THE ANNOTATED EXECUTIVE EMPLOYMENT AGREEMENT

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General Overview

The employment relationship is fundamentally one of contract. While many employment relationships are based on nothing more than a handshake, it is increasingly common for executives to have lengthy formal agreements.

Employment agreements can become even more complex if the agreement is being drafted in the context of an acquisition or a shareholders' agreement. In such cases, great care must be taken to coordinate provisions in the employment agreement with the business terms in other agreements. For example, it may be appropriate to consider the inter-relationship of restrictive covenants in an Agreement of Purchase and Sale or a Shareholders' Agreement with similar provisions in the Employment Agreement. In some cases, "earn out" provisions in an Agreement for Purchase and Sale may be linked to continued employment under the Employment Agreement. Stock option rights on termination may have to be reviewed or dealt with in the Employment Agreement as well. In short, many executive employment agreements are situated in a complex legal context. When matters become contentious, ambiguities and contradictions among various agreements can be used by creative employee-side counsel. Before drafting an executive employment agreement, ensure that the total context is understood and that the employment agreement is consistent with other legal arrangements.

When the employment relationship ends, former employees may want to avoid the certain terms of the agreement, such as limits to notice or post-termination restrictions on competitive activity. Accordingly, counsel should be careful to avoid common pitfalls that may void an employment agreement.

All employment agreements are required to comply with the minimum statutory employment standards prescribed in legislation. In Canada, most jurisdictions have stipulated that any contractual term which contravenes the legislated minimum is void.

If a court finds a term as to notice or termination void, it will not substitute the statutory minimum in its place. It will typically declare the provision or agreement void, and will apply the common law instead. The common law is typically very generous to employees. It is therefore

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* The authors acknowledge the able assistance of Emily Joyce, student-at-law, Goodman and Carr LLP in drafting the annotations to this agreement.

important for employer-side counsel to take all statutory minimums into account when drafting the employment agreement.

> *See Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986 with respect to the unenforceability of termination provisions that are contrary to the minimum standards of the Ontario Employment Standards Act.*

If the employment contract is poorly drafted, any ambiguities will be interpreted against the interests of the party who drafted the agreement, generally the employer.

> *Allison v. Amoco Productions Co., (1975), 58 D.L.R. (3d) 233)*

It is also important to ensure the employment agreement contains all terms and conditions of employment. Efforts to incorporate additional terms in the agreement through guidelines and manuals may be unsuccessful.

> *Rahemtulla v. Vanfed Credit Union (1983), 4 C.C.E.L. 170 (B.C.S.C.), and Christensen v. Family Counselling Centre of Sault Ste. Marie & District (2001), 151 O.A.C. 35 (C.A.)*

It is often difficult to prove that the employee knew and agreed to the terms in such ancillary materials. If it is important that an employee agree to certain terms contained in a guideline or manual, the guideline or manual must be provided to the employee with the offer of employment and there must be proof that the employee reviewed and agreed to the terms. In short, the guideline or manual must be incorporated by reference into the contract.

There can also be problems enforcing employment agreements signed ***after*** *employment has commenced, if the agreements add new terms to the original agreement. See section on consideration below.*

An employment contract may be unenforceable if consent to the contract was obtained through an abuse of authority, coercion, duress or undue influence.

> *Puiia v. Occupational Training Centre (1983), 43 NFLD. & P.E.I.R. 283 (P.E.I. C.A.*

To avoid this problem, it is a good idea to give employees sufficient time to consider the terms of the contract, ask questions and seek legal counsel, so that it is clear that consent was freely given. A contract that is negotiated between the parties is much more likely to be enforced than a one-sided contract of adhesion.

If the employee does not read through the full agreement before signing, the agreement may not be binding on the employee. Some employees have successfully argued that since the employee did not know or read the contents of the agreement, s/he could not agree to be bound by its terms.

Burden v. Eastgate Ford Sales & Services (82) Co. (1992), 44 C.C.E.L. 218 (Ont. Gen. Div.)

Some employment-side counsel require that an employee initial each and every page of the agreement, in order to avoid the suggestion that the employee did not read or was not given an opportunity to read the entire agreement.

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THIS AGREEMENT IS MADE [AS OF] THIS ■ DAY OF ■ 20■,

B E T W E E N:

■, a corporation incorporated under the laws of ■

(the "**Corporation**")

- and -

■, of ■

(the "**Executive**")

RECITAL:

A. The Corporation and the Executive wish to enter into this Agreement to set forth the rights and obligations of each of them as regards the Executive's employment with the Corporation;

NOW THEREFORE in consideration of the mutual covenants and agreements contained in this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the Corporation and the Executive agree as follows:

Consideration

In order for a contract to be enforceable, there must be consideration given for signing it. This is ordinarily not an issue in employment contracts – the employee agrees to be bound by the

terms and conditions of the employment agreement in exchange for compensation provided by the employer. However, it can become a problem where the employment agreement is signed after the employee has started working. To avoid this problem, it is always preferable that the employment agreement be signed before the employee starts work.

If this is not possible, it may still be possible to establish consideration. For instance, the employer's agreement not to exercise a legal right, such as terminating the employee, may be consideration for the additional terms in the employment agreement.

> *Maguire v. Northland Drug Co., [1935] S.C.R. 412 is the leading case which stands for the proposition that continued employment constitutes consideration. See Stott v. Merit Investment Corp. (1988), 48 D.L.R. (4th) 288 (Ont. C.A.) for an example of an employer not exercising a right to sue as constituting consideration for the agreement.*
>
> *The Ontario Court of Appeal held in Francis v. Canadian Imperial Bank of Commerce (1994) 21 O.R. (3d) 75 (Ont. C.A.) that a clause which restricted notice to 3 months was a significant modification of an employee's common law rights and therefore required fresh consideration in order to be enforceable.*
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> *Note that recent decisions have emphasized that in order to constitute consideration, the employee must be aware that the employer will exercise its legal right, if the employee fails to sign the agreement. Techform Products Limited v. Wolda (2001) 56 O.R. (3d) 1 (Ont. C.A.), Kohler Canada v. Porter [2002] O.J. No. 2418 (O.S.C.J.)).*

Another tactic would be for the employer to provide additional consideration for the added terms of the employment agreement, such as a promotion, a bonus or additional compensation. If the document is signed after the commencement of employment, the employer-side counsel may have to consider one of several options:

1. *The employee must be given additional consideration in exchange for any additional terms. The continued payment of the employee's salary may not be sufficient consideration, as the employee is already entitled to it.*

2. *Acknowledgements that the written agreement simply* ***confirms*** *the verbal terms and conditions of employment. This technique only works if there is evidence that the terms were substantially negotiated and agreed upon, including controversial terms like notice clauses and post-termination restrictions, but was only reduced to writing subsequently. This is often the case when the employment agreement is part of a larger commercial transaction. It is not unusual to have a point-form schedule, outlining the basic terms of the business agreement, with the formal employment agreement being drafted after the close of the transaction.*

3. *Ensuring that the employee knows that if he or she does not sign the agreement, the employee will be legally terminated – on notice or with an adequate compensation package. An*

illegal threat of termination, i.e. without adequate notice or compensation, is likely to be ineffective. [See Kohler Canada v. Porter, supra]

