Restrictive Covenants in Employment Contracts: Enforceability of Non-Competition, Non-Solicitation, Confidentiality & Fiduciary Obligations

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Rev.01: 1FEB2013

Abstract

This paper discusses how employees owe their employers certain obligations or duties while the employment contract remains extant; and although some of those obligations or duties may continue to be owed by a former employee to her former employer, other obligations or duties will terminate upon the termination of the employment contract. Some obligations are contractual, while others find their roots in equity or at common law. Examples of the former include express contractual "restrictive covenants" such as non-solicitation, non-dealing, non-competition and confidentiality terms; examples of the latter include equitable fiduciary obligations, or contractual terms implied as matters of fact or law. Some obligations will be enforced by the courts; others will not, depending on the factual circumstances in light of the law.

Part II of this paper discusses obligations or duties that are, or may be, owed by employees to their employer while the employment contract is extant. Part III of this paper discusses obligations or duties that are, or may be, owed by former employees to their former employer following termination of the employment contract. Part IV of this paper discusses the enforceability (or unenforceability) of these obligations or duties. Part V concludes this paper with the observations that employees owe their employers certain obligations or duties both during, and following termination of, the employment contract. Such duties may include: express or implied contractual duties of fidelity, good faith and loyalty, confidentiality, non-competition, non-solicitation, and/or non-dealing; common law obligations of confidentiality; equitable fiduciary obligations. In order to enforce these obligations in court, a former employer will face various hurdles, including: rebutting the presumption of illegality of contractual restrictive covenants by showing the terms are not ambiguous, are necessary to protect proprietary interests, and are reasonable as between the parties and in relation to the public interest; avoiding the General Billposting Rule; establishing good and valuable consideration supporting the contract in which the restrictive covenants are found; establishing that the breach caused the losses complained of to establish damages; mitigation of damages; coming to court with "clean hands"; and meeting any argument that the former employer waived its right to enforce the restrictive covenants, or is estopped from enforcing them. In order for a former employer to obtain interim or interlocutory relief from the court by way of injunction, the applicant will need to show a strong prima facie case that it will be able to meet all of the aforementioned hurdles. It will also have to show "irreparable harm" and that the "balance of convenience" weighs in its favor. Third parties to the obligations owed between employers and their employees—present or former—can incur liability (directly or vicariously) arising from their breach.

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I. Introduction

Employees owe their employers certain obligations or duties while the employment contract remains extant; and although some of those obligations or duties may continue to be owed by a former employee to her former employer, other obligations or duties will terminate upon the termination of the employment contract. Some obligations are contractual, while others find their roots in equity or at common law. Examples of the former include express contractual "restrictive covenants" such as non-solicitation, non-dealing, non-competition and confidentiality terms; examples of the latter include equitable fiduciary obligations, or contractual terms implied as matters of fact or law. Some obligations will be enforced by the courts; others will not, depending on the factual circumstances in light of the law.

Part II of this paper discusses obligations or duties that are, or may be, owed by employees to their employer while the employment contract is extant. Part III of this paper discusses obligations or duties that are, or may be, owed by former employees to their former employer following termination of the employment contract. Part IV of this paper discusses the enforceability (or unenforceability) of these obligations or duties.

Part V concludes this paper with the observations that employees owe their employers certain obligations or duties both during, and following termination of, the employment contract. Such duties may include: express or implied contractual duties of fidelity, good faith and loyalty, confidentiality non-competition, non-solicitation, and/or non-dealing; common law obligations of confidentiality; equitable fiduciary obligations In order to enforce these obligations in court, a former employer will face various hurdles, including: rebutting the presumption of illegality of contractual restrictive covenants by showing the terms are not ambiguous, are necessary to protect proprietary interests, are reasonable as between the parties and in relation to the public interest; avoiding the *General Billposting* Rule; establishing good and valuable consideration supporting the contract in which the restrictive covenants are found; establishing that the breach *caused* the losses complained of to establish damages; mitigation of damages; coming to court with "clean hands"; and meeting any argument that the former employer waived its right to enforce the restrictive covenants, or is estopped from enforcing them. In order for a former employer to obtain interim or interlocutory relief from the court by

way of injunction, the applicant will need to show a strong *prima facie* case that it will be able to meet all of the aforementioned hurdles. It will also have to show "irreparable harm" and that the "balance of convenience" weighs in its favor. Third parties to the obligations owed between employers and their employees—present or former—can incur liability (directly or vicariously) arising from their breach.

II. Employment-Extant Employment Obligations

An employment relationship is fundamentally a contractual relationship, and the contractual terms are where most of the obligations and duties owed by the employee to her employer are to be found. Such contractual terms may be express or implied. Implied contractual terms may be implied as a matter of fact, or as a matter of law.[1] Contractual terms implied into a contract as a matter of fact are contract-specific and based on the parties' intention at the time the contract was entered into. Contractual terms implied into a contract as a matter of law result from "the implication of a term as a legal incident of a particular class or kind of contract, without regard to the presumed intention of the parties."[2]

a. Express Contractual Restrictive Covenants During Employment

Most written employment contracts that do contain express restrictive covenants are drafted so that the restrictive covenants purport to apply both during the term of the contract, as well as following its termination. For example: "During the term of this Employment Agreement and [for some time period] following its termination the Employee shall not [do X within the geographic limits of Y]". Restrictive covenants expressly found in employment contracts often include non-solicitation, non-dealing, non-competition and confidentiality terms. Often express contractual restrictive covenant

[1] For a general discussion of the implication of contractual terms as a matter of fact, as a matter of law, and on the basis of "custom and usage" see E. Wayne Benedict, "Arbitral Collective Agreement Interpretation: The Modern Approach", Rev 4 (Paper delivered at the 30th Annual Labour Arbitration Conference, Calgary, 31 May 2012), online: JD Supra <http://www.jdsupra.com/post/fileServer.aspx?fName=fe278987-b930-494b-9ac1-97582ffcf1d9.pdf> at 20-22 ["Agreement Interpretation"].

[2] *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, [1987] S.C.J. No. 29 at para 42 (QL) ["*C.P. Hotels*"].

"clauses are but written expressions of the common law duty which would, in any event, be imposed on"[3] the employee.

Generally, non-solicitation terms impose the obligation on employees not to solicit the employer's employees, clients and/or suppliers for purposes not in the interests of the employer. Non-dealing terms impose the obligation on former employees not to deal with employees and/or clients of the former employer at all (irrespective of whether the former employee "solicited" the employee and/or client, or the latter approached the former unsolicited).[4] Non-competition terms impose the obligation on employees not to compete with the employer. Confidentiality terms impose the obligation on employees not to misuse or wrongfully disclose the employer's "confidential information." In addition to employment contracts, restrictive covenants are often expressed in other forms of contracts; such as: purchase and sale of corporate share agreements;[5] purchase and sale of business agreements;[6] unanimous shareholder agreements;[7] franchise agreements;[8] sub-contractor agreements;[9] independent contractor agreements;[10] and partnership agreements.[11]

b. Implied Contractual Restrictive Covenants & Common Law Obligations During Employment

Employment contracts that are silent in relation to restrictive covenants, which inherently include all unwritten (oral) contracts of employment, contain terms implied as a matter of law. An example of a term implied as a matter of law into every employment contract that is silent in relation to its termination is the implied term requiring that the employer

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[3] *Hub International (Richmond Auto Mall) Ltd. v. Mendham*, 2011 BCSC 1780, [2011] B.C.J. No. 2494 at para 82 (QL) ["*Mendham*"]
[4] See eg *Hub International (Richmond Auto Mall) Ltd. v. Redcliffe*, 2012 BCSC 1280, [2012] B.C.J. No. 1812 at paras 4, 24 (QL) ["*Redcliffe*"].
[5] See eg *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290, [2008] A.J. No. 944 (QL) ["*Dreco*"].
[6] See eg *Redcliffe*, *supra* note 4.
[7] See eg *Sharp Mechanical Ltd. v. Downing*, 2012 SKQB 36, [2012] S.J. No. 112 at para 19 (QL) ["*Sharp Mechanical*"].
[8] See eg *Invescor Restaurants Inc. v. 3574423 Canada Inc*., 2012 ONCA 387, [2012] O.J. No. 2569 (QL) ["*Invescor*"].
[9] See eg *Altam Holdings Ltd. v. Lazette*, 2009 ABQB 458, [2009] A.J. No. 834 (QL) ["*Altam*"].
[10] See eg *Cruise Connections Canada v. Cancellieri*, 2012 BCSC 53, [2012] B.C.J. No. 76 (QL) ["*Cruise Connections*"].
[11] See eg. *550934 British Columbia Ltd. v. A.R. Thomson Group*, 2012 BCSC 1332, [2012] B.C.J. No. 1867 (QL) [" *A.R. Thomson*"].

give the employee "reasonable notice" of termination. Iacobucci J., writing for the majority in *Machtinger*,[12] "characterize[d] the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly."[13] McLachlin J.'s concurring reasons more clearly expressed the principles of implied terms:

> **45** So the real issue is this: in the absence in a contract of employment of a legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period, and in particular, to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?
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> **46** This question cannot be answered without examining the legal principles governing the implication of terms. The intention of the contracting parties is relevant to the determination of some implied terms, but not all. Intention is relevant to terms implied as a matter of fact, where the question is what the parties would have stipulated had their attention been drawn at the time of contracting to the matter at issue. Intention is not, however, relevant to terms implied as a matter of law. As to the distinction between types of implied terms see Treitel, *The Law of Contract* (7th ed. 1987), at pp. 158-165 (dividing them into three groups: terms implied in fact; terms implied in law; and terms implied as a matter of custom or usage), and *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.[14]

"Employees are [also] required to given reasonable notice [to the employer] when terminating their employment contract, pursuant to both statute and common law."[15] This is a term implied as a matter of law into every indefinite-term contract of employment that is silent as to how the employee may terminate the employment contract.

The courts have also implied, as a matter of law, into every contract of employment that does not contain express restrictive covenants, obligations and duties owed by the employee to the employer that serve the same purposes as restrictive covenants. Non-solicitation and non-competition restrictions fall within the employee's duty of good faith, fidelity and loyalty to the employer. These implied duties, however, end with the termination of the employment contract. Confidentiality obligations fall within the common law duty of the employee to keep the employer's "confidential information" confidential, which duty continues indefinitely beyond the termination of the employment contract. In *Evans* Graesser J. wrote: "There has never been any general

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[12] *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 (QL) ["*Machtinger*"].
[13] *Ibid* at para 20.
[14] *Ibid* at paras 45-46; emphasis added.
[15] *Flag Works Inc. v. Sign Craft Digital* (1978) Inc., 2007 ABQB 434, [2007] A.J. No. 876 at para 56 (QL) ["*Flag Works*"].

requirement for temporal limitations on the wrongful disclosure of truly confidential or proprietary information by former employees. At common law, employees may not disclose their employer's confidences. They are only released from such obligations when the information is no longer confidential or proprietary, or limitation periods have passed."[16] The duty of good faith, fidelity and loyalty has been described as follows:

> …It has long been accepted that there is a fundamental term implied in every contract of employment. The employee is expected to serve his employer honestly and faithfully during the term of his employment. This duty of fidelity permeates the entire relationship between employer and employee. It is a flexible concept that is paramount to the basic relationship. There is an implied obligation placed upon the employee to act in the best interests of his employer at all times. The employee shall not follow a course of action that harms or places at risk the interests of the employer.[17]

The duty of fidelity, good faith and loyalty requires present employees to avoid conflict of interest, which has been defined "in the employment context [as] being a 'situation in which an employee engages in activities which are external and parallel to those he performs as part of his job, and which conflict or compete with the latter'."[18] In *Zoic Studios* [19] Russel J. wrote:

> It is trite law that every employee owes his or her employer an implied contractual duty of fidelity, good faith and loyalty. The content of this duty was outlined by Fisher J. in *McMahon v. TCG International Inc*., 2007 BCSC 1003 at para. 51:
>
> > [51] The implied duty has been held to include the following:
> >
> > 1. to serve his employer faithfully;
> > 2. not to compete with his employer;
> > 3. not to reveal confidential information;
> > 4. not to conceal from his employer facts which ought to be revealed;
> > 5. to provide full-time service to his employer.[20]

It has been judicially suggested that

> The foregoing implied duties extend to employment relationships involving independent contractors or other relationships which may fall outside of strict employee/employer

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[16] *Evans v. Sports Corp*., 2011 ABQB 244, [2011] A.J. No. 408 at para 238 (QL) (damages assessment reconsideration allowed, 2011 ABQB 478, [2011] A.J. No. 867 (QL)), affirmed, 2013 ABCA 14, [2013] A.J. No. 13 (QL) ["*Evans*"].

[17] *Perewernycky v. National - Oilwell Canada Ltd*., 2007 ABQB 170, [2007] A.J. No. 298 at para 29 (QL) ["*Perewernycky*"], citing *CRC-Evans Canada Ltd. v. Pettifer*, 197 A.R. 24, [1997] A.J. No. 20 at para 45 (QL) (QB), affirmed, 1998 ABCA 191, [1998] A.J. No. 629 (QL) ["*CRC-Evans*"]; emphasis added.

[18] *Perewernycky*, *supra* note 17 at para 32, citing *Downham v. Lennox & Addington*, [2005] O.T.C. 1025, [2005] O.J. No. 5227 at para. 189 (QL) (Ont SCJ) ["*Downham*"], citing *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431 at para 10 (QL) (FCA), leave to appeal to SCC refused, [1986] S.C.C.A. No. 282 (QL) ["*CIBC*"]; emphasis added.

[19] *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322, [2012] B.C.J. No. 1883 (QL) ["*Zoic Studios*"].

[20] *Ibid* at para 186. See also *Altam*, *supra* note 9 at para 127.

> relationships [and] it] is an implied term that not only will the employee or contractor not establish himself or herself in direct competition with the employer, but that they will not entice away customers of the employer during the currency of the employment relationship…[21]

However, the proposition that an independent contractor is impliedly impressed with duties "not to compete with his employer" and "to provide full-time service to his employer" is antithetical to the legal indicia of "independent" contractors as being independent of the "employer"[22] and free to enter into contracts for services with other "employers."[23] A contractor limited through a term implied as a matter of fact into the contract for services to providing services to a single employer would at best be a "dependent" contractor. "In Canada a worker can provide services as an employee or as an independent contractor. These two relationships have important legal, fiscal, and tax implications. Only a natural person can be an employee";[24] and only an employee owes her employer the contractual duty of fidelity, good faith and loyalty implied as a matter of law. In *Steinke* McKelvey J. noted: "many of the cases relied upon by the parties deal with employment relationships that give rise to various 'duties', including a duty of loyalty. Given that here the relationship was one of an independent contractor, such employment-derived duties do not necessarily apply…"[25] However, obligations such duties of fidelity, good faith and loyalty may be expressly incorporated within, or implied as a matter of fact into, any contractual arrangement, including those of "sub-contractor" or "dependant/independent contractor." Further, as Germain J. notes in *ADM*:

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[21] *Altam, supra* note 9 at paras 128-129; but see *Altam* at para 164 where Lee J. acknowledges that "Lazette's relationship with Altam was a subcontracting relationship [and] unlike an employment relationship, Altam was not the exclusive retainer of 109's services. Mr. Lazette, with Mr. Bauman's knowledge, was able to and did from time to time seek out work from other sources, including work as a truck driver and working on pipelines" and *Altam* at para 230 where Lee J. writes "the underlying contract makes clear that the relationship is one of independent contractor and principal. The starting point assumption is that the contractor will pursue its own self interest, not that of the principal" and *Altam* at para 236 where Lee J. writes: "Outside of the employment context, duties of fidelity can only exist with an express contractual obligation." Such findings are inconsistent with an extension of legally (as opposed to factually) implied contractual duties of fidelity, good faith and loyalty to independent contractors proposed in the same decision at para 127.

