Employment Contracts: How to Lay a Solid Foundation

submitted by:

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A. INTRODUCTION

The contract is an essential aspect of the employment relationship. Generally, it marks the very beginning of the relationship and is often the primary focus at the conclusion. Where the contract is drafted with care it provides both parties with a greater degree of certainty as to how the relationship will continue, it defines the terms that will govern the parties’ obligations, and it even allows for a smooth transition at its conclusion.

The contract, however, has not always been at the core of the employment relationship, and has gained prominence only in recent decades. Previously, the employment relationship relied upon more relational principles to govern conduct. This was especially true prior to industrialisation. Although it is, perhaps, not initially apparent, these past principles assist in providing some guidance with respect to the modern employment contract. While employment law has not swung back to the time of master and servant law, it is evident that the status of the parties is still a primary consideration affecting the interpretation of employment contracts.

The contract remains an essential component of any employment relationship today. It is therefore necessary for an employment lawyer to fully understand the elements of an employment contract, and how the contract interacts with other legal concepts that significantly affect the relationship. An employment contract does not function in a vacuum, and as such it is essential to consider how the provisions within the contract may be interpreted. The purpose of this discussion is to provide insight into the requirements for a flexible and lasting employment agreement. This paper will address key terms of a typical employment contract, and will discuss how the relevant jurisprudence has interpreted these provisions. It is intended that this will provide useful insight for drafters of employment contracts to ensure that the parties have the proper flexibility and certainty to guide the employment relationship.

B. DEVELOPMENT OF THE CONTRACTUAL RELATIONSHIP

In order to fully understand the contextual setting of the employment contract today, it is important to examine the development of the employment relationship. Canada’s employment history, as with many aspects of Canadian history, has its roots in Britain. Traditionally, the employment relationship is deemed to have begun with the advent of master and servant regimes during the fourteenth century. An examination of the principles guiding this system will provide insight into forces, still relevant today, that interact with the modern employment contract. As Judy Fudge notes, “The origins of the contract of employment in the status relation of master and servant help to account for some of the implied duties in the contract of employment that distinguish it from other historical development of employment relations.”\(^1\) The unique history of the employment relationship has influenced the manner in which contractual principles have been applied to that relationship.

In early English society, “paternalistic control and individualism were evident,” and they gained further prominence during the sixteenth and seventeenth centuries. Reciprocity of obligation was the defining feature of this regime, although the master was arguably in a position of significant control over the subservient servant. “‘No man without a lord’ was the phrase which expressed this principle whereby all subjects of the realm were bound within a pyramidal structure of reciprocal obligations and protection and obedience.” Consequently, this regime of employment relations had a broad impact. It was directly responsible for maintaining the hierarchical ordering of early British society. This system was in place until the early nineteenth century. It was at this time that contractual principles began to displace status-based principles.

Although the employment contract began to gain prevalence during this period, the employment relationship was still influenced by the imposition of obligations external to the contract. Contractual terms started to be implied:

This perspective of the employment relationship was buttressed by 19th century English judges who implied into the employment contract a standard duty of fidelity on the employee which was transposed virtually intact from the neo-feudal law of master and servant which existed prior to the Industrial Revolution.

Despite this, the relationship continued to experience a fundamental shift. As well, “[b]y the beginning of the nineteenth century, laissez-faire was displacing older policies of paternalism and mercantilism…” At this point, labour began to be treated as a commodity to be bought and sold. This led to the advent of the market and to freedom of contract between employers and employees. This amounted to a shift from status to contract as the basis for the employment relationship.

The contract-based approach to employment continued, without much interference, into the mid 20th century. “The ubiquity of the contract of employment, both as an institutional feature of labour markets and as a legal concept, went unchallenged until the advent of the welfare state,

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3 Ibid. at 9.


7 Supra note 2 at 9.

8 Ibid.
which was accompanied by the incremental growth of statutory regulation.”⁹ At this point, legislation began to regulate the relationship between employers and employees. Essentially, “…law imposed employment status in the absence of contract and stipulated many terms of the employment relationship, thereby reducing the scope for freedom of contract.”¹⁰ Arguably, this created a shift in focus back to the status of the parties, a focus which influences the employment relationship still today.

When drafting the modern employment contract these considerations are unlikely to enter into the parties’ consideration. However, many of the principles of master-servant law continue to impact the relationship today. It is, perhaps, this history that produces employee protection through implied terms, common law presumptions, and requirements such as reasonableness and fidelity. The employment relationship is certainly impacted by status considerations, which effectively buttress the freedom of contract in the realm of employment. Acknowledging this history surely assists in understanding the limitations of the written employment contract, as discussed below.

C. CONSIDERATION & TIMING

1. The Importance of Consideration

It is a general principle in contract law that, in order for a valid contract to be created, consideration must pass between the parties. An employment contract, of course, is no exception to this rule. As such, this should be a primary concern for an employment lawyer. An employment contract, at its roots, is about the employee’s promise to provide services and the employer’s promise to hire.¹¹ Without consideration, the employment contract is null and void.

The requirement of consideration is, with respect to most employment contracts, a non-issue. In most cases it is not difficult to prove that either the employer made a promise to pay an individual for services or that an employee undertook to provide such services. The analysis is less clear, however, where the parties seek to amend the contract during an existing employment relationship.

2. Mid-Contract Changes

Where either the employer or the employee seeks to make mid-contract changes to the employment contract, further consideration is required. For many years, the principle governing mid-contract changes was that an employer’s mere promise to continue the employment of an employee was insufficient to amount to valid consideration. This principle was articulated in the Ontario Court of Appeal decision Francis v. Canadian Imperial Bank of Commerce.¹² The case

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⁹ Supra note 4 at 40.

¹⁰ Ibid.

¹¹ See, for instance, S. Ball, Canadian Employment Law (Toronto: Canada Law Book Inc., looseleaf) at 6-1.

¹² (1994), 21 O.R. (3d) 75 (Ont. C.A) [Francis].
involved an employee who had accepted a position with the bank upon receiving a letter of offer for employment. The offer was conditional only on the receipt of a satisfactory letter of reference from the employee’s previous employer. The individual responded with an unconditional acceptance of the position. Upon attending work, he was given numerous forms and documents, including an “Employment Agreement.” The issue at trial was whether the employment agreement constituted a valid agreement between the parties.

The bank submitted that the employee’s initial acceptance did not constitute the whole employment agreement as it was conditional upon further forms and documents. The court stated that in order to vary an existing contract, new or additional consideration is required. The court found that “[t]he bank was already bound to employ the plaintiff as a result of the exchange of correspondence and the fulfilment of the condition of a suitable reference.” Therefore, additional consideration was required to alter this agreement. No new consideration was provided at the time that Mr. Francis was asked to sign the employment agreement; therefore the revised contract was unenforceable. Consequently, the period of reasonable notice implied in the earlier contract applied to Mr. Francis.

