EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

UNDER ATTACK: FORFEITURE AND TERMINATION CLAUSES

Melanie Polowin, Partner – Ottawa

Cristina Borbely, Associate – Waterloo

Amy Derickx, Associate – Ottawa

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SPEAKERS

MELANIE POLOWIN

Partner

melanie.polowin@gowlingwlg.com
+1 613 786 0244

CRISTINA BORBELY

Associate

cristina.borbely@gowlingwlg.com
+1 519 575 7507

AMY DERICKX

Associate

amy.derickx@gowlingwlg.com
+1 613 786 3251

AGENDA

TOPIC	*SPEAKER*
Introduction	Elisa Scali, Melanie Polowin
Matthews v Ocean Nutrition Canada Ltd., 2020 SCC 26	Melanie Polowin
Waksdale v Swegon North America, 2020 ONCA 391	Amy Derickx
Sewell v Provincial Fruit Co. Ltd, 2020 ONSC 4406	Cristina Borbely
Ojo v Crystal Claire Cosmetics, 2021 ONSC 1428	Amy Derickx
Lamontagne v JL Richards, 2021 ONSC 2133	Cristina Borbely
Perretta v Rand A Technology Corporation, 2021 ONSC 2111	Amy Derickx
Rahman v Cannon Design Architecture Inc., 2021 ONSC 5961	Cristina Borbely
Livshin v The Clinic Network, 2021 ONSC 6796	Cristina Borbely
Battiston v Microsoft Canada Inc., 2020 ONSC 4286, 2021 ONCA 727	Amy Derickx

DUTY TO DRAW ATTENTION TO FORFEITURE PROVISIONS

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MATTHEWS V OCEAN NUTRITION CANADA LTD., 2020 SCC 26

- Key employee since 1997 as Vice President, New and Emerging Technologies
- Aspects of role removed in 2011
- Clearly personality conflict between new management and Matthews
- Matthews resigned and brought claim for constructive dismissal
- At issue were incentive and variable compensation entitlements, including stock options

MATTHEWS V OCEAN NUTRITION CANADA LTD., 2020 SCC 26

- Language requiring employee to be “full time” or “active” ineffective
- Exclusion clause did not cover “unlawful” termination
- Even if it did, it would still be ambiguous

MATTHEWS V OCEAN NUTRITION CANADA LTD., 2020 SCC 26

- **WARNING**
  - Reinforces that reasonable notice (or compensation/damages for) for ALL compensation elements is *always the starting point in every analysis*;
  - Implicitly approves lower courts' ongoing efforts to demand *virtually perfect* drafting, processes and conduct from employers;
  - Game-changer is recognition of an (as yet undefined) employer *duty* to draw attention to harsh forfeiture provisions, *even if those provisions are common or "industry standard*"

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REFERENCE TO “CAUSE” AND “JUST CAUSE”

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WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- Short-service employee terminated on a without cause basis
- Sued for wrongful dismissal
- Contract had strong ESA clause
- Argued both “cause” and “without cause” provision unenforceable
- “without cause” clause likely enforceable on its own, but
- “with cause” provision violated the *Employment Standards Act*, 2000, SO 2000 c 41 (“**ESA**”)
- Employer argued severability clause to save “without cause” provision

WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- Lower court - Superior Court - held “cause” provision was **unenforceable**, but did not impact “without cause” provision
- Held that common law reasonable notice was sufficiently rebutted and ESA applied
- Court of Appeal disagreed
- Termination provisions should be interpreted as a whole
- Severability clauses cannot save termination provisions, **if even one part invalid, all is invalid**
- **Common law prevailed**

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WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- **WARNING**
  - Most employment agreements with “cause” termination clauses may be invalid
  - Ensure contracts are updated for new employees and employees being promoted
  - Contract templates need to be reviewed annually, if not more frequently
  - This case has been applied in subsequent cases to the detriment of employers

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FAILURE TO REFERENCE CERTAIN ENTITLEMENTS

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SEWELL V PROVINCIAL FRUIT CO. LTD, 2020 ONSC 4406

- Employee employed for less than one year
- Employment agreement signed by employee referred to “just cause”
- Employee did not understand the full implications of the termination provisions
- Termination provisions were never explained to the employee
- Court stated that it was reasonable for employee to sign the agreement without parsing out meaning of termination provisions or seeking independent legal advice
- Court emphasized protection of employees and consideration of agreement as a whole

SEWELL V PROVINCIAL FRUIT CO. LTD, 2020 ONSC 4406

- The agreement violated the ESA for two reasons:
  1. combination of notice and severance pay entitlements;
  2. “For Just Cause” provision contracted out of ESA standard
- 45 year-old employee with less than one year of service was awarded four months’ notice

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SEWELL V PROVINCIAL FRUIT CO. LTD, 2020 ONSC 4406