[22] "The central question [to determine whether a person is an employee or an independent contractor] is whether the person who has been engaged to perform the services is performing them as a person in business on his own account": *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59, [2001] S.C.J. No. 61 at para 47 (QL) ["*Sagaz*"].

[23] See eg *Precision Gutters Ltd. v. Canada (Minister of National)*, 2002 FCA 207, [2002] F.C.J. No. 771 at para 27 (QL) ["*Precision Gutters*"].

[24] *ADM Measurements Ltd. v. Bullet Electric Ltd*., 2012 ABQB 150, [2012] A.J. No. 259 at para 37 (QL) ["*ADM*"]; emphasis added.

[25] *Steinke (c.o.b. Muscle Mechanics Massage Therapy) v. Barrett*, 2012 MBQB 49, [2012] M.J. No. 72 at para 55 (QL) ["*Steinke*"]; emphasis added.

> **38** … ADM hired Bullet to provide Bullet's employee, Mr. Young, to provide services to ADM on Bullet's behalf. The relationship between ADM and Bullet would, by its nature, be an independent contractor relationship.
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> **39** The problem with this approach is that adding an intermediary corporation can distort the true nature of a worker/employer relationship. Courts have rejected any legal effect in an intermediary corporation such as Bullet when that corporation "... is principally a tool for tax planning and management for an individual employee who does the work while the money is paid to the corporate vehicle." …Bullet falls into that category, and can be ignored when evaluating the relationship between ADM and Mr. Young. …[26]

Thus in *ADM*, Bullet, an independent contractor and corporation, could not be an employee of ADM and could not have owed ADM an implied contractual duty of fidelity, good faith and loyalty. However, Mr. Young who was legally an employee of Bullet, not of ADM, was held to be ADM's "employee"[27] when the court "rejected any legal effect in [the] intermediary corporation [Bullet]", and thus Mr. Young may have owed ADM an implied contractual duty of fidelity, good faith and loyalty while Bullet provided him to perform services to ADM, which implied duties, if they existed, would have ended with the termination of the Bullet-ADM "independent contractor" contract.[28]

While an employee's breach of the duty of fidelity, good faith and loyalty to his or her employer may amount to repudiation of the employment contract enabling the employer to accept the repudiation and summarily terminate the employment contract without notice, such a breach may also result in significant damages awarded against the employee. For example, in *RBC Dominion*[29] the Supreme Court of Canada upheld the trial judgment of $1,483,239.00 against RBC's former Cranbrook branch manager, Don Delamont, who left RBC and went to its competitor Merrill Lynch after orchestrating of the departure of virtually all RBC's investment advisors while he was still employed by RBC. Mr. Delamont and the investment advisors went to Merrill Lynch providing no advance notice to RBC, in breach of their implied obligation to give RBC reasonable

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[26] *Ibid* at paras 38-39, citing *Alberta Permit Pro v. Booth*, 2007 ABQB 562, [2007] A.J. No. 1060 at para 128 (QL), affirmed, 2009 ABCA 146, [2009] A.J. No. 406 (QL) ["*Permit Pro*"]; emphasis added.
[27] *ADM, supra* note 24 at para 51: "Mr. Young was a direct employee of ADM from the point, November 1, 1997, when he began to work as a manager. Bullet's intermediary role is irrelevant to my analysis that follows."
[28] *ADM, supra* note 24 at para 55: "Once a contract has ended, an employee has a full right to compete with his former employer. This 'painful reality'…extends to soliciting business from the former employer's customers with whom the ex-employee was acquainted during his employment… That right to compete may be restricted by terms in the employment contract, with what is called a restrictive covenant."
[29] *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc*., 2008 SCC 54, [2008] S.C.J. No. 56 (QL) ["*RBC Dominion*"].

notice of termination of their individual employment contracts. "The trial judge awarded damages in the amount of $1,483,239 against [Mr.] Delamont for the loss of profits RBC suffered as a result of his failure to perform his duties in good faith, specifically, his orchestration of the departure of virtually all RBC's investment advisors"[30] during his employment with RBC. The Court wrote that Mr. "Delamont's duty of good faith in the discharge of his employment contract. An implied term of that contract, …was to retain the employees of RBC who were under his supervision. In organizing their mass exit, he breached that duty of good faith. The damages for that breach are the amount of loss it caused to RBC."[31] The Court noted: "The duties found here for all the defendant employees [fiduciary (Mr. Delamont) and "mere" or "normal" (the investment advisors) alike] were the implied duties to perform one's employment functions in good faith and to give reasonable notice of termination. The compensatory damages awarded are grounded in these implied duties which were not seriously disputed. It is therefore unnecessary for the purposes of this case to go beyond these duties."[32] "The duty to give notice of departure led to damages, assessed in relation to the length of the notice period. Other contractual duties, such as the duty of good faith, gave rise to the large award against [Mr.] Delamont for loss of profit."[33]

Employees' "intention" (or lack of intention) to compete with his or her present employer is irrelevant to assessing potential breach of the duty of fidelity, good faith and loyalty. As Russell J. wrote in *Zoic Studios*:

> **219** I do not find that it is relevant whether the defendants intended to compete. The fact is that they did. Ms. Gannon's company agreed to work for a former client of her current employer. Mr. Adams used company resources to work on a project hoping to enhance his position with his employer's former client and to obtain future business. While I believe that they knew Eureka would not return to Zoic BC, in my view that is not a relevant consideration as to whether they competed while still employed.[34]

The defendant Ms. Gannon in *Zoic Studios* was also found to have breached her duty of fidelity, good faith and loyalty by failing to advise her employer of certain facts which she ought to have revealed in relation to a past business opportunity that she knew was not going to return to her employer, as well as by her failure to attempt to retain other of

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[30] *Ibid* at para 8; emphasis added.
[31] *Ibid* at para 13.
[32] *Ibid* at para 22.
[33] *Ibid* at para 23.
[34] *Zoic Studios*, *supra* note 19 at para 219; emphasis added.

the employer's employees when she had the responsibility to do so within the scope of her employment.[35] The plaintiff in *Zoic Studios* correctly recognized the distinction between an employee's misuse of its confidential information while still employed, and a former employee's misuse of its confidential information post-termination (which amounts to breach of post-termination duty of confidentiality, discussed in Part III.b below).[36] Russell J. wrote:

> **270** The plaintiff has two claims in regard to the misuse of confidential information. Firstly, it says Ms. Gannon and Mr. Adams misused confidential information [while still employees] and, therefore, breached their duty of good faith and fidelity. Secondly, it says all of the defendants misused Zoic's confidential information [post-termination] and, therefore, breached their duty of confidentiality. For the sake of efficiency, I will deal with both of these claims under this heading. I recognize, however, that a breach of confidence is its own cause of action.[37]

If the employer's client "consents" to the employee's (mis)use of its information, the client's *ex post facto* ratification of the employee's (mis)conduct does not operate to cure the employee's breach the duty of confidentiality:

> **306** I acknowledge that after GEP Productions was informed that Eureka material was in the possession of the defendants and Mr. Gore, it advised Zoic BC it consented to this. However, that later ratification does not absolve Ms. Gannon of her conduct for two reasons. The first reason is that the material on hard drive 1 included information that did not belong to GEP Productions, such as the actuals document. Second, this information was taken at a time when Ms. Gannon was employed by Zoic BC. There was no proper reason for her to take the information from Zoic BC, nor was it hers to take.[38]

The defendant Ms. Gannon in *Zoic Studios* was found to have breached her contractual duty of good fidelity, good faith and loyalty while still employed by taking and misusing her employer's confidential information; and she was also held liable for her post-termination breach of confidence for misusing her ex-employer's confidential information.[39]

To understand the common law duty on the (ex)employee not to misuse or disclose "confidential information" of the (ex)employer, it is necessary to understand what "confidential information" is. The employment contract may define "confidential information", in which case the express definition will govern; however, if the parties to

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[35] *Ibid* at paras 248, 251.
[36] See also *Altam, supra* note 9 at para 125.
[37] *Zoic Studios, supra* note 19 at para 270; emphasis added.
[38] *Ibid* at para 306; emphasis added.
[39] *Ibid* at para 354.

the contract have not expressly agreed to what "confidential information" encompasses, the common law provides guidance:

> First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e. that it is not already in the public domain. It may be that some or all of his rivals already have that information: but as long as the owner believes it to be confidential, I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection.[40]

"[C]ustomer lists are by definition and nature the confidential property of the employer."[41] "As a matter of first principles",[42] there is no proprietary ownership right in "clients" or "customers" *per se;*[43] notwithstanding some judicial obiter to the contrary.[44] Further, if the employer's "customer list might as well have been the Yellow Pages of the …industry in the communities where [the employer] operated", such "common knowledge" is not "proprietary … knowledge."[45] "Suppliers lists" may be confidential property if the employer compiled the list "with the intention that it would be confidential and that its use by employees would be restricted to the purposes of advancing its own interests."[46] "There is no proprietary interest in the information, knowledge and experience that employees learn in the course of their employment about their trade";[47]

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[40] *Perewernycky*, *supra* note 17 at para 30, citing *Marshall (Thomas) (Exports) Ltd. v. Guinle*, [1978] 3 All E.R. 193 (CA) at 209-10.
[41] *Flag Works*, *supra* note 15 at para 890; emphasis added. See also *Cruise Connections*, *supra* note 10 at para 211.
[42] *Phytoderm Inc. v. Urwin*, 90 O.T.C. 262, [1999] O.J. No. 383 at para 14 (QL) (CJGD) ["*Phytoderm*"].
[43] See eg *Belton v. Liberty Insurance Co. of Canada*, 189 O.A.C. 173, [2004] O.J. No. 3358 at paras 12, 15 (QL) (CA) ["*Belton*"]: "the trial judge concluded… the agents had no ownership or legal entitlement to their customers… I would not disturb the trial judge's finding… as she applied the appropriate factors…"; *LCI International Inc. v. STN Inc*., 10 E.T.R. (2d) 297, [1996] O.J. No. 107 at para 4 (QL) (OSCGD), affirmed, [1997] O.J. No. 1948 (QL) (CA) ["*LCI International*"]: "There is no 'property' in the customers"; *Drake International Ltd. v. Miller*, 9 O.R. (2d) 652, [1975] O.J. No. 2439 at para 6 (QL) (HCJ) ["*Drake*"]: "There is no property in such customers."
[44] See eg *Evans*, *supra* note 16 at para 273 where Graesser J. writes: "TSC clearly had a proprietary interest in its clients, regardless of who was servicing them"; but see *Evans*, *supra* note 16 at para 229.7 where Graesser J. correctly notes: "There is no 'ownership' of clients…" See also *Soost v. Merrill Lynch Canada Inc*., 2009 ABQB 591, [2009] A.J. No. 1126 at para 168 (QL), varied, 2010 ABCA 251, [2010] A.J. No. 955 (QL), leave to appeal to SCC refused, [2010] S.C.C.A. No. 399 (QL) ["*Soost*"]
[45] *ADM*, *supra* note 24 at paras 86-89.
[46] *Flag Works*, *supra* note 15 at para 106.
[47] *Ibid* at para 88. See also *Maguire v. Northland Drug Co*., [1935] S.C.R. 412, [1935] S.C.J. No. 11 (QL) ["*Maguire*"]: "The information and training which an employer imparts to his employee become part of the

therefore, such information is not proprietary "confidential information" of the employer. In *Cruise Connections* Pearlman J. wrote of the duty of confidentiality as follows:

> **207** The duty to preserve confidence arises when a person receives information in circumstances where he or she is on notice that the information is confidential…
>
> **208** The duty to preserve confidence does not depend upon the existence of a fiduciary relationship or duty and may arise from an express or implied contractual term, or even in the absence of a contract [i.e. tort or property law]: …
>
> **209** In *International Corona Resources Ltd. v. LAC Minerals Ltd*., [1989] 2 S.C.R. 574 at para. 10, La Forest J., for the majority, approved and applied the following three-part test for breach of confidence …:
>
> > First, the information itself… must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it. ...
>
> **210** The same test applies whether the claim of breach of confidence arises under a contract or is based on causes of action in tort or property: …[48]

In *Cruise Connections* there was a finding of tortious conduct: "By taking the plaintiff's confidential client lists without the permission of Cruise Connections [during the employment] and then using that client information [post-employment] to contact clients and to market and sell cruise related products on behalf of Vision 2000, the individual defendants committed the tort of conversion."[49] Further, "if a reasonable person standing in the shoes of the recipient of the information would have realized upon reasonable grounds that the information was given to him in confidence, he or she will be under an equitable obligation to preserve the confidence of that information."[50]

c. Equitable Fiduciary Obligations During Employment

While the employment relationship is subsisting, all employees—including equitable fiduciaries[51]—owe the employer the common law duties of good faith, fidelity, loyalty

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equipment in skill and knowledge of the employee, and so are beyond the reach of such a [restrictive] covenant."

[48] *Cruise Connections, supra* note 10 at paras 207-210; citations omitted, emphasis added. See also *Paradigm Shift Technologies Inc. v. Oudovikine*, 2012 ONSC 148, [2012] O.J. No. 190 at paras 30-31 (QL) ["*Paradigm Shift*"].

[49] *Cruise Connections, supra* note 10 at para 257; citation omitted, emphasis added.

[50] *Ibid* at para 212; citation omitted, emphasis added.

[51] See discussion of "fiduciaries" in Part III.c, *infra.*

and confidentiality discussed above. In *Canadian Aero*,[52] the Supreme Court of Canada noted that "mere employees … duty to their employer, unless enlarged by contract, consist… only of respect for trade secrets and for confidentiality of customer lists"; but that employees in "a fiduciary relationship to [their employer] betokens loyalty, good faith and avoidance of a conflict of duty and self-interest" and fiduciaries' is "a larger, more exacting duty." The Court held that in the factual context of that case:

> …the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

The post-termination obligations of former "normal employees" or "mere employees", and fiduciaries differ,[53] which is discussed further in Part III.c below. Independent contractors (individuals or corporations) may be found to owe fiduciary obligations to the principal they contract services to.[54] It is clear that corporations are beneficiaries of equitable fiduciary relationships (the fiduciaries being directors, officers and *ad hoc* "key employees" of the principal corporation); it is equally clear that corporations (i.e. corporate sub-contractors, corporate independent/dependant/contractors) can owe fiduciary duties to a different corporate principal (the true "employer").

III. Post-Employment-Termination Continuing Obligations

a. Post-Termination Express Contractual Restrictive Covenants

As mentioned above, most written employment contracts that do contain express restrictive covenants are drafted so that the restrictive covenants purport to apply both during the term of the contract, as well as following its termination. For example: "During the term of this Employment Agreement and [<u>for some time period] following its termination</u> the Employee shall not [do X within the geographic limits of Y]". Restrictive covenants expressly found in employment contracts often include non-solicitation, non-dealing, non-competition and confidentiality terms.

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[52] *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, [1973] S.C.J. No. 97 (QL) ["*Canadian Aero*"].
[53] *Flag Works*, *supra* note 15 at para 27.
[54] *Altam*, *supra* note 9 at paras 106, 230, citing *Smith v. UndercoverWear Ltd*., [1993] O.J. No. 2180 at paras 33-34 (QL), 1993 CanLII 5587 ["*Smith*"].

b. Post-Termination Implied Contractual Restrictive Covenants & Common Law Obligations

"In the absence of specific contractual or fiduciary obligations … employees are free to leave their employment and compete with their former employers [and] employers are not entitled to be protected against competition from their former employees."[55] "[E]ven competition by a former employee with fiduciary obligations will not in and of itself constitute a breach of fiduciary duty."[56] However, employees (including fiduciaries) may not compete unfairly by taking or using confidential and proprietary information, such as trade secrets or customer lists."[57]

"Taking and using confidential information is clearly a breach of a departing employee's duty of good faith and confidentiality";[58] however, note that the "taking" of the confidential information during the employment term is a breach of the duty of good faith, fidelity and loyalty which duty ends with the termination of the employment contract, while the "keeping" and "using" of the confidential information post-termination is a breach of the duty of confidentiality, which duty continues indefinitely post-termination. Some courts have conflated the duty of confidentiality into the duty of fidelity: such as: "[a] duty of fidelity, including a duty not to use or disclose the employer's confidential information, is generally implied in employment contracts and survives the termination of those contracts."[59] Recall, though, that the implied duty of fidelity, good faith and loyalty includes obligations that end with the termination of the employment contract; including the duties: to serve his employer faithfully; not to compete with his employer; not to conceal from his employer facts which ought to be

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[55] *Flag Works, supra* note 15 at paras 82-83. See also *KOS Oilfield Transportation Ltd. v. Mitchell*, 2010 ABCA 270, [2010] A.J. No. 1049 at paras 32, 36 (QL) ["*KOS Oilfield*"]; *RBC Dominion, supra* note 29 at para 19.

