

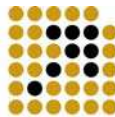
12th East Region Solicitor's Conference 2006
May 5-6, 2006
Chateau Montebello, Québec

*Negotiating the Employment Contract:
Issues Worth Considering*

Janice Payne
Partner
Nelligan O'Brien Payne, LLP

Mark Chodos
Student-at-Law
Nelligan O'Brien Payne, LLP

Craig O'Brien
Student-at-Law
Nelligan O'Brien Payne, LLP



NelliganO'BrienPayne

Lawyers/Patent and Trade-Mark Agents
Avocats/Agents de brevets et de marques de commerce

Negotiating the Employment Contract
Table of Contents

I-	Introduction	3
II-	Termination Clauses	3
	a) Minimum Statutory Requirements.....	4
	b) Can Termination Clauses Limit the Common Law Notice Period?	4
	c) Ambiguous Termination Clauses.....	6
III-	Restrictive Covenants / Confidentiality clauses.....	7
	a) Enforceability / Reasonableness	8
	i) Restrictive Covenants.....	8
	ii) Confidentiality clauses	10
	b) Claims Over Against Employee.....	11
IV-	Fixed Term Contracts	12
	a) <i>Ceccol v. Ontario Gymnastics Federation</i>	13
	b) <i>Flynn v. Shorcan Brokers Ltd.</i>	14
	c) <i>Alguire v. Cash Canada Group Ltd.</i>	16
V-	Post-hiring Amendments to the Employment Contract – What Constitutes Constructive Dismissal?.....	17
VI-	Stock Option Plans and Other Ancillary Plans/ Documents	21
VII-	Negligent Misrepresentation.....	23
	a) Negligent Misrepresentation Since <i>Queen v. Cognos</i>	25

1 I- Introduction

The contract of employment is more than an exchange of work for pay. Canadian jurisprudence recognizes that stable employment relationships are essential for a properly ordered and growing economy. We also understand that adaptability fosters a productive, competitive economy. Maintaining the appropriate equilibrium between stability and adaptability in employment relationships is a continuing challenge; the scales of justice continue rebalance to meet the evolving needs of employers and employees.

This paper canvasses a number of topics of present concern involving the written employment contract. It is intended to provide a brief overview of how the Courts are currently interpreting and resolving these employment issues so that employment lawyers can address them when their clients are negotiating (or re-negotiating) employment contracts. Allowing clients to deal effectively with these issues in a timely, forthright and honest manner at the outset will save them the increased time, expense, and stress of conflicts later in employment relationship.

II- Termination Clauses

Parties to an employment contract can rebut the common law presumption of reasonable notice by agreeing to an unambiguous notice of termination clause that complies with the applicable employment statute.

When signing an employment contract containing a restrictive termination clause, employees do not always realize that what they signed limits their notice entitlements to the minimum notice required under the *Employment Standards Act* (“ESA”). They do not understand the length of notice they would otherwise be entitled to if they are wrongfully dismissed. It is usually only after dismissal that they realize that they are entitled to substantially less notice than they would have received under the common law. Canadian courts may enforce such clauses, provided they are drafted in an appropriate and unambiguous manner.

1.1 a) Minimum Statutory Requirements

In *Machtinger v. HOJ Industries Ltd.*¹, the Supreme Court of Canada established that any notice clause in an employment contract for the termination of an employee must meet the minimum statutory requirements in the jurisdiction of employment. If it fails to do so, then the presumption of reasonable notice based on the common law will apply. According to *Machtinger*, this presumption can be rebutted only "... if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly"². Clauses with specified notice periods (such as two weeks) are generally considered null and void, unless the notice period is long enough to meet any potential statutory notice period requirement. Any clause which provides for a specific period of notice will generally be unenforceable even if the employee has not been employed for the requisite amount of time to be entitled to that period of notice as the clause will still eventually result in notice that is less than the statutory minimum.³ A clause specifying that an employee may be terminated "at-will" and without any notice is clearly illegal and unenforceable.⁴

1.2 b) Can Termination Clauses Limit the Common Law Notice Period?

Many termination clauses in employment contracts contain wording identical or similar to "in full satisfaction of any and all claims you have or may have in connection with the termination of your employment". While this type of language shows a clear intention to replace the common law and can minimize court challenges by employees, failing to include this type of language is not always fatal to employers.

In *MacDonald v. ADGA Systems International Ltd.*⁵, the Ontario Court of Appeal had to determine what interpretation should be given to the plaintiff's termination clause. The wording of the clause was "either party may terminate this Agreement at any time by

¹ [1992] 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491 (S.C.C.).

² *Ibid.* at para. 20.

³ *Shore v. Ladner Downs* (1998), 160 D.L.R. (4th) 76 (B.C.C.A.), leave to S.C.C. denied [1998] S.C.C.A. No. 362.

⁴ See for example *Hutchison v. Enreach Software Canada Inc.* (2002), O.T.C. 919 (Ont. S.C.J.).

⁵ [1999] O.J. No. 146 (Ont. C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 147.

giving not less than one (1) month's prior written notice". The Court of Appeal determined that this language was sufficient to rebut the common law presumption of reasonable notice as it complied with the ESA's minimal requirement of one week's notice per year of service, up to a maximum of eight weeks.⁶ In the court's opinion, legally, it did not matter that the clause did not say that it replaced any common law notice entitlement.⁷

In *Wood v. Industrial Accident Prevention Assn.*⁸, the termination clause stated that, "should it be necessary to terminate your employment without cause, it will be in accordance with the *Employment Standards Act* of Ontario." The court agreed with the employer that the clause was worded with sufficient clarity to remove Wood's common law right to seek damages for wrongful dismissal.⁹ The court was not concerned that there was nothing in the wording which specified that the termination clause was meant to replace any common law entitlement to notice.