1. **Definitions**

1.1 In this Agreement,

(a) ["**Affiliate**" has the meaning attributed to such term in the [*Canada Business Corporations Act/Business Corporations Act* (Ontario)] as the same may be amended from time to time and any successor legislation thereto;]

(b) "**Agreement**" means this agreement and all schedules attached to this agreement, in each case as they may be amended or supplemented from time to time, and the expressions "hereof", "herein", "hereto", "hereunder", "hereby" and similar expressions refer to this agreement and unless otherwise indicated, references to sections are to sections in this agreement;

(c) "**Basic Salary**" and "**Salary**" have the respective meanings attributed to such terms in section 5.1;

(d) "**Benefits**" has the meaning attributed to such term in section 5.3;

(e) "**Business**" means, in respect of the Corporation, ■, and in respect of Sub1, ■, and in respect of Sub2, ■;

(f) "**Business Day**" means any day, other than Saturday, Sunday or any statutory holiday in the Province of Ontario;

(g) "**Business Records**", with respect to a Person, means all business and financial records of or relating to the Person or the Person's business (whether or not recorded on computer) including but not limited to customer lists, lists of suppliers, surveys, plans and specifications, information about personnel, purchasing and internal cost information, operating manuals, engineering standards and specifications, marketing and development plans, price and cost data, price and fee amounts, pricing and billing policies, quoting procedures,

marketing techniques and methods of obtaining business, forecasts and forecast assumptions and volumes, and future plans and potential strategies, contracts and their contents, customer or client services, data provided by customers or clients and the type, quantity and specifications of products and services purchased, leased, licensed or received by customers or clients of the Person or any subsidiary of the Person;

(h) ["**Change of Control of the Corporation**" means the occurrence of a transaction or series of transactions as a result of which the Corporation becomes controlled by a Person other than ■; for the purpose of the foregoing, the Corporation is controlled by a Person if such Person, together with any of its Affiliates, beneficially owns shares of the Corporation carrying more than 50% of the voting rights ordinarily exercisable at meetings of shareholders of the Corporation, such rights being sufficient to elect a majority of the directors of the Corporation]

Senior executives routinely negotiate Change of Control provisions. Typically, an executive's agreement to work for a specific organization is premised on being a member of a certain team and sharing a certain vision. The corporate culture of an organization can change dramatically once there is a change of control and many executives prefer to be able to treat the agreement at an end upon a Change of Control.

(i) "**Confidential Information**", with respect to a Person, means all information and facts (including Intellectual Property and Business Records) relating to the business or affairs of the Person and the subsidiaries of the Person or their respective customers, clients or suppliers that are confidential or proprietary, whether or not such information or facts: (i) are reduced to writing; (ii) were created or originated by an employee; or (iii) are designated or marked as "confidential" or "proprietary" or some other designation or marking. For greater certainty, Confidential Information includes, but is not limited to:

(i) work product resulting from or relating to work or projects performed or to be performed by an employee, including but not limited to

interim and final lines of inquiry, hypotheses, research and conclusions and the methods, processes, procedures, analyses, techniques and audits used in connection with research and conclusions;

(ii) [computer software of any type or form and in any stage of actual or anticipated development, including but not limited to, programs and program modules, routines and subroutines, procedures, algorithms, design concepts, design specifications (design notes, annotations, documentation, flowcharts, coding sheets, and the like), source code, object code and load modules, programming, program patches and system designs];

(iii) all information which becomes known to an employee as a result of the employee's employment by the Person or any of the Person's subsidiaries, which the employee, acting reasonably, believes or ought to believe is confidential or proprietary information from its nature, or from the circumstances surrounding its disclosure to the employee;

[that with respect to the employment of the Executive by the Corporation, Confidential Information does not include the general skills and experience gained during the Executive's employment or engagement with the Corporation or any of the Subsidiaries which the Executive could reasonably have been expected to acquire in similar employment or engagements with other employers;]

(j) "**Disability**" means the mental or physical state of the Executive such that the Executive has been unable as a result of illness, disease, mental or physical disability or similar cause to fulfil the Executive's obligations under this Agreement either for any consecutive [six] month period or for any period of [12] months (whether or not consecutive) in any consecutive [24] month period;

This type of definition can only deal with the common-law definition of frustration due to disability and cannot constitute a waiver of the mandatory requirements of Ontario Human Rights Code. For an introduction to the complexity of human rights issues in the area, consider

reading the overview in Jim D'Andrea et al, Illness and Disability in the Workplace: How to Navigate through the Legal Minefield (Aurora: Canada Law Book Inc., 1995, looseleaf), §4:5400.

(k) "**Employer Subsidiary**" has the meaning attributed to such term in section 2;

(l) "**Employment Period**" has the meaning attributed to such term in section 4;

(m) "**ESA**" means the *Employment Standards Act, 2000* (Ontario) as the same may be amended from time to time and any successor legislation thereto;

(n) "**Intellectual Property**" means all intellectual property including but not limited to trade marks and trade mark applications, trade names, certification marks, patents and patent applications, copyrights, know-how, formulae, processes, inventions, technical expertise, research data, trade secrets, industrial designs and other similar property, and all registrations and applications for registration thereof, and includes computer software, formulae, processes, patterns, discoveries, devices or compilations of information (including production data, technical and engineering data, test data and test results, and the status and details of research and development of products and services);

(o) "**Just Cause**" [means/includes]:

the wilful failure of the Executive to properly carry out the Executive's duties and responsibilities or to adhere to the polices of the Corporation after notice by the Corporation of the failure to do so and an opportunity for the Executive to correct the failure within [30 days] from the date of receipt of such notice; and

(i) theft, fraud, dishonesty or misconduct by the Executive involving the property, business or affairs of the Corporation or the Subsidiaries or the carrying out of the Executive's duties, including, without limitation,

any breach by the Executive of the representations, warranties and covenants contained in sections 2, 10, 11, 12, 13, 14 and 15;

When dealing with senior executives, the definition of just cause may be one of the most heavily negotiated aspects of the agreement. We are simply providing a sample for your consideration.

(ii) the wilful failure by the Executive to properly carry out the Executive's duties and responsibilities or to adhere to the policies of the Corporation after notice by the Corporation of the failure to do so and an opportunity for the Executive to correct the failure within [30 days] from the receipt of such notice;

(iii) the Executive's dishonesty, misappropriation, wilful misconduct, theft, fraud or gross negligence in the carrying out of the Executive's duties, or involving the property, business or affairs of the Corporation or the Subsidiaries;

(iv) the Executive's conviction of a criminal or other statutory offence which has a potential sentence of imprisonment greater than six (6) months or the Executive's conviction of a criminal or other statutory offence involving, in the sole discretion of the board of directors of the Corporation, moral turpitude;

(v) the Executive's breach of [a material] fiduciary duty owed to the Corporation or the Subsidiaries;

(vi) the Executive's refusal to follow the lawful written direction of the board of directors of the Corporation or a more senior officer; or

(vii) any [material] breach by the Executive of the representations, warranties and covenants contained in sections 2, 10, 11, 12, 13, 14 and 15.

