

**SUPREME COURT OF CANADA**

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| **Citation:** Payette *v.* Guay inc., 2013 SCC 45, [2013] 3 S.C.R. 95 | **Date:** 20130912  **Docket:** 34662 |

**Between:**

**Yannick Payette and Mammoet Canada Eastern Ltd.,**

**successor to Mammoet Crane Inc.**

Appellants

and

**Guay inc.**

Respondent

**Official English Translation**

**Coram:** McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 75) | Wagner J. (McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell and Karakatsanis JJ. concurring) |

Payette *v.* Guay inc., 2013 SCC 45, [2013] 3 S.C.R. 95

Yannick Payette and

Mammoet Canada Eastern Ltd.,

successor to Mammoet Crane Inc. Appellants

v.

Guay inc. Respondent

**Indexed as: Payette *v.* Guay inc.**

2013 SCC 45

File No.:  34662.

2013:  January 23; 2013:  September 12.

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

on appeal from the court of appeal for quebec

*Contracts — Restrictive covenants in agreement for sale of assets — Vendor subsequently becoming employee of purchaser under contract of employment — Whether restrictive covenants linked to contract of employment — Whether restrictive covenants reasonable as to their term and their territorial scope — Civil Code of Québec, S.Q. 1991, c. 64, art. 2095.*

G, a commercial enterprise, acquired assets belonging to corporations controlled by P.  The agreement for the sale of assets between the parties contained non‑competition and non‑solicitation clauses. To ensure a smooth transition in operations following the sale, the parties also agreed to include a provision in their agreement in which P undertook to work full time for G as a consultant for six months. The parties also reserved the option of subsequently agreeing on a contract of employment under which P would continue to work for G. At the end of the transitional period, the parties agreed on a contract of employment, originally for a fixed term and subsequently for an indeterminate term. A few years later, G dismissed P without a serious reason. P then started a new job with M, a company that is a competitor of G.

In the Superior Court, G’s motion for an injunction compelling P to comply with the restrictive covenants in the agreement for the sale of assets was dismissed. The Court of Appeal set aside the Superior Court’s judgment and ordered a permanent injunction, requiring P and M to comply with the restrictive covenants at issue.

*Held*: The appeal should be dismissed.

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 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. These rules have no equivalent in the commercial context, since an imbalance of power is not presumed to exist in a vendor‑purchaser relationship.

Parties negotiating the sale of assets have greater freedom of contract than parties negotiating a contract of employment, both at common law and in the civil law of Quebec. 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 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.

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 of the *Civil Code of Québec* (“*C.C.Q.*”) is one of them, and it provides that an employer who has resiliated the contract of employment without a serious reason may not avail him or herself of a stipulation of non‑competition. Article 2095 *C.C.Q.* is applicable to a non‑competition clause only if the clause is linked to a contract of employment.

To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is important to clearly identify the reason why the covenant was entered into. The “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.

In this case, in light of the wording of the non‑competition and non‑solicitation clauses and of the factual context that led to their being accepted, they cannot be dissociated from the contract for the sale of assets. As a result, the scope of these clauses must be interpreted on the basis of the rules of commercial law, and the protection provided for in art. 2095 *C.C.Q.* does not apply.

In the commercial context, a restrictive covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable having regard to the context in which it was negotiated. 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. In this case, there is no evidence that the five‑year period is unreasonable having regard to the highly specialized nature of the business’s activities. Moreover, 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 at issue.

While it is true that in the case of a non‑competition covenant, the territory to which the covenant applies must be identified, a determination that a non‑solicitation covenant is reasonable and lawful does not generally require a territorial limitation. In this case, the failure to include a territorial limitation in the non‑solicitation clause does not support a finding that this clause is unreasonable, which means that it is lawful.