- **WARNING**:
  - Employees are not required to interpret termination provisions or seek independent legal advice prior to signing employment agreements
  - Employees are entitled to severance pay; notice cannot be provided in lieu
  - Further reinforces the demand for *virtually perfect* drafting from courts

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OJO V CRYSTAL CLAIRE COSMETICS, 2021 ONSC 1428

- Warehouse Manager hired in August 2018 and terminated in July 2019
- Employment agreement signed
- Statutory minimums upon termination provided
- Employee claimed the termination provisions were unenforceable for two reasons:
  1. Reference to “just cause for summary dismissal”;
  2. No reference to continuation of benefits during notice period

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OJO V CRYSTAL CLAIRE COSMETICS, 2021 ONSC 1428

- Court found that the employer as drafter had failed to distinguish between the ESA and the common law standard of termination without notice or pay in lieu of notice
- “summary dismissal” does not incorporate the ESA standard
- Court agreed that the termination provision did not require the employer to continue paying the value of benefits during minimum notice as required by the ESA

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OJO V CRYSTAL CLAIRE COSMETICS, 2021 ONSC 1428

- Court rejected the employee's claim for a pro-rated bonus payment
- The agreement did not provide for a bonus payment, discretionary or otherwise
- Employee relied on conversation with his manager
- Manager denied conversation occurred
- No legal consideration for alleged bonus entitlement

OJO V CRYSTAL CLAIRE COSMETICS, 2021 ONSC 1428

- **WARNING**
  - The Court will not read in words for the employer's benefit
  - Silence on benefit continuation may render termination provisions void

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LAMONTAGNE V JL RICHARDS, 2021 ONSC 2133

- Bilingual chartered accountant employed for approximately 6 years as a Controller
- At issue was the employee's entitlement to common law notice
- This required an inquiry into the validity of the termination clause
- If clause invalid or ambiguous, common law notice will not be rebutted

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LAMONTAGNE V JL RICHARDS, 2021 ONSC 2133

- Termination provision stated “for cause at any time, without notice”
- Employer argued that meant only “no notice” need be given and did not take away ability to provide payment instead
- Employer also argued that “for cause” should not include cause at common law
- Illegal termination provisions, whether in whole or in part, will not be enforced
- Agreement will be read as a whole; illegality of “termination for cause provision” invalidated entirety of termination clause

LAMONTAGNE V JL RICHARDS, 2021 ONSC 2133

- Employer's arguments were considered contradictory
- Appropriate interpretation of "for cause" is that it applies to both common law and statutory cause
- Employee could be terminated without notice for conduct that is not wilful or "bad on purpose"
- "Termination for cause" provision illegal for incorporation of "just cause" concept

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LAMONTAGNE V JL RICHARDS, 2021 ONSC 2133

- "Termination without cause" provision also invalid for failure to mention benefits and bonuses
- "complete entitlement" is an attempt to contract out of the payment of benefits and bonuses during the notice period

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LAMONTAGNE V JL RICHARDS, 2021 ONSC 2133

- **WARNING**
  - "For cause" incorporates the "just cause" standard
  - Employment agreements should be reviewed for reference to "cause" and updated as necessary
  - If notice is contracted out of, court will find that employer also contracted out of pay in lieu of notice
  - Be careful of reference to "complete entitlement" and/or a failure to reference an employee's entitlement to benefits and bonuses
  - Language that implies "that's all, folks" may invalidate termination provisions
  - What the employer might have done is irrelevant

REPUDIATION

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PERRETTA V RAND A TECHNOLOGY CORPORATION, 2021 ONSC 2111

- Customer Advocate employed for approximately 6 years terminated in March 2020
- Employment agreement provided for statutory minimums, plus two weeks' pay
- Employer initially refused to pay the additional two weeks' until the employee signed a release
- Following letter from employee's counsel, employer apologized and paid out the additional two weeks' pay
- Employee argued an entitlement to common law damages due to the employer's repudiation of the employment agreement

PERRETTA V RAND A TECHNOLOGY CORPORATION, 2021 ONSC 2111

- An agreement is repudiated if a reasonable person would conclude the breaching party no longer intended to be bound by the contract with the result that the innocent party would be deprived of substantially the whole benefit of the contract
- Repudiation is an objective test
- Subjective intent is irrelevant

PERRETTA V RAND A TECHNOLOGY CORPORATION, 2021 ONSC 2111

- Employer's repeated request for a signed release in exchange for the additional two weeks' pay constituted a breach of the employment agreement
- Breach could not be cured by apology or post-breach payment of amounts owed

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PERRETTA V RAND A TECHNOLOGY CORPORATION, 2021 ONSC 2111

- Court commented on the validity of the termination provisions “in obiter”
- “Termination With Cause” provision listed 11 categories of “just cause”
- Some of the categories did not rise to the ESA standard
- The phrase “subject to the ESA” did not save the provision but created ambiguity
- The clause was ambiguous and therefore unenforceable

