Law Society of Ontario | Barreau de l'Ontario

Annotated Employment Agreement Clauses 2023

CO-CHAIRS

Hermie Abraham
Advocation Professional Corporation

Lauren Bernardi
Bernardi Human Resource Law LLP

February 28, 2023

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Library and Archives Canada
Cataloguing in Publication

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ISBN 978-1-77345-604-1 (PDF)

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CO-CHAIRS: **Hermie Abraham**, *Advocation Professional Corporation*

Lauren Bernardi, *Bernardi Human Resource Law LLP*

February 28, 2023
1:30 p.m. to 5:00 p.m.
Total CPD Hours = 3 h Substantive + 30 m Professionalism

Law Society of Ontario

SKU CLE23-00204

Agenda

1:30 p.m. – 1:35 p.m. **Welcome**

Hermie Abraham, *Advocation Professional Corporation*

Lauren Bernardi, *Bernardi Human Resource Law LLP*

1:35 p.m. – 2:05 p.m.	**Update on Court Rulings Upholding/Striking Down Agreements** Jonquille Pak, *JPak Employment Lawyers* Robert Richler, *Bernardi Human Resource Law LLP*
2:05 p.m. – 2:10 p.m.	**Questions and Answers**
2:10 p.m. – 2:25 p.m.	**Consideration and Transfer of Contracts** Neena Gupta, *Gowling WLG (Canada) LLP*
2:25 p.m. – 2:30 p.m.	**Questions and Answers**
2:30 p.m. – 3:05 p.m.	**Post-Covid Clauses** Sheryl Johnson, *Sullivan Mahoney LLP* Anna Malazhavaya, *Advotax Law* Lisa Stam, *SpringLaw Professional Corporation*
3:05 p.m. – 3:15 p.m.	**Questions and Answers**
3:15 p.m. – 3:35 p.m.	**Break**
3:35 p.m. – 3:50 p.m.	**Restrictive Covenants in a Non-Competition World** Mackenzie Irwin, *Samfiru Tumarkin LLP* Paul Macchione, *Norton Rose Fulbright Canada LLP*
3:50 p.m. – 3:55 p.m.	**Question and Answer Session**

3:55 p.m. – 4:20 p.m.	**Drafting to Meet Client Needs** (25 m P) Pamela Krauss, *Morrison Reist Krauss LLP* Nancy Ramalho, *Stikeman Elliott LLP*
4:20 p.m. – 4:25 p.m.	**Question and Answer Session** (5 m P)
4:25 p.m. – 4:55 p.m.	**Human Rights/EDI Clauses** Rich Appiah, *Appiah Law Professional Corporation* Nathaniel Marshall, *Marshall Workplace Law*
4:55 p.m. – 5:00 p.m.	**Question and Answer Session**
5:00 p.m.	**Program Ends**

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Annotated Employment Agreement Clauses 2023

Summary of Recent Case Law Regarding Enforceability of Termination Provisions

Jonquille Pak
JPak Employment Lawyers

Dilpreet Grewal
JPak Employment Lawyers

The Enforceability of Employment Contracts in Ontario: Highlights from 2022

Ryan Wozniak
Wozniak Law Professional Corporation

February 28, 2023

cpd

SUMMARY OF RECENT CASE LAW REGARDING ENFORCEABILITY OF TERMINATION PROVISIONS

Authors: Jonquille Pak & Dilpreet Grewal

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Forbes v Glenmore Printing Ltd, [2023] BCJ No 24 BC *Employment Standards Act*, R.S.B.C. 1996, c. 113	"Glenmore Printing may terminate this Agreement by giving the Employee, (a)After the first three months of continuous employment, one week's notice or wages, (b)After the first year of continuous employment, two weeks' notice or wages, and (c)After three consecutive years of employment three weeks' notice or wages, plus one additional week's notice or wages for each additional year of employment to a maximum of eight weeks' notice or wages."	No	The Court found that the language did not contract out of minimum ESA requirements. Nor can the clause be invalidated because it does not contemplate the entitlements under the group terminations section of the ESA.
McMahon v Maximizer Services Inc, [2023] BCJ No 6 BC *Employment Standards*	"Maximizer may terminate your employment without notice, and without severance being paid, at any time: i) with cause; or ii) during a probationary period. In the event Maximizer initiates termination, and that termination is without cause, Maximizer will provide the greater of: a) the notice (or payment in lieu) prescribed by the Employment Standards Act of BC as amended or replaced from time to time; and	No	The Court held that the plaintiff was disaggregating words in the clause to find any ambiguity she could to set aside the agreement. The clause was clear, and the employer drafted it in contemplation of complying with the minimum requirements of the ESA.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Act, R.S.B.C. 1996, c. 113	b) Two (2) weeks' written notice of termination (or payment in lieu), PLUS an additional one (1) week for every completed year of service to a maximum of four (4) months ("severance"). In the event Maximizer initiates termination and that termination involves the payment of severance, severance will be calculated using base salary only. (Note: Any unused vacation is payable by law, and would be in addition to severance). Other compensation elements (specifically including, but not limited to: incentives, commissions and bonuses directly tied to future performance; benefits documented in this Agreement; undocumented benefits or perks; monthly expenses typically incurred while employed; etc.) will not be considered in severance calculations."		
Quesnelle v Camus Hydronics Ltd, [2022] OJ No 4769 ON *Employment Standards*	"During your Probation Period and afterwards, you will be entitled only to notice of termination, termination pay and/or severance pay as required by the *Ontario Employment Standards Act*."	Yes	The words "and/or" and "only" created ambiguity as to the employer's obligations under the ESA. The termination clause was unenforceable.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Act, *2000*, S.O. 2000, c. 41			
Baker v Fusion Nutrition Inc, [2022] OJ No 4712 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"4.1 Termination for Cause (sic): Both parties may terminate this Agreement at any time without notice of further payment/provisions of services if either is in breach of any of the terms of this Agreement. 4.2 Termination with Notice: Either party may terminate this agreement upon providing thirty (30) days written notice to the other party. 4.3. Notice Payments: Upon termination of the Contractor's engagement pursuant to article 4 hereof, the Company shall pay the Contractor all monthly payments for a period of 4 months commencing on the termination date."	Yes	"In my view, clause 4.1 would result in the defendant being able to terminate the plaintiff for "cause" without complying with the minimum notice or payment obligations under the ESA for all forms of termination without cause, without limitation. The termination clause is therefore unenforceable."
Nassar v Oracle Global Services ULC, [2022] OJ No 4264 ON *Employment Standards*	"Termination of Employment: (a) For Cause: Oracle Canada may terminate your employment at any time, for just cause, without any notice or pay in lieu of notice."	Yes	The Court, following *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451, held that the just cause provision contravened the ESA and that the entire termination clause was unenforceable.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Act, *2000*, S.O. 2000, c. 41			
Shultz v Prococious Technology Inc (cob Cleardent), [2022] BCJ No 1532 BC *Employment Standards Act*, R.S.B.C. 1996, c. 113	"6.3 Termination by Company Without Cause. The Company may terminate the Employee's employment for any reasons, without cause, upon providing the Employee with only the notice or payment in lieu of notice (or a combination thereof) in the minimum amount required by the British Columbia Employment Standards Act, as amended from time to time. Benefits will end on the last day worked. 6.4 The Employee understands that by complying with this Article 6.3, the Company satisfies its entire obligation under statute and common law to provide notice or pay in lieu of notice to the Employee in the event that their employment is terminated. In no event will the Employee receive less notice or pay in lieu of notice than the minimum termination notice or pay in lieu of notice they are entitled to under the British Columbia Employment Standards Act, as may be amended from time to time."	No	"The Employment Agreement contains an unambiguous Termination Provision, adopting the standards and timelines set out in the ESA. It is valid and enforceable."
Henderson v Slavkin, [2022] OJ No 3695	"13. Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum	Yes	The Court found clause 13 had a high degree of clarity and was enforceable. Conversely, clause

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	notice or pay in lieu of notice and any other benefits required to be paid under the terms of the Employment Standards Act, if any. By signing below, you agree that upon receipt of your entitlement under the Employment Standards Act, no further amount shall be due and payable to you, whether under the Employment Standards Act, any other statute or common law. 18. Conflict of Interest. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the employer. A conflict of interest includes, but is not expressly limited to the following: (a) Private or financial interest in an organization with which does business [sic] or which competes with our business interests; (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware or ought reasonably to be aware; (c) Financial interests include the financial interest of your parent, spouse, partner, child		18 was overly broad and ambiguous, and clause 19 contravened the ESA.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	or relative, a private corporation of which the [sic] you are a shareholder, director or senior officer, and a partner or other employer; (d) Engage in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us. A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice. 19. Confidential Information. You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records. You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other third party, either during your employment or any time thereafter, any confidential information relating to our business, including office forms, instruction sheets, standard form letters to patients or other documents drafted and utilized in the Employer's practice except as required by law or as required in the performance of your job duties.		

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	For clarity, confidential information includes . . . . . . In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause. This provision shall survive the termination of this Agreement."		
Tarras v Municipal Infrastructure Group Ltd, [2022] OJ No 4007 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"(a) Termination for Cause. TMIG may terminate Employee's employment hereunder for "Cause" immediately upon delivery of a written termination notice to Employee. "Cause" means the repeated and demonstrated failure on Employee's part to perform the material duties of his/her position in a competent manner, which Employee fails to substantially remedy within a reasonable period of time after receiving written warnings and counseling from TMIG; Employee engaging in theft, dishonesty or falsification of records; Employee willful refusal to take reasonable directions after which Employee fails to substantially remedy after receiving written warnings from TMIG; or any act(s) or omission(s) that would amount to Cause at common law. In the event that Employee's employment hereunder is terminated pursuant to the	Yes	The termination provisions, specifically (a), conflicted with the ESA and were unenforceable. This hearing was held a day after the Court of Appeal's decision in *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451 was released. The defendant relied on *Rahman* 2021 ONSC 5961 which was varied.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	provisions of section 11 (a), Employee shall not receive payment of any kind, including notice of termination or payment in lieu thereof, or severance pay, if applicable, save and except accrued and outstanding salary and vacation pay.”		
Crawford v SRXC-NS Inc, [2022] NSJ No 359 NS *Labour Standards Code* CHAPTER 246 OF THE REVISED STATUTES, 1989	"[The employer] may terminate your employment at any time without cause by providing you only with the minimum statutory requirements as prescribed in the applicable employment and/or labour standards legislation and as such, you shall have no further entitlement upon termination of your employment and shall not be entitled to reasonable notice or pay in lieu at common law."	No	The defendant clearly articulated the intention to contract out of common law entitlement. The language was enforceable.
Nicholas v Dr Edyta Witulska Dentistry Professional Corp, [2022] OJ No 2297 ON	“(a) Termination with Cause Your employment may be terminated immediately by the Employer without notice or pay in lieu of notice should cause for termination exist under the common law of the courts of Ontario.”	Yes	Following *Waksdale v Swegon North America Inc*. 2020 ONCA 391, the Court found the Termination with Cause provision breached the ESA, thereby invalidating the termination provisions as a whole.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Employment Standards Act, *2000*, S.O. 2000, c. 41			
Gracias v Dr David Walt Dentistry Professional Corp, [2022] OJ No 2325 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the Employer. A conflict of interest includes, but is not expressly limited to the following: (a) A private or financial interest in an organization which does business or which competes with our business interests; (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware of or ought reasonably to be aware; (c) Engaging in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us. A failure to comply with this clause above constitutes both a breach of this agreement	Yes	"the termination for cause provisions in Ms. Gracias' employment contract are not compliant with the *Employment Standards Act, 2000* and she is entitled to her common law entitlements for a dismissal without cause."

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	and cause for termination without notice or compensation in lieu of notice." There was a similar for cause provision in response to violations of the confidentiality provisions.		
Lamontagne v JL Richards & Associates Ltd, [2021] OJ No 6873 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"Employment may be terminated for cause at any time, without notice."	Yes	Divisional Court; appeal of an application decision: *Lamontagne v JL Richards & Associates Ltd*, [2021] OJ No 1788 (affirmed) The "for cause" term in the termination clause incorporated the common law concept of "just cause". It is reasonable to infer that there would be notice pay for a dismissal for cause even if the conduct did not constitute wilful misconduct under the ESA. The term contravened the ESA and the terminations provisions were unenforceable.
Campbell-Givons v Humber River Hospital, [2021] OJ No 6030	The decision did not quote the entirety of the clause. The plaintiff took issue with the just cause provisions, specifically:	Yes	The Court followed *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, among other

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"clauses (iii) (demonstrated incompetence); (v) (any material breach); (vi) (any conduct which in the reasonable opinion of the President and CEO of the hospital...tends to bring...disrepute); and (ix) (any other act or omission which would amount to cause), all fall well short of the narrow "wilful misconduct" exemption specified under the ESA regulation." There was further discussion as to whether the following language "saved" the termination clause as a whole: "At all times the Employee will receive all employment standards entitlements owing to her in accordance with the Ontario Employment Standards Act, 2000."		authorities, to find that the termination clause violated the ESA and was unenforceable. The breaches were not saved or clarified by the additional catch-all language. Of interest, *Rahman v. Cannon Design Architecture Inc.*, 2021 ONSC 5961 was considered (prior to the appeal decision varying it). However, the Court was unmoved by the rationale in *Rahman*.
Battiston v Microsoft Canada Inc, [2021] OJ No 5295 ON	This case was not about termination clauses in the employment agreement, rather the entitlement to equity arising out of a termination as detailed in the plaintiff's Stock Award Agreement. The Court found the following language gave him notice of the terms and indicated that he understood and accepted the equity plan terms. "Congratulations on your recent stock award! To accept this stock award, please go to My Rewards and complete the online	No	This appeal concerned the trial judge's finding that the termination provisions in the plaintiff's Stock Award Agreements were unenforceable because they were harsh, oppressive and were not brought to the plaintiff's attention. The trial judge erred because the plaintiff chose not to read the Stock Award Agreement and had

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	acceptance process. A record will be saved indicating that you have read, understood and accepted the stock award agreement and the accompanying Plan documents. Please note that failure to read and accept the stock award and the Plan documents may prevent you from receiving shares from this stock award in the future." The plaintiff was routinely prompted to click a box to verify that he understood and accepted the terms.		expressly agreed to it for 16 years. The language in the Stock Award Agreement was enforceable.
Livshin v Clinic Network Canada Inc, [2021] OJ No 5279 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"c)Termination by the Company for Just Cause - The Company has the right, at any time and without notice, to terminate your employment under this Agreement for just cause." The defendant relied on "failsafe" provision: "c) Severability of terms - In the event that any term of this Agreement is found to be unenforceable for any reason, that finding will not affect any other term of this Agreement. If any term of this Agreement is so broad as to be unenforceable, that term will be interpreted to be only as broad as is enforceable."	Yes	Following *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 and *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, the Court found that the termination clause violated the ESA and was unenforceable. The termination clause as a whole was void. The "failsafe" clause was rather a severability provision and it could not operate on clauses that contract out of employment standards.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Asgari Sereshk v Peter Kiewit Sons ULC, [2021] BCJ No 2841 BC *Employment Standards Act*, R.S.B.C. 1996, c. 113	"a) Voluntary Termination. You may terminate your employment at any time by giving the Company 2 weeks' prior written notice. b) Termination for Cause. The Company may terminate your employment for just cause or serious reason, at any time, without any notice or pay in lieu of notice. "Cause or serious reason" for this purpose includes such things as serious misconduct and a false statement on either of your resume or employment application, as well as any other conduct which would constitute cause or serious reason at law. The failure by the Company to rely on this provision in any given instance or instances shall not constitute a precedent or be deemed a waiver. c) Termination Without Cause. The Company may terminate your employment at any time in its sole discretion, for any reason, without cause or serious reason, upon providing to you: a. that minimum amount of advance notice (or pay in lieu) to which you are entitled on termination of employment under the applicable employment or labour standards statute or law in the province where you are	No	The Court found that the language was clear and the broad wording to cover several jurisdictions was unproblematic. The plaintiff was picking out discrete words or phrases, in isolation, to suggest that they were difficult to understand. The termination clause was enforceable.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	assigned to work for the Company at the time your employment is terminated (the "Act"), and b. Any other minimum amounts or entitlements to which you are entitled on termination of employment under the Act, including: (A) statutory severance pay; and/or (B) for that minimum period required by the Act, continuation of any benefits in which you are enrolled as of the date you receive notice of termination."		
Rahman v Cannon Design Architecture Inc, [2021] OJ No 4769 **Varied**: *Rahman v Cannon Design Architecture Inc*, [2022] OJ No 2603 ON *Employment Standards*	"CannonDesign maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes just cause for summary dismissal."	No (varied by Ontario Court of Appeal)	The judge used a contextual approach to interpreting the intentions of the contract. Rahman was sophisticated, received legal advice, and the parties demonstrated a subjective intention to comply with the ESA. The termination provisions were found to be enforceable. On appeal, the Ontario Court of Appeal adopted a plain reading of the contract and found the provision to contravene the ESA. The termination provisions were void and unenforceable.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
Act, *2000*, S.O. 2000, c. 41			
Pederson v Brandt Developments Ltd, [2021] SJ No 280 SK *The Saskatchewan Employment Act*, SS 2013, c-S-15.1	"9.1.The Employee may terminate his employment by giving 30 days' advance notice in writing to Brandt, unless otherwise provided in Schedule "B". Brandt, at its option, may waive such notice, in whole or in part, in which case the Employee shall be entitled to receive pay in lieu of notice for the lesser of: (a)the remainder of the notice period, which was not worked, or (b)the statutory notice period for terminations applicable to the Employee as specified in the relevant provincial employment or labour standards legislation for the province in which the Employee works. 9.2 Brandt may terminate this Agreement, immediately and without notice for just cause. Brandt may also terminate this Agreement before it's expiry date, without cause or reason, by giving the Employee 60 days' notice, unless otherwise provided in Schedule B, in writing (or at Brandt's option, pay in lieu of notice) which shall include all payments or entitlements to which the Employee is entitled in respect of notice and	No	Relying on *Waksdale v Swegon North America Inc.*, 2020 ONCA 391, the plaintiff argued that by making it a requirement that he provide 30 days' notice, as opposed to the 2 weeks required by the SK ESA, the term is invalid and therefore the entire termination clause is invalid, entitling him to common law notice. Although *Waksdale* was recognized as good law, the Court did not find the termination provisions 'illegal' or to contravene the SK ESA and were thereby enforceable. Section 2-63(1) required an employee to give at least 2-weeks' notice, it did not preclude contracting a longer period.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	severance pursuant to the relevant provincial employment or labour standards legislation." There was additional language putting conditions on his bonus eligibility upon termination.		
Perretta v Rand A Technology Corp, [2021] OJ No 1486 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"Termination Without Cause - We may terminate your employment in our sole discretion, without cause, by providing you with two weeks of notice or pay in lieu of notice (or some combination thereof), plus the minimum notice or pay in lieu of notice (or some combination thereof) and severance pay (if any) then required by the ESA. Rand will also continue your Benefits to the extent and for the minimum period required by the ESA. Termination With Cause - We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, subject to the ESA. For the purposes of this Agreement, "just cause" means just cause as that term is understood under the common law and includes, but is not limited to: [list of Eleven Categories of Just Cause]"	Yes	Notwithstanding the employer's conduct which repudiated the employment agreement, the Court assessed the enforceability of the termination provisions. Three of the listed categories of just cause failed to rise to the statutory threshold set out in *Termination and Severance of Employment*, O. Reg. 288/01 and thereby breached the ESA. A "saving provision" designed to be compatible with future changes to the ESA cannot operate where there are terms in direct conflict with the ESA from the outset.