**Cases Cited**

**Referred to:** *Elsley v. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865; *Groupe Québécor Inc. v. Grégoire* (1988), 15 Q.A.C. 113; *Burnac Corp. v. Les Entreprises Ludco Ltée*, [1991] R.D.I. 304; *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd.*, 1998 CanLII 12603; *Yvon Beaulieu Well Drilling Ltée v. Marcel Beaulieu Puits Artésiens Ltée*, [1992] R.J.Q. 2608; *Allard v. Cloutier* (1919), 29 B.R. 565; *Trans‑Canada Thermographing (Ontario) Ltd. v. Trans‑Canada Thermographing Ltd.*, SOQUIJ AZ-92021644; *Papeterie L’Écriteau inc. v. Barbier*, [1998] J.Q. no 5090 (QL); *Robitaille v. Gestion L. Jalbert inc.*, 2007 QCCA 1052 (CanLII); *World Wide Chemicals Inc. v. Bolduc*, 1991 CarswellQue 1157; *L.E.L. Marketing Ltée v. Otis*, [1989] Q.J. No. 1229 (QL); *Moore Corp. v. Charette* (1987), 19 C.C.E.L. 277.

**Statutes and Regulations Cited**

*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 2089, 2095.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Thibault and Morin JJ.A.), 2011 QCCA 2282, [2012] R.J.Q. 51, [2011] J.Q. no 18658 (QL), 2011 CarswellQue 14220, SOQUIJ AZ‑50812630, setting aside a decision of Lemelin J., 2010 QCCS 2756 (CanLII), [2010] J.Q. no 6099 (QL), 2010 CarswellQue 7487, SOQUIJ AZ‑50650070. Appeal dismissed.

*Éric Hardy*, *Pierre Duquette* and *Vincent Rochette*, for the appellants.

*Mario Welsh*, *Gilles Rancourt* and *Gwenaelle Thibaut*, for the respondent.

English version of the judgment of the Court delivered by

Wagner J. —

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 *Elsley v. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 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]

1. 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.
2. 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.
3. 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.
4. 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*

1. 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.
2. 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.
3. 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]

1. 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.
2. 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.
3. 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.
4. 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.
5. 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 (CanLII)*

1. 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.
2. 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.
3. 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.
4. However, the territory to which clause 10.1 applied was held to be too broad.
5. 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.
6. 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.
7. 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, Chamberland, Thibault and Morin JJ.A.*

1. 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

1. 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.
2. 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.
3. 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.
4. 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

1. 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.
2. 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.
3. 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

1. 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?

1. 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.*

1. 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*; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; and *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865.
2. 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.
3. 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.
4. 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]

1. 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.
2. 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.

1. 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.
2. 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.
3. 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

1. 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.
2. 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 “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.
3. 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*

1. 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.
2. 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*

1. 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.
2. 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.*
3. 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*

1. 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.
2. In *Groupe Québécor Inc. v. Grégoire* (1988), 15 Q.A.C. 113, 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 (para. 36).
3. 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. [paras. 39-50]

1. 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.
2. 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?*

1. 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

1. 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. v. Les Entreprises Ludco Ltée*, [1991] R.D.I. 304 (Que. C.A.). 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.
2. 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.
3. 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)

1. 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: *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd.*, 1998 CanLII 12603 (Que. C.A.). 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.
2. 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*

1. 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 v. Marcel Beaulieu Puits Artésiens Ltée*, [1992] R.J.Q. 2608 (Sup. Ct.); see also *Allard v. Cloutier* (1919), 29 B.R. 565, 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*., SOQUIJ AZ‑92021644 (Sup. Ct.); *Papeterie L’Écriteau inc. v. Barbier*, [1998] J.Q. no 5090 (QL) (Sup. Ct.).
2. 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*

1. 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.
2. 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.
3. 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)

1. 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.
2. 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.
3. 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 *Robitaille v. Gestion L. Jalbert inc.*, 2007 QCCA 1052 (CanLII). With respect, a distinction must be drawn between a non‑solicitation clause and a non‑competition clause. Let me explain.
4. 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.
5. 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.
6. 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.* *v. Bolduc*, 1991 CarswellQue 1157, *L.E.L. Marketing Ltée* *v.* *Otis*, [1989] Q.J. No. 1229 (QL), and *Moore* *Corp. v.* *Charette* (1987), 19 C.C.E.L. 277, 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.
7. 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

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

*Appeal dismissed with costs.*

Solicitors for the appellants:  Norton Rose Fulbright Canada, Québec.

Solicitors for the respondent:  Heenan Blaikie Aubut, Québec.