Non-Competes and Protections for Confidential Information and Trade Secrets: Reconsidering the Public Interest*

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Abstract

Restrictive covenants in employment agreements have become a major tool of employment and intellectual property regulation over the last three decades. While the Canadian law of restrictive covenants has undergone minimal change during this time, reforms to the law of confidential information and trade secrets and sustained scholarly critique on the adverse policy impacts of restrictive covenants invite reconsideration of the law in Canada; more specifically, in light of these developments, concerns about the public interest in non-compete clauses and agreements warrant renewed attention. The legal interests that non-compete clauses and agreements serve to protect—almost always, the maintenance of confidential information and trade secrets—already receive ample protection in the civil and criminal law. These existing laws deliver a more tailored and more appropriate scope of protection than that offered by non-competes themselves, and they generate fewer adverse effects for the public than non-competes, too. In light of these existing laws, combined with the changing nature of work and new scholarship on the adverse impacts of non-competes, this article supports proposals to attenuate the enforceability of restrictive covenants by prohibiting non-competes in Canada.

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Résumé

Au cours des trois (3) dernières décennies, les clauses restrictives incorporées dans les conventions de travail sont devenues un outil majeur de la réglementation sur l'emploi et la propriété intellectuelle. Bien que les lois canadiennes qui traitent de clauses restrictives aient fait l'objet de très peu de changements pendant cette période, les réformes des lois sur les renseignements personnels et les secrets commerciaux ainsi que la critique soutenue des universitaires sur les impacts politiques néfastes des clauses restrictives invitent à réexaminer les lois canadiennes, plus particulièrement en raison de ces développements et des préoccupations d'intérêt public dans les clauses et les conventions de non-concurrence qui justifient une attention renouvelée. Les intérêts juridiques que les clauses et les conventions de non-concurrences visent à protéger - presque toujours le maintien des renseignements personnels et des secrets commerciaux - bénéficient déjà d'une ample protection dans le droit civil et criminel. Ces lois en vigueur offrent une protection dont la portée est plus personnalisée et plus appropriée que celle qui est fournie par les conventions de non-concurrence elles-mêmes, en plus de générer moins d'effets néfastes pour la population que les conventions de non-concurrence. Compte tenu de ces lois en vigueur, ainsi que de la nature changeante des travaux et de cette nouvelle recherche sur les impacts néfastes des conventions de non-concurrence, le présent article appuie les propositions visant à atténuer l'applicabilité des clauses restrictives en interdisant les conventions de non-concurrence au Canada.

1.0 Introduction

In the employment setting, restrictive covenants—a catch-all term[1] for various types of express agreements that prohibit competition against a certain party, prevent disclosure of specific information, and/or ban solicitation of an entity's employees or customers—are often underestimated; in fact, they are a significant form of employment and intellectual property (IP) regulation.[2] Among the various types of restrictive covenants that exist, non-competes are generally viewed as the most "drastic,"[3] since they limit an individual's ability to engage in employment. Usually placed into an employment agreement as a provision signed at the outset of

[1] As a taxonomical matter, this article discusses restrictive covenants rather than restraints on trade, because the latter is a concept at common law. See *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 15 [*Shafron*].

[2] For example, Graves argues that covenants not to compete, in particular, remain "strangely under-analyzed, especially as a category of intellectual property regulation": Charles Tait Graves, "Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation" (2011) 3:2 Hastings Sci & Tech LJ 69 at 72. Fisk notes that the struggle of employers to exercise control of their employees has been a struggle for generations, whereas it was once "considered a branch of the law of unfair competition or, occasionally, the law of master and servant," while it is now "regarded as fitting in the domain of intellectual property": Catherine L Fisk, "Knowledge Work: New Metaphors for the New Economy" (2005) 80 Chicago-Kent L Rev 839 at 855 [Fisk, "Knowledge Work"].

[3] *Lyons v Multari*, 2000 CanLII 16851 (ONCA) at para 31.

employment, if not shortly thereafter,[4] they can act as a sharp brake on the mobility of labour.[5] In recent decades, they have become "a standard requirement in our contemporary labour market"[6] and a major tool for commercial entities to exert control over individuals. They are almost always invoked under the guise of maintaining confidential information and trade secrets.[7]

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[4] Daniel P O'Gorman, "Contract Theory and Some Realism About Employee Covenant Not to Compete Cases" (2012) 65 SMU L Rev 145 at 178. In the United States, empirical research has shown that non-competes are used in an estimated 70 percent of high-level employees' contracts. See Yun Lou, Rencheng Wang & Yi Zhou, "Non-Competes, Career Concerns, and Debt Covenants" (July 2017) at 2, online: *SSRN* <https://ssrn.com/abstract=3054876>. In the United States, the signing of such agreements after the start of employment has developed into a problem such that several jurisdictions, including Minnesota, North Carolina, Pennsylvania, and South Carolina, have passed laws requiring new consideration if such an obligation is imposed on an employee after the start of employment. See Orly Lobel, "Enforceability TBD: From Status to Contract in Intellectual Property Law" (2016) 96 BUL Rev 869 at 878. Generally speaking, if the provision is proposed in the employment letter, then the promise of employment serves as consideration. In Ontario, "continued employment without more" will generally not serve as consideration, but if combined with "the continued forbearing of the employer from exercising its contractual right to dismiss" an employee, then adequate consideration may be found—a standard that is highly favourable to employers: *Techform Products Ltd v Wolda*, 2001 CanLII 8604 (ONCA) at para 24.

[5] Ronald J Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete" (1999) 74 NYU L Rev 575 at 603.

[6] Orly Lobel, "The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property" (2015) 93 Tex L Rev 789 at 824 [Lobel, "The New Cognitive Property"]. Once a feature of managerial employee contracts exclusively, today restrictive covenants are a regular feature of the labour market for employees of all levels. As Lobel explains, "Workers ranging from event planners to chefs, from investment-fund managers to yoga instructors, from physicians to camp counselors are all increasingly required to sign them": *ibid*. This scholarship focuses on the American setting, however, and further empirical scholarship is needed in Canada to provide a clear sense of the use of non-competes in Canada. Nonetheless, for anecdotal evidence, see Christine Dobby, "Sign Here: Why the Increasing Use of Non-Compete Clauses Is Bad for Employees, and the Economy," *The Globe and Mail* (27 September 2019).

[7] Brait and Pollock note that even in the absence of a written agreement, protection for confidential information and trade secrets will continue to exist for information susceptible to that definition. They write: "The advantage of a written agreement is that an employer can expand these rights to include inventions and other developments created

Starting in the late 1990s, legal scholarship, particularly in the United States, began to turn its attention toward the adverse effects of non-compete agreements. This scholarship addressed the causal links between widespread recourse to non-competes and innovation in certain technology regions,[8] often arguing that non-competes, by serving as locks on employee mobility, reduced knowledge spillovers necessary for the creation of agglomeration economies.[9] More recently,

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outside of the regular course of employment": Richard Brait & Bruce Pollock, "Confidentiality, Intellectual Property and Competitive Risk in the Employment Relationship" (2004) 83:3 Can Bar Rev 585 at 600 [Brait & Pollock, "Confidentiality, Intellectual Property and Competitive Risk"]. As the authors note, restrictive covenants that pertain to the protection of confidential information are also "[t]he least problematic" to obtain: *ibid* at 607. Richey and Bosik also describe restrictive covenants as a form of "additional protection to an employer beyond the scope of trade secrets law": P Jerome Richey & Margaret J Bosik, "Trade Secrets and Restrictive Covenants" (1988) 4:1 Lab Lawyer 21 at 27.

[8] Following the publication of Saxenian's *Regional Advantage: Culture and Competition in Silicon Valley and Route 128* (Cambridge, MA: Harvard University Press, 1996), scholarly attention began to turn toward the role of these laws on fostering innovation. This was followed by Gilson's "The Legal Infrastructure of High Technology Industrial Districts," *supra* note 5, which centralized the role of the legal infrastructure. Gilson argued that the rules governing the enforceability of non-compete agreements was a "causal antecedent" to the business culture in Silicon Valley and along Route 128 in Boston as described by Saxenian: *ibid* at 578. For Gilson, the fact that Route 128's technology district emerged from publicly funded research being channelled into a region with two world-class universities during the Second World War and the Cold War meant there was not much use of restrictive covenants (even though Massachusetts law was tolerant of such agreements): *ibid* at 605–607. As for California, its outright ban on restraints on trade was "the initial condition" for Silicon Valley's second-stage agglomeration economy: *ibid* at 607–609. Marx et al, by examining a policy reversal on non-compete agreements in Michigan, which went from prohibitory to tolerant in its stance following a law reform project in 1985, argue that jurisdictions tolerating such agreements have experienced a "brain drain" of talent away toward jurisdictions that prohibit them. In addition, the Michigan law resulted in a reduction by 34 percent of the movement of inventor employees. See Matt Marx, Jasjit Singh & Lee Fleming, "Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain" (2015) 44:2 Research Pol'y 394.

[9] Gilson, *supra* note 5 at 595: "Much of a high technology firm's intellectual property is informal in character, embedded in the human capital of its employees … [it] can be most effectively transferred through proximity and, in particular, by an employee changing jobs. Thus, employee mobility is the mechanism by which the required knowledge spillover occurs." See also *ibid* at 626: "[T]he interemployer spillover of proprietary tacit knowledge …

there has been a great deal of media attention on the negative impact of non-competes,[10] especially for unskilled, low-wage workers.[11] Although some US states have had long-standing prohibitions on such agreements,[12] many others have recently implemented changes to this area

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allows Silicon Valley to reset its product cycle repeatedly." The concentration of talented employees in a given region—labour market pooling—provides better access to talent for employees. See Matt Marx & Lee Fleming, "Non-Compete Agreements: Barriers to Entry … and Exit?" (2012) 12:1 Innovation Pol'y & Economy 39 at 54 [Marx & Fleming, "Non-Compete Agreements"]. Conversely, the movement of tacit knowledge can also be seen as barring a company's ability to access that asset once the departed employee has gone. See Sampsa Samila & Olav Sorenson, "Noncompete Covenants: Incentives to Innovate or Impediments to Growth" (2011) 57:3 Mgmt Sci 425 at 427.