In *Lloyd v. Oracle Corp. Canada*¹⁰, the termination clause stated that:

Oracle may terminate your employment at any time, without cause upon giving prior notice in accordance with the Ontario *Employment Standards Act*, or any similar legislation which is in force in the province within which Oracle's offer of employment is accepted.

While Lloyd had expressed concerns with the termination clause when he was hired, he ultimately agreed to its terms. When he was terminated four years after commencing his employment with Oracle, Lloyd challenged the termination clause. He argued that it only set a minimum notice period based on the ESA, which was not sufficient to displace his common law entitlement to reasonable notice. Following the reasoning in *MacDonald* and *Wood*, Justice Wilton-Siegel concluded that the employment contract limited the

⁶ *Ibid.* at para. 21.

⁷ *Ibid.* at para. 23.

⁸ [2000] O.J. No. 2711 (Ont. S.C.J.).

⁹ *Ibid.* at para. 17.

¹⁰ [2004] O.J. No. 1806.

notice period and the compensation to what was permitted under the ESA.¹¹ It was not necessary that the clause specifically state that it displaced any entitlement to reasonable notice under the common law.

1.3 c) **Ambiguous Termination Clauses**

A court will refuse to enforce a termination clause if it is ambiguous. An example of this is *Dodich v. Leisure Care Canada*¹². The relevant clause stated that the employer could end the employment relationship by providing Dodich 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 (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the Employment Standards Act.

The court considered the provision and found it ambiguous, and did not rebut the presumption that the common law entitlement to reasonable notice would apply.¹³

Another recent case where the dismissed employee argued that the termination clause was ambiguous and therefore unenforceable is *Strench v. Canem Systems Ltd.*¹⁴ The clause stated that:

...Should you be terminated for cause, then you will not be entitled to any advance notice of termination or severance pay in lieu thereof. Should you be terminated for reasons other than cause, then you will be entitled to advance notice of your termination, or severance pay in lieu thereof, or any combination of advance notice and severance pay, in accordance with the following formula:

- (a) more than three months but less than one year's employment -
in accordance with the Employment Standards;

¹¹ *Ibid.* at para. 67.

¹² [2006] B.C.J. No. 92 (B.C.S.C.).

¹³ *Ibid.* at para. 14.

¹⁴ [2005] B.C.J. No. 2698 (B.C.S.C.).

- (b) more than one year but less than five years' continuous employment - two weeks' notice for each completed year of employment or severance pay in lieu thereof;
- (c) more than five years - two weeks' per completed year of employment.

The judge agreed with the employer that the clause had a clear formula for calculating notice and severance based on the length of service, and was unambiguous and incapable of more than one reasonable interpretation.¹⁵

Recent changes to the ESA may have altered the understanding of what constitutes an ambiguous termination clause in Ontario. Previously, one of the notable differences between the British Columbia and Ontario statutes concerned the formers' inclusion of the term "at least" with reference to the minimum notice period allowable under the ESA. As the Ontario statute did not contain these words, these clauses were somewhat less likely to be found to be ambiguous in Ontario.¹⁶ As the Ontario ESA now contains similar language, it is presently unclear how the Ontario Courts will interpret clauses that purport to limit an employee's notice entitlements to the ESA minimum.¹⁷

The contrast between the decisions in these two cases shows that if an employer wishes to improve its chances of enforcing a termination clause it should be advised to specify the exact amount of notice to be provided so that the employee cannot later complain that he or she did not understand the clause. Of course, the best way to avoid litigation is to craft a termination clause that is the product of actual negotiations between an employee and employer.

2 III- Restrictive Covenants / Confidentiality clauses

An increasing number of employers have been asking prospective employees, as part of the offer of employment, to agree to some form of restrictive covenant and/or a confidentiality clause. A typical restrictive covenant is either an agreement not to

¹⁵ *Ibid.* at para. 45-47.

¹⁶ *Wood v. Industrial Accident Prevention Assn.*, [2000] O.J. No. 2711 at para. 11.

¹⁷ See *Employment Standards Act*, R.S.O. 2000, c.41, s.57.

compete with the employer after the worker leaves its employ (a non-competition clause), or not to solicit its former employer's customers, suppliers and employees after the cessation of employment (a non-solicitation clause). In order for these clauses to be enforceable they must be reasonable as to their nature and scope. If the clause is properly drafted it will be enforceable and may support a claim for damages and/ or injunctive relief if it is breached.

A typical confidentiality clause will state that the employee cannot reveal or utilize confidential information acquired at the workplace, and the employee cannot use the confidential information if he or she takes a position with a different company.¹⁸

2.1 a) *Enforceability / Reasonableness*

i) Restrictive Covenants

A determination of the reasonableness of a restrictive covenant will focus on the length of time that it applies, its geographic coverage and the nature of the restrictions. Courts are much more likely to reject non-competition covenants, as opposed to non-solicitation clauses. Non-competition covenants tend to be more scrutinized because they restrict the employee's ability to obtain gainful employment in the industry where they possess their knowledge and experience.

