NON-COMPETITION CLAUSES IN CANADIAN EMPLOYMENT LAW AND THE DOCTRINE OF INEQUALITY OF BARGAINING POWER

*David J. Doorey**

Abstract

In 2021, the Ontario government legislatively prohibited most non-competition clauses, the first Canadian government to take this step. The move was unexpected because the political party in power (the Progressive Conservative Party, or PCP) has not traditionally been a strong supporter of workers' rights. However, the PCP wanted to demonstrate a new commitment to the working class, and it knew that banning non-competition clauses would attract little backlash from its business constituency since the common law renders almost all non-competes illegal in Canada anyway. The common law approach to the enforceability of non-competition clauses is similar in Canada and the United States. Courts in both countries are suspicious of these clauses because they restrict the right of workers to accept jobs within their field. However, Canadian courts are far less likely to enforce non-competition clauses than their American counterparts.

This divergence can partly be explained by fundamental differences in employment law architecture, including the fact that a doctrine of inequality of bargaining power guides Canadian courts. This doctrine, developed primarily by the Supreme Court of Canada over the past half-century, is comprised of both a descriptive and a normative element. Descriptively, the doctrine recognizes (1) that work has a psychological component and is integral to human dignity, personal identity, and self-worth in Canadian society; and (2) that the employment relationship is frequently characterized by inequality of bargaining power. Normatively, the doctrine of inequality of bargaining power posits that, due to the importance of work and the reality of inequality of bargaining power, the common law *should* develop in a manner that considers the vulnerability of employees.

Relying on the doctrine of inequality of bargaining power, Canadian courts have refused to sever or rectify unreasonable and over-broad non-competition clauses. This refusal marks a substantial divergence from courts in the United States, where courts routinely intervene on behalf of employers to read down unreasonable non-competition clauses to make them enforceable. This Article examines the treatment of non-competition clauses in employment contracts through a comparative lens, explaining how Canadian courts (and now legislators) have demonstrated much less tolerance for contractual restrictions on the right to work.

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INTRODUCTION

In the fall of 2021, the Ontario government surprised the Canadian employment law community by becoming the first jurisdiction in the country to legislatively prohibit non-competition clauses in employment contracts.[1] The law came as a surprise because there was no public campaign to ban non-competition clauses, and the governing Progressive Conservative Party (PCP) in Ontario is hardly a staunch advocate for workers' rights. For example, among the PCP's first actions when they assumed power in 2018 was to introduce the Making Ontario Open for Business Act,[2] which repealed a set of worker-friendly laws enacted by the previous liberal government.[3] On the other hand, the conservative government's decision to prohibit non-competition clauses made sense in the political climate of 2021. An election was looming in the summer of 2022, and the PCP had rebranded itself as the party that is "Working for

* Ph.D., Professor of Labor and Employment Law, York University, Toronto; Senior Research Associate, Harvard Law School Centre for Labor and a Just Economy.

1. *See* Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.). Primary jurisdiction over employment law in Canada resides with the provinces. Approximately eight percent of Canadians are governed by federal employment legislation. *See* DAVID J. DOOREY, THE LAW OF WORK 279–80 (3d ed. 2024).

2. Making Ontario Open for Business Act, 2018, S.O. 2018, c 14 (Can. Ont).

3. Sara Mojtehedzadeh, *Amid Protests, Tories Pass Bill That Scales Back Workers' Rights and Freezes Minimum Wage*, TORONTO STAR (Nov. 21, 2018), https://www.thestar.com/politics/provincial/amid-protests-tories-pass-bill-that-scales-back-workers-rights-and-freezes-minimum-wage/article_3cb4e4b2-27e9-579f-9317-a16808f4daab.html [https://perma.cc/T62N-FKR2].

Workers."[4] For example, the government's Minister of Labor proclaimed that "the future of conservatism is a working-class future."[5] The ban on non-competition clauses fits with the government's newly adopted political strategy of introducing modest work law reforms that benefited workers but would not unduly alienate the PCP's core business constituency. Since most non-competition clauses in Canada are unenforceable anyway, the PCP no doubt felt confident that the law would receive little pushback from their allies in the business community while scoring points on the worker protection side of the political ledger

Canadian courts have long treated non-competition clauses in employment contracts with great suspicion. Non-competition clauses are presumed to be unenforceable restraints on trade, contrary to public policy. A narrow exception is carved out for "reasonable" non-competition clauses, but the reasonableness test has, in practice, resulted in courts striking down most challenged clauses. Although, on the surface, the test for enforceability of non-competition clauses in Canada appears to mirror the United States's "rule of reason" doctrine quite closely, in practice, the two legal models diverge in important ways.[6] Courts in the United States are much more inclined to enforce non-competition clauses than their Canadian counterparts.[7] This difference can partly be explained by fundamental differences in the countries' basic employment law infrastructure.

For example, Canada is not an "at-will" jurisdiction, and the default requirement for notice of termination in Canada has significant ramifications for the treatment of non-competition clauses.[8] More fundamentally, Canadian courts recognize that the employment relationship is usually characterized by unequal bargaining power and that work is fundamental to human self-identification and personal

4. *See* Patty Coates, *If Doug Ford Is Really 'Working For Workers', His Government Needs to Offer More than Slogans*, TORONTO STAR (July 18, 2022), https://www.thestar.com/opinion/contributors/2022/07/18/if-doug-ford-is-really-working-for-workers-his-government-needs-to-offer-more-than-slogans.html [https://perma.cc/HF8H-KGA4].

5. Monte McNaughton, *Monte McNaughton: The Future of Conservatism Will Be with the Working Class*, THE HUB (Apr. 28, 2023), https://thehub.ca/2023-04-28/monte-mcnaughton-the-future-of-conservatism-will-be-with-the-working-class/ [https://perma.cc/7T2U-89KL].

6. David Doorey & Rachel Arnow-Richman, *The Law and Politics of Noncompete Reform: A Cross-Border Perspective* ONLABOR BLOG (Feb. 24, 2022), https://onlabor.org/lessons-from-canada-on-the-prohibition-of-noncompete-agreements/ [https://perma.cc/X9HE-ELXH]. For a detailed summary of the "rule of reason" doctrine, *see* Rachel Arnow-Richman, *The New Enforcement: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,* 50 SETON HALL L.R. 1223, 1228–29 (2020).

7. *Employment Law Differences Between Canada and the U.S.*, TORYS, https://www.torys.com/startup-legal-playbook/employment-law-differences-between-canada-and-the-us [https://perma.cc/77ER-K7V9] (last visited Feb. 7, 2024).

8. *See* DOOREY, *supra* note 1, at 155 (explaining the origins of divergent approaches to "at-will" employment in the U.S. and Canadian "reasonable notice").

growth.[9] These elements have influenced the development of employment law to a much greater degree in Canada than in the United States. This "doctrine of inequality of bargaining power" permeates the evolution of employment contract law in Canada, including the courts' approach to non-competition clauses. The influence of the doctrine can be witnessed in the refusal of Canadian courts to sever or rectify unreasonable restrictive covenant clauses. Whereas courts in some U.S. jurisdictions will rescue employers that draft unreasonably broad non-competition clauses by redrafting them to fit the judges' opinion of what seems fair, Canadian courts hold employers to a higher standard of drafting that does not overreach. In Canada, an unreasonable non-competition clause is void, full stop.[10]

This Article examines the common law and legislative approach to non-competition clauses in Canadian employment law through a comparative lens. Part I describes the history and development of the critical elements of the Canadian approach to non-competition clauses. Part II explains fundamental differences in the approach to non-competition clauses in Canadian and U.S. common law, including the impact of Canada's default requirement for the parties to an employment contract to provide "reasonable notice" of termination and the refusal of Canadian courts to sever or redraft unreasonable restrictive covenants. Part III then describes the development and influence of the doctrine of inequality of bargaining power in Canadian employment law and explores how that doctrine helps explain the divergent approaches to non-competition clauses in Canada and the United States. Finally, Part IV considers Ontario's new statutory prohibition on non-competition clauses and considers what impact it might have moving forward.

I. THE LAW OF NON-COMPETITION CLAUSES IN CANADIAN EMPLOYMENT CONTRACTS

The contemporary approach of Canadian courts to non-competition clauses in employment contracts can be traced to early British common law decisions concerning contracts in restraint of trade and public policy illegality.[11] In its 1894 decision in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition*,[12] the House of Lords discussed the tension that exists between the concept of freedom of contract and public policy concerns against restraint of trade:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with

9. *See* Machtinger v. HOJ Industries, (1992) 1 S.C.R. 986, 1003 (Can.); *see infra* Part III.
10. *See* Shafron v. KRG Insurance, [2009] 1 S.C.R. 157 (Can.).
11. *See* Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] AC 535 (HL).
12. *Id.*

> individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.[13]

The general rule identified in *Nordenfelt* was long ago adopted in Canada, leaving as a central question, to be determined on a case-by-case basis, what meaning to attribute to Lord Macnaghten's proviso, "if there is nothing more."[14]

In a 1935 decision called *Maguire v. Northland Drug Co.*,[15] the Supreme Court of Canada (SCC) summarized the rule as a rebuttable presumption that non-competition clauses are unenforceable as unlawful restraints on trade and are therefore contrary to public policy:

> The decision in this case must turn on the larger question of whether or not this particular covenant is one which ought to be enforced. Public policy, as interpreted by the courts, requires on the one hand that employers be left free to protect from violation their proprietary rights in business, and on the other hand, that every man be left free to use to his advantage his skill and knowledge in trade. In the weighing and balancing of these opposing rights, the whole problem in cases of covenants in restraint of trade is to be found. Less latitude is allowed in the enforcement of restrictions as between employer and employee than as between vendor and purchaser of good will. *Prima facie* all covenants in restraint of trade are illegal and therefore unenforceable. 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.[16]

The SCC noted that an employer seeking to enforce a non-competition clause against an ex-employee must demonstrate that the covenant aims to protect a legitimate proprietary interest instead of simply limiting

13. *Id.* at 565; *see also* Shafron v. KRG Insurance, [2009] 1 S.C.R. 157 (Can.).
14. *See Nordenfelt*, [1894] AC at 565.
15. [1935] 1 S.C.R. 412 (Can.).
16. *Id.* at 416.

competition by the former employee. "Competition as such" will not be restrained.[17]

In *Maguire*, the SCC directed that a restrictive covenant must go no further than is reasonably adequate to protect the identified proprietary interest: "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."[18] Finally, the SCC noted that even where there is a proprietary interest in protecting customer lists and contacts that justifies a non-solicitation restraint, customers are free to change their patronage, and the mere fact that customers move to follow a former employee who has moved to a competitor or set up a competing business is not proof of a breach absent evidence of actual solicitation.[19]

Some forty years later, the SCC again considered the common law approach to non-competition clauses in employment contracts in *Elsley v. J.G. Collins Ins. Agencies*.[20] The SCC once more distinguished the situation of a non-competition clause included in a sale of business contract from one found in a standard employment contract. According to the court, in the former situation, there are valid reasons for the purchaser to insist that the vendor not immediately set up a competing business once the sale is complete, and inequality of bargaining power is presumed to be less of a concern since the parties are more likely to be sophisticated or represented by legal counsel.[21] However, in the case of an employment contract, the SCC noted:

> 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. . . . Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employee.[22]

Elsley is a relatively rare example of a Canadian case in which the court upheld a non-competition clause against a former employee.[23] The employee, Elsley, was a senior insurance sales professional who had built a close personal relationship with hundreds of former employer

17. *Id.* at 416; *see also* American Building Maintenance Company Ltd. v. Shandley, (1966) 58 D.L.R. (2d) 525 (Can. BC CA).