[10] Christine Dobby, "Sign Here: Why the Increasing Use of Non-Compete Clauses Is Bad for Employees, and the Economy," *The Globe and Mail* (27 September 2019), online: <https://www.theglobeandmail.com/business/article-sign-here-increasing-use-of-non-compete-clauses-in-employment/>.

[11] One notable article in the *New York Times* from 2014 drew attention to the phenomenon and went viral: Neil Irwin, "When the Guy Making Your Sandwich Has a Noncompete Clause," *New York Times* (14 October 2014). The article describes the phenomenon of Jimmy John's, a chain of 2,000 sandwich shops, utilizing non-competes to prevent employees from working at other sandwich shops. After the practice garnered scrutiny from the New York attorney general, the chain dropped the provisions from its contracts. See Sarah Whitten, "Jimmy John's Drops Noncompete Clauses Following Settlement," *CNBC* (22 June 2016). Another notable article from this same period appeared in the *Washington Post*. See Lydia DePillis, "The Rise of the Non-Compete Agreement, from Tech Workers to Sandwich Makers," *Washington Post* (21 February 2016). Since then, more popular media attention has followed, with *Vox* stating that a general prohibition—as applied in California—has been the "secret weapon" of the state's economic and innovation success. Timothy B Lee, "A Little-Known California Law Is Silicon Valley's Secret Weapon," *Vox* (13 February 2018), online: <https://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes>. Similarly, *TechCrunch* has qualified the state's unique policy as the reason "Silicon Valley keeps winning." Chris Devore, "Silicon Valley Keeps Winning Because Non-Competes Limit Innovation," *TechCrunch* (18 February 2016), online: <https://techcrunch.com/2016/02/18/silicon-valley-keeps-winning-because-non-competes-limit-innovation/>.

[12] For example, California, Oklahoma, and North Dakota have long-standing statutes that ban restraints on trade. See Cal Bus & Prof Code § 16600, 15 OK Stat § 15-219B, and ND Cent Code § 9-08-06. These are generally focused only on employer–employee restraints and do not pertain to the sale of a business (that is, commercial restrictive covenants), which courts approach with an attitude matching that of the Supreme Court of Canada in *Payette v Guay inc*, 2013 SCC 45, [2013] 3 SCR 95 at para 57 [*Payette*].

of law in direct response to this commentary.[13] In 2020, Joe Biden even campaigned on a promise to eliminate nearly all non-compete agreements.[14] President Obama proposed a similar policy.[15] In addition to non-competes, the use of non-disclosure agreements has attracted renewed scrutiny in recent years, in particular in the context of discrimination and harassment lawsuits (especially sexual harassment lawsuits).[16] All of this attention is unsurprising, in light of

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[13] For example, see the recent legislative developments in Illinois (820 ILCS 90; 820 ILCS 17/10), Nevada (Nev Rev Stat § 612.195), Oregon (Or Rev Stat § 653.295), and Washington, DC (DC Law 23-209, online: <https://code.dccouncil.us/us/dc/council/laws/23-209>). See also "Tightening Restrictions on Noncompetes," *Morrison & Foerster Employment Law Commentary* (29 July 29, 2019), online: <https://elc.mofo.com/topics/Tightening-Restrictions-on-Noncompetes.html>. Among the states that have narrowed their non-compete laws, Idaho, Illinois, Nevada, New Mexico, Massachusetts, and Washington have made moves in this direction. The Morrison & Foerster article notes that the hostility toward non-competes is continuing, especially for non-competes governing gig workers and hourly wage employees whose employment conditions fall under the *Fair Labor Standards Act*. The District of Columbia recently enacted DC Act 23-563, which prohibits non-compete agreements signed after the date of coming into force of the Act. The Act also subjects employers found in violation of the status to administrative penalties ranging from $350 to $3,000 for each violation of the law. Perhaps most incredibly, the law also requires employers to provide notice to employees of the statute's coming into force by providing the following written notice: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."

[14] In campaign literature ("The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions"), the Biden campaign promised to "[e]liminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers." The campaign literature noted that nearly 40 percent of American workers will be forced to sign such an agreement at some point in their career.

[15] In a policy statement released in 2016, the Obama administration noted: "Most workers should not be covered by a non-compete agreement. Though each state faces different circumstances, we believe that employers have more targeted means to protect their interests, that non-compete agreements should be the exception rather than the rule, and that there is gross overuse of non-compete clauses today." See White House, Policy Statement, "State Call to Action on Non-Compete Agreements" (25 October 2016).

[16] As a method of dispute resolution, many settlements require parties to maintain confidentiality about the terms of the settlement. Variously called non-disclosure provisions or non-disparagement provisions, these clauses have the

the overall shift toward "shorter-term, non-union" employment that has marked the contemporary job market,[17] even while the knowledge possessed by employees remains a key asset for many employers (if not *the* key asset), and even as disputes over human capital continue to arise.[18] Given all of this attention, it is unsurprising that some in Canada have called for revisiting the law.[19] Yet, unlike American scholars and politicians, Canadian commentators have

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effect of restricting a party from uttering truthful statements in public concerning the details of the settlement. The use of such agreements "to suppress allegations of sexual harassment is common in Canada," notes one commentator, who says that law societies have been quiet about their members' use of such agreements in sexual harassment matters. See Hamilton Gay, "#MeToo and Restricting the Use of Non-Disclosure Agreements in Canada," *CBA National* (28 March 2019). In the United States, the topic gained a certain notoriety after presidential candidate Michael Bloomberg attracted scrutiny for the use of such agreements at his company, in particular after the issue was raised by fellow candidate Elizabeth Warren. See Sasha Pezenik & Tonya Simpson, "Bloomberg Digs In—Doesn't Want Female Former Employees Freed from NDAs," *ABA News* (15 January 2020).

[17] See Graves, *supra* note 2 at 72. Graves argues that restrictive covenants have historically been viewed as a province of employment law, rather than intellectual property law, and that their common acceptance in many jurisdictions has created an aura of "settled" law around the subject: *ibid* at 73. Stone has also noted that the historical employment relationship "gave the worker an implicit promise of life job security and opportunities for promotion along clearly defined job ladders," which have disappeared in the contemporary era (even if they were never universal in the first place and excluded many groups such as women). See Katherine VW Stone, "Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace" (2002) 34 Conn L Rev 721 at 725 [Stone, "Knowledge at Work"]. Tenure at jobs declined steeply in the latter half of the 20th century: *ibid* at 726–727. For a summary of literature regarding the steep decline in job tenure, see Katherine VW Stone, "Human Capital and Employee Mobility" (2002) 34 Conn L Rev 1233 at 1242.

[18] Dale Neef, "Introduction—Rethinking Economics in the Knowledge-Based Economy" in Dale Neef, G Anthony Siesfeld & Jacquelyn Cefola, eds, *The Economic Impact of Knowledge* (Boston: Butterworth-Heinemann, 1998) at 3–4. Lou et al have also shown that litigation concerning non-compete agreements is on the rise, with "the number of U.S. court decisions pertaining to non-compete clauses [rising] 61% from 2002 to 2012": Yun Lou, Rencheng Wang & Yi Zhou, "Non-Competes, Career Concerns, and Debt Covenants" (July 2017) at 8, online: *SSRN* <https://ssrn.com/abstract=3054876>.

[19] See Connor Bildfell, "The Case for Broadening the Ambit of Restraint of Trade and for Focusing on Reasonableness" (2016) 53:3 Alta L Rev 681. Bildfell argues that the current formulation of the reasonableness analysis is adequate, and he calls for modulating the assessment of reasonableness through a proportionality analysis

balked at or ignored the idea of banning non-compete agreements.[20] This is surprising. Although the Canadian context surrounding these agreements differs from the American one,[21] the American experience is not entirely dissimilar to the Canadian one and is replete with instructive lessons.

By bringing existing American scholarship into conversation with the law of restrictive covenants in Canada, this article contextualizes the Canadian law of restrictive covenants. While

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akin to the *Oakes* test (derived from *R v Oakes*, [1986] 1 SCR 103). See also Jason Mercier, "Perdu dans le labyrinthe et retrouvé dans le jardin : La problématique des clauses restrictives dans les contrats d'emploi dans les provinces de common law au Canada" (2016) 47 :1 Ottawa L Rev 179 [Mercier, "Perdu dans le labyrinthe"]. Mercier deems the current state of the common law as "un régime défectueux qui crée de l'incertitude et de la confusion dans les relations d'emploi" [a flawed regime that creates uncertainty and confusion in employment relationships] and calls for re-evaluating the applicable analysis: *ibid* at 220. As discussed below in this article, Mercier calls for the use of "garden leave" provisions as the appropriate solution to this uncertainty in the law.

[20] See Mercier, "Perdu dans le labyrinth," *supra* note 19 at 219–220: "Une loi qui éliminerait les clauses restrictives au profit des clauses de congé jardinage aurait comme effet d'ajouter de la certitude dans le monde des affaires canadien. Toutefois, compte tenu des implications politiques, il est préférable de laisser le processus judiciaire suivre son cours et d'appliquer ces clauses selon les principes de common law qui existent déjà dans d'autres juridictions." [A law that would eliminate restrictive covenants in favour of garden leave clauses would add certainty to the Canadian business community. However, given the political implications, it is better to let the judicial process run its course and apply these clauses according to common-law principles that already exist in other jurisdictions.] See also Dobby, *supra* note 10.