Another requirement for a valid restrictive covenant is that consideration must flow from the employer in exchange for the employee's promise. This consideration often takes the form of adequate notice or compensation in lieu of notice should the employee be terminated. In certain cases, it can also be the payment of an annual fee for the duration of the non-competition clause.¹⁹ If the clause is introduced partway through employment, it cannot merely be the employee's continued employment and salary, since this is something the employee is already entitled to.²⁰ The consideration concern is easily met

¹⁸ See for example *Chevron Standard Ltd. v. Home Oil Co.*, [1982] 3 W.W.R. 427 (Alta. C.A.).

¹⁹ See for example *Singh v. 3829537 Canada Inc.*, [2005] O.J. No. 2402 (Ont. S.C.J.).

²⁰ See for example *Canac Kitchens Ltd. v. Lionetti*, [2002] O.J. No. 5718 at para. 6.

where the restrictive covenant is signed as part of signing the employment contract at the time of hire. As with any contract, consideration must flow when obligations are imposed.

Employers may enforce restrictive covenants by obtaining an interlocutory injunction to stop their former employees from breaching the covenant. The courts have established that the employer will have to show a strong *prima facie* case that the covenant is enforceable to have the injunction granted.²¹ If it is determined that the scope of the non-solicitation or non-competition clause is too broad in scope or duration, the employer's burden will not be met. In *Sherwood Dash Inc. v. Woodview Products Inc.*²² the employer sought an injunction to stop two of their former employees from working for their competitors. The non-competition clause the employees had signed had prevented them from working for any competitor *anywhere*. The court found that this clause was unenforceable because of the lack of temporal and spatial restrictions. In Justice Perrell's words, the covenant was "overkill".²³

A non-competition clause will also be considered to be unreasonable and overbroad if it is too long in duration. In *947535 Ontario Ltd. (c.o.b. H & R Block) v. Jex*²⁴, the employer required all of their seasonal employees to sign restrictive covenants each year which did not permit them to compete with the defendant for two years, during which time they were not to compete within twenty-miles of where the employer operated, and were not to solicit its clients. The Court determined that the restrictive covenants were too broad and unreasonable as the employer owned locations in 11 other urban centers located within the twenty-five mile radius. As well, the two-year limitation period was too long for temporary employees who only worked for the employer for five months of the year (i.e.: during tax season). The restrictive covenants were therefore void and unenforceable.

²¹ See for example *Gerrard v. Century 21 Armour Real Estate Inc.*(1991), 4 O.R. (3d) 191.

²² [2005] O.J. No. 5298 (Ont. S.C.J.).

²³ *Ibid.* at para. 69.

²⁴ *947535 Ontario Ltd. (c.o.b.) H & R Block v. Jex*, [2003] O.J. NO. 3290 (Ont. S.C.J.).

A non-solicitation clause will also be unenforceable if its geographic scope is too broad. In *Gunning & Associates Marketing v. Kesler*²⁵, the employer sought to enforce a restrictive covenant that prevented Kesler from soliciting or accepting business from its 60 Canadian customers, and from all their American customers for one year after his termination. The Court found that the one-year limitation was reasonable as was the prohibition on the solicitation of the employer's Canadian customers. However, the scope of the non-solicitation clause could not legally extend to the employer's American customers as the employee had limited or no contact or knowledge with these customers. This went beyond what was reasonably necessary to protect the employer's legitimate business interests.²⁶

ii) Confidentiality clauses

A common law duty of confidentiality will exist even in the absence of a clause in the employment contract. However, an employer who wants to strengthen any potential case against an employee who breaches this duty will still want to include a confidentiality clause in the employment contract in order to draw the employee's attention to the obligations and safeguard the employer's trade secrets and customer lists.

Several cases have examined the scope of a confidentiality clause. In *Turbo Resources Ltd. v. Gibson*²⁷, the Saskatchewan Court of Appeal limited a lower court injunction restraining the employee from disclosing any knowledge or information acquired during the course of his employment as to business methods, circumstances and systems of the employer. The Court of Appeal held that the scope of the clause was limited to restraining the use of confidential information of a competitive nature that was not otherwise available.

²⁵ [2005] O.J. No. 1059 (Ont. S.C.J.).

²⁶ *Ibid.* at para. 14, 16.

²⁷ (1987), 60 Sask. R. 221 (C.A.).

The Ontario Court of Appeal recently determined in *IT/NET Ottawa Inc. v. Berthiaume*²⁸ that in order for an employer to successfully prove that an employee has breached the terms of a confidentiality clause, it must prove that the employee was aware of the confidential information, and that it has been misused.²⁹ As well, if the employee only provides another employer with knowledge of his or her own experience and qualifications, this will not be considered confidential information belonging to the employer.³⁰ The Court concluded that there had not been a breach of the duty of confidentiality.

A breach of a confidentiality clause will be enforceable if the employee who breached the agreement used the information from his former employer to assist his new employer in obtaining a financial advantage. These breaches come up most often between rival temporary staffing and outsourcing agencies, where the employers bid on staffing contracts. In *Calian Technology v. Fredrickson*³¹, the defendants had signed letters in which they agreed not to submit resumés to other employers with respect to a contract the plaintiff was bidding on. The employees, after being hired by a rival employer, used the former employer's confidential information, to secure a contract for the rival employer. The trial judge distinguished between the employee's own resumés, which were their own property, and the specially prepared resumes and skill matrixes prepared by the employer, which were its confidential property.

2.2 b) Claims Over Against Employee

In many cases where an employee breaches a non-competition clause by working for a rival employer, the former employer will sue both the employee for breaching the non-competition clause and the new employer for inducing the breach of contract. In these cases, the new employer may cross-claim against the employee for contribution and indemnity for all damages they may be liable to pay to the old employer.

