

CITATION: ITCAD Tech Inc. v. Patel et. al., 2026 ONSC 368
DIVISIONAL COURT FILE NO.: 541/25
DATE: 20260123

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Sachs, Nakatsuru and O’Brien JJ.

| | | |
|----------------------------------|---|---|
| BETWEEN: |) | |
| |) | |
| ITCAD Tech Inc. |) | Shane Greaves, for ITCAD Inc. |
| |) | |
| Appellant |) | |
| |) | |
| – and – |) | |
| |) | |
| Kishan Patel and TechSpirer Inc. |) | Jordan Cantor and Abby Leung for Kishan Patel and TechSpirer Inc. |
| |) | |
| Respondents |) | |
| |) | |
| AND BETWEEN: |) | |
| Kishan Patel and TechSpirer Inc. |) | Jordan Cantor and Abby Leung for Kishan Patel and TechSpirer Inc. |
| |) | |
| Appellants by Cross-Appeal |) | |
| |) | |
| -and- |) | |
| |) | |
| ITCAD Tech Inc. |) | Shane Greaves, for ITCAD Inc. |
| |) | |
| Respondent by Cross-Appeal |) | HEARD at Toronto: December 8, 2025 |

H. SACHS J.

Overview

[1] Kishan Patel is an information technology consultant. He carries on business through his personal corporation, TechSpirer Inc. In this decision they will be collectively referred to as the “Consultants”. ITCAD Tech Inc. (“ITCAD”) is a vendor of record for the Ontario government. This means that it may supply consultants to the government, which does not hire consultants directly. Vendors of record bill the government for the consultants’ services and retain a portion of the fees received as compensation for their services.

- [2] ITCAD assisted the Consultants to obtain a position with a branch of the Ministry of Health (“MOH”). The Consultants entered into a contract with ITCAD that contained a non-competition clause that prohibited the Consultants from performing work for that branch of the Ministry of Health for 12 months following the termination of its contract with ITCAD. During the term of the contract, ITCAD lost its position as a vendor of record with the government. ITCAD negotiated arrangements with other vendors of record who were prepared to take on the Consultants and pay ITCAD a portion of the fees the government paid them for the Consultants’ services.
- [3] ITCAD directed the Consultants to enter into new arrangements with one of these vendors of record. In order to pressure the Consultants to do so, ITCAD withheld approximately two months of fees that it had received from the government for the Consultants’ services. The Consultants chose to go with another vendor of record who was prepared to pay the Consultants a greater portion of their fees than the vendor of record chosen by ITCAD.
- [4] The Consultants commenced an action against ITCAD for the two months pay that ITCAD had withheld. They also sought punitive damages against ITCAD for withholding their pay.
- [5] ITCAD counterclaimed for damages against the Consultants, claiming that their actions in using a vendor of record that it had not suggested violated the non-competition clause between the parties.
- [6] Both parties brought summary judgment motions on their claims. On June 2, 2025, Dow J. granted summary judgment to the Consultants on their claim for the two months pay that had been withheld and awarded them punitive damages. He also found that the Consultants had breached the non-competition clause in the contract between the parties and awarded ITCAD damages in relation to that breach.
- [7] ITCAD has appealed the motion judge’s award of punitive damages and has appealed the quantum of damages awarded to it on its counterclaim, claiming that the amount awarded should have included an amount for HST. The Consultants have cross-appealed, arguing that the motion judge erred in awarding ITCAD any damages for violating the non-competition clause, since that clause was unenforceable under the provisions of the *Employment Standards Act*, R.S.O. 2000, c. 41 and at common law. They also maintained that the motion judge erred when he failed to find that the contract between the parties was frustrated when ITCAD lost its position as a vendor of record with the government. Finally, it argued that the motion judge erred in his assessment of the quantum of punitive damages.
- [8] For the reasons that follow, I would dismiss the appeal and cross-appeal as to punitive damages and allow the cross-appeal with respect to the breach of the restrictive covenant. The motion judge erred in finding that the restrictive covenant was enforceable at common law in the circumstances of this case.