The courts readdressed the issue of mid-contract amendments in the decision in *Techform Products Ltd. v. Wolda*. The Ontario Court of Appeal specifically addressed whether continued employment could amount to valid consideration. This case stemmed from an intellectual property dispute between Techform Products Ltd. and its former employee, Mr. Wolda. Mr. Wolda had previously been an employee and independent contractor with the company. Essentially, “[t]he central issue in *Techform* was who owned the rights to inventions developed by Mr. Wolda: Techform or Mr. Wolda, a former employee who became an independent contractor?” In this case, Mr. Wolda’s employer asked him to sign an “Employee Technology Agreement” (ETA) after he had provided consulting services for the company for approximately four years. The agreement assigned his rights of invention to Techform. Techform indicated that his contract would be terminated if he did not sign the additional agreement. At trial, the court held that there was no consideration to support the ETA.

However, the Court of Appeal reversed the trial judgment and found that sufficient consideration existed in Techform not terminating its relationship with Mr. Wolda. The court specifically stated, “The consideration set out in the ETA was “continuing employment” with Techform.” Further, the court held that “…implied forebearance from dismissal for a reasonable period is adequate consideration.” Techform’s agreement to not terminate Mr. Wolda for a reasonable

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14 (2001), 56 O.R. (3d) 1 (Ont. C.A.) [*Techform*].
16 *Supra* note 14 at para. 18.
period of time following his signing the agreement constituted sufficient consideration. As a result, the ETA was binding between the parties.

The court examined the nature of forbearance as an essential consideration. It is essential that the employee be offered something beyond that to which he or she is already entitled:

As the Court of Appeal noted, the principle that is fundamental to consideration in the context of an employment contract amendment is that, in return for the new promise received by the employer, something must pass to the employee. In addition, the “something” must go beyond that to which the employee is entitled under the original contract.  

Simply allowing the employee to continue employment is insufficient for valid consideration. The employer must have had the intent to terminate the relationship in order for true forbearance to exist. Further, the court held that continued employment in addition to an implied forbearance on the part of the employer from dismissing an employee after the signing of the agreement will provide valid consideration. This is the case, provided that the employer’s promise provides further job security to the employee for a reasonable period of time. Essentially, there must be a clear intention to terminate the employee prior to the additional agreement, and the employer must promise to not terminate the employee for a reasonable period of time following the agreement.

The decision in Hobbs v. TDI Canada Ltd. further considers the issue of mid-contract amendments. The plaintiff, Mr. Hobbs, was hired as a commissioned salesperson after the oral negotiation of his commission rates. Subsequently, he signed a written offer of employment that indicated that his commission rates would be provided in a separate document. Two weeks after he commenced work he was provided with a “Solicitor’s Agreement” that he was required to sign. The agreement outlined the commissions agreed upon, but also included a provision stating that the rates were subject to change at TDI’s discretion. The agreement further stated that commission was not payable until customer billing was complete. Mr. Hobbs reluctantly signed it. Eventually, the employee quit his employment with TDI and found another position with a different company. TDI’s position was that the subsequent agreement precluded it from paying commission beyond his draw at the date of resignation.

The Court of Appeal rejected the trial judge’s finding that the two agreements were one contract in two parts. The court stated the following three reasons for this conclusion:

(i) TDI did not present the initial agreement to Mr. Hobbs as the introductory part of a more extensive contract that was to follow at a later date;

(ii) The second agreement was inconsistent with the commission arrangement originally agreed upon by the parties; and

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18 Supra note 15 at 3.

(iii) The Solicitor’s Agreement was provided to Mr. Hobbs only after he had already begun working under the initial agreement.20

Consequently, the solicitor’s agreement was deemed to be an amendment to the initial contract. Further consideration was required to make the solicitor’s agreement a valid agreement. In assessing whether there was valid consideration in this case, the court commented on the importance of providing the employee with a further benefit. The court stated at paragraph 42:

The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognises this vulnerability, and the courts should be careful to apply Maguire and Techform Products only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.

The court concluded that no such consideration was provided to Mr. Hobbs. There was no evidence to suggest that TDI had intended to terminate Mr. Hobbs’s employment prior to his signing the solicitor’s agreement. As such, the agreement was not a valid amendment to the employment contract.

The decision in Kohler Canada Co. v. Porter21 further articulates the requirement for valid consideration to amend the terms of employment. The case surrounded a dispute regarding the validity of restrictive covenants following the employee’s resignation from the company. The employee had worked for his employer for 13 years without a contract. Without any warning, he was then provided with an employment contract to sign. He signed the agreement without any explanation. The agreement contained provisions restricting his post-employment work. The court did not uphold the covenants, as the contract did not contain valid consideration. At paragraph 40, the court clearly stated:

The non-competition clause was clearly an amendment to the existing employment relationship that was adverse to the employee. As such, the employer is required to give something of value to the employee in exchange for that promise, beyond continued employment to which the employee is already entitled under the original contract.22

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20 Ibid. at paras. 23-28.
22 Ibid. at para. 40.
In order to validate a mid-employment amendment, consideration must be provided by way of a new benefit to which the employee is not already entitled.

Courts have been willing to find consideration in circumstances where the employee is provided a further benefit of some value. The decision in Basaraba v. Wapiti Regional Library\(^\text{23}\) involved the provision of an employment contract to an employee during mid-employment. Ms. Basaraba commenced her employment in 1990. Following a leave of absence nine years later, her employer provided her with an employment contract to sign. She was informed that all management staff was required to sign contracts. She subsequently signed the agreement. The contract included provisions providing her with a new title, a salary increase, and extended annual vacation. The court found that these terms provided sufficient consideration to uphold the new employment contract. As a result, the notice provisions in this agreement governed her dismissal.

The courts have, in some instances, upheld consideration that had not yet vested in the employee as a benefit. The British Columbia decision Duprey v. Seanix Technology (Canada) Inc.\(^\text{24}\) addressed this in a claim for wrongful dismissal. The employee claimed that his contract consisted of a verbal agreement and subsequent letters providing his job description. The employer alleged that the contract was governed by an agreement signed subsequent to his employment commencing. This agreement stipulated that Mr. Duprey was a probationer for a period of six months, and that the notice period upon dismissal was fixed at the statutory minimum for this period. Medical benefits were also included to commence upon conclusion of the probationary period. The court questioned whether this subsequent agreement contained the necessary consideration to amend the employment contract.

