



RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

Practical Guidance for Employers

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Today we will cover:

1	Introduction
2	Restrictive Covenants in Employment Agreements
3	Different Types of Restrictive Covenants & Remedies
4	When are Restrictive Covenants (Un)Enforceable?
5	Caselaw Update
6	Common Drafting Issues & Best Practice



INTRODUCTION

Opening Comments



We are litigators with specializations in a diverse array of commercial and employment matters. We help clients win lawsuits and, better yet, avoid them entirely.



We will outline the basics of restrictive covenants in employment agreements and how to draft them for future success.



Restrictive Covenants in employment agreements are difficult to enforce and will depend on the circumstances. Get legal advice early.



Feel free to ask questions!

What are Restrictive Covenants?

A Restrictive Covenant is an agreement that restrains certain activities.

Examples:

- Non-Competition
- Non-Solicitation
- Confidentiality

Why Restrictive Covenants?

Restrictive Covenants can protect your business:

- Market Position
- Goodwill
- Trade Secrets

If breached, you have several options:

- Injunctions (Court order requiring certain actions be taken / not taken)
- Damages (Money paid to put you in position where covenant not breached)

Typical Features of a Restrictive Covenant

Features of a Restrictive Covenant

- **Interest:** What is being protected?
- **Scope:** What exactly is restricted, and where?
- **Duration:** How long does the restriction last?



RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

Context Matters

Commercial

- Roughly equal bargaining power
- Restrictive Covenants protect the bargain (for example, the transfer of goodwill)

Employment

- Unequal bargaining power
- Restrictive Covenants protect the bargain but also can undermine an employee's ability to earn a living or negotiate better conditions.

Context Matters (cont'd)

The Employment Context

- More strict than general commercial context.
- Restrictive Covenants in the employment context = risk of restraint of trade (assumed to be unenforceable, unless employer establishes it is reasonable.)
- To determine if a restraint of trade in a Restrictive Covenant is reasonable, Court will look to the specific circumstances and consider whether:
 - Interest Protected = legitimate
 - Terms = clear
 - Restraint = reasonable with respect to:
 - Activities prohibited
 - Duration
 - Geographic area
 - Fairness & the public interest

The Employment Context

Per the Supreme Court of Canada, “Reasonableness” always depends on the circumstances:

The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.

Elsley v. J.G. Collins Ins. Agencies, 1978 CanLII 7 (SCC), [1978] 2 SCR 916

In other words, past cases can provide no ironclad guarantee as to whether your clause is enforceable



THE TYPES OF RESTRICTIVE COVENANTS & REMEDIES

Overview – The Types of Restrictive Covenants

Non-Competition – Prohibits an employee from performing services in competition to the employer’s business.

- Nature of the services provided by the business / employee is critical
- Contract will provide guidance, but overly broad definition may not be enforceable.

Non-Solicitation – Prohibits an employee from “soliciting” business, customers, or clients:

- Requires something akin to an ‘invitation’, ‘appeal’, or ‘request’.
- “Something more” than a general advertisement is generally needed to constitute a breach of a non-solicitation covenant.

Overview – The Types of Restrictive Covenants (cont'd)

Confidentiality – Prohibits an employee from using or disclosing “confidential information” belonging to the business

- Information can be training documents, client lists, systems, etc.
- Contract usually defines what ‘confidential information’ means, but Courts can override language.

Non-Competition

AllWest Insurance Services Ltd. v. Meredith Phendler, 2009 BCSC 2

14. You agree that during your employment with AllWest and for a period of twenty-four (24) months immediately following its termination, regardless of the reason for such termination or the party effecting it, you shall not, except as an employee of AllWest, directly or indirectly, whether individually or in partnership or jointly or in conjunction with any person or persons, as principal, agent, shareholder, officer, employee or in any other manner whatsoever:

[...]

b. conduct insurance-related business with any person or entity that was an AllWest Client during your employment under this Agreement, with the exception of the members of your immediate family;

Non-Competition (cont'd)