18. *Maguire*, [1935] 1 S.C.R. at 417.

19. *Id*. at 418.

20. [1978] 2 S.C.R. 916 (Can.).

21. *See id*. at 924.

22. *Id.*

23. *Id.* at 929.

customers over many years.[24] When he left and immediately established a competing insurance business, almost half of the employers' customers followed Elsley to his new business even though there was no evidence that he had actively solicited the customers. The SCC ruled that a non-competition clause prohibiting Elsley from competing against the former employer for a period of five years within a geographic area in and around the City of Niagara Falls, home to the former employer's business, was reasonable.[25] The SCC concluded:

> 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.[26]

The test for the enforceability of non-competition clauses in the Canadian common law that emerged from these early SCC decisions can be summarized as follows:

1. A non-competition clause in an employment contract is *prima facie* void and unenforceable as an unreasonable restraint on trade.[27] A narrow exception has been carved out for "reasonable" non-competition clauses.[28]

2. A "reasonable" non-competition clause is one that satisfies the following criteria:

A. The contract language is unambiguous. An ambiguous restrictive covenant clause is unreasonable and, therefore, void.[29]

B. The employer has a "real proprietary interest" entitled to protection.[30]

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24. *Id.* at 921.
25. *Id.* at 929.
26. *Elsley*, [1978] 2 S.C.R. at 926.
27. *Id.* at 924.
28. *Id.*
29. Shafron v. KRG Insurance Brokers (Western) Inc., [2009] 1 S.C.R. 157, para. 27 (Can.); M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 36 (Can. Ont. C.A.); *see also* Rhebergen v. Creston Veterinary Clinic Ltd., [2014] B.C.L.R. 4th 97, paras. 53–68 (Can. B.C. C.A.) (discussing the meaning of "ambiguity" in this context).
30. *See Elsley*, [1978] 2 S.C.R. at 925.

C. The temporal and geographic limits in the restrictive covenant clause are reasonable, considering the nature of the work involved.[31]

D. The covenant clause is not overly broad in that a less intrusive non-solicitation or non-disclosure clause could not have addressed the employer's concerns.[32]

With regard to element B above, the courts have accepted trade secrets, confidential information, and customer lists as legitimate proprietary interests.[33] The SCC explained the scope of protected interests in *Maguire*:

> The practical question then is this, what are the rights which the employer is entitled to protect by such a covenant, and does the covenant not go beyond what is reasonably adequate in furnishing that protection. Proprietary rights, such as secrets of manufacturing process and secret modes of merchandising, clearly come within the group of rights entitled to protection. So also is the right of an employer to preserve secret information regarding his customers, their names, addresses, tastes and desires.[34]

In practice, a real proprietary interest has been recognized in two scenarios. The first involves a situation in which the nature of the work creates such a close personal relationship between the former employee and the customer that the employee essentially becomes the face of the business for the customer.[35] This point was summarized by the Manitoba Court of Appeal as follows:

> It can now be said with confidence that where the nature of the employment will likely cause customers to perceive an individual employee as the personification of the company or employer, the employer has a proprietary interest in the preservation of those customers which merits protection against competition from that individual employee after his termination.[36]

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31. *See id.*

32. *See* Mason v. Chem-Trend Ltd. (2011), 106 O.R. 3d 72, para. 26 (Can. Ont. C.A.); H.L. Staebler Co. v. Allan (2008), 92 O.R. 3d 107, para. 51 (Can. Ont. C.A.); Lyons v Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) ("Generally speaking, the courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests.").

33. *See Elsley*, [1978] 2 S.C.R. at 924.

34. Maguire v. Northland Drug Co., [1935] 1 S.C.R. 412, 416 (Can.).

35. Winnipeg Livestock v. Plewman (2000), 192 D.L.R. 4th 525, para. 41 (Can. Man. C.A.).

36. Friesen v. McKague (1992), 96 D.L.R. 4th 341, para. 17 (Can. Man. C.A.).

In *Elsley*, the SCC found a proprietary interest existed because, to the employer's customers, "Elsley *was the business* . . . . Elsley met the customers, telephoned them frequently, placed their insurance policies and answered their queries."[37] The second scenario occurs where the nature of the work is such that the former employee gained special insight or "intimate knowledge of the client's particular needs, preferences, or idiosyncrasies" that provides the employee with an unusual competitive advantage in attracting that customer to follow them to their new endeavor.[38]

However, as criteria C and D above indicate, even if the court finds a proprietary interest at stake, there is still a strong possibility that the non-competition clause will fail the reasonableness test. Firstly, the courts will closely scrutinize whether the temporal and geographic boundaries are carefully crafted to not constitute an overreach given the employer's legitimate business concerns.[39] Secondly, courts regularly rule that a non-solicitation clause (rather than a more restrictive non-competition clause) is sufficient to address the employer's concerns.[40]

The Ontario Court of Appeal decision in *Lyons v. Multari*[41] provides a typical example of the Canadian approach to non-competition clauses. In that case, Multari accepted employment as a dental surgeon at Lyon's dental surgery practice.[42] The employment contract included a non-competition clause prohibiting Multari from working as a dental surgeon within a five-mile radius of Lyon's offices for a period of three years.[43] After a couple of years, Multari quit and joined another dental surgery office located within a five-mile radius.[44] Lyons sued Multari for breach of contract in an effort to enforce the non-competition clause.[45] The Court ruled that the former employer, Lyons, had a proprietary interest in the

37. *Elsley*, [1978] 2 S.C.R. at 920.

38. *Winnipeg Livestock*, 192 D.L.R. 4th 525 at para. 41.

39. *See* H.L. Staebler Co. v. Allan (2008), 92 O.R. 3d 107, para. 53 (Can. Ont. C.A.) (holding that a clause with no geographic boundary was unreasonable); MacMillan Tucker MacKay v. Pyper, [2009] B.C.L.R. 4th 694, para. 47 (Can. B.C. S.C.) (holding that a restriction on competition by lawyer within five miles of old law firm was unreasonable); Renfrew Insurance Ltd. v. Costese (2014), 574 A.R. 377, para. 17 (Can. Alta. C.A.) (holding that a six-month, sixty-kilometer restriction on former salesperson was reasonable); Kohler Can. Co. v. Porter (2002), 26 B.L.R. 3d 24, para. 48 (Can. Ont. S.C.J.) (holding that a restriction covering North America is unreasonable).

40. *See* Lyons v Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) (holding a non-competition clause unenforceable because a less intrusive non-competition clause would protect the employer's legitimate interests).

41. *Id.*

42. *Id.* at para. 4.

43. *Id.* at para. 6.

44. *Id.* at para. 7.

45. *Id.* at para. 9.

relationships with local dentists who refer the patients.[46] The Court described this relationship as "good will" built up over time in some professions.[47] Moreover, the court found that the geographic (five miles) and temporal (three years) boundaries were reasonable in these circumstances.[48] The non-competition clause was nevertheless unenforceable because the court ruled that Lyons' concerns about Multari attracting work from dentists with whom Lyons had built up good will could have been addressed by a less intrusive non-solicitation clause.[49]

II. FUNDAMENTAL DIFFERENCES IN THE LEGAL TREATMENT OF NON-COMPETITION CLAUSES IN CANADA AND THE UNITED STATES

So far, much of the description of Canadian law regarding non-competition clauses in employment contracts aligns quite closely with the general approach to those clauses in the United States' common law. As described by Professor Rachel Arnow-Richman and I:

> [T]he baseline common law [in the two countries] is similar: in states that allow them, the employer must demonstrate that the noncompete is necessary to protect a legitimate interest; that it is reasonable in scope; that it adheres to contract formalities; and, in some cases, that the agreement is not unduly harmful to the public.[50]

However, in several important respects, the Canadian approach diverges sharply from the approach taken by courts in many U.S. states. The result of these differences is that non-competition clauses are far less likely to be enforced in Canada. To understand why this is the case, one needs to understand certain fundamental differences in the broader employment law models of the two countries.

A. *At-Will Versus the Requirement for Notice of Termination*

The first significant difference is that Canada is not an at-will jurisdiction.[51] The default presumption in the Canadian common law of employment is that the parties must provide "reasonable notice" of

46. *Lyons*, 50 O.R. 3d 526 at para. 25.
47. *Id.* at para. 26.
48. *Id.* at para. 29.
49. *Id.* at para. 48.
50. Doorey & Arnow-Richman, *supra* note 6.
51. *See* Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. 2d 140, 143 (Can. Ont. H.C.J.) ("[T]here is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement.") (citing Carter v. Bell & Sons (Can.) Ltd., [1936] 2 D.L.R. 438 (Can. Ont. C.A.).

termination of the employment contract.[52] The notice requirement exists as an implied contract term, and the courts decide how much notice an employer must provide by applying a well-known set of criteria, of which length of service is the most important.[53] The seminal decision on the assessment of implied reasonable notice, *Bardal v. Globe and Mail Ltd.*,[54] described the criteria to be considered as follows:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[55]

Applying these factors, courts have assessed reasonable notice at two years or more for very long-serving employees, although most employees are entitled to much less than that.[56] Since the requirement for reasonable notice of termination is an implied term, it can be avoided by an express agreement that sets out the amount of notice required.[57] For example, the parties could expressly agree that contract termination is possible without notice, effectively replacing presumed reasonable notice with an at-will contract. In practice, though, this possibility is constrained for most employees by overlapping statutory obligations in Canada that require employers to provide employees with minimum specified amounts of notice.[58] The statutory notice amounts are usually far less than what the

52. *See id.* There are some exceptions to the general presumption that reasonable notice is required, such as termination by the employer for cause (summary dismissal) and where there is frustration of contract, for example. *See generally* DOOREY, *supra* note 1, at ch. 12 (Summary Dismissal), ch. 11 (Frustration).