CASE, PROVINCE & STATUTE	TERMINATION CLAUSE	CLAUSE VOID?	COURT DECISION/REASONING
	The defendant also relied on the following language to argue that it intended to comply with the ESA: "If your minimum entitlements upon termination pursuant to the ESA exceed that which is set out above, your minimum entitlements under the ESA will govern. If any provision of this Agreement provides a right or benefit that is less than the corresponding minimum right or benefit under the ESA that provision will be deemed to provide the corresponding minimum right or benefit under the ESA."		
Ojo v Crystal Claire Cosmetics Inc, [2021] OJ No 1149 ON *Employment Standards Act*, *2000*, S.O. 2000, c. 41	"Termination Crystal Claire maintains the right to terminate your employment at any time and without notice or payment in lieu of thereof, if you engage in conduct which constitutes just cause for summary dismissal."	Yes	The just cause provision contravened the ESA and invalidated the termination provisions as a whole. (follows *Waksdale*) The plaintiff was entitled to common law notice. The use of the term "summary dismissal" did not change the analysis.

THE ENFORCEABILITY OF EMPLOYMENT CONTRACTS IN ONTARIO: HIGHLIGHTS FROM 2022

By: Ryan Wozniak
Wozniak Law P.C.

A. Termination Clauses

(i) Introduction

When I consult with employers about disputes over the enforceability of termination clauses in employment contracts, I often feel like Sisyphus rolling his boulder up a hill over and over again in an eternal cycle of agonizingly hopeless repetition. As sure as the sun will rise tomorrow, crestfallen employers will ask why the boulder they are pushing is so heavy, not realizing that they have already been conscripted to the hills of Tartarus, condemned to employment law damnation for their sins.

Despite the clear guidance provided by our courts, employers continue to find new and creative ways of violating the *Employment Standards Act, 2000*[1] ("**ESA**") when, by now, they ought to be accomplishing the exact opposite, ostensibly with little trouble. As Low J. (as she then was) put it in *Wright v. The Young and Rubicam Group of Companies (Wunderman)*[2], at paragraph 36, "There is…no particular difficulty in fashioning a termination clause that does not violate either the minimum standards imposed by the *Employment Standards Act* or the prohibition against waiving statutory minimum requirements".

[1] S.O. 2000, c. 41.
[2] 2011 ONSC 4720 (CanLII) at para. 36.

Every year our courts release a new series of decisions reaffirming the principles that they affirmed the previous year, and every year employers insist on litigating the very same drafting mistakes that befell them in the first instance. When it comes to termination clauses in employment contracts, employers should live by a simple adage: if there is any real doubt, then pay it out. Why? Because history shows that in lawsuits involving vague, ambiguous or uncertain termination clauses employers always lose.

(ii) Some Employers Sparred With *Waksdale* and All of Them Lost

2022 brought with it a troika of widely discussed yet equally reiterative cases in which our courts played the same old song but with different guitars. The first is *Rahman v. Cannon Design Architecture Inc*.[3] In *Rahman*, the employee signed a binding offer letter that contained the following termination provision:

> "CannonDesign maintains the right to terminate your employment at any time and ***without notice or payment in lieu thereof***, if you engage in conduct that ***constitutes just cause for summary dismissal***."[4] (emphasis added)

The plaintiff moved for summary judgment asking the court to declare the termination clause void on the basis that it contravenes the ESA; namely, that it putatively allows the employer to terminate the employee without providing statutory notice of termination or severance pay in circumstances where the employee's conduct does not meet the threshold of wilful misconduct set out in Ontario Regulation 288/01 ("**Regulation 288/01**").[5]

[3] 2022 ONCA 451 (CanLII), rev'g 2021 ONSC 5961 (CanLII).
[4] *Ibid.* at para. 14.
[5] See sections 2(1)3. and 9(1)6.

The motion judge held that the termination clause is enforceable because the plaintiff had independent legal advice and is a "woman of experience and sophistication".[6] The motion judge further found that the parties' subjective intention was to comply with the ESA.

Not surprisingly, the Court of Appeal overturned the decision of the motion judge. The Court held that on its plain wording, the termination clause violates section 2(1)3. of Regulation 288/01, which states:

> "The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:
>
> 3. An employee who is guilty of ***wilful*** misconduct, disobedience of ***wilful*** neglect of duty that is not trivial and has ***not been condoned by the employer***." (emphasis added)

Citing *Waksdale v. Swegon North America Inc.*[7], the Court held that the clause is void because it purports to allow the defendant to dismiss the plaintiff without providing statutory notice, or pay in lieu of notice, for misconduct that is not wilful – i.e., for not "being bad on purpose".[8] The sophistication of an employee and the subjective intentions of the parties are irrelevant when assessing the enforceability of a termination provision: a termination clause that violates the ESA is void for all purposes *ab initio*.[9]

Next is the case of *Henderson v. Slavkin et al.*[10], where the plaintiff, a receptionist, signed an employment contract containing the following provisions, which the plaintiff

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[6] *Supra* note 3 at para. 21
[7] 2020 ONCA 391 (CanLII)
[8] *Supra* note 3 at para. 28
[9] *Supra* note 2 at paras. 28 – 30; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 (CanLII)
[10] 2022 ONSC 2964 (CanLII)

argued are void on the basis that they are violative of the ESA, and in particular, Regulation 288/01:

> "18. Conflict of Interest…A failure to comply with this clause above constitutes both a breach of this agreement and ***cause for termination without notice or compensation in lieu of notice***.
>
> 19. Confidential Information…In the event that you breach this clause while employed by the Employer, your employment will be terminated ***without notice or compensation in lieu thereof, for cause***."[11] (emphasis added)

The Superior Court held that the clauses violate section 2(1) of Regulation 288/01 because they do not distinguish between wilful and unwilful misconduct. Brown J. found, at paragraph 38, that "the provisions are overly broad and ambiguous…One would have to guess as to what words are missing such that an employee would not be able to know, upon entering the contract, what conduct in that case might cause termination without notice or compensation in lieu thereof."[12]

The plaintiff also argued that the without termination clause in her contract was unenforceable, despite the fact that it preserved her minimum statutory entitlements under the ESA, because it purported to allow the employer to dismiss her without cause "for any reason". More specifically, the plaintiff argued that there are numerous circumstances set out in the ESA which specifically prohibit termination.

Brown J. rejected the plaintiff's argument, finding as follows:

> "[36]… the court should not strain to create ambiguity where none exists in the context of interpreting a termination clause. Further… ***a judge, in interpreting a termination clause, must look for the true intention of the parties, not to disaggregate***

[11] *Ibid* at para. 13
[12] *Supra* note 7 at para. 38

> ***the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law***.
>
> [37] In my view, there is no inconsistency between the termination clause and the ESA provisions which could give rise to any ambiguity in the plaintiff's right to continue to receive benefits pursuant to the ESA. When considering the wording of the clause in issue and the intent of the parties demonstrated in the wording of the clause, indicating compliance with the requirements of the ESA, ***I cannot conclude that the clause could or should be interpreted as contrary to or inconsistent with the provisions of the ESA. I do not find anything which would suggest that the termination clause should be interpreted as contrary to the ESA***."[13] (emphasis added)

Finally, in *Gracias v. Dr. David Walt Dentistry*[14], the plaintiff, a dental hygienist, signed an employment contract with the defendant containing the following provisions:

> "21. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests…A failure to comply with this clause above ***constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice***.
>
> 22. Confidential Information…In the event that you breach this clause while employed by the Employer, ***your employment will be terminated without notice or compensation in lieu thereof, for cause***. This provision shall survive the termination of this Agreement."[15] (emphasis added)

Once again, and to the surprise of few, the court held that clauses 21 and 22 contravene section 2(1) of Regulation 288/01, and voided the otherwise enforceable without cause termination provision contained in the plaintiff's contract, because they could allow the employer to terminate the plaintiff's employment without statutory notice

[13] *Supra* note 10 at paras. 36 – 37.
[14] 2022 ONSC 2967 (CanLII)
[15] *Ibid.* at para. 57

for behavior that falls short of wilful misconduct. Perrell J. held that "…the termination for cause provision contracts out of the Act and is void. The unlawful termination provision cannot be severed…"[16]

B. Arbitration Clauses

In *Irwin v. Protiviti*[17], a case that has largely flown under the radar, the Ontario Superior Court upheld a mandatory arbitration clause that violates the ESA. The plaintiff was employed by the defendants as a managing director in their risk and compliance group for just over three years. She earned approximately $350,000 per year. The plaintiff signed an employment contract on December 8, 2013. There was no dispute that the plaintiff negotiated some of the terms of her contract and had the benefit of legal counsel at various stages of the negotiation. The plaintiff's employment contract contained the following arbitration clause:

> "***Any dispute or claim*** arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement, whether based on contract or tort or otherwise shall be submitted to arbitration pursuant to applicable provincial law having jurisdiction over the dispute or claim. The parties agree that neither punitive damages nor legal fees may be awarded in an arbitration proceeding required by this Agreement…"[18] (emphasis added)

The plaintiff sued the defendants claiming that she had been constructively dismissed. The defendants moved under both rule 21.01 of the *Rules of Civil Procedure* and section 7(1) of the *Arbitration Act*, R.S.O. 1990, c. 17 ("**Arbitration Act**") for an order

[16] *Supra* note 10 at para. 94
[17] 2021 ONSC 7596 (CanLII). Protiviti is a division of Robert Half Canada Inc. and Robert Half International Inc.
[18] *Ibid.* at para. 4

staying the action on the basis that the subject matter of the dispute is governed entirely by the arbitration clause. The plaintiff argued that the arbitration clause was unconscionable, or alternatively, that it is void because it contracts out of the enforcement provisions found in section 96 of the ESA.

Ramsay J. ordered a stay of proceedings and referred the matter, including the question of the validity of the arbitration clause, to arbitration. Ramsay J. held that "The jurisprudence as well establishes that where there is a jurisdictional challenge, the issue must first to be resolved by the arbitrator."[19]

The plaintiff appealed. The Court of Appeal quashed the appeal on the basis that it is statute-barred by operation of section 7(6) of the Arbitration Act, which states that there is no right of appeal from a ruling made by a court on a motion for a stay under section 7(1) of the Act.[20] However, the court nevertheless went on to offer its own take on the plaintiff's arguments, albeit in *obiter*. Regarding the plaintiff's unconscionability argument, the court had this to say:

> "The appellant's argument from unconscionability is that it is unconscionable for an arbitration clause to exclude potential awards of punitive damages or costs. The determination of unconscionability is a "probing factual inquiry": *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, at para. 15. The record assembled on this motion is voluminous, and the interpretation of the arbitration agreement would depend on factual findings, including findings of credibility. It would be necessary to assess the sophistication of the parties, their bargaining power, and other aspects of the factual matrix related to the drafting of the agreement. Whether the arbitration clause ought to be found void for unconscionability could therefore not be determined by a

[19] *Supra* note 17 at para. 13
[20] 2022 ONCA 533 (CanLII) at para. 4

> superficial consideration of the evidence. Answering that question would risk turning the motion into a mini-trial: *Heller*, at para. 45."[21]

As for the plaintiff's argument that the arbitration clause violates the ESA, the Court stated as follows:

> "The question of the arbitration clause's consistency with the *ESA* and the *HRC* are also questions of mixed fact and law, in that they cannot be decided in the abstract, but require an interpretation of the employment agreement. The motion judge was, inferentially, of the view that these questions could not be decided by undertaking a superficial consideration of the evidence. In any event, given that the unconscionability question needed to be resolved by arbitration, it would make little sense to bifurcate the proceedings and have the remaining questions resolved by the motion judge.
>
> It is worth noting that none of the access to justice concerns that animated Heller are present in this case. The plaintiffs in *Heller* clicked on a standard form services agreement, were unlikely to have received legal advice, had no opportunity to negotiate the agreement, were made subject to the law of the Netherlands with arbitration to take place in the Netherlands, and required to pay a fee of $14,500 USD just to begin the arbitration. In contrast, the appellant was a professional earning a base salary of $350,000, claiming over $1.5 million, and facing arbitration in Ontario under Ontario law. She had the assistance of legal counsel during the negotiation of the employment agreement. Notwithstanding that the unavailability of a costs award under the arbitration clause makes arbitration potentially less remunerative than it would otherwise be, there is no suggestion that the costs of arbitration are disproportionate to the potential reward, or that barriers to arbitration would effectively leave the appellant without remedy."[22]

What is interesting about this case (at least to me) is that both the motion judge's decision and the *obiter* comments made by the Court of Appeal directly contradict the Court's earlier ruling in *Heller v. Uber Technologies Inc.*[23] ("***Uber***"), where it held that the

[21] *Ibid.* at para. 12
[22] *Supra* note 20 at paras. 13 – 14
[23] 2019 ONCA 1 (CanLII). This decision was appealed to the Supreme Court of Canada, but the court did not dispose of the issue of whether section 96 of the ESA is an "employment standard" within the meaning of the Act.

complaint investigation process under section 96 of the ESA is an inviolable "employment standard" as defined in the Act. It therefore follows that any arbitration clause that fails to unambiguously preserve an employee's right to invoke that process is void by operation of both section 5(1) of the ESA and section 7(2) of the Arbitration Act, which state, respectively:

> "5(1) …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***."
>
> [and]
>
> "7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> […]
>
> 2. The ***arbitration agreement is invalid***." (emphasis added)

It is clear from a plain reading of the arbitration clause in *Irwin* that it does not preserve the plaintiff's right to make a complaint under section 96 of the ESA. Consequently, the clause is void according to *Uber.* So why did the court not invoke subsection 7(2)2. of the Arbitration Act and refuse to order a stay? It seems that the Court was persuaded by the fact that the plaintiff is a sophisticated party who had the assistance of legal counsel and earned an annual salary in excess of $350,000.00, which happen to be the very same factors that the Court unequivocally rejected in *Rahman*.

C. Incentive Plans

In *Williams v. Air Canada*[24], the Ontario Superior Court reaffirmed the now well-established principles laid out by the Court of Appeal six years ago in *Paquette v. TeraGo Networks Inc.*[25] governing an employee's entitlement to incentive payments post-termination; namely, that a contractual term that requires "active employment" in order for an employee to qualify for incentive payments is not sufficient to deprive an employee of a claim for damages for payments that they would have received had they been giving working notice. This is because an employment contract is not treated as "terminated" until after the reasonable notice period expires.

In order take away or limit an employee's entitlement to incentive payments during their common law notice period, an employment contract must contain clear and unambiguous limiting language that does not fun afoul of the ESA. Again, these principles are well-settled.

In *Williams*, the plaintiff was employed by Air Canada in the role of International Operations Training Manager. She was dismissed in 2020 when Air Canada reduced its workforce by more than 50 percent because of the COVID-19 pandemic. As of the date of her dismissal, the plaintiff had accumulated over 24 years of service. The plaintiff sued Air Canada for, among other things, damages for wrongful dismissal, including any incentive plan ("**AIP**") and profit-sharing plan ("**PSP**") bonuses paid out during her notice period, which ran into 2021 and 2022. The plaintiff moved for summary judgment.

[24] 2022 ONSC 6616 (CanLII) (S.C.J.)
[25] 2016 ONCA 618 (CanLII) (C.A.)

The evidence was uncontradicted that, in 2020, Air Canada faced its worst financial year in its history, operating at a loss of $3.8 billion. As a result, no incentive payments were made under the AIP or the PSP for the 2020 fiscal year. However, on cross-examination, Air Canada's deponent stated that it was "possible" that AIP and PSP payments could be paid to employees for the 2021 and 2022 fiscal years.

The AIP plan contained the following language:

> "If you ***are no longer an employee performing your employment duties on the payout date***, you will not be eligible for payout of the AIP award. All entitlements, if any, under the AIP that are unpaid on your Termination Date (as defined below), shall be cancelled, and no entitlement will be granted after your Termination Date, except only to the extent otherwise required by the Canada Labour Code.
>
> Termination Date. For the purposes of the AIP 'Termination Date' means the latter of the date
>
> - you notify Air Canada or Air Canada notifies you of the immediate termination of your employment (including retirement) or
>
> - the last day on which you are required to perform your employment duties
>
> The 'Termination Date' ***is not extended by any entitlement to a notice of termination of employment under statute, contract, the common law, or an order of a court or tribunal***." (emphasis added)

The PSP plan contained similar language:

> "If you terminate your employment (including resigning and/or abandoning your position) or if ***your employment is terminated before the payout date*** (during or after the plan year), you will not be eligible for a profit sharing award.
>
> The Termination Date is the later of the date:
>
> (i) you notify Air Canada or Air Canada notifies you of the immediate termination of your employment, or;

(ii) the ***last day of which you are required to perform your employment duties***,

Regardless in both cases, of whether ***you are entitled to notice of termination of employment under contract, the law***, or an order of a court or tribunal." (emphasis added)

Ryan Bell J. found that these provisions do not unambiguously take away the plaintiff's common law right to AIP and PSP payments that would otherwise be payable during her notice period because they potentially provide two events which would prevent her continued participation in the plan.[26]

I note parenthetically that in *Ruel v. Air Canada*[27], Ramsay J. considered the very same AIP plan and also held that its terms did not displace the plaintiff's common law right to payments under the plan during his notice period:

> "Had the plaintiff been given common law notice, he would have remained "full-time" and "actively" employed and received a salary and benefits within the common law notice period. As stated recently by the Supreme Court of Canada in *Matthews*, at para. 66: "Yet it bears repeating that, for the purpose of calculating wrongful dismissal damages, ***the employment contract is not treated as 'terminated' until after the reasonable notice period expires***"…."[28] (emphasis added).

D. Conclusion

2022 provided employment lawyers with another opportunity to study what they should already know. I remain optimistic, perhaps hopelessly so, that 2023 will bring with it new issues and novel arguments for the employment bar to ponder and debate. One argument that I have not seen made in defence of an impugned termination clause is that

[26] *Supra* note 24 at paras. 50 - 54
[27] 2022 ONSC 1779 (S.C.J.)
[28] *Ibid.* at para. 67

its terms confer a greater benefit than the ESA such that the question of whether it violates the Act is moot. Time shall tell.

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TAB 2

Annotated Employment Agreement Clauses 2023

Two Technical Issues: Fresh Consideration & Assignments of Employment Agreements

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Two Technical Issues: Fresh Consideration & Assignments of Employment Agreements

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INTRODUCTION

In Ontario, the employment relationship is one primarily of contract.

Basic rules of contract law also apply to employment agreements. This paper deals with two aspects of contract law that often trip up employment lawyers: fresh consideration and assignment.

