Ontario Court Of Appeal Upholds Non-Competition Clause And Holds Parties To Their Bargain

A very recent decision from the Ontario Court of Appeal has confirmed the presumed enforceability of non-competition covenants negotiated in the context of the sale of a business.

Non-competition (or "non-compete") clauses are provisions in employment contracts or business agreements that restrict an individual from engaging in similar business or work. The enforceability of these covenants tends be nuanced and contextual, and will depend on the precise drafting of the clause, the setting in which it arises (e.g. employment versus sale of a business), and the evidence of reasonableness of and justification for the clause in the particular circumstances.

Non-Competition Clauses in the Context of the Sale of a Business

In *Dr. C. Sims Dentistry Professional Corporation v. Cooke,* 2024 ONCA 388 ("*Sims*"), one dentist bought another's practice for $1.1 million. The seller agreed to work in the buyer's practice for two years, and to a non-solicitation/non-competition provision, as part of the transaction. The provision provided that for five years following the termination of the parties' association, the seller would not engage in a dentistry practice within 15 km of the dental business. After the buyer terminated his association with the seller, he gave notice of his intent to work at another practice 3.3 km away from the business, and took the position that the non-competition covenant was unenforceable.

The trial judge's ruling that the clause at issue was reasonable and therefore enforceable was upheld on appeal. The Court of Appeal's decision confirmed that non-compete clauses negotiated between the parties are presumptively enforceable when they are negotiated as part of the sale of a business. The court in *Sims* noted that "parties to a commercial agreement for the purchase and sale of a business are best placed to determine what is reasonably required to protect the purchaser's interest in the goodwill", and generally deferred to the parties' bargain.

In determining that the covenant at issue was reasonable, the Court of Appeal noted that the trial judge was correct to consider the "commercial context" for the non-competition covenant. This included the various deal documents that contained the non-compete clause, that both parties were represented by legal counsel who did not

object to the provision and had equal bargaining power when they negotiated the agreement, and that the seller had put forward evidence confirming that the valuation of the goodwill for the dental practice at issue was based on a presumption of a five year restrictive covenant. The Court of Appeal also accepted evidence that the five-year time period was reasonable as it reflected the reality that it takes several visits for a patient to build up trust with their dentist, and concluded that a 15 km radius was not unreasonable in the particular market of the parties.

Non-Competition Clauses in an Ordinary Employment Context

The analysis in *Sims* would have been different had the case not arisen from the sale of a business. At common law, non-competition clauses are presumed not to be enforceable in an ordinary employment context. This presumption was recently codified in recent legislative amendments in Ontario.

In 2021, the *Employment Standards Act, 2000* was amended to include new restrictions on non-compete provisions. The amendments introduced a general prohibition on non-compete clauses in employment contracts, with exceptions for a sale of the business, and for employees who are "executive" which is defined to include a person who is a "chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position."

Key Takeaway

While *Sims* is a victory for parties seeking to enforce contractual bargains, it also demonstrates the importance of carefully drafting restrictive covenant provisions in commercial agreements, and of the need for the party seeking to enforce those covenants to be able to present evidence to substantiate the scope and reasonableness of the clause.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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