53. *Id.* at 143.

54. *Id.* at 140.

55. *Id.* at 145.

56. *See generally* DOOREY, *supra* note 1, at ch. 10; *see also:* Lowndes v. Summit Ford Sales Ltd (2006), 206 47 C.C.E.L. (3d) 198 (Can. Ont. C.A) (explaining that greater than two years' notice is possible in "exceptional cases"); Lynch v. Avaya Canada Corporation, (2023) ONCA 696 (CanLII) (upholding award of thirty months' reasonable notice for terminated employee with thirty-nine years' service in a speciality field).

57. Carter v. Bell & Sons (Can.) Ltd, [1936] O.R. 290 (Can. Ont. C.A).

58. *See* DOOREY, *supra* note 1, at 328–31. At-will contracts permitting termination with no notice are still permissible in Canada with respect to employees who are excluded from the statutory notice entitlements. *See id.* Statutory notice requirements often require a limited number of months' service before the notice entitlement is triggered. *See id.* For example, the requirement on an employer to provide notice of termination under the Ontario Employment Standards Act does not commence until the employee has been employed three consecutive months. Employment Standards Act, S.O. 2000, c 41 (Can.). In addition, many categories of employees are excluded entirely from all or parts of Canadian labor standards legislation. *See* DOOREY, *supra* note 1, at 332.

employee would be entitled to under implied reasonable notice, ranging from one to twelve weeks, depending on jurisdiction and length of service.[59] However, the parties are not free to contract out of statutory minimum notice requirements.[60]

Consequently, most Canadian employees are entitled to some amount of notice of termination. This feature of Canadian employment law has several important implications for our discussion of non-competition clauses. One is that these clauses are treated as unenforceable in Canada if the employer has terminated the contract without providing the required notice of termination. This principle has its roots in the seminal 1909 House of Lords decision *General Billposting Co. v. Atkinson*,[61] which held that wrongful termination of an employment contract effectively voids a restrictive covenant, rendering it unenforceable. Canadian courts long ago adopted the principle in *General Billposting*.[62] The rationale for the principle was described recently by the Alberta Court of Appeal as follows:

> [T]here are valid reasons for excusing a wrongfully dismissed employee from compliance with restrictive covenants. Most particularly, to hold otherwise would reward employers for mistreating their employees. For example, an employer could hire a potential competitor, impose a restrictive covenant on the employee, then wrongfully dismiss her a short time later and take advantage of the restrictive covenant. This would be a highly effective, but manifestly unfair, way of reducing competition. A second justification may be that enforcing a restrictive covenant in the face of wrongful termination prima facie negates the consideration (whether continued employment or something else) given by the employer to the employee when she accepted the restrictive covenant. Said another way, because the employment was prematurely and wrongfully terminated the employee will not "have received, during the period of his or her employment, an extra amount of remuneration for having conceded to be bound by the restraint in the contract."[63]

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59. *See* DOOREY, *supra* note 1, at 324 (depicting a list of notice periods in every Canadian jurisdiction).

60. *See* Roden v. Toronto Humane Society (2005), 259 D.L.R. 4th 89, para. 55 (Can. Ont. C.A.) (holding a notice of termination clause that defines how much notice is required enforceable provided that the clause does not violate labor standards legislation).

61. [1909] A.C. 118 (HL).

62. *See* Globex Foreign Exchange Corp. v. Kelcher (2011), 337 D.L.R. 4th 207, para. 48–54 (Can. Alta. C.A.).

63. *Id.* at para. 54; *see also* Cohnstaedt v. Univ. of Regina (1994), 113 D.L.R. 4th 178 (Can.

At trial, the issue of whether the employer terminated the contract without the required notice (known as wrongful dismissal) is typically consolidated with the issue of whether the restrictive covenant is enforceable.[64] If the court rules that required notice was not provided, it follows that the restrictive covenant clause is void, even if the clause would otherwise have satisfied the legal test for enforceability of such clauses discussed above.

A second implication of the requirement for notice of termination in Canada is that it is more difficult for an employer to introduce non-competition clauses after the original terms of the employment contract have been ratified. In the United States, courts often permit employers to introduce non-compete clauses mid-contract as a sort of "afterthought."[65] Professor Arnow-Richman described this type of modification as a "cubewrap" contract that involves the employer introducing new restrictive terms after the initial contract terms have been settled.[66] The practice is permitted under U.S. employment law because employment contracts are at-will: "It is precisely because employment is at-will that courts generally find cubewrap noncompetes to be valid contract modifications, supported by continued employment as consideration."[67] Canadian employers also occasionally attempt to introduce non-competition clauses after employment has commenced, but the legal principles governing that modification are very different.

The requirement for notice of termination of the employment contract means that neither side can unilaterally modify the contract.[68] The contract's original terms survive until the appropriate notice of termination of the contract has expired or both parties agree to a

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Sask.) (finding that an employer that wrongfully terminates an employee cannot then enforce a restrictive covenant clause).

64. *See Globex Foreign Exchange Corp.*, 337 D.L.R. 4th 207 at para. 2.

65. *See* Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1472 (1987); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompete*, 2006 MICH. ST. L. REV. 963, 966 (2006) [hereinafter Arnow-Richman, *Cubewrap Contracts and Worker Mobility*]; Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 641 (2007) [hereinafter Arnow-Richman, *The Rise of Delayed Term*] (discussing the common practice of employers introducing non-competition clauses after the terms of employment have already been agreed upon).

66. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 966.

67. *Id.* at 980.

68. *See* Wronko v. Western Inventory Serv. Lrd. (2008), 90 O.R. 3d 547 (Can. Ont. C.A.) (explaining that absent agreement by the parties supported by fresh consideration, a party wishing to modify terms of employment is required to terminate the contract by providing the contractual amount of notice required and then offer a new contract on revised terms).

modification supported by mutual fresh consideration.[69] Therefore, any attempt by an employer to introduce a new non-competition clause during the life of employment is treated as a midterm contract modification in Canada.[70] In theory, an employee can refuse to accept a proposed modification to the contract, at which point a persistent employer must terminate the contract by providing the requisite notice and then offer a new contract on revised terms, including, for example, a non-competition clause.[71]

Of course, in practice, most employees accept amendments the employer puts before them for fear of losing their jobs.[72] However, even if the employee "agrees" to a mid-contract introduction of a non-competition clause, that modification will only be enforceable if supported by fresh consideration.[73] If a non-competition clause is introduced mid-contract and not supported by fresh consideration, the courts will not enforce the covenant if the employer later attempts to rely upon it.[74] In contrast to the prevailing attitude in some courts in the United States, in Canada, continued employment alone does not constitute valid and fresh consideration to support an amendment.[75] This outcome follows logically from the fact that the contract can only be terminated with notice. As the Ontario Court of Appeal explained: "[T]he 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."[76] None of this prevents an astute employer in Canada from lawfully introducing a non-competition clause mid-contract; it is not much of a hurdle for an employer aware of the legal framework to ensure fresh consideration accompanies the amendment.[77] The point is simply

69. *Id*. at para. 36.

70. *Id*.

71. *Id.* at para. 32; Hill v. Peter Gorman Ltd. (1957), 9 D.L.R. 2d 124 (Can. Ont. C.A.).

72. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 967.

73. Globex Foreign Exchange Corp. v. Kelcher (2011), 337 D.L.R. 4th 207 (Can. Alta. C.A.).

74. *Id.*

75. *See id.* at para. 87 ("[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 given.").

76. Hobbs v. TDI Canada Ltd. (2004), 192 O.A.C. 141, para. 32 (Can. Ont. C.A.); *see also* Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. 3d 75 (Can. Ont. C.A.) (stating that continued employment is not fresh consideration to an employee for a mid-contract modification benefiting the employer).

77. For example, Canadian courts have accepted the concept of forbearance as consideration. In the Canadian context, this refers to an exchange whereby if the employee agrees to the employer's proposed amendment, the employer agrees that it will not exercise its

that the default requirement for notice of termination adds a hurdle to be overcome by Canadian employers seeking to introduce non-competition clauses mid-contract.

Non-competition clauses interact with the notice requirement in Canadian employment law in other ways as well. For example, including a non-competition clause can penalize employers by leading courts to order longer periods of reasonable notice.[78] One of the key factors that courts consider in assessing the length of implied reasonable notice is the availability of similar, alternative employment.[79] Because the sole purpose of a non-competition clause is to impede the worker's ability to find similar alternative employment, it is not surprising that Canadian courts have ruled that the presence of a non-competition clause can extend the period of required reasonable notice. This reality can impose an economic cost on employers who elect to include a non-competition clause in employment contracts.

In addition, the presence of a restrictive covenant clause is relevant in assessing whether an employee mitigated their losses after being wrongfully dismissed. A lawsuit by an employee alleging termination without proper notice is an action for breach of contract, and, therefore, the standard rules of contract law generally apply, including the obligation for the aggrieved party to make reasonable efforts to mitigate their losses. In wrongful dismissal cases, this means that employees must make reasonable efforts to secure similar, alternative employment by searching and applying for jobs.[80] The onus is on the employer to prove that the employee failed to make reasonable mitigation efforts and that had the employee done so, they would likely have secured earnings that should be deducted from the damages awarded in the wrongful dismissal

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contractual right to terminate the contract with notice for some period of time into the future. Techform Products Ltd. v. Wolda (2001), 56 O.R. 3d 1, para. 25 (Can. Ont. C.A.); Maguire v. Northland Drug Co., [1935] 1 SCR 412, 416–17 (Can.); *see also* Lancia v. Park Dentistry Corp., [2018] O.J. No. 648, para. 28 (Can. Ont. S.C.J.) (finding that consideration provided in the form of a one-time signing bonus is sufficient to support a mid-contract modification).

