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• RESTRICTIVE COVENANTS: COMPARING EMPLOYMENT CONTRACTS AND COMMERCIAL AGREEMENTS •

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A restrictive covenant is a contractual provision by which parties agree that the future conduct of a party will be restricted in some manner. Restrictive covenants, such as non-competition and non-solicitation clauses, are used in both employment contracts and commercial agreements (e.g., for the sale of a business).

While these clauses aim to protect legitimate business interests, they are presumptively unenforceable under Canadian employment law as a restraint of trade. Courts, however, may enforce these provisions if they are determined to be reasonable as between the parties and with respect to the public interest. In contrast, in the sale of business context, restrictive covenants are presumptively valid and the party resisting enforcement must prove the covenant is unreasonable. The test of reasonableness in either case will consider the context and scope of the clause and whether it is clearly drafted, balancing the freedom of contract against the public interest in free trade and employment mobility.

CONTEXT MATTERS: EMPLOYMENT VS. COMMERCIAL AGREEMENTS

Courts have consistently drawn a distinction in their approaches to non-competition clauses found in an agreement to sell a business and those found in employment contracts.

EMPLOYMENT CONTRACTS

Restrictive covenants in employment contracts are subject to greater judicial scrutiny due to the inherent imbalance of power between employers and employees. Employees often lack bargaining power when negotiating an employment agreement, and such clauses can unfairly limit the employee's ability to earn a living after leaving a job.

As the Supreme Court of Canada stated in *Shafroon v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6, 2009 SCC 6 ("*Shafroon*"), the absence of payment for goodwill and the unequal bargaining power justifies a higher threshold to determine reasonableness in employment contexts. Courts are particularly cautious when restrictive

covenants may prevent an employee from using skills and knowledge acquired in prior employment for a future job.

COMMERCIAL AGREEMENTS

In contrast, restrictive covenants in commercial agreements, often between a vendor and purchaser, are more likely to be upheld. These parties typically negotiate on equal footing, and the sale of goodwill in a business can justify the imposition of non-compete clauses, which also allow purchasers to establish and protect relationships with the business's existing customers.

The Supreme Court of Canada in *Payette v. Guay inc.*, [2013] S.C.J. No. 45, 2013 SCC 45 ("*Payette*"), emphasized that freedom of contract is paramount in commercial transactions. The British Columbia Court of Appeal echoed this in *IRIS The Visual Group Western Canada Inc. v. Park*, [2017] B.C.J. No. 1634, 2017 BCCA 301 ("*IRIS*"), noting that it is reasonable for a seller to be bound by a non-compete clause to protect the buyer's investment and restrict the seller from opening a competing business.

ASSESSING REASONABLENESS: A SHARED FRAMEWORK WITH DIFFERENT STANDARDS

The foundational test for evaluating restrictive covenants comes from *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] S.C.J. No. 47, [1978] 2 S.C.R. 916 ("*Elsley*"), which outlined three key factors:

1. Proprietary Interest: Is there a legitimate business interest being protected?
2. Scope of the Covenant:
 - Geographic scope
 - Duration
 - Nature of restricted activity
3. Public Interest: Does the covenant unduly restrict trade or employment?

While this framework applies in both contexts, courts will apply a higher degree of scrutiny when

assessing reasonableness of restrictive covenants in employment contracts. Further, courts will favour enforcement of less restrictive means that sufficiently protect a legitimate business interest. For example, a non-solicitation clause may be enforceable without a geographic limitation (*Payette*, at paragraph 69), but a non-competition clause must be narrowly tailored and justified by exceptional circumstances (*Elsley*).

AMBIGUITY: A COMMON PITFALL

Regardless of context, clarity is essential. Courts will not enforce a restrictive covenant if its terms are ambiguous, as this precludes a proper assessment of reasonableness. In effect, if the party subject to the covenant does not know when they may be in breach, then it is unreasonable.

- In *Shafren*, the lack of clarity around the geographic area rendered the covenant unenforceable.
- In *Globex Foreign Exchange Corp. v. Kelcher*, [2011] A.J. No. 881, 2011 ABCA 240, the Alberta Court of Appeal found the term "dealings" in a non-solicitation clause too vague to enforce. With this vague language, the Court found it would have been impossible for the employee to know when they would have been in breach.