(p) "**Person**" means any individual, partnership, limited partnership, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, regulatory body or agency, government or governmental agency, authority or entity however designated or constituted;

(q) "**Subsidiaries**" means ■ ("**Sub1**"), a corporation incorporated under the laws of ■, and ■ ("**Sub2**"), a corporation incorporated under the laws of ■;

(r) ["**Term**" has the meaning attributed to such term in section 4;]

(s) "**Termination Without Cause**" has the meaning attributed to such term in section 8.1(c); and

(t) "**Year of Employment**" means any 12 month period commencing on [January 1, 20■{INSERT DATE THE EMPLOYER TYPICALLY MAKES SALARY INCREASES OR THE START OF THE FISCAL YEAR OR OTHER RELEVANT DATE, ETC.}] or on any anniversary of such date, provided that for the purposes of this Agreement, the "**First Year of Employment**" shall be deemed to commence on [the date hereof/■] and to end on [December 31, 20■{I.E., ONE DAY PRIOR TO THE DATE REFERRED TO ABOVE}].

1.2 [For the purposes of this Agreement, the increases (if any) in the Canadian cost of living shall be determined by changes in the Consumer Price Index for all of Canada published by the Government of Canada or, if the same is not available, by such equivalent or successor index as may be available from time to time.]

1. Employment

The obsolescence of the original contract can be used to challenge the enforceability of an agreement. This is primarily an issue for long-term employment relationships, where the job responsibilities, remuneration, and title have changed since the employee signed the original agreement. In such cases, courts have found that the substratum of the original agreement no longer existed, and the original contract terms were therefore unenforceable.

Lyonde v. Canadian Acceptance Corporation Ltd. (1983), 3 C.C.E.L. 220 (Ont. H.C.J.), Dolden v. Clarke Simpkins Ltd. (1983), 3 C.C.E.L. 153 (B.C. S.C.), and Sawko v. Foseco Canada Ltd.(1987), 15 C.C.E.L. 309 (O.D.C.)

It is possible to avoid such problems through careful drafting of the contract and prudent employment practises. For instance, the employment contract should provide for the possibility of a fundamental change in the employee's duties or compensation. The courts have upheld such contracts in Hine v. Susan Shoe Industries Ltd. (1989), 71 O.R. (3d) 438 (Ont. H.C.J.) and Nikolic v. Computer Associates, [2000] O.T.C. 458 (S.C.J.).

Employers should also ask employees to periodically review and confirm their employment agreements, and indicate that they continue to apply, despite any changes in work responsibilities or remuneration.

Matthewson v. Aiton Power Ltd., [1987] O.J. 49 (C.A.), and Wallace v. Toronto-Dominion Bank (1983), 41 O.R. (2d) 161 (Ont. C.A.)

Finally, employers should make material changes such as promotions or increases in remuneration conditional on the execution of an amended employment agreement or a confirmation that the remaining terms of the employment agreement remain in place. All these tactics affirm the employee's consent to the terms of the contract, making it more difficult for the employee to argue that they should not apply.

The Corporation shall employ the Executive, and the Executive shall serve the Corporation, [in such [senior] position as the Corporation may from time to time designate/in the position of ■] on the terms and conditions and for the remuneration hereinafter set out. In such position, the Executive shall perform or fulfil such duties and responsibilities as the Corporation may designate from time to time [and as are reasonably consistent with [the position of ■ and] the Executive's education, training and experience.] The Executive shall report to the [President] of the Corporation, or such other individual as the Corporation may [reasonably] require.

[The Executive agrees, in lieu of employment by the Corporation as contemplated above, to serve such of the Subsidiaries (an "Employer Subsidiary") in such [senior] position and reporting to such individual as the Corporation may designate from time to time. In such a case, the Corporation agrees to cause the Employer Subsidiary to employ the Executive, and the Executive agrees to perform or fulfil any duties and responsibilities as the Corporation or the Employer Subsidiary may designate [and as are consistent with the Executive's education, training and experience]. This Agreement shall govern the employment relationship between the

Executive and each Employer Subsidiary. For that purpose, the term "Corporation" shall, unless the context otherwise requires, be deemed to include each Employer Subsidiary.]

2. **Performance of Duties**

During the Employment Period, the Executive shall serve the Corporation faithfully, honestly, diligently and to the best of the Executive's ability. The Executive shall (except in the case of illness or accident) devote all of the Executive's working time and attention to the Executive's employment hereunder and shall use the Executive's best efforts to promote the interests of the Corporation. [If the Corporation relocates any or all of its business or operations from [Toronto], its principal place of business at the date hereof, the Executive's place of employment may be changed accordingly.]

The portion in square brackets is critical for an employer and is often heavily negotiated. Employers, particularly national and multi-national employers, want the right to transfer key employees. Employees are increasingly reluctant to move because of family considerations. The courts have looked closely at an employer's requirement that an employee transfer. The courts have reviewed: (a) the economic circumstances leading to the employer's request; (b) whether the requirement has been made in good faith or is an ill-disguised effort to make the employee move; (c) the nature of the employment, including any previous transfers; (d) the nature of the industry; (e) the type of employer; (f) the employer's written policies regarding geographic transfers; and (g) any implied or express terms in the contract of employment.

> *See the excellent discussion in Echlin et al, Quitting for Good Reason (Aurora: Quitting for Good Reason: The Law of Constructive Dismissal in Canada, 2001) in Chapter 10, Geographic Relocation.*

3. **Employment Period**

Note that the Employment Standards Act, 2000, mandates that employees be credited for their previous service when they continue working for a company after the business changes hands. Thus, when an employer has purchased a business, and is extending written offers of employment to employees of the vendor company, careful attention should be paid to the issue of start date and the recognition of seniority for common-law and statutory purposes.

The Executive's employment under this Agreement shall, subject to section 8, be for an indefinite term. Accordingly, the Corporation shall employ the Executive and the Executive shall serve the Corporation as an employee in accordance with this Agreement for the period

beginning on [the date hereof] and ending on the effective date the employment of the Executive under this Agreement is terminated in accordance with section 8.3 (the "**Employment Period**").

4. **Remuneration.**

4.1 Basic Remuneration.

The Corporation shall pay the Executive a gross salary in respect of each Year of Employment in the Employment Period (before statutorily required deductions) of $■ (the "**Basic Salary**") payable in instalments according to the policy of the Corporation for [employees/senior executives] as it may be amended from time to time, the first payment to be made on ■. The Basic Salary shall be subject to increase, and a corresponding increase shall be made in the instalments referred to above, effective on the first day of each Year of Employment (other than the First Year of Employment) in the Employment Period, in respect of the gross salary to be paid for such Year of Employment, to reflect increases (if any) in the Canadian cost of living. For the purpose of this Agreement, "Salary" means the Basic Salary as adjusted from to time to reflect increases (if any) in the Canadian cost of living.

Instead of a commitment to adjust salary for inflation, you may wish to substitute a more general commitment for annual review of the salary by the appropriate corporate personnel, and define "salary" to mean, for example, the "basic salary as adjusted from time to time to reflect increases (if any) as approved by the board of directors of the corporation."

[Bonus Remuneration. The Executive shall, in respect of each Year of Employment during the Employment Period, receive [bonus remuneration on the basis set out in Schedule 5.2/such bonus remuneration, if any, as the [board of directors of the Corporation, in its/■{OFFICER} in the ■'s{OFFICER}] sole discretion may authorize

If the corporation has an existing bonus/incentive plan, this plan should be attached as Schedule 5.2. Care should be taken to avoid agreement on any bonus arrangements that conflict with an existing plan. Care should also be taken to consider how "vacation pay" under the Ontario Employment Standards Act, 2000 will be dealt with in the context of bonuses. The Act requires that 4% of all wages, i.e. all compensation, be paid as vacation pay. In some instances, the failure to

distinguish between bonus and vacation pay on bonus may be an inadvertent breach of the Act.