78. *See* Watson v. Moore Corporation (1996), 134 D.L.R.4th 252, para. 48 (Can. B.C. C.A.); Ostrow v. Abacus Management Corporation Mergers & Acquisitions, [2014] B.C.J. No. 1046, para. 79 (Can. B.C.); Murrell v. Burns Int'l Security Servs. Ltd., [1997] 33 C.C.E.L. 2d 1 (Can. Ont. C.A.), para. 2 (noting that it is proper to consider a non-competition clause in assessment of the length of reasonable notice when the clause impeded the employee's job opportunities); Khan v. Fibre Glass-Evercoat Co., [2000] O.J. No. 1877, para. 28 (Can. Ont.) (extending notice period from four months to nine months because of a five-year non-competition clause).

79. Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. 2d 140 (Can. Ont.); DOOREY, *supra* note 1, at ch. 10.

80. Evans v. Teamsters Local Union No. 31, [2008] 1 S.C.R. 661 (Can.) (discussing the scope of an employee's duty to mitigate their losses from a wrongful dismissal)

lawsuit.[81] However, a court will not entertain an argument by the employer that the employee failed to mitigate by researching jobs that the non-competition clause would prohibit them from accepting.[82]

B. *Contrasting Approaches to Severance*

A second important difference between the two countries' approaches to non-competition clauses lies in the application of contract law doctrines of severance and rectification. In the United States, courts regularly redraft unreasonable and otherwise unenforceable clauses.[83] As many commentators have noted, this approach incentivizes employers to draft overly broad clauses with the knowledge that, if challenged, a court will simply fix the clause on behalf of the employer. For example, Harlan Blake notes: "If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[84]

Professor Arnow-Richman points to the Alabama case of *King v. Head Start Family Hair Salons*[85] as demonstrative of this approach to severance.[86] That decision involved a long-service hairdresser who signed a non-competition clause prohibiting her from working within a two-mile radius of any Head Start location for a period of one year after her employment with Head Start ended.[87] When King signed the contract, there were only fifteen Head Start salons, but that number had doubled to thirty by the time she quit sixteen years later.[88] The trial judge ruled that the non-competition clause was enforceable and issued a preliminary

81. *Id.*; *see generally* DOOREY, *supra* note 1, at 230–32 (discussing the duty to mitigate in wrongful dismissal lawsuits).

82. *See Ostrow*, [2014] B.C.J. No. 1046 at para. 104; *Khan*, [2000] O.J. No. 1877 at para. 28; *Watson*, 134 D.L.R.4th 252 at para. 48.

83. *See* Arnow-Richman, *supra* note 6, at 1256 ("Almost every jurisdiction that enforces noncompetes permits a court to pare down and partially enforce a noncompete that is otherwise overbroad in scope.").

84. Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 683 (1960); *see also* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 976 ("[T]the employer has the luxury of knowing that if an overbroad agreement is ultimately challenged in court, the judge is likely to reduce its scope rather than void it entirely."); Kenneth Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 249–50 (2007); Charles Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO STATE L.J. 1127, 1134–35 (2009) (noting that when employers anticipate that courts will sever and read down an unreasonable non-competition clause to make it reasonable there is little risk in including an unenforceable clause in the contract).

85. 886 So. 2d 769 (Ala. 2004).

86. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972.

87. *King*, 886 So. 2d at 770.

88. *Id.* at 771.

injunction.[89] On appeal to the Supreme Court of Alabama, the Court reversed the trial judge's finding that the non-competition clause was enforceable, ruling that the clause imposed an "undue hardship" on King.[90] However, the court modified the clause to protect Head Start's interests.[91] The court explained:

> To prevent an undue burden on King and to afford some protection to Head Start, the trial court should enforce a more reasonable geographic restriction—such as one prohibiting King from providing hair-care services within a two-mile radius of the location of the Head Start facility at which she was formerly employed or imposing some other limitation that does not unreasonably interfere with King's right to gainful employment while, at the same time, protecting Head Start's interest in preventing King from unreasonably competing with it during the one-year period following her resignation.[92]

Were the facts in *King v. Head Start Family Hair Salons* put before a Canadian court, it is almost certain that the non-competition clause would be struck down entirely for failing the *Elsley* reasonableness test.[93] Firstly, insofar as the employer's concern is that customers might follow King to a new hair salon, that interest would not likely be recognized as a legitimate proprietary interest worthy of legal protection but rather be perceived as an attempt by the employer to impede normal, healthy competition.[94] Therefore, Canadian courts are unlikely to recognize a proprietary interest in the relationship between low-wage service sector workers and their employer's customers. And even if a Canadian court accepted that a legitimate proprietary interest exists, it would likely strike down the non-competition clause in *Head Start* because a less restrictive non-solicitation clause would suffice. That is the lesson from cases such as *Lyons v. Multari*, discussed above.[95]

In addition, the non-competition clause in the *Head Start* case appears to prohibit King from working in any capacity at a competing hair salon, not just as a hairdresser.[96] A Canadian court would likely find this

89. *Id.* at 769.

90. *Id.* at 772.

91. *See id.*

92. *Id.* at 772.

93. *See* Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 923 (Can.).

94. *See* Maguire v. Northland Drug Co., [1935] 1 SCR 412, 416–17 (Can.) (noting that employers have no proprietary interest in preserving their customers against normal competition).

95. *See* Lyons v. Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) (striking a non-competition clause because non-solicitation clause was sufficient to address former employer's concerns).

96. King v. Head Start Family Hair Salons, 886 So. 2d 769, 770 (Ala. 2004).

restriction overbroad, even if the court accepted that Head Start had a proprietary interest worthy of protection. For example, it is unclear what legitimate proprietary interest Head Start has in preventing King from working as a receptionist at another salon.

In a recent decision called *M&P Drug Mart v. Norton*,[97] the Ontario Court of Appeal struck down a non-competition clause applicable to a pharmacist because the clause restricted the employee from taking any job in a store that has a pharmacy.[98] The court ruled that this restriction was unreasonable.[99] Notably, in response to the employer's argument that the court should read the clause to restrict its application to just employment as a pharmacist, the court stated: "[T]he court is not empowered to rewrite the covenant to reflect its own view of what the parties' consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances."[100] This unwillingness of Canadian courts to rectify or sever unreasonable non-competition clauses to make them reasonable is a significant point of departure from the American approach.

The leading Canadian case on severance is *Shafron v. KRG Insurance*,[101] a 2009 decision of the SCC. The non-competition clause in that case prohibited the former employee, Shafron, from competing against KRG Insurance in the sale of insurance for a period of three years within "the metropolitan City of Vancouver," a vague geographic description without legal meaning.[102] The employee accepted new employment within three years in the Vancouver suburb of Richmond.[103] In the application to enforce the non-competition clause, the British Columbia Court of Appeal ruled that the reference to the "metropolitan City of Vancouver" was ambiguous but applied the contract law doctrine of "notional severance" to construe the clause to mean the "City of Vancouver and environs," including Richmond.[104] Considering all the factors involved, the Court of Appeal ruled that the non-competition clause was reasonable and, therefore, enforceable.[105]

The SCC disagreed and overruled the Court of Appeal.[106] It began its analysis from the usual starting point: "At 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 and

97. [2022] O.A.C. 398 (Can. Ont. C.A.).
98. *Id.* at para. 45.
99. *Id.*. at para. 4.
100. *Id.* at para. 49.
101. [2009] 1 S.C.R. 157 (Can.).
102. *Id.* at para. 5.
103. *Id.* at para. 8.
104. *Id.* at paras. 45–46.
105. *Id.* at para. 46.
106. *Id.* at paras. 55, 58–59.

should be free."[107] A narrow exception exists for "reasonable" restrictive covenants.[108] In the case at hand, the SCC ruled that the clause's reference to "the metropolitan City of Vancouver" was ambiguous and, therefore, unenforceable according to the normal test for enforceability of non-competition clauses: "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."[109]

The SCC then considered whether an ambiguous and, therefore, unreasonable non-competition clause could be severed to make it unambiguous and reasonable.[110] The SCC described "blue-pencil" and "notional" severance: "Severance, when permitted, appears to take two forms. 'Notional' severance involves reading down a contractual provision so as to make it legal and enforceable. 'Blue-pencil' severance consists of removing part of a contractual provision."[111] Following a brief discussion of the historical development of notional and blue-pencil severance in contract law generally, the SCC ruled that blue-pencil severance should be used only in "rare cases where the part being removed is trivial and not part of the main purpose of the restrictive covenant," and that "notional severance has no place in the construction of restrictive covenants in employment contracts."[112]

The SCC identified two reasons courts should not intervene through severance or rectification to fix ambiguous or unreasonable non-competition clauses. Firstly, the SCC ruled that severance should be avoided when there is no clear standard against which to measure "reasonableness" when the parties initially agree to the contract term.[113] The task of a court in applying severance is to give effect "to the intention of the parties *when they entered into the contract*."[114] The SCC noted that there are cases in which courts have applied notional severance to cure contract clauses that violate statutory rules where it is clear that the parties did not intend to violate the law.[115] However, with regards to non-

107. *Shafron*, [2009] 1 S.C.R. 157 at para. 16.

108. *Id.* at para. 17.

109. *Id*. at para. 36.

110. *Id.* at para. 28.

111. *Id.* at para. 29.

112. *Id*. at paras. 2, 37.

113. *Shafron*, [2009] 1 S.C.R. 157 at para. 38.

114. *Id.* at para. 32 (emphasis added). This contrasts with the U.S. approach, as noted by Professor Arnow-Richman where some courts look "to the situation of the parties at the time they appear in court and asks whether enforcing the noncompete would unduly disadvantage the employee." Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 970.