Consideration

Consideration is one of the basic tenets of contract law. Consideration is defined as follows:

> Something of value to which a party is not already entitled, given to the party in exchange for contractual promises. Consideration can take various forms, including a:
>
> - Monetary payment.
> - Promise to do something.
> - Promise to refrain from doing something.
>
> Consideration is one element critical to the formation of a contract and it must be legally sufficient for the contract to be enforceable.[1]

The case law has made clear that if an employer wishes to amend the terms of an existing employee's employment, "fresh" consideration will be required. Without it, any amendments made to the employment relationship may not be binding.

In general, an offer of new employment **does** constitute sufficient consideration for an employment agreement. Often, however, the problem arises when an employer seeks to bind an existing employee to new terms and conditions of employment.

Employers Cannot Impose a New Employment Agreement without "Fresh" Consideration

Ontario courts have consistently held (with one minor exception, discussed below) that continued employment is not good consideration.

[1] "Consideration", in Glossary, Thomson Reuters Practical Law, https://ca.practicallaw.thomsonreuters.com/7-503-9758?transitionType=Default&contextData=(sc.Default)&firstPage=true (Accessed February 27, 2023).

In other words, the law in Ontario does not permit employers to change the terms of employment and rely on the continued employment relationship as consideration for the new employment terms.

The leading case for this proposition is *Francis v Canadian Imperial Bank of Commerce*.[2] In this case, the Ontario Court of Appeal turned to the general principles of contract law relating to consideration to determine whether an employment agreement was binding on the parties.

Prior to commencing employment, Francis was given and accepted an offer of employment by letter.

On July 4, 1978, Francis attended his first day of work and signed a separate employment agreement. This second document entitled the Bank to terminate Francis' employment upon three months' written notice or upon payment of three months' salary in lieu of notice.

Francis claimed that this agreement was a unilateral attempt to alter the terms of employment, as the essential terms of the employment contract were already set out and agreed upon in the offer of employment letter.

The Bank argued that the initial offer of employment was not a contract of employment. There were still certain conditions that were outstanding, i.e. a letter of reference and other documentation that needed to be provided by Francis.

The Court found that the Bank's argument was untenable.

Accordingly, the Court held that the termination clause contained in the employment agreement dated July 4, 1978 constituted a variation of the original employment contract. Therefore, the general principle that new or additional consideration is required to support a variation of an existing agreement applied and the termination clause was not enforceable.

In a more recent decision, *Hobbs v TDI Canada Ltd*.,[3] the Ontario Court of Appeal held that a signed agreement entered into after an oral agreement did not form part of the employment contract due to lack of consideration.

Hobbs accepted employment with TDI based on the terms of an initial contract, which set out the basic employment terms. Terms related to commission rates were not included in this contract, but were agreed to orally between the parties. One week after starting his employment, a "Solicitor's Agreement" was presented to Hobbs which set out, among other things, commission and termination clauses. Hobbs signed the agreement.

The Ontario Court of Appeal held that the Solicitor's Agreement was a separate contract and was therefore not part of the employment contract initially entered into between the

[2] *Francis v Canadian Imperial Bank of Commerce*, 1994 CarswellOnt 995 (WL Can) [1994] OJ No 2657 (ON CA) ["*Francis*"].
[3] *Hobbs v TDI Canada Ltd*., 2004 CarswellOnt 4989 (WL Can) [2004] OJ No 4876 (Ont CA) ["*Hobbs*"].

parties. The Solicitor's Agreement was an attempt to amend or vary the terms of the employment contract entered into and, accordingly, required fresh consideration. The Court found that no fresh consideration was given in this case.

Relying on *Francis*, the Court stated:

> The law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment as consideration for the new terms.[4]

The Court went on to emphasize why consideration is especially important in the employment context, where there is unequal bargaining power between employers and employees.

> 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.[5]

More recently, in *Fasullo v Investments Hardware Ltd*.,[6] the Ontario Superior Court confirmed that employers must provide either notice or consideration to an employee before changing the terms to an employment agreement. Without the notice or consideration, Ontario courts will not enforce the agreement.

The Court found that the terms of the employment agreement were finalized in May 2007, based on **oral discussions** where the essential terms of Fasullo's employment were agreed on. These essential terms included Fasullo's start date (June 18, 2007), expected salary and responsibilities on the job. Fasullo resigned, once it appeared the parties were agreed on the economic terms.

Fasullo started on June 18, 2007, but was presented a document for signature dated June 20, 2007. The written agreement contained a clause that provided Fasullo could be terminated at any time with written notice or pay in lieu of notice required under the *Employment Standards Act, 2000* or ESA.

Relying on *Hobbs*, the Court found that despite Fasullo signing the June 2007 agreement, the employer provided no consideration, so the contract (and, specifically, the termination on notice clause) was null and void. Fasullo's continued employment with the employer was not sufficient consideration for the new agreement.

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[4] *Hobbs*, *supra* note 2 at para 32.
[5] *Ibid* at para 42.
[6] *Fasullo v Investments Hardware Ltd*., 2012 ONSC 2809.

The requirement of "fresh consideration" was also considered by the Ontario Court of Appeal in *Holland v. Hostopia Inc.,* 2015 ONCA 762 (CanLII), where an agreement signed nine months after the start of employment was found to be unenforceable due to lack of fresh consideration.

A recent New Brunswick case that hit the headlines establishes that the problem of agreements signed after the start of employment continues.

In *Dornan v. New Brunswick (Health)*[7], Dr. John Dornan was offered the prestigious position of CEO of the Horizon Health Network. The chronology of events is of particular interest:

- March 3, 2022: Five-year term, salary, benefits, car allowance and 6 week holiday agreed upon verbally;
- March 4, 2022: Press Release announcing his appointment is released;
- March 7, 2022: Dr. John Dornan starts work;
- March 23, 2022: Dr. John Dornan receives a written offer.

The agreement had a detailed termination clause that offered 12 months of compensation if Dr. Dornan was terminated in the first year of employment. Dr. Dornan had already resigned his previous position. He testified that he felt he had no option but to execute the agreement.

In July, 2022, there was an extremely unfortunate and well-publicized death in the waiting room of the emergency department of one of the hospitals. Dr. Dornan was terminated. Was he entitled to only 12 months in lieu of notice or was he entitled to the balance of the five-year term?

Arbitrator Filliter found that the termination clause in the written agreement was not enforceable and awarded Dr. Dornan the economic value of the balance of his contract.

$1,762,554 for salary

$ 31,088 for lost vehicle allowance

TBD – lost pension benefits

TBD – lost health and dental

$ 200,000 for breach of the duty of good faith

The total award will no doubt exceed $2 million dollars.

[7] 2023 CanLII 10433 (NB LA, Arbitrator Filliter).

Exception: Continuation of Employment Constitutes Consideration where Employer had Prior Contractual Intention to Terminate Employment

As mentioned above, in most cases, continued employment will not be sufficient consideration.

The Ontario Court of Appeal has offered a nuance to this analysis.

Continued employment may be sufficient consideration where the employer had the right to terminate. In *Techform Products Ltd. v Wolda*,[8] the Ontario Court of Appeal found, on the facts, that the employer had the right to terminate the independent contractor on sixty days' notice (as per the existing agreement). Techform required the consultant to sign an Employee Technology Agreement ("ETA") that formally assigned all intellectual property rights to Techform. The issue was whether the ETA was actually enforceable.

The Court took the employer presenting the new terms of employment to Wolda as an implied promise to forbear from dismissing Wolda for a reasonable period of time thereafter.

The Court noted that this promise was fulfilled, as Wolda continued to be employed by Techform for an additional four years.

This continued employment, in the circumstances, was therefore deemed to be valid consideration by the Court.

In its analysis, the Court said:

> Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say, "sign or you'll be fired" and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.[9]

To be clear, once again, continued employment will not generally constitute valid consideration. Nonetheless, *Techform* presents an interesting exception to the general rule that is worth noting.

The authors note that the *Techform* case dealt with the enforceability of intellectual property provisions rather than a termination clause. The case should be relied on with caution.

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[8] *Techform Products Ltd. v Wolda*, 2001 CarswellOnt 3461 (ON CA) ["*Techform*"].
[9] *Techform*, *supra* note 6 at para 26.

What happens if an employee resigns and then is subsequently rehired?

In *Theberge-Lindsay v 3395022 Canada Inc.*,[10] an employee's clear resignation prior to being rehired by the same employer represented a break in the chain of employment. This break meant that the employment itself was **adequate consideration** for the employment agreement.

Theberge-Lindsay began working for the dental practice in 1993. Over the years of her employment, the dental practice restructured several times and required the employee to sign a series of employment contracts that contained clauses limiting the employee's entitlement for wrongful dismissal.

Theberge-Lindsay advised of her resignation in March 2005, and then later rescinded her resignation prior to the effective date and the employer agreed to rehire her.

Upon being re-hired, Theberge-Lindsay signed a new employment agreement dated June 30, 2005.

The Ontario Court of Appeal found that the 2005 agreement was enforceable and served to limit the employee's entitlement to *ESA* minimums.

The Court held that her entitlements were to be calculated based on her "rehire" date in 2005, rather than the entire period of her service dating back to 1993. Because she clearly and unequivocally resigned, there was a break in the employment relationship.

After this break, the rehiring in 2005 marked an entirely new contract and a new employment relationship. Accordingly, *ESA* entitlements were calculated based on this new employment.

Therefore, where there is a clear break in the employment, such as was the case here, employment alone is sufficient consideration. This can be distinguished from cases like *Hobb*, for example, as the new employment agreement here represented an entirely new employment relationship.

These authors, however, query the correctness of this decision and caution about over-reliance on what appears to be an anomalous outlier in the case law.

Assignments of Employment Agreements

The second technical issue we wish to review is the assignment of employment agreements.

[10] *Theberge-Lindsay v 3395022 Canada Inc.*, 2019 ONCA 550.

The Ontario Court of Appeal confirmed that an employment contract is a **personal services contract**, which means it is generally not assignable without the consent of both parties.[11]

The rule against employment contracts being assigned without the consent of the employee is aimed at protecting employees from unilateral changes in their employment relationship. Employers should be wary of any attempts to unilaterally assign an employment agreement, as this could be treated as a breach of contract and/or constructive dismissal at common law.

Nonetheless, the vast majority of lawyer-drafted contracts contain a provision that permits the employer to assign the employment agreement to a related party or to a buyer of all or substantially all of the assets of the employer.

Asset Sales

In an asset sale, a purchaser chooses which assets (and liabilities) it wants to assume.

A Seller cannot unilaterally transfer its existing employment contracts to a purchaser, even if the purchaser would like to retain the employees.

In the case of an asset sale, the existing employment agreements will be terminated by operation of law.

In a recent Ontario Court of Appeal case, *Krishnamoorthy v Olympus Canada Inc.*,[12] the Court applied the reasoning in *Addison* and held that following an asset sale, the employment contract between the employee and seller was terminated and a new contract of employment was entered into with the purchaser.

In 2005, Olympus purchased some, but not all, of the assets of an unrelated company, Carsen. Following the sale, Olympus offered employment to most of Carsen's employees, including Krishnamoorthy. Krishnamoorthy signed an employment agreement, which was substantially similar to those he had with Carsen, with the exception of certain clauses, including the termination clause at issue.

Krishnamoorthy argued that by operation of the *Employment Standards Act, 2000 ("ESA"),* section 9(1), his employment was continuous and the termination clause was therefore invalid. Krishnamoorthy further argued that the termination clause was invalid because he received no consideration for the new employment contract.[13]

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[11] *Addison v M. Loeb Ltd*., 1984 CanLII 2067 (SC), affirmed on appeal at 1986 CarswellOnt 836 (ON CA) ["*Addison*"].

[12] *Krishnamoorthy v. Olympus Canada Inc.*, 2017 ONCA 873 (CanLII).

[13] Section 9(1) of the ESA provides:

Sale, etc., of business

9 (1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act

In the end, the Ontario Court of Appeal ruled that the termination clause was, in fact, valid.

The offer of employment by Olympus amounted to fresh consideration for the mew agreement. Effectively, there was no pre-existing obligation with Olympus. The Court distinguished situations like this from situations like in the case of *Hobbs* and *Francis*. In *Krishnamoorthy,* there were two different employers, rather than a single employer.

This change in employers marked a change in the employment relationship as the identity of the employer changed. Thus, the Court concluded that Olympus' offer of employment alone amounted to consideration for the new employment agreement.

This case falls in line with older case law, such as *Canada (Attorney General) v Standard Trust Co*.,[14] where the Court held that an asset purchase will terminate any employment agreement.

Share Sales

In law, a corporation is considered its own legal entity that has a separate existence from the person(s) who own it.

Accordingly, employment agreements are not "assigned" to the purchaser of the corporation's shares because the identities of the parties to the agreement (the employee and employer) do not change. A share sale does not mark the start of a new employment relationship, even though the corporation has new owners. This can get more complicated in situations where the employer corporation subsequently amalgamates with another entity, for example, as this would result in the employer corporate identity changing.

The Court in *Whittemore v Open Text Corp*.,[15] held that an employment agreement entered into prior to the sale of a company was still valid and in force when the employee was terminated nine years later.

Open Text was bought by way of share purchase. This means that the legal entity itself (the employer) did not change, despite ownership of that entity changing. The Court held that the employee was bound by his original employment contract, which included certain

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and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. 2000, c. 41, s. 9 (1).
Exception
(2) Subsection (1) does not apply if the day on which the purchaser hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the seller and the day of the sale. 2000, c. 41, s. 9 (2).
Definitions
(3) In this section,
"sells" includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning. 2000, c. 41, s. 9 (3).

[14] *Canada (Attorney General) v Standard Trust Co*., 1994 CarswellOnt 1004, [1994] OJ No 2976 (Ont Ct J (Gen Div)) [Commercial List].
[15] *Whittemore v Open Text Corp*., 2013 ONSC 2339.

restrictions on his entitlements to termination pay. At no point, the Court noted, was this contract replaced by a new contract with Open Text.

The Court stated that "[t]he general principle is that on a sale of shares there is no change in the corporate identity of the employer and, therefore, no termination of employment."[16]

The Court also confirmed that the sale of a corporation's shares will not constitute the termination of an employee's employment in *Filiatrault v Tri-County Welding Supplies Ltd*.[17]

In this case, the Court effectively summarized the state of employment agreements amid a share sale:

> Courts have also addressed the rights of an employee when their employer sells the shares of the business. The sale of a company's shares is merely a change of shareholders which does not affect the company's assets and as such the company continues to exist as it did prior to the share sale. The sale of a business through a sale of its shares does not alone result in the termination of an employee's employment. A further step would be required to terminate employment.[18]

It is outside of the scope of this article to consider contractual provisions that could be inserted to protect employees in the case of a share sale. Such provisions, known as "change in control" provisions, are designed to trigger compensation to senior employees upon a sale or related types of transactions.

Conclusion

In conclusion, employment agreements are founded on the basics of contract law. Contract law principles can render otherwise well-drafted clauses unenforceable.

If need be, pay the employee a signing bonus in order to underpin the enforceability of an agreement. The authors recommend a week's base salary, vacation or similar benefit, so that the consideration is considered real, despite the old principle that "adequacy of consideration" is not for the court to review.

Provide the employee time to review the agreement.

The authors also recommend that the employee be given explicit written instructions to have the document reviewed by counsel and to offer to pay a portion, if not all, of the legal fees involved.

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[16] *Ibid* at para 22.
[17] *Filiatrault v Tri-County Welding Supplies Ltd*., 2013 ONSC 3091 ["*Filiatrault*"].
[18] *Ibid* at para 32.

Employers should be willing to be reasonable in their negotiations about the termination clause in an agreement. Reasonable clauses that are negotiated are much more likely to get enforced (or better yet, never make it to the courts at all!)

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TAB 3A

Annotated Employment Agreement Clauses 2023

Employee vs. Independent Contractor? Contractual Considerations

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February 28, 2023

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Employee vs. Independent Contractor? Contractual Considerations

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Background

The employment relationship, as employment law practitioners are aware, is complex. I describe delving into an employment relationship as "*peeling the onion*". The same complexity applies where a company decides to contract with an individual as an independent contractor. Often such independent contractors are treated like a separate category of workers (i.e., employees) and not as independent service providers. This paper applies only in relation to independent contractors that provide services through their principals and do not normally employer employees, workers, or helpers.

While there are certain contractual clauses that assist with a contractor being deemed by various employment related administrative or adjudicative tribunals to be an independent rather than a dependent or an employee, what is most important is for the parties who wish to having an independent contractor or consulting relationship to adhere to the intent and purposes or creating such a consulting agreement. Meaning, decision-makers (whether a tribunal or the courts) will look to the actual relationship and its workings. Decision makers across all forums will look at the following four factors when assessing whether an individual engaged to perform services for a company is performing them as an independent contractor or a worker/employee/dependent contractor (and each of these factors can be broken down into numerous subfactors):

1. **Level of control** the company (employer) has over the individual's activities, including but not limited to their hours, location of work, provision of training, reporting relationship, exclusivity of services/earnings, and means of performing the work, including whether the individual can subcontract work or hire their own helpers/employees;

2. **Whether the individual provides their own tools or equipment**;

3. **Whether there is a chance of profit and a risk of loss** taken by the individual in performing the services, including but not limited to the degree of responsibility for investment and management held by the individual, terms of payment and productivity, and who is liable for damages and/or quality of the work performed (i.e., whose business is it?);

4. **The integration of the worker in the company's business**. That is, is the work performed as an integral part of the business (i.e., that of an employee) or done on behalf of the business but not integrated into that business (i.e., that of an independent contractor)?

Whether or not an individual is a worker/employee/dependent contractor or an independent contractor is a question of law to be determined after consideration of all the relevant factors. In making such a determination, the intention of the parties is relevant *only to the extent* that it is reflected in the actual arrangements made between the parties in structuring their relationship. That being said, the parties cannot by their "*agreement*" render the relationship to be that of an employee or an independent contractor or contract out of minimum statutory protections. The parties need to walk the walk and talk the talk.

As such, when an adjudicator or the courts perform an assessment to determine whether the relationship at hand is one of a worker/employee/dependent contractor or an independent contractor, there is no one factor that is determinative across all cases.

Conducting this status assessment involves the weighing of the relevant factors taken together as a whole in the individual circumstances of a specific contractual relationship. While all of the factors and their subfactors will be considered to the extent that they are applicable, at the end of the day the applicable factors will be assigned a weight and their combined weight will be assessed as to where the particular relationship falls on the continuum between employee and independent contractor. Meaning, a factor may be given more or less weight depending on the particular relationship being assessed with all of the factors being relevant to, or "*as*" relevant to a particular case. Also meaning that here is no bright line rule that consistently and predictably distinguishes between these two categories of individuals.

Is an "nature of the services" or "status" clause enough to establish that an individual is an independent contractor?