The court determined that a benefit that has not yet been enjoyed by the employee may amount to valid consideration. The court found that the medical benefits were valid consideration, despite the fact that the employee had not actually yet received the benefit. The court stated: “[The coverage] remained of value to the plaintiff, albeit, at least initially, only potentially available.”\(^\text{25}\) In some cases, a potential benefit that is not yet realized may provide the basis for valid consideration.

Finally, it should be noted that notice of the contractual change may be sufficient to amend the contract in lieu of consideration. This was the case in Wronko v. Western Inventory Services Ltd.\(^\text{26}\) surrounding a claim for wrongful dismissal.\(^\text{27}\) The case involved an employee who worked for the company from 1988 to 2004. During this period, he received numerous promotions with increasing responsibility and salary. The employee signed a new employment contract at the

\(^{23}\) [2002] S.J. No. 479 (Sask. Q.B.) [Basaraba].


\(^{25}\) Ibid. at para. 16.

\(^{26}\) [2006] O.J. 4042 (Ont. S.C.) [Wronko].

\(^{27}\) Supra note 15 at 8.
point of each promotion. His final promotion involved his appointment to the position of vice-president.

His employment contract signed at this time altered his termination provision, replacing a termination provision of two (2) weeks’ notice for each year of service to a maximum of twenty (20) weeks by a requirement that the defendant pay “the previous two (2) years salary plus bonus to be paid as termination if notice of termination is given to you at any fiscal year end or at any other time.” (sic) Two years later, when a new president was hired, the employee was asked to sign a new agreement which limited his notice of termination to a maximum of thirty weeks. He refused to sign this agreement upon receiving independent legal advice. The employer then responded by providing the employee with a total of 104 weeks’ notice that his contract would be amended to include the new termination provision. Prior to the completion of this notice period, he informed his employer that he considered himself constructively dismissed. The court held that the notice provided by the employer was sufficiently reasonable to amend the previous contract.28

3. Recommendations

The following recommendations are based on the above case law (it should be noted that the first two recommendations provide the greatest certainty):

- Ensure that the employment contract, in its entirety, is signed prior to employment commencing. This provides certainty of terms to both parties;

- Employers who seek to amend the contract during employment should provide the employee with some additional benefit in exchange for the change. This may take the form of a promotion or additional compensation/benefits;

- Continuing an employee’s employment is only further consideration to support an amendment where the employer can demonstrate a clear and prior intent to terminate that employee;

- In cases where the employer cannot provide an additional benefit to the employee for a mid-contract amendment, the employer should advise the employee of the impending change a significant period before the change is set to occur. This, however, does not provide the same degree of certainty as the prior recommendations.

D. CREATING A SOLID FOUNDATION

1. A Lasting Relationship: Flexibility

Effective contract drafting must consider the reality that few jobs remain the same over a prolonged period of time. Inevitably, employees receive promotions, duties are reassigned, and

the workplace requires general renewal. At the outset of an employment relationship it may be difficult, if not impossible, to account for the magnitude of potential change that may occur over the course of the relationship. It is therefore important to ensure that the core of the contractual arrangement has sufficient flexibility to apply to a multitude of circumstances into the future. This is necessary to ensure the parties the certainty that is desired through a written employment contract.

There are essentially two circumstances where significant changes to the relationship can render an employment contract unenforceable. First, this may occur where the substratum of the employment contract has significantly changed since the inception of the employment contract. Second, it may be implied that the contract could not have been intended to apply to the position ultimately occupied by the employee. In each case, the foundation of the contract is no longer the basis for the current employment relationship. The important consideration, therefore, is how to draft a contract with a sufficiently broad foundation for future changes to employment.

With the proper steps, a contract can achieve the necessary flexibility to continue application into the unknown future. A contract that does not provide such flexibility and foresight may very well lose its relevance. Where a contract is no longer relevant to the parties, it may very well disappear. This becomes particularly problematic at the conclusion of an employment relationship where one of the parties seeks to rely on the framework of the contract. This situation is explored in recent Canadian decisions, as discussed below.

(a) Flexibility and the Substratum of the Contract

As mentioned above, it may be possible for a valid employment contract to disappear where the substratum of the initial employment is no longer applicable to current circumstances. This is explored in the Ontario Court of Appeal decision of Irrcher v. MI Developments Inc. This case involved the claim of an employee that the termination provisions of his contract did not apply at the time of his termination because the substratum of the contract had disappeared. The employee had begun work as a corporate engineer with an affiliate of MI Developments Inc. in 1986. Mr. Irrcher moved through a series of positions with the company and its affiliates, each time signing a different contract. He finally signed a contract with the company in 1990, which contained a provision for six months’ notice upon termination.

During his employment with MI Developments Inc., Mr. Irrcher received increased responsibility and remuneration. Essentially, the court found that his remuneration and the method of its calculation had changed. His title had also changed over time. The Court of Appeal upheld that trial judge’s finding that the 1990 written contract did not apply to Mr. Irrcher at the time of his termination because the substratum of the written contract had disappeared. This was the result of a fundamental change in the nature of his job.

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30 [2003] O.J. No. 4087 (Ont. C.A.) [Irrcher].

31 Ibid. at para. 1.
Consequently, the employment contract had disappeared and Mr. Irrcher was entitled to reasonable notice under the common law.

The British Columbia case, *Strench v. Canem Systems Ltd.*, involved a wrongful dismissal allegation by a branch manager. He had begun employment two years prior as a construction manager, and was subsequently promoted. Prior to his promotion, he went through a similar evaluation process as when he was initially hired. As the result of the promotion, he received:

(i) An increase in salary to $100,000 per year (an increase of $25,000);
(ii) An increase in car allowance to $700 per month; and
(iii) An enhancement of his bonus;
(iv) A change in work and responsibilities as follows:
   a. He became directly responsible for all administrative and operations matters for 65 employees;
   b. He would now be reporting directly to the President; and
   c. He became responsible for making contributions to overall company policy.

The employee claimed that, as the result of his promotion, the provisions of the contract no longer applied to him. He claimed that he was therefore entitled to the common law notice period.

Interestingly, the court disagreed. The court relied on a clause of the employment contract that allowed for oral amendments to the employment contract so long as these amendments did not conflict with the existing contract. As such, the court found that the contract did contemplate such changes to the employment contract, and that the changes were not so fundamental as to extinguish the substratum of the employment contract. It seems that the court evaluated the change to the nature of the job as being relatively unsubstantial.

The British Columbia decision in *Krieser v. Active Chemicals Ltd.* provides further assistance. While the decision was essentially determined on the issue of valid consideration for mid-contract amendments, the decision provides insight into the degree of change required for the substratum of the contract to disappear. The original contract was not referenced or followed during the employee’s 17-year employment with the employer. The court found that the substratum of the employment contract had disappeared for two reasons. First, the parties had never relied upon the contract to govern their relationship. Second, the employee’s position had changed substantially within the company, even though this was never reflected in a change in title. The employee was awarded 13 months’ notice.

