

Pharmacy manager not bound by non-competition agreement

Litigation | Litigation & Dispute Resolution | Non-Compete

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In Ontario, the [Working for Workers Act, 2021](#) provides that no employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement, subject to certain narrow exceptions. A “non-compete agreement” is defined as “an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the employment relationship between the employee and the employer ends”. Any agreement which contravenes this statutory prohibition is void.

For agreements entered into prior to this legislation, Ontario courts have taken a cautious approach to enforcing restrictive covenants on public policy grounds. Terms of a contract that restrain a vendor of a business from competing with the purchaser or an employee upon leaving employment from competing with the employer, were considered to be prima facie unenforceable.

In order to withstand scrutiny, a restrictive covenant must be clear as to activity, time, and geography. A covenant that is ambiguous on any of these matters is prima facie unenforceable since, in the face of unresolved ambiguity, the covenant cannot be found to be reasonable. Courts will not re-draft a restrictive covenant which fails to meet these criteria.

In *M & P Drug Mart Inc. v. Norton*, 2022 ONCA 398 (CanLII), the applicant purchaser of a pharmacy in Huntsville, Ontario entered into an employment agreement with the respondent, a pharmacist, who had worked at the pharmacy from the 1980s to the acquisition in 2014. At the time of the acquisition, he was the pharmacy manager.

The applicant wished to continue the respondent’s employment following the acquisition. In May 2014, after negotiations in which the respondent had the benefit of legal advice, they entered into an employment agreement under which he would serve as pharmacy manager.

The employment agreement contained non-competition covenants which were the subject of specific negotiations. The respondent had considerable leverage in the negotiations and the applicant made concessions in his favour to secure his agreement.

The terms of the non-competition covenants, as finalized, were tied to the respondent’s age at the time his employment ended. The covenant at issue read as follows:

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 the business located at 10 Main Street East, Huntsville, Ontario P1H 2C9.

In September 2020, after the respondent gave several months’ notice, he resigned from his employment with the applicant and went to work as a pharmacist at another pharmacy in Huntsville less than three kilometres from the applicant’s location.

Litigation ensued. The applicant brought an application to enforce the non-competition agreement, which was dismissed. The applicant then appealed to the Ontario Court of Appeal.

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For the purposes of the appeal, there was no doubt that the respondent had been working as a pharmacist at the competing pharmacy location, sufficient to constitute a breach of the restrictive covenant if it was enforceable.

While non-competition terms are prima facie unenforceable, a restrictive covenant may will be upheld if it is reasonable in reference to the interests of the parties and the public, judged in light of the circumstances at the time the covenant is made: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, at paras. 15-17 ; *Martin v. ConCreate USL Limited Partnership*, 2013 ONCA 72, at paras. 49, 54.

The reasonableness of a restriction is scrutinized differently depending on whether the covenant is between purchaser and vendor or between employer and employee. A non-competition covenant in an employment agreement that restricts the post-termination activities of an employee is subject to more rigorous scrutiny than a non-competition covenant in a sales agreement that restricts the post-sale activities of the vendor: *Shafron*, at para. 23.

In the case at hand, the applicant had the onus of demonstrating that the restrictive covenant was reasonable between the parties. Specifically, the applicant had to show that the clear meaning of the covenant was “a demonstrably reasonable restriction of activity.” If there was any ambiguity in the language of the covenant or the covenant imposed broader restrictions than were reasonable, then the covenant would be unenforceable.

The applicant argued that the covenant was reasonable since it did not seek to go beyond restricting the respondent from acting as a pharmacist for a pharmacy or a store that included a pharmacy within the stated geographical limitations.

In the Court of Appeal's view, however, the wording of the covenant was overly broad since it purported to forbid the respondent 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 the [applicant]”.

The language of the covenant could be taken to extend to working in a job other than a pharmacist for a supermarket that included a pharmacy department, even if the job was in a completely different department. The Court of Appeal determined that the covenant was therefore ambiguous since the wording did not clearly and only restrict the respondent from working as a pharmacist. Rather, the restriction went further and could be read, for example to prevent him from doing work unrelated to the practice of pharmacy for an enterprise that had, as any aspect of its undertaking, a pharmacy. The restrictive terms would also prevent him from being a passive investor to any extent in any such enterprise, given the restrictions on being “interested in” or “concerned with”, “directly or indirectly”.

The applicant was essentially asking the court to read the covenant as applying only to the respondent acting as a pharmacist for a pharmacy or a store that includes a pharmacy in the year following the termination of his employment. The applicant argued that this was the protection the parties were aiming at in their pre-contractual dealings, and this extent of protection would be reasonable. It was the very conduct in which the respondent engaged.

Unfortunately for the applicant, the covenant was not worded in such a restricted manner and the factual matrix cannot change the words used. The Supreme Court of Canada's decision in *Shafron* prevents courts from “rewriting” an unenforceable restrictive covenant. Even though the respondent freely agreed to the term in his employment agreement, the Court of Appeal noted that the question as to the enforceability of the term was one of “legal consequences rather than business ethics.”

The application judge's decision not to enforce the covenant, rooted in public policy, was therefore affirmed and the respondent was not liable for taking on employment at another pharmacy. A PDF version is available to download [here](#).

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