[21] The relative lack of a social safety net in the United States is arguably a factor in the increased American (compared to Canadian) hostility toward restrictive covenants, and specifically non-competition agreements, since benefits like health care are often tied to employment, even if employees are able to continue these benefits through the *Consolidated Omnibus Budget Reconciliation Act* (COBRA) and state-equivalent COBRA legislation, which allows workers who lose their health benefits following the termination of employment to continue them for a period of time thereafter (usually at cost to the employee, up to 102 percent of the cost). In addition, the country's more recent historical connection to slavery is noteworthy. Greg T Lembrich, "Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants" (2002) 102:8 Colum L Rev 2291 at 2299: "Against the historical backdrop of slavery, indentured servitude, and the Black Codes, courts have been especially wary of issuing orders that seem to conflict with free labor ideology."

the Canadian law of restrictive covenants has undergone minimal change during this time, reforms to the law of confidential information and trade secrets and sustained scholarly critique on the adverse policy impacts of restrictive covenants invite reconsideration of the law in Canada; more specifically, in light of these developments, concerns about the public interest in non-compete clauses and agreements warrant renewed attention. The legal interests that non-compete clauses and agreements serve to protect—almost always, the maintenance of confidential information and trade secrets—already receive ample protection in the civil and criminal law. These existing laws deliver a more tailored and more appropriate scope of protection than that offered by non-competes themselves, and they generate fewer adverse effects for the public than non-competes, too. In light of these existing laws, combined with the changing nature of work and new scholarship on the adverse impacts of non-competes, this article supports proposals to attenuate the enforceability of restrictive covenants by prohibiting non-competes in Canada.

2.0 Restrictive Covenants in Canada

The law of restrictive covenants seeks to balance two competing ends: encouraging economic freedom and respecting freedom to contract.[22] Uncontroversially, employees should be free to move in the economy and change jobs; however, they also have a right to enter into contracts that impose restrictions on their own mobility.[23] Even if this latter freedom is exercised by

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[22] *Elsley v JG Collins Ins Agencies*, [1978] 2 SCR 916 at 923 [*Elsley*].

[23] See *Barton Insurance Brokers Ltd v Irwin et al*, 1999 BCCA 73 at para 39: "[T]he general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, … the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment." See also IGC Stratton, "Restraint of Trade During and on the

individuals, it is most coveted by commercial entities seeking to restrain the conduct of competitors. In Canada, restrictive covenants are governed by the common law in every province except Quebec, where they are regulated by the *Civil Code*. Generally speaking, "[t]he common law has always been jealous of any interference with trade."[24] As recently as the 17th century, the approach of the common law was to deem restraints on trade—the common law's encompassing term for restrictive covenants—as prima facie void.[25] At the heart of the law, this presumption remains operative today.[26] A departure from this general rule, however, was

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Termination of a Contract of Employment" (1997) 12:1 Denning LJ 107. A more visceral description of this balancing is offered by Fisk, who refers to it as a "conflict between employee freedom and corporate control": Catherine L Fisk, "Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920" (2001) 52 Hastings LJ 441 at 442 [Fisk, "Working Knowledge"].

[24] Lord Macnaghten in *Trego and Smith v Hunt*, [1896] AC 7, cited in *RL Crain Limited v Ashton and Ashton Press Manufacturing Company Limited*, [1949] OJ No 500, [1950] OR 62, [1950] 1 DLR 601, 11 CPR 53, 9 Fox Pat C 201, 1949 CarswellOnt 87.

[25] For an extended discussion, see *Nordenfelt*, *infra* note 26 at 553: "The rule of policy, as originally understood and administered, struck all restraints, whether partial or general." See also *Jiffy Foods Ltd v Chomski*, [1973] OJ No 2116 at para 11, [1973] 3 OR 955, 38 DLR (3d) 675, 10 CPR (2d) 181: "Because of the general principle of the common law that a man is entitled to exercise any lawful trade or calling, contracts in restraint of trade are prima facie void."

[26] See *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*, [1894] AC 535 at 571 [*Nordenfelt*]: "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with 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." There is a small collection of early common-law cases upholding the rule that any restraint on trade, at any time, was void. The most notable among these cases is *Dyer's Case* (1414), YB 2 Hen 5, folio 5, Michaelmas plate 26. For a discussion of early English cases treating general restraints as void, regardless of their narrowness or generality, see Charles E Carpenter, "The Validity of Contracts Not to Compete" (1928) 76 U Pa L Rev 244. Carpenter suggests that the early resistance to the law may have been a result of the decimation of the English population following the Black Death between 1346 and 1353, which created a labour shortage. He points to the passage of the *Statute of Labourers* (also referred to as the *Ordinance of Labourers*), which set wages at pre-pandemic levels and inhibited certain movement—a measure that was resisted in the Peasants' Revolt of 1381. See "Statute of Labourers," *Oxford Reference*, online:

enunciated in *Mitchel v Reynolds* (1711),[27] which drew a distinction between "general restraints," which continued to be void, and "particular restraints," which were deemed permissible with reasonable consideration.[28] *Mitchel* provided the theoretical basis for the common law's modern restraint of trade doctrine in holding "that wherever a sufficient consideration appears to make it proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained."[29] The exception for particular restraints was further modified by *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* (1894), which revised this test to permit restraints on trade with "sufficient justification"[30] when the agreement was "reasonable"[31] and "in no way injurious to the public."[32] A test of

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<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100046308>. Notably, even the early law contained exceptions for restraints that involved the sale of property or a business. See Carpenter, *supra* at 245. See also Harlan M Blake, "Employee Agreements Not to Compete" (1960) 73:4 Harv L Rev 625 at 625–638. In the wake of *Mitchel v Reynolds*, *infra* note 28, the rule was amended such that restraints on trade were divisible into camps of general restraints (always void) and particular restraints (permissible in given circumstances). The clearest enunciation of this rule in modern case law remains *Nordenfelt*, *supra* at 571: "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with 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*" [emphasis added].

[27] For a discussion of the importance of this case from a historical perspective, see Blake, *supra* note 26. Blake notes that "[f]or 250 years the most cited case on common-law restraints of trade has been *Mitchel v Reynolds*": *ibid* at 629.

[28] *Mitchel v Reynolds* (1711), 24 Eng Rep 347 at 349 (QB): "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not. … Particular restraints are with consideration."

[29] *Ibid* at 348. See Carpenter, *supra* note 26 at 248–249. See also Blake, *supra* note 26 at 631.

[30] *Nordenfelt*, *supra* note 26 at 565.

[31] *Ibid*.

[32] *Ibid*.

reasonableness of the agreement between the parties and with regard to the public interest became the cornerstone of the restrictive covenant analysis.[33] Reasonableness looks at several factors, including the existence of a legitimate proprietary interest; temporal and spatial aspects of the covenant; and an assessment of whether the covenant is "against competition generally."[34] The onus of demonstrating reasonableness falls on the party seeking enforcement of the covenant (that is, often the employer).[35]

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[33] *Elsley*, *supra* note 22 at 923: "A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest." *Elsley* remains the clarion standard for restrictive covenants, with its calls to "lift" them "out of an employment context and examine [them] in a disembodied manner, as if [they] were some strange scientific specimen under microscopic scrutiny": *ibid* at 923–924. See also *Shafron*, *supra* note 1 at para 17: "[D]espite the presumption that restrictive covenants are *prima facie* unenforceable, a reasonable restrictive covenant will be upheld." The *Restatement (Second) of the Law of Contracts* takes a somewhat inverse formulation, noting of restraints on trade that "[s]uch a promise is not … unenforceable unless the restraint that it imposes is unreasonably detrimental to the smooth operation of a freely competitive private economy": *Restatement (Second) of the Law of Contracts* (Philadelphia: American Law Institute, 1981) § 188, comment a. See also *HL Staebler Company Limited v Allan*, 2008 ONCA 576 at para 36 [*HL Staebler*].

[34] See *Elsley*, *supra* note 22 at 925. See also *Setym International inc c Belout*, 2001 CanLII 24941 (QCCS) at para 41 [*Setym International*]: "[C]es clauses ne seront jugées valides que si elles sont limitées dans le temps, dans l'espace et quant au genre de travail à ce qui est nécessaire pour protéger les intérêts légitimes de l'employeur" [these clauses will be considered valid only if they are limited in time, space, and kind of work to what is necessary to protect the legitimate interests of the employer]. The Court of Appeal for Alberta has also opined that "[i]f it is impossible to predict when you are breaching a restrictive covenant, it is in essence unreasonable": *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240 at para 19 [*Globex*].

[35] At common law, "[t]he onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms": *Shafron*, *supra* note 1 at para 27. For the civil-law rule, see *Setym International*, *supra* note 34 at para 41. See also *Payette*, *supra* note 12 at para 57. Restrictive covenants in the employment context should not be confused with restrictive covenants in a commercial context, where the presumption is one of validity. *Ibid* at para 58: "[T]he criteria for analyzing restrictive covenants in a contract for the sale of assets will be less demanding and … the basis for finding such covenants to be reasonable will be much broader in the commercial context than in the context of a contract of employment. I am therefore of the opinion that, in the commercial context, a restrictive

The civil law explicitly recognizes non-competition agreements[36] "for a reasonable time after the contract terminates,"[37] but does not mention non-solicitation agreements[38] (although there is debate as to whether the provisions concerning the duty of loyalty encompass the latter).[39] While some courts in Quebec have referred to restrictive covenants as "restraints of trade"—importing the taxonomy of the common law—the term is not endemic to the civil law.[40] The general rule is set forth in article 2089 of the *Civil Code*, which provides that such agreements are permissible when they have the requisite "express terms"[41] and do not lack specificity.[42] In addition, a

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covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable." This is generally the trend in most other jurisdictions that permit them, too. See O'Gorman, *supra* note 4 at 184.