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33 *Strench*, supra note 32 at para. 75.

34 *Krieser*, supra note 34.

35 *Krieser*, supra note 34 at 56.
The determining factor in cases such as these is whether the employee advanced through the hierarchy of the organization in a substantial way. Specifically,\textsuperscript{36}

The logic is that one would expect that an enhancement of position and salary would be accompanied by an enhancement in the entitlement to notice.\textsuperscript{37} In addition, failure to refer to an earlier contract which limits the common law reasonable notice requirement at the time an employee has been promoted, has been considered an indicia that the previous termination provision is no longer in the minds of the party as being an element of the employment contract.\textsuperscript{38}

While the duration of employment sometimes may render the original contract obsolete, time alone does not invalidate the substratum of the contract. Rather, there must be a significant change to remuneration, responsibilities and status. This change may in some cases need to be more significant than a natural progression through the organizational ladder. However, it is apparent that flexibility must be built into the employment to ensure that the certainty of the written contract remains relevant.

2. At the End of the Relationship: Termination Clauses

It is important to draft terms in an employment contract that provide certainty at the conclusion of the employment relationship. However, at the time of signing an employment agreement, an employee generally does not appreciate his or her full notice entitlement upon termination. Consequently, it is very possible that an employee will agree to a notice period under contract that is less than his or her common law entitlement.\textsuperscript{39} It is only after dismissal that such an employee will realise that he or she has contracted for a reduced notice period. Despite this, Canadian courts may enforce such terms provided they are clear and unambiguous.

(a) Compliance with Statutory Requirements

Termination clauses must fully comply with the minimum statutory requirements of the relevant jurisdiction. Therefore, it is also important to consider the existing statutory framework. Caution must be exercised to ensure that the terms placed in the contract will be upheld. The flexibility of parties to contract precisely as they choose has its limits. Particular attention must be given to termination clauses, to ensure that the employment relationship terminates as planned. The courts have held that parties to an employment contract may rebut the presumption of reasonable notice through the use of clear language within the employment contract. However, it is absolutely essential that the clause comply with the minimum standards mandated in the applicable employment statute.

\textsuperscript{36} Supra note 15 at 25.
\textsuperscript{38} See, for instance, Sawko v. Foseco Canada Ltd. (1987), 15 C.C.E.L. 309 (Ont. Dist. Ct.) [Sawko].
Canadian jurisdictions have generally codified this principle in employment statutes. For the present discussion, it is useful to point out that both Manitoba and Ontario have provisions within their respective employment codes. *The Employment Standards Code* of Manitoba, provides that “[t]he Code prevails over any enactment, agreement, right at common law or custom that (a) provides to an employee wages that are less than those provided under this Code; or (b) imposes on an employer an obligation or duty that is less than an obligation or duty imposed under this Code.”40 The Ontario *Employment Standards Act, 2000* 41 articulates this in s. 5(1), indicating that “…no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.” In general terms, the drafters of an employment contract must look to the appropriate provincial statute.

The Supreme Court decision in *Machtinger v. HOJ Industries Ltd.*42 established that the termination provisions within an employment contract must satisfy the minimum statutory requirements in the jurisdiction of employment. If the provision does not meet the minimum standard, then the common law presumption of reasonable notice will apply. The common law notice period is a presumed and must be rebutted. The case involved the wrongful dismissal of two employees. Each had signed employment contracts providing a lesser notice period upon termination than that mandated by the Ontario statute.

Iacobucci J. concluded for the court that where a notice provision in a contract is shorter than that mandated by statute, the termination clause is null and void, and cannot be used as evidence of the parties’ intention.43 Further, where “…an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted.”44 Finally, an employer is not able to rely on the minimum standards set out in the Act where the contractual provisions do not meet the minimum requirements. Allowing the employer to rely on the basic statutory provisions after attempting to subvert these employees would be a “perverse” outcome.45 Consequently, the common law governs the period of notice to be provided in such cases.

It is important, when drafting an employment contract, to also be conscious of the minimum statutory requirements as they apply throughout the entire contract.46 This is demonstrated in the

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40 C.C.S.M. c. E110 [MESC] at s. 3(3).
41 S.O. 2000, c. 41 [ESA].
44 *Ibid.* at para. 34.
46 *Supra* note 15 at 10.
decision of *Shore v. Ladner Downs*. The *Shore* case involved the question of whether or not the notice provision within the employment contract was valid. The provision was as follows:

> ... Firm policy dictates your employment to be probationary for the first 6 months during which employment may be terminated at the sole discretion of the Firm without cause. Notice period within and after the probation period to be 30 days by either party.

At the time of his dismissal, Mr. Shore was entitled by statute to less than the 30 days’ notice. However, the legislation contained provisions increasing the notice period over time. At some point in the future, the contract term would violate the statutory minimum. The employer claimed, therefore, that the provision was valid and would only be void at “…such time as the statutory requirement exceeded the contractual term.” As reasons for its decision, the court stated at paragraph 16:

> The policy considerations applied in *Machtinger* ...would not be served if the contract were to be interpreted in favour of the employer so as to leave the individual employee responsible for determining, at the point of termination, whether the statutory minimum had risen above the notice period stated in the contract.

Consequently, where a contract clause may violate minimum employment standards at some future date, the provision may be held null and void in the present. The term may then be void from the beginning.

It is apparent that the parties to an employment contract must consider the current and future requirements mandated by employment legislation. This is not a consideration that should be postponed. Notice provisions must satisfy the minimum legislative provisions for notice throughout the entire life of the contract. It should be further emphasised that these obligations cannot be ignored. A provision allowing the employer to terminate an employee “at-will” without notice is clearly unenforceable.

**Ambiguity**

Termination clauses must be clear. When drafting termination clauses that limit the common law of reasonable notice, the parties must ensure that the terms are sufficiently clear to be enforceable. Canadian case law is clear that a clause attempting to limit the application of common law reasonable notice must not be ambiguous. Ambiguity is a fatal flaw.

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Dodich v. Leisure Care Canada\(^{51}\) provides a recent example of the treatment of ambiguous termination provisions. The plaintiff was employed as the Manager of Recreation Services at a seniors’ residence in Vancouver. After nearly two years’ employment, she was terminated without notice and without cause. She claimed that she was entitled to reasonable notice, rather than the three weeks’ salary she was provided. The defendant claimed that the employment contract contained a clause that rebutted the common law presumption of reasonable notice. The clause stated:

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\text{…Lifestyle [the defendant] may end the employment relationship by providing you with a minimum of two (2) weeks notice, or pay in lieu of notice, or such that is required by the Employment Standards Act, whichever is greater. In any event, we guarantee that you will be provided with compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the Employment Standards Act.}
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The court found that the clause did not stipulate an upper limit, and that the presumption of reasonable notice was not clearly displaced by another specified notice period.\(^{52}\) The clause was ambiguous and unenforceable as drafted.

