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Can "Temporary" Remote Work Become a Contractual Right? *The British Columbia Court of Appeal Says, "Yes"*

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As employers continue to navigate hybrid and return-to-office strategies, a recent decision of the British Columbia Court of Appeal confirms that a remote work arrangement can, in some circumstances, become an enforceable contractual term – even if the employer initially intended it to be temporary or informal.

In *Cressey Construction Corporation v Parolin*,[2] the Court of Appeal held an employee's informal work-from-home arrangement was an essential oral term of her employment contract. As a result, when her employer required her to return to the office without reasonable notice, this amounted to constructive dismissal, and the employee was awarded 19 months' reasonable notice.

Fortunately for employers, if properly documented and managed, a remote work arrangement can remain temporary, and at the discretion of an employer.

What happened in Cressey Construction?

Tracy Parolin was the Director of Marketing for Cressey Construction Corporation, with 18 years' service. The terms of Parolin's employment agreement were mostly oral.

In 2013, when Parolin returned from maternity leave, she was given flexibility in her work hours to accommodate childcare. This arrangement continued for several years, until the onset of the COVID-19 pandemic, when Parolin and her co-workers began exclusively working from home. When her co-workers returned to the office in June 2020, Parolin continued to work from home due to her child's health concerns. At the time, Parolin was told by Cressey, "as long as the job was getting done, it did not matter where she worked." Cressey assumed Parolin would return to the office when the pandemic ended. However, it did not communicate this expectation to her.

Fortunately for employers, if properly documented and managed, a remote work arrangement can remain temporary, and at the discretion of an employer.

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In March 2023, Cressey asked Parolin to return to work in-person. At this point, she had worked flexibly for ten years, including remotely for three years. Parolin did not wish to return to the office and took the position the requirement that she do so was a "constructive dismissal."[3]

At trial, the judge found Parolin's flexible work hours and work location were oral terms of her employment contract which could only be changed with "reasonable discussion and/or notice." As such, Cressey unilaterally requiring that Parolin return to the office established constructive dismissal:

> *I have concluded that a term of Ms. Parolin's employment contract was her ability to work flexible hours at home, due to childcare commitments. This term was not indefinite, as it was tied to childcare commitments. While I accept that employers have the ability to manage their workforce, including the location of work, that is tempered where a binding term in an employment contract exists. <u>In this case, while the term of flexible hours and location in employment contract is oral, I have concluded it exists, and thus can only be changed with reasonable discussion and/or notice.</u> There is no question that Cressey knew of Ms. Parolin's flexible work arrangement, which she had for ten years, and her work from home arrangement, which she had for three years. The defendant authorized this, knew it existed, and supported it over that time. <u>I have therefore found Ms. Parolin's flexible work hours and location to be oral terms in her contract of employment, as set out above.</u>*[4]

The British Columbia Court of Appeal agreed.

An informal agreement to allow an employee to work remotely can, in certain circumstances, evolve into a binding contractual term

Key Takeaways and Best Practices

The decision makes clear an informal agreement to allow an employee to work remotely can, in certain circumstances, evolve into a binding contractual term, particularly if:

- Remote work continues for a significant period of time, and
- The employer does not clearly communicate the remote work arrangement is temporary, discretionary, or subject to change.

To reduce the risk of a constructive dismissal when changing a remote work arrangement, consider the following best practices:

- An employment agreement should be written (remember - an employment agreement that is not written down is worth the paper on which it's written…).
- An employment agreement should expressly identify the work location, whether any remote work arrangement is temporary, that the employer can require the employee to return to the office, and that doing so does not constitute constructive dismissal.
- Have a remote work policy, which addresses location and hours of work and is regularly updated and made known to employees.
- Distinguish between a discretionary remote work arrangement and a remote work arrangement provided as part of the employer's duty to accommodate.
- Train managers how to communicate accurately and effectively about a remote work arrangement or policy, including the employer's expectations. For example, avoid statements such as "you can work from home as long as the work gets done."
- Before implementing a return-to-office mandate:
  - Review every existing remote work arrangement or policy, written or oral, formal or informal, and consider:
    - Is the arrangement truly discretionary?
    - Could it have evolved into a contractual entitlement?
    - If so, what is the most effective way to bring the employee back to the office while minimizing the risk of a constructive dismissal?
  - Is there an accommodation or human rights related obligation which must be considered?

In every case, plan the transition carefully, with the advice of experienced employment counsel.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or <u>info@sherrardkuzz.com.</u>

[1] With thoughtful assistance from Ella Waxman.

[2] <u>2026 BCCA 199.</u>

[3] Constructive dismissal can occur when an employer makes a unilateral, fundamental change, to an essential term of employment.

[4] Emphasis added by the British Columbia Court of Appeal.

DID YOU KNOW?

Ontario's Minister of Education is considering an outright, province-wide ban on cell phones on all school properties, to curb distractions and improve student mental health. The proposed ban builds on strict regulations introduced in 2024 and would move from a (near) "out-of-sight" policy to a near total ban on prohibited devices (subject to exceptions for medical and accessibility reasons). Eight of Canada's ten provinces have already introduced, or propose to introduce, a cell phone ban on school property. Ontario is also studying an age-based social media ban, following a similar ban on social media and artificial intelligence proposed in Manitoba. To learn more or for assistance contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

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Non-Compete Covenants Take Another Hit

Following in Ontario's footsteps, the federal government recently introduced legislation that, if passed, will amend the *Canada Labour Code* to ban most non-compete covenants in federally regulated workplaces.[1]

A non-compete covenant can be an important means to protect an employer's business interests, such as confidential information, key relationships, and competitive secrets.