[56] *Flag Works, supra* note 15 at para 84. See also *R.J.V. Gas Field Services Ltd. v. Baxandall*, 2003 ABCA 170, [2003] A.J. No. 731 at para 25 (QL) ["*R.J.V. Gas*"].

[57] *Flag Works, supra* note 15 at para 85; emphasis added. See also *Altam supra* note 9 at para 133; *Evans, supra* note 16 at para 330. See also *698871 Ontario Inc. (c.o.b. The Engraving Shoppe) v. Menard & Associates Inc*., 2012 ONSC 6166, [2012] O.J. No. 5142 at para 19 (QL) ["*Engraving Shoppe*"]; *Polar Wireless Corp. v. Roberts*, 2012 ONSC 6482, [2012] O.J. No. 5465 (QL) ["*Polar Wireless*"].

[58] *Service Corp. International (Canada) Ltd. (c.o.b. Graham Funeral Home Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd*., 2012 BCSC 586, [2012] B.C.J. No. 784 at para 21 (QL) ["*Graham Funeral*"].

[59] *6180 Fraser Holdings Inc. v. Ali*, 2012 BCSC 247, [2012] B.C.J. No. 333 at para 30 (QL) ["*Fraser Holdings*"]; emphasis added.

revealed; and to provide full-time service to his employer.[60] It is conceptually useful to view the duty of confidentiality as a separate obligation that operates concomitant to the duty of good faith, fidelity and loyalty while the employment contract is extant, but continues to bind the former-employee following the termination of the employment contract after the duty of good faith, fidelity and loyalty ends. This is the "common law duty of confidence to their former employer not to disclose or use trade secrets and confidential information",[61] which is independent of an employee's contractually implied duty of good faith, fidelity and loyalty.

Post-termination "duties owed by mere employees, unless enlarged by contract, consist only of respect for trade secrets and confidentiality of customer lists."[62] In *RBC Dominion*, for example, the Supreme Court set aside the trial judgment against RBC's former investment advisors who had left to work at its competitor Merrill Lynch. The "the trial judge awarded damages on the basis that the employees continued [post-termination] to be a under a general duty not to compete, this award of damages was wrong in law."[63] The Supreme Court of Canada has set out the "test for whether there has been a breach of confidence… It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated."[64] In *Globex 2*, the Alberta Court of Appeal wrote:

> **25** A few elementary principles about an employee's **non-**contractual and **non-**fiduciary obligations help set the stage. First, an employee's duty of good faith and fidelity is generally restricted to the period of employment and will not normally prevent a departing employee from soliciting a former employer's clients: ... Second, absent a binding contractual undertaking to the contrary, an employee is generally free to compete with a previous employer from the time of his notice, but may be liable for improper use of the employer's confidential information during the notice period: *RBC Dominion* …at paras 18-20. Third, post-employment there is a duty not to misuse confidential information: *ibid*. ...[65]

With respect, the proposition that "absent a binding contractual undertaking to the contrary, an employee is generally free to compete with a previous employer from the

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[60] See general discussion in Part II.b *supra*.
[61] *Corona Packaging Inc. v. Singh*, 2012 ONSC 2746, [2012] O.J. No. 2025 at para 24 (QL) ["*Corona*"].
[62] *Flag Works*, *supra* note 15 at para 29.
[63] *RBC Dominion*, *supra* note 29 at para 20.
[64] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83 at para 129 (QL) ["*Lac Minerals*"]. See also *Zoic Studios*, *supra* note 19 at para 310.
[65] *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, [2011] A.J. No. 881 at para 25 (QL) ["*Globex 2*"]; emphasis added.

time of his notice" is wrong in law. The Supreme Court of Canada's statement that the Alberta Court of Appeal relied on reads: "Generally, an employee who **has terminated** employment is not prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice."[66] *Prima facie* the statement appears to support the Alberta Court of Appeal's articulation; however, the facts in *RBC Dominion* were that the employees had terminated their employment contract without giving the former employer notice. Once they had (wrongfully) terminated the employment contracts, they were no longer bound by the duty of good faith, fidelity and loyalty, which ends with the termination of the employment contract—they were not prevented from competing with the employer during the notice period that they should have given but did not; and the employer was confined to damages for the employees' failure to give reasonable notice. However, when an employee properly gives the employer working notice of termination of the employment contract, the employment contract remains extant, and the duty of good faith, fidelity and loyalty continues, until the notice period expires or the contract is otherwise terminated—he cannot compete with the employer during the notice period without breaching the duty of good faith, fidelity and loyalty; but he may do so once the notice period expires and the contract has thus terminated.

Further, liability "for improper use of the employer's confidential information" before, during or after the employee-given notice period is not grounded in the duty of good faith, fidelity and loyalty, which ends with the termination of the employment contract; but rather, it is grounded in the duty of confidentiality (the duty not to take, misuse or disclose the employer's or ex-employer's confidential information), which binds the employee both while the employment contract is extant (prior to and during and notice period), as well as indefinitely post-termination. In *Cruise Connections*, Pearlman J. wrote:

> the defendants [non-fiduciary non-corporate independent contractors] were bound by the confidentiality provisions of their respective contractor agreements. Furthermore, independently of that provision, they owed a common law duty to Cruise Connections to preserve the confidentiality of client information developed by and paid for by the plaintiff through its marketing programs and provided to them for the purpose of selling cruises on behalf of the plaintiff.[67]

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[66] *RBC Dominion, supra* note 29 at para 18.
[67] *Cruise Connections, supra* note 10 at para 202.

A "departing employee … will breach [the express or implied] contractual duty of good faith to the employer by taking a list of the employers' customers [while the employment is extant] for use after their employment has ceased."[68] Thus in *Cruise Connections*, it was held that former employees had "acted in breach of their duty of good faith when [post-termination and] in pursuit of their own self interest they attempted to transfer as many cruise bookings as possible from Cruise Connections to Vision 2000 using confidential client information they had taken from the plaintiff" while the employment contract was extant;[69] and, former employees, "in breach of their duties of good faith, …made false entries in WinCruise concerning the reasons why customers cancelled bookings"[70] while the employment contract was extant. The former office manager's "use and dissemination of the [former employer's] confidential client information [both during and following termination of the employment contract] constituted a breach of the common law duty of confidence she owed to Cruise Connections."[71] The former customer care supervisor "breached her duty of loyalty to Cruise Connections by [disclosing] her WinCruise password and by printing out and disseminating the various cruise booking reports"[72] while the employment contract was extant.

Restrictive covenants may be implied as a matter of fact into any contract that meets the legal requirements for such an implication.[73] For example, in *Gentech* in relation to an "oral agreement" between "an insurance broker" and a "non-employee agent", the Ontario Court of Appeal wrote: "It is implicit in this arrangement that whoever sold the book of business would not solicit those customers for two years, reflecting the two times annual commission price formula."[74]

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[68] *Ibid* at para 205.
[69] *Ibid* at para 215.
[70] *Ibid* at para 218.
[71] *Ibid* at para 235.
[72] *Ibid* at para 245.
[73] See Agreement Interpretation, *supra* note 1.
[74] *Gentech Insurance Ltd. v. Martina*, 2012 ONCA 605, [2012] O.J. No. 4282 at para 12 (QL) ["*Gentech*"]; emphasis added.

c. Post-Termination Equitable Fiduciary Obligations

Black's defines a fiduciary relationship as one "in which one person is under a duty to act for the benefit of the others on matters within the scope of the relationship."[75] In *Elder Advocates* the Supreme Court of Canada wrote:

> Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. Per se, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui qui trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, ad hoc fiduciary relationships must be established on a case-by-case basis.[76]

"An employee does not traditionally have a fiduciary relationship to his or her employer, and so falls into the '*ad hoc*' category."[77]

In some jurisdictions, including Alberta, legislation imposes fiduciary obligations on "directors" and/or "officers" of corporations. Alberta's *Business Corporations Act*,[78] s 122(1)(a) reads: "Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties shall act honestly and in good faith with a view to the best interests of the corporation…"[79] Therefore, in Alberta every employee of a corporation who is a corporate "director" or "officer" of the employer (corporation) is, by statute, in a fiduciary relationship to his or her employer. However, if an employee has not been elected as a director or appointed as an officer of his or her corporate employer in compliance with the *Business Corporations Act*, she or he may still be found to be an equitable fiduciary, as was the finding in *Canadian Aero* , where the Supreme Court of Canada wrote: "I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. … they acted respectively as president and executive vice-president of Canaero [they were] senior officers of Canaero. They were 'top management' and not mere employees. … O'Malley and Zarzycki stood in a fiduciary relationship to

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[75] Bryan A. Garner, ed. *Black's Law Dictionary*, 7th ed (St. Paul: West Group, 1999) at 640 ["*Black's*"].
[76] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] S.C.J. No. 24 at para 33 (QL) ["*Elder Advocates*"]. See also *Flag Works, supra* note 15 at para 47: "Fiduciary duties are among the most onerous obligations recognized by law and [where an] employee owes fiduciary obligations [it becomes] the kind of relationship in which equity would intervene to protect a dependent or vulnerable party by acting on the conscience of the fiduciary." The law of fiduciary is a principle derived from the English courts of equity (not the English courts of common law), which becomes important in relation to enforcement of fiduciary obligations post-termination, as discussed in Part IV below.
[77] *ADM*, *supra* note 24 at para 59.
[78] *Business Corporations Act*, RSA 2000, c B-9.
[79] *Ibid* s 122(1)(a); emphasis added.

Canaero."[80] Some courts have expressed the opinion that the Supreme Court of Canada established a category of fiduciary relationship—"top management"—in *Canadian Aero*.[81] Alternatively, *Canadian Aero* is more likely an early application of the test for an *ad hoc* fiduciary duty to arise wherein any employee who, in the factual context, meets the equitable requirements will be held to be a fiduciary on an *ad hoc* (non-categorical) basis.[82]

In *Elder Advocates*[83] the Supreme Court of Canada recently set out the factors that may establish "the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized."[84] The Court held that the "rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent" set out in *Frame*,[85] and relied on by numerous courts in the employment context,[86] is not sufficient; specifically, that "vulnerability alone is insufficient to support a fiduciary claim."[87] The Court wrote:

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[80] *Canadian Aero*, *supra* note 52.

[81] See eg *Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337, [2006] B.C.J. No. 2006 at paras 71-72 (QL) ["*Pan Pacific*"]: "Over the years, the courts have identified a number of categories of employees who owe fiduciary obligations to their employers. In *Canadian Aero* the court found that 'top management' of a company owed that company a fiduciary duty, even if they were supervised by officers of the company and did not hold positions in the company, such as director, that fell within the usual categories of those who had fiduciary duties." See also *Pan Pacific* at para 82: "the application of the categorical approach of 'top management' or 'key employee' to determine if a person is a fiduciary is, in my view, little different, in substance, to the principled [*ad hoc*] approach…"; *Zoic Studios*, *supra* note 9 at para 95: "Categories of employees that owe a fiduciary duty to their employer have already been established by the courts… The leading case is *Can. Aero v. O'Malley*";

[82] See eg *Altam*, *supra* note 9 at para 109, citing *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84 at para 34 (QL) ["*Hodgkinson*"]: "a fiduciary relationship arises as a matter of fact out of specific circumstances of the parties rather than the class of relationship to which fiduciary relationships are innate. The question to be asked is whether given all the surrounding circumstances one party can reasonably have expected that the other would act in the former's best interest with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive examples of evidential factors to be considered in making a determination as to a fiduciary status."

[83] *Elder Advocates*, *supra* note 76.

[84] *Ibid* at para 29.

[85] *Frame v. Smith*, [1987] 2 S.C.R. 99, [1987] S.C.J. No. 49 at para 60 (QL) ["*Frame*"]: "Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3)The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

[86] See eg *Zoic Studios*, *supra* note 19 at para 91; *Altam*, *supra* note 9 at para 108; *Evans*, *supra* note 16 at para 200.

[87] *Elder Advocates*, *supra* note 76 at para 28. See also *ADM*, *supra* note 24 at para 69: "…the 'vulnerability' line of fiduciary employee cases are no longer an accurate statement of the law. McLachlin C.J.C. in *Elder Advocates* at para. 36 is explicit, *vulnerability alone* does not define a fiduciary relationship.

> **36** In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*:[88] (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[89]

"Undertaking to put the best interests of an employer above your own arises in two circumstances. One is where an employee explicitly agrees by contract to undertake a fiduciary obligation";[90] and "[t]he second instance [is] where an employee may be a fiduciary relationship is where that employee is a key senior manager."[91] "Whether someone is a fiduciary is legal question for the court to determine based on the substance of the matter, the nature of the relationship and the responsibilities assumed"[92]—based on the entire factual context. However, "it is difficult to imagine that…a wage employee and non-decision maker, would … implicitly [undertake] to put [his employer's] interests beyond his own"[93] such that an *ad hoc* fiduciary duty would arise.

Fiduciary obligations bind a fiduciary "even if he was not bound by a formal restrictive covenant or non-competition agreement";[94] the former obligations being in equity, the latter being in contract. Separate from, and subject to, any enforceable contractual restrictive covenants, a fiduciary is free to compete fairly with her former employer post-termination of the employment contract, though restricted by fiduciary obligations that continue for a reasonable period of time post-termination.[95] Further, "a

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Rather, a fiduciary employee is one who also *undertakes* to put the best interests of an employer above his own."

[88] *Frame*, *supra* note 85.

[89] *Elder Advocates*, *supra* note 76 at para 36; emphasis added. See also *ADM*, *supra* note 24 at para 60.

[90] *ADM*, *supra* note 24 at para 70. But see *ADM*, *supra* note 24 at para 72;emphasis added: "if equal contracting parties should explicitly identify their respective fiduciary relationships, then logically a fiduciary status should not be foisted on the more vulnerable of contracting parties in an employer/employee relationship. A fiduciary relationship should not be inferred but rather explicitly reflected in an agreement under which an employee agrees to work for an employer."

[91] *ADM*, *supra* note 24 at para 73, citing *Canadian Aero*, *supra* note 52. And see *ADM*, *supra* note 24 at para 74: "The director-like authority of this kind of employee warrants a special duty for an employee who operates in this central a role. An employee of this type may not experience the vulnerability and imbalance of power experienced by the typical employee. Thus, no injustice results from implying the onerous though time-limited non-competition obligation that flows from the fiduciary relationship."

[92] *Flag Works*, *supra* note 15 at para 37; emphasis added.

[93] *ADM*, *supra* note 24 at para 84.

[94] *Consolidated Compressor Company Ltd. v. Northwest Equipment Ltd.*, 2012 ABQB 222, [2012] A.J. No. 376 at para 60 (QL) ["*Consolidated Compressor*"].