Parties should also be aware of the implications of progressive scales of reasonable notice entitlement, based upon time of employment, when drafting employment contracts.\(^{53}\) Such schemes usually include the term “at least” and provide a specified amount of notice per year of employment. A contract term that provides notice for termination “…in accordance with the Employment Standards Act…” may not provide sufficient clarity on its own in such instances. This is because the notice period arguably requires some calculation. It may not be sufficiently specific. However, in other cases such references to employment standards codes were deemed sufficiently clear to be valid.\(^{54}\) Consequently, the parties to an employment contract must be aware of the implications of specific wording in the legislation.

Certainty is best ensured through providing contract terms that specify the precise amount of reasonable notice to be provided. This would ensure the necessary clarity to reduce the likelihood that either party would later claim that they did not understand the clause. The best method to ensure that a termination provision is accepted, however, is through proper negotiation between the parties such that both parties accept the notice stipulated.

\(^{51}\) [2006] B.C.J. No. 92 (B.C.S.C.) [Dodich].

\(^{52}\) Ibid. at para. 11.


(c) **Employer Concerns – Contra Proferentem**

Where the terms of the termination provision limiting reasonable notice are unclear, it is the employer who bears the weight of the consequences. This is due to the contract law principle of *contra proferentem*. In the event that a contract provision is ambiguous, the clause will be interpreted as against the drafter of the contract. As a result, the court may interpret unclear termination provisions against the interests of the party who drafted the employment contract. With only the rarest exception, the employer is the victim of the rule. It is therefore in the employer’s best interest to ensure that such a clause is clearly expressed.

The decision in *Dodich*\(^55\) provides application of this rule. As noted above, the termination provision allowed for two possible outcomes. Specifically, the employee would receive either two weeks’ salary in lieu of notice or the notice as provided under the employment statute. The court determined that competing interpretations of entitlement were therefore possible. The court therefore concluded, “The defendant drafted the termination clause and the principle of *contra proferentum* where competing interpretations are put forth must be construed against it.”\(^56\) The onus was placed upon the employer to demonstrate that the provision within the employment contract displaced the common law presumption of reasonable notice. Clearly, it is in the employer’s best interest to ensure certainty, clarity and agreement with respect to termination clauses.

3. **Recommendations**

The following recommendations are based on the above case law:

(a) **To ensure the employment contract persists:**

- Flexibility can be built into an employment contract by including language allowing for the possibility of a fundamental change in the employee’s duties or compensation during employment;

- For certainty, an employee may be asked to periodically acknowledge that the employment agreement continues to apply to his or her employment, despite any alterations in the position;

- Update the employment contract each time an employee receives a promotion or enhanced compensation if its terms are not flexible.

(b) **Where the employer seeks to limit the notice period upon termination, ensure that the contract provision complies with the statute:**

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\(^55\) *Supra* note 51.

\(^56\) *Ibid.* at para. 15.
• Provide fixed notice period provisions that meet or exceed the notice period of the applicable employment statute;

• Draft termination clauses to reference the relevant notice period in the applicable legislation. This further ensures that the provision remains compliant as the legislation is amended over time;

• Avoid uncertain language, such as “at least” when drafting termination provisions;

• Review and amend termination provisions when the legislation changes;

• Stipulate in the termination provision that the employee is entitled to the fixed amount of notice in the contract or the statutory minimum, whichever is greater.

E. POST-EMPLOYMENT CONCERNS

1. Restrictive Covenants

Restrictive covenants are a common contractual method to protect the employer’s interests following the conclusion of the employment relationship. Generally, these clauses restrict the employee’s ability to compete with the employer following employment. These provisions tend to encompass highly skilled workers in professional or specialized fields. Employees who have access to sensitive or proprietary information may be required to sign a confidentiality agreement prior to their employment. “This will ensure that they do not use or divulge confidential information either during employment or for a period of time thereafter.”

Other common restrictive covenants include non-competition agreements and non-solicitation agreements. A restrictive covenant limits the employee from competing against the employer, usually within a pre-arranged geographic region, following employment. A non-solicitation agreement endeavours to restrict the employee’s ability to solicit the former employer’s suppliers, customers and employees. An employer must ensure that such a clause, however, is reasonable as to its nature and its scope. In a case where the covenant unfairly restricts the former employee from exercising a livelihood, the clause will be unenforceable.

The employer must ensure that sufficient consideration flows to the employee for his or her promise, such as reasonable notice or compensation in lieu of notice. The consideration may take a variety of forms, and may include compensation for the duration of the covenant. However, where the covenant is included with the initial employment contract, no additional consideration is necessary.


58 See, for example, Singh v. 3829537 Canada Inc., [2005] O.J. No. 2402 (Ont. S.C.J.).
2. Judicial Treatment

It is important to note that, due to the restrictive nature of these clauses, the very existence of the clause does not ensure its subsequent enforcement. The employer must enforce the clause through the courts by obtaining an injunction. The employer must succeed in demonstrating a strong *prima facie* case that the injunction is enforceable before the actions of an enterprising ex-employee will be restricted.\(^5\) The case law, below, demonstrates when a restrictive covenant will be deemed too harsh or unfair to be upheld against an employee.

(a) Interpretation of Clauses – *Contra Proferentem*

The British Columbia case, *KRG Insurance Brokers (Western) Inc. v. Shafron*\(^6\) provides an interesting example of the court’s interpretation of restrictive covenants. The case involved a claim by an employer that its former employee was restricted from conducting business within Metropolitan Vancouver. The covenant stipulated that the employee would not engage in the insurance brokerage business in Metropolitan Vancouver for three years following employment with KRG. It is important to note that this term had no precise meaning and did not amount to the Greater Vancouver Regional District. The employee subsequently left KRG Insurance, and began working as a broker in the Richmond area, near Vancouver. Much of his business followed him to this new company. The trial judge found that the restrictive covenant was unreasonable, uncertain and unclear. As a result, the trial judge did not enforce the agreement against the employee.

The appeal court held, however, that the term was reasonable and understandable. Specifically, the court interpreted the parties’ wording as “…clearly intend[ing] a geographic reach that included the City of Vancouver and something more.”\(^6\) The court, however, also found that the parties did not intend to include the *entire* Greater Vancouver Regional District. It is interesting that the court did not consider the clause to be vague, and therefore interpret the clause against the drafter. Rather, the court went to great efforts to understand the intention of the parties. Despite this approach, it is always advisable for the parties to seek clarity in their contractual language.

