at p. 567. Whether the term of a clause is reasonable must be assessed on the basis of the specific circumstances of the case before the court, including the nature of the activities to which the clause applies. For example, in the case of a sale of assets between well-informed persons who are represented by competent counsel, it is likely, although there may be exceptions, that the clause so negotiated is reasonable. In assessing these factors, the Quebec courts have found non-competition clauses in commercial contracts that applied for as long as 10 years to be valid: *Trans-Canada Thermographing (Ontario) Ltd. v. Trans-Canada Thermographing Ltd*. (1992), SOQUIJ AZ-92021644; *Papeterie l'Écriteau inc. c. Barbier*, [1998] J.Q. No. 5090 (C.S. Que.).

64 In the instant case, there is no evidence that the stipulated period of five years from the date on which the appellant Payette ceased to be employed by the respondent, Guay inc., is unreasonable. The courts regularly find clauses with similar terms valid. Everything depends on the nature of the business, and each case must be assessed in light of its own circumstances. Here, the highly specialized nature of the business's activities weighs in favour of finding a longer period of up to five years to be valid. Indeed, this was not in issue at trial, as the parties recognized the specialized nature of the business's activities.

**(b) Territorial Scope**

65 The covenant's territorial scope requires a more thorough analysis. In principle, the territory to which a non-competition covenant applies is [TRANSLATION] "limited to that in which the business being sold carries on its trade or activities ... as of the date of the transaction": N.-A. Béliveau and S. LeBel, "Les clauses de non-concurrence en matière d'emploi et en matière de vente d'entreprise: du pareil au même?", in Service de la formation continue du Barreau du Québec, vol. 338, *Développements récents en droit de la non-concurrence* (2011), 113, at p. 182. A non-competition clause that applies outside the territory in which the business operates is contrary to public order. In this case, the trial judge found that the territorial scope of the non-competition clause was overly broad, because the clause applied to the entire province of Quebec even though the territory served by Groupe Fortier was limited to the Montréal area.

66 With respect, the trial judge made a clear and determinative error in his assessment of the facts in defining the territory served by Groupe Fortier. This error was not limited to his interpretation of the facts or his assessment of the credibility of witnesses. Rather, it relates to a sensitive matter at the very heart of the point of law at issue. In his affidavit of May 5, 2010, the appellant Payette stated that the business carried on [TRANSLATION] "the vast majority" — not "all" — of its activities in the Montréal area: A.R., vol. I, at p. 120. In light of this more precise description of the territory in which the business being sold carried on its trade, the territorial scope of the non-competition clause is not excessive.

67 As the majority of the Court of Appeal emphasized, the crane rental market is unique: [TRANSLATION] "Cranes are mobile. They go where the construction sites are. The activities of this type of company therefore depend more on how construction sites are dispersed than on the company's places of business" (para. 84). In light of the unique nature of the crane rental industry, the territory to which the non-competition covenant applies is not broader than is necessary to protect the legitimate interests of the respondent, Guay inc.

*(3) Non-Solicitation Covenant (Clause 10.2)*

  

68 The appellants argue that the covenant set out in clause 10.2 is unreasonable because of its term and of the absence of a territorial limitation. They rely on the analysis of the trial judge, who found that the words [TRANSLATION] "do business or attempt to do business" in clause 10.2 created a hybrid non-competition covenant and prohibition against soliciting the purchaser's employees and customers. The appellants submit that clause 10.2, like clause 10.1, therefore had to contain a geographic limitation. In my opinion, they are wrong.

69 It is in my view perfectly legitimate and reasonable to state that the words "do business" can in theory refer to the act of competing. However, a thorough review of the circumstances in which the October 2004 agreement was negotiated does not support such an interpretation in this case, as the restrictive covenants at issue can be distinguished from one another as regards both their purposes and their objectives. While it is true that in the case of a non-competition clause, the territory to which the clause applies must be identified, a determination that a non-solicitation clause is reasonable and lawful does not generally require a territorial limitation.

70 At the hearing, the appellants referred in support of their argument to a proposition enunciated by Marie-France Bich, now a judge of the Quebec Court of Appeal, that a non-solicitation clause must be interpreted using the same factors as for a non-competition clause, and must therefore be limited not only as to time but also as to territory: "La viduité post-emploi: loyauté, discrétion et clauses restrictives", in Service de la formation permanente du Barreau du Québec, vol. 197, *Développements récents en droit de la propriété intellectuelle* (2003), 243. The Court of Appeal applied this proposition of Bich J.A. in *Gestion L. Jalbert inc. c. Robitaille*, 2007 QCCA 1052 (C.A. Que.). With respect, a distinction must be drawn between a non-solicitation clause and a non-competition clause. Let me explain.

71 In the case at bar, there are valid reasons for rejecting an approach according to which the validity of a non-solicitation clause is conditional on a territorial limitation. First, it must be borne in mind that Bich J.A.'s analysis and the Court of Appeal's examination of the issue in *Robitaille* were conducted in the context of legislative provisions designed to protect employees from unreasonable non-competition clauses, and the question was whether the provisions in question also applied to non-solicitation clauses. In other words, the analysis concerned a legislative scheme that applied exclusively to contracts of employment or service. There is no such legislative scheme applicable to non-competition clauses in contracts for the sale of assets. Where contracts for the sale of assets are concerned, the courts will be more deferential as regards the balance usually sought by the parties to such a contract between the protection of the employer's legitimate interests and the principle of free competition. The rules applicable to restrictive covenants are much less stringent in this context.

72 In addition, the nature of a non-solicitation clause agreed to in the context of specialized commercial activities leads to the conclusion that the validity of such a covenant does not depend on the existence of a territorial limitation. Generally speaking, the object of a non-solicitation clause is narrower than that of a non-competition clause, and the obligations assumed under a non-solicitation clause are less strict than those assumed under a non-competition clause. As Patrick L. Benaroche notes, [TRANSLATION] "the courts assess the reasonableness of non-solicitation clauses in broader terms, because the intended protection is narrower in scope than under a true non-competition clause", and they have, even in the context of a contract of employment, "proven to be more liberal with respect to the former than to the latter": "La non-sollicitation: paramètres juridiques applicables en matière d'emploi", in Service de la formation continue du Barreau du Québec, vol. 289, *Développements récents sur la non-concurrence* (2008), 183, at pp. 193 and 200.

73 Moreover, I am of the opinion that a territorial limitation is not absolutely necessary for a non-solicitation clause applying to all or some of the vendor's customers to be valid, since such a limitation can easily be identified by analyzing the target customers. In *World Wide Chemicals Inc. c. Bolduc*, 1991 CarswellQue 1157 (C.S. Que.), *L.E.L. Marketing Ltée v. Otis*, [1989] Q.J. No. 1229 (C.S. Que.), and *Moore c. Charette* (1987), 19 C.C.E.L. 277 (C.S. Que.), for example, the Superior Court noted that a non-solicitation clause does not require a geographic limitation. Finally, in the context of the modern economy, and in particular of new technologies, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete.

  

74 In the instant case, the trial judge's interpretation of clause 10.2 strays from the actual intention of the parties, who negotiated and agreed to the inclusion of two separate clauses, one dealing with competition and the other dealing specifically with solicitation. If a pragmatic, rational and coherent approach is taken, the two clauses must be interpreted separately on the basis of their objectives. Moreover, the common meaning of the words normally used in such a context must not be disregarded. The fact that a non-competition component was added to the concept of solicitation even though clause 10.2 specifically precluded solicitation of the business's customers and employees can lead to only one logical and coherent conclusion if the wording of that clause is assessed as a whole: the parties did in fact agree on separate obligations in clause 10.1 and clause 10.2. In my opinion, therefore, the failure to include a territorial limitation in the non-solicitation clause does not support a finding that the clause is unreasonable, which means that it is lawful.