RECENT CASE LAW HIGHLIGHTS

COMMERCIAL CONTEXT

- *Dr. J.S. Minhas Dental Corp. v. Dentalcorp Health Services Ltd.*, [2025] B.C.J. No. 1518, 2025 BCCA 286: Upheld a non-compete clause preventing a seller of five dental offices from operating within 10 km of any purchased location. The Court found the clause reasonable and granted the interlocutory injunction; leave to appeal dismissed.
- *People Corporation v White Raven Consulting Ltd.*, [2025] B.C.J. No. 2531, 2025 BCSC 2525: Upheld non-competition, non-solicitation, and non-acceptance of work clauses preventing the seller of an Indigenous-focused financial services corporation from, essentially, operating a similar business within British Columbia

and Alberta for five years. The Court upheld the restrictive covenants for the purpose of an interlocutory injunction, but noted the reasonableness of the covenants with respect to activity, territory, and time were at least arguable matters for trial.

EMPLOYMENT CONTEXT

- *Dibble v. Creative Music Therapy Solutions Inc.*, [2024] B.C.J. No. 1116, 2024 BCSC 1066: A non-solicitation clause in a dependent contractor agreement was struck down due to geographic overreach, excessive duration (three years), and ambiguous language.
- *IRIS*: Although the spatial (five-kilometer) and temporal (three-year) restrictions to the non-compete clause were reasonable, the nature of the prohibited activity was ambiguous and, even if it was clear, would have gone beyond the scope necessary to protect the appellants' business interests.
- *Quick Pass Master Tutorial School Ltd. v. Zhao*, [2022] B.C.J. No. 2022, 2022 BCSC 1846: Involving an independent contractor, the Court found *no imbalance of power* due to the contractor's experience and negotiated compensation. The 18-month non-compete clause across Vancouver, Burnaby, and Richmond was acceptable. However, the non-solicitation clause was invalid for being overly broad and unclear.

THE ONTARIO PROHIBITION

Since October 25, 2021, the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, has prohibited employers from entering into employment contracts or other agreements with employees that include a non-competition agreement, irrespective of whether it is time-limited or geographically restricted. However, the prohibition does not apply to non-competition clauses entered into before October 25, 2021.

Exceptions to Ontario's non-competition prohibition also exist for:

1. the sale or lease of a business operating as a partnership or sole proprietorship, where the

seller becomes an employee of the purchaser following the sale; and

2. executive employees (e.g., CEO, COO, president, etc.).

Importantly, the prohibition does not extend to non-solicitation and non-disclosure agreements.

A CAUTION FOR FEDERAL EMPLOYERS

In May 2026, the federal government introduced Bill C-31, which would amend the *Canada Labour Code*, R.S.C., 1985, c. L-2, to similarly prohibit employers from entering non-compete agreements with certain employees.

Though still under consideration, the amendments would apply to employers in federally regulated industries such as banking, transportation, and telecommunications, with narrow exceptions similar to those currently operating in Ontario, such as for executive employees and when the seller of a business is employed by the business following the transaction.

If enacted, there will be a one-year transition period for existing non-competition clauses, after which the legislation would apply to any non-compete, including those entered into before the amendments. Employee protections could also extend to prohibit "other employment-related restrictions" not yet specified.

As a result, federal employers will need to be aware of how potential *Canada Labour Code* amendments could affect the use of future, and existing, non-competition clauses.

CONCLUSION

While restrictive covenants serve important business purposes, their enforceability hinges on context. Courts apply stricter scrutiny in assessing restrictive covenants in employment contracts to protect workers' rights, while commercial agreements benefit from greater contractual freedom. To ensure enforceability, parties must draft covenants that are clear, reasonable, and tailored to the specific interests at stake, keeping in mind the context and power differentials between the parties.

We will continue to closely monitor any developments in how Canadian jurisdictions approach restrictive covenants, along with the progress of Bill C-31. We will provide updates as more information becomes available.

If you have any questions about the application of restrictive covenants in employment and commercial contexts, and what this means for your workforce or business, please contact the authors or another member of our Labour, Employment & Human Rights Group: <https://www.lawsonlundell.com/practice-area/labour-employment-human-rights>.

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