6180 Fraser Holdings Inc. v Ali, 2012 BCSC 247

4.1 Non-Competition: The Contractor acknowledges that in the course of her duties he will have access to marketing and other information of the Company relating to its operations and that if the Contractor were to compete against the Company or [its] affiliates, the Company and/or its affiliates would suffer irreparable damage. Accordingly, the Contractor covenants and agrees that she will not during the term of this Agreement and for a period of one (1) year after termination of this Agreement, directly or indirectly, whether as owner, shareholder (except to the extent of a less than five per cent ownership interest of the outstanding shares of a publicly held corporation), director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship:

- (a) perform services for any customer of a Medicine Shoppe Pharmacy owned by the Company or an affiliate of the Company; and
- (b) except in the performance of her duties hereunder, solicit any business from, or initiate contact with, any person, firm, corporation or other entity who was at the date of this Agreement, or at any time during the term of this Agreement a customer or client of a Medicine Shoppe Pharmacy owned by the Company or an affiliate of the Company.

Non-Solicitation

Dr. P. Andreou Inc. v. McCaig, Gowdy and White, 2006 BCSC 829

9.3 During the term and at any time thereafter, the Associate will not communicate either directly or indirectly with patients of the Principal for the purposes of soliciting such patients to obtain dental care or services, including without limitation dental hygiene services, from a source other than the Principal or persons employed or engaged by the Principal, except in the case of professional referrals as permitted by this Agreement.

Non-Solicitation (cont'd)

6180 Fraser Holdings Inc. v Ali, 2012 BCSC 247

4.6 Restrictions on Soliciting Leads.

The goodwill being developed by the Contractor is intended to belong to the Companies. It would be unfair to the Companies if the Contractor contacted or solicited in any way the persons who became customers or referral sources of the Companies for purposes of causing such persons to use the services of another pharmacy. Therefore, during the term of the Agreement and for one (1) year following the termination of this Agreement for any reason, the Contractor agrees not to directly or indirectly contact or solicit customers or referral sources of the Companies for any purpose including without limitation, for the purpose of directing business away from the Companies, or for the purpose of marketing or promoting another pharmacy. This provision will be interpreted broadly, in favour of the Companies.

Confidentiality

Dentalcorp Health Services Ltd. Et al v. Dr. J.S. Minhas Dental Corp et al, 2024 BCSC 2006

5.0 CONFIDENTIALITY – The Associate and the Dentist, jointly and severally, covenant and agree with the Professional Corporation and the Facility Operator that they shall: (i) keep the Confidential Information confidential, except where disclosure is permitted pursuant to this Section 5.0; and (ii) take whatever measures are reasonably necessary to preserve the confidentiality of such Confidential Information ... The Associate and the Dentist, jointly and severally, covenant and agree with the Professional Corporation and the Facility Operator that: (i) they shall not use the Confidential Information for any purpose other than the sole purpose of providing the Associate Services in accordance with the terms of this Agreement; and (ii) they shall not disclose any Confidential Information...

[...]


Confidentiality (cont'd)

Dentalcorp Health Services Ltd. Et al v. Dr. J.S. Minhas Dental Corp et al, 2024 BCSC 2006

“Confidential Information” includes:

- a) all confidential information including:
 - (i) trade secrets and confidential know how; and
 - (ii) financial, accounting, business, marketing and technical information, patient lists, suppliers lists, the names of third parties that refer patients and clients to the Dental Endeavour, Patient Records, know how, technology, operating procedures, fees for all services performed in the Dental Endeavour, databases, source codes and methodologies, of which the Dentist becomes aware or generates (both before or after the day this Agreement is signed) in the course of, or in connection with (including confidential information belonging to a third party) the Associate providing the Associate Services;
- b) all copies, notes and records based on or incorporating the information referred to in paragraph (a); and
- c) the terms of this Agreement and the Acquisition Agreements,

but does not include any information that was public knowledge when this Agreement was signed or became so at a later date (other than as a result of a breach of confidentiality by, or involving, the Dentist)



**■ WHEN ARE RESTRICTIVE COVENANTS
(UN)ENFORCEABLE?**

Remedies for Breach – Pre-Trial (Injunctions)