Fortunately, even if the federal ban comes into effect, there are other types of restrictive covenants available to employers (in every Canadian jurisdiction), so long as they are properly designed and executed.

Non-Compete and Other Restrictive Covenants

The three most common types of restrictive covenants are:

- **Non-compete:** prohibits an employee from competing against their former employer (*e.g.,* joining a competitor or starting a competing business).
- **Non-solicit:** prohibits an employee from soliciting clients, suppliers, or employees, *etc.*
- **Non-disclosure:** prohibits an employee from using and/or sharing confidential information such as business information, trade secrets, client names, *etc.*

Canadian courts have severely limited the circumstances in which a restrictive covenant is enforceable after an employment relationship ends because the covenant is considered a restraint of trade. As a result, the burden rests with the employer to demonstrate a restrictive covenant represents the minimal degree of restriction required to protect the organization's legitimate business interests.

A non-compete covenant is generally considered the most restrictive because it can prevent an employee from working in their chosen field. To date, Ontario is the only Canadian jurisdiction with a legislative ban on a non-compete covenant. Elsewhere, their use is governed by common law (see Other Provinces).

Ontario Ban

As of October 25, 2021, an employer in Ontario is prohibited from entering into a non-compete covenant with an employee, except if:

- An individual sells or leases a business and immediately afterwards becomes an employee of the purchaser, or
- The employee is a C-suite executive, such as a chief executive officer, president, chief legal officer, chief administrative officer, *etc.*

A non-compete covenant agreed to <u>before</u> October 25, 2021, remains valid so long as it otherwise complies with common law (see Other Provinces).

Proposed Federal Ban

Similar to Ontario, exceptions apply if an individual leases or transfers a business to the employer and immediately afterwards becomes an employee of the employer, or if the employee is a C-suite executive. However, unlike in Ontario, an employer will have a one-year grace period in which an existing non-compete covenant will continue to apply. After that, the non-compete covenant will be <u>void</u>.

Significantly, the federal legislation opens the door to further limitations on the use of restrictive covenants by giving the government the power to ban "other employment-related restrictions" by regulation.

Other Provinces

For employers not subject to Ontario or federal employment regulation – the good news is a non-compete covenant remains available, provided it complies with common law. So, too, does a non-solicit and non-disclosure covenant, even in Ontario and federally.

As noted above, under common law, a restrictive covenant is presumptively unenforceable as it acts as a "restraint of trade." A court will only uphold it if it is reasonable between the parties and serves a legitimate proprietary interest, such as protecting trade secrets or established client relationships. This has been interpreted to mean the following:

- **Activity restricted:** The scope of what is prohibited must be clear (not ambiguous) and no broader than necessary.
- **Geographic scope:** The territory must be defined and limited to where the employer actually operates and the employee provided services. Worldwide or undefined geographic areas are often rejected.
- **Duration:** The time limit must be only as short as needed to prevent harm to the employer.

Key Takeaways

Statutory bans on the use of a non-compete covenant, and existing common law limitations, have made it increasingly difficult to protect a business through the use of a restrictive covenant. **Fortunately, it's not impossible, and a well-drafted, restrictive covenant, compliant with the common law, can still play an important role in protecting an employer's interests, across Canada.**

That said, employers subject to Ontario and federal employment legislation should revisit any non-compete covenant currently in force. If it could be grand-fathered (Ontario), it must still comply with the common law. If it will be void one year after the federal ban takes effect, consider alternatives such as the use of a well-drafted non-solicit and/or non-disclosure covenant.

For more information or assistance, contact your Sherrard Kuzz LLP lawyer, or <u>info@sherrardkuzz.com.</u>

[1] <u>Bill C-31</u>, *Budget 2025 Implementation Act, No. 2* is currently before the Standing Committee on Finance

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What Employers Need to Know

AI in the workplace is here to stay. Yet, many employers use AI without understanding the potential risks and liabilities. Join us as we address key AI-related risks, and strategies to manage them.

1. Recruitment and Human Resources

- Risks associated with:
  - Bias and human rights (direct and indirect)
  - Using AI to draft employment contracts, policies, *etc.*
  - Using AI to inform HR-related decisions
- Disclosure/transparency obligation
- Employer liability when using third-party software

2. Privacy

- Dos and don'ts of using AI to monitor productivity, performance, and remote work
- Existing laws and what's coming down the pipe across Canada

3. Legal Privilege and Confidentiality

- Inadvertent waiver of legal privilege
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4. AI Use Policy

- Why have one?
- What should a policy include?

5. Collective Agreement Considerations

- Potential impact on provisions regarding technological change, contracting out, *etc.*

DATE: **Wednesday, September 16, 2026: 9:00 a.m. – 10:30 a.m. EST**
WEBINAR: **Via Zoom** (registrants will receive a Zoom link the day before the webinar)
COST: Complimentary
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