**V. Disposition**

75 For these reasons, I would dismiss the appeal and affirm the decision of the Quebec Court of Appeal, with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

# TAB 2

**Frank Doerner, Jr., Carl Doerner and Joseph Doerner** (*Defendants*) *Appellants*;

and

**Bliss & Laughlin Industries Incorporated and Doerner Products Co. Limited** (*Plaintiffs*) *Respondents*;

and

**Northfield Metal Products Ltd.** (*Defendant*).

1980: May 26, 27; 1980: December 18.

Present: Laskin C. J. and Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Contracts — Sale of business — Non-competition covenants — Covenants to run for five years from the later of the date of execution of the agreement or the date of leaving employment with the company — Clause in share purchase agreement that all representations, warranties and agreements to survive for six years from the date of closing — Appellants left company nine years after sale and became engaged in enterprise in direct competition with the company — Whether or not the non-competitive covenants were enforceable.*

This appeal concerned a restrictive covenant given by vendors of shares in a manufacturing company to the purchasers, who then continued the operation of the company's business. The purchasers, alleging a breach of the covenant, brought action against the vendors. At trial, the covenant was held to be unenforceable, but an appeal was allowed and the vendors appealed to this Court.

In 1965, as part of the purchase agreement, the vendors, who were key men in the company's operation, signed covenants prohibiting their carrying on or associating with a like business for a period of five years from the later of the date of the execution of the agreement or the date of their leaving the employ of the company. The vendors resigned their positions in the spring 1974, and shortly after incorporated a business that operated in direct competition with the Doerner Company and significantly reduced its sales and profits.

Appellants denied the allegation of breach of covenant and based their argument in part on an article in

**Frank Doerner, fils, Carl Doerner et Joseph Doerner** (*Défendeurs*) *Appelants*;

et

**Bliss & Laughlin Industries Incorporated et Doerner Products Co. Limited** (*Demanderesses*) *Intimées*;

et

**Northfield Metal Products Ltd.** (*Défenderesse*).

1980: 26 et 27 mai; 1980: 18 décembre.

Présents: Le juge en chef Laskin et les juges Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Contrats — Vente d'entreprise — Clauses de non-concurrence — Engagements en vigueur pendant cinq ans à partir de la date de la signature du contrat ou de la date de la cessation de l'emploi auprès de la compagnie, selon la plus tardive des deux — Clause dans la promesse d'achat des actions portant que les déclarations, garanties et conventions demeureront en vigueur pour une période de six ans à partir de la date de signature — Appelants quittant la compagnie neuf ans après la vente et se lançant dans une entreprise en concurrence directe avec la compagnie — Clauses de non-concurrence exécutoires ou non.*

Ce pourvoi vise une clause restrictive consentie par les vendeurs des actions d'une compagnie manufacturière aux acheteurs, qui ont ensuite continué à exploiter l'entreprise en question. Les acheteurs, qui allèguent une violation de la clause, ont intenté une action contre les vendeurs. En première instance, la clause n'a pas été jugée exécutoire, mais un appel de ce jugement a été accueilli et les vendeurs se pourvoient maintenant devant cette Cour.

En 1965, dans le cadre de l'acte de vente, les vendeurs, qui sont les hommes clé de la compagnie, ont signé un engagement qui leur interdisait de poursuivre une entreprise semblable ou de s'y associer pour une période de cinq ans à compter de la date de la signature de la vente ou de celle de la cessation de leur emploi avec la compagnie, selon la plus tardive des deux. Les vendeurs ont démissionné au printemps 1974 et peu après ont constitué une compagnie qui faisait une concurrence directe à la compagnie Doerner, ce qui en a considérablement diminué les ventes et profits.

Les appelants ont nié l'allégation de violation de clause et ont fondé leurs prétentions en partie sur un

the share purchase agreement which provided that all representations, warranties and agreements made by the sellers would survive for a period of six years from the date of closing. It was contended that the vendors were freed from the burden of the covenant restricting employment if they remained in the company's employ for six years or more. In addition, appellants maintained that they were entitled to discontinue their employment with the company, freed from all obligation created by the covenant, because of wrongful and monopolistic practices of the company contrary to the public interest and public policy.

*Held*: The appeal should be dismissed.

The covenant was clearly and unambiguously expressed and was not affected by the terms of other articles. It fixed without doubt the time limits of its own operation—from the date of the closing of the transaction if the Doerners thereafter did not become employed by the company, and from the date of termination of employment if they did. The covenant did not bind the Doerners for a period extending too far into the future.

The covenant was approached as one given by the vendor of a business to a purchaser; it formed part of a transaction involving the purchase of a going concern and the paying for more than physical assets. Considering the interests of the parties, the covenant was clearly reasonable. The purchaser, having paid for the goodwill, was entitled to the five-year protection. The Doerners' key role in both their business and the industry made their continuation in the business very desirable and their competition very dangerous. The restrictions imposed in the case at bar fell within the range the authorities considered acceptable.

The covenant was neither unreasonable with respect to the public interest nor contrary to public policy and therefore void. Both the trial judge and the Court of Appeal concluded the allegations of wrongdoing on the part of the purchasers had not been made out. While there was conflicting evidence on the issues of fact involved in the appellants' allegations of wrongdoing, the judgment of the trial judge was not to be replaced in order to reach conclusions different from those which he adopted. It was not shown that the trial judge had made any error. The plaintiff's conduct, nevertheless, was relevant to the determination of his right to relief. Where the conduct of the purchaser in the operation of the acquired business had a direct relationship to the restrictive covenant obtained on the purchase, and where his behaviour in the conduct of that business raised grave issues of public policy, the Court could refuse to

paragraphe de la promesse d'achat des actions qui porte que toutes les déclarations, garanties et conventions des acheteurs demeureront en vigueur pour une période de six ans à partir de la date de signature du contrat. Les vendeurs appelants prétendent être libérés de la clause restreignant leur emploi s'ils demeurent au service de la compagnie pendant six ans ou plus. De plus, ils prétendent avoir le droit de mettre fin à leur emploi auprès de la compagnie, libres de toute obligation créée par la clause, à cause des pratiques illégales et monopolistiques adoptées par la compagnie et contraires à l'intérêt et à l'ordre public.

*Arrêt*: Le pourvoi est rejeté.

La clause est clairement formulée en termes non équivoques et elle n'est pas touchée par les termes des autres articles. Elle fixe indubitablement la durée de son application, soit depuis la date de la signature du contrat si les Doerner n'entrent pas au service de la compagnie ou depuis la date de la cessation de leur emploi s'ils travaillent pour elle. L'engagement ne liait pas les Doerner pendant une période trop étendue.

L'engagement doit être considéré comme un engagement consenti par le vendeur d'une entreprise à un acheteur; il fait partie d'une opération d'achat d'une entreprise en activité dont le prix englobait plus que les biens corporels. Compte tenu des intérêts des parties, la clause est manifestement raisonnable. L'acheteur, qui a payé l'achalandage, a droit à la protection de cinq ans. Le rôle clé des Doerner à la fois dans leur entreprise et dans l'industrie rendait très souhaitable le maintien de leur présence au sein de l'entreprise et très dangereuse leur concurrence avec elle. Les restrictions imposées en l'espèce cadrent bien avec ce que les décisions faisant autorité ont considéré acceptables.

Cet engagement n'était ni déraisonnable vis-à-vis de l'intérêt public, ni contraire à l'ordre public et donc nul. Le juge de première instance ainsi que la Cour d'appel ont conclu que les allégations d'inconduite de la part des acheteurs n'avaient pas été prouvées. Malgré certains éléments de preuve contradictoires sur les questions de fait énoncées dans les allégations d'inconduite présentées par les appelants, le jugement du juge de première instance ne devrait pas être modifié afin de parvenir à des conclusions différentes. On n'a pas démontré que le juge de première instance a commis une erreur. Néanmoins, la conduite du demandeur est pertinente à la détermination de son droit à un redressement. Lorsque la façon dont l'acheteur exploite l'entreprise acquise a un lien direct avec la clause restrictive obtenue lors de l'achat, et lorsque son comportement à cet égard pose de graves questions d'ordre public, la Cour peut refuser

accord the relief to which he otherwise would have been entitled.