[36] *Civil Code of Québec*, CQLR c CCQ-1991, art 2089 [*Civil Code*].

[37] *Ibid*, art 2088.

[38] This term does not appear in the *Civil Code*.

[39] For example, Justice Bich of the Court of Appeal for Quebec has noted that the jurisprudence tends to view article 2088 of the *Civil Code* as prohibiting solicitation of clientele through the use of confidential documents or information or tactics of denigration or trumpeting falsehoods and deceit or the solicitation of employees ("solliciter de façon insistante et systématique ses ex-collègues de travail et tenter de les convaincre de quitter l'employeur"): *Concentrés scientifiques Bélisle inc c Lyrco Nutrition inc*, 2007 QCCA 676 at para 42 [*Concentrés scientifiques Bélisle*]. Some have maintained that non-solicitation is articulable as an activity occurring within non-competition itself. One trial court judge recently wrote that the court deems soliciting clientele of a former employer as a form of competition ["Le Tribunal estime en effet que solliciter la clientèle de son ancien employeur c'est lui faire concurrence"]: *9112-3158 Québec inc c Brochu*, 2020 QCCS 145 at para 13.

[40] See *Copiscope inc v TRM Copy Centers (Canada) Ltd*, 1998 CanLII 12603 (QCCA), citing English jurisprudence such as *Nordenfelt*, *supra note* 26.

[41] *Civil Code*, *supra* note 36, art 2089.

[42] The "character of reasonableness of a non-competition clause flows from its drafting," and whether it provides sufficient clarity. See *Entreprises Première générale (Québec) inc c 3501663 Canada inc*, 2000 CanLII 18126 (QCCS) at para 22. See the discussion by Justice Deslisle in *Drouin v Surplec Inc*, where he cited doctrine noting the requirement for clear express terms "a pour conséquence que les clauses de non-concurrence que l'on qualifie parfois de « clauses-escalier », de « clauses par paliers » ou de « clauses-entonnoirs » devraient être considérées

broader and less well-defined set of responsibilities incumbent on an employee are channelled through article 2088 of the *Civil Code*, which states:

> The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work.
>
> These obligations continue for a reasonable time after the contract terminates and permanently where the information concerns the reputation and privacy of others.[43]

The contours of the duties set forth in this article are such that even when an employee competes against a former employer, this competition "must remain loyal and respect the principle of good faith."[44] Not unlike the notion of a fiduciary in the common law, the civil law perceives this duty as tracking the status of a given employee and considers whether the employee's position was "key and principal."[45] Mirroring the common law, the *Civil Code* places "[t]he burden of proof that the stipulation is valid on the employer."[46]

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comme nulles *ab initio*" [has the consequence that non-competition clauses, which are sometimes referred to as "staircase clauses," "step-by-step clauses," or "funnel clauses," should be regarded as void *ab initio*] [original citation omitted]: *Drouin v Surplec Inc*, 2004 CanLII 20120 (QCCA) at para 46.

[43] *Civil Code*, *supra note* 36, art 2089.

[44] *Concentrés scientifiques Bélisle*, *supra* note 39 at para 42.

[45] *Ross and Anglin Ltd c Thompson*, 2012 QCCS 2529 at para 146. This is not unlike the duty that a director may owe a legal person, per *Civil Code*, *supra note* 36, art 322. Le Breton-Prévost notes that the duty of loyalty in Quebec's civil law is much influenced by corporate notions of the fiduciary, even though it is "pervaded" with the standards of good faith that circulate through the civil law's conception of contractual and extracontractual obligations. See Caroline Le Breton-Prévost, "Loyalty in Québec Private Law" (2016) 9:1 J Civ L Stud 329..

[46] *Civil Code*, *supra note* 36, art 2089.

Comparatively speaking, there is general harmony in the approach between the two traditions.[47] In both traditions, theories of contract govern their formation, enforceability, and the logic behind repudiation/resiliation that can render them void.[48] Practically speaking, in both traditions, ambiguity can be viewed as the "main difficulty"[49] in restrictive covenants. The stakes of this analysis are high: restrictive covenants containing ambiguous or unreasonable provisions cannot be narrowed by notional severance and can be repaired only by blue-pencil severance.[50] (Corporate attorneys and defendant-side employment lawyers have, accordingly, demonstrated great inventiveness in the drafting of such agreements).[51] Because restrictive covenants are tested

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[47] The civil law's approach to restrictive covenants has been deemed by some as "virtually identical to those found in the rest of Canada." See generally Emond Harnden, "Quebec Court Strikes Down Non-Competition Clause" (1 November 2005), online: <https://www.ehlaw.ca/nov05-positron/>.

[48] This view rests on the principle of repudiation elucidated in the House of Lords case *General Billposting Co Ltd v Atkinson*, [1909] AC 118, 46 SLR 701, where Lord Collins held that once the "conduct of the [employer] evince[s] an intention no longer to be bound by contract," then the company is no longer able to enforce its restrictive covenant on the employee. See also *Globex*, *supra* note 34 at paras 42–72. For the civil-law approach, see *Civil Code*, *supra note* 36, art 2085. See also *FLS Transportation Services Limited c Fuze Logistic Services Inc*, 2020 QCCS 2604 at para 13: "Under Quebec law, more specifically under article 2095 of the *Civil Code of Québec*, the enforceability of otherwise valid restrictive covenants can be compromised if the employer terminates an employee without a serious reason or … if he himself has given the employee a serious reason to leave. This is true not only of non-competition, but also of non-solicitation clauses." See also *TBM Holdco ltée c Desrosiers*, 2014 QCCS 5997 at para 44; and *Corporation Xprima.com c Goudreau*, 2012 QCCS 5889 at paras 26–27.

[49] *Shafron*, *supra* note 1 at para 27.

[50] *Ibid*.

[51] One notable example is the use of the use of "descending scope" or "waterfall" clauses (that is, clauses that identify tiers of restrictions, in the hope that severance will only remove the broadest of these identifiers). See Shafik Bhalloo & Alisha Parma, "Restrictive Covenants: When the Honeymoon Ends" (2016) 53:3 Alta L Rev 643. See also Jason Janson & Sandra Cohen, "Restrictive Covenants in Employment Contracts: Canadian Approach," Osler Hoskin & Harcourt LLP, online: <https://www.osler.com/uploadedfiles/our_people/profiles/h/restrictive%20covenants%20in%20employment%20contracts.pdf>. However, at least one judge has found that "[a] descending scope covenant is always ambiguous":

and reviewed only by courts, the utilization of unenforceable restrictive covenants whose limits are never tested or reviewed poses a challenge to the law in both traditions, since the widespread use of restrictive covenants that are never tested but otherwise unenforceable risks cognizing obligations in the minds of employees that may, in fact, not be lawful. This is a challenge that neither tradition can easily address.

3.0 Alternatives Modes of Protection

As the saying about fair play goes, players should tackle the ball, not the man. In the context of restrictive covenants, the legal mechanism itself and the interests it purports to protect are often conflated. Restrictive covenants are almost always justified as a way of protecting confidential information and trade secrets; but rather than protect that subject matter directly, restrictive covenants regulate the conduct of individuals. In the process, they supplement separate and existing law that already protects confidential information and trade secrets.[52] The presence or absence of restrictive covenants does not eliminate existing duties to safeguard confidential information and trade secrets during and after employment, and it does not impact other obligations that exist in the law or that remain coded into the employment relationship in the absence of such agreements.[53] Since the protection of confidential information and trade secrets

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Bonazza v Forensic Investigations Canada Inc, 2009 CanLII 32268 (ONSC) at para 14 (upholding an arbitrator's decision that a descending scope provision in a restrictive covenant was enforceable).

[52] As the Supreme Court of California has noted, "where no unlawful methods are used, public policy generally supports a competitor's right to offer more pay or better terms to another's employee" and "the independent wrongfulness requirement … promote[s] the public policies supporting the right of at-will employees to pursue opportunities for economic betterment and the right of employers to complete for talent workers": *Ixchel Pharma, LLC v Biogen, Inc*, 9 Cal 5th 1130 at 1144 (2020).

[53] While the primary means of protecting against the theft of confidential information or trade secrets at civil law remains the breach of confidence or violation of a fiduciary duty for a key employee, criminal law also serves as a

is already part of the law governing the relationships where restrictive covenants would be applied, it is worth pausing to reflect on the superfluous nature of the protection offered by restrictive covenants in light of the severe effects they can have an individuals.

Confidential information and trade secrets are often the only legitimate interest that restrictive covenants serve to protect, despite these interests enjoying independent protection through other arms of the law.[54] Catherine Fisk argues that the judicial embrace of restrictive covenants came about because they were they were "an unobjectionable contractual expression of the obligations that tort law imposed already."[55] Restrictive covenants pertaining to the protection of

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deterrent for egregious conduct. See *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 [*Lac Minerals*]; see also *Criminal Code*, RSC 1985, c C-46, s 391.

[54] For example, *Elsley* noted that the protection of confidential information and trade secrets is a key justification for this law ("[a]lthough 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 employer"): *Elsley*, *supra note* 22 at 924. See also *Herbert Morris Ltd v Saxelby*, [1916] 1 AC 688 at 702 [*Herbert Morris*]. The most significant means of protecting confidential information and trade secrets in Canada in the civil litigation context remains the breach of confidence. To that end, it should not be forgotten that the most important precedent for breach of confidence, the majorities in *Lac Minerals*, *supra* note 53, found violation of the breach of confidence and nearly articulated a fiduciary duty (in light of custom and practice in industry) in the absence of any contract whatsoever.

