The Anatomy Of An Enforceable Non-Competition Clause

Canadian courts have consistently held that covenants in employment agreements prohibiting a departing employee from working for a competitor are in restraint of trade, and therefore prima-facie un-enforceable. Non-competition covenants in employment contracts will therefore not be enforceable unless they can be demonstrated to be reasonable in all respects, particularly where a non-solicitation covenant would be sufficient to protect the employer's legitimate proprietary interests[1].

What if an employee is permitted to compete with their former employer if they so choose, but they agree that their choice to do so will result in the payment of a specified "price" to their former employer? Is this type of agreement enforceable? While these types of non-competition "arrangements" have been upheld in more than one Canadian jurisdiction, the precise reasoning has not been entirely consistent between provinces.

In Ontario, there has been a line of cases upholding employment contract clauses requiring departing employees who go to work for a competitor to either forfeit a specific benefit or otherwise pay money to their former employer. The "price" of competition in these cases has varied, but has (successfully) included:

- the forfeiture of gratuitous monthly retirement payments[2];
- the forfeiture of stock options that would otherwise have been available to the employee had they left and not worked for a competitor[3]; and
- the repayment of training costs[4].

In all of these cases, the Ontario Court found that the clauses were not in restraint of trade, given that they did not prevent the employee from competing, pursuing their profession, or otherwise doing "whatever they chose to do". Accordingly, the clauses were not subjected to the usual reasonableness test.

More recently, in the British Columbia Court of Appeal's decision in *Rhebergen*

v. Creston Veterinary Clinic Ltd.[5] , the Court upheld a clause requiring a veterinarian who started a competing clinic (within 25 kilometres and within 3 years of departure) to pay his former employer a pre-agreed sum of money. In reviewing the relevant authorities (including the Ontario cases) the Court said that "Whether such a clause in a contract of employment amounts to a recognized restraint for the purposes of the doctrine, rendering the clause unenforceable if unreasonable, is … by no means settled law." The Court found that the provision in issue was not a conventional non-competition covenant, as it did not prevent the employee for competing. The Court did, however, find that the payment required by the arrangement was a form of "restraint", and therefore had to satisfy the "reasonableness" test. The Court considered the payment to be reasonable in the circumstances, given that it was not "extravagant" compared to the cost to the former employer of having trained Dr. Rhebergen.

Employers seeking to restrain competition by former employees may be able to do so by carefully crafting reasonable arrangements requiring competing employees to forgo a benefit or pay a reasonable price. The enforceability of these provisions, and how they will be interpreted by our Courts may vary from province to province. It may be that we have to wait to hear from the Supreme Court of Canada for a definitive approach to the enforcement of these types of clauses.

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