4.2 Benefits.

The Corporation shall provide to the Executive, in addition to Salary and bonus remuneration, [if any,] the benefits (the "Benefits") described in Schedule 5.3. The Benefits will be provided in accordance with and subject to the terms and conditions of the applicable plan, fund or arrangement relating to such Benefits in effect from time to time. The Executive acknowledges that the Corporation may amend or terminate the Benefits from time to time as provided in the applicable plan, fund or arrangement.

4.3 Pro-Rata Entitlement in First Year of Employment.

Notwithstanding sections 4.1 and 4.2, the Basic Salary [and any bonus remuneration] shall be prorated in respect of the First Year of Employment such that the Executive shall be entitled to receive and the Corporation shall be required to pay in respect of such year only that proportion of the Basic Salary [and such bonus remuneration] that the number of days in the First Year of Employment is to 365.

4.4 Pro-Rata Entitlement in the Event of Termination.

If the Executive's employment is terminated pursuant to section 8, or if the Executive dies during the Employment Period, the Executive shall be entitled to receive in respect of the Executive's entitlement to Salary [and bonus remuneration], and the Corporation shall be required to pay in respect thereof, only that proportion of the Salary [and such bonus remuneration] in respect of the Year of Employment in which the effective date of the termination of employment or the date of death occurs that the number of days elapsed from the commencement of such Year of Employment to the effective date of termination or the date of death is to 365.

5. **Expenses**

The Corporation shall pay or reimburse the Executive for all travel and out-of-pocket expenses reasonably incurred or paid by the Executive in the performance of the Executive's duties and responsibilities upon presentation of expense statements or receipts or such other supporting documentation as the Corporation may reasonably require.

6. **Vacation**

The Employment Standards Act, 2000, requires employers to give employees at least two weeks vacation for every year worked. They must also pay vacation pay to employees at a rate of 4% of all income earned during the period for which the vacation was earned. When an employment relationship ends, the employer has an obligation to compensate the employee for unpaid vacation pay, equivalent to 4% of ***all income*** *earned in the year up to termination. Employment Standards Act, 2000, S.O. 2000, c.41, Part XI.*

The Executive shall be entitled during each Year of Employment (other than the First Year of Employment) during the Employment Period to vacation with pay of ■ weeks. [**note to draft: must be at least 2 weeks**] Vacation shall be taken by the Executive at such time as may be acceptable to the Corporation having regard to its operations [and no more than ■ weeks of vacation shall be taken consecutively]. In the event that the Executive does not take the full vacation to which the Executive is entitled in any Year of Employment, the unused vacation shall not be carried over to the next Year of Employment, but the Executive shall receive payment in lieu of the unused vacation/the Executive may, with the consent of the Chairman of the Corporation, carry over up to two weeks of unused vacation to the following Year of Employment, and otherwise will lose the entitlement to the unused portion of vacation, except any payments in respect of vacation pay required by the ESA]. Notwithstanding the foregoing, if the Executive's employment is terminated pursuant to section 8, the Executive shall not be entitled to receive any payment in lieu of any vacation to which the Executive was entitled and which had not already been taken by the Executive except any payments in respect of vacation pay required by the ESA.

7. **Car Allowance**

The Corporation shall lease a car for the Executive for the Employment Period, provided that the maximum monthly lease payments to be paid by the Corporation for the first lease period shall be $■. [Such maximum monthly payment shall be increased at the end of each ■ year lease period to reflect increases (if any) in the Canadian cost of living.] The Corporation shall pay full maintenance and operating costs.

Note that car allowances are treated as taxable income and the Employee should be reminded to keep accurate records of business use in order to justify deductions.

8. **Termination**

Termination and severance provisions can be complicated, and they often become the subject of litigation. It is a good idea to review these provision with the employee prior to executing the agreement, to ensure their enforceability at law. Particularly where the contractual terms are significantly less than the employee's common-law entitlements, Courts have tried to avoid the contractual terms.

8.1 Notice.

The Executive's employment may be terminated [prior to the end of the Term] at any time:

(a) by the Executive on ■ [weeks/months] prior notice to the Corporation;

(b) by the Corporation without prior notice and without further obligation to the Executive for reasons of Just Cause or because of the occurrence of Disability; or

The law has struggled with the issue of termination due to disability (see definition of "Disability"at section 1.1(j) above). At common law, an employment agreement was considered to be frustrated, if the illness of the employee rendered performance impossible. Courts have not established exact criteria regarding when an employment contract is considered to be frustrated. An employer can terminate an employee for frustration without notice or compensation in lieu.

Dartmouth Ferry Commission v. Marks (1904), 34 S.C.R. 366 and Yeager v. R.J. Hastings Agencies Ltd. (1984), 5 C.C.E.L. 266 (B.C.S.C.).

Note that the presence of generous short-term and long-term disability benefits may lead to an inference that the employer and employee anticipated and agreed that long periods of absences would not constitute frustration. In the Yeager decision, the court established that the court should consider the following criteria: (1) the terms of the contract, including provisions as to sick pay; (2) how long the employment was likely to last in the absence of illness; (3) the nature of the employment; (4) the nature of the illness, how long it was continued and the prospects of recovery; and (5) the period of past employment.

The law has been rendered even more complicated by the statutory duty to accommodate illness under the various human rights codes. A certain level of absenteeism may have to be tolerated by the employer in order to meet the duty to accommodate.

(c) by the Corporation, for any reason other than Just Cause or Disability (a "**Termination Without Cause**"), at any time without prior notice and without further obligation to the Executive other than those obligations of the Corporation pursuant to section 9.

8.2 [The Executive's employment shall terminate upon the death of the Executive.]

8.3 Effective Date.

The effective date on which the Executive's employment shall be terminated shall be:

(a) in the case of termination under section 8.1(a), the last day of the ■ [week/month] period referred to therein;

(b) in the case of termination under sections 8.1(b) and 8.1(c), the day the Executive is deemed, under section 18, to have received notice from the Corporation of such termination;

(c) [in the event of the death of the Executive, on the date of the Executive's death.]

8.4 [Material Change in Duties and Responsibilities.

If there has been a material change in the Executive's duties and responsibilities such that the Executive is required to assume duties that are not consistent with, or to relinquish responsibilities that are consistent with, those customarily and usually performed by [a

■/an individual having the Executive's education, training and experience], the Corporation shall be considered for all purposes of this Agreement to have terminated the Executive's employment pursuant to section 9.1.3 on the date of such material change.]

This is an effort to incorporate the common-law of constructive dismissal.

8.5 [Change of Control.