²⁸ [2006] O.J. No. 283 (Ont. C.A.).

²⁹ *Ibid.* at para. 4.

³⁰ *Ibid.* at para. 5.

³¹ [2004] O.J. No. 1004 (S.C.J.).

One such case is *MacDonald (c.o.b. P&L Services) v. Klein*³². The defendant had breached the non-competition clause in his contract with the plaintiff, and had gone to work for a rival company. The plaintiff sought damages from both Klein, and from his new employer. The new employer sought contribution and indemnity from Klein for any sums they would have to pay, on the basis that Klein had misled them as to the nature of his employment with the plaintiff. Klein had not told the plaintiff that he was still under contract with the plaintiff when he began to work for his new employer. The judge determined that the senior managers of the new employer were more experienced businesspeople than Klein, and had a duty to take steps to avoid interfering with any contractual relations between Klein and the plaintiff. Because they had not met this duty, Klein was only required to indemnify his new employer to the extent of seventy five percent (75%) of their liability.³³

While there is not any other recent case law on the subject of indemnity in the context of breaches of a restrictive covenant, the general rule is that a new employer will have a right to seek indemnity from the employee who breaches the non-competition clause with their former employer if the employee does not disclose the existence of the non-competition clause to his new employer. However, if the new employer is aware of the clause, and still elects to hire the employer, it is unlikely that it will be able to successfully claim for indemnity and contribution if it is held to have induced the employee to breach the restrictive covenant.³⁴

3 IV- Fixed Term Contracts

Employers will hire on occasion new employees on fixed term contracts, to avoid committing indefinitely to an employee with which they do not have a prior relationship. Generally speaking, if an employee is hired on a fixed term contract, and the employee works even one day beyond the expiration of that term without any future understanding

³² *MacDonald (c.o.b. P&L Services) v. Klein*, [1998] O.J. No. 4922 (Gen. Div.).

³³ *Ibid.* at para. 122.

³⁴ *Ibid.*

being reached, the contract becomes indefinite, terminable only on reasonable notice.³⁵ While this concept is rather straightforward, the situation is more complex if an employee is employed pursuant to a series of fixed term contracts. Since the 2001 decision of the Ontario Court of Appeal in *Ceccol v. Ontario Gymnastics Federation*³⁶, and subsequent decisions on this topic, the law has been clarified with regard to when a series of fixed term contracts evolve into one indefinite employment contract.

3.1 a) Ceccol v. Ontario Gymnastics Federation

In *Ceccol*, the plaintiff had been employed by the defendant employer for sixteen years as its Administrative Director. Throughout her employment, Ceccol's employment relationship was governed by a series of one-year contracts, with similar terms. Her employment contract stated that it would be renewed if she received a favourable performance review and if the parties could agree on the terms and conditions of renewal. Prior to the expiry of one of her fixed-term contracts, the employer informed Ceccol that her contract would not be renewed, and offered her severance payments in exchange for signing a release. Ceccol refused to sign the release and brought an action for damages for wrongful dismissal. At trial, the judge determined that Ceccol was an indefinite-term, not a fixed-term employee and that she was entitled to reasonable notice, beyond the statutory notice in the ESA. The employer appealed this decision.

The Ontario Court of Appeal dismissed the employer's appeal and agreed with the trial judge that the employment contract was for an indefinite term, subject to renewal and termination.³⁷ The Court determined that a true fixed term employment contract requires "unequivocal and explicit" language and any ambiguities will be interpreted strictly against the employer's interest.³⁸ Employers should not be able to avoid the traditional protections of the ESA and the common law by resorting to the label of a "fixed term contract" when the underlying reality of the employment relationship is one of

³⁵ See for example *Evans v. Vancouver Board of Parks and Recreation* (1982), 16 A.C.W.S. (2d) 284 (B.C.S.C.).

³⁶ (2001), C.C.E.L. (3d) 167 (Ont. C.A.).

³⁷ *Ibid.* at para. 27.

³⁸ *Ibid.* at paras. 25-27.

continuous service by the employee for many years, along with oral representations and conduct by the employer that clearly signal an indefinite relationship.³⁹

The court considered a number of factors to determine that Ceccol was an indefinite employee, all of which revolve around what the conduct and expectations of the parties were and the true substance of the relationship. These included:

- Her length of service was in excess of 15 years;
- Her position was that of administrative director;
- Her past supervisors testified that they viewed her position as being indefinite;
- She thought she had been hired for an indefinite term, and continued to think that way throughout her employment;
- Her work responsibilities and investments in her training were long term, clearly outliving the terms of a one-year contract;
- The contract was in a standard form, with no emphasis on the issue of termination and no attempt was ever made to bring to the attention of the plaintiff that the termination provisions actually applied to her. This was required in the face of the employee's reasonable belief that the termination provisions did not apply to her;
- The contracts were not always drawn for exactly twelve months and some were signed before or after the end of the twelve-month period;
- After one particular year, the plaintiff was described in her performance appraisal as a "full-time" employee in contradistinction to "contract" employee.

3.2 b) Flynn v. Shorcan Brokers Ltd.

Since the decision in *Ceccol*, some Courts have placed greater emphasis on the strict language of the contracts, while minimizing the conduct and expectations of the parties during the employment relationship.

An example of this approach can be found in the decision of the Ontario Superior Court of Justice in *Flynn v. Shorcan Brokers Ltd.*⁴⁰, which was recently affirmed by the Ontario

³⁹ *Ibid.* at para. 26.