(b) Enforceability / Reasonableness

(i) Non-Competition / Non-Solicitation Clauses

A restrictive covenant will only be enforced where it is deemed reasonable. This assessment considers the length of time that it is intended to apply, and the geographic scope of its application. Particularly, the court considers the public policy implications of these clauses, as the provision reduces employability and business competition.

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\(^6\) [2007] B.C.J. No. 261 (B.C.C.A.) [*KRG*].

Lyons v. Multari\textsuperscript{62} (leave to appeal dismissed by the Supreme Court) provides insight into how the courts approach the enforceability of restrictive covenants. This case involved a dentist who had joined an existing dental practice. At the time of entering the business, the dentist agreed to a non-competition agreement that restricted him from later opening a dentistry office within five miles for a period of three years. Subsequently, the dentist left that office and opened his own business. Eventually, he opened a competing practice within five miles of his former employer. The employer deemed this to be a violation of its agreement. The court stated that, generally, non-solicitation clauses are acceptable; however, non-competition clauses will be upheld in exceptional cases only.\textsuperscript{63} The court held that the non-competition agreement was overly broad, and that the employer’s business could have been protected by a less-restrictive non-solicitation agreement. The court stated:

\begin{quote}
The non-competition clause is a more drastic weapon in an employer's arsenal. Its focus is much broader than an attempt to protect the employer's client or customer base; it extends to an attempt to keep the former employee out of the business.
Usually, non-competition clauses are limited in terms of space and time.\textsuperscript{64}
\end{quote}

Generally, “…the courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests.”\textsuperscript{65} A non-competition clause will only be enforced in exceptional cases.

Friesen v. McKague,\textsuperscript{66} an earlier decision of the Manitoba Court of Appeal, also considers the reasonability of restrictive covenants. This case involved an appeal of an order granting an injunction against a veterinarian preventing him from practising in Steinbach, Manitoba. The restrictive covenant, signed at the initiation of employment, essentially prevented the employee from competing within a 25-mile radius of Steinbach for a period of three years. The employee alleged that the clause should be void as it was unreasonable. The court disagreed.

The court stated that a number of factors must be considered to determine reasonableness, including the interests of the employee. The court noted:

\begin{quote}
A covenant in restraint of trade as between an employer and an employee is \textit{prima facie} unenforceable. Nonetheless, if it is shown that the employer had a
\end{quote}

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\textsuperscript{62} (2000), 50 O.R. (3d) 526 (Ont. C.A.) \textit{[Lyons]}.

\textsuperscript{63} \textit{Ibid.} at para. 49.

\textsuperscript{64} \textit{Ibid.} at para. 31.

\textsuperscript{65} \textit{Ibid.} at para. 33.

\textsuperscript{66} (1992), 96 D.L.R. (4th) 341 (Man. C.A.) \textit{[Friesen]}.
legitimate business interest to protect and that the restraint is reasonable, both between the parties and in the public interest, it may be enforced.\(^67\)

The court considered that there was no inequality in bargaining power between the parties and that the parties knew that a close relationship would form between the employee and the employer’s customers. In such cases, where the employee essentially becomes the personification of the business, the employer will have a proprietary interest in need of protection.\(^68\) As a result, the circumstances of this case justified an exception to the general rule that a non-competition agreement is void.

The recent Manitoba Court of Appeal decision in *Winnipeg Livestock Sales Ltd. v. Plewman*\(^69\) provides further consideration of the reasonableness of restrictive covenants. This case involved a well-reputed auctioneer, Mr. Plewman, employed by a large auction market. Mr. Plewman signed a contract including a restrictive covenant that stated he would not solicit business from, or provide services to, any of the auction market’s competitors for 18 months following termination of his employment. The employer sought to enforce this agreement against Mr. Plewman.

The court concisely outlined the preferred approach in assessing restrictive covenants. The court stated that it must first assess whether the employer has a proprietary interest in need of protection, and then examine whether there is a less invasive means of protecting that interest.\(^70\) Next, the court must assess whether the temporal and spatial restrictions are unreasonable or too broad. Finally, the court must assess public policy considerations, and assess whether they unnecessarily prevent competition.\(^71\) The court held that the employer did not have a proprietary interest, either in the skill of Mr. Plewman or in the formation of close bonds between Mr. Plewman and the business’s clients. The court held that the employer did not require such broad protection as that provided by the restrictive covenant.

*Sherwood Dash Inc. v. Woodview Products Inc.*\(^72\) provides a further example of where the courts held that the non-competition was too broad. The covenant in this case restricted the employees from working for any competitor anywhere for a period of two years following their employment. The court stated, “It is arguable in the immediate case that the restrictive covenant goes too far; colloquially speaking, it is ‘overkill.’”\(^73\) The court held that this clause was unenforceable, since it was too broad both spatially and temporally.


\(^68\) *Ibid.* at 346.


\(^70\) *Ibid.* at para. 22.


\(^72\) [2005] O.J. No. 5298 (Ont. S.C.J.) [*Sherwood*].

\(^73\) *Ibid.* at para. 69.
Essentially, a restrictive covenant is unenforceable where the restriction is overly broad, either temporally or spatially. Drafters of such clauses must ensure that they do not extend the restrictions too far, in effect unfairly limiting the employee’s ability to work. Further, the courts have a definite preference for non-solicitation agreements, as the inability to engage clients of an employee’s former employer is much less limiting.

(ii) Confidentiality Clauses

Absent any contract provision, an employee owes a duty of fidelity to his or her employer. However, an employer may strengthen this obligation by including a confidentiality agreement in the employment contract. This may also be useful in reiterating to the employee his or her obligations regarding the employer’s trade secrets and customer lists.

The use of confidentiality clauses has its limits, though, as articulated by the courts. The decision in *IT/NET Ottawa Inc. v. Berthiaume* is a recent Ontario case that provides insight into the acceptable scope of confidentiality clauses. The case involved an appeal of a trial decision that awarded the employer damages for breach of contract based on the employee’s breach of his duty of fidelity. The court held that in order for an employee to breach a confidentiality agreement, the employee must both be aware of the confidential information and have misused it. Essentially, the scope of confidentiality agreements is limited to preventing the use of confidential information for unfair competitive purposes. The appeal was consequently allowed.

The decision in *M.E.P. Environmental Products Ltd. v. Hi Performance Coatings Co. Ltd.* further discusses the validity of a confidentiality agreement, but focuses on its function as a restrictive covenant. This case involved a confidentiality agreement that entitled the employer to indemnity for losses or damages that would arise from a former employee’s use or disclosure of confidential information, as broadly defined in the agreement. The employees were prohibited from soliciting clients and suppliers identified in the agreement. Further, the clause required the employees to return or destroy all confidential information following employment with the employer.