Of the allegations of wrongdoing, only the assertion that the respondents had engaged in monopolistic and anti-competitive pricing could have had any relevance for it could have had a bearing on the question of reasonableness with respect to the public interest. The question of the reasonableness of a covenant of this nature, moreover, had to be considered with reference to the time the covenant was given. Even if these practices had been established, the sale of the business and the giving of the restrictive covenant did not create a monopoly for one existed before the sale.

*Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Ltd.*, [1894] A.C. 535; *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916; *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, [1973] 2 O.R. 57, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of O'Leary J. Appeal dismissed.

*D. K. Laidlaw, Q.C.*, and *J. Colangelo*, for the defendants, appellants.

*J. John Brunner, Peter Israel* and *R. Hobson, Q.C.*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

McINTYRE J.—This appeal concerns a restrictive covenant given by vendors of the shares in a manufacturing company to the purchasers, who then continued the operation of the company's business. The purchasers, alleging a breach of the covenant, brought action against the vendors. At trial the covenant was held to be unenforceable, but an appeal was allowed and the vendors now appeal to this Court.

By an agreement, dated August 20, 1965, the respondents Bliss & Laughlin Industries Incorporated, a very large United States conglomerate operating principally in the steel industry, agreed to purchase from the appellants all of the issued and outstanding capital stock of Frank Doerner & Sons Limited. The appellant vendors are brothers

[1] (1978), 5 B.L.R. 132.

d'accorder le redressement auquel il aurait autrement droit.

Des allégations d'inconduite, seule celle portant que les intimées se sont livrées à une fixation de prix monopolistique et contraire à la concurrence peut être pertinente parce qu'elle pourrait avoir un effet sur la question du caractère raisonnable vis-à-vis de l'intérêt public. En outre, la question du caractère raisonnable d'une clause de cette nature doit être examinée par rapport à l'époque où elle a été consentie. Même si de telles pratiques avaient été prouvées, la vente de l'entreprise et l'acquiescement à la clause restrictive n'ont pas créé un monopole puisqu'il en existait un avant la vente.

Jurisprudence: *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Ltd.*, [1894] A.C. 535; *Elsley c. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 R.C.S. 916; *H. F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, [1973] 2 O.R. 57.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1], qui a accueilli un appel interjeté du jugement du juge O'Leary. Pourvoi rejeté.

*D. K. Laidlaw, c.r.*, et *J. Colangelo*, pour les défendeurs, appelants.

*J. John Brunner, Peter Israel* et *R. Hobson, c.r.*, pour les demanderesses, intimées.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Ce pourvoi vise une clause restrictive consentie par les vendeurs des actions d'une compagnie manufacturière aux acheteurs qui ont continué à exploiter l'entreprise en question. Les acheteurs, qui allèguent une violation de la clause, ont intenté une action contre les vendeurs. En première instance, la clause n'a pas été jugée exécutoire, mais un appel de ce jugement a été accueilli et les vendeurs se pourvoient maintenant devant cette Cour.

Par contrat en date du 20 août 1965, l'intimée Bliss & Laughlin Industries Incorporated, un conglomérat américain très important qui faisait principalement affaires dans l'industrie sidérurgique, a convenu d'acheter aux appelants toutes les actions émises et en circulation de Frank Doerner & Sons Limited. Les vendeurs appelants sont des frères

[1] (1978), 5 B.L.R. 132.

who, with their father, had commenced the busness of Frank Doerner & Sons Limited in 1945. The Doerner Company was engaged in designing, manufacturing, and marketing chair bases and controls. The bases are the structures upon which the chairs are mounted and the controls are the devices that control swivel, height, tilt and inclination of the chairs. The appellants are all skilled tool and die makers who were actively engaged in designing and developing chair controls and bases for the company, as well as acting as officers and directors. Frank Doerner, Jr. was president, Carl Doerner was vice-president, and Joseph Doerner was secretary and sales manager. Carl Doerner was responsible for production and plant operation.

qui, avec leur père, ont mis sur pied l'entreprise de Frank Doerner & Sons Limited en 1945. La compagnie Doerner s'occupait de conception, de fabrication et de mise en marché de bâtis et d'éléments de réglage de siège. Les bâtis sont les structures sur lesquelles sont assemblés les sièges, et les éléments de réglage sont les mécanismes qui permettent de les faire pivoter ou d'en régler la hauteur, l'angle ou l'inclinaison. Les appelants sont tous des outilleurs-ajusteurs expérimentés qui participaient activement à la conception et à la mise au point des éléments de contrôle et des bâtis de siège pour la compagnie, tout en agissant comme dirigeants et administrateurs. Frank Doerner, fils, était président, Carl Doerner était vice-président et Joseph Doerner était secrétaire et directeur des ventes. Carl Doerner était responsable de la production et de l'exploitation de l'usine.

The agreement for sale provided for a sale to the respondent of all the issued shares of Frank Doerner & Sons Limited for $900,000. It also provided in s. 5(d) that the Doerners would sign and deliver to the respondent covenants in a form prescribed in the agreement. The covenant is reproduced hereunder:

La promesse de vente prévoyait la vente à l'intimée de toutes les actions émises de Frank Doerner & Sons Limited pour un montant de $900,000. Elle stipulait également à l'al. 5d) que les Doerner signeraient et remettraient à l'intimée des engagements dans la forme prescrite au contrat. Voici le texte de l'engagement:

As further consideration for your purchase of my 268 ⅓ shares of common stock of Frank Doerner & Sons Limited pursuant to the Purchase Agreement among you and Carl Doerner, Joseph Doerner and myself, dated August , 1965, I hereby covenant and agree that for a period of five years from the closing date of such purchase or from the termination of my employment with you, whichever period ends later, I will not, without your prior written consent, anywhere within any county of any province of Canada or of any state of the United States in which the business of Frank Doerner & Sons Limited is being carried on, own, manage, operate, control, be employed by, participate in, or be connected with the ownership, management, operation or control of any business (i) similar to the type of business being conducted by Frank Doerner & Sons Limited or (ii) operating under any name similar to that of Frank Doerner & Sons Limited; nor will I give any such business any information concerning the business, products, prices, customers or affairs of Frank Doerner & Sons Limited.

[TRADUCTION] En contrepartie supplémentaire de votre achat de mes 268⅓ actions ordinaires de Frank Doerner & Sons Limited aux termes de la promesse d'achat conclue entre vous et Carl Doerner, Joseph Doerner et moi-même, le août 1965, je m'engage par la présente, pour une période de cinq ans qui suivra la date de signature de cette vente ou celle de la cessation de mon emploi auprès de vous, selon la plus tardive des deux, à ne pas acquérir à titre de propriétaires, à ne pas administrer, exploiter, contrôler une entreprise (i) semblable au type d'entreprise exploitée par Frank Doerner & Sons Limited ou (ii) exploitée sous un nom semblable à celui de Frank Doerner & Sons Limited, sans avoir obtenu votre consentement préalable, dans un comté d'une province du Canada ou dans un état des États-Unis où l'entreprise de Frank Doerner & Sons Limited est exploitée, à ne pas en devenir l'employé ou à ne pas détenir de droits dans la propriété, l'administration, l'exploitation ou le contrôle de pareille entreprise; je m'engage également à ne fournir à aucune entreprise de ce genre de renseignements concernant l'entreprise, les prix des produits, la clientèle ou les affaires de Frank Doerner & Sons Limited.

Each of the Doerners executed and delivered a covenant in this form to the respondents and, although the individual covenants were signed after the agreement for sale, it was understood by all the parties, and these proceedings have been based upon the proposition that the restrictive covenants contained in the three forms executed and delivered to the respondents form a part of the purchase agreement and part of the consideration for the purchase price.