An example of such a clause is the following:

> **Independent Contractor**
>
> (a) The Consultant is an independent contractor who retains complete control over, and complete responsibility for their operations. The Consultant is not, and shall not hold themselves out to be, an employee, agent, legal representative, partner, subsidiary, or joint venturer of the Client for any purpose whatsoever;
>
> (b) The Consultant shall have no right or power to, and shall not, bind or obligate the Client in any way, manner or thing whatsoever, or represent that they have any right to do so;
>
> (c) As an independent contractor, the Consultant shall be solely responsible for the manner and working hours in which they perform any services under this Agreement;

No, such a clause is not enough; such a clause only addresses the parties' intent.

When drafting such contracts, in addition to the parties' intent you need to gather and assess information with regard to the mechanics and nature of total workings of the relationship in order to avoid terms that conflict with the parties' intent (i.e., contractual pitfalls). This is because the mechanics support factors that weigh towards the relationship to be determined as either an employment relationship or an independent contractor relationship. Although, such a status clause must be included in a written consulting agreement as a best practice. It is far more problematic for a written consulting agreement not to express the parties' specific intent as to the nature of their relationship or the status of the individual as an independent contractor than not. Where there is no status clause, the relationship more likely than not will be found to be one of employment.

Another best practice is never to start with an employment contract as the template to your written consulting agreement.

Additionally, never use a one-size fits all template across industries and clients. While some clauses that will need to be built into a written consulting agreement are standard, others by nature of the industry, services contracted for, manner of payment, and other nuisances of the relationship will need to be tailored.

Contracts of vs. for Services

Where an individual performs the service of work, they receive remuneration and the work is performed according to the direction and control of the individual's employer. The terms of the contract may be either in writing or given orally, but both are equally binding and enforceable. This is known as a **contract of service**, which is an employer/employee relationship.

The other type of contract between two parties that is relevant to this paper, is that of a contract by which an individual, the contractor or service provider, makes a commitment to another person, the client/company to provide a service for a price or fee. This is known as a **contract for service**, which is not an employer/employee relationship. Under a contract for service the contractor is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance (i.e., there is no direction and control over the means by which the contractor performs their services).

Individuals may approach their employer or potential employer to request to be treated as an independent contractor because of the tax benefits of being an independent contractor (e.g., being being able to claim deductions for expenses). On the other hand, employers may approach employees for the cost savings that such a relationship can provide to the employers. The latter is connected to the changes to the Ontario *Employment Standards Act*, 2000 introduced on this day last year with the *Working for Workers Act, 2022*.

Why does this legally matter?

There are many employment law consequences of treating an employee as an independent contractor when they are legally a worker/employee/dependent contractor.

Over the past two decades the emergence of "*own-account*" self-employment through such categories of workers as freelancers, consultants, and independent contractors, has become more prevalent in the workplace. This is due to a range of factors such as the globalization of trade, the introduction of new technologies, including but not limited to the ability to work remotely anywhere in the world, and workers' desire for autonomy and independence. Such prevalence is blurring the line between workers/employees/dependent contractors and independent contractors.

Workers/employees/dependent contractors are protected by various protective employment-related statutes, including but not limited to in relation to employment or labour standards, health and safety, and different forms of public insurance or safety net programs. Those who are independent contractors more often than not do not benefit from such statutory protections and/or common law entitlements of employees to such rights as reasonable notice and/or are not owed the same implied duties.

All employment-related statutes have their own policy goals, so it is possible that a worker/employee/dependent contractor may be held to be an "*employee*" or fall within one statute's protections and not under the protection of other statues. In light of such differences, the

law is clear that courts and tribunals must take into account the applicable home legislation wording and the particular policy objectives of such home legislation when deciding if an individual has status for the purpose of that specific statute.

As such, companies who are clients under a consulting agreement and incorrectly treat an employee (in law) as an independent contractor and as a result have failed to apply the necessary statutory protections will face liability in relation to doing so. This may range from unpaid entitlements or deductions to interest, fines, and other penalties depending on the specific employer obligations that are applicable. Similarly, under the common law at the cessation of the contractual relationship, companies who are found to be a contractor's employer (i.e., they are determined to be an employee or deemed worker/employee/dependent contractor) will have accrued liability, including but not limited to for providing common law reasonable notice rather than any contractual termination or early termination provisions.

The following are some examples of applicable legislation and related sample employment contract clauses:

Protective Legislation:

Employment Standards Act, 2000

Employees can make a complaint to the Ministry of, Labour Immigration, Training and Skills Development ("**MOL**") if they do not get paid the wages they are owed under the *Employment Standards Act ,* 2000 and its regulations (collectively the "**ESA")**. There is no cost to do this. Independent contractors on the other hand cannot do so and must go to court in order to receive unpaid compensation under their consulting agreement. There are legal and/or court costs arising from such civil actions. This is because true independent contractors are exempt from receiving the statutory minimums of the ESA. On the other hand, those individuals who are not true independent contractors but treated as such by their employer, their employers will be accruing liability for unpaid minimum wage, vacation pay, public holiday pay, premium public holiday pay, overtime pay, termination pay, and/or severance pay, as well as in relation to non-monetary minimum terms such as entitlement to breaks and rest periods between shifts. For federally regulated employers, accruing liability for statutory employment standards minimums are equally applicable.

The ESA does not define an "*independent contractor*". Rather, it defines what an "*employee*" and an "*employer*" is in subsection 1(1) as:

> "*employee*" includes,
>
> (a) a person, including an officer of a corporation, who performs work for an employer for wages,
> (b) a person who supplies services to an employer for wages,
> (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
> (d) a person who is a homeworker,
> and includes a person who is an employee;

"*employer*" includes,
(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and
(b) any persons treated as one employer under section 4, and includes a person who is an employer;

Additionally, the ESA provides under section 3 parameters as to whom the statutory minimums of the ESA apply to and whom they do not. The relevant exclusions in relation to the contents of this paper are set out in combined effect of subsection 3(5)(11.1) and 3(7), which as of January 1, 2023 exclude from ESA coverage business and IT consultants. The sections provide:

3 (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Other exceptions
(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:
11.1 If the requirements of subsection (7) are met, a business consultant or an information technology consultant.

Business and IT consultants
(7) For the purposes of paragraph 11.1 of subsection (5), the following are the requirements that must be met:

1. The business consultant or information technology consultant provides services through,
i. a corporation of which the consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or
ii. a sole proprietorship of which the consultant is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act.*
2. There is an agreement for the consultant's services that sets out when the consultant will be paid and the amount the consultant will be paid, which must be equal to or greater than $60 per hour, excluding bonuses, commissions, expenses, travelling allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate.
3. The consultant is paid the amount set out in the agreement as required by paragraph 2.
4. Such other requirements as may be prescribed.

Rules re calculation of rate
(8) For the purposes of paragraph 2 of subsection (7), such other rules as may be prescribed apply with respect to the calculation of a consultant's hourly rate or other compensation.

Ontario Labour Relations Act, 1995

Two or more "*employees*", as defined by the *Ontario Labour Relations Act, 1995* (the "**OLRA**"), can form the basis of an application for certification. Only "e*mployees*" are covered by the protections of the OLRA. The OLRA does not expressly provide a definition of what constitutes an "*employer*" or an "*employee*". It does under subsection 1(1) expressly define "*dependent contractors*" as an "*employee*", as follows:

> "*dependent contractor*" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;
>
> "*employee*" includes a dependent contractor;

Subsection 1(3) of the OLRA defines an "*employee*" for the purposes of the OLRA as not including:

> Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,
> (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or
> (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Additionally, subsection 126(1) of the construction industry provisions of the OLRA provides that an "*employee*" includes individuals engaged in whole or in part in off-site work but who is commonly associated in work or bargaining with on-site employees. However, no where in the OLRA is an express definition of an "*employee*".

WSIB

The *Workplace Safety and Insurance Act, 1997* ("**WSIA**") provides insured compensation and other benefits to eligible workers who become ill or injured in the course of their employment. This insurance plan is funded primarily by employer payroll remittances. WSIA defines various classes of "*workers*" in a broader manner than does some other employment-related statutes (i.e., they may not be *employees*" for the purposes of other employment related legislation and/or the common law). WSIA's definition of worker and employer is far broader than that of the common law. WSIA expressly defines the following terms for the purpose of its protections:

> "*emergency worker*" means a person described in paragraph 6, 7 or 8 of the definition of worker who is injured while engaged in the activity described in that paragraph;
> "employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry and includes,

(a) a trustee, receiver, liquidator, executor or administrator who carries on an industry,
(b) a person who authorizes or permits a learner to be in or about an industry for the purpose of undergoing training or probationary work, or
(c) a deemed employer;

"*independent operator*", subject to section 12.1, means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose;

"*learner*" means a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work;

"*student"* means a person who is pursuing formal education as a full-time or part-time student and is employed by an employer for the purposes of the employer's industry, although not as a learner or an apprentice;

"*temporary help agency*" means an employer referred to in section 72 who primarily engages in the business of lending or hiring out the services of its workers to other employers on a temporary basis for a fee;

"*worker*" means a person who has entered into or is employed under a contract of service or apprenticeship and includes the following:
1. A learner.
2. A student.
3. An auxiliary member of a police force.
4. A member of a volunteer ambulance brigade.
5. A member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade.
6. A person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so.
7. A person who assists in a search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police.
8. A person who assists in connection with an emergency that has been declared [as set out in the Act].
9. A person deemed to be a worker of an employer by a direction or order of the Board.
10. A person deemed to be a worker under section 12 or 12.2.
11. A pupil deemed to be a worker under the *Education Act*.

In addition, subject to prescribed limitations, under section 12 of WSIA independent operators, sole proprietors, partners in a partnership, and executive officers of corporations who carry on business in an industry included in Schedule 1 or Schedule 2, other than construction (that has special rules), can apply to be deemed to be a "*worker*" (i.e., to receive insurance) and to be covered by WSIA's protections/insurance. Where the same occurs under subsections 12(1) or (3) of WSIA, the independent operator, sole proprietor,

partnership or corporation, as the case may be, are deemed to be the employer for the purposes of the insurance plan.

Section 12.1 of WSIA defines for the purpose of sections 12.2 12.3, and 182.1 that an "independent operator" is:

(a) an individual who,
(i) does not employ any workers,
(ii) reports himself or herself as self-employed for the purposes of an Act or regulation of Ontario, Canada or another province or territory of Canada, and

(iii) is retained as a contractor or subcontractor by more than one person during the time period set out in a Board policy, or

(b) an individual who is an executive officer of a corporation that,

(i) does not employ any workers other than the individual, and
(ii) is retained as a contractor or subcontractor by more than one person during the time period set out in a Board policy.

Under the enforcement provisions of WSIA, including section 141, a person who retains a contractor or subcontractor to perform work in an industry included in Schedule 1 or Schedule 2, other than construction, may be deemed by WSIB to be the employer of the workers employed by the contractor or subcontractor to perform the work, and in that case the person is liable to pay the premiums payable by the contractor or subcontractor in respect of their workers as if the person were the contractor or subcontractor.

Should there be a workplace illness or injury, the parties in advance should have addressed who is the "*employer*" for the purposes of WSIA's protections and obligations (i.e., reporting and payment of premiums). Parties whom are deemed to be the employer who have failed to comply with WSIA face prescribed monetary penalties payable to the WSIB in addition to any penalty imposed by a court for an offence under the WSIA. In addition, where a person (i.e., employer or deemed employer) is determined to have committed an offense under WSIA, they face fines as well as prosecution in a court of law. Particularly, where an individual they are liable to a fine not exceeding $25,000 or to imprisonment not exceeding six months or to both. Where they are not an individual, they face a fine not exceeding $500,000.

OHSA

The *Occupational Health and Safety Act* ("**OHSA**") protects the occupational health and safety of "*workers*" and promotes the prevention of workplace injuries and occupational disease. This includes the right to refuse unsafe work. Employees and independent contractors both have rights and responsibilities for healthy and safe working conditions and parties to a consulting agreement should address the same in its written terms.

In relation to such protections, subsection 1(1) of the OHSA has the following defined terms:

"*constructo*r" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer;

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

"*worker*" means any of the following, but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program:

1. A person who performs work or supplies services for monetary compensation.

2. A secondary school student who performs work or supplies services for no monetary compensation under a work experience program authorized by the school board that operates the school in which the student is enrolled.

3. A person who performs work or supplies services for no monetary compensation under a program approved by a college of applied arts and technology, university, private career college or other post-secondary institution.

4. REPEALED: 2017, c. 22, Sched. 1, s. 71 (2).

5. Such other persons as may be prescribed who perform work or supply services to an employer for no monetary compensation;

"w*orkplace*" means any land, premises, location or thing at, upon, in or near which a worker works; [**emphasis added**]

Again, the definition of a "*worker*" is broader under the OHSA than under other statutes and may encompass individuals who are not necessarily "*employees*" for the purposes of other statutes and/or the common law however does not include independent contractors.

Human Rights Code

The Ontario H*uman Rights Code* (the "**Code**") provides equal rights and opportunities without discrimination in the protected areas of employment, housing (accommodation), and services. About three-quarters of all human rights claims of breaches of the Code come from the "*workplace*".

Under the Code the term "*employment*" is used in a very general way. Employees, independent contractors, and volunteers are covered. Independent contractors have been found to be persons covered by the Code in the "employment" context" in such cases as *Sutton v. Jarvis Ryan Associates* (2010]) HRTO 2421 (CanLII) and *Ketola v. Value Propane*, (2002) HRTO 46510 (CanLII).

Human rights applications can be filed against employers – and also against contractors, unions, and boards of directors. In the unionized context employers and unions have a joint duty to make sure that workplaces are free of discrimination and harassment.

Additionally, under the *Code* service providers have obligations to users of their services, including the duty to accommodate the needs of people with disabilities to allow people to equally benefit from and take part in services. Meaning, that service providers and others may need to change their rules, procedures, policies and requirements to allow for equal access and equal opportunities even if they have not made a specific or formal request and take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions in a timely way. Depending on the sector and services being provided by a contractor, a client may wish to include in the consulting agreement a term expressly requiring the contractor's adherence to such obligations.

Accessibility for Ontarians with Disabilities Act, 2005

The *Accessibility for Ontarians with Disabilities Act* ("**AODA**") is a law that sets out a process for developing and enforcing accessibility standards for persons with disabilities that organizations must follow. The employment and customer service standards are the most relevant to this paper.

The employment standards are provided for in Part III of the AODA. Part III defines and addresses employer obligations in relation to recruitment generally as well as in relation to assessment and selection processes, n*otices to successful applicants and existing employees of employers obligations under the AODA,* performance management, career development and advancement, redeployment, individual accommodation plans, emergency response plans, return to work processes, and documentation in relation to the foregoing. Subsection 20(1) of the AODA provides that these standards applies to employees and not unpaid volunteers and other non-paid individuals.

The customer service standards are provided for in Part IV.2 of the AODA These standards: (a) apply to "obligated organizations" who provide goods, services, or facilities; and (b) require such providers to develop, implement, and maintain policies governing its provision of goods, services or facilities, as the case may be, to persons with disabilities that adhere to prescribed principles.

Nowhere in the AODA is the term "*employee*", "*dependent contractor*", or "*independent contractor*" defined.

Sample warranty clauses to address potential liability under any applicable employment-related legislation:

(x) to abide by all of the Client's applicable policies, procedures and technology protocols when on premises, interacting with its customers or as otherwise necessary or required to perform the Services (e.g., in relation to business and office conduct/Code of Conduct, health and safety, anti-violence, harassment and/or discrimination, and use of the Client's facilities, supplies, information technology, equipment, networks, and other resources);

(x) The Contractor warrants and agrees that it will: (a) have in place throughout the Term of this Agreement and any extension or renewal thereof appropriate insurance, including but not limited to WSIB benefits for its employees (as applicable); and (b) will have sole responsibility in relation to any of its employees' WSIB and/or other insurances claims in any manner connected to the provision of the Services under

this Agreement. The Contractor hereby undertakes and agrees to indemnify and hold harmless the Client in relation to any and/ all employee and/or other insurance claims for which it is liable. The Contractor must provide the Client with proof of current insurance: (i) upon commencement of this Agreement; (b) upon request; and (iii) at least annually.

(x) In relation to the Fees, the Contractor acknowledges and agrees that the Contractor will: (a) apply the applicable H.S.T. for the Services rendered on each invoice; and (b) be solely responsible for all taxes and deductions on such Fees as required by any applicable provincial or federal legislation.

Legislation that requires payroll deductions, withholdings, and remittances:

Canada Pension Plan Act

The Canadian Pension Plan (CPP) provided for under the *Canada Pension Plan Act* ("**CPPA**") provides to employees a pension plan when they retire and/or disability benefits where employees are unable to work. To fund such benefits, employees and employers pay into the CPP through payroll deductions of CPP premiums from employees' pay cheques.

No payroll or other deductions are paid from payments to independent contractors. Indpendent contractors must payments to CPP for such benefits.

Subsection 2(1) of the CPPA provides the following defined terms:

employee includes an officer;

employer means a person liable to pay salary, wages or other remuneration in relation to employment, and, in relation to an officer, includes the person from whom the officer receives their remuneration;

employment means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;

excepted employment means employment specified in subsection 6(2);

Subsection 6(2) of the Act defines "*excepted employment*" to include, amongst other things employment of a casual nature otherwise than for the purpose of the employer's trade or business;

Under section 9 the CPPA, it is mandatory for every in respect of each employee employed by it in pensionable employment to make an employer's base contribution for the year as prescribed by the Act, including in situations where self-employment follows employment or employment follows self-employment. Additionally, section 21 of the CPPA has the mandatory provisions that: (a) every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct and remit an employee's full CPP contributions in respect of the pensionable employment is paid to the employee in a year; and (b) where they fail to do so, the employer is liable to the government for the whole amount that should have been deducted and remitted from the time it should have been deducted plus interest at the prescribed date as of the first date it was owed plus any applicable penalties. Where this occurs, the CPPA deems that such payments were received by the employee to whom the remuneration was payable.

Under section 21.1 of the CPPA, if the employer who fails to deduct or is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally or solidarily liable, together with the corporation for any such payments, interest, and penalties relating to it. As such, it is important to address such premium liability in your consulting agreements where the intent is not to treat the individual as an employee to avoid such liability should the employee be deemed to be an employee for the purposes of the CPPA.

Employment Insurance Act

Employees and employers make employment insurance (EI) premium payments in accordance with the *Employment Insurance Act* ("**EIA**") from each of their pay cheques for EI benefits. EI benefits provide employment insurance where an employee loses their job, are laid off, and/or require special EI benefits (e.g., pregnancy and parental leave or sick benefits. Such premium deductions are remitted to EI to fund this insurance program.

Independent contractors are not entitled to EI when unemployed however may be eligible for special benefits (i.e., pregnancy and parental, sick, and compassionate care) on a voluntary basis. No deductions of premiums are made from the earnings of independent contractors for EI.

Like under the CPPA, employers under the EIA are liable for failing to remit required EI deductions from payments to their employees and must make it where the intent is not to treat the individual as an employee.right by remitting the same to the government where employees fail to do so (i.e., pay it twice). As such, it is important to address such premium liability in your consulting agreements to avoid such liability should the employee be deemed to be an employee for the purposes of the EIA.

