

**“If It Ain’t Fixed, Don’t Broke It!” – *Flynn* and Fixed
Term Contracts**

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The author wishes to thank Amanda Darrach of
Koskie Minsky LLP for her assistance

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If It Ain't Fixed, Don't Broke It:

***Flynn v. Shorcan Brokers Ltd.* and Successive Fixed Term Employment Contracts**

INTRODUCTION

As the Ontario Court of Appeal noted in *Ceccol v. Ontario Gymnastic Federation* [2001] O.J. No. 3488, the consequences can be significant for an employee found to be employed pursuant to a fixed term contract. Reasonable notice periods no longer apply, and, as such, in some instances the notice period may be extremely short or even non-existent. It is critical then to identify the criteria the Courts will use to determine whether an employee's contract is for a fixed or indefinite term. This is particularly difficult however in cases where there are a series of fixed term contracts which are subject to a series of renewable terms.

The Courts, while listing many factors germane to their conclusions, adhere to three main criteria when determining an employment contract to be for a fixed term:

1. Clear and unequivocal language in the contract;
2. Sophistication of the parties; and
3. Reasonable expectations of the parties, created by conduct, representations, or surrounding circumstances.

As determined by the Court of Appeal in *Ceccol*, generally speaking, when any ambiguity exists in the contract language, the Courts will give the benefit of the doubt to the employee and find that the contract was indefinite, giving the employee the advantage of common law reasonable notice.

Only in circumstances where the contract is clear, the parties are sophisticated, and the employee has no reasonable expectation of an indefinite term contract, will the Courts find that the employee has been employed pursuant to a fixed term contract and subject to the specific notice provisions identified in the contract.

However, in applying this criteria post *Ceccol* to successive fixed term contracts which are automatically or otherwise renewable for a further term, some Courts can be seen to place an overriding emphasis on the strict language of the contracts, arguably to the point of disregarding the conduct and expectations of the parties and the true substance of the relationship.

Flynn v. Shorcan Brokers Ltd., [2004] O.J. No. 2977 is a recent decision of the Ontario Superior Court of Justice, which is currently on appeal to the Court of Appeal. This case, in the writer's view, is illustrative of this approach. In that decision, the Honourable Madam Justice Macdonald canvassed the authorities in support of the three criteria identified above. However, the Court arguably places little to no emphasis on the expectations of the parties based upon their conduct in favour of what it finds to be the "clear and comprehensive" wording of the contracts, to find against the employee's argument of an indefinite employment term.

Facts

The Plaintiff, Frank Flynn, ("Flynn") had been employed by the Defendant, Shorcan Brokers Limited ("Shorcan"), for just over four years. Shorcan carried on business in the bond trading and brokerage industry. Flynn had been hired by the President of Shorcan in November 1998 shortly after leaving his employment as Senior Broker and Vice-President of Freedom Bond Brokers Inc. Shorcan had been looking for an employee to revitalize the Repurchase Agreement Desk at its operation, and it was hoped that Flynn would be key in rebuilding this aspect of the business.

It is unclear on the facts relayed in the decision as to whether Flynn was subject to an existing indefinite employment contract at the time of his hiring.

Shorcan was subsequently purchased by a large multi-national, Exco Shorcan Limited ("Exco") in late 1998. Shortly after the purchase, Exco determined that it was exposed to approximately \$6,000,000.00 in potential severance should it be required that employees be let go. As a result, in January 1999 Shorcan instituted a policy of offering all employees standard term contracts for a fixed term of one year, except if terminated earlier for just cause, which contracts incorporated notice and severance provisions in accordance with the *Employment Standards Act*. The employees were thereby allowed to maintain any existing contracts through to the end of their term, but upon expiry were required to sign the new, one year fixed term contract. The one year contracts were thereafter renewed for further one year terms to coincide with their expiration dates.

Shorcan distributed a memorandum detailing this new policy to each of the employees, and a staff meeting was held to discuss it. The employees were further advised to discuss the new contract with their own legal advisor before signing. It was determined that Flynn attended the staff meeting and chose not to retain counsel. The company instituted and followed procedures for tracking and renewing the contracts as they expired.

