

Case In Point

Court Finds ESA Prohibition on Non-Compete Agreements Does Not Apply to Agreements Entered into before October 25, 2021

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The Ontario Superior Court of Justice has held that the recently enacted provision in the *Employment Standards Act, 2000* (ESA) which prohibits non-compete agreements in employment contracts or other agreements does not apply prior to October 25, 2021.

By way of background, Ontario's [Working for Workers Act, 2021](#) (*Act*) received Royal Assent on December 2, 2021. Among other things, the *Act* amended the *ESA* to prohibit non-compete agreements in employment contracts or other agreements, subject to exceptions for executives or for the sale of a business. This amendment was deemed to have come into force on October 25, 2021.

In [Parekh et al v. Schecter et al](#), the Court provided its interpretation of the new non-compete provision. In this case, the plaintiffs purchased a dental practice and as part of the sale, it was specifically agreed that one associate, Dr. Ira Schecter, would continue working at the practice for four years following the sale. In coming to this agreement, the plaintiffs sought three restrictive covenants from Dr. Schecter, namely: (1) a non-compete covenant, restricting Dr. Schecter from practising dentistry within a 5 km radius of the plaintiffs' business during the term of the agreement and for two years thereafter; (2) a non-solicitation covenant; and (3) a confidentiality covenant related to patient information.

Dr. Schecter remained an associate for some time following the sale, but then resigned and began practising at another dental practice which was within a 5 km radius of the plaintiffs' business.

In response, the plaintiffs brought an interlocutory injunction motion seeking orders to enforce the restrictive covenants, including the non-compete covenant.

Before the Court, Dr. Schecter argued that the new *ESA* prohibition on non-complete agreements applied to void his non-compete clause and that to find otherwise would cause a lack of legal uniformity and create two tiers of employees with vastly different levels of protection.

Ultimately, the Court found that the new prohibition does not apply to non-compete agreements entered into prior to October 25, 2021. In so finding, it provided the following helpful commentary:

[46] Section 34(3) of the [*Act*] states that section 4 (containing the new *ESA* provisions prohibiting non-compete clauses) "is deemed to have come into force on October 25, 2021." Typically, legislation comes into effect when a Bill receives Royal Assent, or on a date to be named by proclamation by the Lieutenant Governor. But here, the legislature selected a specific date before Royal Assent happened on December 2, 2021.

[47] Faced with this express legislative intent to make the *ESA* amendments applicable as of October 25, 2021, and not earlier, it cannot be said the provisions with respect to the non-compete clause applies to contracts of employment with non-compete clauses entered into before October 25, 2021.

[48] At most, and in respect of this case, the new *ESA* provisions confirms the public policy against restraint of trade, which has already been accepted in the common law.

Once it determined that the prohibition did not apply to the non-compete clause in this case, the Court applied the common

law test for injunctions and concluded that each prong of the three-prong test had been met: (1) the plaintiffs had a strong *prima facie* case that the non-compete clause had been breached; (2) the plaintiffs would suffer irreparable harm if the non-compete clause was not enforced and it would be fundamentally unjust to confine the plaintiffs to a remedy in damages; and (3) the balance of convenience favoured the plaintiffs.

The Court granted an order prohibiting Dr. Schecter from carrying on or engaging in the practice of dentistry within a 5-km radius of the plaintiffs' business until October 27, 2023 – the date specified in the agreement. The Court also issued an injunction prohibiting him from soliciting any of his prior patients to receive dental treatment at his new practice.

This case provides a welcome interpretation for employers looking for clarification on the effects of the new prohibition on non-compete agreements in the *ESA*, specifically as it pertains to agreements entered into before October 25, 2021.