Income Tax Act

Both employees and independent contractors must pay income tax. Employers have the obligation to deduct income taxes as prescribed under the *Income Tax Act* ("**ITA**") from each pay cheque of its employees and remit it to the government on their employees' behalf. Like under the CPPA and the EIA, where the employer pays out funds to their employees without withholding the required income taxes, they are liable to the government to pay the amounts that ought to have been deducted where the employees fail to meet their obligations to pay such amounts to the government. Independent contractors on the other hand receive their earnings (fees, retainers, and the like) without any payroll deductions or withholdings from the client and must declare their income and pay taxes to the government directly. As such, it is important to address such premium liability in your consulting agreements to avoid such liability should the employee be deemed to be an employee for the purposes of the ITA.

Sample WSIA, CPP, EI, and ITA Clause:

> All payments made by the Client to the Consultant shall be made without statutory deductions in respect of, but not limited to, the federal and provincial income tax acts, *Canada Pension Plan Act*, *Employment Insurance Act*, *Workplace Safety and Insurance Act* and/or any applicable Ontario Health Premium in connection with the Ontario Health Insurance Plan. The Consultant acknowledges responsibility for arranging and paying all applicable taxes,

payments, premiums, as well as any interest, fines, and/or penalties under any legislation with respect to the Services provided for under this Agreement by the Consultant.

Sample Catchall Legislation Clause:

As an independent contractor, the Consultant is solely responsible for all taxes, wages, remittances, benefits, premiums and insurance including, without limitation, payment of employment insurance, Canada Pension Plan premium payments, retirement benefits, and worker's compensation premiums, if applicable. The Client will not provide any benefits or insurance to the Consultant including, without limitation, pension or retirement benefits, vacations, medical and dental insurance, life insurance, short-term or long-term disability insurance and/or worker's compensation insurance, and the Consultant irrevocably agrees not to make any claims for such benefits, wages, and/or insurance. Further, the Consultant shall not accrue or earn any seniority or service credits for any purpose as a result of the Services performed under this Agreement, including but not limited to under the ESA.

In addition, in addition to the above clause it is also recommended to include indemnification clause or clauses as minimum statutory entitlements cannot be contracted out of. A sample indemnification clause is:

The Consultant further agrees to indemnify and hold the Client harmless with respect to any claims or demands properly exigible, including penalties, interest, and costs or expenses incurred in defending any claims or demands, including legal fees, which might be made against the Client with respect to the deductions and/or remittances referred to in Sections X and X of this Agreement and/or the failure of the Consultant to make proper remittances as required by this Agreement.

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TAB 3B

Annotated Employment Agreement Clauses 2023

How to Run a Virtual Law Firm: Key Employment Agreement Terms

Lisa Stam
SpringLaw Professional Corporation

Evaleen Hellinga
SpringLaw Professional Corporation

February 28, 2023

cpd

Trusted Virtual Counsel Wherever Your Workplace
www.springlaw.ca

How to Run a Virtual Law Firm: Key Employment Agreement Terms

By Lisa Stam and Evaleen Hellinga
February 2023

In this paper, we will explore some important clauses that we include in our firm employment agreements to address our unique work environment of a fully virtual law firm.

Virtual Law Firms

Although working remotely has become commonplace since 2020, many law firms have not made the leap to operate fully and deliberately remotely. Many continue to explore the hybrid model, where the "real" location remains the in-person office location.

SpringLaw is an employment and labour law firm that has been a deliberately virtual firm since its inception in 2017. The infrastructure is virtual first, with every process, software choice, workflow and communication tool designed for virtual collaboration. Our full infrastructure is designed to be a data conveyor belt that only pulls in software and systems that will fully integrate wholistically. If you're going fully remote, it goes without saying that everything needs to be centrally located in the cloud.

At the moment, we are a team of 13 people: three partners, five associates, two paralegals and three operations staff, all working fully remote. The firm has a mailing address for the very infrequent snail mail that still arrives (when when can we finally ban all cheques?), but otherwise, no physical office. Most client meetings are held using video or phone calls and any in-person meetings are confined to litigation where virtual was not an option.

To make this run smoothly, we include a number of specific provisions in our employment agreements and in our firm's *WTF Manual* (our Working the Flow Procedures Manual), each of which foster our virtual firm culture, communications, document management and day to day collaboration.

Human Connections in a Virtual Firm

Operating a virtual firm effectively does require us to change the way we work. Building a strong virtual work culture can't happen by accident or default - it is an investment no less than all the in-person customs that have developed over the last century or two.

How can we build relationships and rapport with our clients when they (almost) never meet us in person? How do we manage documents and ensure security and confidentiality? How does an open-door policy work in a virtual firm? How do we ensure appropriate mentorship and oversight for junior lawyers? How do we manage performance and time management issues?

The casual osmosis of an in person firm doesn't happen in a virtual environment, requiring regularly scheduled 1:1 meetings, at least weekly team calls and the social glue and humour of chat channels. It may feel too impersonal or distant for traditional lawyers, but electronic communications are increasingly the comfort zone for the generations coming into the workplace, for both our employees and clients.

We augment our digital channels with at least quarterly in person meetings and an annual full team 3 day retreat, and encourage video calls as the default internal communication for substantive content, rather than phone calls or emails.

Employment agreements are an important tool for all employers to set and manage expectations of both the employees and the firm. In the context of a virtual firm, where the partners may not have the same ability to demonstrate expectations through in-person workplace practices and culture, setting these clear expectations upfront and building out a new integrated communications layer becomes even more important. This theme underlies each of the key provisions in our employment agreements.

Key Employment Agreement Terms in a Virtual World

1. Role

Describing an employee's role is common term in most employment agreements. In any firm, setting clear expectations regarding the associate or other staff members' role gives both parties a shared understanding of the work and something to refer back to when issues arise.

In a virtual firm, where associates or other staff cannot observe those around them as a benchmark in the same way as in an in-person office, terms in the agreement regarding roles become a key reference point.

The role provision describes the purpose of the role in the firm, along with a detailed job description. Specific terms and metrics should replace the intangible 'around the edges' expectations of the things associates should "just know" through observation. Instead, we try to remain granular around what the job entails so that the new employee can rely on that during the early days of the job.

The virtual associate can't observe those intangibles by osmosis in any event, so just list them and talk about them during regulary occuring career development and mentoring meetings. It is largely myth that osmosis was ever a better way to learn than deliberate and thoughtful mentoring. Setting out job expectations and a deliberate mentoring infrastructure will always be the better approach.

Our firm's role provision also sets out how remote associates should be spending their time, to help demonstrate the expectations to new team members. For example, X% client legal services, including advising, research, consultations, developing substantive legal knowledge, etc.; X% admin and training, including docketing, invoice review, CPD, task management, specific meetings, etc.

For companies outside the law, these sorts of details are commonplace. New lawyers are often starting their first office job and need the granular details about when to show up and what to do.

2. Hours of Work and Availability

Virtual work supports flexibility. Associates can perform their work from anywhere at any time, which can be very attractive but can also lead to challenges. One refrain we all heard from employees working from home during the pandemic lockdowns was that, while productivity was up, so was burnout. Employees were able to work all the time, without any commute time, team lunches, or distractions from coworkers. With increased time available for work, employees similarly felt an increased expectation to work longer hours. A firm also needs its lawyers and staff to be available during key hours for both clients and coworkers to reach them.

Clear expectations around hours of work can help avoid that burnout, highlight the flexible nature of virtual work, and ensure the team is working on a complementary schedule that means lawyers are available for clients, mentorship, and collaborative activities.

Establishing specific core hours manages expectations in the absence of seeing each other at our desks. We specify the minimum hours people are to be at their desk, we have a culture of checking in each morning and saying goodnight at the end of the day on our chat channels, and keeping in regular touch during the day. This is often no less and no different than the in-person environment.

3. Location of Work

The ability to work from anywhere offers flexibility for employees and an enhanced pool of candidates for the firm, however, there is good reason to maintain some say over the location of work for virtual employees. What if an employee wants to work from a different time zone? Who is responsible for travel costs when a lawyer needs to attend an in-person proceeding when they are living in another province? Are there potential tax liabilities or unique employment liabilities where an employee works from a jurisdiction outside Ontario? Will the remote location have sufficiently strong and reliable wi-fi?

We are still discovering the answers to some of these questions as remote work becomes more commonplace and caselaw on these issues catches up. In the meantime, the firm has the discretion to change the location of work, with the expectation it will be exercised reasonably.

The bottomline priority for our firm is that anything goes as long as you have good wifi. Whether at the cottage or abroad, people can focus and get their work done as long as they can connect to reliable and high speed internet.

4. Virtual Office

Working in a virtual office takes an additional layer of self-sufficiency and responsibility. Each lawyer, paralegal, and staff member creates their own secure and dedicated physical office, and is responsible for managing their space and equipment. This requires a very strong IT vendor support available 24/7 and responsive to individual inquiries.

To ensure our remote-based practices work seamlessly together, each person must take responsibility for staying in daily touch with the other members of the firm, being readily available by telephone, email and/or video conference, and making extra efforts to maintain an “open door”.

We particularly push the senior lawyers to set up weekly office hours, recurring 1:1s with juniors, paralegals and ops, and to always foster comfort with interrupting each other for help. Virtual collaboration works best when there are no silos and we’re all eager to help each other. We can’t see when each other has their head down trying to meet a deadline, so virtual nods and frequent communication will help share when are crunch moments and when the door is wide open.

5. Workflow Systems and Policies

The key to an effective, efficient and innovative law firm is careful and ruthless adherence to internal workflow systems and procedures. What is the client intake process? What is the document naming protocol? How are client documents saved and shared within the firm to ensure confidentiality but access to those who need it? What platforms are available for communication with other lawyers and operational staff and how are team members expected to use them?

These workflows may be learned on the job in a bricks and mortar firm and are not always clearly set out in policies or procedures. Those external cues that you might have in in-person firm are replaced by written processes in a virtual firm. Our WTF Manual describes everything from intake steps and scripts, to file closing protocols, docketing, client emails, chat rooms, sharing documents with clients, the firm's knowledge management system, administrative procedures, etc. Our employment agreements include a term which references the WTF Manual as the central source of our workflow systems. It is a contractual requirement to both adhere to and contribute to the WTF Manual.

6. Confidentiality & Data Security

Maintaining confidentiality and data security is crucial to both protecting our clients' confidential information and the reputation of any law firm. In a virtual firm, the firm provides the infrastructure to ensure data can be secured and confidential, however, a significant responsibility also lies with the employee to follow appropriate protocols.

We include both a Confidential Information Agreement and a Remote Work Policy as schedules to our employment agreements to establish these employee obligations. The terms in the Remote Work Policy require all employees to maintain a separate, designated and secure work area at home, where all work is kept confidential and inaccessible to others. All employees must also maintain homeowner's insurance for the work location and its contents.

We have regular training sessions on security protocols, require 2-Factor Authentication and frequent password updates through a business-grade password program, work regularly with our IT vendor on system updates and upgrades, and keep our IT vendor on speed dial for every slight red flag email that comes in the door that may pose a security risk.

Basically, we stay paranoid. In addition to employee engagement, data security protocols are likely one of the most important issues to regularly monitor, iterate and update.

Finally, cybersecurity insurance is a must whether an in person or virtual firm.

7. Equipment

Including a term regarding equipment in an employment agreement clearly establishes who is responsible for what and can avoid disputes about what expenses may relate to the home office.

Our firm provides computer equipment to all employees, including a laptop, scanner, monitors, printer, shredder, and standard software. This allows our firm to have a unified, seamless experience for our clients, regardless of which team member works with them. For newer or smaller firms, it may seem initially appealing and flexible to have employees DIY their office with the computer or equipment of their choice, but that inhibits firm consistency and ease of IT integration.

As this equipment is installed and remains in each employee's home, the employment agreement specifies the equipment remains the property of the firm at all times. Further, our IT support vendor has access to all of our computer systems to maintain data security, so employees know they have no expectation of privacy while using the equipment.

8. Remote Working Policy

While the employment agreement covers the basic and most crucial terms of employment, an appended Remote Working Policy can provide more granular terms about how the virtual office functions. This is where you might further specify expectations regarding the physical home office space, communication channels in the firm, and the equipment the firm is not responsible for providing, such as a secure and reliable internet connection, any furnishing, heating, lighting, electricity or other utility costs for their office space. We maintain it as an additional stand alone policy appended to the contract to underscore the importance of the remote-specific terms.

Conclusion

A virtual firm opens up a world of possibilities, allowing us to practice law and serve clients more efficiently and effectively, work with colleagues near and far, and offer flexibility and autonomy that both our lawyers and employees love. It does, however, require clear and deliberate terms to specify employee roles, hours of work and availability, workflows, data security, equipment, and other aspects of remote working are a few of the key ingredients to ensuring smooth operations and a healthy work environment.

Above all, deliberate mentoring, human connections and collaborations require special attention in a virtual environment and are the key to success of a law firm whether in person or remote.

* * *

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TAB 3C

Annotated Employment Agreement Clauses 2023

Legal Issues Surrounding Remote Workers (PowerPoint)

Anna Malazhavaya
Advotax Law

February 28, 2023

cpd

Legal Issues Surrounding Remote Workers

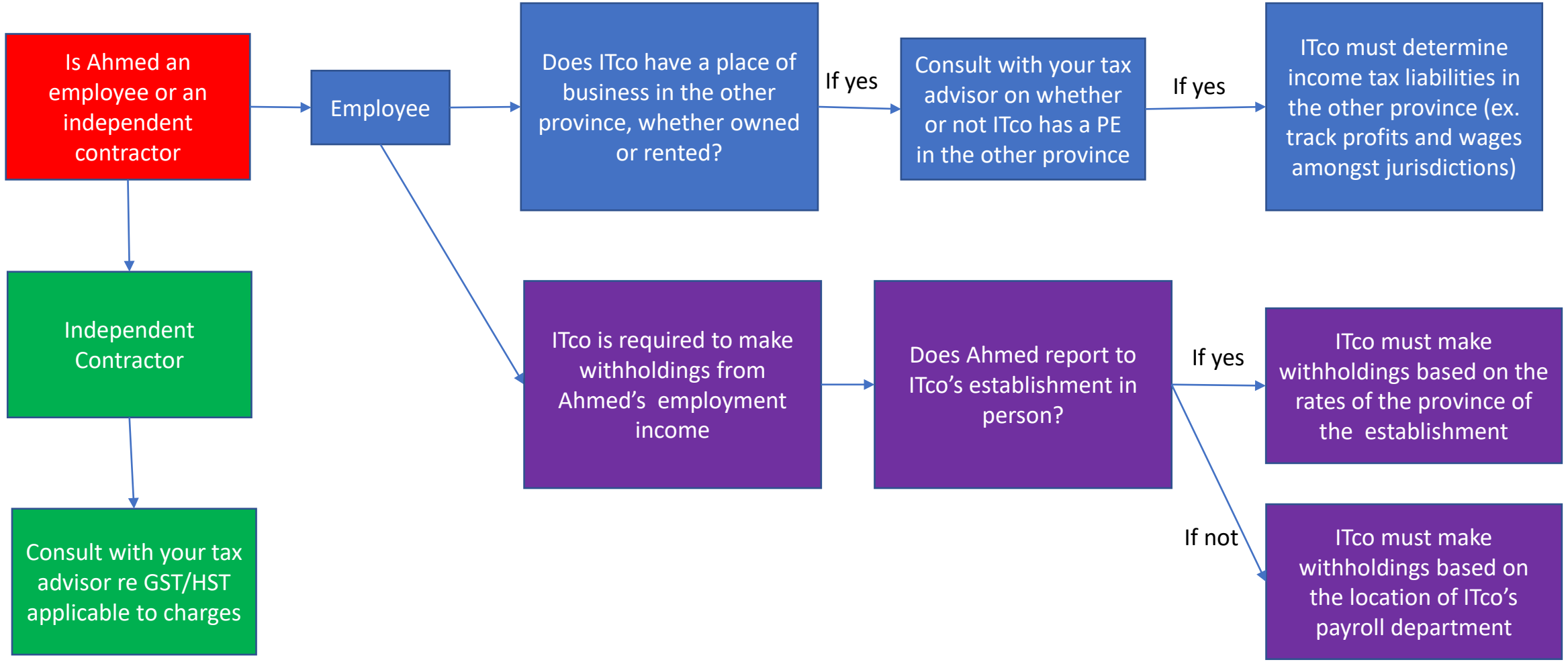
Annotated Employment Agreement - Post-Covid Clauses Panel

Case Study # 1: A resident worker in a different Canadian province

ITco is a Canadian IT development corporation with an office in Toronto, ON.

Ahmed is a highly skilled IT developer who lives in Calgary, AB. Ahmed refused to relocate to Toronto, but agreed to a remote arrangement where he works from Calgary. He currently works from his condo, which is less than ideal because he is frequently interrupted by his young children. Ahmed asks IT to rent a small office/workspace for $1,500/month.

Case Study # 1: A resident worker in a different Canadian province

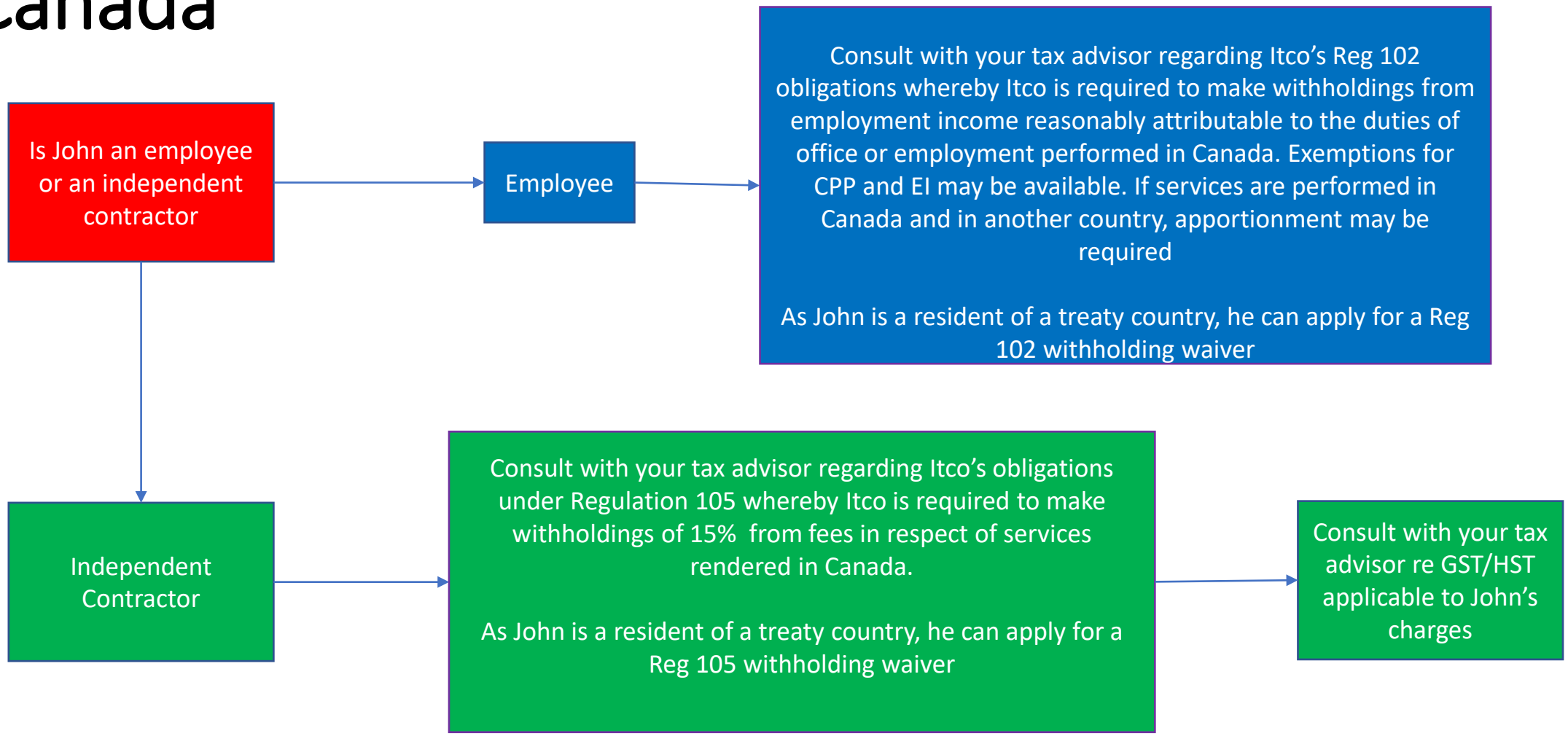


Case Study # 2: A non-resident worker in Canada

ITco is a Canadian IT development corporation with an office in Toronto, ON.