The employer sought to enforce this agreement against former employees who became employed with a competing business. The defendant employees asserted that they had not breached the confidentiality agreement, and further that the confidentiality agreement was unenforceable as it was vague and uncertain. The court determined that the confidentiality agreement was sufficiently clear, and was not vague or overly broad. The court ordered an interlocutory injunction preventing the former employees from using the confidential information to solicit clients or suppliers of their former employer.

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74 [2006] O.J. No. 283 (Ont. C.A.) [*IT/NET*].
In reaching this conclusion the court considered the enforceability of restrictive covenants. The court seems to have relied primarily upon the test articulated in Elsley in reaching its decision. The court found that the parties had “reasonably clearly” agreed to the terms in the agreement and that “[t]he agreement [did] not necessarily purport to unduly restrict competition or trade in the marketplace.”77 Essentially, the agreement only prevented the employees from using information obtained in their prior employment to solicit the clients and suppliers of their former employer. This was not spatially or temporally too broad.78

3. Recommendations

The following recommendations are based on the above case law:

• Any contract provisions that seek to restrict an employee’s post-employment must be very clear in scope;

• Employers should restrict the obligation to non-solicitation only if that will adequately protect their business interests;

• An employer should seek to include a non-competition in the contract only in exceptional cases. When drafting this clause, an employer must ensure that it is reasonable in its temporal and geographic limitations;

• The effect of a non-competition or non-solicitation agreement must be fair. An employer cannot seek to eliminate potential competition;

• An employer must draft a confidentiality agreement with a focus on preventing the employee from using its information for unfair competitive purposes.

F. CONCLUSION

It is evident that the context in which the employment contract exists is of primary importance. The parties to an employment contract must be aware of the employment contract’s interaction with legislation and the common law. Otherwise, the law governing the employment relationship may be very different from that intended by the employer and the employee at the commencement of the relationship. Although the written contract remains a cornerstone of employment, it is important to understand the status of the parties.

In order to ensure that the employment contract provides a solid foundation for the employment relationship, the parties must endeavour to draft a contract that reflects their intentions. Generally, this should involve attempting to draft a contract that provides fairness to each party, and contains the clearest language possible. Most importantly, neither party must attempt to use

77 Ibid. at para. 21.
78 Ibid.
the contract to escape their obligations and provide an unfair outcome to the other party. A contract that considers these points will ensure a solid foundation, with the necessary flexibility for a lasting employment relationship.
Appendix A – Employment Contract Checklist

Letter or Formal Contract

Identify Position
➤ job description
➤ can the employer change it unilaterally?
➤ lateral transfers v. promotions

Can the Employer Relocate the Employee After Employment Commences?
➤ expenses covered?

Salary
➤ when to be reviewed?
➤ increases
➤ COLA adjustment

Commission Income

Bonus
➤ discretionary or determined by formula
➤ when payable (date)?

Profit Sharing; Stock Option Plans
➤ when entitled?
➤ does agreement specifically provide that option vesting and/or exercise time thresholds are not to be increased by an employee notice period?

Benefits
➤ when entitled?
➤ pension plan
➤ employee savings plan
➤ life, disability, medical and dental insurance
➤ employee loans
➤ discount privileges
➤ professional dues & memberships
➤ credit cards & expense accounts
➤ car allowance or company car
➤ parking
➤ financial counselling

Sick Leave
➤ can it be accumulated?
➤ treatment on termination
Vacation
- can it be accumulated?

Moving Costs Covered on Hiring
- preliminary trips
- travel for self and family
- furniture
- accommodation
- expenses of sale of home & purchase of new home
- Conflicts of Interest
- full time and attention

Confidentiality

Ownership of Intellectual Property
- disclosure of pre-existing inventions/works
- disclosure of inventions/works created while employed
- assignment of works and invention title to employer
- waiver of moral rights
- employee responsibility for ongoing record keeping
- employee assistance in registration efforts

Former Employment
- all existing restrictive covenants have been disclosed
- employee promise not to breach any existing restrictive covenant
- employee promise not to use former employer’s proprietary information in new employment
- cause for termination
- indemnification of employer

Term
- fixed or indefinite

Notice Required to Terminate
- where just cause/no cause
- definition of cause, if any
- during any probationary period
- does it increase with length of service/promotion?
- lump sum severance in lieu
- impact of mitigation
- is recruitment/inducement specifically contemplated?
- compliance with The Employment Standards Code (notice and severance pay)
- by employee
Restrictions on Future Employment/Business Activity
- are they reasonable protections of an employer proprietary interest(s)?
- geographic scope
- time

Legal Advice
- who pays?

Guaranteed Salary in the Event of Corporate Takeover or Change
- "Golden Parachute"

Indemnity Provisions
- especially for Directors and officers

Applicable Law & Jurisdiction

Arbitration

Whole Contract
- no representations
Appendix B – Sample Employment Clauses

1. Contract Application

This agreement governs the entire relationship between the parties, and no other representations or warranties apply. This agreement governs the entire duration of the parties’ relationship, and continues to bind the parties notwithstanding any changes within the relationship, including but not limited to salary, benefits, title, job description or position.

2. Termination by Employer for Cause

The Employer may terminate this Agreement at any time for just cause without payment of any compensation, either by way of notice, anticipated earnings or damages of any kind. For purposes of this Agreement, just cause includes but is not limited to the following:

(a) Any material breach of the provisions of this Agreement;
(b) Any and all omissions, commissions or other conduct which would constitute cause at law, in addition to the specified causes.

3. Termination by Employer Without Cause

(1) This agreement may be terminated in the following manner in the specified circumstances:

(a) This agreement may be terminated by the Employee at any time and for any reason, on the provision of [two] weeks’ advance written notice to the Employer. The Employee understands and agrees the Employer, in its sole discretion, may waive all or any part of the notice provided by the Employee and thereby terminate the Employee’s employment at any time during said notice period by providing the Employee with a lump sum payment equivalent to the Employee’s salary for the balance of the notice period that remains outstanding as at the date on which the Employer so exercises such waiver. The Employer and the Employee specifically understand and agree that, in the event the Employer decides to waive all or part of the notice period provided by the Employee, then, the period for which the Employer will be obligated to provide the said lump sum payment shall not exceed the outstanding balance of the [two] week notice period referenced herein, regardless of whether or not the Employee voluntarily elects to provide the Employer with more than [two] weeks’ notice of his or her resignation.

(b) By the Employer, once the probationary period is completed, by giving the Employee [ ] weeks’ notice of termination, or, at the Employer's discretion pay wages in lieu thereof, plus all payments or entitlements prescribed by The Employment Standards Code, including notice of termination, or at the Employer's option pay in lieu of notice, and severance pay if applicable. The provisions of this paragraph will not apply in circumstances where the employee resigns from employment or is terminated for cause.