If there is a Change of Control of the Corporation the Executive may, within 30 days of learning of the Change of Control, give notice to the Corporation that the Executive is leaving the Executive's employment, and such leaving shall be treated for all purposes of this Agreement as a termination by the Corporation of the Executive's employment pursuant to section 8.1(c)]

9. Rights of Executive on Termination and Lump Sum Payment

This provisions describes the employee's right to severance on termination, sometimes known as 'payment in lieu of notice'. For obvious reasons, notice provisions are highly litigated, and must be drafted carefully to ensure that they will be enforced by a court. One of the most common pitfalls is failing to meet the statutory minimums prescribed by employment legislation (in Ontario, the Employment Standards Act, 2000). When this occurs, the notice provision will be void. The provision will also be void if it has the ***potential*** *to violate statutory minimums at some point in the future, when the employee would be entitled to more notice under the statute due to length of service. See, for example, Shore v. Ladner Downs (1998), 160 D.L.R. (4th) 76 (B.C. C.A.). Should this occur, the generous common law standards will take the place of the provision in the agreement. See Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986.*

To avoid this occurring, ensure severance payments comply with legislation, and explicitly state that the legislated minimums will apply should the contractual payment be insufficient under legislation. When referring to the legislated minimums, it is important to specify the statute which applies (see Boule v. Ericatel Ltd., [1998] B.C.J. No. 1353 (B.C.S.C)). Employment contracts should also be reviewed and amended whenever there is a change to employment standards legislation.

Employers have also successfully challenged severance provisions, where the employment contract provides for severance grossly disproportionate to the employee's length of service, the capacity of the corporation, or standards of fairness. Courts have refused to enforce such clauses on the grounds of unconscionability.

UPM-Kymmene Corp. UPM-Kymmene Miramichi Inc.[2002] OJ 2412 affirmed Feb.16, 2004, Ontario Court of Appeal, www.ontariocourts.on.ca/decisions/2004/

February/upmC38603.htm; Zielinski v. Saskatchewan (Beef Stabilization Board), [1992] 42 C.C.E.L. 24 (Sask. Ct.Q.B.), and Rooney v. Cree Lake Resources Corp., [1998], O.J. No. 3077 (Ont. Ct. J.).

9.1 Where the Executive's employment under this Agreement has been terminated by the Corporation under section 8.1(c), the Executive shall be entitled to receive from the Corporation, in addition to accrued but unpaid Salary [and bonus remuneration, if any] and any entitlement in respect of vacation as contemplated by section 6, a lump sum payment (the "**Severance Payment**") equal to $■, less any statutorily required deductions and amounts owing by the Executive to the Corporation or any of its Subsidiaries for any reason. The Severance Payment shall be paid by the Corporation to the Executive within 7 days after the end of the Employment Period, and shall be in full satisfaction of any and all entitlement that the Executive may have to notice of termination or payment in lieu of such notice, severance pay, and any other payments to which the Executive may otherwise be entitled pursuant to the ESA and any other applicable law, provided that the Severance Payment shall not be a smaller amount than that to which the Executive would otherwise be entitled under the ESA, in which case the Executive shall receive the amount payable under the ESA. The Executive acknowledges that this provision as to the Severance Payment due in the case of termination pursuant to Section 8.1(c) shall apply regardless of the years of service or any changes to compensation, title or seniority.

There are numerous possibilities of how to structure a notice provision. In this example, the parties have agreed to an immediate lump sum. The Executive would be entitled to this amount, regardless of the length of service. Note, also, that because the payment is by way of lump sum, there is a presumption that the concept of mitigation does not apply. In short, the Executive is entitled to receive these monies even if the Executive is completely successful in mitigating his or her losses from employment by finding alternate employment.

In other cases, the parties negotiate a formula that varies with the number of years of service. Note also that the notice provision specifically preserves the right to any accrued, but not yet paid, bonus. This is often a negotiated point. Many employers refuse to pay bonus (even if with respect to a previous period of service) to an employee that has resigned or is terminated on the basis that the bonus also serves as a "retention" tool and reward for loyalty. The retention aspect, of course, becomes irrelevant if the employee is being terminated.

9.2 The Executive shall cease to receive the Benefits as at the effective date of termination or such later date as may be required by the ESA. [If the terms or provisions of any fund, plan or arrangement relating to a Benefit do not permit continued coverage for such period, the Corporation shall pay to the Executive the cost that the Corporation would incur in obtaining equivalent coverage during the Severance Period if the Executive had continued to be employed in that period to a maximum of $■.]

The Employment Standards Act, 2000 requires employers to continue providing benefits to the employee for the full notice period prescribed in the statute.

9.3 [All options issued to the Executive shall terminate unexercised on the effective date of termination in accordance with the terms of the ■ Share Option Plan or such other option plan as may be in effect from time to time{CHECK THE RELEVANT PLAN TO ENSURE THAT THIS IS CONSISTENT WITH THE PLAN}.]

The issue of stock options upon termination is very controversial. Depending on the exact wording of the executive employment agreement and the stock option agreement, there may be a justification for treating the executive as an active employee during the common-law notice period. Employers usually object to treating the Executive as active during the notice period. Counsel should review the following cases:

> *Buchanan v. Geotel Communications Corporation, [2002] 18 C.C.E.L. (3d) 17; Brock v. Matthews Group Ltd. (1991), 34 C.C.E.L. 50 (Ont. C.A.); Gryva v. Moneta Porcupine Mines Ltd. (2000), 6 C.C.E.L. (3d) 43 (Ont. C.A.) and Veer v. Dover Corp. (Canada), (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.).*

9.4 The Corporation shall have no obligation to make the Severance Payment unless the Executive executes and delivers to the Corporation a release in the form attached as Schedule 10.4.

Alternative paragraph 9.1

Where the Executive's employment under this Agreement has been terminated by the Corporation under section 8.1(c), the Executive shall be entitled to receive from the Corporation in addition to accrued but unpaid Salary and vacation entitlements to the date of termination, the Executive entitlements under the Ontario *Employment Standards Act, 2000* for notice and or compensation in lieu of notice and statutory severance (where applicable). In addition, the Executive shall be entitled to receive base salary and benefits (excluding stock option, short-term and long-term disability insurance, bonus and car allowance) continuation for a period of one month for each year of service (or pro-rated for partial years of service). The total statutory notice, statutory severance and base salary payable under this paragraph shall not exceed ● months of base salary at the Executive's Base Salary at the date notice of termination is provided.

This alternate provides for an increasing amount of notice, depending on the Executive's level of service, up to a maximum. The payment is structured as ***a continuation****, not a lump sum. There is no reference to the concept of "mitigation." It is preferable to clarify the parties' intentions regarding what would happen if the Executive successfully finds another job. For a review of the case law regarding the application of the duty to mitigate in the context of a specific contractual formula regarding notice, see the discussion in Ball, Canadian Employment Law (Aurora: Canada Law Book, looseleaf), § 12:20.*

Alternative paragraph 9.1 (which contains a specific reference to mitigation)

Where the Executive's employment under this Agreement has been terminated by the Corporation under section 8.1(c), the Executive shall be entitled to receive from the Corporation, in addition to accrued but unpaid Salary and vacation entitlements to the date of termination, the Executive shall receive notice (or compensation in lieu) in accordance with the Ontario *Employment Standards Act,* 2000. In addition, the Executive shall receive base salary and benefits (excluding stock option, short-term and long-term disability insurance, bonus and car allowance) continuation for a period of ● months and an additional 1 month for each year of service (or pro-rated for partial years of service), subject to the Executive's duty to mitigate. If the Executive commences alternate employment during the contractual salary continuation period, the Executive shall immediately report such alternate employment to the Employer and provide particulars of the compensation package for such alternate employment. The Employer shall immediately pay to the Executive as a lump sum, the greater of:

(a) the difference in compensation between the Executive's base salary with Employer and the compensation received from such alternate employment; or

(b) 50% of the balance owing by way of contractual salary continuation.

