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Mere Share Ownership Not Enough to Justify Enforcement of Non-Compete Against an Employee

In the recent decision of *Wyse Meter Solutions Inc v CARMA Corp*, Justice Audrey P. Ramsay rejected an attempt by a former employer to obtain injunctive relief enforcing a non-competition clause against an employee who had been required, as a condition of employment, to purchase shares in the employer.

The employee resigned in 2023 to join a competitor, CARMA Corp. The Plaintiff brought a motion seeking an injunction to enforce a non-competition clause against its former employee, the result of which would have been to require him to resign his new role.

Rather than relying on the non-competition clause in the employee's employment contract, the Plaintiff relied on another non-competition clause, contained in a Unanimous Shareholders' Agreement, which purported to prevent shareholders from competing with the company after ceasing employment.

However, the former employee and new employer demonstrated that he had been required as a condition of his employment agreement to purchase shares in the Plaintiff (and only ever owned 0.01% of the issued and outstanding common shares in the company).

The Respondents distinguished the circumstances before the Court from those where non-competition clauses have been found to be enforceable against shareholders (or, more commonly, former shareholders who have sold the business to a purchaser) where those shareholders were the "face of the business" and permitting competition would undermine the goodwill of the business.

The Court found that the Plaintiff had failed to establish even a *prima facie* case that the non-competition clause in the USA would be enforceable.

The Court's decision also relied on the fact that the non-competition clause in the USA purported to preclude competition for one year after an individual disposed of their

shares in the Plaintiff. Despite the former employee having offered to sell his shares back to the company upon resignation, the Plaintiff refused, thereby rendering the restrictive covenant effectively of an indefinite duration.

The Court warned that employers who refuse to repurchase shares from a former employee, and then seek to enforce restrictive covenants arising from that share ownership, may be found to have come to Court without “clean hands”, thereby disentitling themselves to equitable relief.

This is an important case for employers across Ontario, particularly those who, faced with increased difficulty in enforcing non-competition and non-solicitation clauses in employment agreements, have turned to creative solutions, such as requiring their employees to purchase shares, thereby creating obligations under shareholders’ agreements. The Court has made clear that such attempts to improperly circumvent legal principles against restraint of trade will not be accepted.