In January of 1999, Flynn signed his standardized one year fixed term contract. After that date, he proceeded to sign a series of such contracts, each containing the same or similar terms, except that his compensation varied widely over the years. The case appears to suggest that there was no negotiation concerning the length of the term in respect to any of the contracts, all of which were renewed prior to their expiry dates. The last contract was for a term of November 30, 2001 to November 30, 2002.

The evidence showed that Flynn had become increasingly dissatisfied with his employment. He expected a high level of remuneration, benefits, and paid vacation leave. In December 2002, his first child was born, which led to a desire for a change in lifestyle. The Court found that by November 2002, Flynn wished to relocate to the United States, and in 2001 sold his home in Ontario to purchase one near Philadelphia. The Court inferred that Flynn had the intention of eventually leaving the bond trading business completely and becoming a teacher.

Prior to the expiry of his most recent contract on November 30, 2002, the company commenced negotiations for a renewal, except that in light of Flynn's obvious desire to return to the United States, it presented for negotiation a consulting agreement with containing a non-competition clause with a view to preventing Flynn from competing with Shorcan for a period of time after his departure from the company. The Court found that for his part, Flynn wished to make as much money as possible before making the transition to his new career. The Court found that the negotiations were conducted with these priorities in mind.

The company tabled a final proposal for the consulting agreement on December 9, 2002, to remain open until December 13, 2002. Shorcan advised Flynn that if he did not sign the consulting agreement his employment would be terminated and he would be paid severance. At that time, Flynn communicated that he did not wish to accept the terms of the consulting agreement.

By letter dated December 16, 2002, Shorcan stated that as Flynn had declined the consulting agreement, as well as a new offer of employment, he was entitled to receive notice and severance pay, pursuant to the *Employment Standards Act*, of \$65,096.00, representing a total of five weeks notice and five weeks severance. The company instead offered Flynn, as a goodwill gesture, the sum of \$100,000.00, plus medical and dental benefits for a 60 day period. This money was deposited into Flynn's bank account.

Following these events, Flynn sought employment with Tradition, a company based in New York, which maintained an ongoing relationship with Shorcan. It was known to Shorcan during the negotiations over the consulting agreement that Flynn was in communication with Tradition. Shorcan therefore had direct communications with Tradition, mentioning that Tradition's employment of Flynn would put the two companies into direct competition. As a result, Tradition did not make an offer of employment to Flynn until the expiry of six months after Flynn had departed from Shorcan.

Positions of the Parties

Flynn maintained that he was employed by Shorcan on a permanent basis for an indefinite term. As such, he contended that he had been wrongfully terminated on December 16, 2002. Moreover, Flynn claimed damages for the actions of Shorcan with regards to Tradition, which he said caused Tradition not to hire him for a period of six months.

Shorcan contended that the contract was for a fixed term and that it had expired in accordance with its terms on November 30, 2002, with the parties being unable to agree upon either a further fixed term contract or a consulting agreement. Shorcan therefore maintained that the concept of common law reasonable notice did not apply. Accordingly, Shorcan contended that the severance package of \$100,000.00 was more than appropriate. Shorcan further denied any actionable wrong in its communications with Tradition concerning Flynn.

Decision

Madam Justice Macdonald had no difficulty in finding that the contract was for a fixed term, and that there was no wrongful dismissal.

On the wrongful dismissal claim, the Court found that Shorcan had acted reasonably during the contract negotiations with Flynn, and that failing an agreement as to the consulting agreement, that the negotiations come to an end with no renewal agreement completed.