- Extraordinary remedy. Injunctions compel behavior.
- Injunctions can be prohibitive or mandatory
 - Prohibitive = restraining certain activities
 - Mandatory = requiring that certain activities be done.
- Interlocutory Injunctions (Pre-Trial)
 - Merits
 - If seeking prohibitive injunction, must prove there is a “Serious Question to be tried” (low threshold)
 - If seeking mandatory injunction, must prove you have a “Strong *Prima Facie*” case (high threshold)
 - Irreparable Harm
 - Harm that cannot be compensated for with an award of damages
 - Have included things like goodwill and market share (depending on circumstances)
 - “Balance of convenience favours granting injunction

Remedies for Breach – Post-Trial

Permanent Injunction

- Underlying right fully proven?
- Wrongs sufficiently likely to occur or re-occur?
- Alternative Remedy providing reasonably sufficient protection?
- Any reason why injunction not appropriate (for example, delay or 'unclean' hands)?
- What are appropriate terms / scope?

Damages

- Order for payment of money
- Meant to put employer in position they would have been in had no breach occurred
- Must flow from breach
- Can be reduced for expected future contingencies - for example, if employee stops working early due to age (see *Lyons v. Multari*, 2000 CanLII 16851 (ON CA))

A Restraint of Trade must be reasonable

“The principles to be applied in considering restrictive covenants of employment are well-established.... A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the Courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the Courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable". The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.”

Elsley Et Al. V. J.G. Collins Insurance Agencies Ltd. (1978), [1978 CanLII 7 \(SCC\)](#)

Reasonableness in Employment Context

Interest Protected = legitimate

Terms = not ambiguous

Restraint = reasonable with respect to:

- Activities prohibited
- Duration
- Geographic area
- Fairness & the public interest

Proprietary Interest

Whether an interest is legitimate depends on the circumstances.

Legitimate interests include:

- Client Relations / Company's "book of business"
- Company goodwill
- Confidential information – including trade secrets, business plans, marketing strategy

Generally, no legitimate interests in:

- Prospective or potential clients
- Employee's professional skill / experience
- Employee's ability to compete in the future
- Information that is not deemed 'confidential enough'

Ambiguity - *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6:



“The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant.”



“Applying [notional] severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the courts will only sever the unreasonable parts or read down the covenant to what the courts consider reasonable.”



“Blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant.”



“General rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.”

Ambiguity

An ambiguous clause is one that:

- Can sustain multiple reasonable interpretations.
- May be interpreted as overly broad in terms of prohibited activity, type of business, geographical or temporal scope.
- Contains multiple inconsistent definitions.

“Ladder clauses”, which set out a descending scope of restrictions, are always ambiguous and therefore unenforceable (see, for example, *Bonazza v. Forensic Investigations Canada Inc.*, 2009 CanLII 32268)

Activities Prohibited

- Prohibition on activities cannot go further than is “reasonably adequate” to protect the legitimate interest.
- Generally, non-solicits should be tailored to:
 - Identifiable clients or customers, which:
 - employer has actually serviced,
 - do not otherwise ‘belong’ to employee,
 - are clients at time of termination
 - Active solicitation, as opposed to mere contact / general advertisement

Activities Prohibited: Soliciting

OK, but what exactly is *solicitation*?

[26] I can see no useful purpose or meaning in a distinction between a covenant not “to communicate for the purpose of soliciting”, as stated in the agreements, and a covenant not “to solicit”. The action restricted is the same because one cannot “solicit” if one does not “communicate”. The communication element is redundant. One can communicate with the effect of obtaining business without soliciting or intending to solicit business, particularly if the person who receives the communication is dissatisfied with the service he is receiving or for some other reason looking for a new service provider. The purpose of the action of communicating for the purpose of soliciting or the action of soliciting is the same, to seek business. The prohibition in the agreements is against soliciting business from former clients. Therefore, we must turn to the question posed by Dickson J. in *Elsley*.