[55] Fisk, "Working Knowledge," *supra* note 23 at 511. Fisk has also argued that the separation between confidential information and trade secrets on the one hand and restrictive covenants on the other could be seen as linked to the division between equity and law. For example, she notes that the laws regarding both of these items developed disparately, with "[n]oncompetition covenants sometimes … be[ing] litigated on the law side in a suit for damages, and sometimes in equity seeking specific performance," whereas confidential information and trade secrets disputes were wholly subsumed under the latter: *ibid* at n 32. "The early English cases involved covenants that were suits on a bond; pursuant to the covenant, the employee agreed to pay a specified sum if he worked in violation of the terms, and the litigation was a suit on the debt [that is, a suit in law]. In many cases, however, the employer preferred specific enforcement of the covenant because of the difficulty of ascertaining and collecting damages. When the employer sought an injunction to restrain the employee from working, the action was in equity": *ibid*.

confidential information and trade secrets have been noted as "[t]he least problematic" to defend in court,[56] since they can be viewed as part of an affirmative effort to obtain protection of information-based assets by ascribing status to them as confidential information or trade secrets *by acting toward the subject matter as such*. In this regard, they are not unlike other administrative, technical, or legal measures a party might take to assign such status to a given subject matter, such as using encryption, passwords, and firewalls; training employees to treat certain information as confidential; and so on. Conversely, many restrictive covenants that are struck down do not relate to confidential information and trade secrets.[57] Since the standard of reasonableness that is used to permit "particular" restraints on trade is activated only by a legitimate interest, and since the only legitimate interest is often confidential information and trade secrets, it is unsurprising that the two areas of law are often conflated.[58] Outside of confidential information and trade secrets, the notion of what is a protectable interest is not even

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[56] Brait & Pollock, "Confidentiality, Intellectual Property and Competitive Risk," *supra* note 7 at 607.

[57] See *HL Staebler*, *supra* note 33 (noting that there was no proprietary interest such as trade secrets or confidential information, and rather merely "trade connections" that the former employer sought to protect).

[58] See *Elsley*, *supra note* 22 at 923. Justice Dickson (as he then was) noted here in his comment that "[a]lthough 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 employer*" [emphasis added]. See also *Herbert Morris*, *supra note* 54 at 702. See also Stone, "Knowledge at Work," *supra* note 17 at 746: "[T]he long-standing view has been that to be enforceable, a covenant not to compete must protect an employer's interest in a trade secret or in other 'confidential information.'" See also Marx & Fleming, "Non-Compete Agreements," *supra* note 9 at 44: "[A] chief objective of requiring non-compete agreements is to guard against the leakage of trade secrets." See also Moffat, "The Wrong Tool," *infra* note 121 at 900: "Courts regularly justify noncompetes by reference to the need to protect trade secrets." For a quintessential example of this justification, see *Elsley*, *supra* note 22 at 924.

well defined, further obfuscating the differences between the two areas of law.[59] In this light, restrictive covenants can be seen as a double layer for existing protections already offered at law—"extra icing on a cake already frosted," to borrow Justice Elena Kagan's metaphor from a different context.[60]

At common law, all employees—fiduciary or not—owe obligations such as carrying out reasonable instructions, performing the job one was hired for, acting honestly, and not acting deliberately to harm an employer's reputation.[61] Ancillary to these obligations is the obligation of good faith,[62] which is also sometimes referred to as a duty of fidelity,[63] which encompasses a duty to refrain from competition with an employer during employment[64] and to refrain from "improper use of confidential information."[65] This duty continues for a period of time after

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[59] See Stephen A Smith, "Reconstructing Restraint of Trade" (1995) 15 Oxford J Leg Stud 565. Smith notes that in pure employer–employee covenants, outside of confidential information and trade secrets, "the concept of a legitimate interest is less well defined."

[60] *Yates v United States*, 574 US 528 at 557 (2015) (Kagan J dissenting). Justice Kagan was describing the use of legislative history to support an analysis of a statute whose interpretation is already clear.

[61] Brait & Pollock, "Confidentiality, Intellectual Property and Competitive Risk," *supra* note 7 at 587.

[62] *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54 at para 37 (Abella J dissenting on other grounds) [*RBC Dominion Securities*].

[63] Brait and Pollock adopt this taxonomy in their review of the implied duties pertinent to confidentiality in the employment context: Brait & Pollock, "Confidentiality, Intellectual Property and Competitive Risk," *supra* note 7. The Supreme Court of Canada has noted that it is "a duty of fidelity or good faith": *RBC Dominion Securities*, *supra* note 62 at para 19.

[64] Richard A Brait, "The Use of Restrictive Covenants in the Employment Contract" (1981) 6:2 Queen's LJ 414 at 417.

[65] *RBC Dominion Securities*, *supra* note 62 at para 37 (Abella J dissenting on other grounds). See also Brait, "The Use of Restrictive Covenants in the Employment Contract," *supra* note 64 at 415 *et seq*.

employment,[66] and it is heightened for fiduciaries.[67] In addition to these implied duties, common law recognizes breach of confidence in employment and non-employment relationships, too.[68] The importance of these duties as a whole is that they set forth certain obligations regardless of the existence of a restrictive covenant. The civil law also sets forth several broad duties with similar purpose and effect that bind the performance of employees both during and after their employment, regardless of the existence of express terms. For example, the *Civil Code* enunciates a broad duty for employees to perform their duties "with prudence and diligence," "to act faithfully and honestly," and to refrain from using confidential information obtained at work—obligations that "continue for a reasonable time after the contract terminates."[69] These

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[66] See also *RBC Dominion Securities v Merrill Lynch Canada et al*, 2003 BCSC 1773 at para 35: "Every employee, whether or not in a fiduciary relationship to the employer, owes a duty of fidelity or good faith to the employer which is not limited to current employment. This general duty includes a duty not to compete unfairly against the employer during or after the employment arrangement, and in turn not to make use of the employer's confidential information and material to compete with the employer." The Supreme Court has noted that while the employment contract may have terminated, "residual duties may remain. … Subject to these duties, the employee is free to compete against the former employer": *RBC Dominion Securities*, *supra* note 62 at para 19.

[67] In *Can Aero v O'Malley*, Justice Laskin (as he then was) noted that "the fiduciary duty of a director or officer does not terminate upon resignation and … it cannot be renounced at will by the termination of the employment": *Can Aero v O'Malley*, [1974] SCR 592 at 616. This duty had become "obscured" by its proximity and analogousness with the right against using confidential information, from which it had to be carefully separated: *ibid* at 616–617. However, interestingly, the rationale for distinguishing between fiduciary employees and non-fiduciary employees is not unlike that used to distinguish between confidential information and non-confidential information: see Brait, "The Use of Restrictive Covenants in the Employment Contract," *supra* note 64 at 419. These fiduciary duties "transcend[] the severance of the employee–employer relationship," persisting for a period of time thereafter: *Alberts et al v Mountjoy et al*, 1977 CanLII 1026 (ONSC). Canadian courts, as well as academic commentaries, "have concluded that the fiduciary obligations of senior executives do not automatically cease upon termination of employment": *Spartek Systems Inc v Brown*, 2014 ABQB 526 at para 119.

[68] See *Lac Minerals*, *supra* note 53.

[69] *Civil Code*, *supra note* 36, art 2088.

obligations are often described as a catch-all duty of loyalty owed by employees to their employers.[70] These duties, set out in article 2088 of the *Civil Code*, are contingent on the degree of confidence placed in the employee by the employer.[71] On top of these mechanisms are provisions in the *Criminal Code* that broadly—and perhaps sweepingly—criminalize the misappropriation of trade secrets.[72] This array of law covers the same terrain as restrictive covenants.[73] The main difference between the law of confidential information and trade secrets and the law of restrictive covenants is that, rather than balancing economic freedom with freedom to contract, the law of confidential information and trade secrets balances employers' rights to protect their confidential information and trade secrets while simultaneously leaving every person "free to use to [their] advantage [their] skill and knowledge in trade."[74] The extensive body of case law on confidential information and trade secrets that distinguishes between protectable interests and innate skills, memory, and talent provides a large body of jurisprudence to guide judges.[75] In the past, courts were less willing to tolerate restrictive covenants when the law of confidential information or trade secrets was a more appropriate

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[70] *Canadian National Railway c Canadian Pacific Railway*, 2020 QCCS 801 at paras 30–35.

[71] *Concentrés scientifiques Bélisle*, *supra* note 39 at para 39.

[72] *Criminal Code*, *supra* note 53, ss 342.1, 391.

[73] For example, *RBC Dominion Securities*, *supra* note 62, included allegations of unfair competition premised on the misuse of confidential information (among other causes of action). The trial judge, in substantiating these allegations, used the theft of this information to calculate damages. In other words, even without precedent or statutory law supporting the company's ability to enforce its restrictive covenant, legal recourse remained available to it. See also *Faccenda Chicken v Fowler*, [1987] Ch 117 at 126–127.

[74] *Maguire v Northland Drug Co Ltd*, [1935] SCR 412 at 416.

[75] For example, see *Faccenda Chicken Ltd v Fowler*, *supra* note 73.

remedial instrument.[76] For example, in *Jarvis v Peck* (1843), the New York Court of Chancery noted that "[a]lthough the policy of the law will not permit a general restraint of trade [as opposed to a particular restraint], yet a trader may sell a secret of business and restrain himself generally from using that secret."[77]

Even apart from the law of confidential information and trade secrets, it should not be forgotten that other modes of protection are available in lieu of restrictive covenants. For example, garden leave—idling an employee bound by an employment contract with a notice period during that period—has grown very popular with Canadian employers in the last decade, and especially in the last five years, since it achieves many of the same outcomes of restrictive covenants.[78] During garden leave, the employee remains bound by the full suite of duties of his or her

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[76] For example, see *Robb v Green*, [1895] 2 QB 315. In this case, defendant "secretly copied from the border book a list of the names and addresses of the customers." The court noted that "[w]here an employee is intrusted with a trade secret, the use of this secret for his own profit and to the disadvantage of his employer will be restrained." See also *Morison v Moat* (1851), 68 ER 492 (granting an injunction for misappropriation of non-patented medicinal ingredient list). In the United States, see *Tabor v Hoffman*, 118 NY 30 at 37 (1889): "[I]f there was a secret, it belonged to him, and the defendant had no right to obtain it by unfair means, or to use it after it was thus obtained." See also *Peabody v Norfolk*, 98 Mass 452 at 460 (1868): "[C]ourts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment."

