

## ESCALATING PROTECTIVE COVENANTS (THE “EPC” MANDATE)



Over the years, there has been considerable debate about the validity and the enforceability of restrictive covenants on trade and career.

The basic premise in standard employment and associate agreements within our profession is that time and distance determine the level of protection a business owner has in the event of a termination or resignation from a practice.

Language such as “three to five years” and “three to five kilometers” is common. These ranges may vary depending on whether the practice is in an urban, suburban, or rural/remote location.

But that approach is no longer practical.

### **Why would we want to restrict anyone from making a living?**

It is a horrible construct and, frankly, not cool...

Modern courts are also reluctant to uphold anything that appears to restrict a person’s livelihood. This is Canada, where balance and fairness are central principles of our legal system.

For example, at present, if someone agrees to a three-kilometre restriction and then begins practicing just two kilometres away, there must be a way to quantify the breach of the contract and tabulate the resulting damages to the principal’s business.

The problem is that it takes 1-2 years to prove financial damage because the passage of time is the best evidence of damage. Actual performance data speaks volumes, and in some cases, no measurable damage occurs at all.



This is why restrictive covenants, as they are currently designed, are impractical.

So let's change the language to reflect what we are truly trying to achieve – to protect a business and not to restrict a career.

### **I call them Protective Covenants.**

And I submit that the protective terms of a contract should escalate as the principal and associate relationship evolves over time.

The premises are quite simple.

The longer you work within an organization - as an associate, the more influential you become with the staff and the clientele. Time of service and tenure matter.

Time makes us more familiar with the business and its revenue sources, and therefore the passage of time will inevitably make you more influential.

Contribution to overall productivity must also be factored in.

If you have been with me for five years but your revenue has continually declined, such that you are now a 5% contributor to the total sum of production, you are not a significant threat to the business should you decide to leave.

That situation may require a Diminishing Protective Covenant, also known as a DPC.

However, if you have been with me for five years and your revenue has grown each year to the point where you contribute, say, 40% of the total sum of production, then yes, you are becoming much more influential within the business.



### **This scenario demands an Escalating Protective Covenant, or EPC.**

These ever-evolving metrics of time and productivity are why I am proposing a new and improved version of our outdated employment, associate, and independent contracts.

Sorry HR and labour lawyers, you fell asleep at the switch on this one.

To make this all add up, we need a method for mathematical determination:

### **Yes, another darn formula! Nerds like me love spreadsheets!**

Here is my first DRAFT of the EPC slide rule:

For each year you stay with the business, I would like you to agree to extend your time and distance proportionately. For example, 1 kilometre for the 1st year, 2 kilometres for the 2nd year, and so forth, up to a maximum of 10 kilometres.

Similarly, for each year that your production increases by 5% or more of the total sum, you agree to increase the time of protection: 1 year for the 1st year, 2 years for the 2nd year, and so forth, up to a maximum of 10 years.



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It is not yet a perfect science, but you get the drift – right?

**More time and greater contribution equal greater ability to impact the business.**

I am proposing this protection to support the owners I serve and to respect their many years of unpaid sweat equity, the major risks they have taken, the debt load demands, dealing with landlords, managing human resources (and even more HR lately), and the list goes on.

With respect, employees and associates face little to NONE of these demands thrust upon them.

Finally, if any one or both of the EPC covenants are broken, much like a promise, the offending party should be made aware upfront of pre-determined liquidated damages. For example, \$1,000 per patient solicited away, or \$10,000 for a staff member solicited away.

Or consider this bold concept: for each year and/or each kilometre breached, pay the principal \$100,000 for each metric. That could really add up!

These distinct economic penalties may not always be enforced, as each situation could be debated or litigated, but they are certainly a deterrent. And deterrents are why we have locks on our doors. They may not stop criminals entirely, but they will make them think twice.

This is a working paper and conceptual proposal, but I believe passionately in the idea of protective covenants.

**Restrictive covenants have to go.**

It's time to get with the times and protect your business while respecting the ability of employees and associates to have a career elsewhere – just not too close!

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