[95] *Ibid* at para 65.

former fiduciary employee who is free to compete is not required to tell his former employer that he is about to do so."[96] The Alberta Court of Appeal set out the scope of a fiduciary's obligations in *Physique Health*:[97]

> (1) A fiduciary cannot take a maturing business opportunity from an employer either while he or she is an employee or after the employment relationship has been terminated. …
>
> (2) In opportunity cases, there must be a misuse of the fiduciary's power before liability attaches. …
>
> (3) Competition with the Plaintiff after the employment relationship has ceased does not of itself constitute a breach of the fiduciary duty. …
>
> (4) The right to compete is qualified; the employee must not actively solicit the business of specific customers of the employer. The restriction continues "for a reasonable period of time after termination of the employment". …
>
> (5) After the employment relationship has terminated, the employee must not use or disclose confidential information learned in the course of his or her employment, but the obligation does not extend: ". . . to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorized disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith". …
>
> (6) Employees who are fiduciaries of their former employer breach those obligations when they take a confidential customer list and use trade secrets of the former employer for use in a competing enterprise.[98] …

Generally it is not a breach of fiduciary duty for fiduciary to engage in business with other former employees, as long as he does not induce them to leave during the course of their employment; however, where the fiduciary is aware of non-solicitation clauses in the former employees' contracts of employment and he agrees to undertake a business that would involve the former employee(s) soliciting the former employer's clients and suppliers he may be held in breach of his fiduciary obligations.[99]

"[I]f a fiduciary obligation exists, an employee can only be restrained from competing with his former employer for a reasonable length of time."[100] "An employee fiduciary is not restricted for an unlimited period [and t]he period in which a fiduciary cannot equitably compete with a former employer is considered relative to many

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[96] *Veolia ES Industrial Services Inc. v. Brulé*, 2012 ONCA 173, [2012] O.J. No. 1183 at paras 32-33 (QL), leave to appeal to SCC refused, [2012] S.C.C.A. No. 229 at para 43 (QL) ["*Veolia*"].
[97] *Physique Health Club Ltd. (c.o.b. Physique Fitness Store) v. Carlsen*, 193 A.R. 196, [1996] A.J. No. 1004 at para 4 (QL)(CA)[" *Physique Health*"].
[98] *Ibid* at para 4; citations omitted; emphasis added. See also *Veolia, supra* note 96 at paras 32-33.
[99] *Consolidated Compressor, supra* note 94 at para 66.
[100] *R.J.V. Gas, supra* note 41, citing *Physique Health, supra* note 97 at para 4; emphasis added. See also *ADM, supra* note 24 at para 224.

factors."[101] Underlying the reasonable length of time is how long (as a matter of legal fiction) will it take the employer to replace the fiduciary employee and establish contact with customers the fiduciary dealt with, given all of the factual context of the fiduciary employee's employment relationship with the employer. "A fiduciary's duty of non-solicitation subsists for so long after his resignation as is reasonable in the circumstances to enable the former employer to contact clients and attempt to retain their loyalty, and will depend on the nature of the position held by the departing employee."[102] "[T]he duty of a departing fiduciary employee subsists for so long after his termination as is reasonable in the circumstances to enable the former employer to himself contact his clients and attempt to retain their loyalty. The length of that period will obviously be affected by the nature of the position held by the departing employee."[103]

IV. Interim, Interlocutory and Final (Un)Enforceability of Restrictive Covenants and Fiduciary Obligations

A party who is allegedly suffering harm from another's alleged breach of a contractual restrictive covenant, common law duty and/or equitable fiduciary obligation may file suit seeking remedies from the court. It may not be prudent for the complaining party to continue allowing damages to accrue while awaiting final remedies from the court following trial of the action. The complaining party may apply for interlocutory relief from the court; namely, an interlocutory injunction which, if granted, would prohibit the impugned conduct, usually until the final determination of the matters in dispute at trial.[104] Sometimes the complaining party is not willing, or able, to wait for the hearing of the application for an interlocutory injunction, in which case the complaining party may apply for interim relief from the court; namely, an interim injunction which, if granted, would prohibit the impugned conduct, until the hearing of the interlocutory injunction application.

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[101] *ADM, supra* note 24 at paras 224-225.
[102] *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, 1996 ABCA 169, [1996] A.J. No. 475 at para 32 (QL) ["*World Wide*"]. See also *Consolidated Compressor, supra* note 94 at para 67.
[103] *Graham Funeral, supra* note 58 at para 20.
[104] However, "An interlocutory injunction would only rarely be continued past the contractual expiry date" of the restrictive covenant—its temporal limitation: *Fuller Western Rubber Linings Ltd. v Spence Corrosion Services Ltd.*, 2012 ABCA 137, [2012] A.J. No. 442 at para 7 (QL) [" *Fuller Western*"].

This Part begins with a discussion of principles related to final determinations as to the enforceability of restrictive covenants and fiduciary obligations because the strength (or lack thereof) of the applicant's case is the first element in the legal test applied in relation to interim/interlocutory injunctive relief, discussed in Part IV.b below.

It should be noted that a person that might be bound by contractual restrictive covenants may elect to bring an application for a declaration from the court as to the restrictive covenants' (un)enforceability before taking actions (competing or soliciting) that may incur liability. For example, in *ConCreate*[105] the applicant (former employee) sought a declaration from the court that contractual "Non-Competition and Non-Solicitation Agreements" that he had signed were totally or partially unenforceable as an illegal restraint of trade. His application was dismissed; in other words, the court held that the restrictive covenants were enforceable.

a. Final (Un)Enforceability of Restrictive Covenants and Fiduciary Obligations

i. Rebutting the Presumption of Illegality

At least as early as 1935, the Supreme Court of Canada recognized that "*Prima facie* all covenants in restraint of trade are illegal and therefore unenforceable."[106] The Court wrote:

> The illegality being a presumption only, is rebuttable by evidence of facts and circumstances showing that the covenant is reasonable, in that it goes no further than is necessary to protect the rights which the employer is entitled to protect, while at the same time it does not unduly restrain the employee from making use of his skill and talents. The onus of rebutting the presumption is on the party who seeks the enforcement, generally the covenantee. Reasonableness is the test to be applied in ascertaining whether or not the covenant is a fair compromise between the two opposing interests.[107]

The Supreme Court of Canada recently reaffirmed in *Shafron* that "[a] restrictive covenant in a contract is what the common law refers to as a restraint of trade",[108] that "[a]t common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged

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[105] *Martin v. ConCreate USL Limited Partnership*, 2012 ONSC 1840, [2012] O.J. No. 1367 (QL) ["*ConCreate*"].
[106] *Maguire, supra* note 47.
[107] *Ibid*; emphasis added.
[108] *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] S.C.J. No. 6 at para 15 (QL) ["*Shafron*"].

and should be free",[109] and that "all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule."[110] However, "despite the presumption that restrictive covenants are *prima facie* unenforceable, a reasonable restrictive covenant will be upheld."[111]

"A restrictive covenant precludes the vendor in the sale of a business from competing with the purchaser and, in an employment contract, the restrictive covenant precludes the employee, upon leaving employment, from competing with the former employer"[112] or soliciting the former employer's clients, employees and/or suppliers. "The absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business."[113] "[R]estrictive covenants that flow from the sale of the business are more tolerated by the courts than those which prevent employees from working in their craft or career choice."[114] Therefore, the first question in determining the enforceability of a restrictive covenant "is whether the restrictive covenant at issue is properly characterized as being contained in an employment contract or a contract for the sale of a business";[115] if the former, "the reasonableness [of the] the restrictive covenant must stand up to the more rigorous test applicable to employment contracts."[116] "Since employment contracts are sometimes an aspect of a vendor and purchaser contract, the courts will analyse

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[109] *Ibid* at para 16.
[110] *Ibid*, citing *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535.
[111] *Shafron, supra* note 108 at para 17; emphasis added.
[112] *Ibid* at para 15.
[113] *Ibid* at para 23.
[114] *Travel Co. v. Keeling*, 2009 ABQB 399, [2009] A.J. No. 732 at para 49 (QL) ["*Travel Co*."].
[115] *Shafron, supra* note 108 at para 24.
[116] *Ibid* at para 25. See also *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] 2 S.C.R. 916, [1978] S.C.J. No. 47 (QL) ["*Elsley Estate*"]: "The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. … in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. … The agreement sued upon is the employment agreement. …The restrictive covenant, if enforceable, must stand up to the more rigorous tests applied in an employer/employee context."; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, [2005] A.J. No. 1654 at para 29 (QL) ["*Globex 1*"]; *ConCreate, supra* note 105 at para 18.

whether or not it is appropriate to scrutinize the reasonableness of the contract as an employment contract or as a commercial or sale contract."[117]

The second question to be determined is whether the restrictive covenant under consideration is ambiguous,[118] because "for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous. The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. …An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity." [119] Am ambiguity may be patent or latent.[120] In *Shafron* the parties incorporated the following non-competition restrictive covenant into the employment contract:

> Shafron agrees that, upon his leaving the employment of MSA or KRG Insurance for any reason save and except for termination by KRG Insurance without cause, he shall not for a period of three (3) years thereafter, directly or indirectly, carry on, be employed in, or be interested in or permit his name to be used in connection with the business of insurance brokerage which is carried on within the metropolitan City of Vancouver.[121]

The geographic restriction "Metropolitan City of Vancouver" is not a legally defined term, and is therefore patently ambiguous. "In both the commercial and the employment context, if a covenant is ambiguous in the sense that it does not clearly define the prohibited activities, the territory of its operation, and the time of its operation, it is unreasonable and unenforceable… A covenant will be ambiguous if it is impossible for the person bound by it to predict what activities are precluded by the covenant."[122]

If there is ambiguity in the restrictive covenant under consideration, then the third question to be determined is whether either the doctrine of "blue-pencil" severance, or the doctrine of rectification,[123] may be invoked to resolve the ambiguous term. "[A]n

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[117] *ConCreate, supra* note 105 at para 22.
[118] For a general discussion of the law of contractual interpretation and principles of ambiguity see Agreement Interpretation, *supra* note 1 at 23-27.
[119] *Shafron supra* note 108 at para 27.
[120] See eg *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344, [2011] O.J. No. 1994 at paras 18, 30 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 297 (QL) ["*Mason*"]: "the plain words were clear…and therefore there was no [patent] ambiguity [however] the restriction is [latently] ambiguous in its practical implementation." See also *Invescor, supra* note 8 at paras 17-21 (distinction between patent and latent ambiguity in restrictive covenant).
[121] *Ibid* at para 12; emphasis in original.
[122] *ConCreate, supra* note 105 at para 25; citations omitted.
[123] "Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their

ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable."[124] In *Shafron* the Court wrote:

> **2** Severance, when permitted, appears to take two forms. "Notional" severance[125] involves reading down a contractual provision so as to make it legal and enforceable. "Blue-pencil" severance[126] consists of removing part of a contractual provision. For reasons I set out below, notional severance is not an appropriate mechanism to cure a defective restrictive covenant. As for blue-pencil severance, it may only be resorted to in rare cases where the part being removed is trivial, and not part of the main purport of the restrictive covenant.
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> **36** …blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.[127]
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> **37** …notional severance has no place in the construction of restrictive covenants in employment contracts. …[128]

In *Shafron* the trial judge dismissed KRG Western's action finding that the term "Metropolitan City of Vancouver" was neither clear nor certain—it was patently ambiguous. The British Columbia Court of Appeal reversed the decision of the trial judge, holding that the restrictive covenant was enforceable; it applied the doctrine of "notional" severance to construe it as applying to the "City of Vancouver and municipalities contiguous to it." The Supreme Court of Canada reversed the Court of

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contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract": *Shafron supra* note 108 at para 53, citing *Frederick E. Rose (London) Ld. v. William H. Pim Jnr. & Co.*, [1953] 2 Q.B. 450 at p. 461 (C.A.). "[T]he necessary requirements for rectification: (1) the existence and content of the inconsistent prior oral agreement; (2) that the party seeking to uphold the terms of the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and (3) "the precise form" in which the written instrument can be made to express the prior intention": *Shafron supra* note 108 at para 53, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] S.C.J. No. 20 at paras. 37-40 (QL) ["*Performance*"].

[124] *Shafron supra* note 108 at para 43.

[125] *Ibid* at para 30, citing *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] S.C.J. No. 9 at para 57 (QL) ["*Transport North*"], per Bastarache J. (dissenting): "Notional severance involves reading down an illegal provision in a contract that would be unenforceable in order to make it legal and enforceable."

[126] *Shafron supra* note 108 at para 30, citing *Transport North, supra* note 125 at para 2: "Notional severance involves reading down an illegal provision in a contract that would be unenforceable in order to make it legal and enforceable."

[127] *Shafron supra* note 108 at paras 2, 36. See also *Travel Co., supra* note 114 at para 50.

[128] *Shafron supra* note 108 at paras 2, 36-37; emphasis added.

Appeal and restored the trial decision. It held: that "Metropolitan City of Vancouver" was ambiguous; that the doctrine of notional severance should not have been applied by the Court of Appeal;[129] that the doctrine of "blue-pencil" severance could not be applied the to phrase "Metropolitan City of Vancouver" to strike out "Metropolitan" leaving "City of Vancouver";[130] and that the doctrine of rectification could not be applied as there was no evidence of mistaken description for the court to clarify. In *Elsley Estate* the Supreme Court of Canada noted: "In the absence of evidence of mutual mistake leading to the conclusion that the true agreement of the parties was other than as recorded, the application for rectification was properly refused by the trial judge";[131] and "The fact that it could have been drafted in narrower terms would not have saved it, for … '... the question is not whether they could have made a valid agreement but whether the agreement actually made was valid'."[132]

Some judges have posited that "notional" or "blue-pencil" severance may be available where the parties to the contract in which the restrictive covenants are contained have expressly included a "severance" provision empowering the court to do so.[133] Others have raised the possibility without deciding the issue.[134] Still others have determined that in light of the Supreme Court of Canada's decision in *Shafron*, "notional" severance is never available in the context of employment-related restrictive covenants, and "blue-pencil" severance in the employment context is always limited to "cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant", even if the contract under consideration contains express

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[129] In 2005 the Alberta Court of Appeal foreshadowed the Supreme Court of Canada's dictate that the "doctrine of notional severance ….does not apply to contracts in restraint of trade" in the employment context in *Globex 1*, *supra* note 116 at para 44. See also *Travel Co.*, *supra* note 114 at para 51.
[130] See also *Altam*, *supra* note 9 at paras 226-229;
[131] *Elsley Estate*, *supra* note 116. See general discussion of the doctrine of rectification, *supra* note 123.
[132] *Elsley Estate*, *supra* note 116.
[133] See eg *Senos v. Pacesetter Performance Drilling Ltd*., 2010 ABQB 533, [2010] A.J. No. 946 at para 63 (QL) ["*Senos*"]: "I see no reason why the parties cannot expressly empower the court to blue pencil or read down a restriction that is otherwise unreasonable. *Shafron* is authority that the courts do not have the inherent power to do so, but does not suggest that the parties cannot agree to give the courts such powers."
[134] See eg *Phoenix Restorations Ltd. v. Brownlee*, 2010 BCSC 1749, [2010] B.C.J. No. 2455 at paras 14, 31 (QL) ["*Phoenix*"] where the contract under consideration purported that the "court shall have the power to reduce the duration or area of such provision and, in its reduced form, such provision shall then be enforceable and shall be enforced" but the court noted that restrictive "covenants cannot be read down to what might be reasonable. Notional severance does not apply to restrictive covenants in employment contracts."

severability language.[135] Note that in *GDL Solutions* Brown J. wrote that "in the context of the sale of a business rather than in the employment context… [*Shafron*] cautions regarding severance are less applicable. However, [he found] that only 'blue line' severance is appropriate" "in the context of the sale of a business rather than in the employment context."[136] Brown J. held "that the phrase 'ten (10) kilometres of' should be struck from the non-competition clause",[137] applying "'blue line' severance."[138]

"Rectification is a remedy that has very limited application and is limited to situations where the plaintiff is able to establish that there was a prior contract whose terms were definite and ascertainable, and the written contract failed to accurately record what had been specifically agreed."[139] The Ontario Court of Appeal wrote in *Veolia*:

> In *Shafron*, at para. 53, the Supreme Court stated that rectification is to be used with great caution and set out three requirements: (1) an inconsistent prior oral agreement; (2) that the party seeking to uphold the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and (3) 'the precise form' in which the written instrument can be made to express the prior intention.[140]

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[135] See eg *Mendham, supra* note 3 at paras 23, 78 where the contract under consideration purported that "[i]f any of the foregoing covenants are found to be unreasonable to any extent by a court of competent jurisdiction adjudicating upon the validity of the covenants, whether as to the scope of the restriction, the area of the restriction or the duration of the restriction, then such restriction shall be reduced to that which is in fact declared reasonable by such court, or a subsequent court of competent jurisdiction requested to make such a declaration" but the court wrote: "I have considered whether I can in this case 'read down' clause 8.02(a). I am of the view I cannot. It is clear Hub intended the blanket prohibition on Mendham performing any services as specified in the agreement. Under the circumstances and for the purposes of this interlocutory application I am not prepared to 'read down' this clause." See also *ConCreate, supra* note 105 at paras 42, 46, 127-128: "Severance is not available where the contracting parties do not provide for it in their agreement… In the case at bar, there is a severance provision… the doctrine of severance would not have been available to read down the covenants in the case at bar to make them reasonable …In the context of covenants in restraint of trade, the recent cases indicate that the doctrine of severability is of limited availability, and I would not apply it in the case at bar. … had I found that the covenants were unreasonable in the scope of their operation, their territoriality, or in their duration, I would not have been able to apply either the 'blue pencil severance' technique or the 'notional severance' technique because to do so would be to rewrite the contract for the parties."