115. *See Shafron*, [2009] 1 S.C.R. 157 at para. 38 (citing Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, para. 134 (Can.) (severing a clause that required interest rate exceeding that permitted by the Criminal Code of Canada where evidence indicated that the parties did not intend to violate the Code).

competition clauses in employment contracts, "there is no bright-line test":

> In the case of an unreasonable restrictive covenant, while the parties may not have had the common intention that the covenant be unreasonable, there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable. Applying notional severance in these circumstances simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case. Such an approach creates uncertainty as to what may be found to be reasonable in any specific case.[116]

Therefore, the SCC rejected the notion that courts should redraft non-competition clauses based on their subjective beliefs about what the parties would have thought was reasonable either at the time of contracting or at the time enforcement of the clause was attempted.[117]

The second reason why Canadian courts should not apply severance to fix an unreasonable non-competition clause, according to the SCC, is that doing so would encourage employers to overshoot what is reasonable with the comfort of knowing that if the employee challenges the clause, the courts will just read it down and rescue the employer.[118] On this point, the SCC cited the 1913 decision of the British House of Lords in *Mason v. Provident Clothing & Supply Co*.,[119] where Lord Moulton wrote:

> It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage in view of the longer purse of his master.[120]

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116. *Id.* at para. 39.

117. *Id.*; *see also* Churchill Cellars Ltd. v. Haider, [2022] N.S.R. 2d 352, para. 33 (Can. N.S. S.C.) ("In the present case, the restrictive covenant contains both a non-competition clause and a non-solicitation clause within the temporal and spatial limits specified. It is to be remembered, however, that courts decide on the validity of restrictive covenants as they are written by the parties and cannot 'write down' a restrictive covenant into narrower terms which the court considers to be more reasonable in scope in the employment context at hand.").

118. *See Shafron*, [2009] 1 S.C.R. 157 at para. 33.

119. [1913] A.C. 724.

120. *Id.* at para. 745.

This realist approach to restrictive covenants emphasizes the potential *in terrorem* effects of non-competition clauses. Lord Moulton recognized over a century ago that employees are restrained in practice even by unreasonable (and therefore unenforceable) non-competition clauses because the costs and risks of challenging such clauses are too formidable. In other words, employees will behave as if a non-competition clause is enforceable even if it is not.

In refusing to rectify the vague non-competition clause in *Shafron*, the SCC concluded as follows:

> While the courts wish to uphold contractual rights and obligations between the parties, applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the courts will only sever the unreasonable parts or read down the covenant to what the courts consider reasonable.[121]

Notably, the reluctance of Canadian courts to rescue unreasonable and unlawful contract clauses is not confined to the law of non-competition clauses.

The SCC has adopted a similar approach towards severance and rectifying contract terms violating labor legislation. A theme in Canadian employment law is that the common law should encourage employers to draft employment contracts carefully, with an eye on employee vulnerability and full knowledge that the courts will not rescue unlawful clauses. We can see this approach applied in *Machtinger v. HOJ Industries*,[122] for example, where the SCC refused to read down a notice of termination clause that permitted the employer to terminate the employee at-will (without notice) when the applicable labor standards legislation required that the employer provide the employee with at least four weeks' notice.[123] In rejecting the employer's argument that the Court should substitute for the unlawful clause a requirement that the employer provide only the minimum statutory four weeks' notice, the SCC concluded that: "If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with

121. *Shafron*, [2009] 1 S.C.R. 157 at para. 33; *see also* Adrian Lang & Mel Hogg, *Injunctions to Restrain the Departing Employee or Fiduciary: What You Need to Know*, 37 ADVOC. Q. 231, 233 (2010) ("Reading down overly broad covenants would encourage employers to draft broad restrictive covenants in the hope that they would be upheld and thereby inappropriately increase the risk to the employee who may be forced to abide by an unreasonable restrictive covenant.").

122. Machtinger v. HOJ Indus. Ltd., [1992] 1 S.C.R. 986, 1013 (Can.) (noting that SCC refused to read down a contract that violated labor standards legislation).

123. *See id.*

the Act."[124] The SCC ruled that a requirement to provide "reasonable notice" is to be implied when a notice of termination clause violates labor standards legislation.[125] As a result, the employer in the *Machtinger* case was ordered to pay damages based on the amount the employee would have received had he worked for a period of implied reasonable notice, which the court fixed at seven months.[126]

The fact that Canadian courts will not sever or rectify an unreasonable non-competition clause focuses attention on the contractual language and not on what other language the parties might have used to craft a reasonable non-competition clause. As the SCC noted in *Elsley*: "The fact that [the clause] could have been drafted in narrower terms would not have saved it, for as Viscount Haldane said in *Mason v. Provident Clothing and Supply Co*., '. . . the question is not whether they could have made a valid agreement but whether the agreement actually made was valid.'"[127]

III. THE DOCTRINE OF INEQUALITY OF BARGAINING POWER IN CANADIAN EMPLOYMENT LAW

Concerns over inequality of bargaining power have influenced the development of the law of non-competition clauses in both Canada and the United States, although in different ways. Courts in both nations have long recognized that inequality of bargaining power is a relevant factor in assessing the reasonableness or legitimacy of non-competition agreements. The courts understand that employers sometimes include non-competition clauses in employment contracts assuming that the employee will lack either knowledge of its potential impact or the fortitude to resist it for fear of losing the job.[128] Of course, this is true of most other contract terms as well, but non-competition clauses are a special case because they involve restraint of trade that can restrict the employee's ability to earn a livelihood.[129] Therefore, courts in both nations accept that legal doctrine has a role in policing the legitimacy of non-competition clauses to ensure that employers are not exploiting their superior bargaining power to unfairly impede their employees' economic security.

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124. *Id.* at 1004.

125. *Id.* at 986–87, 993.

126. *Id.* at 986.

127. Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 925–26 (citation omitted).

128. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 964–65 (discussing the judicial reform based on the power imbalances between the contractual parties); Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 596 (La. 1974) (noting that disparity of bargaining power justifies ruling non-competition clauses unenforceable); Shafron v. KRG Insurance, [2009] 1 S.C.R. 157, para. 23 (Can.).

129. *See Orkin Exterminating Co.*, 302 So. 2d at 596, 598.

However, in Canada, much more so than in the United States, the evolution of the common law of the employment contract has been directly influenced by judicial concern for the inherent inequality of bargaining power that defines most employment relationships.[130] While Daniel Barnhizer observed that courts in the United States "rarely acknowledge power explicitly" and compared the "legal doctrine of inequality of bargaining power" to "the socially embarrassing aunt or uncle that the family talks about but to whom no one really pays attention," in Canada inequality of bargaining power is front and center in employment law.[131] Indeed, it is impossible to understand much of Canadian employment law without acknowledging that inequality of bargaining power acts as a lens through which the normal rules of contract law are viewed and applied. The emergence and development of the "doctrine of inequality of bargaining power" in Canadian employment law has been driven largely by the SCC.[132]

In the *Machtinger v. HOJ Industries* decision described in the previous section, the SCC observed that "individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers."[133] The SCC then cited with approval the following passage written by Professor (now Judge) Katherine Swinton:

> [T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[134]

The SCC's recognition that inequality of bargaining defines most employment relationships is not merely descriptive. Rather, it is a normative direction to the judiciary on how the common law of employment must evolve.

The Alberta Court of Appeal recently described the emergence of Canadian employment law as a set of "judicially mandated principles of interpretation designed to protect employees because of perceived, and sometimes very real, inequality of bargaining power as between

130. Gillian Demeyere, *The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom* 38 Dalhousie L.J. 1, 3 (2015).

131. Daniel Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005).

132. Machtinger, v. HOJ Indus. Ltd., [1992] 1 S.C.R. 986, 1002–03 (Can.).

133. *Id*. at 1003.

134. *Id.* (internal quotations and citation omitted).

employees and employers."[135] This concern for the inequality of bargaining power, which rests at the foundation of the employment relationship, is paired with a secondary recognition by the SCC, namely that work is more than a mere economic exchange but rather is fundamental to human self-worth and dignity. The SCC emphasized this point in an often-cited passage from a 1987 decision called *Re Public Service Employee Relations Act*[136]:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[137]

The point is not that the normal rules of contract law fall by the wayside in Canadian employment law. It is more subtle than that; the lesson is that in the application of the rules of contract to the employment setting, judges are expected to contextualize, keeping in mind the significance of the role of work in society and to human growth and dignity, and the potential vulnerability of employees owing to inequality of bargaining power. The Ontario Court of Appeal recently explained that "courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life."[138]

This contextual approach informs the application of contract law principles in significant ways. For example, in the *Machtinger* decision, the SCC's reference to the inequality of bargaining power and the importance of work provided the context for the SCC's explanation for why, given two plausible arguments as to what should happen when a contract term violates labor standards, courts should choose the

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135. Holm v. AGAT Laboratories Ltd., [2018] A.R. 23, para 40 (Can. Alta. C.A.) (O'Farral, J., concurring); *see also* Miller v. Convergys CMG Canada Ltd. P'ship (2014), 375 D.L.R. (4th) 171, para. 15 (Can. B.C. C.A.) ("As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers."); Hobbs v. TDI Canada Ltd. (2004), 246 D.L.R. (4th) 43, para. 42 (Can. Ont. C.A.) (explaining that courts should be vigilant in requiring fresh consideration to support a midterm modification that favors the employer due to general "inequality of bargaining power between employees and employers").

136. [1987] 1 S.C.R. 313 (Can.).

137. *Id.* at 368. This passage has been cited with approval by the SCC on many occasions since. *See, e.g.*, *Machtinger,* [1992] 1 S.C.R. at 1002; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, para. 6 (Can.); Slaight Commc'ns Inc. v. Davidson, [1989] 1 S.C.R. 1038, para. 7 (Can.); *see also* Douglas Brodie, *Canadian Jurisprudence and the Employment Contract* 15 Ind. L.J. 626, 626 (2022) (noting the influence on the Canadian common law of employment of the belief that work is essential component of personal self-identity).

138. Wood v. Fred Deeley Imports Ltd. (2017), 134 O.R. (3d) 481, para. 26 (Ont. C.A.).

interpretation most favorable to the employee.[139] Ambiguities in employment contract language are resolved in favor of employees, recognizing both that employers usually draft the contracts and present them to the employee as a done deal and that the common law should protect vulnerable employees. In explaining its decision to accept the interpretation of ambiguous contract language that favored the employee's interests rather than the employer's, the Ontario Court of Appeal similarly referenced the need for courts to protect workers:

> In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees.[140]

The requirement that mid-term contract amendments favoring the employer be supported by fresh mutual consideration is strictly enforced in Canada because courts recognize that employees are often unable to refuse the employer's proposed amendment.[141] In an often-cited decision called *Braiden v. La-Z-Boy*,[142] the Ontario Court of Appeal explained that the need for mutual consideration to support amendments to employment contracts is "especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers."[143] Inequality of bargaining power is also an element in the doctrine of unconscionability, which has been relied upon to strike down mandatory arbitration clauses and improvident settlement agreements that take advantage of vulnerable workers.[144]

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139. Machtinger, [1992] 1 S.C.R. at 1003.

