

Member's Quarterly

Summer 2021 Edition

Feature

Winning and Losing with Restrictive Covenants

Don't overload the restrictions to avoid clauses being unenforceable

When Restrictive Covenants, such as Non-Compete and Non-Solicitation clauses, are built into employment contracts, they can be a useful tool in protecting an employer's business interests. However, the enforceability of such provisions is a complex and often daunting area of Canadian law. Numerous factors are taken into consideration during a Court's analysis in deciding whether or not a Restrictive Covenant should be upheld and enforced. Even at the best of times, whether or not a Court will uphold the enforceability of such clauses can appear unpredictable. To illustrate the foregoing, here is a simplified case comparison of two relatively similar Ontario Court of Appeal cases.

Winning – *Smilecorp Inc v Pesin*

A Non-Solicitation Clause was agreed to in a dentist's employment contract. The clause prohibited the dentist from soliciting any patients of his employer's dental practice, as well as sending any communications or notice of his resignation to any patients of the practice. The dentist was prohibited from doing so for a period of 2 years.

Before receiving his notice of termination, the dentist made copies of the practice's patient list without the consent of the practice, his intent being to use the information to inform patients of his new practice location. In response, the practice commenced legal action against the dentist for breach of the clause contained within the employment contract.

The Court determined that the clause was enforceable and that the dentist was in breach of the employment contract. The dentist was ordered to pay damages for the business losses the practice suffered.

Losing – *Lyons v Multari*

A Non-Compete Clause was agreed to in a dental surgeon's employment contract. The clause prohibited the dental surgeon from competing within a 5-mile radius of his employer's dental practice. The dental surgeon was prohibited from doing so for a period of 3 years.

After delivering his notice of resignation, the dental surgeon opened a new oral surgery practice approximately 3.7 miles away from the practice. In response, the practice commenced legal action against the dental surgeon for breach of the clause contained within the employment contract.

Despite a seemingly clear breach of the clause, the Court determined that the clause was not enforceable because it was unreasonable in the circumstances; the dental surgeon was not in breach of the employment contract. The practice was not entitled to damages for any business losses suffered.

These cases had similar facts yet arrive at opposite conclusions regarding enforceability of their respective Restrictive Covenants. **The key lesson: enforceability of Restrictive Covenants is extremely fact-dependant.** Generally speaking, enforceability will hinge on the following:

- Legitimate business interests — Does the employer have a proprietary interest in need of protection via Restrictive Covenant?
- Type of Restrictive Covenant used — Was the use of a Non-Compete clause reasonably warranted or would have the use of a Non-Solicitation clause sufficed to adequately protect business interests?



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- Employee's position with the employer — Was the employee considered a "key employee", the "face of the employer" etc., or did the employee have limited interaction with clients and customers?
- Geographic scope of the Restrictive Covenant — Was the geographic scope overbroad or was it appropriate to protect business interests?
- Duration of the Restrictive Covenant — Was the duration unnecessarily long or was it appropriate to protect business interests?
- Clients and customers that the Restrictive Covenant applies to — Does it only apply to existing clients and customers or future clients and customers as well?
- Industry standards; and
- Public interest in preventing Restrictive Covenants from creating monopolies.

Overall, the more "restrictive" that a Restrictive Covenant is, the more difficult it will be to legally enforce. Ironically, an employer's interests are best served by drafting the restrictions as narrowly as possible to protect the employer but not step further than absolutely needed, to avoid the entire restriction clause being unenforceable. Given this delicate balance, employers should seek legal advice if they wish to include such clauses in employment contracts.

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