

# SUPREME COURT OF CANADA DENIES LEAVE TO APPEAL “BLUE PENCIL” DECISION

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The Supreme Court of Canada has denied leave to appeal in *City Wide Towing and Recovery Service Ltd. v Poole*,<sup>[1]</sup> leaving the Alberta Court of Appeal's [decision](#) to apply the doctrine of notional (or “blue-pencil”) severance undisturbed.

## Background

In 2017, Devon Poole sold his vehicle towing business, Capital Towing, to City Wide Towing and Recovery Service Ltd. (“City Wide”). In connection with the sale, Mr. Poole agreed to a five-year non-competition covenant that prohibited him from competing with City Wide in British Columbia, Alberta, Saskatchewan or any other area within Canada where City Wide carried on business – even though the business sold (i.e., Capital Towing) had only operated in and around Edmonton, Alberta.

When Mr. Poole began working with a competing business following the sale, City Wide sought to enforce the covenant and an interim injunction was granted by the chambers judge. At the Alberta Court of Appeal, Mr. Poole argued against the enforceability of the covenant on the basis that it was overbroad and should have been limited to just the territory in which Capital Towing (not City Wide) carried on business.

While the Alberta Court of Appeal agreed with Mr. Poole that the covenant was overbroad, it also gave weight to a notional severance clause in the applicable agreement. On that basis, it applied the blue pencil doctrine to read the geographic scope of the covenant down to Alberta only in order to make it reasonable and enforceable.

Mr. Poole subsequently sought leave to appeal the Alberta Court of Appeal's decision to the Supreme Court. However, leave was denied by the Supreme Court on February 25, 2021.

## Lessons for Employers

Canadian courts have traditionally resisted blue penciling restrictive covenants on the basis that the parties drafting a contract have an obligation to ensure that the covenants are no wider than is reasonable. Therefore, it is somewhat surprising that the Supreme Court denied leave to appeal the Alberta Court of Appeal's

decision, which goes against the traditional approach.

The Supreme Court Act states that leave to appeal will be granted where the case is “by reason of its public importance or the importance of any issue [...] one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it”. Evidently, the Alberta Court of Appeal’s decision – which stands for the principle that courts may blue pencil restrictive covenants negotiated in the context of the sale of a business – did not rise to this level of importance.

The Supreme Court’s denial means that the Alberta Court of Appeal’s decision remains good law in that province. However, it remains to be seen whether the courts in other provinces and territories will take a similar approach.

[1] [ps2id id='1' target='']2020 ABCA 305.

by [David Fanjoy](#) and [Paul Boshyk](#)

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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