After the execution and delivery of documents, the respondents assumed control of the company's business. Shortly after the purchase, the name of the company was altered to Doerner Products Co. Limited. The Doerners remained in the employ of the company. Frank Doerner, Jr. became vice-president and general manager, and Joseph Doerner became sales manager and assistant to Frank Doerner. The company carried on its operation much as it had prior to the sale of shares, at least in so far as its relations and dealings with its customers were concerned. The Doerners, in addition to being officers of the company, remained active in the business operations much as they had before the sale. On April 30, 1974 Joseph Doerner resigned and a few days later Carl Doerner also resigned. Upon learning of his brothers' resignations, Frank Doerner, Jr. resigned on May 24, 1974. At about this time one Edward Dorsch, who had been plant superintendent, also resigned.

In the summer of 1974, the appellants and Edward Dorsch incorporated a company known as Northfield Products Limited. This company went into the business of manufacturing and selling chair controls and bases in competition with the Doerner Products Co. Limited, which will hereafter be referred to as the Doerner Company. By November of 1974 it was in full production. During the first year of this competition the Doerner Company's sales declined and its profits were substantially reduced.

This action commenced on October 4, 1974. It alleged a breach of the restrictive covenant and sought an injunction against its continuation by

Chacun des Doerner a signé et remis un engagement de cette teneur à l'intimée et, bien que les engagements individuels aient été signés après la promesse de vente, toutes les parties ont convenu, et les présentes procédures sont fondées sur cette proposition, que les clauses restrictives contenues dans les trois formules signées et remises à l'intimée font partie de l'acte de vente et constituent un élément de la contrepartie du prix d'achat.

Après la signature et la remise des documents, l'intimée a pris la direction de l'entreprise de la compagnie. Peu après l'achat, le nom de la compagnie a été modifié pour devenir Doerner Products Co. Limited. Les Doerner sont demeurés au service de la compagnie. Frank Doerner, fils, est devenu vice-président et directeur général, et Joseph Doerner est devenu directeur des ventes et adjoint de Frank Doerner. La compagnie a continué l'exploitation de son entreprise à peu près comme elle le faisait avant la vente des actions, du moins en ce qui concerne ses rapports et ses négociations avec ses clients. En plus d'être dirigeants de la compagnie, les Doerner ont continué de participer à l'exploitation de l'entreprise comme ils le faisaient avant la vente. Le 30 avril 1974, Joseph Doerner a démissionné et quelques jours plus tard Carl Doerner a fait de même. Lorsqu'il a appris la démission de ses frères, Frank Doerner, fils, a démissionné le 24 mai 1974. Vers la même époque, Edward Dorsch, qui avait été surintendant de la manufacture, a également donné sa démission.

Au cours de l'été 1974, les appelants et Edward Dorsch ont constitué une compagnie désignée sous le nom de Northfield Products Limited. Cette compagnie s'est lancée dans la fabrication et la vente d'éléments de réglage et de bâtis de siège en concurrence avec Doerner Products Co. Limited, ci-après appelée la compagnie Doerner. En novembre 1974, elle était en pleine activité. Pendant la première année de cette concurrence, les ventes de la compagnie Doerner ont baissé et ses profits ont considérablement diminué.

Cette action a été intentée le 4 octobre 1974. On y invoquait une violation de la clause restrictive et on cherchait à obtenir une injonction qui mettrait

the operation of the Northfield business, as well as damages for breach of the covenant. The Doerners defended denying any breach of the covenant. The denial was based upon their construction of the covenant which relied on the provision of article 7(a) of the share purchase agreement, which provided:

> All representations, warranties and agreements made by Sellers shall survive for a period of six years from the date of Closing. All representations, warranties and agreements made by Sellers hereunder shall be joint and several.

They contended that the five-year period from the closing date of the agreement, or from the termination of employment with the company, could bind them only if they left their employment with the company before the six-year period referred to in article 7(a) had expired. In any event, they argued that they were freed from the burden of the covenant if they remained in the company's employment for the full six-year period. A further point was advanced to the effect that they were entitled to discontinue their employment with the company, freed from any obligation created by the covenant, because of certain unlawful and monopolistic practices adopted by the purchasers in the operation of the Doerner Company's business. They asserted that the respondents had directed: unlawful accounting practices concerned with the valuation of inventory for the purpose of tax evasion; the dumping of Doerner products in the United States at very low prices to the detriment of the Canadian company, and to the benefit of the American companies controlled by the respondent; the misuse of a Canadian government grant; and monopolistic and anti-competitive pricing. As a result of the alleged misconduct, it was claimed that they were justified in leaving the company's employment and that the restrictive covenant should not be enforced against them.

At trial the action was dismissed. The trial judge found that the restrictive covenant was reasonable with reference to the interests of the parties concerned and reasonable in the interests of the public. He considered that the covenant provided no more than adequate protection to the purchaser and it did not create a monopoly because a monopoly already existed, the Doerner

fin à l'exploitation de l'entreprise Northfield, de même que des dommages-intérêts pour violation de la clause. Les Doerner ont nié toute violation de la clause. Leur dénégation est fondée sur leur interprétation de la clause qui s'appuie sur les dispositions de l'al. 7a) de la promesse de vente des actions, dont voici le texte:

> [TRADUCTION] Toutes les déclarations, garanties et conventions des acheteurs demeureront en vigueur pour une période de six ans à partir de la date de signature du contrat. Toutes les déclarations, garanties et conventions des acheteurs seront conjointes et solidaires.

Ils prétendent qu'ils ne peuvent être liés pour la période de cinq ans depuis la date de signature du contrat ou depuis celle de la cessation de leur emploi auprès de la compagnie que s'ils quittent leur emploi auprès de la compagnie avant l'expiration de la période de six ans prévue à l'al. 7a). Quoi qu'il en soit, ils prétendent qu'ils sont libérés de l'engagement s'ils demeurent au service de la compagnie pendant les six ans complets. Ils prétendent de plus avoir le droit de mettre fin à leur emploi auprès de la compagnie, libres de toute obligation créée par la clause, à cause de pratiques illégales et monopolistiques adoptées par les acheteurs dans l'exploitation de l'entreprise de la compagnie Doerner. Ils affirment que les intimées ont ordonné: des pratiques comptables illégales relatives à l'évaluation du stock dans un but d'évasion fiscale; le dumping de produits Doerner aux États-Unis à des prix très bas au préjudice de la compagnie canadienne et à l'avantage des compagnies américaines sous la haute main de l'intimée; l'emploi impropre d'une subvention du gouvernement canadien; et une méthode de fixation des prix monopolistiques et contraire à la concurrence. Compte tenu de la mauvaise administration imputée, ils prétendent que leur démission est justifiée et que la clause restrictive ne peut leur être opposée.

L'action a été rejetée en première instance. Le juge de première instance a conclu que la clause restrictive était raisonnable compte tenu des intérêts des parties en cause et raisonnable dans l'intérêt du public. Selon lui, la clause se borne à assurer une protection suffisante à l'acheteur; elle n'a pas créé de monopole puisqu'il en existait déjà un étant donné que la compagnie Doerner détenait

Company having had before the sale some ninety-eight per cent of the Canadian market in the products it sold and, accordingly, the covenant was not injurious to the public. He also found that allegations by the Doerners of unfair, unlawful, and monopolistic business practices of the employer were not supported in the evidence. He dismissed the action, however, on the basis that the proper interpretation of the sales agreement required that the restrictive covenant be read with s. 7(a) of the agreement which, he said, provided for a six-year warranty, and he held that the restrictive covenant could be effective only if the covenantors left the employment some time within the six-year period.

In the Court of Appeal Morden J.A., speaking for a unanimous court, disagreed with the trial judge upon the construction of the covenant and held it to be binding upon the covenantors. He held that the covenant was reasonable, both from the point of view of the parties and from that of the public interest, and he also considered that the evidence did not support the allegations of wrongdoing made against the respondents. The appeal was accordingly allowed and the respondents were held to be entitled to damages for breach of the covenant in an amount to be assessed by the local master at Kitchener. The claim for an injunction had been abandoned at the appeal.