Factual Background

- [9] In 2021 Mr. Patel became interested in obtaining a position with the MOH and learned that the only way to be hired was through a vendor of record. He therefore contacted ITCAD, which is a vendor of record. Through ITCAD he went on a job interview with a branch of the MOH and did not succeed in getting a position. Another position became available and, after receiving some coaching from Linda Zhao, the operator of ITCAD, he was successful in being offered the position through ITCAD.
- [10] After being offered the position, Mr. Patel incorporated TechSpirer Inc. On May 21, 2021, TechSpirer entered into an Independent Contractor Agreement with ITCAD that contained a 12-month non-competition clause. The contract expired on October 31, 2022.
- [11] On November 24, 2022, Mr. Patel entered into a second contract with ITCAD. Its terms were essentially the same as the first contract, and extended to March 31, 2023.
- [12] Under the arrangement, ITCAD billed the MOH for TechSpirer's services and TechSpirer billed ITCAD for its services. The amount billed by ITCAD to the MOH was more than the amount billed by TechSpirer to ITCAD.
- [13] In February of 2023, ITCAD and Ms. Zhao were added as defendants to a fraud action. As a result, ITCAD's status as a vendor of record was suspended, leaving the Consultants in a precarious position. That status was restored in August of 2024, when the action against it was discontinued.
- [14] After its suspension, ITCAD identified and enlisted other entities who were prepared to act as vendors of record for ITCAD's consultants and to pay ITCAD a share of the monies they received for those consultants' services. ITCAD told the Consultants that if they entered into an agreement with one of the identified vendors of record, ITCAD would waive the provisions of the non-compete clause.
- [15] Instead of entering into an agreement with one of the vendors of record identified by ITCAD, TechSpirer, on March 30, 2023, entered into a one-year agreement with another vendor of record that agreed to pay TechSpirer a greater share of the money paid by MOH for its services than ITCAD did.
- [16] TechSpirer billed ITCAD \$31,238.01 for its services in February and March of 2023. ITCAD refused to pay the amount and threatened legal action for the Consultants' refusal to work with one of their sponsored vendors of record.
- [17] The amount remained unpaid, prompting the Consultants to bring an action against ITCAD in which it also claimed punitive damages. ITCAD counterclaimed, seeking damages for what it alleged was the Consultants' breach of the non-compete agreement, which it calculated to be \$64,621.88. ITCAD admitted it owed the Consultants \$31,238.01 and thus was seeking recovery of \$32,383.87, being the difference between its alleged damages for the breach of the non-compete and the amount it owed the Consultants.

The Summary Judgment Motion

- [18] Both parties sought to have their claims determined by way of summary judgment.
- [19] On the motion, the Consultants took the position that ITCAD was a temporary help agency within the meaning of the *Employment Standards Act*. That Act prohibits a temporary help agency from restricting an assignment employee from entering into an employment relationship with a client of the agency. On this basis, according to the Consultants, the non-compete clause that formed the basis for ITCAD's counterclaim was unenforceable.
- [20] The motion judge rejected the Consultants' argument on this point. In doing so, he found that the facts of this case aligned more closely with the facts of a case cited by ITCAD than it did with the facts of the case cited by the Consultants. He also relied on the plain wording of the agreement, which described TechSpirer as an independent contractor.
- [21] The motion judge also addressed the Consultants' alternative argument that the non-compete clause was unenforceable at common law. He rejected this submission, finding that the clause had a legitimate business purpose, that it was restricted only to the specific MOH branch that the Consultants worked for and that 12 months, while at the upper limit of the term for a non-compete such as this, has been upheld as appropriate. Therefore, he found that the clause was reasonable and enforceable.
- [22] The Consultants also argued that the contract between them and ITCAD was frustrated when ITCAD's status as a vendor of record was suspended and, therefore, ITCAD could not base a claim on the non-compete clause. ITCAD objected to this submission on the basis that it had not been pleaded. The motion judge found that he did not need to deal with this argument because, in his view, the agreement had not been frustrated or repudiated by ITCAD. He also rejected the Consultants' argument about a lack of consideration for the non-compete clause in the second agreement between the parties.
- [23] The motion judge assessed ITCAD's damages for breach of the non-compete. Ms. Zhao's affidavit set out that those damages amounted to \$70 per day for 250 days, for a total of \$17,500.00.
- [24] The motion judge awarded the Consultants \$15,750 in punitive damages, being approximately 50% of the amount that ITCAD withheld from the Consultants. The motion judge found that ITCAD's conduct in withholding earnings breached the employer's implied duty of good faith and fair dealing.
- [25] The Consultants were awarded \$31,238.01 for the amounts they billed that remained unpaid and \$15,750 in punitive damages. ITCAD was awarded \$17,500 in damages on its counterclaim.

Issues Raised

- [26] The appeal and cross-appeal raise two main issues:

- (i) Did the motion judge err when he awarded the Consultants punitive damages?
- (ii) Did the motion judge commit an error of law or palpable and overriding error of fact when he concluded that the restrictive covenant between the parties was enforceable?