[77] *Jarvis v Peck* (1843), 10 Paige Ch 118 at 124.

[78] The validity of garden leave remains somewhat obscure in the civil law. See *Langlais c Sennheiser (Canada) inc*, 2020 QCCA 723 at para 34. However, see the trial case, where the judge compared it to an "administrative suspension": 2018 QCCS 4695 at para 58.

employee status.[79] Although garden leave remains "uncommon" in Canada,[80] it raises fewer of the moral and ethical problems of restrictive covenants because, unlike a restrictive covenant, the employee continues to receive his or her salary during the period of idleness. In addition, other, more traditional forms of IP protection remain available in lieu of restrictive covenants. For example, Shopify, one of the most valuable companies in Canada,[81] has a relatively weak patent portfolio compared with other similar platform technology companies,[82] although it makes extensive use of non-competes.[83] Enhancing its use of other forms of intellectual property could

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[79] See *Evening Standard Co Ltd v Henderson*, where an employee of the *Evening Standard* was required to provide notice of one year for termination of employment. The employee's repudiation of the contract to work at a competing newspaper was not accepted by the original employer, who opted to require the employee to remain idle during the notice period—a provision that the court enforced through an interlocutory injunction. *Evening Standard Co Ltd v Henderson*, [1986] EWCA Civ 9, [1987] IRLR 64 (CA). By opting to pay the employee's salary and benefits, the original employer dismantled the "forced starvation" argument of requiring an employee to wither without succor. See Stratton, "Restraint of Trade During and on the Termination of a Contract of Employment," *supra* note 23 at 118.

[80] See L&E Global, "Restrictive Covenants in Canada" (1 December 2020), online: <https://knowledge.leglobal.org/restrictive-covenants-in-canada/>.

[81] Ian Vandaelle, "Shopify Displaces RBC to Become Canada's Most Valuable Company," *BNN Bloomberg* (6 May 2020), online: <https://www.bnnbloomberg.ca/shopify-displaces-rbc-to-become-canada-s-most-valuable-company-1.1432436>.

[82] For example, as of April 28, 2021, Shopify had 167 patents assigned to it by the US Patent and Trademark Office. See "assignee:(Shopify Inc.) country:US," *Google Patents*, online: <https://patents.google.com/?assignee=Shopify+Inc.&country=US&oq=assignee:(Shopify+Inc.)+country:US>. By comparison, Alibaba Group Holding Limited had 6,270 patents. See "assignee:(Alibaba Group Holding Limited) country:US," *Google Patents*, online: <https://patents.google.com/?assignee=Alibaba+Group+Holding+Limited&country=US>. By further comparison, Amazon had 20,031 patents. See "assignee:(Amazon Technologies, Inc.) country:US," *Google Patents*, online: <https://patents.google.com/?assignee=Amazon+Technologies%2c+Inc.&country=US>.

[83] Jim Hinton, "Despite What Its CEO Says, Shopify's IP Is Worth a Lot More Than a 'Good Bottle of Scotch,'" *The Globe and Mail* (18 April 2021).

strengthen its position, helping it to achieve protection of "information, rather than the employee."[84] In addition to these alternative measures, employers can take prophylactic measures to "ensur[e] long-term loyalty of top talent."[85] Some of these measures to make a workplace more attractive include using performance compensation to retain employees, through measures such as offerings of restricted stock units that vest on a delayed schedule, or perks such as free food that remove or ease costs of living.[86] Pegging salaries to markets through equity compensation marks a shift toward "reward[ing] results, not tenure,"[87] in a type of "credit system"[88] that may be more appropriate in merit-driven work environments where restrictive covenants are often used. Indeed, jurisdictions with heightened enforceability of restrictive covenants are more likely to tie compensation to salary exclusively, for just that reason.[89]

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[84] Norman D Bishara & David Orozco, "Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy" (2012) 87:3 Ind LJ 979 at 996–997.

[85] See Bildfell, *supra* note 19 at 86.

[86] For example, Amazon, Uber, Apple, Facebook, and Intel all make use of restricted stock unit compensation. See "Top 10 Companies That Offer Restricted Stock Units," *TradingSim*, online <https://tradingsim.com/blog/top-10-companies-that-offer-restricted-stock-units/>. For a brief description of the trend of companies offering food to their employees, see Katie Canales, "Cayenne Pepper Ginger Shots, Homemade Lemon Tarts, and Michelin-Starred Chefs—Here's What Employees at Silicon Valley's Biggest Tech Companies Are Offered for Free," *Business Insider* (31 July 2018), online: <https://www.businessinsider.com/free-food-silicon-valley-tech-employees-apple-google-facebook-2018-7>.

[87] Stone, "Knowledge at Work," *supra* note 17 at 736.

[88] Fisk, "Knowledge Work," *supra* note 2 at 863.

[89] Mark J Garmaise, "Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment" (2011) 27:2 JL Econ & Org 376.

4.0 Reconsidering the Public Interest

Given that restrictive covenants can have a serious impact on an individual's livelihood (a non-compete can prevent an employee from earning a livelihood at all), they have always attracted a unique level of scrutiny from courts, and this scrutiny has always prioritized the public interest.[90] In *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd*, Lord Hodson noted that "the basis of the doctrine of restraint of trade is the protection of the public interest."[91] Concerns about public interest are alive in judicial reviews of such agreements,[92] even though, as Stephen Smith has noted, the public interest "is ignored in most restraint of trade decisions."[93] Furthermore, it is has been noted that restrictive covenants are enforced only in "exceptional circumstances."[94] Regardless of whether the public interest is an active component of judicial decision making, and regardless of the courts' general rulings in these matters, restrictive covenants must still receive individual attention by courts. This results in a failure to address some of the problems rendered by widespread use of such agreements, since they are, in effect, presumptively lawful until tested

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[90] *Elsley*, *supra note* 22 at 923. There, Justice Dickson (as he then was) noted that a restrictive covenant is enforceable "only if it is reasonable between the parties and with reference to the public interest." In a recent decision, a Quebec court similarly noted that "une clause de non-concurrence est contraire à l'ordre public — car contraire à la liberté de travail — à moins que l'employeur ne prouve" [a non-competition clause is contrary to public order—because it is contrary to freedom of work—unless the employer proves] its limitation as to time, space, and activity prohibited and its necessity to protect a legitimate business interest: *La Presse (2018) inc c Jutras*, 2019 QCCS 3930 at para 10. See also *Imperial Sheet Metal Ltd et al v Landry and Gray Metal Products Inc*, 2007 NBCA 51 at para 37.

[91] *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd*, [1968] AC 269.

[92] *Nordenfelt*, *supra* note 26 at 565.

[93] Smith, "Reconstructing Restraint of Trade," *supra* note 59.

[94] *Camino Modular Systems Inc v Kranidis*, 2019 ONSC 7437 at para 17.

by a court.[95] In light of such conclusions, the notion of the public interest and its relationship to restrictive covenants need revisiting for several reasons, particularly when it comes to non-compete agreements.

First, to state the obvious: the nature of work itself has changed considerably since the development of the law's initial tolerance for restrictive covenants. Work has become precarious, remote, and dislocated.[96] Imposing constraints on an employee's post-employment activity in an era of diminishing job tenure when employment is increasingly shorter and more precarious poses an even greater threat to the well-being and livelihood of members of the public than it did in 1711 when *Mitchel* was decided. In tandem with these pressures on labour, workers have become increasingly dependent on their jobs as greater reservoirs of personal identity and fulfillment, as the role and importance of religious and traditional reservoirs of identity have diminished.[97]

Second, because courts are constrained to reviewing individual agreements, they are poorly situated to address broader problems wrought by these agreements.[98] Scholarship has criticized

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[95] A party could ignore a restrictive covenant that it deemed unlawful. However, such determinations would remain unstable until their adjudication by a court.

[96] See generally Canada, House of Commons, *Precarious Work: Understanding the Changing Nature of Work in Canada: Report of the Standing Committee on Human Resources, Skills, and Social Developments and the Status of Persons with Disabilities* (June 2019) (Chair: Bryan May), online: <https://www.ourcommons.ca/Content/Committee/421/HUMA/Reports/RP10553151/humarp19/humarp19-e.pdf>. The precarity and remoteness of work, along with the shift toward virtual options, certainly enhance the opportunity for trade secret and confidential information theft; nonetheless, for reasons identified throughout this article, existing protections against such theft offer ample protection without restrictive covenants.

[97] Derek Thompson, "Workism Is Making Americans Miserable," *The Atlantic* (24 February 2019).