[136] *GDL Solutions Inc. v. Walker*, 2012 ONSC 4378, [2012] O.J. No. 3768 at para 78 (QL) ["*GDL Solutions*"].

[137] *Ibid* at para 79.

[138] But see *Rawlco Radio Ltd. v. Lozinski*, 2012 SKQB 460, [2012] S.J. No. 710 (QL) ["*Rawlco Radio*"], where Acton J. considered a geographic restriction worded "in Saskatoon, Saskatchewan plus a radius of 100 kilometres around Saskatoon, Saskatchewan." Acton J., with no analytical consideration, issued an injunction enforcing the restrictive covenant, thus implicitly holding that "a radius of 100 kilometres around" was not ambiguous, and without considering the availability of the doctrine of blue-pencil severance to sever the ambiguous words. The *Rawlco Radio* decision is arguably wrong in law.

[139] *Senos, supra* note 133 at para 36, citing *Performance, supra* note 123.

[140] *Veolia, supra* note 96 at para 30.

Globex 2[141] is an example where ambiguity in the wording of the restrictive covenant defeated its enforcement. The clause read, in part, that the former employee "will not…solicit customers in any manner whosoever, in any business or activity for any client of Globex with which he/she had dealings on behalf of Globex at any time within the twelve (12) months preceding" termination of the employment contract.[142] The Alberta Court of Appeal wrote: "the term 'dealings' is ambiguous both in meaning and practical application";[143] "If it is impossible to predict when you are breaching a restrictive covenant, it is in essence unreasonable";[144] "If the meaning of a restrictive covenant cannot be ascertained, I do not think a court should enforce it".[145] On the other hand, where "[t]he broad scope of prohibited activities is expressed by using language that has meaning within the industry. Using terms of art common to a particular industry does not make the language used as being either ambiguous or vague."[146]

If there is no ambiguity in the restrictive covenant under consideration, or if the ambiguity in the restrictive covenant has been resolved through application of the doctrine of "blue-pencil" severance or the doctrine of rectification in the exceptionally rare circumstances where they may apply, then the fourth question to be determined is whether the restrictive covenant under consideration is "reasonable." In *Elsley Estate* the Supreme Court of Canada wrote:

> …A covenant in restraint of trade is enforceable only if it is reasonable between the parties **and** with reference to the public interest. … The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. … The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances. …[147]

To be enforceable, a restrictive covenant must be both (1) reasonable as between the parities, and (2) reasonable with reference to the public interest. "The [legal] question[s] of [1)] reasonableness between the parties and [2) reasonableness] in reference to the public interest [are] determined in the context of the facts of the particular case …existing at the time the contract is made, which includes the parties' expectations of what possibly

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[141] *Globex 2*, *supra* note 65.
[142] *Ibid* at para 14.
[143] *Ibid* at para 16.
[144] *Ibid* at para 19.
[145] *Ibid* at para 20.
[146] *Adderley v. 1400467 Alberta Ltd*., 2012 ABCA 216, [2012] A.J. No. 704 at para 23 (QL) ["*Adderley*"].
[147] *Elsley Estate*, *supra* note 116; emphasis added. See also *Globex 1*, *supra* note 116 at para 28.

could happen in the future."[148] The onus of proving that a restrictive covenant is reasonable as between the parities to an employment contract is on the party asserting its enforceability.[149] In assessing the reasonableness of a restrictive covenant as between the parities to an employment contract, the Court in *Elsley Estate* wrote:

> In assessing the reasonableness of the clause with reference to the interests of the parties, several questions must be asked. First, did Collins have a proprietary interest entitled to protection? … Second, were the temporal or spatial features of the clause too broad? …The [third] and crucial question is whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employer. In a conventional employer/employee situation the clause might well be held invalid for that reason. …Whether a restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee's business and the nature and character of the employment. Admittedly, an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, in exceptional cases, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.[150]

Restrictive covenants' reasonableness as between the parities requires an examination of: (1) whether the employer has a "proprietary interest entitled to protection"; (2) whether the temporal limitation is too long; (3) whether the geographic limitation is too broad; (4) whether the scope of activities prohibited is too broad.

"Confidential information", as discussed above, is a proprietary interest and entitled to protection, including trade secrets and client lists, but not clients *per se*. Globex 2 provides and example where "business methods used by the appellant were not sufficiently unique to be proprietary",[151] and thus were not entitled to protection. After it is determined that the ex-employer has a proprietary interest entitled to protection, "the reasonableness of a restrictive covenant is determined by considering the extent of [1] the activity sought to be prohibited and [2] the extent of the temporal [limitation] and [3 the] spatial scope of the prohibition."[152]

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[148] *ConCreate, supra* note 105 at paras 15-16.
[149] See *Altam, supra* note 9 at para 214; *ConCreate, supra* note 105 at para 14.
[150] *Elsley Estate, supra* note 116.
[151] *Globex 2, supra* note 65 at para 40.
[152] *Shafron supra* note 108 at para 43; emphasis added.

Where the parties define the activities sought to be prohibited in the restrictive covenant, they concomitantly exclude "all activities that are not covered by that definition."[153] The Alberta Court of Appeal wrote in *Globex 1*:

> Covenants that contain a blanket restriction against competition are generally held unenforceable as being an unreasonable restraint of trade. The employee's right to exploit his or her knowledge and skills must be balanced with the employer's interest in protecting its trade secrets, confidential information and proprietary interests. Frequently, a covenant against solicitation of the employer's clients will suffice to protect the employer's proprietary interests; in such cases a non-competition covenant will be unnecessary, unreasonable, and therefore unenforceable.[154]

"If a blanket restriction on competition is not reasonably necessary to protect the employer's interests, then the non-competition covenant is unenforceable."[155] The court noted, however, that in exceptional cases a "non-competition clause will be reasonably necessary where the employee obtains such personal knowledge of and influence over the employer's customers as would enable him, if competition were allowed, to take advantage of the employer's trade connection to undermine the business of the employer."[156] In *Altam* Lee J. restates these principles concisely as:

> …where an adequate non-solicitation clause exists between the parties, a non-competition clause will generally be unnecessary, unreasonable and hence, unenforceable. However, a non-competition clause will be reasonably necessary where an employee obtains personal knowledge and influence over the employer's clients as would enable him, if competition were allowed, to take advantage of the employer's trade connection to undermine the employer's business.[157]

Where restrictive covenants are "unlimited both as to time and territory" it is "highly unlikely" that they will be justified as reasonable.[158] Further, "in ... restrictive covenants and non-competition agreements, it is virtually inconceivable that a geographic scope would not be included in defining the scope of any non-competition covenant [and] it is equally unlikely that covenants relating to a regional business would be intended to extend to the whole world."[159] But "[i]t is unnecessary for there to be a geographic scope

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[153] *Adderley supra* note 146 at para 10.
[154] *Globex 1, supra* note 116 at para 30; emphasis added. See also *Ted Thomson Management Inc. v. 1331503 Ontario Ltd. (c.o.b. Jenner Geisler)*, 2013 ONSC 264, [2013] O.J. No. 113 at para 39 (QL) ["*Ted Thomson*"].
[155] *Ibid* at para 35.
[156] *Ibid* at para 33.
[157] *Altam, supra* note 9 at para 60.
[158] *KOS Oilfield supra* note 55 at para 31.
[159] *Senos, supra* note 133 at para 47.

to…non-solicitation provisions (customers and employees) as those are people/entity specific terms."[160]

It is "the general law in Canada on employment restrictive covenants that the enforceable restrictions will be shorter and narrower where the job is less sophisticated or entry level."[161] Conversely, where the former employee is "president or chief financial officer, …there may be more justification for a broader prohibition on competition after such a highly placed employee leaves the company."[162] "The covenant … must not go further than is reasonably adequate to give the protection that is to be afforded; if it goes too far or is too wide, either as to time or place or scope, it will not be enforced; and if bad in any particular, it is bad altogether."[163] In *Globex 2*, for example, the Alberta Court of Appeal held that **"**the clause is overly broad [in relation to the activity sought to be prohibited] because it prohibits the former employee from 'solicit[ing] customers in any manner whosoever, in any business or activity for any client of Globex'."[164] In *Mason* the Ontario Court of Appeal held that "the complete prohibition on competition for one year is overly broad as well as unworkable in practice and makes the restrictive covenant unreasonable and unenforceable."[165]

Recall that in *Shafron*, the "issue [was] whether, in an employment contract, the doctrine of severance may be invoked to resolve an ambiguous term in a restrictive covenant or render an unreasonable restriction in the covenant reasonable."[166] It follows that in addition to resolving an ambiguous restrictive covenant term, "blue-pencil" severance may be used, in appropriate circumstances, to "render an unreasonable restriction in the covenant reasonable."[167] However, as with its use in resolving ambiguity, "blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant."[168] For example, in *Veolia* the Senior Executive Employment

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[160] *Ibid* at para 51. See also *Fraser Holdings, supra* note 59 at para 16.
[161] *Travel Co., supra* note 114 at para 53.
[162] *Mason, supra* note 120 at para 26.
[163] *Maguire, supra* note 47. See also *Phoenix, supra* note 134 at paras 24, 37, 40; *Mendham, supra* note 3 at para 75.
[164] *Globex 2, supra* note 65 at para 21.
[165] *Mason, supra* note 120 at para 31.
[166] *Shafron, supra* note 108 at para 1; emphasis added.
[167] See eg *ConCreate, supra* note 105 at para 40.
[168] *Shafron supra* note 108 at paras 36.

Agreement dated January 1, 2004 contained a restrictive covenant worded, in part: "during the Senior Executive's employment with the Employer and for a period of: … Two years *commencing on January 1, 2007* following termination by the Senior Executive…the Senior Executive covenants and agrees not to compete, either directly or indirectly, with the core Business within…the Provinces of Ontario and Quebec."[169] On 7 July 2004, the Senior Executive gave 180-day notice of termination. The trial judge applied "blue-pencil" severance after concluding "that severing the words 'commencing on January 1, 2007' …would produce 'exactly' what the parties had intended."[170] The Ontario Court of Appeal allowed the appeal, writing:

> **17** … blue-pencil severance could not be resorted to in this case to remove the words "commencing on January 1, 2007" from the non-competition covenant. Without the deletion of these words, the restrictive covenant, which commences two years after Mr. Brulé ceased to be employed by Veolia, is clearly unreasonable and unenforceable. …
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> **23** In this case, there was evidence, not referenced by the trial judge in his reasons, that the parties would not have agreed to remove the words "commencing on January 1, 2007" without varying other terms of the contract. Blue-pencil severance was therefore not available. …
>
> **29** The words 'commencing on January 1, 2007' are not trivial. They go to the duration of the restriction and are part of the main purport of the clause. This is not one of those rare cases where blue-pencil severance may be resorted to.[171]

In assessing the reasonableness of a restrictive covenant contained in an employment contract with reference to the public interest, the Court in *Elsley Estate* wrote: "After the party relying on a restrictive covenant has established its reasonableness as between the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it."[172] "If the covenant is reasonable as between the parties and the party seeking to avoid the covenant cannot show any injury to the public interest, the covenant is enforceable."[173] For example, "[w]here the [restrictive] covenant clearly contravenes the *Competition Act*, R.S.C., 1985, c. C-34, it will be ruled unenforceable"[174] as contrary to the public interest.

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[169] *Veolia, supra* note 96 at para 8.
[170] *Ibid* at para 13.
[171] *Ibid* at paras 17, 23, 29.
[172] *Elsley Estate, supra* note 116. See also *Fraser Holdings, supra* note 59 at para 15; *ConCreate, supra* note 105 at para 14.
[173] *ConCreate, supra* note 105 at para 36.
[174] *Ibid* at para 37.

It should be noted that a professional who enters into a contract containing restrictive covenants, the terms of which contract arguably breach the professional's professional regulatory standards, will not automatically result in the restrictive covenant being declared unreasonable and thus unenforceable. For example, in *Smilecorp*[175] the Ontario Court of Appeal wrote:

> **39** I would also reject Dr. Pesin's argument that the parties' contractual arrangements offend the regulatory scheme for dentists established by the RHPA and the Act so as to render Dr. Pesin's non-solicitation covenant unenforceable "as a matter of law".[176] …
>
> **49** Finally, I agree with the application judge that any conflict between Dr. Pesin's obligations under the Advisories and the Regulation, on the one hand, and under the management agreement, on the other hand, is an issue for Dr. Pesin and his regulator. Under preamble L of the management agreement, Dr. Pesin accepted that Smilecorp made no representation or warranty that the terms of the management agreement conformed with the regulatory regime that governs Dr. Pesin's dentistry practice. Indeed, under that preamble, Dr. Pesin was obliged to satisfy himself as to such conformity. General principles of contract law, therefore, govern the issues in contention as between Smilecorp and Dr. Pesin.[177]

Even if the party asserting contractual restrictive covenants' enforceability successfully rebuts the presumption of illegality by showing: the applicant has proprietary interests entitled to protection, the terms of the covenants are unambiguous, the terms of the covenants are reasonable as between the parties, and the terms of the covenants are reasonable with reference to the public interest; the court still may not enforce them based on one or more of: the *General Billposting* Rule; lack of consideration for a new, renewed or amended contract containing the covenants; damages being absent or too remote; failure of the duty to mitigate damages; the "clean hands" doctrine; and/or the equitable or legal doctrines of estoppel.

ii. The *General Billposting* Rule

"[W]hen an employer terminates an employee without cause and without providing proper notice, this 'constitutes a wrongful dismissal, in breach of the employee's contract, and any payment by the employer in lieu of notice is an attempt at compensation for the breach'."[178] "When an employer dismisses an employee wrongfully the employer

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[175] *Smilecorp Inc. v. Pesin*, 2012 ONCA 853, [2012] O.J. No. 5734 (QL) ["*Smilecorp*"].
[176] *Ibid* at para 39.
[177] *Ibid* at para 49; emphasis added.
[178] *Globex 2*, *supra* note 65 at para 10, citing *Love v. Acuity Investment Management Inc*., 2011 ONCA 130, [2011] O.J. No. 771 at para 44 (QL), leave to appeal refused, [2011] S.C.C.A. No. 170 (QL) ["*Love*"].

is said to have repudiated the contract and can no longer enforce its benefits… This repudiation would apply both to the restrictive covenant and the non-solicitation elements [of the contract] unless an overarching common-law duty against non-solicitation applied."[179] The principle that wrongful termination renders restrictive covenants in employment contracts unenforceable has become known as the *General Billposting*[180] Rule, and in *Globex 2* the Alberta Court of Appeal reaffirmed that it remains the law in Alberta.[181] The Court noted:

