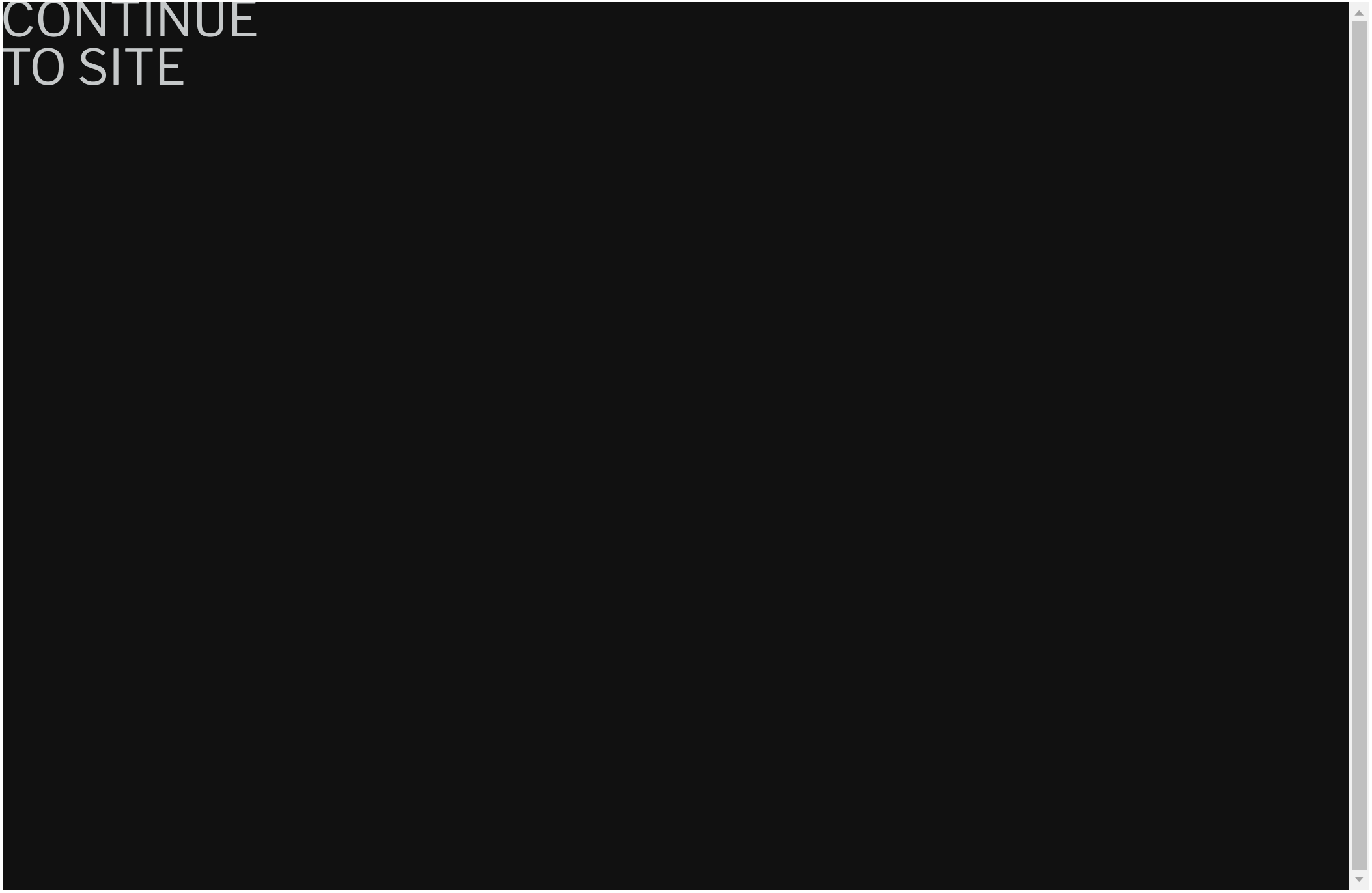

By Matthew Tomm

Feb 25, 2020 / Share

The Ontario Court of Appeal has dealt a significant blow to the utility of “saving clauses” to salvage drafting errors when the termination provision of an employment contract is not compliant with employment standards legislation. Rossman v. Canadian Solar Inc. confirms that there is no substitute for the proper drafting of employment contracts.

The employee, Noah Rossman, was hired in May 2010. His employment contract contained the following termination clause:

“…. this agreement may be terminated … on giving the employee written notice [or pay in lieu] for a period which is the greater of: (i) 2 weeks, or (ii) In accordance with the provisions of the Employment Standards Act (Ontario) or other applicable legislation. … Benefits shall cease 4 weeks from the written notice. “

The court held that the clause was unenforceable for being inconsistent with Ontario’s Employment Standards Act (ESA). It stated with finality that benefits would cease after four weeks, yet

the ESA mandates that employees of four years or more are entitled to benefits continuation for longer than four weeks.

