



## Restrictive Covenants in the Employment Context: How to Achieve Enforceability

By Megan Smith



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Restrictive covenants in employment agreements, commonly known as non-competition or non-solicitation clauses, are notoriously difficult to enforce. Employers seeking recourse after an employee has left to start or join a competing business are often frustrated and disappointed to learn that the non-compete provisions of their employment agreement are unenforceable. Usually, this is because the clauses are too vague or too broad. Through an established body of court cases, Canadian judges have set out very strict requirements for a restrictive covenant to be enforceable.

Courts have justified this approach on the grounds that employees have very little bargaining power upon entering the employment relationship, and that to unnecessarily restrict their ability to earn a living post-employment would be unjust. Accordingly, restrictive covenants contained within an employment agreement are subjected to a higher scrutiny than those found within an agreement to purchase a business, where the purchaser has paid for obtaining the goodwill of the business. This higher scrutiny has also been applied to independent contractor agreements, in which a similar imbalance of power often occurs.

There are two main types of restrictive covenant clauses in employment agreements: non-solicitation provisions (in which the employee is prevented from soliciting customers or employees of the former employer for a time, but can compete generally) and non-competition clauses (the employee is prohibited from competing against the former employer, usually for a defined period and within a defined geographical area).

Courts have held that these types of restrictive covenants are on their face unenforceable as being a restraint of trade, and thus contrary to public policy. The onus is on the party seeking to rely on the clause (i.e., the employer) to establish that it is reasonable.

In demonstrating that a restrictive covenant is reasonable, the employer must establish that it has a proprietary interest in need of protection. While trade secrets, trade connections, confidential information, customer lists, and goodwill have been recognized as legitimate proprietary interests, an employer has no proprietary right per se to its customers.

Once the employer has established a proprietary interest entitled to protection, the Court will consider whether that interest could have been adequately protected by other less restrictive measures. A non-competition provision is usually only required in “exceptional” circumstances, and will not be enforced where a non-solicitation clause would have been adequate.

The Manitoba Court of Appeal has listed a number of factors to be considered when determining whether exceptional circumstances exist so as to justify the use of a non-competition clause:

- the length of service of the employee with the employer;
- the amount of personal service provided by the employee to the client;
- whether the employee dealt with clients exclusively, or on a sustained or recurring basis;

- whether the knowledge about the client which the employee gained was of a confidential nature, or involved an intimate knowledge of the client's particular needs, preferences or idiosyncrasies;
- whether the nature of the employee's work meant that the employee had influence over clients in the sense that the clients relied upon the employee's advice, or trusted the employee;
- if competition by the employee has already occurred, whether there is evidence that clients have switched their custom to that employee, especially without direct solicitation;
- the nature of the business with respect to whether personal knowledge of the clients' confidential matters is required;
- the nature of the business with respect to the strength of customer loyalty, how clients are "won" and kept, and whether the clientele is recurring; and
- the community involved and whether there were clientele yet to be exploited by anyone.

After satisfied the restrictive covenant is necessary, a Court will look to whether the scope of the clause is reasonable by reference to the activity prohibited, the geographical area of the prohibition and the duration of the prohibition. The clause should be no broader than is absolutely necessary to protect the interest of the employer and the language of the clause cannot be ambiguous.

If the language of the clause fails as too broad or ambiguous, will the Court "save" it by reading it down? In most cases, the answer is no. The Supreme Court of Canada has held that notional severance (reading down a contractual provision so as to make it legally enforceable) is not an appropriate mechanism to cure a defective restrictive covenant. Blue-pencil severance (removing part of a contractual provision) may only be resorted to in rare cases where the part being removed is trivial, and not part of the main purpose of the restrictive covenant.

A recent decision dealing with the enforceability of a non-competition clause is *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301. IRIS the Visual Group Western Canada Inc. ("IRIS") delivered eye care services and sold eyewear products through outlets where its customers could have their eyes examined by an optometrist and purchase corrective lenses or eyewear. In order to deliver these services IRIS contracted directly with individual optometrists, including the respondent Dr. Park. Dr. Park provided services for IRIS from 2007-2016 when she resigned to set up her own optometry business 3.5 km away.

IRIS sought to enforce a non-compete provision within its contractual agreement with Dr. Park that prohibited competition within 5 km for a period of 3 years. The language used prohibited the departing optometrists from being in partnership with, or “in conjunction with” or employed by any person or company “carrying on, engaged in, interested in or concerned with a business that competes with” IRIS.

At trial, the judge held that while the temporal and spatial limitations in the clause were reasonable, the description of prohibited activities was unenforceable as being too broad. IRIS appealed.

The British Columbia Court of Appeal agreed with the trial judge, finding that the clause was both ambiguous and overbroad. The Court queried how to determine the nature of the connection required to compete “in conjunction with” another person, or how to determine whether an individual is “concerned with” a competing business. Further, the clause defined a business that competes with IRIS as extending to an entity that dispensed non-prescription optical appliances. If enforced, such a restriction would prevent Dr. Park from engaging in a wide range of work, including work that had nothing to do with the practice of optometry, and could not be said to be the minimal restriction necessary to protect IRIS’s proprietary interests.

IRIS argued that the Court should excise the words “non-prescription” to narrow the list of prohibited activities to render the clause enforceable. The Court declined to do so, finding that it was not at all clear that the words “or non-prescription” were trivial, and that IRIS clearly intended to prevent Dr. Park from competing in any way, however remotely. It would not be appropriate to rewrite the contract to create a more moderate restriction which was not in the intention of the parties.

The IRIS decision illustrates the importance of careful drafting in employment contracts. While restrictive covenants can offer protection to employers, it is important that such clauses meet the relevant legal requirements. It is recommended that an employer seek legal advice when drafting a restrictive covenant clause so as to maximize the likelihood of enforceability.

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