This type of provision is typically. Expect tough bargaining on how much the Executive receives even if terminated shortly after the commencement of employment. Most Executives expect at least 3 months and some as much as 12 months as a basic package. This is not unfair, as many Executives are leaving secure and successful careers in large establishments.

The mitigation provision is often referred to colloquially as a "clawback." The Employer takes back or "claws back" a portion of the package if the Executive successfully mitigates. Some Employers provide "executive transition counselling" in order to assist the Executive to find alternate work. This is often provided as an incentive to agree to the clawback. Note that this clawback is much more generous to the employee than the common-law approach, which expects a dollar for dollar deduction for any monies earned by way of mitigation.

10. No Conflicting Obligations

This clause is important to include when hiring executives who have been previously employed by another corporation. In such cases, they may be bound by agreements with their former employers, including non-solicitation and confidentiality agreements. If they should breach these agreements while working for their new employer, the new employer may be held liable for the damage the breach caused the old employer. This clause may help the new employer avoid problems and potential liability. Employers should also consider adding a clause in which employees represent that they will not use proprietary information belonging to the former employer in the course of their current employment.

> *See 57134 Manitoba Ltd. v. Palmer (1989), 37 B.C.L.R. (2d) 50 (B.C. C.A.), and Clayburn Industries v. Piper (1998), 44 C.C.E.L. (2d) 129 (B.C. S.C.)*

The Executive represents and warrants that none of the negotiation, entering into or performance of this Agreement has resulted in or may result in a breach by the Executive of any agreement, duty or other obligation with or to any Person, including, without limitation, any agreement, duty or obligation not to compete with any Person or to keep confidential the Confidential Information of any Person, and there exists no agreement, duty or other obligation binding upon the Executive that conflicts with the Executive's obligations under to this Agreement.

11. Non-Competition

Non-competition clauses protect employers from direct competition from their former employees, after the employment relationship ends. This is a valid concern for employers, but it must be balanced with employees' right to earn their living in their chosen industry. As a result, courts are unlikely to enforce a non-competition clause, particularly where a simple non-solicitation clause, prohibiting the solicitation of customers and employees, would suffice to protect the employer's interest.

In considering whether to enforce a non-competition agreement, courts will consider whether the employer has a proprietary interest requiring protection and whether the geographical area and duration of the competition restriction is reasonable. The courts have also recognised that open competition is good for society.

> *Lyons v. Multari (2000), 50 O.R. (3d) 536 (Ont. C.A.), and Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535 (H.L.).*

There are, however, cases where a non-solicitation clause will not adequately protect the employer's interests.

For instance, where the employee has the primary relationship with the clients of his/her employer, there is a good chance the clients will seek out the employee after he/she has started a competing business, whether or not the employee actively solicits their patronage. In such cases, the court may enforce a reasonable non-competition agreement. Courts may take a similar approach in the context of a non-competition agreement as part of the purchase and sale of a business, where the purchase price paid by the new owner was in part for the client base of the business.

J.G. Collins Insurance Agencies v. Elsley, [1978] 2 S.C.R. 916.

The Executive shall not, either during the Employment Period or for a period of ■ thereafter, directly or indirectly, in any manner whatsoever including, without limitation, either individually, or in partnership, jointly or in conjunction with any other Person, or as employee, principal, agent, director or shareholder:

11.1 be engaged in any undertaking;

11.2 have any financial or other interest (including an interest by way of royalty or other compensation arrangements) in or in respect of the business of any Person which carries on a business; or

11.3 advise, lend money to, guarantee the debts or obligations of [or permit the use of the Executive's name or any part thereof by] any Person which carries on a business;

which is the same as or substantially similar to or which competes with or would compete with the business carried on during the Employment Period or at the end thereof, as the case may be, by the Corporation or any of the Subsidiaries in any jurisdiction in which the Corporation or any of the Subsidiaries [conducts a material portion of its Business/earns revenues amounting to ■% or greater of its total earnings].

Notwithstanding the foregoing, nothing herein shall prevent the Executive from owning not more than [five]% of the issued shares of a corporation, the shares of which are listed on a recognized stock exchange or traded in the over-the-counter market in Canada, which carries on a business which is the same as or substantially similar to or which competes with or would compete with the business of the Corporation or any of the Subsidiaries.

Additional language to Section 11.3 – this approach is not recommended and should not be used

Some lawyers use a "blue pencil" approach, i.e. setting out a decreasingly restrictive geographic zone. The term "blue pencil" is derived from the coloured pencil used by editors in the pre-computer days to mark up text before publication. This approach is not recommended in Ontario. Canadian courts have routinely rejected the "blue pencil" approach on the basis that the scope of the restriction is uncertain. The policy reason is that an employee should know exactly the scope of the restriction to which he or she is agreeing. A "blue pencil" approach might look like this:

(a) anywhere in the world; provided that if this section 11.3.(a) is determined to be unenforceable, then;

(b) anywhere in Canada; provided that if this section 11.3(b) is determined to be unenforceable, then;

(c) anywhere in Ontario; provided that if this section 11.3(c) is determined to be unenforceable; then;

(d) anywhere in Toronto, Ottawa, Hamilton, or London, Ontario.

The Executive and the Corporation agree that sections 11.3(a) to 11.3(d) above are severable and acknowledge that it is their intention that, if the restraint contemplated by section 11.3(a) above is found by a court to be unreasonable, the Executive and the Corporation shall be subject to the restraint contemplated by section 11.3(b) above and so on.

See the comments of Mr. Justice Lambert in Canadian American Financial Corp. v. King, 60 D.L.R. (4th) 203 (B.C.C.A.)

12. **No Solicitation of Customers**

The Executive shall not, either during the Employment Period or for a period of ■ thereafter, directly or indirectly, contact or solicit any designated customers or clients of the Corporation or any of the Subsidiaries for the purpose of selling to the designated customers or clients any products or services which are the same as or substantially similar to, or in any way competitive with, the products or services sold by the Corporation or any of the Subsidiaries during the Employment Period or at the end thereof, as the case may be. For the purpose of this section, a "designated customer or client " means a Person who was a customer or client of the Corporation or of any of the Subsidiaries during some part of the Employment Period.

Although non-solicitation clauses are much more likely to be enforced, counsel should be careful not to overdo it. In certain cases, it may be appropriate to tighten the definition of customer or client to include only those customers or clients with whom the Executive had dealings. In certain cases, the definition will be negotiated to include or exclude clients whom the Executive is bringing to the Corporation.

13. **No Solicitation of Employees**

The Executive shall not, either during the Employment Period or for a period of ■ thereafter, directly or indirectly, employ or retain as an independent contractor any employee [(excluding any employee in an exclusively clerical position)] of the Corporation or any of the Subsidiaries or induce or solicit, or attempt to induce, any such person to leave that person's employment.

14. **Confidentiality**

Confidentiality agreements protect the employers' interests in confidential information. Courts have found that fiduciary employees, such as managers and directors, have a duty of loyalty, good faith and must avoid a conflict of interest. These duties survive the end of the employment relationship. This obligation would incorporate a duty of confidentiality. However, not all employees fall into this category, and others have no obligation after the end of the employment relationship, beyond respect for trade secrets and for confidentiality of customer lists. This limited duty can be expanded by contract.