In this Court counsel for the appellants based his argument on two propositions. He contended that the trial judge had been correct in his approach to the construction of the covenant and that its force was spent after the passage of six years from the closing of the sale transaction. He argued as well, and this was clearly his principal submission, that the covenant was not reasonable in the public interest and that the second branch of the test propounded by Lord Macnaghten in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Limited*[2], at p. 565, had not been met.

The point raised concerning the construction of the covenant may be readily disposed of. I am in full agreement with the Court of Appeal on this

[2] [1894] A.C. 535.

quatre-vingt-dix-huit pour cent du marché canadien des produits qu'elle vendait et par conséquent, la clause n'était pas préjudiciable au public. Il a également conclu que les allégations de pratiques commerciales monopolistiques, injustes et illégales imputées à l'employeur ne sont pas appuyées par la preuve. Il a toutefois rejeté l'action pour le motif que la bonne interprétation du contrat de vente exige que la clause restrictive soit lue en corrélation avec l'al. 7a) lequel, a-t-il dit, accorde une garantie de six ans, et il a conclu que la clause restrictive ne pouvait être exécutoire que si les contractants quittaient leur emploi avant l'expiration de la période de six ans.

Le juge Morden qui a exposé les motifs unanimes de la Cour d'appel, n'a pas souscrit à l'opinion du juge de première instance relativement à l'interprétation de la clause et a jugé qu'elle liait les contractants. Il a jugé que la clause était raisonnable tant du point de vue des parties que de celui de l'intérêt public, et il est également d'avis que la preuve n'appuyait pas les allégations d'inconduite imputée aux intimées. Il a donc accueilli l'appel et jugé que les intimées ont droit à des dommages-intérêts pour violation de la clause, dont le montant serait déterminé par le *master* local à Kitchener. La demande d'injonction avait été abandonnée en appel.

Devant cette Cour, l'avocat des appelants a fondé ses prétentions sur deux propositions. Il a prétendu que le juge de première instance avait bien interprété la clause et que celle-ci avait perdu son effet à l'expiration du délai de six ans suivant la signature du contrat de vente. Il a prétendu également, et c'était là manifestement son principal moyen, que la clause n'était pas raisonnable dans l'intérêt public et que la deuxième partie du critère proposé par lord Macnaghten dans l'arrêt *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Limited*[2], à la p. 565, n'avait pas été respectée.

On peut facilement trancher la question relative à l'interprétation de la clause. Je souscris entièrement à l'opinion de la Cour d'appel sur cette

[2] [1894] A.C. 535.

point. In my view, the covenant is clearly expressed in language which creates no ambiguity and is not affected by the terms of article 7(a). It fixes without doubt the time limits of its own operation. The evidence indicated that the purchasers, in acquiring the company's shares, were seeking more than 'bricks and mortar'. They wanted the Doerners with the business and while the agreement, including the covenant, did not provide for their employment, it did provide that if they were not in the company's employment they would not be in competition with it. The purchasers wanted a five-year restriction on the future employment of the Doerners after they terminated their employment with the Doerner Company. This period was to run from the date of the closing of the transaction if the Doerners did not thereafter become employed by the company, and from the date of termination of employment if they did. This was expressed in unequivocal language and it cannot be said to have bound the Doerners for a period extending too far into the future—see *Elsley v. J. G. Collins Insurance Agencies Ltd.*[3], for a covenant which governed the employment over a longer period. I can give no effect to this argument. The covenant, if not otherwise contrary to the law, bound the Doerners according to its clearly expressed terms at the time they terminated their employment with the Doerner Company.

The general principles governing cases of this nature are well settled. While, generally speaking, covenants in restraint of trade have been considered contrary to public policy and unenforceable, certain exceptions have been recognized. Covenants which restrain competition by an employee with his former employer, and those restraining a vendor of a business from competing with his purchaser, form two exceptions to the general rule where the restraint imposed is reasonable considering the interest of the respective parties and also the interest of the public. It is recognized that the public has an interest in the continued provision of goods and services resulting from the employment of skills acquired by employees in the course of their employment and,

[3] [1978] 2 S.C.R. 916.

question. A mon avis, la clause est clairement formulée en termes non équivoques et elle n'est pas touchée par les termes de l'al. 7a). Elle fixe indubitablement la durée de son application. Il ressort de la preuve qu'en acquérant les actions de la compagnie, les acheteurs désiraient obtenir plus qu'«une coquille». Ils désiraient obtenir la participation des Doerner au sein de l'entreprise et bien que le contrat, y compris la clause, ne prévît pas leur emploi, il prévoyait effectivement que s'ils ne travaillaient pas pour la compagnie, ils ne devaient pas lui faire concurrence. Les acheteurs voulaient imposer pendant cinq ans une restriction à l'emploi futur des Doerner après la cessation de leur emploi auprès de la compagnie Doerner. Cette période devait courir depuis la date de la signature du contrat si les Doerner n'entraient pas au service de la compagnie, et depuis la date de la cessation de leur emploi s'ils travaillaient pour elle. Cette condition était formulée en termes non équivoques et l'on ne peut dire qu'elle a lié les Doerner pendant trop longtemps—voir *Elsley c. J. G. Collins Insurance Agencies Ltd.*[3], pour une clause qui limitait l'emploi pendant une plus longue période. Je ne peux retenir cet argument. Si l'engagement n'est pas par ailleurs contraire à la loi, il liait les Doerner conformément à sa teneur clairement exprimée si ces derniers mettaient fin à leur emploi auprès de la compagnie Doerner.

Les principes généraux qui s'appliquent aux affaires de cette nature sont bien établis. Bien que, d'une manière générale, les clauses restreignant le commerce aient été jugées contraires à l'intérêt public et sans force exécutoire, il existe certaines exceptions. Les clauses qui limitent la concurrence d'un employé avec son ancien employeur et celles qui empêchent le vendeur d'une entreprise d'entrer en concurrence avec l'acheteur sont deux exceptions à la règle générale lorsque la restriction imposée est raisonnable compte tenu des intérêts des parties respectives et également de l'intérêt du public. Il est reconnu que le public a un intérêt dans la fourniture continue de biens et de services qui résulte de l'utilisation de compétences acquises par des employés en cours d'emploi et, également,

[3] [1978] 2 R.C.S. 916.

as well, an interest in the continuation of the trade or business. Covenants which seek to interfere with such activity are to that extent injurious to the public interest. On the other hand, it is said that it is also in the public interest that a person who has built up a valuable business should be able to sell it and be competent in law to bind himself to refrain from competition with the business he has sold, so that a purchaser will be encouraged to acquire and thus maintain the business in active operation for the general public benefit, as well as his own profit.

A distinction also has been recognized between a covenant given by the vendor of a business to protect his purchaser, and one given by an employee terminating his employment to protect his employer from competition. This latter type of covenant, it has been said, may well arise from dealings between unequals and thus be oppressive to an employee. It may be acceptable, however, where the purpose of the covenant is not to prohibit the employee from exploiting the skills he has acquired in his past employment, but to protect the former employer against competition where the scope and nature of the employee's work and his contact with clients and customers of his former employer is such that he could readily do harm to his employer.

This subject was examined in this Court recently in *Elsley v. J. G. Collins Insurance Agencies Ltd., supra,* where Dickson J. stated the principles, briefly summarized above, and collected the principal authorities. He accepted the test described by Lord Macnaghten in the *Nordenfelt* case, *supra*, and adopted in many other cases, to the effect that to be enforceable a restrictive covenant of this nature must be reasonable both in the interests of the parties to the covenant and in the interests of the public. He made it clear that the question of reasonableness must be determined in each case upon a consideration of the facts presented. With these considerations in mind I will seek to apply these principles to the peculiar facts of the case at bar.

