WILL YOUR NON-COMPETE HOLD UP? BC AND ONTARIO COURTS RULE ON AMBIGUOUS AND OVERBROAD NON-COMPETE RESTRICTIONS

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Recent court decisions in BC and Ontario provide a cross country lesson to employers about the dangers of overly broad or ambiguous non-compete clauses. These cases demonstrate the unhappy consequences which can befall those who do not pay attention.

British Columbia

In *IRIS The Visual Group Western Canada Inc. ("IRIS") v. Hannah Park, Dr. Hannah Park, Optometric Corporation and Affinity Optometry ("Dr. Park")*, 2017 BCCA 301, the BC Court of Appeal upheld a BC Supreme Court decision that a non-compete clause was too broad and ambiguous and thus unenforceable.

Dr. Park initially commenced work as an optometrist for IRIS in 2007 under an employment agreement which contained a clear and straightforward non-compete clause where she agreed "not to practice optometry… within five (5) kilometres…" of the IRIS location for a period of 3 years.

Subsequently Dr. Park went on a maternity leave. On her return the employment agreement was replaced by an independent contractor agreement. This contained a much broader non-compete clause prohibiting Dr. Park from competing "… either directly or in partnership or in conjunction with" any persons or entities which were "carrying on, engaged in, interested in or concerned with a business" that competed with IRIS.

Dr. Park resigned her position with IRIS in 2015 and set up her own optometry practice within 5 kilometres of the IRIS clinic. IRIS commenced legal proceedings to prevent Dr. Park from setting up her practice at that location.

The BC Court of Appeal agreed with the trial court that the non-compete clause was ambiguous and for this reason unenforceable. As the Court queried, what exactly is the nature of the connection or relationship which constitutes competing "in conjunction with" another person or entity, and how is it possible to determine whether an individual is "concerned with" a business that competed with IRIS.

The Court also agreed that the non-compete clause was unenforceable because it was overly broad in scope. The clause restricted Dr. Park not only from competing in the business of optometry, but also in any business that dispenses "prescription or non-prescription optical appliances including eye glasses or sunglasses…". The Court accepted that such a restriction would prevent Dr. Park from engaging in a wide range of work that had nothing to do with the practice of optometry. Therefore, the clause went beyond what was reasonably required to afford adequate protection to IRIS' existing trade connections.

Interestingly, the court commented on the non-compete clause in the original employment agreement, stating that it was "noteworthy" that it "contained the simple restriction that an optometrist could not practice optometry within 5 kilometres of the IRIS location for 3 years". The court then observed that "a case could be made" that a clear and simple non-compete clause, such as was originally agreed to, may have been enforceable. Accordingly, the message seems clear: broadening a non compete clause by the addition of words of association such as "in conjunction with" or "concerned with" or "related to" or "associated with" will not necessarily improve the clause and in fact may very well lead to precisely the opposite result, which seems to have happened in this case.

In concluding that the non-compete clause was unenforceable, the BC Court confirmed that in the context of an employment or independent contractor relationship, such covenants will be subject to heightened scrutiny due to the power imbalance inherent in such relationships. Accordingly, even if clear and unambiguous, the clause must still meet the tests of being reasonable as between the parties and not contrary to the public interest. The court will look to see whether a non-compete clause is necessary to protect a legitimate interest or whether a non-solicitation clause would suffice. Where a non-solicitation clause would be inadequate the court will then examine the scope of the non-compete clause to ensure that it is "no broader in terms of spatial, temporal and activity restrictions to protect the interests of the claimant".

Ontario

In *Ceridian Dayforce Corporation v. Daniel Wright* 2017 ONSC 6763 ("*Ceridian*"), the Ontario Superior Court adopted reasoning very similar to that of the BC Court of Appeal in holding a non-compete clause unenforceable because it was overly broad and ambiguous. In *Ceridian* the employer sought to enforce a non-compete clause against a software developer who resigned. The non-compete clause restricted the employee, for a period of up to 12 months, from "directly or indirectly provid[ing] services, in any capacity … to any person or entity that provides products or services or is otherwise engaged in any business competitive with the business carried on by the Company or any of its subsidiaries or affiliates at the time of his termination…".

The Ontario court held that a prohibition from providing services "in any capacity" to any business competitive with Ceridian was overly broad because it would prohibit the employee from working in areas completely

unrelated to his employment duties as a software engineer. Also, the definition of competitive business was held to be ambiguous since, as the court observed, it would be impossible at the time of hiring for the employee to know the number and kinds of other businesses the employer might have or acquire during the period of employment.

Finally, the Ontario court concluded that the clause was unreasonable both in terms of temporal and geographic scope. The clause provided that for a period of up to 12 months the employee shall not be "... concerned with or interested in or lend money to, guarantee the debts or obligations of or permit his name to be used by any person or persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any competitive business within North America".

The court concluded the 12 months temporal scope was arbitrary because there was no evidence to tie this period of time as necessary for the protection of any reasonable interest and concluded that the geographic scope which prohibited competition in "North America" was overly broad. The court accepted that the term North America generally includes Mexico and the Caribbean and there was no evidence to establish that Mexico / Caribbean restrictions were reasonable.

As did the BC Court of Appeal, the Ontario Superior Court emphasized that a covenant not to compete in the employment context is a restraint of trade and thus *prima facie* void as a general rule. Accordingly, non-compete clauses will be highly scrutinized in the employment context and will only be enforceable if reasonable between the parties and with reference to the public interest. The court will look for the existence of a proprietary or other legitimate interest which can only be protected by a non-compete clause.

Summary

The *IRIS* and *Ceridian* cases provide very useful current judicial road maps which contain important guidance for employers.

First, employers must identify some legitimate interest which requires the protection of a non-compete clause that cannot be protected by a non-solicitation provision. Second, the provision must be no broader than is necessary to protect that legitimate interest. Finally, the provision must contain precise language which clearly identifies what the employee may or may not do.

The temptation to use expansionary language and words of association should be resisted. As the *IRIS* and *Ceridian* cases make clear, such language may only serve to introduce an element of ambiguity and broaden the scope of the non-compete clause beyond what is intended to be covered, and thus in the end risk achieving no protection at all.

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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.