The Court determined that the following factors were relevant to the inquiry into whether the series of contracts, culminating in the contract which expired on November 30, 2002, was for a fixed or indefinite term:

- The contract was "comprehensive and clear", particularly with respect to the issue of termination;
- Flynn was sophisticated, and examined the contracts in detail;
- Flynn declined to get independent legal advice;
- Flynn expressed no displeasure with the contracts until he wished to relocate to the United States;
- There was no inequality of bargaining power, as Flynn had many loyal clients;
- It was open to either party to not agree to a specific term when negotiating the contract; and

- Both parties were clear that the contract terminated as of November 30, 2002, and were in the process of negotiating a consulting contract, but were unable to reach an agreement.

Analysis

In reviewing Madam Justice Macdonald's findings, it seems apparent that the "clear and unequivocal" wording of the agreement took precedent in her view over the substance of the agreement, as argued by Flynn. Specifically, from Flynn's point of view, while Shorcan specified that the contracts were to be one year in duration, that was not the intent of either Flynn or Shorcan when the contracts were entered into. Shorcan clearly hired Flynn to revitalize its Repurchase Agreement Desk, thereby contemplating a relationship of in excess of one year. Further, apart from a renegotiation of salary and benefits, the contracts were basically automatically renewed. There appears to have been no discussion as the length of term, based upon the Company's unilateral pronouncement to all employees as to how the employment contracts would be structured. Further, it would appear that neither party saw Flynn as a one year employee at the time of his termination, as evidenced by the \$100,000.00 severance payment Shorcan paid to Flynn, being a sum which was \$35,000.00 over and above Shorcan's contractual obligations, which in fact were also based upon the *Employment Standards Act* acknowledgement of Flynn being a employee of in excess of five years service. Arguably, the consulting agreement, being on substantially different terms than his previous contracts due to the non-competition clause, constituted a "constructive dismissal", and Flynn found it to be unacceptable.

In arriving at her conclusions, Madam Justice Macdonald discussed previous case law in a search for indicia of fixed term contracts. In doing so, the Court identified the above three criteria as the three main signposts on the path to fixed or indefinite terms: clarity, sophistication, and reasonable expectations.

Ceccol v. Ontario Gymnastic Federation

With respect to the contention that the contract was one for an indefinite term, Madam Justice Macdonald turned to the Court of Appeal decision in *Ceccol*, the most authoritative pronouncement to date on the issue, and stated that Flynn's case was distinguishable in so far as his contract was not ambiguous in respect to extension.

In *Ceccol*, the Plaintiff had been employed for sixteen years pursuant to a series of one year contracts, each of which was very similar to the last. The employer maintained that each contract was for a discrete, fixed term, and that renewal was not automatic or assumed.

The terms of the contracts provided that they were for a fixed term of one year, "unless sooner terminated or extended as hereinafter provided" and that they were subject to renewal "subject to acceptable performance reviews." However, the Court did not make a definite ruling on whether that renewals were optional on the part of the employer. The Plaintiff was very clear that, at the initial interview, the job offer had been for an indefinite term, as she would not have accepted employment otherwise.

The Court stressed the importance of reasonable expectations in the contract law sphere, based on the Supreme Court of Canada decision in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888. The Court in *Ceccol* seems to have undertaken an indepth scrutiny of the realities of the employment relationship and found that the evidence of the Plaintiff led to the reasonable expectation that her contract would be renewed each year, therefore creating an indefinite term contract.

The Court in *Flynn*, however, seems to have made little or no investigation into the expectations of the parties in respect to the contract renewals during the concurrency of the successive contracts and only states, as a concluding paragraph, that there was no evidence upon which it could find that there was conduct on the part of either party which could be construed as indicating that Flynn believed he was a full-time indefinite hire. However arguably, apart from the automatic renewals, there was similarly no such conduct in *Ceccol* either. The Court refers to *Ceccol* for the proposition that it will look at the language of the contracts as being determinative of the relationship where that language is unambiguous. Also, Madam Justice Macdonald placed considerable reliance on the sophistication of Flynn.

Lambert v. Canadian Assn of Optometrists

The Courts in both *Flynn* and *Ceccol* referred to the Ontario case of *Lambert v. Canadian Assn of Optometrists* (1994) 6 C.C.E.L. (2d) 129, affirmed, (1996) 19 C.C.E.L. (2d) 315 (C.A.). Madam Justice Macdonald stated that the *Flynn* case was closer to the *Lambert* facts.

