Cassels

Ontario Court of Appeal Finds Non-Competition Clause in Employment Agreement to be Unenforceable

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Non-competition provisions in employment agreements, particularly if not thoughtfully and carefully drafted, can be difficult to enforce. The Ontario Court of Appeal's recent decision in *M & P Drug Mart Inc. v. Norton* is a good case in point. In that decision, the Court of Appeal upheld the decision of an application judge, which found a non-competition clause in an employment agreement to be unenforceable because it was both ambiguous and overly broad. What follows is a review of that case and the key findings of the Court of Appeal on the way to its ultimate determination.

Background

Mr. Norton, a pharmacist, began working at Hometown IDA in 1980 when he was a student. Except for a brief hiatus, Mr. Norton worked there continuously through to the pharmacy's acquisition by M & P Drug Mart Inc. (M & P) in 2014. At the time of the acquisition, Mr. Norton was the pharmacy manager. Following the acquisition, with the assistance of legal counsel, Mr. Norton entered into an employment agreement (Employment Agreement), which contained the following non-competition clause:

The Employee agrees that during the Employee's employment with the Company and during the one year period following the termination of the Employee's employment with the Company, for any reason whatsoever, the Employee shall not carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with the business within a fifteen (15) kilometre radius of [Hometown IDA's address].

The Employment Agreement also contained a clause whereby Mr. Norton acknowledged that the non-competition and non-solicitation covenants were necessary for the protection of M & P's legitimate business interests and were "reasonable in the circumstances."

On September 25, 2020, Mr. Norton resigned from his employment with M & P. Following his resignation, Mr. Norton went to work as a pharmacist at the Campus Trail Pharmacy in Huntsville, Ontario, which was less than three kilometres from Hometown IDA.

M & P took the position that, in doing so, Mr. Norton was in breach of the non-competition covenant. Mr. Norton, however, argued that the provision was unenforceable.

The Application Judge's Decision

M & P alleged that Mr. Norton breached the non-competition covenant when he went to work at the Campus Trail Pharmacy before the end of the one-year term of the restrictive covenant. The application judge dismissed M & P's application and held that the non-competition covenant was unenforceable both because it was ambiguous and because the scope of the prohibited activities was overly broad.

The application judge found that the clause was ambiguous because it extended to prohibit Mr. Norton from being "concerned", even "indirectly," with an "undertaking involving a business" that was "similar" to Hometown. If enforced, this may have precluded Mr. Norton from working in a non-pharmacist role in a non-pharmacy department of the supermarket if the supermarket also included a pharmacy.[1] Further, the application judge found that it was unclear whether the prohibited competition only included businesses that dispensed prescriptions or, rather, whether it extended to any businesses that sold over-the-counter drugs, cosmetics, greeting cards, or other products that were sold by Hometown IDA but also by convenience, grocery, and big box stores.

The Court of Appeal's Decision

The Court of Appeal upheld the decision of the application judge and dismissed the Appeal.

Since the circumstances at issue occurred prior to the coming into force of the *Working for Workers Act, 2021,* which amended the *Employment Standards Act, 2000* to prohibit non-compete agreements for all employees except for defined "executives" (except when entered into by a vendor in connection with a sale of business), the Court of Appeal held that the parties' rights were governed by the common law. As such, the Court of Appeal proceeded to analyze the non-competition clause in accordance with the common law framework.

At common law, the general rule is that a provision in a contract that restrains a vendor of a business from competing with a purchaser, or an employee upon leaving employment from competing with the employer, is *prima facie* unenforceable on public policy grounds. Such a provision will be upheld, however, if it is reasonable given the interests of the parties and the public, judged in light of the circumstances at the time the covenant is made. To determine whether a non-competition clause is reasonable, the scope, the duration, and geographic reach of the covenant must be properly determined and then assessed for reasonableness.

Applying the framework, to the facts at issue, the Court of Appeal found as follows:

1. M & P had the onus of showing that the clear meaning of the covenant was a "demonstrably

reasonable restriction of activity." The Court examined the words used in the non-competition clause and found that the covenant did not simply provide that Mr. Norton may not work as a pharmacist in a pharmacy or in a store that contains a pharmacy. Rather, it forbid Mr. Norton to "carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with [Hometown IDA]."[2] The Court of Appeal commented that this language restricts all of the activities at undertakings that have non-pharmacy aspects to their business and therefore have non-pharmacy-related employee positions. The Court held that there was no error in the application judge's decision that the wording was ambiguous.

2. M & P's argument against the application judge's conclusion of overbreadth was flawed. The application judge determined that the restrictive covenant would prevent Mr. Norton from doing work unrelated to the practice of pharmacy for an enterprise that had, as any aspect of its undertaking, a pharmacy. This would also prevent him from being a passive investor to any extent in these types of enterprises, given the restrictions on being "interested in" or "concerned with" such enterprises, "directly or indirectly."[3]

3. While M & P argued that the language in the provision was erroneously interpreted by the application judge to cover activities beyond working as a pharmacist, the Court of Appeal disagreed. M & P sought to rely on pre-contractual negotiations to demonstrate that the parties were really only concerned about Mr. Norton going to work as a pharmacist at another pharmacy. The Court of Appeal rejected this argument, however, finding that the covenant used broader language. Notably, the Court commented that it is not "empowered to rewrite the covenant 'to reflect its own view of what the parties' consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances.'"

The Court concluded that the application judge did not err in his conclusion and dismissed the appeal.

Key Takeaways

While the enforceability of restrictive covenants is determined on a case-by-case basis, this decision offers helpful insights into the kind of analysis a court will undertake when considering the enforceability of a non-competition provision and just how important it is to ensure that it is drafted clearly and no more broadly than is necessary. As the Court of Appeal made clear in *M & P Drug Mart Inc. v. Norton*, it is not open to employers to rely on pre-contractual negotiations to correct deficiencies in the language itself, nor is it the role of the Court to do so.

Given the importance of "getting the language right" to the enforceability of non-competition provisions, we recommend that employers considering presenting employees with non-competition agreements or revising restrictive covenant provisions in employment agreement templates consult with a member of our

Employment & Labour Group before doing so.

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[1] *M & P Drug Mart Inc. v. Norton*, 2022 ONCA 398 at para 17.

[2] 2022 ONCA 398 at para 44.

[3] 2022 ONCA 398 at para 47.