John is a resident of the UK for tax purposes. He works for ITco's office in Toronto and occasionally reports to its downtown office.

Case Study # 2: A non-resident worker in Canada

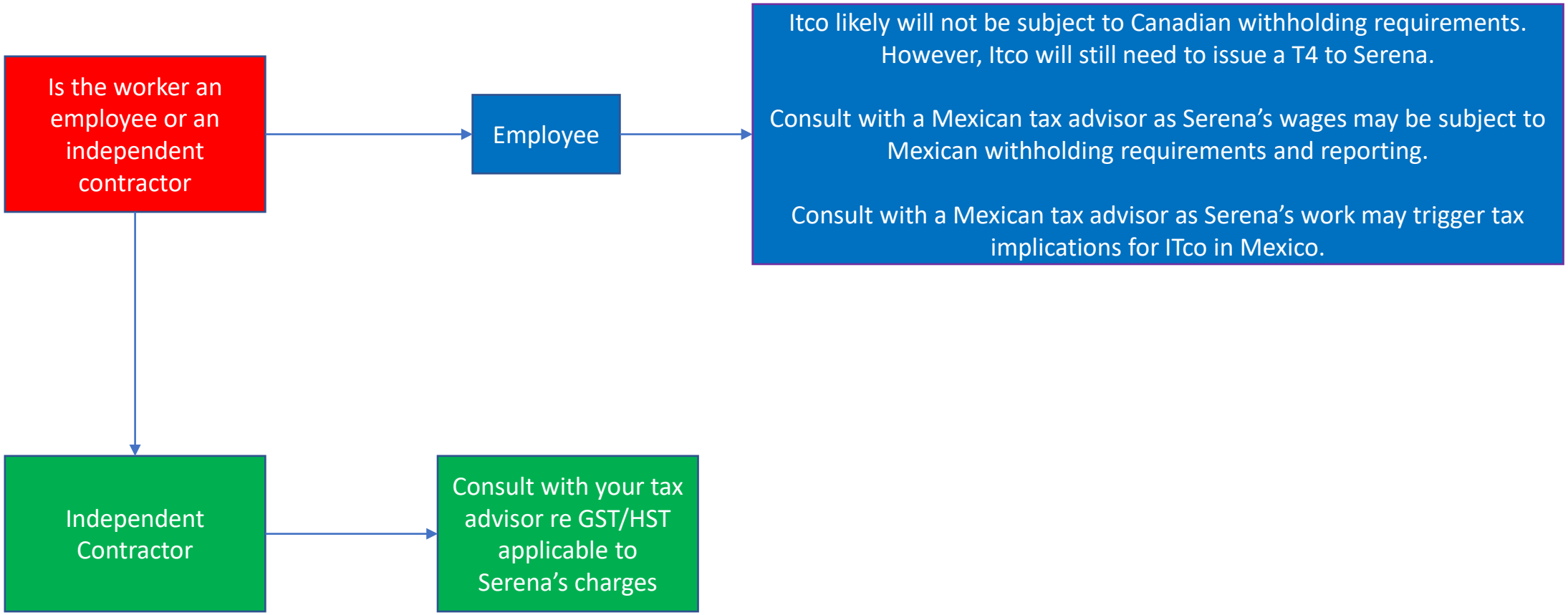


Case Study # 3: A non-resident remote worker outside of Canada

ITco is a Canadian IT development corporation with an office in Toronto, ON.

Serena is a talented junior IT specialist who works from her home in Mexico. She works full-time for ITco.

Case Study # 3: A non-resident worker outside of Canada

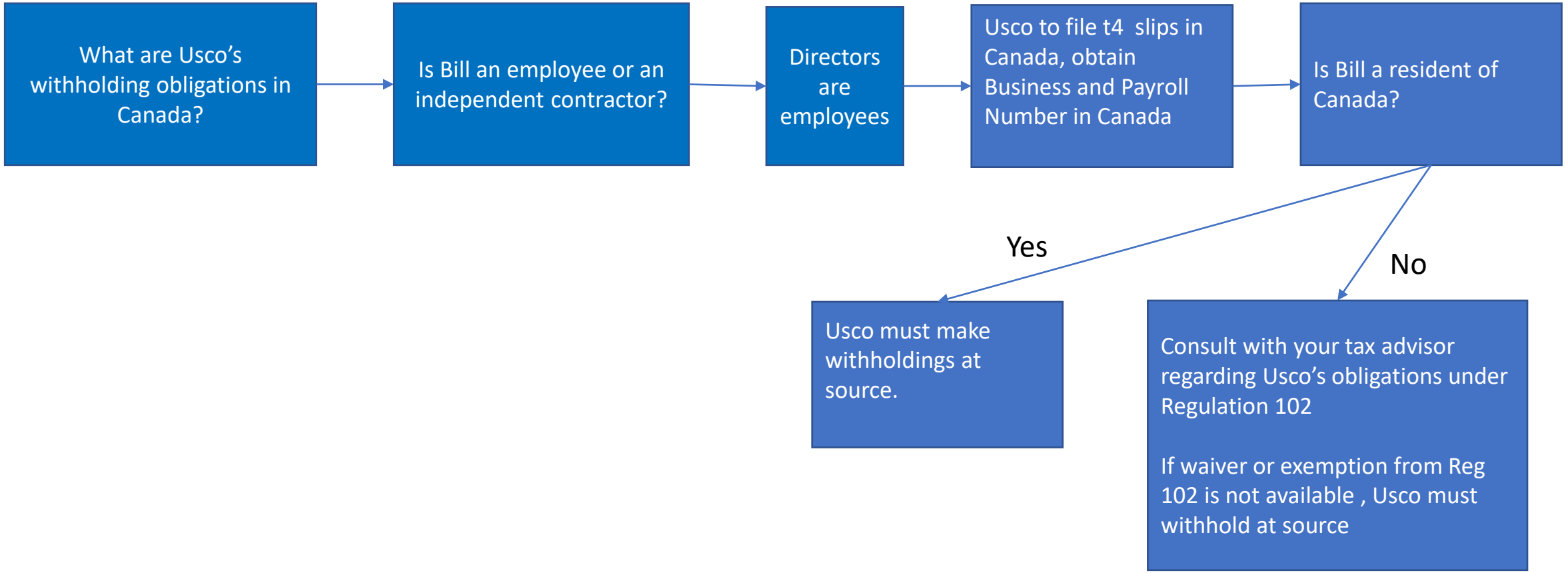


Case Study # 4: Director of a foreign corporation works from Canada

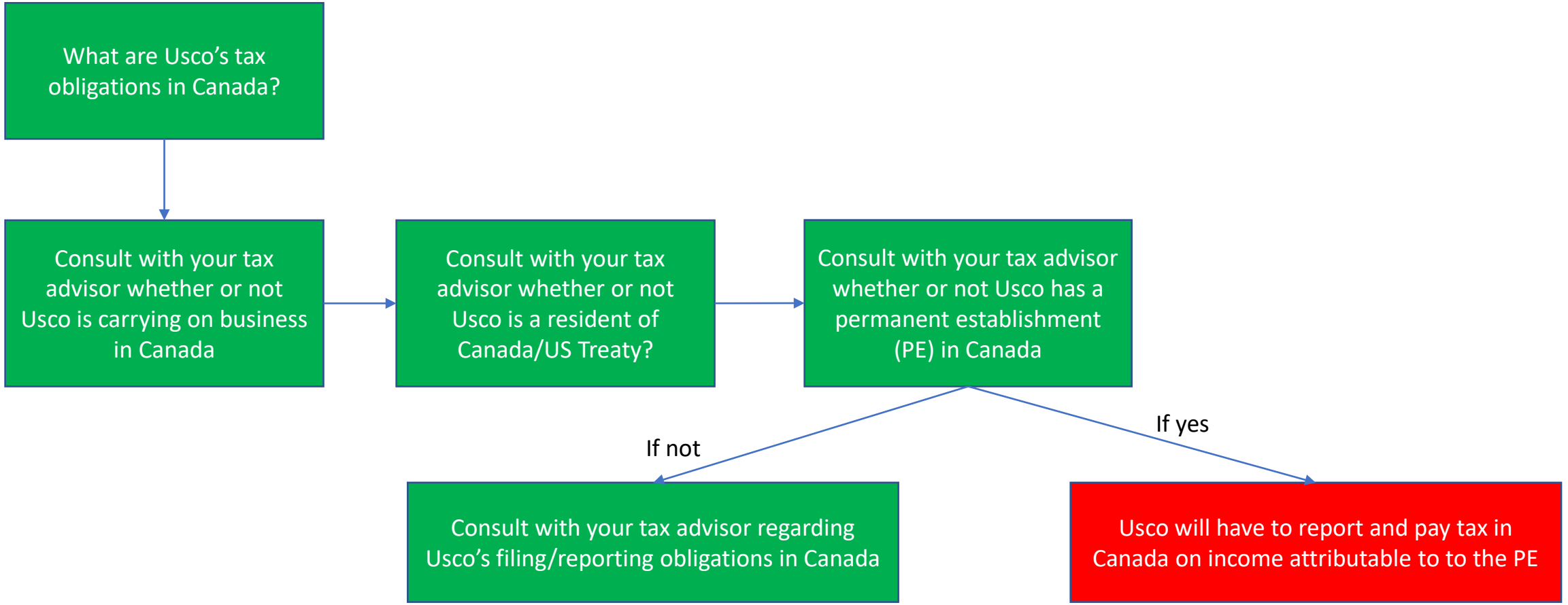
USco is a marketing company with workers in Canada

Bill is a member of the Board of Directors of USco. He lives in Toronto and earns an annual directors fee of USD$200,000. His duties include business development for Usco. He occasionally find and signs new clients for USco.

Case Study # 4: Director of a foreign corporation works from Canada



Case Study # 4: Director of a foreign corporation works from Canada



Permanent Establishment ("PE") under the Canada-US Tax Treaty (Note! Treaties with different countries may contain different PE tests)

"Fixed Place of Business" PE test:
A US business will have a PE in Canada if it has a fixed place of business in Canada, including: a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, as well as, in certain cases, a construction site, a drilling rigs or a ship.

Deemed PE test:
A US business will have a deemed PE in Canada if a US business has a person working in Canada and has , and habitually exercises in Canada, an authority to conclude contracts in the name of the US entity (brokers excluded).

Services PE test:
- **The Single Individual Test:** the individual present in Canada for 183 days or more in any 12 months period AND during the period more than 50% of gross income derived from services in Canada by the individual or
- **The Enterprise Test**: services are provided in Canada for an aggregate of 183 days or more in any 12 months period with respect to the same or connected projects for customers who are residents of Canada or who maintain a PE in Canada

Case Study # 5: A worker works in Canada for a foreign employer

USco is a marketing company with workers in Canada

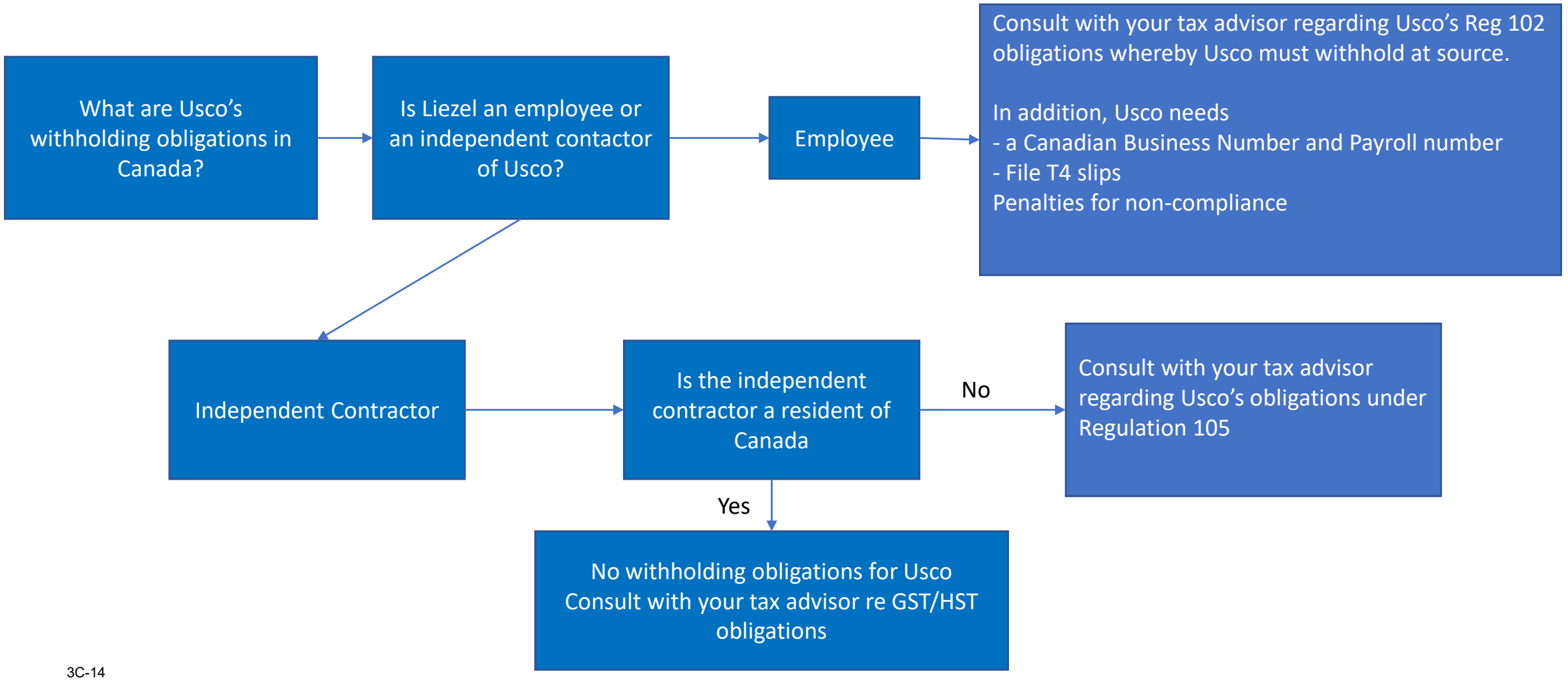
Liezel – is a project manager who works from her home in Toronto and has been overseeing a large contact for USco in Canada for the past 4 years. She works under a contract and gets US$100/hour.

Case Study # 6: A worker works in Canada for a foreign employer

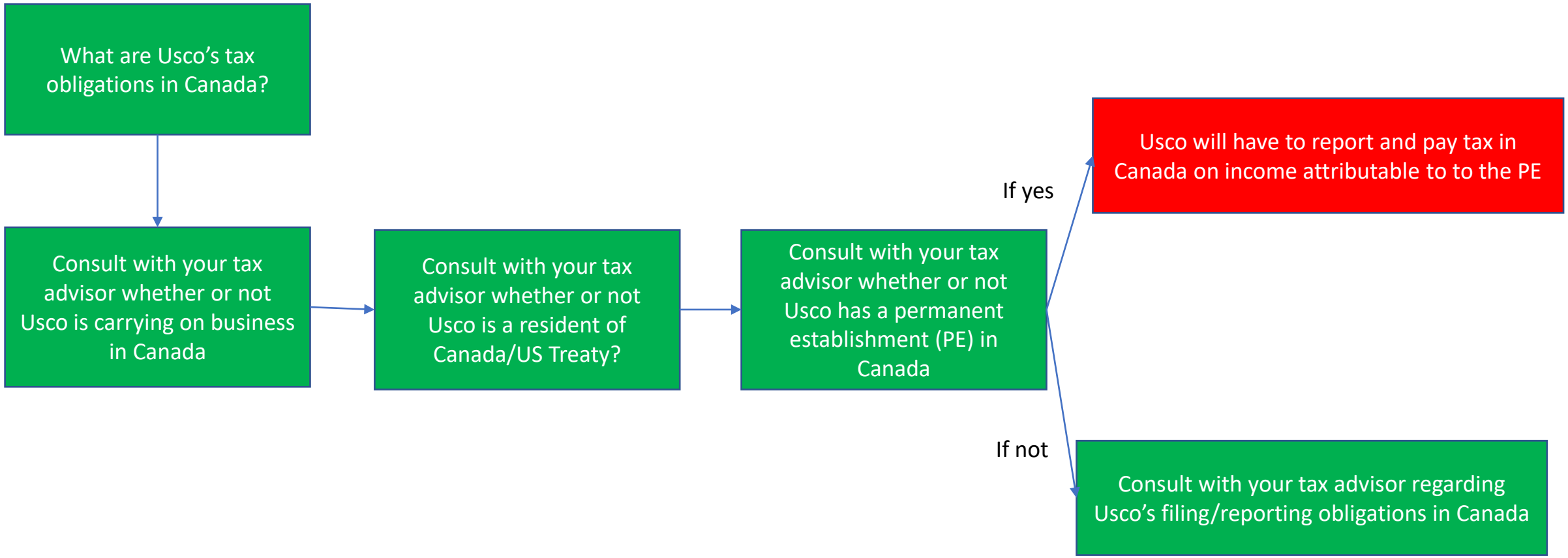
US Clair Law Firm - is a US-based environmental law firm

Clair - is a US licenced solo practice lawyer. She operates her practice through US Clair Law Firm. From April to December she works and provides consultations to her US clients via Zoom from her parents' cottage in Muskoka, ON.