140. Ceccol v. Ontario Gymnastic Fed'n, (2001), 55 O.R. 3d 614, para. 4 (Can. Ont. C.A.); *see also* Miller v. A.B.M. Can. Inc. (2015), 27 C.C.E.L. (4th) 190, paras. 15–16 (Can. Ont. S.C.J.) (Can. Ont.) (noting that due to importance of work to employees, ambiguity should be resolved in favor of employees); Wood v. Fred Deeley Imports Ltd. (2017), 134 O.R. 3d 481, para. 28 (Can. Ont. C.A.) (noting that Canadian courts expressly reference the need for the common law to be interpreted in a manner that respects the vulnerability of employees and the importance of work in their lives).

141. *See* Braiden v. La-Z-Boy (2008), 292 D.L.R. (4th) 172, para. 49 (Can. Ont. C.A.); Hobbs v. TDI Canada Ltd. (2004), 246 D.L.R. (4th) 43, para. 42 (Can. Ont. C.A.).

142. (2008) 292 D.L.R. (4th) 172 (Can. Ont. C.A.).

143. *Id*. at para. 49.

144. *See* Uber Tech. Inc. v. Heller, [2020] 2 S.C.R. 118, 119 (Can.) (holding mandatory arbitration clause in Uber digital contract unconscionable because it is an improvident arrangement based in inequality of bargaining power); Stephenson v. Hilti (Can.) Ltd. (1989), 63 D.L.R. 4th, para. 14 (Can. N.S.S.C.) (discussing a test for unconscionability in the employment law context).

The doctrine of inequality of bargaining power is probably most apparent in the Canadian common law rules governing the termination of employment contracts. For example, in a case called *Wallace v. United Grain Growers Ltd.*,[145] the SCC explained that employees are most vulnerable at the point of termination, and therefore, "the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal."[146] The SCC also recently recognized the right of terminated employees to recover aggravated damages for mental suffering when the manner in which they are terminated is unduly insensitive.[147] In reaching this conclusion and thereby expanding the scope of damages available to wrongfully terminated employees, the SCC noted that employees are "a vulnerable group" and that "for most people, work is one of the defining features of their lives."[148]

The doctrine of inequality of bargaining power is also central to the law of summary dismissal without notice for cause.[149] In Canada, employers must provide notice of termination to the employee unless the employee has committed a fundamental breach of contract.[150] In assessing whether employers have cause for summary dismissal and are relieved of their obligation to provide notice, the SCC requires a "contextual approach."[151] The contextual approach requires courts to assess all the circumstances relating to the employee's misconduct, including any mitigating factors, such as length of service, prior disciplinary record, the employee's family situation, and any other factors that might explain or justify the employee's actions. In application, this approach means that only very serious or sustained and repeated misdeeds or incompetence will justify summary dismissal.[152] In explaining why a contextual approach to summary dismissal is required, the SCC reiterated the importance of protecting vulnerable workers:

> Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which

145. [1997] 3 S.C.R. 701 (Can.).

146. *Id*. at para. 95.

147. *Id*. at para. 94; *see also* Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362 (Can.)

148. *Id.*; *see generally* David J. Doorey, *Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts*, 30 QUEENS L.J. 500 (2005) (discussing the history of the law of aggravated damages for breach of employment contracts); Bruce Curran, *Negotiating About Bad Faith: The Impact of Honda v. Keays on Wrongful Dismissal Settlements*, 24 CAN. LAB. & EMP. L.J. 1 (2022) (discussing the scope and prevalence of damages for bad faith termination).

149. *See* DOOREY, *supra* note 1, at ch. 12.

150. *Id*. The requirement to provide notice is also waived in the event of frustration of contract. *Id.* at ch. 11.

151. McKinley v. BC Tel, [2001] 2 S.C.R. 161, para 34 (Can.).

152. *Id.* at para. 89.

> would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship.[153]

This brief overview is sufficient to identify the contours of the doctrine of inequality of bargaining power in Canadian employment law.

The doctrine comprises both a descriptive and a normative element.[154] Descriptively, the doctrine of inequality of bargaining power recognizes (1) that work has a psychological component and is integral to human dignity, personal identity, and self-worth in Canadian society; and (2) that the employment relationship is frequently characterized by unequal bargaining power. Normatively, the doctrine of inequality of bargaining power posits that due to the importance of work and the reality of inequality of bargaining power, the common law should develop in a manner that considers the vulnerability of employees.[155] Given the wide

153. *Id.* at para. 54.

154. The influence of inequality of bargaining power and the SCC's direction to recognize the importance of work in the development of Canadian employment law are widely acknowledged by courts, practitioners, and academics, although this influence is rarely given the label of the "doctrine of inequality of bargaining power" that I am deploying in this Article. My argument is that it makes sense for reasons of clarity, transparency, and accuracy to recognize the diverse impact of these factors in employment law as a legal doctrine. *See* Barnhizer, *supra* note 131 at 141 (referring to the "legal doctrine of inequality of bargaining power"); M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 359 (examining 1970s' British decisions recognizing a 'legal doctrine of inequality of bargaining power' as a defense to contract enforcement, including Lloyds Bank v. Bundy, [1974] 3 W.L.R. 501 (H.L.) and Macaulay v. Schroder Publishing Co., [1974] 1 W.L.R. 1309 (H.L.); David Percy, *Book Reviews: What's Wrong with the Law?*, 9 ALTA. L. REV. 152, 153 (1971) (discussing the emergence of a "limited doctrine of inequality of bargaining power" in Canadian law).

155. Note that this description of the elements of the doctrine of inequality of bargaining power is consistent with the long-standing mantra of the International Labour Organization, "labour is not a commodity," which was adopted at the 1944 Philadelphia Convention. *See* GERRY RODGERS ET AL., THE INTERNATIONAL LABOR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009 171 (2009). The ILO has had a significant impact on Canadian collective bargaining law (especially public sector labor law) through its influence on the interpretation of freedom of association in the Canadian Charter of Rights and Freedoms. However, the fundamental idea underlying the mantra "labour is not a commodity"—that workers are human beings with psychological needs that should be protected from economic power in the marketplace—has also influenced the law of individual employment contracts in Canada. A full examination of this point is beyond the scope of this Article, but *see, e.g.*, David Beatty, *Labour is Not a Commodity*, *in* STUDIES IN CONTRACT LAW 313–55 (Barry Reiter & John Swan eds., 1980) (explaining the origins and meaning of the concept of labour is not a commodity); Geoffrey England, *The Impact of the* Charter *on Individual Employment Law in Canada: Rewriting and Old Story*, 13 CANADIAN LAB. & EMP. L.J. 1, 6 (2006–07) (noting that the idea that "labour is not a commodity" has "significantly influenced the development of employment contract law"); Brian Etherington, *Supreme Court of Canada Decisions and the Common Law of Employment in the 1990's: Shifting the Balance*

reach of the doctrine in the approach Canadian courts take to interpreting employment contracts, it should come as little surprise that the doctrine has influenced the courts' approach to non-competition clauses.

The doctrine appears most explicitly in the distinction courts draw between non-competition clauses in sale of business agreements and employment contracts. Courts are more inclined to enforce the former than the latter, particularly when the clause is considered in a sale of business contract that applies to sophisticated senior employees in circumstances where both parties had legal representation and real negotiations occurred in the lead-up to the sale agreement. As noted by the SCC in *Elsley*, "the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power."[156] Similarly, in *Shafron v. KRG Insurance Brokers (Western) Inc.*, the SCC distinguished non-competition clauses that apply to business principals in the context of a sale of business from those that govern regular employees:

> It is accepted that there is generally an imbalance in power between employee and employer. For example, an employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources. 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.[157]

Between Rights and Efficiency Concerns, 78 CAN. B. REV. 200, 204–05 (1999) (noting the SCC's reference to "labour is not a commodity" and its direction that because of the importance of work in society, courts should "apply the common law doctrine . . . in a manner which will encourage employer compliance with legislation and protection of employees").

156. Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 923; *see also* Gauvreau v. Pelton, [2016] O.R. 3d, para. 19 (Can. Ont. S.C.J.) (stating that non-competition clauses in employment contracts "are struck down . . . because of inequality of bargaining power and because both the departing employee and the public have an interest in the ability of the employee to employ his or her skills to earn a living"); Lyons v. Multari (2000), 50 O.R. 3d 526, para. 36 (Can. Ont. C.A.) (noting non-competition clauses are more likely to be enforced if they are between parties of equal bargaining power); Tank Lining Corp. v Dunlop Indus. Ltd., (1982) 40 O.R. 2d 219, para. 20 (Can. Ont.C.A.) ("When two competently advised parties with equal bargaining power enter into a business agreement, it is only in exceptional cases that the courts are justified in over-ruling their own judgment of what is reasonable.").

157. Shafron v. KRG Ins. Brokers (Western) Inc., [2009] 1 S.C.R. 157, paras. 22–23 (Can.); *see also* Quick Pass Master Tutorial Sch. Ltd. v. Zhao, [2018] B.C.L.R. 683, para. 34 (Can. B.C S.C.) (noting that courts more closely scrutinize restrictive covenant clauses in employment contracts owing to inequality of bargaining power); Martin v. ConCreate USL Ltd. P'ship, [2013] O.A.C. 72, paras. 52–53 (Can. Ont. C.A.) ("The law distinguishes between a restrictive covenant

Therefore, in the case of a sale of a business, courts are less likely to be influenced by the doctrine of inequality of bargaining power because inequality of bargaining power is no longer presumed: the *absence* of inequality of bargaining power justifies lighter judicial oversight of non-competition clauses.[158]

Notably though, inequality of bargaining power is never deployed as justification to sever or rectify an unreasonable non-competition clause in Canada. If the non-competition clause is found to be unreasonable, assessed at the point the clause is ratified, it is struck down in its entirety. Canadian courts do not intervene to rescue an employer that drafted an unreasonably broad non-competition clause.[159] The Canadian approach stands in sharp contrast to that adopted by some U.S. courts, which have referenced inequality of bargaining power in the employment relationship to justify severing or rectifying an otherwise unreasonable non-competition clause rather than striking it down.[160]

For example, Professor Arnow-Richman explained that the *King v. Head Start Family Hair Salons* decision, discussed earlier, involved judicial intervention to protect a vulnerable employee from potential unfairness rooted in her inequality of bargaining power.[161] The employee in that case was a middle-aged single parent who needed work as a hairdresser to support herself and her daughter.[162] The Alabama Supreme Court ruled that the non-competition clause as drafted was unenforceable because it "worked an undue hardship" by preventing the employee from

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in connection with the sale of a business, and one between an employer and an employee. The former may be required to protect the goodwill sold to the purchaser, and does not usually involve the imbalance of power that exists between employer and employee. Accordingly, a less rigorous test is applied in determining the reasonableness of a restrictive covenant given in connection with the sale of a business. Greater deference is given to the freedom of contract of 'knowledgeable persons of equal bargaining power.").