Dr. P. Andreou Inc. v. McCaig, Gowdy and White, 2007 BCCA 159

Activities Prohibited: Soliciting (cont'd)

[28] More recently, in *Brouwer Claims v. Doge et al*, 2002 BCSC 988, Goepel J. looked to the same dictionary for guidance in considering whether a letter Mr. Doge wrote advising his clients that he would be leaving Brouwer and opening a new office outside the 50 km range of a restrictive covenant under which he was not to “solicit, directly or indirectly, any of the clients of the Covenantee with respect to independent insurance adjusting services”. Goepel J. concluded (at para. 41) that the verb solicit “requires some active step to be done by Mr. Doge”. He quoted (at para. 40) from *Black’s Law Dictionary* (6th edition):

Solicit. To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavour to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication.

Although some substantial clients of Brouwer had followed Mr. Doge to his new location, Goepel J. was not persuaded Mr. Doge had actively solicited their business.

Dr. P. Andreou Inc. v. McCaig, Gowdy and White, 2007 BCCA 159

Activities Prohibited: Competition & Confidential Information

- Prohibition on activities cannot go further than is “reasonably adequate” to protect the legitimate interest.
- Generally, non-competition clauses should be tailored to:
 - The work the employee actually performs (no general restraint on competition allowed)
 - The employer’s field(s) of business at the time the contract is signed
- Generally, confidentiality clauses should be tailored to:
 - Specifically identified information
 - Information that is actually confidential (saying it is will not necessarily make it so)

Duration

- Duration of restriction cannot be more than is “reasonably adequate” to protect the legitimate interest.
- Duration must be set at the time the contract is entered into.
- What is “adequate” will depend on the circumstances.
- The more vulnerable the employer at time of termination, the longer the allowable duration.
 - “Vulnerability” is usually assessed with respect to employee’s role and responsibilities

Geographic Scope

Distance is calculated as a radius - don't just use Google Maps!

[38] In this context, the defendants argue that while the new work location of Dr. Hamin is within a five kilometre radius “as the crow flies”, the correct interpretation of the geographic range of the covenant is “driving distance”. The defendant Dr. Hamin states that the minimum driving distance between the Reflections Location and the new place of business is 5.3 kilometres, and therefore beyond the five kilometre radius.

[...]

[64] In respect of the geographical restriction imposed by the Restrictive Agreement, I have no hesitation in finding that Dr. Hamin is in breach of the five kilometre radius restriction. There is no justification for interpreting the definition of radius to mean the driving distance between the Reflections Location and his new place of business. The evidence establishes that his new place of business is within the five kilometre radius of the Reflections Location.

Dentalcorp Health Services Ltd. et al. v., 2023 MBKB 75

Geographic Scope (cont'd)

- Geographic scope usually defined as a specific region (e.g., province) or a radius centered on a specific place, usually the employer's location.
- No geographic scope = fatal for non-competition clauses. Not fatal for non-solicitation clauses, so long as the rest of the clause is narrow and clear.
- Geographic scope is frequently ambiguous. For example:
 - “Business within” British Columbia – headquartered in BC or selling products in BC?
 - “Greater Vancouver Area” – not a proper name for a geographic location.

Public Interest

- The Public Interest requires, among other things, that employees be at liberty to:
 - Work in their chosen profession
 - Use their skills and abilities to make a living
- A covenant restraining trade must strike a “reasonable balance” between this Public Interest and the employer’s legitimate proprietary interest.
- Onus falls on employer to provide evidence showing the covenant goes no further than necessary to protect its proprietary interest
- Once that happens, employee bears onus to prove the covenant is contrary to the public interest

Rhebergen v. Creston Veterinary Clinic, 2014 BCCA 97

Appeal by employer alleging a restraint of trade was enforceable. Covenant stipulated payment if employee “sets up a veterinary practice” in a prohibited geographic area.