Court of Appeal. The plaintiff had been hired by the defendant, a bond trading and brokerage company, to revitalize a major aspect of its operations. In accordance with the employer's policy Flynn signed a series of four one-year contracts, each containing similar terms, except for varying levels of compensation. After four years, Flynn became increasingly dissatisfied with his employment and sought to relocate to the United States. The employer was aware of this and offered him a consulting agreement, instead of the usual term contract. Flynn refused to accept this agreement, and was terminated by the employer. Instead of being given the usual notice and severance pay pursuant to the ESA, he was offered, and accepted a \$100,000 lump sum payment as a goodwill gesture. Flynn was subsequently hired by Tradition, a U.S. company which had an ongoing relationship with the defendant. Because of this ongoing relationship, Tradition refused to hire Flynn until six months after he had departed from Shorcan. Flynn alleged that he had been wrongfully dismissed by Shorcan and also sought damages from them because Tradition would not hire him for six months.

At trial, Justice Macdonald found that the contract was for a fixed term and there was no wrongful dismissal. She determined that Shorcan had acted reasonably during the contract negotiations with Flynn, and that once he declined the consulting agreement offer, the negotiations had come to an end. The Court considered the following factors to reach its determination that the contract was for a fixed term:

- The contract was “comprehensive and clear”, particularly with respect to termination;
- Flynn was sophisticated, and examined the contracts in detail;
- Flynn knew he could get independent legal advice to review the contracts, but chose not to;
- There was no inequality of bargaining power;
- Either party could have decided not to agree to a term when negating the contracts

⁴⁰ [2004] O.J. No. 2977 (Ont. S.C.J.), affd [2006] O.J. No. 470 (C.A.)

- Both parties were clear that the contract terminated at a certain date, and were in the process of negotiating a consulting contract, but could not reach an agreement.⁴¹

In rendering her decision, Justice Macdonald focused on Flynn's sophistication and the fact that there were no verbal representations by the employer that signalled an indefinite term. She did not think it was significant that Flynn had been hired to revitalize a key area of the defendant's business, which would take well over one year to accomplish, or that the lump sum payment he received upon termination was far more than what Shorcan's contractual obligations were. In general, Justice Macdonald focused far more on the "clear and unequivocal" wording of the contract, then on the parties' expectations when Flynn was initially hired. On appeal, the Ontario Court of Appeal adopted a similar focus on the language of the contracts, and determined that "the appellant fully understood that his employment was speculative in nature at the time he was hired and could be terminated on a moment's notice".⁴²

3.3 c) *Alguire v. Cash Canada Group Ltd.*

Courts in other provinces have also adopted the approach to fixed term contracts set out in *Ceccol*. In *Alguire v. Cash Canada Group Ltd.*⁴³, the Alberta Court of Queen's Bench considered a series of four one-year term contracts with a chain of pawn shops. None of the contracts contained any language regarding notice. The plaintiff claimed that the employment was a contract of indefinite hiring, which entitled him to reasonable notice. The Court disagreed and using the language from *Ceccol*, determined that the contracts contained "unequivocal and explicit language".⁴⁴ The Court considered that each fixed term contract had been concluded after considerable negotiation, the plaintiff was an experienced professional and had an opportunity to seek independent legal advice, but chose not to do so. The Court concluded that the plaintiff was employed under a fixed

⁴¹ *Ibid.* at para. 16.

⁴² [2006] O.J. No. 470, at para. 5.

⁴³ [2004] A.J. No. 1258 (Alta. Q.B.), *aff'd* in part [2005] A.J. No. 1497 (C.A.).

⁴⁴ *Ibid.* at para. 35.

term contract. The Alberta Court of Appeal concurred with this part of the decision on appeal.

Based on the decisions in *Ceccol*, *Flynn* and *Alguire*, where the employment relationship exists for a long period of time, the Court will rely upon the expectations of the parties in the long-term relationship, and the non-sophistication of the parties as the predominant criteria as to whether the contract was for a fixed or indefinite term. However, if the employment relationship is of a shorter duration, the court will focus more on the clear language of the contract and the employee's sophistication to come to its conclusion.

4 V- Post-hiring Amendments to the Employment Contract – What Constitutes Constructive Dismissal?

Farber v. Royal Trust Co. continues to be a seminal Canadian case on the law of constructive dismissal. In it the Supreme Court of Canada outlined the underlying principle of constructive dismissal as follows:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned but has been constructively dismissed.⁴⁵

Whether a change to the employment relationship constitutes a "substantial change" of an "essential term" is fact specific.

Where an employee is demoted without cause, it is almost invariably considered a constructive dismissal. Considering the importance of an individual's employment to their sense of self-worth, as described in *Wallace*, demotion without cause can readily undermine the employment relationship.⁴⁶ Demotion in status, with no change in remuneration, can be a constructive dismissal.⁴⁷

⁴⁵ [1997] 1 S.C.R. 846, at para. 24.

⁴⁶ [1997] 3 S.C.R. 701, at para. 107.

⁴⁷ *Dick v. Canadian Pacific Ltd.*

Employees are constructively dismissed when they are demoted through variations in compensation, restricted duties, and/ or responsibilities; their hours of work are reduced or fundamentally altered; they are transferred without cause; their reporting structures are altered.⁴⁸ Where changes in the employment relationship are contemplated in the contract, they are not unilateral but rather are operations of the employment contract.⁴⁹ Building flexibility into the employment contract from the outset allows the employee to understand that their work duties will not be stagnant at a stage where they can more readily accept or reject the prospect of change. It allows both parties to better understand their respective rights and responsibilities, avoiding confusion and conflict later in the relationship.