To begin with, this case has been argued upon the basis that the covenant must be approached as

un intérêt dans la continuation du commerce ou de l'entreprise. Les clauses qui cherchent à entraver de telles activités sont, dans cette mesure, nuisibles à l'intérêt public. Par ailleurs, on dit qu'il est également dans l'intérêt public qu'une personne qui a bâti une entreprise de valeur puisse la vendre et s'engager légalement à ne pas faire concurrence à l'entreprise qu'elle a vendue, de sorte que l'acquisition et la poursuite de l'entreprise par un acheteur soient encouragées à l'avantage du public en général de même qu'à son propre avantage.

On a également reconnu une distinction entre une clause à laquelle consent le vendeur d'une entreprise pour protéger son acheteur, et celle à laquelle consent un employé qui met fin à son emploi pour protéger son employeur de la concurrence. On a dit que ce dernier type de clause pouvait bien résulter de pourparlers entre des personnes qui ne sont pas sur un pied d'égalité et être ainsi oppressif à l'égard de l'employé. Toutefois, elle peut être acceptable lorsque son but n'est pas d'interdire à l'employé d'utiliser les compétences qu'il a acquises dans son emploi antérieur, mais de protéger l'employeur antérieur contre la concurrence lorsque l'étendue et la nature du travail de l'employé et ses rapports avec les clients de son employeur antérieur sont tels qu'il pourrait facilement lui nuire.

Cette Cour s'est récemment penchée sur ce sujet dans l'affaire *Elsley c. J. G. Collins Insurance Agencies Ltd.*, précitée, où le juge Dickson a énoncé les principes, que je viens de résumer, et a réuni les principaux arrêts. Il a accepté le critère décrit par lord Macnaghten dans l'arrêt *Nordenfelt*, précité, et adopté dans plusieurs autres arrêts, portant que pour être exécutoire une clause restrictive de cette nature doit être raisonnable dans l'intérêt des parties et dans l'intérêt public. Il dit clairement que la question du caractère raisonnable doit être tranchée dans chaque cas après examen des faits présentés. Avec ces considérations à l'esprit, j'essaierai d'appliquer ces principes aux faits particuliers de l'espèce.

Tout d'abord, cette affaire a été plaidée en tenant pour acquis qu'il faut considérer l'engage-

a covenant given by a vendor of a business to a purchaser. Furthermore, it must be recognized that in the acquisition of this business the purchasers were acquiring a going concern and paying for more than physical assets. The price paid includes a substantial allowance for goodwill and the purchasers hoped to acquire, as has been pointed out, the services of the Doerners in the future conduct of the business. In the events which occurred they were successful in this last step but, again it must be noted, they were careful to guard against competition, having paid for the goodwill associated with the Doerners' intimate connection with the business by providing for a covenant restraining the Doerners from active competition for five years after the termination of their employment.

Both courts below considered the covenant was reasonable as between the parties and, indeed, the appellant did not strenuously argue that point before us. His attack was made on the aspect of reasonableness with regard to the public interest. In my view, the covenant was clearly reasonable considering the interests of the parties. The purchaser, having paid for the goodwill, was entitled to the five-year protection. The business had been conducted by the Doerners personally. They knew all the customers and enjoyed a virtual monopoly in the field in Canada. In the eyes of the public they *were* the business. It was this fact which made their continuation in the business so desirable, and their competition with the business so dangerous. The falloff in the business done by the company after the Doerners commenced a competitive operation in 1974 bears testimony to this proposition. While, as Dickson J. has said in *Elsley*, each case must be decided on the basis of its own peculiar facts, a review of the various cases on this subject (see such cases as *Elsley, supra; Herbert Morris, Limited v. Saxelby*[4]; *Connors Bros., Ltd. and Others v. Connors*[5]; and generally Cheshire & Fifoot's *Law of Contract* (9th ed. 1976), at pp. 381 *et seq.*) would indicate that the restrictions imposed in the case at bar fall within the range of

[4] [1916] 1 A.C. 688.
[5] [1940] 4 All E.R. 179.

ment comme un engagement consenti par le vendeur d'une entreprise à un acheteur. De plus, il faut reconnaître que les acheteurs faisaient l'acquisition d'une entreprise en activité et que le prix englobait plus que les biens corporels. Une bonne partie du prix était destinée à l'achalandage et les acheteurs espéraient, comme je l'ai fait remarquer, obtenir les services des Doerner pour continuer à exploiter l'entreprise. Les événements ont montré qu'ils ont réussi dans cette dernière démarche mais, il faut encore le rappeler, ils ont eu la prudence de se prémunir contre la concurrence, puisqu'ils avaient payé l'achalandage relié aux rapports étroits des Doerner avec l'entreprise, en exigeant un engagement qui empêcherait ces derniers d'entrer en concurrence active pendant cinq ans après la cessation de leur emploi.

Les deux cours d'instance inférieure ont jugé que l'engagement était raisonnable entre les parties et, en fait, les appelants ne se sont pas acharnés à plaider cette question devant nous. Leurs arguments visaient plutôt l'aspect raisonnable de l'engagement vis-à-vis de l'intérêt public. A mon avis, l'engagement est manifestement raisonnable compte tenu des intérêts des parties. L'acheteur, qui a payé l'achalandage, a droit à la protection de cinq ans. L'entreprise avait été exploitée par les Doerner personnellement. Ils connaissaient tous les clients et jouissaient virtuellement d'un monopole dans le domaine au Canada. Aux yeux du public, ils *étaient* l'entreprise. C'est ce fait qui rendait si souhaitable le maintien de leur présence au sein de l'entreprise et si dangereuse leur concurrence avec elle. Le déclin des affaires de la compagnie après que les Doerner eurent mis sur pied une exploitation capable de la concurrencer en 1974, appuie cette proposition. Bien que, comme l'a dit le juge Dickson dans l'arrêt *Elsley*, chaque affaire doive être décidée à partir de ses faits particuliers, un examen de la jurisprudence sur ce sujet (voir des arrêts tels *Elsley*, précité; *Herbert Morris, Limited v. Saxelby*[4]; *Connors Bros., Ltd. and Others v. Connors*;[5] et en général Cheshire & Fifoot's *Law of Contract* (9e éd. 1976) aux pp. 381 et suiv.) tend à indiquer que les restrictions imposées en l'espèce

[4] [1916] 1 A.C. 688.
[5] [1940] 4 All E.R. 179.

others which have been found acceptable.

The major attack by the appellants was based on the second branch of the test. It was said that this covenant was unreasonable with regard to the public interest, contrary to public policy, and therefore void. It was said that after taking control of the business the purchasers followed policies which were corrupt, monopolistic, and generally contrary to public policy, to such a degree that the Doerners were freed from the obligation to observe the covenant. The specific allegations made against the purchasers are set out in the statement of defence, para. 8:

> 8. Further, the Doerners left their employment with Doerner by reason of the unfair, unlawful and monopolistic business practices of Doerner all as instructed, authorized and condoned by Bliss. Such practices consist of the following:
>
> (a) Improper accounting for inventory and business purposes of Doerner;
>
> (b) Dumping of Doerner products in the United States;
>
> (c) Misuse of Government grants;
>
> (d) Monopolistic and anti-competitive pricing and marketing policies;
>
> (e) Avoidance and evasion of taxes, particularly by reason of the facts alleged in paragraph 8(a) and (b) hereof.

Much evidence was led at trial concerning these allegations and it was reviewed and considered in the Court of Appeal. In this Court we were referred extensively to parts of the evidence and we were urged to reconsider the findings expressed in the courts below. In both the courts below, after considering the arguments raised regarding the evidence, it was concluded that the allegations against the purchasers were not established. The position of an appellate court with respect to findings of fact made at trial has been frequently stated in this Court, see for example: *Stein v. The Ship "Kathy K"*[6] and authorities there considered. The trial judge must remain the judge of matters of fact where it can be shown that there was evidence before him on which he could base his findings, and where it is not shown that he has

[6] [1976] 2 S.C.R. 802.

cadrent bien avec celles qui ont été jugées acceptables.