158. *Shafron*, [2009] 1 S.C.R. 157 at paras. 18–19.

159. *See id.* at para. 47; *see also* M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 49 (Can. Ont. C.A.). (noting that courts are not empowered to rewrite the contract clause to reflect what the court believes would be reasonable).

160. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972; Maureen Callahan, *Comment, Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 710 (1985) (explaining that courts in most U.S. jurisdictions will recast non-competition agreements to fit what the court believes is reasonable, while in other jurisdictions courts use the "blue-pencil" approach to sever unreasonable parts of the agreement, or, consistent with the approach taken in Canada, courts will strike down unreasonable clauses in their entirety). Note that the approach in the United States is not uniform. *See* BECK REED RIDEN LLP, EMPLOYEE NONCOMPETES: A STATE-BY-STATE SURVEY (2016), https://beckreedriden.com/wp-content/uploads/2024/02/BRR-Noncompetes-20240219-50-State-Noncompete-Survey-Chart.pdf [https://perma.cc/7DPB-E29D] (summarizing which states permit non-competes and also permit judges to sever and reform unreasonable clauses).

161. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972.

162. King v. Head Start Family Hair Salons, Inc., 886 So.2d 767, 769–70 (Ala. 2004).

working in her field.[163] So far, this result is consistent with how a Canadian court would likely decide the dispute. However, as noted earlier, the Alabama Supreme Court ruled that the clause should be read down to impose less hardship on the employee while still protecting the employer's interests.[164] Therefore, the Alabama Supreme Court looked at the circumstances as they existed at the time the employer sought to enforce the non-competition clause and then redrafted the clause to satisfy the Court's own *post facto* opinion of what a fair compromise would look like that both recognized the employee's precarity and protected the employer's business interests.[165]

This approach is entirely foreign to Canadian employment law. As discussed earlier, the non-competition clause in the *Head Start Family Hair Salon* case would not survive judicial scrutiny in Canada because it is "unreasonably" broad.[166] That finding would resolve the matter. There is no second step in Canada in which the court then comes to the rescue of the employer by substituting its own view of what a reasonable clause would look like considering the situation when the employer seeks to enforce the unreasonable clause. Such an intervention would fly in the face of the doctrine of inequality of bargaining power by protecting the interests of the more powerful employer at the expense of restricting the employee's freedom to earn a livelihood. Severance, as it applies to employment contracts, has been explicitly rejected in Canada because it is inconsistent with the doctrine of inequality of bargaining power, which directs courts to develop the common law in a manner that recognizes the psychological needs of employees and the potential for employers to take advantage of employees by drafting overly broad and restrictive covenants.

IV. ONTARIO'S STATUTORY PROHIBITION ON NON-COMPETITION CLAUSES

The unwillingness of Canadian courts to rework unreasonable non-competition clauses does not eliminate the well-known *in terrorem* effects of these clauses.[167] Canadian employers still sometimes include non-competition clauses in employment contracts that have no chance of being enforced if challenged. Of course, the most effective way to address the *in terrorem* effect of non-competition clauses is to make it illegal to include them in employment contracts. In December 2021, the Ontario

163. *Id.* at 772.

164. *Id.*

165. *Id.* at 772–73.

166. *See supra* Part I.

167. *See* Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 665 (2020).

government enacted the Working for Workers Act, 2021,[168] which introduced Canada's first statutory ban on non-competition clauses in employment contracts.[169] The provisions now appear in Part XV.1 of the province's Employment Standards Act.[170] The main charging section provides as follows:

> **67.2** (1) No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement.
>
> . . . .
>
> (2) For greater certainty, subsection 5(1) applies and if an employer contravenes subsection (1), the non-compete agreement is void.[171]

Section 5(1) prohibits employment contracts from contracting out of labor standards, with the result that the statute makes it an offense for an employer to include a non-competition clause in an employment contract.[172] The new prohibition applies prospectively to non-competes entered on or after October 25, 2021, which is the date the legislation was proclaimed in effect. Non-competition clauses that pre-date this effective date continue to be assessed under the common law test described above.[173]

The statutory ban on non-competes largely codifies the existing common law tests as they are applied in practice.[174] As described above, most non-competition clauses are ultimately ruled unenforceable if they make it before a court.[175] The statute carves out two exceptions that align roughly with scenarios in which courts have found non-competition agreements to be enforceable. Firstly, the prohibition on non-competition clauses does not apply to "executives," who are defined as senior

168. Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.).

169. *Id.* at c. 35, sched. 2, sec. 4.

170. Employment Standards Act, S.O. 2000, c. 41, P.XV.1 (Can.).

171. *Id.* at sec. 67.2.

172. *Id.* at sec. 67.1. ("'Non-compete agreement' is defined in the statute as follows: "an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends."

173. *See* Parekh v. Schecter, [2022] ONSC 302, paras. 45–47 (Can. Ont.).

174. *Id.* at para. 48.

175. *See, e.g.*, M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 32 (Can. Ont. C.A.).

executives and officers of companies.[176] Many of the non-competition clauses that the courts have upheld apply to senior officials with intimate knowledge of company strategies and intellectual property or who are "the face of the company" to customers.[177] Secondly, the statute carves out an exception that applies when the seller of a business accepts a job with the purchaser, which also aligns with the common law courts' recognition that non-competes in sale of business agreements deserve greater deference because they are usually for valuable consideration and involve relatively sophisticated contracting parties.[178] Non-competition clauses excluded from coverage under the new statutory ban are not necessarily enforceable. Those clauses, if challenged, would continue to be assessed under the usual common law tests discussed in this Article.

The introduction of the statutory ban on non-competition clauses surprised the employment law community because there had been little warning or consultation about the issue. Since most non-competition clauses are unenforceable in Canada anyway, a legislative ban was not high on the list of demands from worker advocates, who were focused on other more pressing legislative reforms.[179] Certainly, employers were not lobbying the government for this change. Moreover, the governing party in Ontario at the time the law was introduced, the PCP, is not known for leading the way in terms of workers' rights; in fact, it is known for quite the opposite. The PCP markets itself as the business-friendly party of "less regulation," and consistent with this image, one of their first actions when elected in 2018 was to repeal a set of legislative reforms introduced by the former Liberal government that extended new protections to workers.[180] Therefore, the question arises as to why and how a legislative

176. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2(5) ("'[E]xecutive' means any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position").

177. *See, e.g.*, Elsley v. J. G. Collins Ins. Agencies, [1978] 2 S.C.R. 916, 926 (Can.). Note that in the common law model, courts examine the factual circumstances on a case-by-case basis in determining whether the employee stands in a special position of authority and visibility, whereas the statute simply cast a wide net over any employee who holds one of the listed titles.

178. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2(3). *See Elsley*, [1978] 2 S.C.R. at 929 (holding that a non-compete in a sale of business agreement applicable to a vendor who is hired by the purchaser was enforceable).

179. A significant public policy report commissioned by the Ontario government and released in 2017 on reform of labor standards legislation did not mention non-competition agreements: *See* C. MICHAEL MITCHELL & JOHN C. MURRAY, THE CHANGING WORKPLACES REVIEW: AN AGENDA FOR WORKPLACE RIGHTS 9 (2017), https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf [https://perma.cc/FRD9-TFW9].

180. *See* Robert Benzie, *How Politics Put an End to Ontario's Paid Sick Days*, TORONTO STAR (Apr. 27, 2021), https://www.thestar.com/politics/provincial/2021/04/27/how-politics-put-

ban on non-competition clauses made it onto the PCP's legislative agenda.

There are at least two explanations. The first is that a provincial election was looming in the summer of 2022, and the PCP had adopted a new "pro-worker" campaign strategy.[181] Consistent with conservative movements in other countries, conservative politicians in Canada have in recent years more aggressively courted the "working class" vote, recognizing that this constituency is increasingly open to conservative policies and tiring of the identity politics that so often dominate discourse and policy in the more progressive political parties, including the centrist liberals and the leftist New Democratic Party.[182] Polling in the late 2010s showed that conservative parties in Canada were leading among voters who identified as "working class."[183] In the summer and fall of 2021, the PCP introduced the campaign slogan "working for workers," and part of its strategy was to introduce a set of legal rules that would be perceived as worker-friendly.[184]

The Working for Workers Act, 2021 (Bill 27)[185] was introduced in the fall of 2021 and included a bundle of new worker protections. The

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an-end-to-ontarios-paid-sick-days.html [https://perma.cc/WJD8-6EMV] ("After premier Doug Ford's Progressive Conservatives defeated the Grits in the June 2018 election, they moved quickly to freeze the minimum wage at $14 an hour and eliminate the two paid sick days. When Ford undid many of Wynne's labour changes in October 2018, he called the measures 'an absolute job killer' . . . ."); Brenda Bouw, *Ontario to Freeze Minimum Wage, Eliminate Mandatory Paid Sick Days*, THE GLOBE & MAIL, (Oct. 23, 2018), https://www.theglobeandmail.com/business/small-business/talent/article-ontario-government-rolls-back-liberals-labour-friendly-workplace/ [https://perma.cc/UA42-HMUA] ("Ontario's Progressive Conservative government says it plans to repeal chunks of the previous government's Fair Workplaces, Better Jobs Act.").

181. *See All of a Sudden, Conservatives Want To Be the Worker's Best Friend*, THE GLOBE & MAIL (Oct. 28, 2021), https://www.theglobeandmail.com/opinion/editorials/article-all-of-sudden-conservatives-want-to-be-the-workers-best-friend/ [https://perma.cc/7H48-LFJL].