> **46** Repudiation occurs by words or conduct evincing an intention not to be bound by the contract. If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished: … Prospective obligations may be relevant to assessing damages to which the innocent party may be entitled…
>
> **48** When an employee is dismissed without cause or notice, the employer cannot enforce a restrictive covenant otherwise binding the employee…
>
> **51** Alberta trial courts have relied on *General Billposting* for over 35 years…
>
> **54** I am not persuaded it is appropriate to deviate from this long-settled principle of employment law. Indeed, there are valid reasons for excusing a wrongfully dismissed employee from compliance with restrictive covenants. …

In *Globex 2* the "contract provided that the restrictive covenants would come into effect upon termination 'for whatever reason."[182] The Court of Appeal followed *Rock Refrigeration*[183] which held that "it did not matter whether the covenants included phrases such as 'whether lawfully or not', because 'they are merely writ in water, unenforceable under the *General Billposting* principle' [and] 'however expressed, the post-employment restrictions were unenforceable in the event of the employment terminating because of the employer's repudiation accepted by the employee'."[184] The Court concluded:

> **71** I am persuaded by the majority reasons in *Rock Refrigeration* that the contractual language here does not affect MacLean's rights. The same arguments apply to this point as those set out

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[179] *Travel Co., supra* note 114 at para 72, citing *Windship Aviation Ltd. v. deMeulles*, 2002 ABQB 669, [2002] A.J. No. 952 at para 34 (QL), varied on other grounds, 2005 ABCA 239, [2005] A.J. No. 930 (QL) ["*Windship*"]: "…if dismissed without cause, the Respondent would not be bound by the restrictive covenants contained within the agreement." See also *ADM, supra* note 24 at para 139.
[180] *General Billposting Co Ltd v. Atkinson*, [1909] AC 118, 25 TLR 178 ["*General Billposting*"]. See *ConCreate, supra* note 105 at para 47.
[181] *Globex 2, supra* note 65 at paras 43, 54.
[182] *Ibid* at para 67.
[183] *Rock Refrigeration Ltd v. Jones*, [1997] 1 All ER 1, [1997] ICR 938 (CA) ["*Rock Refrigeration*"].
[184] *Globex 2, supra* note 65 at paras 68-69. See also *Survival Systems Training Ltd. v. Survival Systems Ltd.*, 2012 NSSC 202, [2012] N.S.J. No. 275 at para 63 (QL) ["*Survival Systems*"].

> above concerning why restrictive covenants are not binding once there is wrongful dismissal. To hold otherwise would reward the employer who improperly terminates an employment contract.[185]

An employer's wrongful termination of the employment contract can be either by express termination or through repudiation by words or conduct evincing an intention not to be bound by the contract (*viz*. constructive dismissal). In *ADM* Germain J. wrote:

> **125** The employee must prove constructive dismissal… A court evaluates an alleged repudiation with the knowledge of the terminated employee … and from the perspective of a reasonable employee …, in a "somewhat more liberal" manner that is sensitive to the imbalance in authority between employer and employee, and taking into account the necessary flexibility of an employment relationship… The employer's intent is immaterial…[186]

Where the employer wrongfully terminates the employment agreement contrary to its express or implied terms, express contractual language, such as "Upon termination of the Agreement, the obligations of the parties hereunder will be at an end except for the section named 'non-disclosure' and 'restrictive covenant'",[187] will not preserve the enforceability of the express restrictive covenants in the face of the employer's repudiation of the contract through a fundamental breach,[188] where its repudiation was accepted by the employee. In *De Monte* Cole J. wrote:

> …the contract must be interpreted in accordance with the terms as defined and fundamental breach is not one of the ways in which the parties anticipated the contract might be terminated. Therefore I am satisfied that the restrictive covenant in order to survive the termination of the contract, can only survive if the contract is terminated in accordance with section 11.1. I therefore find that as a matter of construction, the restrictive covenant does not survive the fundamental breach of the contract.[189]

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[185] *Ibid* at para 71; emphasis added.
[186] *ADM, supra* note 24 at para 125; citations omitted.
[187] *De Monte Centre Management Inc. v. Spooner*, 2011 BCSC 1124, [2011] B.C.J. No. 1580 at para 82 (QL) ["*De Monte*"].
[188] "A fundamental breach occurs 'Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract'. … the usual remedy for breach of a 'primary' contractual obligation (the thing bargained for) is a concomitant 'secondary' obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to 'put an end to all primary obligations of both parties remaining unperformed' [by accepting the other party's repudiation of the contract]… this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided": *Hunter Engineering Co. v. Syncrude Canada Ltd*., [1989] 1 S.C.R. 426, [1989] S.C.J. No. 23 at para 137 (QL) ["*Hunter Engineering*"], cited in *De Monte, supra* note 187 at para 57.
[189] *De Monte, supra* note 187 at para 85.

However, a non-fundamental breach, which does not amount to repudiation, by the employer will not render restrictive covenants in the breached contract unenforceable.[190] Further, a "relatively minor breach of contract is irrelevant to [a fiduciary employee's] ongoing [post-termination] fiduciary obligations, and does not serve to relieve him of them."[191]

On 23 January 2013 the Supreme Court of Canada heard the appeal in *Payette*,[192] a case in which the Quebec Superior Court refused to enforce the non-competition clause because the former employer's termination of the contract was wrongful (and because the restrictive covenant was unreasonably broad); which decision was reversed by a majority of the Quebec Court of Appeal. The Supreme Court of Canada reserved its decision.

iii. Lack of Consideration

"[A] contract can only exist when parties have entered into an agreement for some form of consideration, with an offer by one party and an acceptance by the other party."[193] "A contract is an exchange of promises, acts, or acts and promises, as a result of which each party to the contract receives something from the other. For a contract to be binding, consideration must flow between the parties. Absent consideration, there is no contract."[194] Often employers will present a new, renewed or amended form of contract to an employee containing restrictive covenants. The employee may sign it, but if there is no consideration flowing to the employee enforcement of the amendments to the contract, including the restrictive covenants, may fail for lack of consideration. "A promise to do something that a party to a contract is already bound to do is not consideration";[195] therefore, an employer's mere promise (express or implied) of continued employment, without more, is not good consideration when the employer is

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[190] See eg *Dan Lawrie Insurance Brokers Ltd. v. White*, 2012 ONSC 1115, [2012] O.J. No. 676 at paras 33, 43 (QL) ["*Dan Lawrie*"].
[191] *Evans v. Sports Corp*., 2013 ABCA 14, [2013] A.J. No. 13 at para 37 (QL) ["*Evans CA*"].
[192] *Payette v. Guay Inc*., 2011 QCCA 2282, [2011] J.Q. no 18658 (QL), appeal to SCC heard and reserved 23 January 2013, [2012] S.C.C.A. No. 63 (QL) ["*Payette*"].
[193] *Speckling v. Communications, Energy and Paperworkers' Union of Canada, Local 76*, 2012 BCSC 1395, [2012] B.C.J. No. 1962 at para 13 (QL) ["*Speckling*"], citing *Coast Dryland Services Ltd. v. Canada (Ministry of Fisheries and Oceans)*, 2007 FC 16, [2007] F.C.J. No. 40 at para 27 (QL) ["*Coast Dryland*"].
[194] *Braiden v. La-Z-Boy Canada Ltd*., 2008 ONCA 464, [2008] O.J. No. 2314 at para 47 (QL) ["*Braiden*"]; emphasis added.
[195] *Ibid* at para 51.

already contractually bound to continue the employee's employment (for at least the reasonable notice period required to be given to lawfully terminate the employment contract).

Forbearance[196] is good consideration, however, so if an employer forms a clear intention to terminate the employment contract and then forebears carrying though on its intention, thus providing the employee continued employment, in consideration of the employee executing the new, renewed or amended form of contract containing restrictive covenants, then the employer's forbearance would be good consideration. Thus, in *Maguire* the Court wrote: "…the employee was given to understand, and did understand, that his refusal to execute the covenant would lead to an early termination of his employment, and that the employer tacitly promised that if the bond were signed, the employment would not soon be terminated. ... This continuance of employment constitutes legal consideration…"[197]

However, in *Atlam* the independent contractor had been providing services to the employer for several months before the employer demanded that it execute a contractual amendment containing the restrictive covenants sued on. Lee J. wrote: "Altam did not provide any consideration for such contractual amendment so arguably these agreements are void for want of consideration. … Altam can not and does not point to any evidence to support the suggestion of any forbearance in its relationship. …the promise to 'forebear' from termination is only consideration where there is some clear prior intention to terminate that the employer sets aside."[198]

In *Globex 2*, the Alberta Court of Appeal held: "Kelcher's and Oliverio's restrictive covenants are not enforceable because they received nothing for signing them beyond that to which they were already entitled."[199] "[C]ontinued employment alone does not provide consideration for a new covenant extracted from an employee during the term of employment because the employer is already required to continue the employment until there are grounds for dismissal or reasonable notice of termination is

[196] "Forbearance, **1.** The act of refraining from enforcing a right, obligation or debt. Strictly speaking, *forbearance* denotes an intentional negative act… **2.** The act of tolerating or abstaining": *Black's, supra* note 75 at 656.
[197] *Maguire, supra* note 47.
[198] *Altam, supra* note 9 at paras 210, 212, 213; emphasis added.
[199] *Globex 2, supra* note 65 at para 73.

given."[200] "Kelcher and Oliverio were not bound by the restrictive covenants due to the lack of consideration."[201]

Further, as the Ontario Court of Appeal has written: "it [is] clear 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 relationship as the consideration for the new terms."[202] However, "something" more than bare continued employment will be good consideration. Thus in *Consolidated Compressor*, consideration for the non-solicitation restrictive covenant was found where the new/amended contract of employment "eliminated the review [probationary] period and thus marked a more permanent period of employment. This was therefore not a situation where employment was merely continued without fresh consideration."[203]

iv. Absence or Remoteness of Damages (Causation)

In any cause of action where damages must be proved, including breach of (employment) contract, the wrongful conduct must cause the injury. For example, in relation to obtaining damages from the court for breach of an express, or the implied, contractual duty of fidelity, good faith and loyalty (to maintain the employer's confidential information in confidence, and to not misuse or disclose it) the plaintiff employer must not only prove on a balance of probabilities that the employee breached the (enforceable) contractual confidentiality term, but also that the breach caused the plaintiff's losses. For example, in *Zoic Studios*[204] the plaintiff's proved the defendants breached its contractual duty of fidelity, good faith and loyalty by taking and misusing its confidential information, but it failed to prove causation.[205] Russell J. wrote: "To be awarded damages for the defendants' breach of contract, the plaintiff must prove on a balance of probabilities that the defendants caused their loss… The defendants must be the 'effective or dominant' cause of the loss."[206] However, remedies in relation to breach of confidence

[200] *Ibid* at para 87.
[201] *Ibid* at para 91.
[202] *Hobbs v. TDI Canada Ltd.*, 192 O.A.C. 141, [2004] O.J. No. 4876 at para 32 (QL) ["*Hobbs*"], followed in *Braiden, supra* note 194 at para 57.
[203] *Consolidated Compressor, supra* note 94 at para 71.
[204] *Zoic Studios, supra* note 19.
[205] *Ibid* at paras 431-432.
[206] *Ibid* at para 365.

post-contractual termination may be grounded in law and equity under various causes of action including contract, property and tort.[207] Thus Russell J. noted that "equitable compensation is a recognition of the benefit received by the defendants through the use of the confidential information",[208] and awarded "equitable compensation" in light of the "finding that the personal defendant, Ms. Gannon, and Leviathan misused confidential information"[209] post-termination of the employment contract.

Glentel is another example where "[t]he trial judge found that the non-competition provisions were valid and enforceable [and] that the appellant had engaged in a number of competitive acts in breach of those provisions [but] there were no damages [caused by] the breach, and so the action [failed]."[210] In *Steinke* the applicant was denied injunctive relief "even though there [was] an admitted breach of the restrictive covenant" where there was "no evidence that damages or loss ha[d] been occasioned by the actions of the defendants."[211]

v. Failure to Mitigate Damages

"The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided… A plaintiff is not contractually obliged to mitigate, and in this sense the term 'duty to mitigate' is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced…"[212] This trite principle of law often arises in the context of an employer's wrongful termination of an employment contract. Thus in *Teamsters*[213] the plaintiff employee who would have been entitled to $132,912.34 damages equivalent to pay in lieu of 22 months notice of termination for wrongful dismissal (awarded at trial, reversed on appeal), got

[207] *Ibid* at paras 442-459. See generally *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, [1999] S.C.J. No. 6 (QL) ["*Cadbury*"].
[208] *Ibid* at para 458.
[209] *Ibid* at para 444.
[210] *Glentel Inc. v. Jefferson*, 2012 ONSC 3746, [2012] O.J. No. 3051 at paras 5, 12 (QL) ["*Glentel*"].
[211] *Steinke, supra* note 25 at paras 51, 59.
[212] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] S.C.J. No. 51 at para 72 (QL) ["*Southcott*"].
[213] *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] S.C.J. No. 20 (QL) ["*Teamsters*"]

nothing due to his failure to mitigate his damages by accepting offered reemployment with the same employer that had expressly terminated his employment.[214]

Less often at issue in litigation, but just as applicable, is an employer's duty to mitigate its damages when it is the wronged party in a breach of contract situation. In the context of this paper, if an employer is going to seek remedies from the court in relation to a former employee's alleged breach of contractual restrictive covenants, common law or equitable obligations, then the employer would be wise to diligently attempt to mitigate its damages and to maintain evidence of its attempts to do so.

By way of example, in *Evans* Graesser J. wrote of "…the efforts TSC made in the days immediately following Mr. Evans' departure to retain his clients. A few telephone calls were made, but no one was assigned the task of contacting all of Mr. Evans' clients; Mr. Evans' clients were not transferred to anyone else at TSC to pursue; and there was no plan or strategy put in place to retain the clients. Essentially, TSC's efforts to mitigate the impact of Mr. Evans' departure and decision to compete with TSC were minimal."[215]

> **312** There is also nothing in the Employment Agreement that would relieve TSC from having to mitigate its damages. The evidence shows that TSC did virtually nothing to mitigate its damages. It had left itself somewhat vulnerable to Mr. Evans because of the late determination that Mr. Evans' contract would not be renewed, and the fact that Mr. Evans had, with some of the players, been their sole point of contact with TSC. Nevertheless, TSC should have made a significant effort to retain their Eastern European clients, rather than rely on the non-solicitation provisions in the Employment Agreement and assume they could simply sit back and collect damages.[216]

Graesser J. held "that TSC failed to mitigate its damages"[217] and that "[i]t is therefore appropriate to reduce TSC's damages by 50% as a result of its failure to adequately mitigate its losses."[218] In *ADM* Germain J. wrote:

> **215** Mr. Beaver and Mr. McCullough both gave evidence that they made some calls and dropped in on some of their customers in an attempt to maintain business. There was little by

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[214] For a discussion of the *Teamsters* decision see: E. Wayne Benedict, "*Evans* Revisited: The Potential for Mischief Where Constructive Dismissal Meets the Duty to Mitigate Damages with the Dismissing Employer" (Paper delivered at the Canadian Bar Association Alberta Labour and Employment Law Section Seminar, Calgary, 21 October 2009), online: Canadian Bar Association <http://www.cba.org/Alberta/sections_south/PDF/Benedict_Evans%20Revisited%202009.pdf> ["*Evans* Revisited"].
[215] *Evans*, *supra* note 16 at para 59.
[216] *Ibid* at para 312.
[217] *Ibid* at para 314.
[218] *Ibid* at para 321.

