

# DANGERS OF ALLOWING THE TACIT RENEWAL OF FIXED-TERM EMPLOYMENT CONTRACTS

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On February 1st, 2016, Justice Lukasz Granosik of the Superior Court of Quebec rendered an interesting decision regarding the application of the terms of a fixed-term employment contract after the tacit renewal of the employment contract for an indeterminate term.

## Overview of the facts

In January 2000, the Employee, Danny Kennel (the "*Employee*"), was hired by Traffic Tech Inc. ("**Traffic Tech**") as a transport specialist. He signed a three-year fixed-term employment agreement, which contained a renewal clause to the effect that "*the Employer will provide the employee with a notice at least sixty days prior to the expiration of the contract advising as to the renewal or the non-renewal of the contract. The renewal would be for a one-year period and from year to year thereafter as the parties see fit*". The employment agreement also contained a confidentiality clause and a clause prohibiting the solicitation of employees and clients.

At the end of the three year period, Traffic Tech did not send the Employee a notice of renewal or non-renewal, however the Employee continued to work. In 2004, the Parties signed a new fixed-term employment agreement for a three-year period (the "**Agreement**"), which contained the same renewal clause, and the same confidentiality and non-solicitation clauses.

At the end of the term, no notice of renewal or non-renewal was given by Traffic Tech and the Employee continued to work for several years.

In 2011, the Employee was approached by a competitor and induced to leave his employment with Traffic Tech. They also asked that three members of his sales team join him. As a result, while the Employee was still working for Traffic Tech, he met with the three employees from his team and presented them with offer letters from the competitor, which they all decided to accept. Accordingly, in April 2012, the Employee met with management of Traffic Tech and presented the four resignation letters to Traffic Tech effective immediately.

Traffic Tech subsequently instituted proceedings against the Employee alleging a violation of the non-solicitation and confidentiality clauses of his Agreement and a breach of his legal duty of loyalty. Among other

things, Traffic Tech sought the amount of \$1.28 million for breach of the non-solicitation clause in the Agreement

### **The Court's decision**

The Superior Court decided that the non-solicitation and confidentiality clauses in the Agreement were inapplicable.

Specifically, since the Agreement had not been renewed in accordance with the renewal clause contained therein, but the Employee had continued working more than five days past the expiration thereof, the Employee's employment was tacitly renewed for an indeterminate term, in accordance with article 2090 of the *Civil Code of Quebec* (C.C.Q.).

However, in accordance with the previous case law in this regard, the Court declared that the tacit renewal only applied to the essential conditions of the Agreement, and specified that this includes the Employee's salary or hours of work. Nonetheless, in an unprecedented decision, the Court concluded that confidentiality clauses, non solicitation clauses, and other restrictive covenants are not essential conditions of the employment agreement. In short, and to the extent that the employee's obligations of confidentiality and non-solicitation exceed the legal duty of loyalty provided at article 2088 of the *Civil Code of Quebec*, those obligations are not enforceable.

It should be noted that the Court did find a breach of the Employee's duty of loyalty since he had solicited members of his sales team while he was still an employee of Traffic Tech. Nonetheless, the Court did not award any damages to Traffic Tech since Traffic Tech was unable to prove that it incurred any damages as a result of the Employee's breach.

### **Important takeaways for employers**

This decision really highlights the dangers for an employer to allow an employee under a fixed-term employment agreement to work beyond the expiry of the term. Firstly, it is clear that this decision set an important precedent in that confidentiality clauses, non solicitation clauses, and non competition clauses will not be enforceable in the event of the tacit renewal of the employment agreement.

Furthermore, there will also be uncertainty when dealing with clauses that exceed salary, hours of work or other basic employment conditions as to whether they fall within the definition of "essential conditions of employment".

As a result, when hiring an employee, an employer should strongly consider whether it is even advantageous to enter into a fixed-term employment agreement or whether an indeterminate term agreement may be safer.

by Shari Munk-Manel

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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