This freedom to negotiate employment contracts that meet the specific needs of the parties is tempered by the reality that employees and employers have markedly different levels of power when negotiating employment contracts, whether it be at the time of hiring or a later re-negotiation. In *Belton v. Liberty Insurance Co. of Canada* the employment contract contained a clause purporting to authorize the employer to unilaterally alter the remuneration of employees on 90 days notice. The employer sought to rely on this clause and have employees sign agreements reducing their remuneration. Nine employees refused to sign and continued to fulfill their work duties. They were terminated and claimed constructive dismissal. At trial this clause was upheld and the employer was found to have cause to terminate the employees for refusing to sign the agreement. Acknowledging employees as a vulnerable group in society, the Ontario Court of Appeal allowed the appeal and found that altering the compensation schedule for these employees constituted a repudiation of the employment contract.⁵⁰

Canadian employment contracts, both oral and written, contain implicit rights and obligations that are only varied with the explicit consent of the parties. While there is debate about whether the right to consultation is itself an implied term of an employment contract, a lack of consultation when changing responsibilities tends to support the

⁴⁸ Stacey Reginald Ball, *Canadian Employment Law*, (Aurora: Canada Law Books, 2005) ch. 10.

⁴⁹ (1986), 16 C.C.E.L. 41 at p. 60.

⁵⁰ [2002] O.J. No. 3687. reversed, [2004] O.J. No. 3358.

employee's contention that the change was unilateral.⁵¹ If an alteration to the employment relationship was not specifically considered when the parties entered their agreement, employers must take care to ensure that the change does not go to the heart of the contract, and/ or consideration is given to the employee for the alteration.

Consideration should pass in order for an employment contract to be altered.

"Consideration" is broadly defined as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."⁵² In the employment context, where an employer wants to alter the change the employment contract, a benefit of some sort must pass to the employee. As consideration is an essential part of any contract, the failure to do so will vitiate the altered arrangement. What constitutes consideration is, however, quite broad.

Hobbs v. TDI Canada Ltd. dealt with a commissioned salesman who was hired after oral negotiations regarding his commission rates.⁵³ Prior to commencing his employ he signed an employment contract that stated that the details of his commission structure would be contained in a separate document. After he began working, the employer presented him with a document that outlined the commission structure, but was different from that which the plaintiff had agreed to orally. The plaintiff signed the agreement. A few months later he found alternate employment and claimed unpaid commission relying on the oral agreement. The Divisional Court held the written commission structure was enforceable. The Court of Appeal overruled this decision, finding that no consideration had passed for the amended agreement. As such, the oral agreement bound the parties, and the written agreement was not enforceable.

Consideration is essential when amending employment contracts, but what constitutes consideration can vary. In *Techform Products Limited v. Wolda*, continued employment *plus* a reasonable forbearance from terminating the employee (who was also an

⁵¹ See discussion of implied term of consultation in *Schumacher v. Toronto-Dominion Bank*, (1997) 147 D.L.R. (4th) 128, and particularly the appeal, at [1999] O.J. No. 1772, para. 28.

⁵² *Currie v. Misa*, (1875), L.R. Ex. D. 153.

⁵³ [2004] O.J. No. 4876.

independent consultant of the employer) was viewed as an enhancement of the employee's job security, thus constituting additional consideration.⁵⁴ In *Baker v. British Columbia Insurance Co.*, an employee of seven years signed an amended contract of employment that limited his period of reasonable notice to 90 days the day before he was terminated without cause. In that matter, the British Columbia Court of Appeal upheld the trial judge's decision that the amended agreement was not enforceable for want of consideration.⁵⁵

If an employer intends to rely on forbearance from termination as additional consideration, it must inform the employee, at the time the agreement is amended, that the employment will be terminated if the employee does not sign the amended agreement.⁵⁶ In *Watson v. Moore Corporation*, an employee signed agreements limiting the right to common law notice after 19 and 21 years of employment.⁵⁷ In finding that there was no consideration for the amended agreement, the British Columbia Court of Appeal held that an employer bears the onus of establishing that it would have terminated the employment had the employee not signed the agreement. They state: "With respect, it is too easy for the employer to say nothing at the time, and then expect the court to find that this employee would have been dismissed had she not signed the agreement."⁵⁸

The confusion surrounding what constitutes consideration for amending an employment contract can be addressed by providing a benefit concurrent with signing an amended agreement. If the employer intends to rely on forbearance from termination as consideration, the employees should be informed directly that their employment will be terminated if they do not agree to the amended agreement, and that their employment will be secure for a reasonable period if they do agree to the amendment.

⁵⁴ *Techform Products Limited v. Wolda*, [2001] O.J. No. 3822.

⁵⁵ *Baker v. British Columbia Insurance Co.*, [1993] B.C.J. No. 487.

⁵⁶ *Hobbs v. TDI Canada Ltd.*, [2004] O.J. No. 4876.

⁵⁷ (1996) 134 D.L.R. (4th) 252 (B.C.C.A.), at p. 260.

⁵⁸ *Ibid.*, at 262.

5 VI- Stock Option Plans and Other Ancillary Plans/ Documents

There are numerous issues surrounding stock option and other ancillary plans, such as profit sharing arrangements, related to the employment relationship. Whether such arrangements impact on other contractual terms, whether they are incorporated into the employment contract, and what happens to these rights upon dismissal, are all issues that have been considered by Canadian Courts. This portion of the paper will review some of the recent case law in this regard, both to highlight some of the potential conflicts that may arise and to provide some of the issues that should be considered when negotiating the employment contract.