In *Lambert*, the employee was employed pursuant to a series of written contracts however the Court does not state the date of the first contract. The last contract, which was dated April 7, 1989, was for a term from January 1989 to December 31, 1992, and stated that it would continue for further one year terms until terminated. The contract also included a very clear 180 day termination notice period. The Plaintiff had alleged that his employment was contingent on a performance appraisal process, which had never occurred. This requirement, in the Plaintiff's view, gave rise to an implied term that his employment would not be terminated, even at the end of the term, without notice of reasons and a chance to be heard. The Court had rejected that contention, stating that the contract was clear and there was no link between the appraisal process and his employment continuing.

The Court in *Ceccol* distinguished *Lambert*, stating that the contract in *Ceccol* had a provision explicitly linking performance appraisals and continuing employment, and that these appraisals had regularly occurred.

Wood v. Industrial Accident Prevention Assn.

MacDonald J. also referred to *Wood v. Industrial Accident Prevention Assn.*, [2000] O.J. No. 2711, where the employer relied on the letter of employment to contend that the employee had no right to claim for wrongful dismissal. This case was clearly included to stress the need for clarity as it was not a matter of debate in *Wood* as to whether the contract was for a fixed or indefinite term, but rather whether the termination provision was of sufficient clarity.

The employee wished to pursue a claim for wrongful dismissal, but the letter of employment stated that "should it be necessary to terminate your employment without cause it will be in accordance with the Employment Standards Act of Ontario." This, the Court felt, was sufficiently clear to oust the common law claim by referring to the notice period contained in the Act.

Ben David v. Congregation B'nai Israel

The Court stressed in *Flynn* that both parties were very sophisticated. In support of the reasoning considering the importance of this factor, the Court referred to *Ben David v. Congregation B'nai Israel*, [1999] O.J. No. 1238. An indefinite term contract was found in that case, as the Court concluded that the Plaintiff was not aware of the contents of the initial contract, or the successive contracts which followed, which included provisions for renewal or non-renewal of the contracts. It should be noted that the terms of the contracts were clear. When first signed in June 1969, the contract was valid for a one year term with an option requiring the employer to give the Plaintiff 60 days written notice of the desire to renew. However, the agreement was not explained to the Plaintiff, and there was no evidence before the Court that he understood the ramifications of the "stringent and onerous provisions of the fixed term and renewal clauses." Further, the evidence suggested that the employer had not, as a matter of practice, ever given the Plaintiff either written or oral notice of its intentions to either renew or not renew.

Following the initial contract, the Plaintiff continued to be employed for a year without any evidence of a written agreement. Thereafter, the parties entered into further agreements from time to time. On some occasions the contracts were not signed; and in some years no agreements were prepared. Subsequently, some agreements were signed for a two year term, with no provision for renewal. Again, the Court found that there was no evidence the Plaintiff understood the contracts, especially the fact that some contained no option to renew. The Plaintiff was employed on a series of such contracts for many years up to 1995 with his remuneration varying between contracts.

The last contract signed by the parties, dated September 1, 1995, was for a one year term expiring August 31, 1995, with a 6 month renewal clause and providing the Plaintiff with 3 months notice to relocate. In November of 1994, the Plaintiff was given notice for the first time that the employer had decided not to renew the contract.

The Court proceeded to find that the final contract was not legally enforceable. The Plaintiff was not aware of the fixed term nature of the contracts, and, moreover, the fixed terms had been put into the contracts after salary negotiations had occurred. It was unlikely that such terms had ever been discussed between the parties, and the Plaintiff had not received any consideration for acceptance of such terms.

In *Ben David*, the long term nature of the relationship as well as the numerous discussions and representations made by the employer led to the Court finding an expectation by the Plaintiff that his employment was of an indefinite duration.