> way of specificity. That is hardly mitigation. From the day Mr. Young walked out of the ADM premises Mr. McCullough, a senior, older, and one presumes wiser business man in the community should have been shoring up his customer base. He could have:
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> 1. immediately sent a letter to his customers outlining ADM's continued involvement in the community and commitment to his customers;
> 2. immediately made calls to his customers and documented these;
> 3. considered discounts and loyalty specials for repeat customers;
> 4. increased ADM's advertising;
> 5. notified all of the clients that Mr. Young was no longer with him and provide new contact telephone phone numbers to allow his clients to contact the appropriate persons; or
> 6. immediately inserted replacement managers in those other centers where managers may have left ADM employ after Mr. Young did.
>
> These are mere examples of mitigation…[219]

Germain J. went on to hold that due to "the combination of the 'planned shutdown' and failure to mitigate … any damage claim by ADM ought to be reduced by 60%."[220] In *Consolidated Compressor* Romaine J. held: "The mere fact that [the former employer] did not apply for an injunction … is not evidence of a failure to mitigate."[221]

vi. The "Clean Hands" Doctrine & Fiduciary Duties

Although in Canada "we now have only one system of courts dispensing both common law and equitable remedies…the distinction between law and equity is still important"[222] both generally, and particularly in this context, of enforcing fiduciary duties in the post-employment context. While a "general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect";[223] it is also a fundamental rule of equity that "He who comes to equity must come with clean hands."[224] A plaintiff seeking equitable relief from the court in relation to an alleged breach of an equitable fiduciary obligation may be deprived of a remedy even upon proof of its claim if it fails to come to court with "clean hands."[225] Note that the doctrine of "clean hands", sometimes referred to as the doctrine of "unclean hands",

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[219] *ADM*, *supra* note 24 at para 215.
[220] *Ibid* at para 222.
[221] *Consolidated Compressor*, *supra* note 94 at para 89.
[222] Gerald L. Gall, *The Canadian Legal System*, 5th ed (Toronto: Thompson Canada Ltd., 2004) at 61.
[223] *Canadian Aero*, *supra* note 52, citing *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438], [1953] S.C.J. No. 54 (QL) ["*Zwicker*"], citing *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 at pp 361, 389 ["*Regal*"]; emphasis added.
[224] *Pro Swing Inc. v. Elta Golf Inc*., 2006 SCC 52, [2006] S.C.J. No. 52 at para 22 (QL) ["*Pro Swing*"].
[225] See eg *Raso v. Dionigi*, 12 O.R. (3d) 580, [1993] O.J. No. 670 (QL) (CA) ["*Raso*"].

applies in an "application … for equitable relief but [not] regarding the enforceability of [contractual] restrictive covenant[s]."[226] While there is a "distinction between contract and equity, and … a fiduciary relationship is a 'creature of equity'[, b]alancing the rights of a beneficiary employer and a fiduciary employee means an evaluation of who is the wrongdoer."[227] Applying the "clean hands" doctrine, "[a]ny fiduciary obligation does not outlive the end of a fiduciary relationship [and] a wrongful dismissal terminates any potential employee fiduciary obligation."[228] In *ADM* Germain J. succinctly wrote:

> A fiduciary is a person who undertakes to put the interests of another before their own; can one imagine that an employee who takes that step goes further to agree that they will continue to prioritize the rights of the employer even when the employer treats the employee in an inequitable manner? That is absurd. The fiduciary employee can only be expected to serve the interests of the employer as long as that beneficiary maintains clean hands.[229]

In the employment context, "[t]he underlying notion behind a breach of the fiduciary obligation seems to be the misappropriation to the fiduciary of an opportunity that rightfully belongs to the employer."[230] "[F]iduciary employees breach their obligations when they take confidential property of their employers and use customer lists or trade secrets of the former employer in a competing enterprise."[231] "Fiduciaries are precluded from obtaining for themselves, without the approval of the company, any property or business advantage either belonging to the company or for which it has been negotiating."[232]

"[T]here is no prohibition against a departing fiduciary employee from **accepting** business from former clients. The prohibition is against solicitation."[233] "Arguably, any contact with former clients is solicitation, but [the British Columbia Court of Appeal] has made it clear that in certain relationships some such conduct is not only proper, but is desirable."[234] "Solicitation" normally denotes a positive action on the part of the solicitor; therefore, "[b]eing tracked down by a[n ex-employer's] customer and returning a telephone call initiated by the [ex-employer's] customer would not be 'soliciting'" the

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[226] *Mason, supra* note 120 at paras 32, 33.
[227] *ADM, supra* note 24 at para 144.
[228] *Ibid* at paras 142, 143, citing *Mace v. Dirk*, 2006 ABCA 106, [2006] A.J. No. 360 at para 28 (QL) ["*Mace*"] and *Windship, supra* note 179 at para 37; emphasis added.
[229] *ADM, supra* note 24 at para 146.
[230] *Flag Works, supra* note 15 at para 47.
[231] *Ibid* at para 89.
[232] *Altam, supra* note 9 at para 117.
[233] *Evans, supra* note 16 at para 211; emphasis in original.
[234] *Edward Jones v. Voldeng*, 2012 BCCA 295, [2012] B.C.J. No. 1353 at para 45 (QL) ["*Edward Jones*"].

ex-employer's customer.[235] "[M]erely advertising your new location and hoping for the best does not constitute solicitation…"[236] Nor does submitting a bid to a public tender issued by a potential or actual client of the former employer.[237] Any "departing employee who has a personal relationship with clients [may] notify his or her clients that he has left [but] there is certainly no general duty (or right) to advise clients that they have a choice as to whether to stay, follow, or find someone new."[238] "[A] departing employee may…write clients to advise of his departure or where he can be located"[239] but if "a letter to clients goes beyond notifying of his departure and providing a new address, it may constitute improper soliciting."[240] "[C]lients are free to choose the person or entity they wish to deal with";[241] however, while

> …a client has the right to know that his advisor or service provider has left his present employment so the client can make a decision as to his or her future business. …the client's right to choose does not mean that the former employer is without remedies in the event the client's choice to conduct business contravenes an otherwise valid restrictive covenant or non-solicitation covenant on the former employee's part. The client may have a choice, but the former employee may have to disgorge profits made in contravention of a restrictive covenant.[242]

If a fiduciary does not personally solicit her former employer's clients in breach of her continuing duty not to do so, but other individuals solicit the former employer's clients on behalf of (for the benefit of) the fiduciary, she will be in breach of her fiduciary obligation not to solicit, whether she had actual knowledge of the individuals' solicitations on her behalf, or was willfully blind to them.[243]

vii. Waiver & Promissory Estoppel

Promissory estoppel is a principle which if successfully advanced prevents a party from enforcing their strict legal rights—i.e. restrictive covenants. "The party relying on the doctrine [of promissory estoppel] must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal

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[235] *Senos, supra* note 133 at para 81.
[236] *Travel Co., supra* note 114 at para 66. See also *Evans, supra* note 16 at paras 261-262.
[237] *Veolia, supra* note 96 at para 44.
[238] *Evans, supra* note 16 at para 227.
[239] *Ibid* at para 279.
[240] *Ibid* at para 280.
[241] *Ibid* at para 285.
[242] *Ibid* at para 246; emphasis added.
[243] See eg *Ibid* at paras 295-297.

relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position."[244] If the former employee successfully advances the equitable doctrine of promissory estoppel, the court will refuse to enforce otherwise enforceable restrictive covenants.

Several courts have referred to the equitable doctrine of promissory estoppel in the context of actions related to enforcement of employment-contract-related restrictive covenants.[245] In *Dent Wizard* Brown J. considered and applied the equitable doctrine of promissory estoppel in the context of an application by a former employer for declarations that a former employee and franchisee breached restrictive covenants, for permanent injunctions and damages.[246] Brown J. held: "that by reason of their conduct the applicants are estopped from seeking to enforce the strict terms of the restrictive covenants in the Termination Agreement."[247] Waiver is a principle that

> …arises where one party to a contract, with full knowledge that his obligation under the contract has not become operative by reason of the failure of the other party to comply with a condition of the contract, intentionally relinquishes his right to treat the contract or obligation as at an end but rather treats the contract or obligation as subsisting. It involves knowledge and consent and the acts or conduct of the person alleged to have so elected, and thereby waived that right, must be viewed objectively and must be unequivocal.[248]

"The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained."[249] In *Community Credit*,[250] Mahoney J. considered, and rejected, an argument of waiver in the context of proceedings to enforce a non-competition restrictive covenant.

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[244] *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, [1991] S.C.J. No. 43 at para 13 (QL) ["*Maracle*"], cited in *Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc*., 2011 ONSC 1456, [2011] O.J. No. 994 at para 188 (QL) ["*Dent Wizard*"].
[245] See eg *A.R. Thomson, supra* note 11 at para 90; *Globex 2, supra* note 65 at para 135.
[246] *Dent Wizard, supra* note 244 at paras 187-198.
[247] *Ibid* at para 198.
[248] *Federal Business Development Bank v SteinBock Development Corp. Ltd*., 42 A.R. 231, [1983] A.J. No. 896 at para 19 (QL) (CA) ["*SteinBock*"], citing *Mitchell & Jewell Ltd. v Canadian Pacific Express Co*., 44 D.L.R. (3d) 603, [1974] A.J. No. 248 at para 30 (QL) (SCAD) ["*Jewell*"].
[249] *SteinBock, supra* note 248 at para 20.
[250] *Community Credit Union Ltd. v. Ast*, 2007 ABQB 46, [2007] A.J. No. 156 (QL) ["*Community Credit*"].

Before moving on to discuss interim/interlocutory enforcement, it should be noted that parties to a contract cannot "agree" to answer legal questions and thus displace the functions of the court—making findings of fact and law. Contractual recitals, acknowledgments, and representations to the effect that "the parties agree that the restrictive convents are reasonable in their scope" "do not bind the Court and do not foreclose the Court deciding that the covenants were unreasonable as between the parties and unreasonable having regard to the public interest."[251] Similarly, parties to a contract do not have the capacity to agree that "John Doe is a fiduciary", because, as noted above, whether or not a person is an equitable fiduciary is a question of law for the court to determine, not an issue that parties to a contract can decide. However, contractual recitals, acknowledgments, and representations may be considered as evidence of the parties' expectations at the time the contract was executed. In *ConCreate* Perell J. wrote in relation to "the recitals, acknowledgments, and representations [of the parties] contained in the various agreements" that

> …these expressions by the parties are [not] meaningless and should [not] be ignored. It is to be recalled that there are two public policy forces at work, the public policy against restrains on trade and the public policy favouring freedom of contract. The capable and capability-advised Mr. Martin agreed to the covenants, and his expression of their reasonableness is not to be ignored, although the Court will make its own determination of reasonableness.[252]

b. Interim, Interlocutory (Un)Enforceability of Restrictive Covenants and Fiduciary Obligations

An injunction is a "court order commanding [*mandamus*] or preventing [*prohibition*] an action."[253] "An injunction is an extraordinary remedy [that] involves the exercise of discretion [by] the chambers judge."[254] As the British Columbia Court of Appeal has written: "an interlocutory injunction is an extraordinary remedy, the refusal of which in no way condones the conduct of a defendant that ignores contractual obligations."[255] A plaintiff/applicant may fail to obtain an injunction restraining solicitation or competition,

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[251] *ConCreate*, *supra* note 105 at para 123.
[252] *Ibid* at para 123; emphasis added.
[253] *Black's*, *supra* note 75 at 788.
[254] *Rocky View (Municipal District No. 44) v. McKinnon*, 2009 ABCA 268, [2009] A.J. No. 884 at para 9 (QL) ["*Rocky View*"].
[255] *Edward Jones*, *supra* note 234 at para 55.

but still prevail at trial claiming breach of contractual restrictive covenants or other obligations.

Although the terms "interim" injunction and "interlocutory" injunction are often used interchangeably, they are not synonymous. An interim injunction is one which, if granted, would prohibit the impugned conduct (i.e. solicitation or competition in breach of restrictive covenants), until the hearing of the interlocutory injunction application. An interlocutory injunction is one which, if granted, would prohibit the impugned conduct (i.e. solicitation or competition in breach of restrictive covenants), for a fixed period of time (i.e. to the contractual expiry date of the restrictive covenant), or until the final determination of the matters in dispute at trial. For example, in *MacQuarrie's Interim*[256] the applicant was granted an "Interim Injunction" pending the hearing of the "Interlocutory Injunction motion" at a later date. Then in *MacQuarrie's Interlocutory*[257] "the motion for an interlocutory injunction [pending a final determination of the non-competition clause's enforceability at trial was] dismissed."[258] Similarly, *Altus Group* was an application for an interim injunction "to preserve the *status quo* pending the interlocutory injunction motion."[259] A plaintiff/applicant may fail or succeed to obtain an interim injunction, subsequently fail or succeed to obtain an interlocutory injunction, and subsequently fail or succeed to prevail at trial claiming breach of contractual restrictive covenants or other obligations.

The leading decision in Canada in relation to the legal test to be met by an applicant for an injunction (interim or interlocutory) is *RJR-MacDonald*,[260] where the Supreme Court of Canada reiterated the

> …three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits [balance of convenience].[261]

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[256] *MacQuarrie's Drugs Ltd. v. Salsman*, 2012 NSSC 234, [2012] N.S.J. No. 333 (QL) ["*MacQuarrie's Interim*"].
[257] *MacQuarrie's Drugs Ltd. v. Salsman*, 2012 NSSC 139, [2012] N.S.J. No. 185 (QL) ["*MacQuarrie's Interlocutory*"].
[258] *Ibid* at para 28.
[259] *Altus Group Ltd. v. Yeoman*, 2012 ONSC 4406, [2012] O.J. No. 3663 at para 2 (QL) ["*Altus Group*"].
[260] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL) ["*RJR-MacDonald*"]; emphasis added.
[261] *Ibid* at para 43.