Case Studies # 5 and 6: A worker works in Canada for a foreign business



Case Studies # 5 and 6: A worker works in Canada for a foreign business



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TAB 4

Annotated Employment Agreement Clauses 2023

Employee Checklist/Analysis

Mackenzie Irwin
Samfiru Tumarkin LLP

Restrictive Covenants in a Non-Competition World

Paul Macchione
Norton Rose Fulbright Canada LLP

February 28, 2023

cpd

Employee Checklist/Analysis:

Mackenzie Irwin, Samfiru Tumarkin LLP

STEP 1 - APPLICATION OF STATUTORY PROHIBITION:

- Are you a true Executive? Consider: Reporting structure, salary, decision making authority, etc?
    - **YES** → You qualify for the exemption → Skip to Common Law Reasonableness Analysis.
    - **NO** → Next Question.
- Did you enter the contract upon the sale of a business?
    - **YES** → You qualify for the exemption → Skip to Common Law Reasonableness Analysis.
    - **NO** → Next Question.
- Did you sign the contract before or after October 25, 2021?
    - **YES** → Non-Competition clauses are prohibited to your employment under the *Employment Standards Act*.
    - **NO** → The Prohibition does not apply to your contract → Skip to Common Law Reasonableness Analysis.
- Does the Contract have a Non-competition clause disguised as a non-solicit?
    - **YES** → prohibited from employment
    - **NO** → Proceed to Common Law Reasonableness Analysis.

STEP 2 - CONSEQUENCES:

Consequences of Non-Competition Clause in Post-Prohibition Contracts include:

- Clause or Entire Contract could be rendered void and unenforceable for attempting to contract out of *ESA*.
    - Potential loss of protection of an otherwise enforceable termination clause.
- Extraordinary damages – moral/punitive damages possible for attempting to circumvent a clear statutory prohibition.

STEP 3 - COMMON LAW ANALYSIS:

Common Law Reasonableness Analysis:

- General Rule: Non-competition clauses ONLY enforced in exceptional circumstances.

Factors considered (***PointOne Graphics Inc. v. Roszkowski et. al.***, 2021 ONSC 629):

- Whether there is a proprietary interest entitled to protection that cannot be protected sufficiently with a non-solicitation clause (*J.G. Collins Insurance Agencies v. Elsley*, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916).
- Whether the temporal or spatial features of the clause are as minimally invasive to achieve the purpose
- Whether the covenant is unenforceable as being against competition generally

- Whether the restrictive covenant is ambiguous or overbroad (*M&P Drug Mart Inc. v. Norton*, 2022 ONCA 398).

OBA Seminar: **Annotated Employment Agreement Clauses 2023**

Topic: **Restrictive Covenants in a Non-Competition World**

Speaker: **Paul Macchione – Norton Rose Fulbright Canada LLP – Employer Counsel**

Date: **February 28, 2023**

What is a "Restrictive Covenant"?

- An agreement that limits what an employee can do during employment and, more importantly, **after employment ends.**

- The purpose of these limitations is to **protect the employer** from the employee's misuse of confidential information, misuse of proprietary trade connections, or unfair competition during the period that follows termination of employment.

The Hierarchy of Restrictive Covenants:

- **Confidentiality clause**
  - restricts use of employer confidential information and trade secrets

- **Non-solicitation clause**
  - restrictions on solicitation of former employer's customers or employees

- **Non-competition clause**
  - restrictions on solicitation of former employer's customers or employees

Restrictive Covenant's and the Court

- Courts are not inclined to enforce non-competes and non-solicits, particularly against employees.

- The party seeking to enforce a restrictive covenant (generally a former employer) bears the burden of proving it is enforceable.

  Restraint of trade:

  - Against the public's interest in allowing a person to earn a living and to provide services to society.

  - However, courts also recognize freedom to contract, and will enforce a non-compete/non-solicit if it is "reasonable":

    - Connected to a legitimate proprietary interest.

      - A non-compete or non-solicit can only be enforced where it protects a proprietary interest such as trade connections or goodwill that are vulnerable to the employee after termination because of the employee's special knowledge or connection to that aspect of the business.

- Clear & Unambiguous.
    - "The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms" S*KRG Insurance Brokers (Western) Inc. v. Shafron, 2009 SCC 6*.
- No more restrictive than necessary.
    - Non-competes and non-solicits are presumed to be unreasonable restraints of trade. The employer can only rebut this presumption by showing the restrictions go no further than is necessary to protect the employer's legitimate proprietary interests.

Higher Standard for Employers:

- There are two tiers of non-competes/non-solicits:
    - **Commercial** – often arising from a sale of business where purchaser has paid for goodwill and there is a balance of bargaining power.
    - **Employment** – including true employees, contractors, and agents where there will be no payment for goodwill when work ends and there is an imbalance of bargaining power.
- There is no room for **ambiguity** or **overly restrictive terms** in covenants for employees or other vulnerable workers.

Legislation:

- In Ontario as of October 25, 2021 non-competes prohibited in Ontario except for (1) C-suite executives or (2) seller of business becomes employed with purchaser. Practically, non-competes were rarely enforceable before. This law makes that explicit.

Identify the "Legitimate Proprietary Interest" – What are we trying to protect?

- A non-compete/non-solicit **can** be used to protect:
    - Client relationships or trade connections.
    - Goodwill (reputation, customer loyalty)
    - Confidential information, including trade secrets, marketing strategy and pricing structure.
- A non-compete/non-solicit **cannot** be used to:
    - Improve competitive position in the marketplace.
    - Solely to prevent the employee from competing.

Set "Reasonable Limits" – What are the minimum protections we need?

For example, an employer might ask:

- How much time will we need to reconnect with our clients?
- Is there a specific region where clients might confuse the employee with the business?
- Who will the employee actually have contact with?
- What level of protection is needed having regard for the hierarchy of restrictive covenants

Leave No Room For Confusion

- A court likely will not enforce a non-compete/non-solicit that is **ambiguous** in any way.
- An employee must know **at the time of contracting** what they are required to refrain from doing.
- Create **definitions** of key terms and **be precise**:
    - Customers
    - Prospective Customers
    - The Business
    - The Geographic Area
    - etc.

For consideration when drafting a non-completion clause:

- Keep in mind a non-compete is typically most appropriate for use if the employee is the "face" of the business or is a key employee with special knowledge of trade connections and strategy.
    - It allows the business a short time to re-establish itself in the market
    - Ask (and be critical):
        - Would a non-solicit be enough to protect client relationships?
        - Would a confidentiality clause be enough to prevent disclosure of key info?
        - Would and IP agreement prevent misuse of key intellectual property?
            - If the answer is **yes**, a non-compete may not be appropriate (or enforceable).

Define the "Business"

- If the business designs software for office support, say so.
- No need to restrict the employee from joining a business that designs software for managing farms.
- **Be precise** – drafters often get into trouble by referencing any activities "including those of any affiliates or subsidiaries".

Narrow prohibited competing activities

- If the employee will be a key sales executive, prohibit competitive sales exec jobs.
- No need to restrict the employee from taking a job as a general labourer with a competitor.
- Courts will expect prohibited activities to mirror the role with the employer.

Narrow the geographic scope

- If the sales exec is responsible for sales in Ontario, limit the covenant to Ontario.
- No need to expand the scope to “Canada” or “North America”.
- **Be precise** – courts have struck down vague definitions like “the Metropolitan City of ____”.

Adopt a realistic duration

- Consider how long it will take a replacement to become the “face” of the business.
- Most enforceable non-competes are 6 to 12 months. Longer examples are rare.
- **Be precise** – courts have struck down ambiguous timelines, like “…up to 12 months”.

For consideration when drafting a non-solicitation clause:

- Keep in mind a non-solicit is typically most appropriate for use if the business will invest in the employee’s relationships with customers, suppliers or fellow employees.
    - Ask (and be critical):
        - Will this employee be a key point of contact between the business and key partners?
        - When the employee departs, might they leverage those relationships to compete?
            - If the answer is yes, a non-solicit may be appropriate.
            - If the answer is no, a confidentiality agreement is likely sufficient to protect employer information.

Focus on competitive solicitation of “Business”

- If employee sold office software, focus on soliciting office software purchases.
- No need to restrict reaching out for charitable donations or an invite to Sunday dinner.
- **Be precise** – Do not restrict communications that do not relate to competing with the “Business”.

Focus on "active" solicitation

- Limit the employee's right to actively "reach out" to solicit business, not the right to receive inquiries.
- Limiting the employee's right to have any communications at all is probably a non-compete.
- **Be precise** – A common error is to include "shall not solicit or respond to…" in restrictions.

Focus on the customers/supplies/workers the employee will have contact with

- Limit the clause to individuals the employee will deal with on behalf of the business.
- A common error is to prohibit contact with "all customers" of the business.
- **Be precise** – A non-solicit should not include individuals the employee had no prior knowledge of.

Adopt a realistic duration

- Consider how long it will take a replacement to connect with customers/suppliers/workers.
- Most enforceable non-solicits are 6 to 24 months. Longer examples are rare.
- **Be precise** – Again, courts will not enforce unclear timelines.

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TAB 5

Annotated Employment Agreement Clauses 2023

Employment Agreement Checklist - Ontario

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February 28, 2023

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EMPLOYMENT AGREEMENT CHECKLIST – ONTARIO

Nancy Ramalho, Pamela Krauss, and Tamara Ticoll

KEY ITEMS		KEY CONSIDERATIONS
STARTING POINTS		
1.	**Format**	Drafting employment agreements is not a one size fits all exercise - ensure the format of the agreement is appropriate for the employer, and for the employee given the nature of their role, for example: ✓ Executive ✓ Mid / Upper Level Management ✓ Professional ✓ Sales ✓ Tech / IT ✓ Labourer ✓ Administrative ✓ New hire vs. existing employee ✓ Template vs. individual agreement
2.	**Style**	Consider the culture and philosophy of the employer, and suit the agreement to the recipient: ✓ Formality: Take into account the type of employee, and strike a balance between formality (for some employees, excessive formality may be intimidating and overzealous), and being overly casual. ✓ Details: Consider everything from the use of pronouns, font, layout (formal vs less formal), letter style, contract style, headings, organization, to recitals or a more informal introduction, and jurisdiction. Note: Whether the employer is federally or provincially regulated will impact the drafting of certain provisions (such as the termination and disability provisions). Additionally, the province(s) of employment should be an initial question.
3.	**Term**	There are two types of employment contracts with respect to duration: ✓ Indefinite Term: The employment relationship lasts until the employer terminates employment, the employee resigns, or the contract can no longer be performed due to frustration. ✓ Fixed Term: Termination is automatic upon the expiry date. Beware of the pitfalls of using a fixed term employment agreement (e.g. statutory severance pay will be owing for a fixed term

KEY ITEMS		KEY CONSIDERATIONS
		contract that exceeds 12 months in duration; damages may be owing to the end of term in the event of early termination; and there is a risk of a finding of an indefinite term contract when successive fixed term contracts are used with consequent liability for common law reasonable notice). Note: The above consequences can, to a certain extent, be addressed in a well-drafted termination provision.
4.	**Recitals or Introductory Paragraph(s)**	The structure of the introductory paragraphs will vary depending on the formality/style of the agreement, but will generally serve to: ✓ Identify Key Details: The parties, start date, if this is a new or amending agreement, past service recognition for an existing employee, etc. ✓ Identify Consideration Provided: For a new employee, the consideration is generally the employee's commitment to provide work in exchange for the employer's commitment to provide compensation. For an existing employee, fresh consideration is needed (e.g. a signing bonus or raise).
5.	**Conditions of the Employment Offer**	Assess whether there are any pre-conditions that must be satisfied before employment begins and if so, provide the employment on a conditional basis. Pre-conditions may include: ✓ Satisfaction of Background or Reference Checks: Ensure background or reference checks are only conducted *after* a conditional offer of employment is made to minimize the likelihood of discrimination allegations where those checks or tests reveal information about employee characteristics which are protected by human rights. ✓ Authorization to Work in Canada: Confirm that the employee is lawfully entitled to work in Canada. For a foreign worker, employment should be conditional upon the employee obtaining and maintaining a valid work permit. Note: In the event the offer needs to be revoked, a conditional offer limits termination liabilities in the event the job is no longer required or the candidate is determined to be inappropriate.

KEY ITEMS		KEY CONSIDERATIONS
6.	**Probationary Period**	The inclusion of a probationary period will make clear that during the initial period of employment, the employee's suitability for employment will be assessed. A typical probationary clause will include: ✓ Duration: 3 months is typically recommended, to align with the requirements of the Ontario *Employment Standards Act, 2000* (the "**ESA**"), which require notice of termination (or pay in lieu thereof) and benefits continuation during such period after 3 months of employment. ✓ Termination: Clarify the consequences of termination of employment prior to the end of the probationary (typically, the employee is entitled to only their accrued wages and vacation pay, unless the probationary period exceeds 3 months). Alternatively, the termination provisions of the agreement can be cross-referenced here. We recommend exercising caution with respect to the use of probationary periods for the following reasons: ✓ Duty to Assess Suitability: The use of a probationary period may result in the implication of a contractual term that the employer has a duty to act in good faith in assessing the employee's suitability. This duty may ultimately make it more difficult for an employer to terminate an employee during their probationary period, as the employer may have to prove to the court (if challenged) that it acted in good faith in assessing the employee's suitability. ✓ Often Unnecessary: An employer does not need a probationary period as it can rely on the provisions of the ESA (and a well drafted termination provision) in order to terminate an employee's employment without notice (or pay in lieu thereof) within their first 3 months of employment.
THE POSITION		
7.	**Details of the Position**	Describe the employee's position in sufficient detail to ensure clarity of terms and avoid future disputes over duties, hours of work, work location, reporting structure, etc. Such details typically include: ✓ Title and duties: A detailed job title and description of job duties which can be a key piece of evidence in measuring workplace performance, establishing reasonable workplace accommodations, and classifying for overtime eligibility. For positions of significant responsibility consider appending a more detailed job description as a Schedule rather than setting out all of this information directly in the body of the employment agreement.

KEY ITEMS		KEY CONSIDERATIONS
		✓ Hours of work, Schedule and Overtime Eligibility: Setting out an employee's expected hours of work and schedule, along with their status as eligible/ineligible for overtime, avoids later disputes over the employee receiving too many, too few, or variable hours, or whether they are being properly compensated for any overtime work. ✓ Work location: The employee may be required to work in a single, fixed, location, or may be expected to work at multiple locations. The employee may also be required to travel infrequently or regularly, and a work location may be a large geographic region rather than a fixed address. If the employee will be working remotely (on a full or partial basis), the employer's expectations in this regard should be made clear. ✓ Right to Change: Consider reserving the employer's right to change details of the employee's position, compensation, and other terms of employment to allow flexibility in the employment relationship (for example, in assigning duties, scheduling hours, directing the employee's work location, or implementing changes to compensation). Failure to do so may result in a constructive dismissal claim if changes result in a job that is substantially dissimilar to the one described in the employment agreement. Note: The level of detail to include is a balance between keeping the document simple and avoiding ambiguity in the employment relationship. As such, what is appropriate may vary depending on the employee hired, the nature of their position, and their level of sophistication.
COMPENSATION AND BENEFITS		
8.	**Salary or Wages**	A salary or wage clause may detail: ✓ Whether compensation will be provided as an annual salary, or as an hourly, weekly, or monthly wage. ✓ Amounts the employee will be paid. ✓ Currency of payment. ✓ Frequency of payment. ✓ Form of payment (typically direct deposit). ✓ Authorized deductions or withholdings.
9.	**Commissions**	Where commissions are provided include: ✓ Entitlement Criteria: Manner of calculation / formula; and when commissions are considered earned (e.g. upon invoicing of sales, or payment of invoices). ✓ Payment Details: When commissions are payable (e.g. at the end

KEY ITEMS		KEY CONSIDERATIONS
		of the month or fiscal/calendar year); whether there will be a draw and if so, the process for reconciling earnings against the draw if applicable; treatment of commissions during periods of leave; calculation of vacation pay on commissions and timing of same. ✓ Termination: Address entitlements on termination or cross reference the relevant termination provisions in the employment agreement. Note: Regardless of how commissions, salary, or wages are calculated, the employer must abide by the requirements of the ESA, including the provision of the applicable minimum wage rate. If a separate commission plan is used, ensure the plan terms and relevant provisions in the employment agreement are consistent.
10.	**Bonus**	Where bonus is provided include: ✓ Entitlement Criteria: Whether the bonus will be discretionary or non-discretionary; entitlement conditions and targets (if any). ✓ Payment Details: Timing of the bonus payment; accrual or "vesting" of the bonus; treatment of the bonus during periods of leave; calculation of vacation pay on bonus (if applicable) and timing of same. ✓ Termination: Address entitlements on termination or cross reference the relevant termination provisions in the employment agreement. Note: If a separate bonus plan is used, ensure the plan terms and relevant provisions in the employment agreement are consistent.
11.	**Equity Compensation**	Equity compensation may be provided in many forms, and there are important tax and securities laws that such compensation must observe. For that reason, equity compensation terms are typically found in ancillary equity compensation plans and agreements. Where an employee has equity entitlements, include the following in the employment agreement: ✓ Type of Equity Compensation: For example, stock options, RSUs, PSUs etc., and number of awards/units. ✓ Entitlement Criteria: Outline any vesting conditions and vesting schedules. ✓ Ancillary Documents: Reference relevant equity entitlement plan(s) and award agreement(s) and ensure consistency with same.

KEY ITEMS		KEY CONSIDERATIONS
		✓ Onerous Terms: Draw attention to harsh or onerous terms per *Battiston v. Microsoft Canada Inc.*, 2021 ONCA 727 ("***Battiston***") (e.g. termination / forfeiture provisions and clawback provisions).
12.	**Group Benefits**	Health benefits may include medical and dental insurance, short-term and long-term disability plans, a variety of other paramedical insurance or benefits, and life insurance. The employment contract should include the following information, as applicable: ✓ Plan Details: The particular benefits the employee will be entitled to; conditions for entitlement (e.g. completion of 3 months' employment); the party responsible for paying the benefits premiums. ✓ Deference to the Plan and Modification: Confirmation that benefits will be governed by the applicable plan documents; provide an employer right to change or discontinue the benefits.
13.	**Additional Benefits and Perquisites**	Describe any additional benefits that the employee will be entitled to under the employment agreement. These may include: ✓ Provision of a company car or car allowance. ✓ Professional fee payment or reimbursement. ✓ Gym or other club memberships. ✓ Employee discounts. ✓ Cellphone or computer costs. ✓ Paid sick days and personal days. ✓ Defined Benefit Pension, Defined Contribution Pension and/or Retirement Savings Programs. ✓ Health Spendings Accounts.
14.	**Vacation and Vacation Pay**	The following vacation-related issues should be addressed in the employment agreement: ✓ Entitlement Criteria: Number of vacation days or weeks per year, or whether the employee is entitled to unlimited paid time off (the latter is becoming increasingly common); timing of the employer's vacation year; entitlement to vacation in partial years of employment (i.e., the first year of employment). ✓ Vacation Pay: How vacation pay will be calculated and confirmation that vacation pay will be paid (at a minimum) in accordance with the ESA on wages (taking into account the broad definition of wages under the ESA, which includes commissions

KEY ITEMS		KEY CONSIDERATIONS
		and non-discretionary bonuses). ✓ Scheduling: Vacation approval process; maximum length of vacation; and extent to which vacation may carryover from year to year. Note: The employer should always ensure that an employee's vacation time and vacation pay are at least as generous as the entitlements set out in the ESA.
15.	**Expense Reimbursement**	Include: ✓ Process for reimbursement of employee expenses made on the employer's behalf. ✓ Reimbursement of an employee's expenses in relocating to accept the job offered by the employer (if applicable). ✓ Reference to the employer's expense policy, if any.
16.	**Employee Handbook / Workplace Policies**	The employer's employee handbook or other existing policies may contain details of benefits and entitlements (among other things), and should therefore be incorporated by reference into the Employment Agreement and provided to the employee on or, ideally, prior to hire. The handbook and other policies may also contain terms and conditions of employment upon which the employer may wish to rely in the future (e.g. for disciplinary purposes).
RESTRICTIVE COVENANTS		
17.	**Conflict of Interest**	The inclusion of a conflict of interest provision in an employment agreement will assist in strengthening the employer's position in the event of a claim from a former employer. In a typical conflict of interest provision, the employee will represent to the employer that they are not subject to any agreement or obligation which restricts them from: ✓ Being employed by the employer; ✓ Performing the duties assigned pursuant to the subject employment agreement; ✓ Soliciting the clients or customers of a third party (including their former employer); and ✓ Using information within their knowledge or control which may be useful in the performance of their duties for the new employer. Note: The level of detail to include in a conflict of interest provision will vary depending on the employee, the nature of their role, and their level of sophistication.