> *See Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, and Orlan Karigan & Associates Ltd. v. Hoffman, [2001] O.J. No. 442)*

It is a good idea to include a general confidentiality agreement in the employment contract.

Note that this confidentiality clause does not deal specifically with intellectual property interests. If the employer's business involves extensive intellectual property, it would be a good idea to have a separate intellectual property agreement to specifically address those interests. This is particularly important where the employee will be creating intellectual property, as recent court decisions have stated that absent an intention to the contrary, the employee may own the invention or development.

Comstock Canada v. Electec Ltd. (1991), 38 C.P.R. (3d) 29 (Fed. T.D).

14.1 All Confidential Information of the Corporation, the Subsidiaries, and their respective customers and clients, whether it is developed by the Executive during the Employment Period or by others employed or engaged by or associated with the Corporation or any of the Subsidiaries, is the exclusive property of the Corporation, any of the Subsidiaries or their respective customers or clients, and shall at all times be regarded, treated and protected as such, as provided in this Agreement.

14.2 As a consequence of the acquisition of Confidential Information, the Executive will occupy a position of trust and confidence with respect to the affairs and business of the Corporation, the Subsidiaries, and their customers and clients. In view of the foregoing, the Executive agrees that it is reasonable and necessary for the Executive to make the following covenants regarding the Executive's conduct during and subsequent to the Employment Period:

(a) The Executive shall not disclose Confidential Information of the Corporation, the Subsidiaries, or their respective customers or clients to any Person (other than as necessary in carrying out the Executive's duties on behalf of the Corporation) at any time during or subsequent to the Employment Period without first obtaining the Corporation's consent, and the Executive shall take all reasonable precautions to prevent inadvertent disclosure of any such Confidential Information. This prohibition includes, but is not limited to, disclosing or confirming the fact that any similarity exists between such Confidential Information and any other information.

(b) The Executive shall not use, copy, transfer or destroy any Confidential Information of the Corporation, the Subsidiaries, or their respective customers or clients (other than as necessary in carrying out the Executive's duties on behalf of the Corporation) at any time during or subsequent to the Employment Period without first obtaining the Corporation's consent, and the Executive shall take all reasonable precautions to prevent inadvertent use, copying, transfer or destruction of any such Confidential Information. This prohibition includes, but is not limited to, licensing or otherwise exploiting, directly or indirectly, any products or services which embody or are derived from such Confidential Information or exercising judgment or performing analysis based upon knowledge of such Confidential Information.

(c) Within five days after the termination of the Executive's employment by the Corporation on any basis, or of receipt by the Executive of the Corporation's written request, the Executive shall promptly deliver to the Corporation all property of or belonging to or administered by the Corporation or any of the Subsidiaries including without limitation all Confidential Information of the Corporation, the Subsidiaries and their respective customers and clients that is embodied in any way, whether physical, or in electronic, magnetic, optical or other ephemeral form, and that is in the Executive's possession or under the Executive's control.

14.3 The Executive acknowledges and agrees that the obligations under this section 15 are to remain in effect in perpetuity.

14.4 Nothing in this section 14 shall preclude the Executive from disclosing or using Confidential Information of the Corporation, the Subsidiaries, or their respective customers and clients at any time if:

(a) such Confidential Information is available to the public or in the public domain at the time of such disclosure or use, without breach of this Agreement; [or]

(b) disclosure of such Confidential Information is required to be made by any law, regulation, governmental body, or authority or by court order provided that before disclosure is made, notice of the requirement is provided to the Corporation, and to the extent possible in the circumstances, the Corporation is afforded an opportunity to dispute the requirement[./; or]

(c) [such Confidential Information becomes available to the Executive on a non-confidential basis from a source other than the Corporation, the Subsidiaries, or their respective customers or clients without breach of this Agreement.]

15. **Informing Prospective Employers**

The Executive shall inform any prospective employers of the existence of this Agreement and the obligations which it imposes upon the Executive under sections 11, 12, 13 and 14.

16. **Representations and Warranties, Covenants and Remedies**

16.1 The obligations of the Executive as set forth in sections 10, 11, 12, 13, 14 and 15 of this Agreement will be deemed to have commenced as of the date on which the Executive was first employed by the Corporation.

16.2 The Executive understands that the Corporation and the Subsidiaries have expended significant financial resources in developing their products and services and their Confidential Information. Accordingly, a breach or threatened breach by the Executive of any of sections 10, 11, 12, 13, 14 and 15 could result in unfair competition with the Corporation and could result in the Corporation suffering irreparable harm that can neither be calculated nor fully or adequately compensated by the recovery of damages alone. Accordingly, the Executive agrees that the Corporation will be entitled to interim and permanent injunctive relief, specific performance and other equitable remedies, in addition to any other relief to which the Corporation may become entitled.

16.3 The Executive acknowledges and agrees that the obligations under each of sections 10, 11, 12, 13, 14 and 15 are to remain in effect in accordance with each of their

terms and will exist and continue in full force and effect despite any breach or repudiation, or alleged breach or repudiation, of this Agreement or the Executive's employment (including, without limitation, the Executive's wrongful dismissal) by the Corporation.

17. **[Co-operation by Executive**

The Executive shall co-operate in all respects with the Corporation if the question arises as to whether a Disability has occurred. Without limiting the generality of the foregoing, the Executive shall authorize the Executive's medical doctor or other health care specialist to discuss the condition of the Executive with the Corporation and shall submit to examination by a medical doctor or other health care specialist selected by the Corporation.

A provision like this one should be used for senior executives only, whose ill-health might impair the operation of the corporation. You should expect some push back on this clause, as it may be perceived as heavy-handed and a breach of privacy. Note that most disability benefit policies include a right to insist on an Independent Medical Examination.

17.1 Policies of the Corporation

The Executive acknowledges that the Executive has been provided with copies of the policies of the Corporation relating to the conduct and performance of its employees, and has read those policies.

Get the Executive to sign an acknowledgement with respect to critical policies, such as sexual harassment, conflict of interest, insider trading and the like so that you can prove exactly which policies were provided to the Executive. Since policies are frequently revised, it may be critical to prove which version the Executive received.

18. **Notices**

Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be given by prepaid first-class mail, by facsimile or other means of electronic communication or by hand-delivery as hereinafter provided, except that any notice of termination by the Corporation under section 9 shall be hand-delivered or given by registered mail. Any such notice or other communication, if mailed by prepaid first class mail at any time

other than during a general discontinuance of postal service due to strike, lockout or otherwise, shall be deemed to have been received on the fourth Business Day after the post marked date thereof, or if mailed by registered mail, shall be deemed to have been received on the day such mail is delivered by the post office, or if sent by facsimile or other means of electronic communication, shall be deemed to have been received on the Business Day following the sending, or if delivered by hand shall be deemed to have been received at the time it is delivered to the applicable address noted below either to the individual designated below or to an individual at such address having apparent authority to accept deliveries on behalf of the addressee. Notice of change of address shall also be governed by this section. In the event of a general discontinuance of postal service due to strike, lock-out or otherwise, notices or other communications shall be delivered by hand or sent by facsimile or other means of electronic communication and shall be deemed to have been received in accordance with this section. Notices and other communications shall be addressed as follows:

(a) if to the Executive:

■ {NAME}
■ {ADDRESS}

(b) if to the Corporation:

■ {NAME}
■ {ADDRESS}

Attention: ■
Telecopier number: ■

19. **Headings**

The inclusion of headings in this Agreement is for convenience of reference only and shall not affect the construction or interpretation hereof.