Interestingly, Rossman had been employed for three years and nine months at the time of his termination and so would have been entitled to less than four weeks' benefits continuance, but that did not assist the employer. A potential conflict with statutory minimums is sufficient to void a termination clause. The court stated: "It is not open to this court to save the impugned provision of the [agreement] with the benefit of hindsight. ...Accordingly, it is irrelevant whether the impugned provision accords with the minimum employment standards in certain circumstances."

The court noted that the termination clause was ambiguous as it would have left Rossman uncertain as to what his entitlement to benefits continuance on termination would be — four weeks as stated in the contract or a longer period based on statute. As a result, Rossman was entitled to five months' notice of termination.

The saving clause

The termination clause also contained a classic saving provision, which provided that "if the minimum statutory requirements as at

the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement."

The employer argued that this saving provision salvaged the intention of abrogating Rossman's right to reasonable notice of termination. The court disagreed, stating: "The termination clause is ambiguous, and the ambiguity is not erased by the saving provision." The four-week benefits clause showed an intention to contract for a lesser benefit than provided for in the ESA and the saving provision could not reconcile the "direct conflict" between that and the remainder of the clause. The court concluded: "In this context, saving provisions in termination clauses cannot save employers who attempt to contract out of the ESA's minimum standards."

The broader context: unequal bargaining power

In recent years, courts have been whittling away at the strategies that employers use to get around faulty drafting and secure favourable terms in their employment agreements. Here are a few popular strategies that have come under fire:

• Notional severance: This is a technique that involves reading down an unenforceable provision in a contract to make it legal and enforceable. Notional severance involves literally adding new words to the parties' agreement. In doing so, courts supplant the parties' intentions with alternative terms. In workplace contexts, employers have tried to rely on notional severance to save restrictive covenants that are unreasonably broad. For example, an employer might argue that a clause preventing an employee from competing with the company for 10 years after termination should be read down to restrict competition for a more reasonable two years. That would allow the employer to overreach when drafting the clause, without the associated risk of the clause being entirely unenforceable. Citing the inequality of bargaining power in employment contexts, the Alberta Court of Appeal rejected this practice: "Employers should not be permitted to draft unreasonably broad restrictive covenants with the expectation that, should the matter ever come to trial, the court will simply re-write the clause so as to make it enforceable" (Globex Foreign Exchange Cxorporation v. Kelcher). In Shafron v. KRG Insurance Brokers (Western) Inc., the

Supreme Court of Canada effectively ended this practice, holding that “notional severance is not an appropriate mechanism to cure a defective restrictive covenant.”

• Step-down clauses: Another favourite among companies that want to have their cake and eat it, too, a step-down clause (also known as a waterfall, ladder or Russian doll clause) involves including multiple alternative provisions related to the same subject and then asking the court to enforce the most restrictive one that is compliant with the law. For example, a non-competition agreement might provide that the employee shall not compete with the employer for 10 years after termination; or in the alternative, seven years; or in the further alternative, five years. This practice has been widely discredited in restrictive covenants. In Bonazza v. Forensic Investigations Canada Inc., the court addressed a non-competition clause with a descending scope geographic restriction, including alternative terms providing for progressively less restriction on the location within with the worker could compete with the company. The court opined that “a descending scope geographic restriction is by its very nature ambiguous, and therefore always unenforceable… In my opinion, Shafron sounds the death knell for descending scope restrictive covenants.”

This jurisprudence is consistent with the traditional role courts have often taken to protecting employees in a context of unequal bargaining power. In most circumstances, employees have limited ability to negotiate favourable terms and courts generally acknowledge that employment contracts are different than typical commercial agreements.

“Employers must have an incentive to comply with the ESA’s minimum notice requirements,” said the Ontario Court of Appeal in Rossman. “They cannot be permitted to draft provisions that capitalize on the fact [that] many employees are unaware of their legal rights and will often refrain from challenging notice provisions in court.”

Yet this is not to say that companies should never include saving clauses in their employment contracts or use similar techniques to hedge their bets. Sometimes, saving clauses can save the day, as indicated in Amberber v. IBM Canada Ltd. However, it is dangerous to rely on them. Employers are better off taking care to ensure that all clauses in their contracts are properly drafted in the first place.

For more information, see:

- *Rossman v. Canadian Solar Inc.,* 2019 ONCA 992 (Ont. C.A.).

- *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571 (Ont. C.A.).

- *Globex Foreign Exchange Corporation v. Kelcher*, 2005 ABCA 419 (Alta. C.A.).

- *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 (S.C.C.).

- *Bonazza v. Forensic Investigations Canada Inc.,* 2009 CanLII 32268 (Ont S.C.J.).

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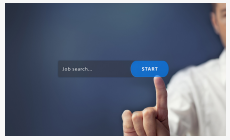

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