

# Enforceability Of Restrictive Covenants In Ontario: Non-competition And Non-solicitation



Restrictive covenants, including non-competition and non-solicitation clauses, are common elements in both [employment agreements](#) and sales of businesses in Ontario. These clauses are designed to protect the interests of businesses by limiting the actions of employees or former business owners after their departure.

## **Non-Competition**

Non-compete clauses typically restrict employees and former business owners from working for a competitor or starting a competing business for a specified period after leaving their current employment or selling their business. Non-compete clauses can be enforced in the context of a business sale where the seller agrees not to compete with the buyer's business. Additionally, non-compete clauses can be enforced against "executives," defined as individuals holding titles such as chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer, chief corporate development officer, or any other chief executive position. For these individuals, the enforceability of a non-compete clause depends on its construction.

## **Non-Solicitation**

Non-solicitation clauses are intended to prevent business owners from soliciting clients, customers, or employees or customers, for example, of their former business. These clauses aim to safeguard the business's interests and relationships. If they are well-constructed and reasonable, they may pass the enforceability test established in common law.

## **Enforceability**

The Court of Appeal for Ontario (ONCA) has recently clarified the enforceability of restrictive covenants, such as non-competition provisions, in the context of business sales. In the case of *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, 2024 ONCA 388 (CanLII), Dr. Sims bought Dr. Cooke's dentistry practice through an Agreement of Purchase and Sale (APS). As part of the sale, Dr. Cooke agreed to a non-competition and non-solicitation covenant, included in both the APS and a separate

agreement with identical terms. This covenant prohibited Dr. Cooke from practicing dentistry or using his name in such practice for five years within a 15-kilometer radius of his former practice. Despite this agreement, Dr. Cooke informed Dr. Sims of his intent to work at a dental practice 3.3 kilometers away, prompting Dr. Sims to initiate legal action. The primary issue at trial was the enforceability of the Non-Compete clause, which the judge upheld. Dr. Cooke appealed, arguing that the trial judge erroneously placed the burden on him to prove the Non-Compete was unreasonable, instead of on Dr. Sims, who sought to enforce it. The ONCA referenced a prior decision, affirming that “courts will scrutinize the reasonableness of a restrictive covenant more rigorously in the employment context, while presuming validity when such clauses are negotiated as part of a business sale.” Restrictive covenants in business sales are designed to protect the purchaser’s interest in the goodwill of the acquired business and thus face less judicial scrutiny compared to those in employment settings. Moreover, when a vendor and purchaser of equal bargaining power enter into a business sale agreement, courts will only rarely interfere with their judgment on what was reasonable at the time.

## **Drafting Enforceable Restrictive Covenants**

The following best practices should be considered when drafting restrictive covenants to enhance their enforceability:

- 1. Clear and Specific Language:** Use precise language to define the scope of the restrictions, including specific geographic areas, duration, and activities covered.
- 2. Reasonableness:** Ensure that the restrictions are reasonable and proportionate to the protection of legitimate business interests.
- 3. Tailored Agreements:** Customize restrictive covenants based on the individual’s role, access to sensitive information, and level of interaction with clients or customers.
- 4. Legal Advice:** Seek legal advice to ensure that the restrictive covenants comply with Ontario law and reflect current judicial trends.

## **Conclusion**

In conclusion, while restrictive covenants like non-competition and non-solicitation clauses can be valuable tools for protecting business interests, their enforceability in Ontario hinges on their reasonableness and precise drafting. Both employers and buyers of businesses must navigate these legal waters carefully to ensure their covenants stand up to judicial scrutiny.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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