[27] A smaller issue concerns the quantum of damages awarded to ITCAD and whether it should have included HST. To succeed on this issue, ITCAD must establish an error of law or a palpable and overriding factual error.

Punitive Damages

[28] ITCAD submits that the motion judge failed to apply the correct legal test when he awarded punitive damages. This test requires a finding that the conduct at issue represents “a marked departure from ordinary standards of human decency”: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36. According to ITCAD, the motion judge never considered this test and limited his discussion on the question of punitive damages to deterrence, which may be the purpose of punitive damages, but is not the legal threshold for awarding such damages. ITCAD submits that if the motion judge had applied the right test, he would have found that ITCAD’s conduct did not meet that test.

[29] ITCAD also argues that the motion judge failed to consider relevant evidence in the form of a prior Small Claims Court decision when he made his award of punitive damages.

[30] I disagree. The motion judge considered the appropriate test. In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 481, the Ontario Court of Appeal set out the following three legal requirements from *Whiten*, for an award of punitive damages in the employment context. First, the conduct must be “reprehensible”, “malicious, oppressive and high-handed” and “a marked departure from ordinary standards of decent behaviour.”: *Boucher*, at para. 79. Second, the award must be “rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation”: *Boucher*, at para. 79. Third, “[t]he plaintiff must show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract”: *Boucher*, at para. 80. A breach of the duty of good faith and fair dealing can constitute such an actionable wrong: *Boucher*, at paras. 81-83.

[31] It is clear from the following paragraph of the motion judge’s decision that he considered the test set out in *Whiten v. Pilot Insurance*:

[28] ...I accept [ITCAD’s] position that punitive or exemplary damages are the exception and reserved for matters which follow within those factors enumerated in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (at paragraph 94).

[32] Amongst the factors cited in para. 94 of *Whiten* are the following:

- (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

- [33] With respect to the first criterion for the award of punitive damages the motion judge made a clear finding that it was “untenable for [ITCAD] to withhold compensation earned and payable to the plaintiff. This is whether it was based on its position of entitlement to damages (and thus a set-off) or as a part of the litigation strategy. I find that such conduct was unacceptable”: Motion Judge’s Decision, para. 27.
- [34] While the motion judge found that the Consultants were not employees, there is also no suggestion that the Consultants had another source of income other than their income from the MOH. ITCAD admitted that it received the money from the MOH for the Consultants’ services in February and March and that it owed the Consultants the amount they charged for their services. Yet, ITCAD retained that money in order to force the Consultants to sign with one of the vendors of record they had an arrangement with, an arrangement that had the indirect effect of circumventing MOH’s decision that ITCAD could no longer act as a vendor of record. It also had the effect of depriving Mr. Patel of all his earnings for two months, earnings that he would have relied on to pay his bills.
- [35] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 197, the Supreme Court of Canada confirmed, as ITCAD points out, that “courts have a much greater scope and discretion on appeal” when it comes to punitive damages. As put by the Supreme Court, “[t]he appellate review should be based upon the court’s estimation as to whether the punitive damages serve a rational purpose.” In this case the punitive damages do serve a rational purpose. Without them, ITCAD would suffer no penalty other than paying the Consultants the money it admitted it owed them. Doing this would not deter them from engaging in the same conduct in the future.
- [36] With respect to the second requirement, the motion judge made a finding that an award of punitive damages was necessary in order to deter ITCAD “and others from similar misconduct in the future.”: Motion Judge’s Decision, at para. 29. In this regard, the Small Claims decision put forward by ITCAD (discussed below) makes it clear that the Consultants were not the only ones who were subjected to ITCAD’s tactics when ITCAD lost its status as a vendor of record.
- [37] With respect to the third requirement for punitive damages, the motion judge implicitly found that ITCAD’s withholding of compensation constituted a breach of ITCAD’s duty of good faith and fair dealing when his statement regarding the unacceptability of ITCAD’s conduct is followed by the following sentence: “The law is clear in the field of employment law that the employer has an implied duty of good faith and fair dealing.”: Motion Judge’s Decision, at para. 27. ITCAD had total control over the receipt and payment of the Consultants’ compensation for their work. This is a key aspect of the vulnerability and imbalance of power inherent in an employment relationship that drives the implied duty of good faith and fair dealing recognized by the Supreme Court of Canada in *Wallace v.*

United Grain Growers Ltd., [1997] 3 S.C.R. 701. Although ITCAD submits that the motion judge erred by applying authorities that dealt with punitive damages in the employment context to an independent contractor, in my opinion, the motion judge did little more than accurately note the factual similarities that existed in the circumstances.

