

Freelance Consultants Not Bound by Non-Competition Agreement

Civil Procedure | Contract Law | Employment & Labour | Employment Law | Litigation | Litigation & Dispute Resolution | Non-Compete

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Freelance consultants may often be faced with a decision to enter into contracts which purport to limit their ability to seek out what might be construed as competitive work. In a competitive industry in which the consultant's services are in high demand, there may be little incentive to do so unless such a term is specifically negotiated as part of the engagement. At the same time, employers of freelance consultants may wish to impose non-competition terms into their agreements in order to protect proprietary concepts and established business relationships. A recent trial decision demonstrates just how difficult it can be to enforce a non-competition term in an agreement with a consultant.

In *S.I. Systems Partnership v. Geng*, 2020 ONSC 8086 (CanLII), two freelance IT consultants had entered into multiple short-term contracts to provide IT services for the Plaintiff, which was a staffing agency in the business of supplying IT services to the RCMP. Subsequently, the consultant defendants cut the Plaintiff out, and entered into new contracts with a competitive staffing agency to provide the same services to the RCMP. The Plaintiff sued the former consultants on the basis of a non-competition term which prohibited them from accepting or soliciting business from the RCMP during the term of the contracts and for six months following termination. A "virtual trial" was held in 2020 before Justice C. MacLeod on the issue of whether the six-month non-competition provisions were enforceable.

Defendants' Knowledge of Non-Competition Term

The defendant consultants advanced separate arguments for why their non-competition clauses should not be enforced. The process by which the defendants entered into contracts with the Plaintiff involved an online portal. The first defendant (Geng) had previously entered into standard form contracts with the Plaintiff which did not include a non-competition term. However, the Plaintiff then changed the form of the contract offered via the online portal and added a non-competition term. Geng argued that he was not aware that the Plaintiff had changed the substantive provisions of his contracts.

Under Ontario law, a party has a duty to review a document before signing it and it cannot use the failure to exercise reasonable prudence and diligence to avoid a contract: *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, (1997) 1997 CanLII 4452 (ON CA); *Suhaag Jewellers Ltd., v. Alarm Factory Inc.*, 2016 ONCA 33. This principle applies to printed contracts or ones which are presented electronically, provided that the contracting party can readily discern the terms had they turned the pages or scrolled down the screen or window: *Rudder v. Microsoft Corp.*, (1999) 1999 CanLII 14923 (ON SC), 40 CPC (4th) 394 (Ont.SCJ).

However, an obscure clause that is buried in "fine print" or complex language which could not be readily understood, or a provision that is startling and would be unanticipated, may engage a requirement to specifically draw the clause to the attention of the party: *Tilden Rent-A-Car Co. v. Clendenning*, (1978) 1978 CanLII 1446 (ON CA).

The presumption that the written text of an agreement is binding, can be overruled by a finding that there was no mutual intention to be bound by the written terms. In the case at hand, Geng's evidence was that he had not read the new form of the contract and he had spent less than three minutes on the Plaintiff's website before agreeing to its terms. The Plaintiff did not lead any evidence to show that the newly introduced non-competition term had been specifically brought to Geng's attention and knew that the term was something that Geng would not accept given the freelance nature of his industry and the high demand for his services.

In the circumstances, Justice MacLeod found that the non-competition term was unenforceable against Geng.

In contrast to Geng's situation, the second defendant (Xu) was aware that his contract contained a non-competition term. Xu's argument was that he had been specifically advised by one of the Plaintiff's employees that the non-compete term would not be enforced and therefore presumably hoped that the non-

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competition term would not be enforced. But there was no binding commitment to that effect, and the employee who had purportedly spoken with Xu was not called as a witness by either party. MacLeod J. drew a negative inference from the failure to call a witness to support Xu's claim.

General Prohibition on Non-Competition Covenants as Restraint of Trade

Although Justice MacLeod drew a negative inference from the failure to call this witness, His Honour found the non-competition term against Xu to also be unenforceable, based on established Ontario law.

Covenants which restrict a contractor from dealing with other service providers are presumptively a restraint on trade and are unenforceable. The courts have been prepared to enforce such contracts only in circumstances in which the restraint is justifiable and in the broader public interest. Amongst the requirements for enforceability are a proprietary interest such as a trade secret or a customer list or specific vulnerability to unfair competition: *Maguire v. Northern Drug Co.*, 1935 CanLII 35 (SCC), [1935] SCR 412 and *J.G. Collins Insurance Agency v. Elsley*, 1978 CanLII 7 (SCC), [1978] 2 SCR 916 at para. 13 - 20.

The Plaintiff bore the onus to prove that the six-month non-competition term was unambiguous and reasonable under all the circumstances, but was unable to do so.

While the evidence established that the Plaintiff acted as a conduit for supplying qualified consultants to its customers, it did not have a proprietary interest in IT expertise. Further, the Plaintiff structured its operations as a number of short-term contracts with no additional payments or compensation other than entering into the requested contract which made it unfair or unreasonable to extract a broad non-competition agreement. Justice MacLeod found that a complete prohibition on providing services or employment to the RCMP was far too broad given the nature of the Plaintiff's business.

Justice MacLeod reasoned that if the non-compete term had been restricted to inside knowledge the consultants might have obtained as a result of their relationship with the Plaintiff, such as knowledge of bid preparation, customer lists, pricing or consultant lists, the non-compete term may have been enforceable. But this was not the case.

As a final note, Justice MacLeod determined that even if he had found the non-competition terms enforceable, the Plaintiff had failed to demonstrate that it had suffered more than nominal damages. The format of the RCMP's request for IT services changed shortly after the consultants refused to re-sign with the Plaintiff, and thus regardless of the actions of the consultants, the Plaintiff would have lost the RCMP contract or been limited to a minimal administrative role.

Given this result, a Plaintiff in similar circumstances may wish to reconsider attempting to enforce a non-competition term through to the end of a multi-day trial or carefully review existing non-competition terms in their contracts to ensure that they are not too broad and that as a matter of contract, there is valid consideration for the non-competition term and that it has been brought to the attention of the worker.

Addendum: Video-Conference Trial Procedure

As an addendum, in this case Justice MacLeod described the process of the virtual trial, which took place over Zoom and was completely paperless, and addressed the new procedures utilized in a video-conferencing trial. His Honour highlighted a number of the changes in court proceedings which have developed since the beginning of the COVID-19 pandemic, and the efforts taken to ensure trials function openly, fairly, and efficiently.

While Justice MacLeod and the Registrar were robed, counsel was permitted to wear business attire. Notably, members of the public and interested parties were provided the Zoom coordinates to comply with the open-court principle. Documents were uploaded and provided to the court via "Sync.com" folders and when a document was referred to in evidence, it was emailed directly to the Registrar.

Witnesses were affirmed over video, and they were asked to confirm that there were no other individuals in the room and that they had no other documents with them. When documents were to be presented to a witness, this was done via the "screen-sharing" function of Zoom or emailed directly. Break-out rooms were used to exclude the witness during objections, and for counsel and their clients to confer privately.

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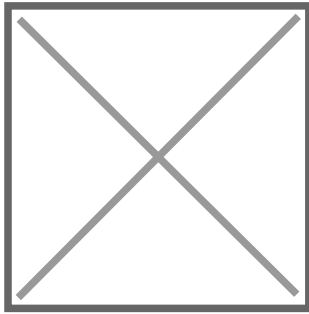


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