Stock options and other ancillary plans or benefits form part of the employment contract if they have become “an integral part of the wage structure” rather than “merely an ex gratia payment”.⁵⁹ To determine whether the employee should be awarded these benefits in a wrongful dismissal action, the court will look to whether they would have been granted if the employer were acting in good faith. If an employee is wrongfully dismissed and the employer paid bonuses or provided stock options to employees in general, these benefits will be afforded the dismissed employee during the notice period.

Veer v. Dover Corp. (Canada) Ltd. is perhaps the best-known case dealing with the effect of a termination of employment on stock options.⁶⁰ Mr. Veer was a senior executive at Dover Corporation at the time of his dismissal, allegedly for.

The relevant stock option clause stated that the employee’s right to the options would automatically cease when employment terminates, either voluntarily or involuntarily. The Ontario Court of Appeal, after determining that the termination was without cause and involuntary, proceeded to define “termination”, a term not defined in the stock option agreement. The Court held: “The agreement should not be presumed to have provided for unlawful triggering events. Rather, the parties must be taken to have intended that the triggering actions would comply with the law in the absence of clear language to the

⁵⁹ (1980), 24 A.R. 181 (C.A.) at p. 194.

⁶⁰ [1999] O.J. No. 1727.

contrary”.⁶¹ Relying on this interpretation, the Court proceeded to hold that the employee was entitled to damages for the options that he could have exercised during the notice period of 24 months.

In *Gryba v. Moneta Porcupine Mines Ltd.*, the plaintiff had been with the company for nine years. He was an engineer by profession, and was President and a member of the defendant Board of Directors. The plaintiff was fired following an Annual Shareholders meeting where dissatisfied shareholders recommended the termination of all employees. The plaintiff had stock options as part of his employment benefits. The following clause formed part of the stock option agreement:

5.2 If an optionee ceases to be employed by the Corporation for cause or if an optionee is removed from office as a director or becomes disqualified from being a director by law, any option or the unexercised portion thereof granted to such optionee shall terminate forthwith. If an optionee ceases to be employed by the Corporation otherwise than by reason of death or termination for cause, or if an optionee ceases to be a director other than by reason of death, removal or disqualification, any option of unexercised portion thereof held by such optionee at the effective date thereof may be exercised in whole or in part for a period of thirty (30) days thereafter.⁶²

The plaintiff did not exercise the stock option within 30 days of his dismissal as it was not financially beneficial to do so at that point. The Ontario Court of Appeal upheld the lower court decision, finding that the 30 day requirement began the day after the notice period elapsed. Thus, in regards to the above clause, the “effective date” of termination assumes compliance with common law notice requirements. As the plaintiff should have had the ability to exercise the option during the notice period, the defendant company was required to pay damages associated with its refusal to honour his option. While the employment agreement and the stock options agreement are ostensibly separate, the stock options form part of the employee’s benefits package. As such, they are part of the overall contractual relationship between the parties.

⁶¹ *Ibid.*, at para. 14.

⁶² [2000] O.J. No. 4775.

That case cites *Ryan v. Laidlaw* approvingly.⁶³ Ryan was a vice-president, had been employed with the defendant company for 12 years, and had stock options with the company. The appellate court held:

The trial judge found that the respondent was entitled to receive the value of an option to purchase the number of shares of the appellant company which would have been available to him had his benefits continued during the 15 months' notice period following his dismissal. We agree. The annual stock option had become a part of the respondent's compensation package by July 1985 when he was dismissed.⁶⁴

From these cases it appears that employee benefits form part of the employment contract, whether or not they are contained in the same contract.

The same approach appears to be followed with respect to automobile benefits, housing allowances or other ancillary benefits. Where these types of benefit plans become part of the employee's integral benefits package in that the employee has a reasonable expectation of receiving them during employment, they will continue during the notice period. This is the case where an employee has access to the automobile for personal as well as business use. Where an employee is provided an automobile exclusively for business use, the entitlement ceases when active work ceases, not at the end of the notice period. Further, the automobile allowance will be pro-rated to account for the portion of its use associated with the business. Only that portion associated with personal use will continue to accrue during the notice period.⁶⁵

6 VII- Negligent Misrepresentation

The tort of negligent misrepresentation is of increasing concern to Canadian employers. The leading case dealing with this issue, *Queen v. Cognos*, concerns representations made when the employer and employee are negotiating the terms of the employment agreement. Since that seminal case, it is becoming clear that employers have a duty of care towards employees that can be breached by making representations to the employee that affect their employment rights in a variety of contexts. Be it when advising an

⁶³ (1995), 26 O.R. (3d) 97 (C.A.).

⁶⁴ *Ibid.*, at p. 98.

⁶⁵ *Martell v. Ewos Canada Ltd.* [2005] B.C.J. No. 2464.

employee regarding the degree of job security associated with a position, regarding pension, life insurance, or termination benefits, or stating that a Canadian regulatory authority will honour accreditations, Canadian employers have a duty to provide accurate information to their employees.