KEY ITEMS		KEY CONSIDERATIONS
18.	**Confidentiality**	Confidentiality provisions expand on an employee's common law duty of confidentiality toward the employer. A confidentiality provision should: ✓ Identify what information is to be treated as confidential, taking into account the nature of the employer's business. ✓ Outline the limits on disclosure of that confidential information during and after employment. Note: Include a confidentiality provision in the body of the employment agreement or in an ancillary agreement.
19.	**Intellectual Property Ownership**	Determine whether the employee will create or develop any intellectual property ("**IP**") in the course of employment. Consider addressing IP ownership in the body of the employment agreement or in an ancillary agreement, including provisions in respect of: ✓ Disclosure: Disclose to the employer all IP that the employee develops during the term of employment. ✓ Assignment: Assign to the employer any future rights, title or interest in any IP that the employee develops during employment. ✓ Future Cooperation: Cooperate with the employer to give effect to the IP assigned to the employer, including executing documents to permit the employer to maintain, enforce, or defend its intellectual property rights. ✓ Moral Rights: Waive any moral rights in any IP that the employee develops during employment. Note: IP provisions should be drafted and reviewed by an IP specialist.
20.	**Non-Solicitation and Non-Competition**	Determine whether the employee will have access to sensitive employer business information, such as customer contacts, pricing information, business plans, and so on. If the employee may be in a position to use such information after employment in a way that harms the employer's business interests, consider including non-solicitation or, **for an executive only**[1], non-competition provisions in the employment agreement (or in an ancillary agreement).

[1] Note re: Prohibition of Non-Competes: Effective October 25, 2021, Ontario employers became prohibited from entering into "an agreement or part of an agreement" containing a non-compete. There are limited exemptions from this prohibition which apply (i) in the context of a sale of business, and (ii) in respect of an "executive". For the purposes of the second exemption, an "executive" is defined in the ESA as "any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position."

KEY ITEMS		KEY CONSIDERATIONS
		✓ Enforceability: Ensure the non-solicitation and non-competition provisions (to the extent the latter is permitted) are: ➢ Clear and unambiguous. ➢ Linked to the protection of the employer's legitimate proprietary interest (such as protecting client relationships, goodwill, trade connections, and confidential information). ➢ Reasonable in terms of geographic scope, temporal scope, and restricted activities. ✓ Use of Defined Terms: In order to satisfy the above requirements, the following key terms should be precisely defined (as applicable): ➢ The employer's "business". ➢ The employer's "client/customer", "prospective client/customer", and "suppliers". ➢ The "geographic area" which is subject to restriction. ➢ The employer's "employees". Note: Any ambiguity in the above terms, or in the restrictions placed on the employee, will result in these restrictive covenants being unenforceable. A court will not interpret the provisions in favour of the employer or "blue pencil" to repair drafting errors.
21.	**Remedies**	Breach of the restrictive covenants by the employee may have potentially serious consequences. A remedies clause will: ✓ Provide for the possibility of seeking an interim injunction to stop further breaches. ✓ Ensure the employer can also seek monetary damages and other remedies, including equitable remedies.
22.	**Preservation of Common Law Duties**	The employee owes common law duties to the employer, including a general duty of good faith and fidelity and a more specific duty of confidentiality, which may overlap with the restrictive covenants in an employment agreement. To address this issue: ✓ Include a provision that preserves the employee's common law duties, regardless of the wording of the agreement, in order to avoid inadvertently contracting out of same.

KEY ITEMS		KEY CONSIDERATIONS
TERMINATION PROVISIONS		
23.	**Temporary Layoff Rights**	Include a temporary layoff clause where the employer anticipates the possibility of using layoff and recall as a method of dealing with work shortages. A temporary layoff clause should include the following: ✓ Confirmation that the employer has the right to temporarily layoff the employee, in accordance with the ESA. ✓ Confirmation that a temporary layoff will not constitute constructive dismissal. Note: Without a layoff clause, even a short layoff may be treated as a constructive dismissal by the employee, entitling them to notice of termination.
24.	**Right to Suspend**	The employer may wish to consider including a right to suspend the employee with or without pay as a disciplinary measure, exercisable at its discretion, to protect against claims of constructive dismissal in the event the employer needs to implement such measures. The circumstances in which the right to suspend the employee can be identified in such a clause (for example, in furtherance of an internal investigation relating to the employee's conduct).
25.	**Resignation**	The ESA does not require an employee to give any notice of termination to their employer. However, it is an implied term of an employment contract that the employee will give reasonable notice of termination, even absent a written contract. To ensure the parties are aligned on expectations in respect of resignation, the employment agreement should include: ✓ Notice: Specify the amount of resignation notice the employee is required to provide before the termination date; and include a requirement to provide written notice with a specified termination date (to ensure resignation is clear and unequivocal). ✓ Expectations During the Resignation Notice Period: Consider including that the resignation notice period is a working notice period unless the parties agree otherwise. ✓ Employer Rights: Reserve the right to preclude the employee from attending at work during the resignation notice period. Note: The appropriate resignation notice is generally determined by the responsibilities, length of service, salary, as well as the time it would reasonably take the employer to replace the employee or otherwise take steps to adapt to its loss.

KEY ITEMS		KEY CONSIDERATIONS
26.	**By the Employer, during the Probationary Period**	See comments in section 6, above regarding the use of probationary periods and the pitfalls of same. Where using a probationary period: ✓ Make clear that on a termination during the probationary period, the employee will only be entitled to accrued compensation and will not be entitled to notice of termination or other termination entitlements. ✓ If the probationary period is longer than 3 months, ensure at least accrued compensation and the employee's minimum statutory entitlements are provided.
27.	**Termination by the Employer for Cause**	Until recently, enumerating potential grounds of termination in a termination for cause provision was considered to be of assistance in justifying an employer's decision to terminate employment, by providing a means to demonstrate that the employee knew or ought to have known which types of misconduct would provide grounds for dismissal. The approach has now changed as a result of *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 ("***Waksdale***"), which found that a termination provision which sets a lower standard for a termination without notice (or pay in lieu thereof) than is permitted by the ESA, will be considered an attempt to contract out of the ESA, rendering such provision unenforceable. In light of *Waksdale* a termination for cause provision should: ✓ Import the ESA Cause Standard: Under the ESA, employees are exempt from receipt of notice of termination (or pay in lieu thereof), if the employee engages in "wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and has not been condoned" by the employer. ✓ Specify Employee Entitlements: Reiterate that on a termination for cause the employee will only be entitled to accrued compensation and will not be entitled to notice of termination or other termination entitlements, other than ESA payments if applicable.
28.	**Termination by the Employer without Cause**	This clause dictates the notice of termination (or pay in lieu thereof) that the employer will provide to the employee upon termination of employment without cause. A termination without cause provision should: ✓ Provide for ESA Entitlements: Make clear that on a termination without cause, the employee will be entitled to accrued compensation and to their statutory entitlements to notice of termination (or pay in lieu thereof), severance pay, and benefits continuation for the length of the statutory notice period. ✓ Where Appropriate for the Client, Provide an Additional Entitlement: In order to secure a release and limit future

KEY ITEMS		KEY CONSIDERATIONS
		negotiation, consider providing for a gratuitous payment, in addition to the employee's statutory termination entitlements. Where provided, typically, this additional entitlement is lower than what the employee would receive at common law upon a without cause termination. However, in some circumstances, an employer might offer more generous termination entitlements to provide a desirable candidate with job security (this is often the case in executive employment agreements). A well drafted termination without cause provision should include the following components: ✓ The right to provide working notice or pay in lieu of notice. ✓ Compliance with the minimum standards of the ESA. ✓ The method of providing pay in lieu of notice (i.e. lump sum or salary continuance). ✓ Clarity with respect to mitigation obligations (if any). ✓ Address entitlements to benefits, bonus, commissions, and other incentive compensation, including ensuring that such entitlements continue during the statutory notice period, and cross referencing any relevant plans or ancillary documents. ✓ The treatment of any equity entitlements on termination without cause (or other termination) is typically addressed in the relevant equity plan or award agreement. Therefore, consider referencing such plan or agreement here and highlighting any onerous terms to ensure compliance with *Battiston*. Note: If the employment agreement provides for a fixed term, a without cause termination provision is key to avoiding liability for the remainder of an unexpired term. In this circumstance, consider adapting the termination clause to account for the possibility termination prior to the end of the term.
29.	**Termination by the Employer for Disability**	Where an employee is unable to work because of a disability, the doctrine of frustration applies where the permanent disability renders performance of the employment contract impossible, and the obligations of the parties are discharged without penalty (subject to the requirements of the ESA). Some employers request the addition of clauses to clarify the terms that will apply in the event an employee becomes disabled. Such a provision will typically include the following: ✓ The length of time that the employer will permit an absence prior to termination of the agreement for frustration. ✓ Confirmation that the employer will provide accommodation, as required by the Ontario *Human Rights Code*. Note: The application of these clauses can violate the Ontario *Human Rights Code* as the ability to consider an employment agreement as frustrated is highly contextual.

KEY ITEMS		KEY CONSIDERATIONS
KEY ADMINISTRATIVE & INTERPRETIVE CLAUSES		
30.	**AODA**	Pursuant to the *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act, 2005*, every employer is required, when making offers of employment, to notify the successful applicant of its policies for accommodating employees with disabilities.
31.	**Successors and assigns**	Use a successor provision that has been customized for the employment relationship and the terms of the agreement. The employer may wish to extend confidentiality and IP protections to its related companies, but the employee's obligations are personal and not assignable to others. As certain IP rights may be bequeathed in a will or granted to an estate, the agreement should also bind the employee's heirs and executors.
32.	**Severability**	A severability clause provides evidence of the parties' intention for the agreement as a whole to survive by severing any invalid, illegal or unenforceable terms or provisions from the agreement.
33.	**Entire Agreement**	This clause limits the parties' agreement about the terms of employment to only those terms in the written agreement (including any attached or referenced documents). Ancillary agreements can be carved out of this clause, if applicable. Absent mistake or fraud, the entire agreement clause usually defeats the possibility of one party relying on prior negotiations, prior agreements, or oral representations to inform the terms of the employment contract.
34.	**Forum for Dispute Resolution or Arbitration**	The Ontario courts typically provide an adequate forum for the resolution of employment-related disputes. However, the parties may agree that disputes arising under the contract's terms will be resolved by an arbitrator rather than a court. In doing so, the parties should clearly delineate the nature of disputes that will be subject to arbitration and those that will not. The clause may also describe any procedural elements of arbitration the parties agree to. An arbitration clause should allow both parties a reasonable opportunity for dispute resolution. If the requirements of arbitration are so onerous as to effectively preclude the employee from seeking redress (including in respect of statutory claims in front of administrative tribunals, such as ESA claims) a court may find the clause unconscionable and unenforceable. We therefore recommend that an arbitration clause be carefully reviewed and considered on a case by case basis, to ensure it is appropriate in the circumstances.
35.	**Independent Legal Advice**	An independent legal advice (ILA) clause is used to provide evidence that the employee has obtained or has been given the opportunity to obtain ILA prior to executing the employment agreement. In the absence of an ILA clause, the courts may exercise their jurisdiction and refuse to enforce the terms of an employment agreement on the basis of duress, fraud, unconscionability or misrepresentation.

KEY ITEMS		KEY CONSIDERATIONS
ADDITIONAL CLAUSES – AT THE REQUEST OF THE EMPLOYEE		
36.	**Common Asks**	On receipt of the employment agreement, an employer may expect an employee, depending on their level of sophistication, the nature of their role, and the context of their hiring (e.g. if they are being recruited, or moving between competitors) to request the following additional clauses: ✓ Good Reason: A good reason provision typically triggers termination without cause entitlements in the event an employer makes unilateral, detrimental changes to an employee's terms and conditions of employment (e.g. material reduction in compensation, demotion/reduction in authority, relocation etc.). A good reason provision will typically include a notification mechanism and cure period so that the employer has the opportunity to rectify the event giving rise to good reason prior to triggering the employee's termination entitlements. This type of clause is intended to mirror / formalize the consequences of a constructive dismissal, and is more common in executive level agreements. ✓ Change of Control: A change of control provision typically triggers termination without cause entitlements in the event of the sale of an employer's business and the employee's subsequent resignation from the company (this is referred to as a double trigger change of control; a single trigger change of control is less common). The events giving rise to a change of control will typically be explicitly defined in the employment agreement. This type of clause is more common in executive level employment agreements. ✓ Indemnity Against Ex-Employer Claims: Where an employee moves between competing businesses and/or there is a concern that the employee may breach the terms of their previous employment agreement (e.g. by breaching their restrictive covenants), the employee may request that the new employer include a clause providing them with indemnification for legal costs and/or damages arising from a purported breach of contract with the ex-employer. Note: Whether to include any of the above clauses, and how to draft same, is a highly contextual determination that should be considered on case by case basis.

KEY ITEMS		KEY CONSIDERATIONS
ADVISING EMPLOYERS ON USING THE EMPLOYMENT AGREEMENT		
37.	**The Final Product**	In order for the employment agreement to be used effectively, particularly if the agreement will be used as a template going forward, counsel should work with their employer clients to ensure: ✓ Employees / HR teams are educated as to how to use the employment agreement and to whom it should be provided; ✓ There is a checklist or a standard email / document with instructions as to how to use the employment agreement; ✓ The client understands the importance of consideration, providing sufficient time for independent legal advice, and ensuring the employment agreement is signed prior to the employee commencing employment; ✓ There is a record keeping system in place to track down agreements in the future when needed; ✓ Employment agreements are regularly reviewed by counsel and kept up to date (an annual review is advisable); and ✓ The client is aware of the pitfalls of making any changes to the employment agreement without legal review.

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TAB 6

Annotated Employment Agreement Clauses 2023

Human Rights/EDI Considerations for Employment Contracts (PowerPoint)

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February 28, 2023

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Human Rights/EDI Considerations for Employment Contracts

Presented at ”Annotated Employment Agreement Clauses”
Law Society of Ontario

February 28, 2023

Rich Appiah, Appiah Law | Employment + Labour Counsel

What Are We Talking About Today?

1. Termination Clauses and the Duty to Accommodate

2. Clauses Limiting Participation in Disability Plans

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EMPLOYMENT + LABOUR COUNSEL

Termination Clauses and the Duty to Accommodate

A classic termination clause that addresses disability:

Disability. The Company shall have the right to terminate Executive's employment hereunder for frustration arising from a Disability (as defined below). For purposes of this Agreement, "Disability" shall mean Executive's inability to perform the majority of his duties hereunder on a full-time basis, subject to accommodation, for a period of one hundred and eighty (180) consecutive days during any three hundred sixty-five (365) day period, as a result of physical or mental incapacity as determined by an independent and qualified Ontario medical doctor reasonably selected in good faith by the Board.

APPIAH LAW
EMPLOYMENT + LABOUR COUNSEL

Termination Clauses and the Duty to Accommodate

The classic clause attempts to define when a “frustration of contract” occurs. In the caselaw, frustration has been defined to occur when, without fault, an employee will not be able to perform her essential job duties for the foreseeable future.

The doctrine of frustration must take into consideration an employer’s obligations under the Ontario *Human Rights Code*. Does the classic clause do this?

Termination Clauses and the Duty to Accommodate

The Human Rights Code

Two key aspects of the Human Rights Code:

- protects employees in Ontario from discrimination and harassment on the basis of disability; and
- imposes an obligation upon employers to accommodate people with disabilities to the point of undue hardship.

What is a Disability?

Disability is broadly defined. It includes "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness".

Termination Clauses and the Duty to Accommodate

Obligation to Accommodate Disabilities – Right to Equal Treatment

- employers have a legal duty to accommodate the needs of people with disabilities who are adversely affected by a requirement, rule or standard
- accommodation is necessary to ensure that people with disabilities have equal opportunities, access and benefits
- employment must be adapted to accommodate the needs of a person with a disability (i.e. individualized) in a way that promotes integration and full participation

Termination Clauses and the Duty to Accommodate

Duty to Accommodate

Duty carries two components:

- procedural: to assess the accommodation need
- substantive: to provide appropriate accommodation

The obligation is to accommodate to the point of “undue hardship”, considering the cost, outside sources of funding, if any, and health and safety requirements.

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Termination Clauses and the Duty to Accommodate

Limitations on the Duty to Accommodate

- no infringement if someone is incapable of performing or fulfilling essential duties or requirements because of disability
- essential duties are the “vital” or “indispensable” aspects of someone’s job
- duty to accommodate does not require an employer to assign essential duties to other employees, or to hire another employee
- employer is also not required to change essential duties so that an employee can meet them

Termination Clauses and the Duty to Accommodate

Forms of accommodation can include:

- permitting return to work in pre-disability job, or if it's not available, pre-disability job
- temporary or permanent alternative work
- allowing a flexible work schedule
- modifying job duties

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Termination Clauses and the Duty to Accommodate

Human rights law must be considered:

- does holding out job cause undue hardship?
- would permitting return to work present undue hardship?
- is there alternative work available to employee? are other accommodations available?

Note a court will also consider whether employer has bargained for long-term absence (e.g. through provision of short- or long-term disability insurance). If the employer has done so, a court will be less likely to find that a frustration has occurred.

Clauses Limiting Participation in Benefits Plans

Consider clauses that allow for participation in a benefits plan to terminate after a lengthy period of absence.

What should you look out for? Ensure that the clauses address all forms of absences, and not just absences related to grounds protected under the Ontario *Human Rights Code,* such as disability.

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