- OR -
(2) The Employer may terminate this Agreement at any time, prior to (1 year from date of signing), upon paying the Employee six (6) months’ base salary in lieu of notice for termination and any severance as would otherwise be required under The Employment Standards Code of Manitoba. The Employer may terminate this Agreement at any time, after (1 year and prior to 2 years – insert dates), without cause, upon paying the Employee nine (9) months’ base salary plus pro-rata at-target bonus in lieu of notice for termination and any severance as would otherwise be required under The Employment Standards Code. The Employer may terminate this Agreement at any time, after (after 2 years – insert date), without cause, upon paying the Employee 12 months’ base salary plus pro-rata at-target bonus in lieu of notice for termination and any severance as would otherwise be required under The Employment Standards Code.

The Employee shall not be required to mitigate the amount of any payment contemplated by this Agreement, nor shall any such payment be reduced by any earnings that the Employee may receive from any other source.

(3) The parties confirm that the notice and pay in lieu of notice provisions contained in Sections x, y and z are fair and reasonable and the parties agree that upon any termination of this Agreement by the Employer in compliance with Sections x, y or z or upon any termination of this Agreement by the Employee, neither the Employer nor the Employee shall have action, cause of action, claim or demand against the other party or any other person as a consequence of such termination.

4. Restrictive Covenants

(a) Non-Competition

(1) During the term of employment with the Employer and for a period of six (6) months following the date of termination of employment for whatever reason, whether with or without cause or by resignation, the Employee shall not, either individually or in partnership or jointly or in conjunction with any person as principal, agent, employee, shareholder or in any other manner whatsoever carry on or be engaged in or be concerned with or interested in any business, or advise any person or entity, which competes with the Employer in the business of (define business), within (geographic limitation), without the prior written consent of the Employer, provided that the Employee shall be entitled, for investment purposes, to purchase and/or trade shares of a public company which are listed and posted for trading on a recognized stock exchange and the business of such public company may be in competition with the business of the Employer, provided that the Employee shall not directly or indirectly, own more than 10% of the issued share capital of the public company, or participate in its management or operation or in any advisory capacity.

(2) The Employee confirms that all restrictions in this section are reasonable and valid and all defences to the strict enforcement thereof by the Employer are waived by the Employee.
(b) Non-Solicitation of Employees, Customers and Other Parties

(1) The Employee agrees that during the term of employment with the Employer and for a period of twelve (12) months following the termination of employment for any reason, whether with or without cause or by resignation, neither the Employee nor any entity with whom the Employee is at the time associated, shall directly or indirectly,

(a) hire, offer to hire, recruit or encourage any of the Employer’s employees or consultants to terminate their relationship with the Employer, or attempt to do so;
(b) approach or solicit any client or customer of the Employer who was a client or customer at the time of, or any time in the two year period preceding, the termination of the Employee’s employment, in an attempt to or with the intent of encouraging the client or customer to discontinue or alter its business relationship with the Employer; or
(c) do or concur in any act or thing which will adversely affect the goodwill of the Employer, or hinder the Employer in retaining the customers and business of the Employer.

(2) The Employee confirms that all restrictions in this section are reasonable and valid and all defences to the strict enforcement thereof by the Employer are waived by the Employee.

5. Confidential Information

(1) (a) The Employee agrees to keep in strictest confidence all Confidential Information (as defined) which the Employee may acquire in connection with or as a result of performance of this agreement relating to the products or the business of the Employer and not to publish, communicate, divulge or disclose to any unauthorized third party or parties any information, without the prior written consent of the Employer, during the term of this agreement or at any time subsequent to it. The term “Confidential Information” includes, but is not limited to information emanating from the Employer, its associates, affiliates, agents, suppliers or customers or conceived or developed by the Employee concerning research, development, patent, copyright, industrial property rights, marketing plans and strategies, profits, costs, pricing and sourcing, systems and procedures.

(b) The Employee agrees not to use any of the foregoing Confidential Information except for the furtherance of his or her obligations under this agreement.

(c) On termination of this agreement, the Employee shall transfer and deliver to the Employer all documents, notebooks, charts, files, CDs, computers, diskettes and records containing or referring to Confidential Information, including copies, summaries and notes, in his or her possession or control.

- OR -

(2) (a) The Executive acknowledges that as the Chief Executive Officer, the Executive will acquire information and/or documentation which is confidential to the Employer, its affiliates, directors, employees and representatives and which information and/or documentation is the exclusive property of the Employer. Accordingly, the Executive undertakes not to disclose same to
any third party either during the term of the Executive's employment except as may be necessary in the proper discharge of his or her employment under this agreement, or after the termination of his or her employment, however caused, except with the written permission of an officer of the Employer.

(b) The Executive may however use or disclose information which he or she acquired during employment with the Employer which:

(i) is or becomes public other than through a breach of this Agreement;
(ii) is known to the Executive prior to the commencement of his or her employment with the Employer;
(iii) is required to be disclosed by law, whether under order of the court or other legal process, provided that the Executive provides notice to the Employer to allow the Employer to avoid such disclosure by the Executive.

6. Trade Secrets

(1) The Employee shall not, directly or indirectly, disclose or use, at any time, either during or subsequent to his or her employment, any secret or any confidential information, knowledge or data of the Employer (whether or not obtained, acquired or developed by the Employee) unless he or she shall first secure the written consent of the Employer to the disclosure or use.

7. Change of Control

(1) For the purposes of this Agreement, a “Change of Control” means the happening of any of the following:

a) When any person or corporation, together with any affiliate or associate of such person or corporation, as such terms are defined by *The Corporations Act*, or a group of persons or corporations acting jointly or in concert with one another, acquires the beneficial ownership, of, or control or direction over, directly, or indirectly, securities of the Employer representing thirty (30) percent or more of the combined voting total of the Employer’s outstanding securities; or
b) The occurrence of a transaction requiring shareholder approval involving the acquisition of the Employer by an entity through the purchase of assets, by amalgamation, merger, consolidation, wind-up or otherwise.

(2) In the event that a Change of Control of the Employer occurs, the following shall apply:

a) The Executive will be guaranteed a position of equivalent value and stature after the Change of Control, inclusive of the continuation of all the entitlements contemplated by this Agreement; or
b) Whether or not an equivalent position has been offered pursuant to paragraph (a) above, at the Executive’s sole option, the Executive shall be entitled to treat his or her employment as being terminated by the Employer pursuant to paragraph x of this
Agreement notwithstanding any other termination provisions of this Agreement and the Employer shall forthwith comply with said paragraph;

(3) In the event of a Change of Control, the non-competition and non-solicitation clause shall be nullified.