C'est sur la deuxième branche du critère que les appelants fondent leurs principaux arguments. On a prétendu que cet engagement est déraisonnable vis-à-vis de l'intérêt public, contraire à l'ordre public et donc nul. On a prétendu qu'après avoir pris la direction de l'entreprise, les acheteurs ont suivi des politiques corrompues, monopolistiques et généralement contraires à l'ordre public à un point tel que les Doerner étaient libérés de l'obligation de respecter l'engagement. Les allégations précises formulées contre les acheteurs sont énoncées dans la défense, au par. 8:

> [TRADUCTION] 8. De plus les Doerner ont quitté leur emploi auprès de Doerner en raison de ses pratiques commerciales injustes, illégales et monopolistiques, conformes aux directives de Bliss et autorisées et excusées par cette dernière. Voici quelles sont ces pratiques:
>
> a) des pratiques comptables irrégulières pour le stock et les objets de l'entreprise de Doerner;
>
> b) le dumping de produits Doerner aux États-Unis;
>
> c) l'emploi impropre de subventions du gouvernement;
>
> d) des méthodes de fixation des prix monopolistiques et contraires à la concurrence;
>
> e) l'évitement et l'évasion d'impôt en raison principalement des faits mentionnés aux alinéas 8a) et b).

Plusieurs éléments de preuve ont été apportés en première instance concernant ces allégations et ils ont été examinés et étudiés en appel. Devant cette Cour, on nous a cité de longs extraits de la preuve en nous demandant de réexaminer les conclusions formulées par les cours d'instance inférieure. Après avoir examiné les arguments présentés relativement à la preuve, les deux cours d'instance inférieure ont conclu que les allégations contre les acheteurs n'étaient pas fondées. La position d'une cour d'appel relativement aux conclusions de fait tirées en première instance a été souvent réitérée par cette Cour, voir par exemple: *Stein c. Le navire «Kathy K»*[6] et la jurisprudence qui y est examinée. Le juge de première instance doit demeurer le juge des questions de fait lorsqu'on peut démontrer que la preuve qui lui a été soumise

[6] [1976] 2 R.C.S. 802.

proceeded on any false principle or made any palpable error. In this case, on his view of the evidence, the trial judge concluded that allegations of wrongdoing had not been made out. The Court of Appeal on its consideration of the evidence reached the same conclusion. In this Court, we were invited to review the evidence and reverse the two courts below on matters of fact. I have considered the evidence and, while there was conflicting evidence on the issues of fact involved in the appellants' allegations of wrongdoing, I am not prepared to substitute my judgment for that of the trial judge in order to reach different conclusions from those which he adopted. The trial judge who heard the evidence reached his conclusions. It has not been shown, in my view, that he made any error and, like the Court of Appeal, I would decline to interfere. I would proceed then upon the basis that the allegations of wrongdoing against the respondents have not been established.

peut fonder ses conclusions, et lorsqu'il n'est pas établi qu'il a agi en se fondant sur des principes erronés ou qu'il a commis une erreur manifeste. En l'espèce, selon sa perception de la preuve, le juge de première instance a conclu que les allégations d'inconduite n'avaient pas été prouvées. Après une analyse de la preuve, la Cour d'appel est parvenue à la même conclusion. On a demandé à cette Cour de réexaminer la preuve et d'infirmer les conclusions des deux cours d'instance inférieure sur des questions de fait. J'ai considéré la preuve et, malgré certains éléments contradictoires sur les questions de fait énoncées dans les allégations d'inconduite présentées par les appelants, je ne suis pas disposé à substituer mon jugement à celui du juge de première instance pour parvenir à des conclusions différentes. Le juge de première instance qui a entendu les témoignages a tiré ses conclusions. A mon avis, on n'a pas démontré qu'il a commis une erreur et, comme la Cour d'appel, je m'abstiens d'intervenir. Je poursuis donc mon examen sur le fondement que les allégations d'inconduite que l'on oppose aux intimées n'ont pas été prouvées.

I do not wish it to be understood, however, that in an action upon a restrictive covenant the conduct of the plaintiff is irrelevant to the determination of his right to relief. Where the conduct of the purchaser in the operation of the acquired business has a direct relationship to the restrictive convenant obtained on the purchase, and where his behaviour in the conduct of that business raises grave issues of public policy, the Court may refuse to accord the relief to which he would otherwise be entitled. Where, for example, the covenantor has been required in the course of his employment by the purchaser to participate in a serious breach of the law relating to the conduct of the acquired business, the courts may well refuse the relief claimed because of such conduct and, in effect, release the covenantor from the obligations of the covenant. Here, as I have stated, there is no basis for interference with the concurrent findings of fact below, and this consideration does not come into play.

Je ne voudrais toutefois pas que l'on croie que, dans une action fondée sur une clause restrictive, la conduite du demandeur n'est pas pertinente à la détermination de son droit à un redressement. Lorsque la façon dont l'acheteur exploite l'entreprise acquise a un lien direct avec la clause restrictive obtenue lors de l'achat, et lorsque son comportement à cet égard pose de graves questions d'ordre public, le tribunal peut refuser d'accorder le redressement auquel il aurait autrement droit. Par exemple, lorsqu'on exige que dans le cadre de son emploi auprès de l'acheteur, le contractant participe à une violation grave de la loi concernant l'exploitation de l'entreprise acquise, les tribunaux pourront très bien refuser le redressement demandé en conséquence et, en fait, libérer le contractant des obligations que comporte la clause restrictive. Ici, comme je l'ai dit, rien ne permet d'intervenir dans les conclusions de fait concordantes des cours d'instance inférieure, et cette considération n'entre pas en jeu.

While it follows from the foregoing that the appeal must fail, I would like to add a comment

Bien qu'il découle de ce qui précède que le pourvoi doit être rejeté, j'aimerais commenter les

regarding the allegations made against the respondents and their relevance, in any event, to the issues in this case. The allegations are set out above in the extract from the statement of defence. Of the five allegations described, only the one in para. 8(d) could have any relevance here, *i.e.* the assertion that the respondents engaged in monopolistic and anti-competitive pricing. As to the other allegations, while the conduct complained of would have been made possible by the sale of the shares, it would not have been influenced by the restrictive covenant. Such conduct would be neither assisted nor impeded by the covenant. If it occurred, it did so as a result of the conscious decisions of the purchasers entirely unrelated to the restrictive covenant and not affected by it.

Regarding the allegations of monopolistic practice, it is apparent that it could have a bearing on the second branch of the *Maxim Nordenfelt* test, *i.e.* the question of reasonableness with respect to the public interest. However, in my view, even assuming such practices had been established, I am unable to conclude that the sale of the business and the giving of the restrictive covenant created any monopoly. The monopoly existed before the sale. It was conceded that the Doerners had about ninety-eight per cent of the Canadian market in the goods that they manufactured and sold prior to the sale transaction. The monopoly had been created by the appellants themselves and it rested largely upon their skill and industry in the pursuit of their business activities. They sold the product of their skill and industry and were paid for it. I cannot agree that they may now say that their creature is an evil thing contrary to public policy, whose continued existence would be harmful to the public interest. I agree with Morden J.A., in the Court of Appeal, and I adopt his words, when he said:

> To the extent that the Doerner company in fact sold to 98% of the Canadian chair control market in 1965 I suppose it could be said that there was a monopoly but it is not suggested that there was anything improper or "pernicious" relating to this. In this regard, the observations of Viscount Maugham in *Connors Bros., Ltd.*,

allégations faites contre les intimées et leur pertinence, en tout état de cause, aux questions en litige. Les allégations sont formulées dans le passage précité de la défense. De ces cinq allégations, seule celle de l'al. 8d) pourrait être pertinente ici, c.-à-d., l'affirmation que les intimées se sont livrées à une fixation de prix monopolistique et contraire à la concurrence. Quant aux autres allégations, bien que la conduite alléguée puisse résulter de la vente des actions, elle n'est pas influencée par la clause restrictive. Pareille conduite n'en bénéficie pas et n'est pas entravée par elle. Le cas échéant, une telle conduite n'a pu résulter que des décisions conscientes des acheteurs sans aucunement être reliée à la clause restrictive et sans avoir été influencée par celle-ci.