The Court found evidence that the employer had engaged in conduct which would lead the Plaintiff to believe he was employed for an indefinite term. Specifically, the employer had indicated that the contracts were pro forma; assured him that they wished him to stay on as long as he wished; and encouraged him in his education to become a Rabbi for the congregation.

By her inclusion of the *Ben David* decision, MacDonald J. appears to be juxtaposing the sophistication of Flynn and Ben David, where Ben David did not understand the ramifications of what he was signing.

Alguire v. Cash Canada Group Ltd.

A recent discussion of the Alberta Court of Queen's Bench which makes reference to the Ontario jurisprudence and the three criteria mentioned above, is *Alguire v. Cash Canada Group Ltd.*, [2004] A.J. No. 1258. In that decision, the Alberta Court of Queen's Bench had occasion to consider the consequence of a series of four one year fixed term contracts. The contracts themselves contained no language regarding notice.

The Court relied on *Ceccol* to find that the contracts contained clear and unequivocal language regarding the fixed term. Each contract stated clearly the dates it concerned, and no provision regarding renewal was included. Moreover, the Court found no reasonable expectation was created by the conduct of the parties, and no evidence was raised concerning the surrounding circumstances which would tend to support any ambiguity.

Moreover, as each of the contracts were hotly negotiated, there could be no claim on the part of the Plaintiff that he did not know the contents or the effect of each of the provisions. The Plaintiff had attempted to negotiate a two or three year renewal contract prior to the expiration of the first term, which was rejected by the employer. The Court found that the Plaintiff was a sophisticated negotiator, had typed two of the contracts after the negotiations had concluded, and had the opportunity to consult with legal counsel, although he did not take advantage of it. Therefore, the Plaintiff was held to be sophisticated and informed.

The Court found that the contracts were a series of fixed term contracts, and that the Plaintiff was not allowed to plead wrongful dismissal or seek common law notice. However, the Court did in fact recognize that "the nature of the employment relationship may change where it continues for some duration" (P.8), referring to *Ceccol* and arguably leaving the door open to the possibility that the length of the relationship may in fact affect the reasonable expectations of the parties.

CONCLUSION

It is the author's contention that in considering the three criteria articulated at the outset of this paper, the unspoken but clearly driving force behind which of the criteria will be paramount, will be the length of the employment relationship. Thus while all of the above decisions purport to review the above criteria as though they are all valid and important considerations, in order to determine when the Court will find the successive fixed term contracts sufficiently clear; the expectations of the parties sufficiently evident; or the sophistication of the employee sufficiently relevant, one has to look at the nature of

the relationship, in terms of its length. Mr. Justice MacPherson comes the closest to articulating the "unspoken" factor in the Court of Appeal decision in *Ceccol* when he states (paras 26 and 27):

"It seems to me that a Court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to avoid the traditional protections of the ESA and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.

In the present case, *Ceccol* served the Federation loyally, professionally and continuously for almost 16 years. The Federation does not say otherwise..."

Thus in *Ceccol* and *Ben David*, where the employment relationship exists, on a continuous basis, for 15 and 26 years respectively, the Court will stress and rely upon the expectations of the parties of a long-term relationship and, in some instances, the non sophistication of the employee, as the dominating criteria in order to provide the employee with reasonable notice. This is notwithstanding that arguably the contracts were as clear as they were in *Flynn*, *Lambert* and *Alguire*. Where however the relationship is of a relatively short duration, as in *Flynn* and *Alguire*, the Court will not assist the employee in attempting to avoid the consequences of a fixed term contract, and will stress the clarity of the contracts and the employee's sophistication to ground its conclusion.

In conclusion, any party facing a determination between a succession of fixed term contracts and an indefinite term contract will be well advised to pay attention to the three criteria: clarity, sophistication, and reasonable expectation, but with a specific focus on the length of the employment relationship, which latter factor will play a key, if unarticulated, role in the Court's deliberations. While the common law presumption may be to interpret successive fixed term contracts as an indefinite term, one has to be mindful of a short employment history mitigating against the presumption, generally to the employee's disadvantage.