[98] Courts have also taken into consideration the COVID-19 pandemic in assessing whether to uphold a restrictive covenant. See *BioConvergence LLC v Attariwala*, No 1:19-cv-01745-SEB-TAB (SD Ind 2020) (Judge Baker taking

this state of affairs on multiple fronts. For example, Ronald Gilson has raised a broad argument that "the absence of legal barriers to high velocity employment provides the pole around which a complementary business culture precipitates," just as the absence of barriers to high-velocity immigration allow for the easier entry of skilled workers.[99] By this argument, non-competes have a deleterious impact on innovation cycles. Further research has demonstrated that toleration of restrictive covenants encourages outward migration toward jurisdictions that prohibit them.[100] This tendency might be linked to the continuing migration of Canadian tech talent to Silicon Valley (though this tendency may also be linked to such factors as the desirable weather and higher pay—although higher pay may itself be the result of employees' ability to job hop and demand higher wages.)[101] For example, in a profile of the 2020 computer science engineering class at the University of Waterloo, 85 percent of graduates moved to the United States upon graduating, with nearly half of the entire class moving to California—a jurisdiction that bans

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judicial notice of the "broadscale economic disruptions caused by the COVID-19 pandemic that cast doubt on [the defendant's] employment prospects, as it does for the vast majority of Americans during these challenging times"). For a broad overview of how the COVID-19 pandemic has activated a reluctance on the part of courts to enforce restrictive covenants in the United States, see Charles F Knapp, Raphael B Coburn & Matthew A Fontana, "The Impact of COVID-19-Related Factors on Courts' Enforcement of Employee Post-Employment Restrictive Covenants" (2020) 10:279 Nat'l L Rev, online: <https://www.natlawreview.com/article/impact-covid-19-related-factors-courts-enforcement-employee-post-employment>.

[99] Gilson, *supra* note 5 at 601.

[100] Matt Marx, Jasjit Singh & Lee Fleming, "Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain" (2015) 44 Research Pol'y 394.

[101] Sean Silcoff, "Canada Facing 'Brain Drain' as Young Tech Talent Leaves for Silicon Valley," *The Globe and Mail* (3 May 2018), online: <https://www.theglobeandmail.com/business/technology/article-canada-facing-brain-drain-as-young-tech-talent-leaves-for-silicon/>. The University of Waterloo has been a central recruiting spot for Google and Amazon in particular. See Lindsay Gellman, "Why Silicon Valley Recruiters Are Flocking to Ontario," *Wall Street Journal* (4 May 2016).

restraints on trade outright.[102] Approximately 10 percent remained in Toronto, while less than 5 percent remained in the Kitchener-Waterloo region itself.[103] A diverse range of scholars have formed a consensus that non-competes also depress wages,[104] and several empirical studies have demonstrated that wages are depressed in jurisdictions that enforce restrictive covenants compared with those that do not.[105] Eric Posner has demonstrated that employees do not receive a wage premium for agreeing to restrictive covenants.[106] In other words, non-competes are not

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[102] Holly Oegema et al, "Software Engineering 2020 Class Profile" (June 2020), online: <https://uw-se-2020-class-profile.github.io/profile.pdf>.

[103] *Ibid.*

[104] "In the aggregate," says Posner, "there's good reason to think that non-poaching agreements and noncompetes are suppressing wages." See Sabri Ben-Achour, "Eric A Posner on the Link Between Wages and Non-Compete Agreements," *University of Chicago Law School* (5 July 2018), online: <https://www.law.uchicago.edu/news/eric-posner-link-between-wages-and-non-compete-agreements>. See also Evan Starr, "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of Theory, Evidence, and Recent Reform Efforts," *Economic Innovation Group* (noting that 38 percent of US workers have signed a non-compete in the past and that states that enforced such agreements were states in which workers earned less than in states that either banned or did not enforce such agreements). Elsewhere, Starr has noted that wages are generally 4 percent lower in jurisdictions that enforce restrictive covenants than in non-enforcing jurisdictions. Starr also notes that a ban on non-competes for highly skilled workers in the tech industry that passed in Hawaii in 2015 resulted in the wages of new hires rising by 4.2 percent. See Evan Starr, "Are Noncompetes Holding Down Wages?" (Paper delivered at "Unrigging the Labor Market: Covening to Restore Competitive Labor Markets," Harvard Law School, 13 June 2018), online: <https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_starr_june_13_2018.pdf>. For an overview of the literature on the downward pressure that non-competes have on wages, see Eric A Posner, "The Antitrust Challenge to Covenants Not to Compete in Employment Contracts" (2020) 83 Antitrust LJ 165, online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433> [cited to SSRN] at 18–20 [Posner, "The Antitrust Challenge"].

[105] Garmaise, "Ties That Truly Bind," *supra* note 89 at 376: "Increased enforceability also results in lower executive compensation."

[106] Posner, "The Antitrust Challenge," *supra* note 104 at 16.

symptomatic of a competitive market, but the opposite.[107] While much attention in recent years has turned toward antitrust as a tool to enhance competitiveness, non-competes are similarly a site of concern for powerful companies inhibiting the mobility of their employees.[108] Courts themselves are not blind to these anti-competitive dimensions of non-competes (after all, the reasonableness test considers whether a restrictive covenant is "against competition generally"),[109] but they are powerless to address the macro-level concerns, because they review them on an individual basis.[110]

Third, the unequal bargaining power embedded into the relationships where these covenants are struck weighs against their reasonableness. Stephen Smith has pointed out that equal bargaining power is usually raised in a manner distinct from the reasonableness test for restraints on trade and is "never a determinative factor" when it is applied to the test for reasonableness of restrictive covenants themselves.[111] Whether bargaining power is considered as part of the test of enforceability of a restrictive covenant or not, the Supreme Court of Canada has noted that "the

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[107] Posner, "The Antitrust Challenge," *supra* note 104 at 20.

[108] For example, in 2019, the attorneys general of 19 states signed a letter addressed to the Federal Trade Commission (FTC) demanding that the FTC classify non-compete agreements in employment contracts as "an unfair method of competition and per se illegal for low-wage workers." See Office of Minnesota Attorney General Keith Ellison, "Attorney General Ellison Leads Fight to Classify Non-Compete Clauses as Unfair and Illegal" (4 May 2021), online: <https://www.ag.state.mn.us/Office/Communications/2019/11/18_NonCompeteClauses.asp>. Posner in particular has argued that regulation of non-compete agreements is warranted because of their "adverse effect on competition." See Posner, "The Antitrust Challenge," *supra* note 104 at 2.

[109] See *Elsley*, *supra* note 22 at 925.

[110] Lembrich, "Garden Leave," *supra* note 21 at 2298–2299.

[111] Smith, "Reconstructing Restraint of Trade," *supra* note 59.

terms of the employment contract rarely result from an exercise of free bargaining power,"[112] because the relationship in its inception is "an act of submission."[113] In the context of restrictive covenants in particular, the Supreme Court of Canada has noted that "[i]t 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."[114] Bargaining power is unequal for other reasons, too. For example, a restrictive covenant can bear on other commercial entities' willingness to extend an offer of employment to an employee who is bound by a restrictive covenant, given the costs associated with a potential lawsuit.[115] This concern exerts itself in a labour market where the unequal power between *firms* means that different restrictive covenants are more or less likely to be litigated, proportionate to the economic power of a commercial entity.[116] The sheer size of commercial entities requiring signature of non-competes as a condition of employment—and their coverage of terrain in the market—challenges an

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[112] *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 92 [internal citation omitted].

[113] *Ibid.*

[114] *Shafron*, *supra* note 1 at para 22.

[115] Lobel, "The New Cognitive Property," *supra* note 6 at 826.

[116] While not totally analogous in nature, a chilling example comes from the no-poach agreements in place among technology companies in Silicon Valley. These involved many of the same dynamics. In 2007, a Google recruiter sent an unsolicited pitch to an employee at Apple. After Apple CEO Steve Jobs discovered the solicitation, he personally contacted the CEO of Google, Eric Schmidt, stating: "I would be very pleased if your recruiting department would stop doing this." The next day, Schmidt directed that the employee be terminated and sent an email within Google stating "[p]lease make a public example of this termination within the group." When he informed Jobs about the action, Jobs's response was a smiley face. See Victor Luckerson, "Steve Jobs' Chilling Response After Getting a Google Employee Fired," *Time* (29 March 2014).

employee's ability to work in a dynamic that never existed in 18th-century England, when the common law began tolerating them.

Finally, at a cognitive level, the current standard of reasonableness and the status of lawfulness of such agreements is far from clear in the minds of employees themselves.[117] This critique focuses on the cognitive bias of signing an agreement governing the post-employment realm at the outset of employment. For obvious reasons, signing an agreement that governs the period *after* employment upon *starting* employment is counterintuitive.[118] Surveys routinely show that individuals signing non-compete agreements know little about the status of their enforceability.[119] Given that the lawfulness of non-competes must be tested by courts on an individual basis, this lack of certainty is not at all surprising. But it means that employees are making career-relevant decisions with little appreciation for, or real understanding of, the state of the law as it pertains to the obligations set forth in agreements governing their employment. Since the majority of such provisions are unlikely to be the subject of litigation—and hence are never to be tested—this state of affairs encourages employers to overreach in their drafting.[120]

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[117] "A restraint that is reasonable in some circumstances may be unreasonable in others": *Restatement (Second) of the Law of Contracts*, *supra* note 33, § 188, comment a.

[118] Bhalloo & Parma, "Restrictive Covenants," *supra* note 51 at 643.

[119] See Evan Starr, "Contractual Restrictions on Post-Employment Activity" (Paper presented at the 20th Annual Lewis & Clark Law School Business Law Fall Forum, "Workplace Secrets, Loyalty, and Poaching: Protecting Employer Interest and Employee Liberty," 11 September 2015).

[120] Viva R Moffat, "The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements" (2010) 52 Wm & Mary L Rev 873 at 888 [Moffat, "The Wrong Tool"]. As Judge Dickson (as he then was) noted in *Elsley*: "It is important … to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. *The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, in the agreement within which it is found, and all of the surrounding circumstances*": *Elsley*, *supra note* 22 at 923–924

The reality is that employees refrain from conduct owing to "*in terrorem* effects" (that is, they refrain from engaging in lawful activity for fear of recourse from what is actually an unenforceable restrictive covenant), with little basis for such connection to the actual law.[121] Very few employees signing non-compete agreements have those agreements scrutinized by counsel.[122]

5.0 A Note on Justifications

The adverse effects of restrictive covenants have generally been dismissed in light of certain classic justifications in this area of law, which deserve a brief comment. The most formidable of these theories is the freedom to contract. However, the quieter justifications of incentive theory and asset theory have also staked important doctrinal ground in justifying restrictive covenants. Given the role, importance, and power of these theories in shaping discourse around restrictive covenants, this section addresses each of these theories.