Quant aux allégations de pratiques monopolistiques, il est évident qu'elles pourraient avoir un effet sur la deuxième partie du critère énoncé dans l'arrêt *Maxim Nordenfelt*, c.-à-d. la question du caractère raisonnable vis-à-vis de l'intérêt public. Toutefois, à mon avis, même si l'on tient pour acquis que de telles pratiques ont été prouvées, je suis incapable de conclure que la vente de l'entreprise et l'acquiescement à la clause restrictive aient créé un monopole. Le monopole existait avant la vente. On a admis que les Doerner détenaient environ quatre-ving-dix-huit pour cent du marché canadien des marchandises qu'ils fabriquaient et vendaient avant la conclusion de la vente. Les appelants eux-mêmes avaient créé le monopole qui reposait en grande partie sur leur compétence et leur labeur dans la poursuite de leur activité commerciale. Ils ont vendu le produit de leur compétence et de leur labeur et en ont reçu le prix. Je ne peux accepter qu'ils puissent maintenant dire que leur création est mauvaise et contraire à l'ordre public et qu'il serait nuisible à l'intérêt public qu'elle demeure en existence. Je souscris à l'opinion du juge Morden et je fais mien le passage suivant de ses motifs:

> [TRADUCTION] Dans la mesure où les ventes de la compagnie Doerner comptaient réellement pour 98 pour cent du marché canadien des éléments de réglage de siège en 1965, j'imagine que l'on peut dire qu'il existait un monopole, mais on ne prétend pas qu'il y ait eu là quelque chose d'incorrect ou de «pernicieux». A cet

[[1940] 4 All E.R. 179], at p. 195, is of some relevance to the facts of the present case:

> 'In the present case, it seems to their Lordships that there are no grounds for holding that a restriction restraining the respondent from carrying on a sardine business in Canada is likely to produce a real monopoly, since every other person in Canada can set up such a business, and the evidence is to the effect that some persons have done so. The practical difficulty in successfully competing with the appellants may well be due to their skill and enterprise and long experience.'

Therefore, any argument to the effect that the covenant was to create a monopoly fails to recognize that its enforcement cannot prevent others from competing in the market and, also, the legitimacy of reasonable protection against competition *from the defendants*. In a sense the defendants seem to be asserting that *they* could properly enjoy, through the Doerner company, a large portion of the chair control market but that it is not legitimate, as far as the public interest is concerned, for any purchaser from them to enjoy such benefit. I cannot accept such a submission.

I would add as well, since a submission on the point was raised in the appeal, that subject to what has been said above concerning proved misconduct, the question of reasonableness of a convenant of this nature must be considered with reference to the time the covenant was given. The English position in this regard is illustrated by comments in Cheshire & Fifoot's *Law of Contract*, (9th ed. 1976), at p. 378; *Gledhow Autoparts, Ltd. v. Delaney*[7], *per* Diplock L.J. at p. 295 and *Commercial Plastics Ltd. v. Vincent*[8], where Pearson L.J., speaking for the Court, dealt with the matter at p. 644. A comment from the Privy Council is to be found in *Attorney General of Australia v. Adelaide Steamship Co., Ltd.*[9], *per* Lord Parker of Waddington, at p. 797. Canadian authority appears in *H. F. Clarke Ltd. v. Thermidaire Corp. Ltd.*[10], in the Ontario Court of Appeal where Brooke J.A., speaking for the Court, said at p. 66:

[7] [1965] 3 All E.R. 288.
[8] [1965] 1 Q.B. 623 (C.A.).
[9] [1913] A.C. 781.
[10] [1973] 2 O.R. 57.

égard, la remarque du vicomte Maugham dans *Connors Bros., Ltd.*, [[1940] 4 All E.R. 179], à la p. 195 présente une certaine pertinence quant aux faits de l'espèce:

> «Leurs Seigneuries sont d'avis qu'ici rien ne permet de conclure qu'une clause restrictive empêchant les intimés d'exploiter une entreprise de sardines au Canada aura vraisemblablement pour effet de créer un monopole réel, puisque toute autre personne au Canada peut constituer une telle entreprise et que, selon la preuve, certaines personnes l'ont fait. La difficulté pratique de faire une concurrence efficace aux appelants peut très bien s'expliquer par leur compétence, leur labeur et leur longue expérience.»

Donc, tout argument portant que la clause visait à créer un monopole omet de reconnaître que son application ne peut empêcher les autres d'entrer en concurrence sur le marché et, également, qu'il est légitime de se protéger raisonnablement contre la concurrence *des défendeurs*. D'une certaine façon, les défendeurs semblent faire valoir qu'*ils* pourraient à bon droit jouir, par l'intermédiaire de la compagnie Doerner, d'une grande partie du marché des éléments de réglage de siège mais qu'il n'est pas légitime, dans l'intérêt public, qu'un de leurs acheteurs jouisse de cet avantage. Je ne peux accepter cette prétention.

J'ajouterai également, puisqu'on a présenté des arguments sur cette question lors du pourvoi, que sous réserve de ce que j'ai déjà dit relativement à l'inconduite prouvée, la question du caractère raisonnable d'une clause de cette nature doit être examinée par rapport à l'époque où cette clause a été consentie. La position anglaise à cet égard est illustrée par des commentaires dans Cheshire & Fifoot's *Law of Contract*, (9e éd. 1976), à la p. 378; *Gledhow Autoparts, Ltd. v. Delaney*[7], le lord juge Diplock à la p. 295 et *Commercial Plastics Ltd. v. Vincent*[8], où le lord juge Pearson, parlant au nom de la Cour, a examiné la question à la p. 644. On trouve un commentaire du Conseil privé dans *Attorney General of Australia v. Adelaide Steamship Co., Ltd.*[9], lord Parker of Waddington, à la p. 797. Un arrêt canadien qui fait autorité est *H. F. Clarke Ltd. v. Thermidaire Corp. Ltd.*[10], devant la Cour d'appel de l'Ontario où le juge Brooke, a dit au nom de la Cour, à la p. 66:

[7] [1965] 3 All E.R. 288.
[8] [1965] 1 Q.B. 623 (C.A.).
[9] [1913] A.C. 781.
[10] [1973] 2 O.R. 57.

This covenant is a covenant in restraint of trade and, when considering whether or nor it meets the test of reasonableness, regard must be had to the time when the covenant was made.

This principle was reasserted in the Ontario Court of Appeal in *Stephens v. Gulf Oil Canada Ltd. et al*[11].

For all of the above reasons, I would dismiss the appeal with costs to the respondents, and affirm the judgment of the Court of Appeal.

*Appeal dismissed.*

*Solicitors for the defendants, appellants: McCarthy & McCarthy, Toronto.*

*Solicitors for the plaintiffs, respondents, Bliss & Laughlin Industries and Doerner Products Co. Limited: P. John Brunner, Toronto and Hobson, Wood, Jenkins, Duncan & Wellhauser, Waterloo.*

[11] (1975), 11 O.R. (2d) 129.

[TRADUCTION] Il s'agit d'une clause restreignant le commerce et lorsqu'on cherche à savoir si elle satisfait au critère du caractère raisonnable, il faut tenir compte de l'époque à laquelle elle a été ratifiée.

La Cour d'appel de l'Ontario a réaffirmé ce principe dans l'arrêt *Stephens v. Gulf Oil Canada Ltd. et al.*[11]

Pour tous ces motifs, je suis d'avis de rejeter le pourvoi avec dépens aux intimées, et de confirmer l'arrêt de la Cour d'appel.

*Pourvoi rejeté.*

*Procureurs des défendeurs appelants: McCarthy & McCarthy, Toronto.*

*Procureurs des défenderesses, intimées, Bliss & Laughlin Industries and Doerner Products Co. Limited: P. John Brunner, Toronto et Hobson, Wood, Jenkins, Duncan & Wellhauser, Waterloo.*

[11] (1975), 11 O.R. (2d) 129.