182. In the U.S. context, *see generally* Ruy Teixeira, *Democrats' Long Goodbye to the Working Class*, THE ATLANTIC (Nov. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/11/democrats-long-goodbye-to-the-working-class/672016/ [https://perma.cc/CMT6-47PF].

183. *See* Murad Hemmadi, *Why Conservatives and the NDP Are Fighting Over the 'Working Class'*, MACLEAN'S (Dec. 14, 2017), https://macleans.ca/politics/why-conservatives-and-the-ndp-are-fighting-over-the-working-class/ [https://perma.cc/5EH2-FWTG] ("While middle-class voters are on board with the Liberals, the Conservatives are leading among voters who see themselves as working class in EKOS's polling. That's a big change from the Tories' base . . . ."); Tom Parkin, *Why is Erin O'Toole Pitching Conservatism to Working Class Voters?*, PRESS PROGRESS (Apr. 5, 2021), https://pressprogress.ca/why-is-erin-otoole-pitching-conservatism-to-working-class-voters/ [https://perma.cc/8WE3-S5ZZ] (noting that "[a]mong working class Canadian voters, Conservatives lead," and explaining how conservatives in Canada are now targeting these voters).

184. *See* Randall Denley, *Doug Ford Makes Peace with Labour, the $15 Minimum Wage*, NAT'L POST (Nov. 2, 2021), https://nationalpost.com/opinion/randall-denley-whacking-businesses-with-wage-hikes-is-no-way-for-doug-ford-to-win-votes [https://perma.cc/ UF93-2W8M].

185. Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.).

reforms included the prohibition on non-competition clauses as well as other rules, such as a requirement for employers with at least twenty-five employees to introduce a written policy on after hours work-related communications that the government heavily promoted as a "right to disconnect", and a requirement that businesses that use delivery workers permit those workers to use their on-site washrooms.[186] The reforms in Bill 27 were carefully selected and designed to achieve a distinct political objective, which was to permit the PCP-led government to promote that they were leading the way in workers' rights by being the first Canadian government to introduce such laws, while at the same time, the design of the laws imposed very little in terms of new substantive obligations on employers.[187]

For example, the much-hyped "right to disconnect" did not actually create a right to disconnect but instead simply required employers to post a policy describing expectations regarding after-hours communications.[188] The requirement that delivery people be permitted to use restaurant washrooms aligned with both existing best practices followed by most reputable businesses and basic human decency.[189] And the prohibition on non-competition clauses, as discussed above, essentially just codified what was the *de facto* common law anyways. Therefore, the government anticipated very little pushback from the employer community in response to any of the reforms in Bill 27, and they received little.

The second explanation for the Ontario government's decision to prohibit non-competition clauses was feedback from certain key industries, especially the entertainment and technology industries, that non-competition clauses were an impediment to attracting talent.[190]

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186. *Id.* at sched. 2, sec. 2, sched. 2, sec. 4, sched. 5. The requirement to adopt an after-hours communication policy now appears in the Employment Standards Act, S.O. 2000, c. 41, P.VII.0.1, Section 21.1. (Can.).

187. *See* David Doorey, *Ontario's Bill 27: One Good Law, One Vacuous Law, and One Missing Law*, THE L. OF WORK (Nov. 3, 2021), https://lawofwork.ca/ontariobill27/ [https://perma.cc/5CKP-P3UB].

188. *See id.*

189. *See* Robert Benzie, *Ontario Law Will Guarantee Washroom Access to Delivery Workers*, TORONTO STAR (Oct. 20, 2021), https://www.thestar.com/politics/provincial/ontario-law-will-guarantee-washroom-access-to-delivery-workers/article_dff7e320-54fc-5571-af1d-80168740c24f.html [https://perma.cc/SDS3-U483].

190. *See, e.g.*, Josh Rubin, *Ontario Government Bans Noncompete Clauses, Freeing Up Workers to Change Jobs*, TORONTO STAR (Oct. 25, 2021), https://www.thestar.com/business/ontario-government-bans-noncompete-clauses-freeing-up-workers-to-change-jobs/article_090b7ff4-f859-58cd-9d62-378df9c6329c.html [https://perma.cc/DER4-AVXA] ("The Ontario government is banning noncompetition clauses in employment contracts, a move it says will give workers more freedom to change jobs, and also help tech companies lure employees from the U.S.").

During debates leading to the enactment of the Working for Workers Act, 2021, Ontario's Minister of Labour said the following:

> We talk about attracting labour to Ontario. One of the major steps that we took—again, the first place in Canada—was to ban non-compete clauses, supported by 27,000 tech companies in Ontario. Of course, we now know through a recent study done over the last few days that Ontario and Toronto is the third-largest tech hub in all of North America, and they specifically said that banning the non-compete clause is really going to help grow that part of the economy.[191]

In a similar vein, PCP Member of Provincial Parliament Deepak Anand explained the background for the decision to enact a ban on non-competition clauses as follows:

> Our next proposal would, if passed, ban employers from using non-competition agreements. These agreements basically prevent an employee from leaving one company to take a new job at a direct competitor for a period of time after they leave their current job. While they are almost never legally enforceable, employers often use them to intimidate their employees. They prevent workers from seeking better and more meaningful opportunities. This limits workers from pursuing exciting opportunities that could help them grow professionally.
>
> We want Ontario to be a place where workers can advance their careers and where businesses can easily recruit the talent they need. We've seen this done in several other jurisdictions. California banned non-compete agreements many years ago, and yet Silicon Valley has flourished. Hawaii banned them in the tech sector in 2015, and following that there was an 11% increase in labour mobility in the sector and a 4% increase in new-hire salaries.
>
> Banning these agreements would increase the mobility of workers and it would improve Ontario's ability to attract top talent.[192]

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191. Monte McNaughton, Minister of Labour, statement to the Standing Comm. on Soc. Pol'y of the Legis. Assemb. of Ont. SP-158 (Mar. 28, 2022) (transcript available at 14). https://www.ola.org/en/legislative-business/committees/social-policy/parliament-42/transcripts/committee-transcript-2022-mar-28 [https://perma.cc/QVR9-YJUW].

192. Deepak Anand, MPP, statement to the H. of the Legis. Assemb. of Ont. 1176–77 (Nov. 25, 2021) (transcript available at https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2021/2021-12/25-NOV-2021_L024A.pdf [https://perma.cc/H2A9-ZCX8]).

Therefore, according to the government's talking points, the non-competition ban was part of a broader economic policy to attract and retain talent in certain key industries where labor mobility was perceived as especially attractive and necessary.

It is too soon to assess the impact of the legislative intervention. As noted, the law is prospective, so non-competition clauses that pre-date October 25, 2021 continue to be assessed according to the common law test described earlier.[193] One can anticipate, though, that the law will help address the *in terrorem* effects of non-competition clauses. As previously discussed, employees are often unaware that the non-competition clause in their employment contracts is unenforceable and may behave as if its terms restrict them. The new law not only renders non-competition clauses void but also makes it an offense to include the clause in an employment contract.[194] Under the Ontario Employment Standards Act, an employer found guilty of a first offense may be ordered to pay a fine of up to $50,000 CDN for an individual and $100,000 for a corporation.[195]

The anticipation is that moving forward, very few employment contracts in Ontario will include non-competition clauses as employers learn that there is little point and some financial risk associated with including them. At a minimum, the new law should ensure that a simple Internet search will inform employees that a non-competition clause in their contract is probably unlawful.[196] Therefore, one can anticipate that litigation over non-competition clauses will become relatively rare in Ontario. As of fall 2023, no other Canadian jurisdiction has followed Ontario's lead by similarly prohibiting non-competition clauses.

CONCLUSION

At a superficial level, common law doctrine pertaining to the enforceability of non-competition clauses appears similar in Canada and the United States. Courts in both countries are suspicious of non-competition clauses, which restrain workers from pursuing work within their chosen fields. Therefore, employers on both sides of the border must justify non-competition clauses based on a similar standard of reasonableness. However, on deeper inspection, it becomes evident that

193. *See* Parekh v. Schecter, [2022] ONSC 302, paras. 45–47 (Can. Ont.).

194. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2 (Can. Ont).

195. *Id.*. at sec. 132. Imprisonment is also available for offenders, although in practice that option is rarely exercised. *See id.*

196. For example, my Google search of ["non-competition clause" and Ontario] finds as the top hit a guide produced by the Ontario Ministry of Labour advising that non-competition clauses are unlawful as of October 25, 2021. *Non-Compete Agreements*, ONT., https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements [https://perma.cc/MB23-9EE4] (last visited Apr. 2, 2024).

Canadian courts are far less likely to enforce non-competition clauses than their U.S. counterparts. There are several reasons for this divergence, which are related to important differences in the employment law models of the two countries. For example, the fact that the default rule in Canada is that the employer must provide "reasonable notice" of termination, rather than the United States default of "at will" employment, introduces obstacles and disincentives for Canadian employers interested in restrictive covenants that do not exist in the United States.

More importantly, the doctrine of inequality of bargaining power explained in this Article that permeates Canadian employment law has led courts to adopt a less flexible approach to non-competition clauses. In contrast to the approach that prevails in many U.S. states, the notion that courts should intervene to save an unreasonable clause through legal doctrines of severance and rectification has been soundly rejected in Canada. A model that permits courts to rewrite overbroad non-competition clauses and thereby rewards employers that draft unreasonable restrictions on the right of their ex-employees to earn a livelihood is inconsistent with the fundamental idea prevalent in Canadian law that employment contracts should be interpreted in a manner that recognizes employee vulnerability and the importance of work to personal growth and identity.

Finally, the fact that almost all non-competition clauses in Canadian employment contracts are unenforceable provides the political context to explain why a conservative government in Canada's largest province recently legislated a ban on these clauses. By essentially codifying the existing common law approach, Ontario's Progressive Conservative government could present itself as a progressive advocate for workers, knowing it would face little political backlash from the business community. It is notable as well, given the ongoing political debates in the United States, that an influential conservative political movement in Ontario defended the statutory prohibition on non-competition clauses as a necessary step to remove barriers to labor mobility and productivity as part of a business development strategy to attract workers and investment from the United States and other nations where legal models sanction, justify, and even bolster restraints of worker freedom.