Court below found covenant was unenforceable as it was:

- Ambiguous – what does “sets up a veterinary practice” mean? Uncertain – what if mobile practice?
- Unfair – payment was an “unconscionable penalty” out of proportion to loss that could be suffered

Success – Majority found that covenant was enforceable

- Covenant was a restraint of trade – even if it did not prohibit competition, it restrained competition by requiring employee pay.
- Covenant was not capable of multiple meanings if understood in context – evidence showed parties had a common understanding of what “setting up a practice” meant.
- Payment was, when considered in context, proportional to possible loss, and therefore not unfair penalty



CASELAW UPDATE

NSD Disposal Limited v Ruppel, 2025 BCSC 690

Former employee allegedly copied employer's client contracts, using these to target these clients.

Sought pre-trial mandatory injunction restraining breaches of

- Confidentiality clause
- Non-Solicitation clause

Mixed success

- Order for return of confidential information
- No order re: non-solicitation. While some clients jumped ship, no evidence that confidential information misused

Bouchard v Facility Condition Assessment Portfolio Experts Ontario Ltd., 2024 BCSC 1870

Employee was hired after employer purchased his business. Employee brought a suit for wrongful dismissal. Employer counterclaimed for breach of restrictive covenant.

Employer sought damages for breach of breaches of

- Non-Solicitation clause
- Non-Competition clause

Success

- When viewed in light of asset purchase agreement, Court determined the proper context was commercial → Restrictive covenants presumptively enforceable.
- After evaluating nature of restrictions, Court found covenants to be enforceable.
- 100km radius reasonable due to employer carrying on activities throughout Canada.

Heaps & Doyle Practice Solutions Inc. v Pacula, 2025

BCSC 699

Dental Recruiter was hired after employer purchased her business.
Independent Contractor relationship.

Employer sought mandatory injunction for breach of breaches of

- Non-Solicitation clause
- Non-Competition clause
- Confidentiality clause

Unsuccessful

- The Restrictive Covenants did not clearly restrain the activity sought to be restrained.
- Employer led no evidence that it would suffer irreparable harm if injunction was not granted



BEST PRACTICES

Common Drafting Errors

Generally:

- Ambiguity
- Overbreadth
- No consideration
- No definitions

Confidential Information

- No precise definition of what 'confidential information is'
- Unrealistic definitions

Non-Competition / Non-Solicitation

- All lumped together (if one is unreasonable, all are void)
- Restrictions have nothing to do with employer's business / employee's job
- Restrictions effectively prevent employee from making a living.
- Geographic scope is improperly set out

Drafting Tips

■ Ensure you keep up to date on developments in law
- for example, Ontario has made most restrictive covenants illegal

■ Always use precise definitions

■ Cross-reference your restrictive covenants with the rest of the contract. Inconsistencies could mean ambiguity and render covenant unenforceable

■ Be measured in what you are trying to protect & be mindful of nature of your business operations

■ Don't assume that you can rely on notional severance

Drafting Tips (cont'd)

Consider likely developments, including:

- Changes in geographic scope over time
- Changes in employer's business
- Significant in employee's responsibilities

Where necessary, be prepared to execute new restrictive covenants with fresh consideration.

Consider complementary terms, including:

- that Restrictive Covenants survive termination, regardless of reason for termination
- Restrictive Covenant attaches to successors and assigns
- Acknowledgment that employee given opportunity to seek legal advice

Drafting Tips (cont'd)

- Draft with an eye to the remedies you will want.
- An overly short duration may mean by the time you get an injunction, the duration would already be up.
 - *In rare cases where breach is of massive scale, a Court may exercise its discretion to have injunction run as of the time of the court order, not the time of contract termination.*
- Consider including language on irreparable harm
 - Never enough on its own
 - Almost always helps if you want an injunction
- Example:
 - The Employee acknowledges and agrees that monetary damages might not be a sufficient remedy for any breach by the Employee of the obligations set out in sections [insert numbering], and that in addition to all other remedies available at law, the Employer shall be entitled to seek injunctive or other equitable relief as a remedy for any such breach.*

Avoiding Disputes

- Start with legal advice
- Don't start a business relationship without getting it documented
- Keep signed documents
- Plan for failure
- When things go badly, consider the big picture – legal fights tend to be costly, lengthy, with an uncertain resolution



 **ANY QUESTIONS?**

THANK YOU



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