First, the freedom to contract provides that individuals should be able to enter into agreements of their choice, including agreements that limit their post-employment options and conduct. As

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[emphasis added]. Conducting such an analysis is rigorous. Given that litigating a restrictive covenant may take as long as the period of the restrictive covenant itself, the standard of analysis itself arguably can and should be viewed as an implicit obstacle contributing to the adverse effects of such agreements.

[121] Moffat, "The Wrong Tool," *supra* note 121 at 887–888.

[122] Employment agreements signed in the presence of legal counsel by employees may be—for obvious reasons—seen as fairer in terms of equal bargaining power. For this very reason, California recently enacted a provision of its *Labor Code* that permits employment agreements signed in the presence of counsel to be exempt from any provisions of the *Labor Code* itself. In this, this provision has been seen as a carve-out to California's general prohibition on restrictive covenants enunciated in Cal Bus & Prof Code § 16600. See Cal Lab Code § 925(e). However, Canadian law currently makes no such distinction in its treatment and exercise of the legal construction of bargaining power.

Judge Rothstein wrote in *Shafron v KRG Insurance Brokers*: "[R]ecognition of the freedom of the parties to contract requires that there be exceptions to the general rule against restraints on trade."[123] This defence of restrictive covenants, however, as noted by Justice Dickson in *Elsley*, is rooted in the fantasy of parties exercising their freedom to contract with equal bargaining power, since bargained-for agreements that are not flawed in the bargaining process will be considered valid.[124] However, problems with this classical conceptualization of equal bargaining power are immediately evident in the modern employment landscape, as noted above. Restrictive covenants are "the product of vastly unequal bargaining power, the terms generally favor the drafter, in many circumstances there is slim possibility of opting out, and they are, as a practical matter, never negotiated."[125] In many regards, they are similar to consumer and adhesive contracts.[126] This reality, and the aforementioned factors, undermine the idea that there is any real freedom in the drafting, negotiating, and signing of such agreements. But the illusion continues to operate in the existing legal tests,[127] and the fiction of this legal framework of equal bargaining power at the stage of contract formation is very much alive in the interpretation of restrictive covenants in Canada today.[128]

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[123] *Shafron*, *supra* note 1 at para 17.

[124] *Elsley*, *supra note* 22 at 923.

[125] Moffat, "The Wrong Tool," *supra* note 121 at 882.

[126] Evan Starr, JJ Prescott & Norman D Bishara, "Noncompetes in the US Labor Force" (2021) 64:1 JL & Econ 53. See also Matt Marx, "The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals" (2011) 76:5 Am Soc Rev 695.

[127] Lembrich, "Garden Leave," *supra* note 21 at 2299.

[128] *Payette*, *supra* note 12 at paras 3, 36.

Second, in addition to the freedom to contract, incentive theories play a key role in defending the status quo of restrictive covenants. Stephen Smith has noted that the common law's elucidation of a legitimate interest has, invariably, pertained to "investments of some sort"[129] that are "necessary for the positive endeavor (i.e., the job, developing a business)."[130] Many of the alleged incentives for restrictive covenants are the same as other arms of intellectual property, with its classic justification of the investment incentive.[131] Mark Lemley refers to this theory as *ex ante* because it views IP law as "a necessary evil" that incentivizes the actions of companies to create jobs or commercial entities in the first place, as well as to educate and invest in training their employees.[132] By this argument, without such protection, there would be no reason to invest in employees and human capital.[133] Thus, restrictive covenants incentivize companies to allocate

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[129] Smith, "Reconstructing Restraint of Trade," *supra* note 59 [original citation omitted].

[130] *Ibid.*

[131] According to this view, in the absence of intellectual property laws, the movement of ideas would be uninhibited, and there would be no incentive for inventors to create. See Mark A Lemley, "Ex Ante Versus Ex Post Justifications for Intellectual Property" (2004) 71 U Chi L Rev 129 at 130–131. Lemley notes that this view is subject to multiple critiques, including by those who argue that non-economic motives to create, among other factors, also operate.

[132] *Ibid* at 131. While Lemley elucidates a notion of *ex post* justifications that ground their justifying "unlimited duration and scope of intellectual property rights": *ibid*. For an overview of incentive theories as they apply to restrictive covenants and non-competes in particular, see Viva R Moffat, "Human Capital as Intellectual Property? Non-Competes and the Limits of IP Protection" (2017) 50:4 Akron L Rev 903 at 916–918 [Moffat, "Human Capital as Intellectual Property"].

[133] Bishara & Orozco, *supra* note 84 at 990. See also Samila & Sorenson, "Noncompete Covenants: Incentives to Innovate or Impediments to Growth," *supra* note 9 at 427–428: "Firms can improve their performance through the updating and upgrading of the human capital of their labor forces. Individual employees nevertheless retain the rights of this human capital." This dynamic seemingly yields a Catch-22, where a firm may be disinclined to invest in an employee, since once the employee has received the training, "they might market their newly gained skills to other firms, seeking to higher salaries. Rational employers, recognizing this problem, may therefore refuse to develop these more general skills—despite their value to the firm and society": *ibid* at 427.

resources they would otherwise not allocate.[134] Yet these arguments lack force, especially when one considers that the region that is most synonymous with innovation over the last 30 years—Silicon Valley—is located in a region that prohibits restraints on trade.[135] Firms have always been free to opt out of California's prohibition against restrictive covenants by moving to a jurisdiction that enforces them.[136] This prohibition, which has been the law in California since the late 19th century, has apparently not stopped some of the largest and most innovative companies in the world from establishing their headquarters in California.[137] Furthermore, as noted above, even if these theories have force, the assets themselves are protected through access to the existing gamut of civil and criminal laws available to protect intangible assets, including the law of confidential information and trade secrets.

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[134] For example, it is held by this viewpoint that "they encourage firms to allocate resources to the development of certain sorts of assets, such as intellectual property, human capital, and interfirm relations." See Samila & Sorenson, "Noncompete Covenants: Incentives to Innovate or Impediments to Growth," *supra* note 9 at 427.

[135] Cal Bus & Prof Code § 16600. With exceptions for the sales of businesses, partnerships, and limited liability corporations, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

[136] Gilson, *supra* note 5 at 621.

[137] California still allows for and enforces protection for trade secrets. For example, California's prohibition on restraints on trade codified in Cal Bus Prof Code § 16600 lives alongside the California *Uniform Trade Secrets Act*. In *Edwards v Arthur Andersen*, the California Supreme Court noted that prior case law in the state has confirmed that "section 16600 invalidates provisions in employment contracts and retirement pension plans that prohibit an employee from working for a competitor after completion of his employment or imposing a penalty if he does so unless they are necessary to protect the employer's trade secrets": *Edwards v Arthur Andersen*, 44 Cal 4th 937 at 946 (2008). California has also developed procedural tools to prevent misuse of the law, such as requiring a plaintiff demonstrate the existence of trade secrets as a prerequisite to initiating a proceeding. For example, see Cal Code Civ Proc § 2019.210, which requires that any action alleging misappropriation of trade secrets under the California *Uniform Trade Secrets Act* must identify the trade secret with "reasonable particularity" prior to the start of discovery.

Finally, some have pointed out that the law of restrictive covenants can be supported by asset theories. Asset theories tie restrictive covenants to the notion that employers, simply put, own intangible assets possessed in the minds of their employees that are not just confidential information or trade secrets (which this article has already noted receive independent protection at law), but are also things like customer or business-to-business relationships. Asset theories treat some form of human capital possessed by employees—their skills, their relationships, their knowledge—as a form of intellectual property, which becomes "an intangible but alienable form of property, exchanged—albeit in a limited way—for valuable consideration."[138] This IP rationale is, of course, irrelevant when it comes low-wage employees.[139] Moreover, if this justification is invoked, then human capital must be acknowledged as a unique type of asset—unlike other intangible assets protected by the others arms of intellectual property, such as patents, copyrights, trademarks, or trade secrets. The asset theory, however, reaches dangerously far into claiming property rights over skills and cognitions, and it is not one many openly make.

6.0 Conclusion

This article sought to advance several interconnecting claims. First, it argued that restrictive covenants offer superfluous protection to confidential information and trade secrets. They do so by regulating not the subject matter that they purport to protect, but individual conduct. Second, this type of regulation has several adverse effects not only on individuals but also on the public. In light of these considerations, revisiting the public interest concern in restrictive covenants suggests that the enforceability of restrictive covenants should be attenuated, in particular by

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[138] Moffat, "Human Capital as Intellectual Property," *supra* note 133 at 907.

[139] *Ibid* at 911.

prohibiting non-compete agreements. This article suggests that a bright-line rule prohibiting non-competes would provide clearer guidance to employers, employees, lawyers, and courts to follow in their enforcement. In support of this argument, the article has drawn attention to the adverse social effects of such agreements, taking inspiration from three decades of American scholarship in this area. It has also argued that alternative modes of protection are offered to employers through other applicable duties as well as, notably, independent protections for intellectual property. While the Supreme Court of Canada has distinguished the rigour brought to bear on restrictive covenants of certain kinds, such as those involved in the sale of a business compared with those involving mere employees, in a state of affairs where the common law and the civil law can only scrutinize each contract on a one-by-one basis, the societal-level problems wrought by widespread recourse to such agreements require a different degree of clarity from lawmakers. A new bright-line rule may be the only way to address them.