- [38] ITCAD argues that the motion judge’s decision effectively ignored a Small Claims Court case where ITCAD had engaged in the same conduct and the consultant in that case also sued ITCAD: *6737878 Canada Ltd. v. ITCAD Tech Inc.*, Toronto, SC-16-012770 (Ont. Sm. Cl. Ct.). ITCAD counterclaimed, claiming a breach of the non-compete. The Small Claims Court judge set the damages for withheld fees off against the damages for the non-compete. According to ITCAD this meant that the Small Claims Court implicitly approved of its conduct in withholding payment to the Consultants. There is no merit to this submission. Nowhere in the decision is there any approval expressed of the conduct and it is clear from the decision that no claim was made for punitive damages or any other type of damages that would have necessitated that the judge deal with the moral blameworthiness of the conduct.
- [39] In terms of quantum, the motion judge awarded damages in an amount equal to approximately fifty percent of the amount of earnings knowingly withheld. He found that this amount was appropriate to “deter others from similar misconduct in the future”: Motion Judge’s Decision, at para. 29, citing *Whiten*, at para. 94. ITCAD argues that the damages awarded were excessive, while the Consultants submits that they should have been higher. Making an assessment as to what amount of damages is sufficient to deter the conduct from happening again is a discretionary exercise involving an assessment as to what number will rationally satisfy the purpose of deterrence. An amount that is too small “might simply be regarded as a licence fee...” to continue the misconduct at issue: *Hill v. Church of Scientology*, at para. 199. I am not satisfied that the motion judge erred when he assessed the amount at the number he did.

The Restrictive Covenant

The Restrictive Provision

- [40] The 2021 Agreement between the parties included the following provision:

Non-Competition/Non-Solicitation: The Independent Contractor agrees that:

- (i) During the term of this Agreement and for a period of 12 months after the expiration of this Agreement and any Extension, ITCAD is the sole representative through which the Independent Contractor provides services to the Client, and the Independent Contractor agrees that ITCAD has the sole and exclusive right to submit and represent the Independent Contractor for the Request for Services from the Client.

- (ii) During the term of this Agreement and for the period of 12 months after the expiration of the Agreement and any Extension, he will not accept work directly or indirectly from the Client without ITCAD's prior written consent.

[41] The 2022 Agreement contained essentially the same provision.

Was the Non-compete clause invalid at common law?

[42] In *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, the Supreme Court of Canada outlined the following principles that must be kept in mind when considering the validity of restrictive covenants at common law:

1. Restrictive covenants are covenants in restraint of trade, which “are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free.” They are therefore presumptively unenforceable: para. 16.
2. “However, the recognition of the freedom of the public to contract requires that there be exceptions to the general rule against restraints of trade. The exception is where the restraint of trade is found to be reasonable.” Assessing reasonableness is done with reference to the interests of the parties concerned and with reference to the interests of the public: para. 17.
3. Restrictive covenants in an employment contract are subject to a higher level of scrutiny than restrictive covenants in a contract for a sale of a business. This is because there is “more freedom of contract between buyer and seller than between a master and servant or between an employer and a person seeking employment”: para. 19. There is generally an imbalance in power between employer and employee: para. 22.
4. “The onus is on the person seeking to enforce the restrictive covenant to show the reasonableness of its terms”: para. 27.

[43] The Consultants submit that the motion judge erred, when he found that the non-compete clause was enforceable at common law. As noted by the Consultants, the test for the enforceability of a restrictive covenant in the employment context requires a court to answer the following questions:

- (a) Does the party seeking to enforce the covenant have a proprietary or legitimate interest entitled to protection?
- (b) Are the temporary and spatial features of the covenant reasonable or too broad?
- (c) Does the covenant prevent competition generally, and if so, is this restriction reasonably required for the protection of the covenantee in the circumstances?

Elsley v. J.G. Collins Insurance Agencies Ltd., [1978] 2 S.C.R. 916, at p. 925.