The tort of negligent misrepresentation was adopted in the employment context in Canada in the Supreme Court of Canada decision *Queen v. Cognos*.⁶⁶ The plaintiff was an accountant from Calgary who had secure employment, but wanted more challenging opportunities. Cognos was seeking a chartered accountant to provide expertise regarding accounting software that Cognos was intending to develop. During the interview, the plaintiff was informed that the project was of significant importance to Cognos, that it would take approximately two years to develop, and that the successful candidate would hold a relatively senior position on the project, advising on accounting standards. The trial judge held that there were implicit representations made that a reasonable budgetary plan existed for the project.⁶⁷

The Manager of Product Development, who was aware that the corporate management team had not yet approved the funding for the project, conducted the interviews. This information was not given to any of the candidates. After the plaintiff was orally offered the position, he signed a written employment contract that outlined that the plaintiff could be terminated without cause on one-month notice or one-month salary in lieu of notice. The plaintiff moved his family from Calgary to Ottawa and began his position at Cognos. The plaintiff was unaware, even when beginning his new job, that the funding for the project had not been approved. The management team responsible for approving project funding met to discuss the new project for the first time. They approved a much lower level of funding. Within five months of commencing his new job, the plaintiff was informed that the project he was to participate in would not proceed and that he would be laid off if there were no positions available for him in the finance and administration

⁶⁶ *Queen v. Cognos*, [1993] 1 S.C.R. 87.

⁶⁷ *Ibid.*, at para. 8-10.

department. The plaintiff commenced an action for negligent and fraudulent misrepresentation. Only the claim for negligent misrepresentation was pursued.

The Supreme Court of Canada found that Cognos negligently misrepresented the position and related job security by making statements that would cause a reasonable person who relied on those statements to sustain damages. The Court held that five requirements must be established to maintain a claim for negligent misrepresentation. They are:

1. there must be a duty of care based on a “special relationship” between the representor and the representee;
2. the representation must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said representation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and,
5. the reliance must have been detrimental to the representee in the sense that damages resulted.⁶⁸

The plaintiff was successful in establishing that Cognos breached its duty of care towards him by making representations about the project that were not accurate, and caused the plaintiff to conclude, reasonably, that the project had been approved and he would enter into a relatively secure position with Cognos.

The tort of negligent misrepresentation is applicable in the employment context. In *Queen v. Cognos*, the discussion centres on representations made during the hiring and negotiation process. It can also apply in other situations.

6.1 a) *Negligent Misrepresentation Since Queen v. Cognos*

Since the decision in *Queen v. Cognos*, a few cases have been decided that show that employers can be held liable to negligent misrepresentations in other contexts as well.

An example is *Allison v. Noranda*, where an employer was held liable for providing an employee with negligent advice regarding pension plan options. The employer was also the pension plan administrator. The employee was terminated without cause and given the option of receiving a lump sum severance or having it in 16 monthly instalments. If

⁶⁸ Ibid., at para. 33.

the employee chose to receive instalments, he would have retained his status as an employee until age 55 at which time he would be eligible for early retirement. This was not the case if he chose the lump sum alternative. While the sum of severance did not change depending on the option, the effect it would have on the employee's pension was significant. His pension under the severance option would be \$887 per month; under the lump sum option it was \$302 per month. This difference was not disclosed to the employee.⁶⁹

This case should caution employers that silence can be held to be a misrepresentation in certain situations. The employer did not overtly misstate the differences between the severance options but rather omitted all mention of the different pension implications. They requested that the employee seek independent advice, which the employee did. The employee signed a Release when electing the lump sum payment. Despite this, the New Brunswick Court of Appeal describes the duty of an employer as follows:

Surely, an employer is under an obligation to make sufficient disclosure to enable an employee to make an informed decision in cases where the employer asks an employee to make an election with respect to separation pay options that impact significantly on pension benefits. I say this because pension information is of a specialized nature and, in the present case, within the control of Noranda as administrator of the pension scheme. As well, the pension information was not of a speculative nature, nor subject to differing or divergent interpretations. Finally, Noranda must be deemed to have known that the information would be of overriding significance when Mr. Allison was making his election in the context of settling his dismissal without cause claim against Noranda.⁷⁰

Where the employer has specialized information that can reasonably be assumed to affect the decision making process of an employee, and the employer does not provide that information, they may be held liable for negligent misrepresentation.

A similar situation occurred in *Gauthier v. Canada (Attorney General)*, wherein the Consulting Branch of the RCMP provided incorrect pension advice to an employee considering taking early retirement to take a position with Canada Customs. Relying on

⁶⁹ [2001] N.B.J. No. 241, at para. 1-4 and 12.

⁷⁰ [2001] N.B.J. No. 241, at para. 27.

the pension calculations provided, the employee took a lower paid job. Eight years after retiring, the RCMP discovered their mistake, stopped paying the employee's pension and claimed for reimbursement. The Court analysed this matter following the criteria set out in *Queen v. Cognos*, and found that the employee would have remained in the prior position until attaining the requisite years of service to qualify for a full pension had he been aware of the requirement. The employee was entitled to rely on the employer's calculations of entitlements, as they were within the employer's, not the employee's expertise.⁷¹ The employer was also held liable for the emotional stress caused by this situation.

Presently in Canada, employers have a duty to provide their employees reasonably accurate advice on issues within the employer's knowledge or expertise. If an employer fails to do so, and the employee relies in inaccurate advice, the employer may be held liable for the damages that result. Employers have been held liable for damages such as loss of income, loss of pension, travel and relocation expenses, loss on purchase or sale of a home, disruption and inconvenience, and emotional stress.⁷²

⁷¹ [2000] N.B.J. No. 143 at para. 28.

⁷² Stacey Reginald Ball, *Canadian Employment Law*, (Aurora: Canada Law Books, 2005) at 20:30.5A.