20. **Invalidity of Provisions**

Each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity or unenforceability of any such provision or part thereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provision hereof.

To the extent permitted by applicable law, the parties waive any provision of law which renders any provision of this Agreement invalid or unenforceable in any respect. [The parties shall engage in good faith negotiations to replace any provision which is declared invalid or unenforceable with a valid and enforceable provision, the economic effect of which comes as close as possible to that of the invalid or unenforceable provision which it replaces.]

21. **Entire Agreement**

This Agreement constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement. This Agreement supersedes and replaces all prior agreements, if any, written or oral, with respect to the Executive's employment by the Corporation and any rights which the Executive may have by reason of any such prior agreement or by reason of the Executive's prior employment, if any, by the Corporation. There are no warranties, conditions or representations (including any that may be implied by statute) and there are no agreements between the parties in connection with the subject matter of this Agreement except as specifically set forth or referred to in this Agreement. No reliance is placed on any warranty, representation, opinion, advice or assertion of fact made either prior to, contemporaneous with, or after entering into this Agreement, or any amendment or supplement thereto, by the Corporation or its directors, officers and agents to the Executive, except to the extent that the same has been reduced to writing and included as a term of this Agreement, nor has the Executive been induced to enter into this Agreement, or any amendment or supplement, by reason of any such warranty, representation, opinion, advice or assertion of fact. Accordingly, there shall be no liability, either in tort or in contract, assessed in relation to any such representation, opinion, advice or assertion of fact, except to the extent contemplated above.

This type of clause is important to try to avoid arguments of collateral agreements or negligent misrepresentation. Nonetheless, courts often find ways to protect an employee if there appears to be some underlying unfairness at issue.

Queen v. Cognos Inc. [1993] 1 SCR 87.

22. **Waiver, Amendment**

Except as expressly provided in this Agreement, no amendment or waiver of this Agreement shall be binding unless executed in writing by the party to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided.

23. **Currency**

Except as expressly provided in this Agreement, all amounts in this Agreement are stated and shall be paid in Canadian currency.

24. ***Employers and Employees Act* Not to Apply**

The Corporation and the Executive agree that section 2 of the *Employers and Employees Act* (Ontario) shall not apply to or in respect of this Agreement or the employment of the Executive hereunder.

25. **Governing Law**

Multi-jurisdictional employers should pay particular attention to the governing law clause of the employment agreement, as there may be dispute as to which jurisdiction's law should apply. Different jurisdictions have varying levels of protections in place for employees; thus, the choice of jurisdiction may have a profound impact on the outcome of any litigation. Canadian courts have demonstrated an unwillingness to allow employers to limit their responsibilities to their employees by selecting the most favourable jurisdiction to their cause.

> *Hodnett v. Taylor Manufacturing Industries Inc. (2002), 22 C.P.C. (5th) 360 (Ont. S.C.J.), Buchanan v. Geotel Communications Corporation (2002), 18 C.C.E.L. (3d) 17 (Ont. S.C.J.), and Waddell v. Cintas Corp., [1999] B.C.J. 2404, reversed on appeal at [2001] B.C.J. 2619, and reheard at [2002] B.C.J. 1522.*

This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

26. **Counterparts**

This Agreement may be signed in counterparts and each of such counterparts shall constitute an original document and such counterparts, taken together, shall constitute one and the same instrument.

27. **Acknowledgement**

The Executive acknowledges that:

27.1 the Executive has had sufficient time to review and consider this Agreement thoroughly;

27.2 the Executive has read and understands the terms of this Agreement and the Executive's obligations hereunder; and

27.3 the Executive has been given an opportunity to obtain independent legal advice, or such other advice as the Executive may desire, concerning the interpretation and effect of this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement.

■ {CORPORATION}

By: _____

{Name: ■}

Title: ■}

_____ _____

■ {Witness} ■ {Executive}

[SCHEDULE 5.2

Bonus Remuneration]

The parties hereto agree that the Employer shall have the right, in its sole discretion, to amend, alter, change or annul ["Amendments"] this or any other bonus remuneration plan it may institute and that any such Amendments, even if they cause a significant drop in the Executive's compensation, shall not constitute wrongful or constructive dismissal.

The parties should be careful about bonus arrangements. Where an organization is heavily sales driven, bonus plans may change on an annual or even quarterly basis. Some organizations re-adjust territories or the underlying formula for bonus calculations frequently. If the employer wishes to retain flexibility, specific language should be contained to retain the right to amend bonus arrangements. The Executive should be aware of the Employer's approach to bonuses. In certain cases, it may be appropriate to negotiate guaranteed minimum bonuses for a certain period of time. This cushions the Executive from any unexpected drops in income during the initial stages of the contract.

SCHEDULE [5.3]

Description of Benefits to be Provided to the Executive

The Employer will wish to retain some flexibility with respect to benefits. In certain cases, contracts will preserve the Employer's right to amend, alter, change or annul ["Amendments"] this or any future benefit plan. Although it is outside the scope of this presentation, employee-side counsel should carefully discuss the portability of benefit plans, especially short-term and long-term disability. In certain cases, the Executive may insist on a very specific customized benefit plan (that is completely portable, regardless of the loss of income) and the Employer agrees to pay all or portion of the costs.

SCHEDULE 10.4

Form of Release

Except as regards the obligation of the Corporation to pay accrued but unpaid Salary [and bonus remuneration, if any] and to make the Severance Payment (as that term is described in the Employment Agreement between the undersigned and the Corporation dated ■), the undersigned (the "**Releasor**", which term includes the undersigned's successors, assigns, heirs, executors, estate trustees, personal representatives and administrators) in consideration of the sum of $1.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby remises, releases and forever discharges ■ (the "Corporation") and ■, ■ and ■ (collectively, the "**Subsidiaries**") and their present and former directors, officers, agents, servants and employees (the "**Releasees**", which term includes their respective successors, assigns, heirs, executors, estate trustees, personal representatives and administrators) of and from all actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims and demands whatsoever, known or unknown, suspected or unsuspected, and without limiting the generality of the foregoing, in respect of the Releasor's hiring by, employment with and termination of employment with the Corporation in respect of claims or entitlements to salary, vacation pay, leave, benefits, long-term disability benefits, expenses, overtime pay, notice of termination, pay in lieu of notice of termination, termination pay or severance pay, wrongful dismissal damages, whether arising by contract (express or implied), common law, in equity or pursuant to any statute or regulation of Canada or any province including the Ontario Human Rights Code and the *Ontario Employment Standards Act, 2000* (collectively, the "claims") which the Releasor ever had, now has or may hereafter have against the Releasees, or any of them, for or by reason of, or in any way arising out of any cause, matter or thing existing up to the date hereof relating to, or arising directly or indirectly by reason of or as a consequence of, the Releasor's employment by the Corporation or any of the Subsidiaries .

DATED: ■

Witness	■{TYPE RELEASOR'S NAME BELOW SIGNATURE}

Bibliography

Employment Agreements Bibliography

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