- [44] The motion judge accepted ITCAD's position regarding the first factor, which was that it competes with other vendors of record to place qualified people in positions with Ontario government agencies. To do so it makes efforts and incurs costs to identify candidates and prepare them for the interview or vetting process the proposed candidate must undergo in order to be offered a position. Therefore, it requires the non-competition clause to deter individuals from using its skills to obtain the position and then switching to another vendor of record who offers them a better deal. Thus, the motion judge concluded that "there was a valid basis for the non-competition clause.": Motion Judge's Decision, at para. 18.
- [45] With respect to the second factor, the motion judge found that the scope of the clause was reasonable since it was restricted to the particular branch of the MOH where ITCAD had helped the Consultants obtain a position. The Consultants were free to apply for positions at any other branches of the MOH or at any other ministry within the Ontario government. With respect to the length of the covenant, the motion judge found that 12 months, while high, was within the reasonable range.
- [46] With respect to the third factor, given the fact that the covenant only applied to a particular branch of the MOH, the motion judge found that it did not prevent competition generally.
- [47] The Consultants made a number of arguments regarding the enforceability of the restrictive covenant, including that the motion judge failed to address the fact that the restrictive covenant was being used by ITCAD to circumvent the MOH's decision to revoke ITCAD's right to act as a vendor of record. This was not a circumstance that was contemplated by the covenant. In other words, the Consultants did not switch to another vendor of record because that vendor of record offered them a better deal (ITCAD's stated purpose for the non-compete clause), but because ITCAD was no longer authorized to act as a vendor of record. ITCAD was, in effect, using the restrictive covenant to force the Consultants to enter into an arrangement with another vendor of record that was prepared to allow ITCAD to continue to earn revenue from the Consultants' services when the MOH had taken steps to ensure that they could not do so. Restrictive covenants are presumptively unenforceable as being contrary to public policy. To enforce the restrictive covenant at issue in these circumstances would be contrary to the public interest.
- [48] I agree with the Consultants. Allowing ITCAD to enforce the restrictive covenant in this case is allowing them to restrain the Consultants from taking steps to preserve their jobs in a circumstance where the MOH has made it clear that they can no longer do so through ITCAD. Thus, the MOH, not the Consultants, brought about the circumstance that caused the Consultants to seek a new vendor of record. It could not reasonably be in the contemplation of the parties that the Consultants would be prevented from taking steps to preserve their employment with the MOH if the MOH were to find that ITCAD was no longer qualified as a vendor of record. This is not an interest the restrictive covenant was designed to protect.

- [49] Further, this is not an interest that is reasonably in the public interest to protect. As the Consultants point out, ITCAD was seeking to use the restrictive covenant to force the Consultants to enter into an arrangement with another vendor of record, which was, in essence, a way for ITCAD to continue to benefit from its status as a vendor of record when the MOH had specifically provided that it was no longer entitled to do so. This was contrary to the public interest.
- [50] Finally, far from furthering the right to freedom of contract, which is the countervailing interest in favour of allowing for the enforcement of restrictive covenants, the enforcement of the restrictive covenant in this case was, indirectly, a stamp of approval of ITCAD's conduct, which involved directing the Consultants to enter into a contract with an entity that they did not want to contract with. This frustrated, rather than furthered, their freedom to contract.
- [51] For these reasons, I find that the motion judge ignored the fundamental principles that must guide the enforceability of restrictive covenants at common law when he allowed the restrictive covenant to be enforced in the circumstances of this case. This is an extricable legal error. His decision in this regard must be set aside. Given this finding, ITCAD's counterclaim for damages cannot succeed. I appreciate that in coming to this conclusion I am disagreeing with the decision of the Small Claims Court judge in *673978 Canada Ltd. v. ITCAD Tech Inc.*, concerning the enforceability of the restrictive covenant. However, I am not bound by that decision and decline to follow it.
- [52] This finding is sufficient to dispose of this aspect of the cross-appeal and there is no need for me to deal with the other issues raised regarding the damages awarded in the cross-appeal.

Conclusion

- [53] For these reasons the appeal and the cross-appeal with respect to punitive damages is dismissed. The cross-appeal with respect to ITCAD's counterclaim for damages in relation to the alleged breach of the restrictive covenant is allowed and ITCAD's counterclaim for damages is dismissed.
- [54] The parties may make submissions in writing on the question of costs. Such submissions shall not exceed five pages. The Consultants shall make their submissions within 10 days of the release of these reasons and ITCAD shall have 10 days to respond. All submissions shall be forwarded by e-mail to annamaria.tiberio@ontario.ca and uploaded to case centre.

Sachs J.

I agree

Nakatsuru J.

I agree

O'Brien J.

Released: January 23, 2026

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REASONS FOR JUDGMENT

Released: January 23, 2026