Generally, in relation to the first stage of the test—whether the applicant can show a "serious question to be tried"—"[t]he threshold is a low one. The judge …must make a preliminary assessment of the merits of the case [and merely be] satisfied that the application is neither vexatious nor frivolous."[262] An exception "to the general rule that a judge should not engage in an extensive review of the merits…arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial."[263] Where the exception applies, "an applicant for interlocutory relief [is] required to demonstrate a 'strong *prima facie* case' on the merits in order to satisfy the first test."[264]

In Alberta, "[t]o obtain an interlocutory injunction [to enforce restrictive covenants in employment contracts], the Plaintiff must meet the standard of a strong *prima facie* case"[265] the first stage of the three-stage *RJR-MacDonald* test. In addition to Alberta, the first stage of the three-stage *RJR-MacDonald* test in such circumstances requires that the "strong *prima facie* case" standard be met in other Canadian jurisdictions, including: British Columbia,[266] Saskatchewan,[267] Nova Scotia,[268] and Ontario.[269]

Whether an applicant for injunctive relief can satisfy the first stage of the three-stage *RJR-MacDonald* test will depend on the strength of her case on the merits in relation to the enforceability of the restrictive covenants, common law or equitable fiduciary obligations as discussed in Part IV.a above—she must be able to establish "a

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[262] *Ibid* at paras 49, 50.
[263] *Ibid* at para 51; emphasis added.
[264] *Ibid* at para 44.
[265] *Altam, supra* note 9 at para 195. See also *Globex1, supra* note 116 at para 10.
[266] See eg *Edward Jones, supra* note 234 at paras 11, 55; *Phoenix, supra* note 134 at para 24; *Mendham, supra* note 3 at para 79; *Fraser Holdings, supra* note 59 at para 14. But see *Redcliffe, supra* note 4 at para 13: "Assuming, without deciding, that the plaintiff need demonstrate a strong *prima facie* case…"
[267] See eg *Sharp Mechanical, supra* note 7 at para 19 (QL) ["*Sharp*"].
[268] See eg *Survival Systems, supra* note 184 at para 33 (QL); *MacQuarrie's Interlocutory, supra* note 257 at para 18.
[269] See eg *DCR Strategies Inc. v. Vector Card Services*, LLC, 2011 ONSC 4241, [2011] O.J. No. 3277 at para 28 (QL) ["*DCR Strategies*"]; *Paradigm Shift, supra* note 48 at para 24; *GDL Solutions, supra* note 136 at para 22, 25-37; *Measuremax Inc. v. Nelsons*, 2012 ONSC 4619, [2012] O.J. No. 3781 at para 19 (QL) ["*Measuremax*"]; *Ted Thomson, supra* note154 at paras 28-29, 33-34. But see *Altus Group, supra* note 259 at paras 25-27.

strong *prima facie* case" that the restrictive covenants or other obligations are enforceable. "There can only be a serious question to be tried if the [restrictive] covenants are reasonable."[270] Note that an applicant may fail to establish a strong *prima facie* case in relation to the enforceability of contractual restrictive covenants restraining a party, but still establish a strong *prima facie* case in relation to alleged breach of fiduciary duties by the same party, in which case an injunction will issue to restrain the latter but not the former.[271] It should also be noted that, just as "[t]he absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business",[272] an applicant for injunctive relief in relation to alleged breach of restrictive covenants in an employment contract context will have to show a strong *prima facie* case; however, an applicant for injunctive relief in relation to alleged breach of restrictive covenants in a contract for the sale of a business context will merely have to meet the lower standard that the application is neither frivolous nor vexatious. In *Stier*,[273] for example, Millar J. wrote:

> **21** The Defendants counter that the higher standard of having the Plaintiff prove a strong prima facie case applies in this instance because the issue involves a restrictive covenant that may restrict a defendant employee's employment in a particular field... However, the Plaintiff's claims concerning breach of employment contract and fiduciary duty, which would have triggered the higher duty, were abandoned at the outset of the interim injunction hearing. I find that the Plaintiff must show that there is a serious issue to be tried, by establishing that the application is neither frivolous nor vexatious.[274]

On the "irreparable harm" element of the three-stage *RJR-MacDonald* test the British Columbia Court of Appeal wrote in *Edward Jones*:

> **36** … the general rule [is] that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. …in this case the potential damages arising out of solicitation, being calculable, do not constitute irreparable harm.
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> **37** Non-competition covenants restrict a departing employee from seeking business generally. It usually will not be possible to tell whether business is lost to the employee's new employer as a result of prohibited competition as opposed to legitimate competition. Such damages, not

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[270] *Phoenix, supra* note 134 at para 25.
[271] See eg *Sharp Mechanical, supra* note 7; See also *Fraser Holdings, supra* note 59 at para 29.
[272] *Shafron, supra* note 108 at para 23.
[273] *Stier Financial Group Inc. v. Stier,* 2012 ABQB 713, [2012] A.J. No. 1231 (QL) ["*Stier*"].
[274] *Ibid* at para 21.

> being calculable, generally do constitute irreparable harm. To similar effect are actions which may damage the reputation of a former employer, or the general use of confidential information.
>
> **38** It is important to recognize that, while these propositions may be true generally, the circumstances of each case must be considered. That is, while most improper solicitations may result in calculable damages, it must not be assumed that all will…[275]

"The evidence of irreparable harm must be clear and not speculative",[276] and there is no "presumption of irreparable harm where the employee breaches a restrictive covenant."[277] "Where the survival of the business is not threatened, and damages are capable of being quantified, there is no irreparable harm."[278] "[T]he existence of a restrictive covenant is more significant to the first prong of the analysis than to irreparable harm. It also comes into play when considering the balance of convenience."[279]

The "balance of convenience" element of the three-stage *RJR-MacDonald* test "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[280] Delay in applying for an injunction can prejudice an applicant's application on the "balance of convenience" element. For example, in *Mendham* Greyell J. wrote: "I would find Hub has not established on the balance of convenience the court should enforce the clause… I reach this conclusion because Hub was aware many months ago, on the date of Mendham's resignation, that he considered the clause unenforceable, and he has competing with them since that time. Yet Hub has waited until …some nine months later, to bring its application."[281] Further, as the remedy of "[a]n interlocutory injunction would only rarely be continued past the contractual expiry date"[282] of the restrictive covenant, delay in applying for injunctive relief can more generally prejudice the applicant. For example, in *Fuller* while the former employer was "arguably justified in bringing the injunction application, …by the time it was set down for argument its

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[275] *Edward Jones, supra* note 234 at paras 36-38.
[276] *Paradigm Shift, supra* note 48 at para 54.
[277] *Ibid* at para 53, 54.
[278] *Ibid* at para 55.
[279] *Edward Jones, supra* note 234 at para 42.
[280] *RJR-MacDonald, supra* note 260 at para 62.
[281] *Mendham, supra* note 3 at para 79.
[282] *Fuller Western, supra* note 104 at para 7, citing *Dreco, supra* note 5.

appropriateness had been undermined by the passage of time."[283] The Court in *Elsley Estate* wrote:

> …if a plaintiff is entitled to an injunction to restrain breach of a restrictive covenant, he is entitled to prevent the entire breach, not just part of it. Thus, for any part not restrained, he may be entitled to unliquidated damages in equity. There would be no double recovery provided the damages were not referable to any period during which breach was restrained by the injunction. …A plaintiff, of course, cannot delay seeking an injunction in order to inflate his damages. He would not be entitled to damages past the time when he should have sought the injunction.[284]

According to the equitable "clean hands" doctrine, discussed above, "[w]hen a party seeks extraordinary, equitable relief from the Court it must come to the Court with clean hands. Where it does not, the Court may for that reason alone refuse the relief sought. In particular, where the Plaintiff seeking to enforce a contract by injunction comes to the Court in breach of that contract, it will 'more often than not disentitle them to the relief sought'."[285] In *Humphries* the applicant "sought what must be an injunction to get back the binders *in specie*."[286] The Alberta Court of Appeal wrote: "This is an equitable remedy, and does not go as of right even on proof of breach of contract by the person to be enjoined. He who seeks equity (in future) must do equity, and he who comes to equity must have clean hands (from the past). Those are well-known maxims of equity… Breach of a covenant by the party seeking the injunction violates the second of these maxims, and even more does a misrepresentation."[287]

V. Third-Party Tortious Liability

a. Direct Third-Party Liability

Often a former employer of a former employee allegedly in breach of contractual restrictive covenants will bring an action against a third-party pleading the tort of interference in contractual relations. The third party may be a new employer of the allegedly restrained former employee, a new corporate business incorporated by the allegedly restrained former employee, or the allegedly restrained former employee who

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[283] *Fuller Western, supra* note 104 at para 11.
[284] *Elsley Estate, supra* note 116.
[285] *Altam, supra* note 9 at para 190, citing *CIBC Development Corp. v. 724133 Alberta Ltd.*, 1999 ABQB 749, [1999] A.J. No. 1656 at para 22 (QL) ["*CIBC Development*"]; emphasis added.
[286] *Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, [2011] A.J. No. 1410 at para 69 (QL) ["*Humphries*"].
[287] *Ibid.*

allegedly solicited other former employees to terminate their employment contracts with the former employer.[288] In *ADM* Germain J. wrote:

> …Interference with contractual relationships is a tort. … to prove injury a plaintiff must demonstrate seven elements:
>
> i) the existence of a contract;
> ii) knowledge or awareness by the defendant of the contract;
> iii) a breach of the contract by a contracting party;
> iv) the defendant induced the breach;
> v) the defendant, by his conduct, intended to cause the breach;
> vi) the defendant acted without justification; and
> vii) the plaintiff suffered damages.[289]

Thus in *Cruise Connections* Pearlman J. held:

> By assisting with the importation of the plaintiff's confidential client information into Cruise Pak and successfully promoting the cruise booking specialists' move to Vision 2000 pursuant to a plan which involved the misappropriation and misuse of the plaintiff's client information Ms. Iverson, initially in her personal capacity, and later as a manager for Vision 2000 wrongfully interfered with the plaintiff's contractual relationships with its sales agents, and with contractual relations between the plaintiff and its clients.[290]

The subsequent "employer" of the "independent contractors" in that case, Vision 2000, was also held directly laible in the tort of wrongful interference with contractual relations: "the corporate defendants are liable for the tort of wrongful interference with the plaintiff's contractual relations with both the defendant cruise booking specialists and Cruise Connections' clients."[291] In *Flag Works* Martin J. wrote: "Merely hiring an individual who already has employment does not meet the strict requirements of this nominate tort and there was no evidence of enticement."[292]

Where two or more "persons", which may include a subsequent employer—corporate or individual—"conspire" together, they may be held jointly and severally liable in the tort of civil conspiracy. The tort of civil conspiracy has been pleaded in cases where the plaintiff's former employee(s) have allegedly conspired to do a lawful act (i.e. compete or solicit) by unlawful means (i.e. in breach of contractual restrictive covenants, in breach of equitable fiduciary obligations or common law duties, or

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[288] See eg *ADM*, *supra* note 24 at paras 166-179.
[289] *Ibid* at para 161, citing *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307, [2000] A.J. No. 1350 at para. 13 (QL) ["*Pocklington*"], and *Ahmad v. Athabasca Tribal Council Ltd*., 2010 ABCA 341, [2010] A.J. No. 1309 at para. 10 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 20 (QL) ["*Ahmad*"].
[290] *Cruise Connections*, *supra* note 10 at para 266.
[291] *Ibid* at para 277.
[292] *Flag Works*, *supra* note 15 at para 119.

involving tortious conduct), with or without a subsequent employer being party to the concerted-action agreement. The following elements must be proved to make out the tort of civil conspiracy:

> 1. an agreement between two or more persons;
>
> 2. concerted action taken pursuant to the agreement;
>
> 3.(i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> 3.(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.[293]

Thus in *Cruise Connections* Pearlman J. held:

> **262** The defendants Cancellieri, Stover, Markus, Szeto and Iverson carried out a common design by unlawful means which included breaches of their duties of good faith, the confidentiality provisions of their respective contracts, their common law duties of confidence, and in the case of the defendant sales agents, conversion.
>
> **263** The conduct … was directed toward the plaintiff because it involved the conversion of confidential information belonging to Cruise Connections…
>
> **264** … there is no question that the plaintiff suffered actual damage, including the loss of commissions, as a result of these defendants' unlawful actions.
>
> **265** I find that the plaintiff has established that the defendants Cancellieri, Stover, Markus, Szeto and Iverson have committed the tort of civil conspiracy, for which they are jointly and severally liable.[294]

However, in *Gentech* the Ontario Court of Appeal set aside a trial finding of liability "for the tort of unlawful conduct conspiracy" because "for the cause of action for unlawful conduct conspiracy… each conspirator must be engaged either in unlawful conduct or conduct intended to harm the complaining party" and "Diamantouros owned his book of business and was entitled to leave without notice. The trial judge made no finding of unlawful conduct by Diamantouros or that his purpose in leaving was to harm Gentech."[295]

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[293] *Mraiche Investment Corp.v. McLennan Ross LLP*, 2012 ABCA 95, [2012] A.J. No. 285 at para 40 (QL)["*Mraiche*"]. See also *Cruise Connections, supra* note 10 at para 251.
[294] *Cruise Connections, supra* note 10 at paras 262-265.
[295] *Gentech, supra* note 74 at paras 16-17.

b. Indirect Third-Party Vicarious Liability

Third-parties can be held vicariously liable for others' breach of contract or other obligations. Thus in *Graham Funeral* the court held that the two former employees "were in clear breach of their duty not to misuse confidential information obtained from their former employer. When a new employer benefits from the misuse of confidential information, that new employer is also liable for the former employer's losses, even if it had no direct knowledge of the employees' breach of duty."[296] The court held the two former employees and their new employer "jointly and severally liable for misuse of confidential information to obtain the transfer of pre-need contracts", and it ordered compensation to the former employer "for the loss of future income those contracts represented, less the portion of that income that would have gone to [the new employer] even in the absence of wrongful conduct."[297] The court ordered the two former employees and their new employer "jointly and severally" liable for "loss of future income" damages in the amount of $280,285; in addition to $10,000 punitive damages against one of the former employees.[298]

"[W]here a fiduciary relationship exists between two parties, equity binds both the conscience of the fiduciary and that of the third-party who knowingly assists or participates in the breach of the first fiduciary's duty."[299] Thus in *Consolidated Compressor*, Romaine J. held: "Mr. Van der Meer is the controlling mind of Northwest, and Northwest is the entity that benefitted from his breaches. I find that Northwest is equally liable with Mr. Van der Meer for his breaches of fiduciary duty.[300] "[F]iduciary obligations may also attach to non-fiduciary employees who depart with fiduciary employees to establish a business in competition with their former employer."[301] For example, in *GDL Solutions* Brown J. wrote: "I find that there is a strong *prima facie* case that Walker is a fiduciary of GDL and the other named defendants [non-fiduciary former

[296] *Graham Funeral, supra* note 58 at para 39; emphasis added.
[297] *Ibid* at para 39.
[298] *Ibid* at para 87.
[299] *Flag Works, supra* note 15 at para 54, citing *Tree Savers International Ltd. v. Savoy*, [1991] A.J. No. 686 (QL) (ABQB), varied, [1992] A.J. No. 61 (QL) (ABCA) ["*Tree Savers*"]. See also *World Wide, supra* note 102 at para 38; *GDL Solutions, supra* note 136 at para 86.
[300] *Consolidated Compressor, supra* note 94 at para 68.
[301] *Survival Systems, supra* note 184 at para 49.

employees] are impressed with fiduciary duties by joining Walker at Hudson in a competing business."[302]

"Generally, the relationship of employer and independent contractor will not give rise to a claim for vicarious liability."[303] Thus in *Cruise Connections* it was held: "the defendants Cancellieri, Stover, Markus and Szeto performed their services for Vision 2000 as independent contractors in business on their own account [and b]ecause the defendant cruise booking specialists are independent contractors, the corporate defendants are not vicariously liable for their acts;"[304] however, "Ms. Iverson…was employed by Vision 2000 [and] the corporate defendants are vicariously liable for Ms. Iverson's tortious interference with the plaintiff's contractual relations."[305] Ms. Estrada was also subsequently hired by Vision 2000 as an employee, and the court held: "the corporate defendants are also vicariously liable for Ms. Estrada's use in the course of her employment with Vision 2000 of client information from WinCruise to assist the defendants in marketing cruise related products to the plaintiff's former customers."[306] Damages were awarded "against the defendants, Cancellieri, Stover, Markus, Szeto, Iverson, Meridian and Vision 2000 in the amount of $590,000" jointly and severally.[307]

VI. Conclusion

Employees owe their employers certain obligations or duties both during, and following termination of, the employment contract. Such duties may include: express or implied contractual duties of fidelity, good faith and loyalty, confidentiality, non-competition, non-solicitation, and/or non-dealing; common law obligations of confidentiality; equitable fiduciary obligations.

In order to enforce these obligations in court, a former employer will face various hurdles, including: rebutting the presumption of illegality of contractual restrictive covenants by showing the terms are not ambiguous, are necessary to protect proprietary interests, are reasonable as between the parties and in relation to the public interest;

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[302] *GDL Solutions*, *supra* note 136 at para 86.
[303] *Cruise Connections*, *supra* note 10 at para 278.
[304] *Ibid* at para 283.
[305] *Ibid* at paras 284, 287.
[306] *Ibid* at para 290.
[307] *Ibid* at para 400.

avoiding the *General Billposting* Rule; establishing good and valuable consideration supporting the contract in which the restrictive covenants are found; establishing that the breach *caused* the losses complained of to establish damages; mitigation of damages; coming to court with "clean hands"; and meeting any argument that the former employer waived its right to enforce the restrictive covenants, or is estopped from enforcing them.

In order for a former employer to obtain interim or interlocutory relief from the court by way of injunction, the applicant will need to show a strong *prima facie* case that it will be able to meet all of the aforementioned hurdles. It will also have to show "irreparable harm" and that the balance of convenience weighs in its favor.

Third parties to the obligations owed between employers and their employees—present or former—can incur liability (directly or vicariously) arising from their breach.