PERRETTA V RAND A TECHNOLOGY CORPORATION, 2021 ONSC 2111

- **WARNING**
  - Ensure compliance with terms of agreement upon termination
  - Failure to pay contractual entitlements could invalidate even valid termination provisions
  - Ensure agreements contain language requiring a release in exchange amounts in excess of ESA minimum standards
  - Categories of cause should not be enumerated in the employment agreement
  - Invalid provisions cannot be saved by the phrase “subject to the ESA”

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SOPHISTICATION OF PARTIES

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RAHMAN V CANNON DESIGN ARCHITECTURE INC., 2021 ONSC 5961

- **“**Principal” of employer employed for approximately four years
- Employee received legal advice at time of employment offer
- Severance entitlements amended to include an enhanced benefit of two months’ notice
- Employee challenged termination provisions
- Termination provision referred to “conduct that constitutes just cause for summary dismissal”

RAHMAN V CANNON DESIGN ARCHITECTURE INC., 2021 ONSC 5961

- Employee adequately informed of statutory and common law rights
- *Ojo* could not represent a conclusive and binding determination that the phrase “conduct that constitutes just cause for summary dismissal” must be construed to contravene the ESA
- There was a mutual intent to comply with the minimum standards of the ESA
- Agreement freely entered into between two reasonably sophisticated parties in the absence of any particular disparity in bargaining power
- No basis to imply into the phrase “just cause for summary dismissal” a standard below the ESA standard

RAHMAN V CANNON DESIGN ARCHITECTURE INC., 2021 ONSC 5961

- Court noted that if the provisions were void, they would have to be void for all purposes, including where greater benefits were provided to the employee
- Termination provisions upheld as valid

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RAHMAN V CANNON DESIGN ARCHITECTURE INC., 2021 ONSC 5961

- **TAKEAWAY**
  - Sophistication of parties matters
  - Pre-employment negotiation of termination provisions may be considered
  - Court will consider factors evincing a mutual intent to comply with ESA minimum standards

LIVSHIN V THE CLINIC NETWORK CANADA INC., 2021 ONSC 6796

- Employee entered into a three-year employment agreement following a share purchase of his practice
- Employee temporarily laid-off due to COVID-19
- Temporary lay-off was converted to a deemed IDEL
- Employee was subsequently terminated

LIVSHIN V THE CLINIC NETWORK CANADA INC., 2021 ONSC 6796

- Employment agreement referred to termination for “just cause” without notice
- Employment agreement provided for “payment” or “working notice in lieu of payment” in the absence of just cause
- Employment agreement required execution of full and final release in exchange for amounts in excess of statutory minimum

LIVSHIN V THE CLINIC NETWORK CANADA INC., 2021 ONSC 6796

- Employment agreement did not differentiate between common law and statutory standards of termination without notice/pay in lieu of notice
- Court emphasized the imbalance of power inherent in the employer-employee relationship
- Court noted that both the employer and employee were sophisticated and represented by counsel at the time of the negotiation of the employment agreement in the context of the acquisition

LIVSHIN V THE CLINIC NETWORK CANADA INC., 2021 ONSC 6796

- *Nonetheless*, court refused to enforce a termination provision that did not comply with the ESA
- No commercial imperative for dismissal for just cause without notice
- Court emphasized the need to encourage employers to draft agreements that comply with the ESA
- Court awarded damages from the date of temporary lay-off to the end of the fixed-term agreement, *a period of roughly 20 months*
- No duty to mitigate

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LIVSHIN V THE CLINIC NETWORK CANADA INC., 2021 ONSC 6796

- **WARNING**
  - Despite *Rahman*, the sophistication of parties may indeed be irrelevant
  - Termination provisions may be invalidated even where employee receives independent legal advice

FAILURE TO NOTIFY

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BATTISTON V MICROSOFT CANADA INC., 2020 ONSC 4286

- Bonus based on performance appraisal
- Policy did not remove common law entitlement to bonus during notice period
- Poor performance did not remove common law entitlement to bonus during notice period
- Interestingly, poor performance in fiscal year 2018 nullified bonus entitlement for the year worked, but did not nullify claim during notice period.

BATTISTON V MICROSOFT CANADA INC., 2020 ONSC 4286

- Stock Award Agreement unambiguously excluded right to unvested shares following termination
- Court found provisions harsh and oppressive
- Provisions were not sufficiently brought to employee's attention, even though in "click through" acceptances on numerous occasions
- Therefore entitled to damages for unvested shares

BATTISTON V MICROSOFT CANADA INC., 2021 ONCA 727

- Court of Appeal reversed the trial judge's conclusions because:
  1. employee's express agreement to the terms for 16 years;
  2. employee's conscious decision not to read the agreement;
  3. employee's misrepresentation (that he had read/understood, even though he hadn't) put him in a better position than an employee who did not misrepresent

BATTISTON V MICROSOFT CANADA INC., 2020 ONSC 4286, 2021 ONCA 727

- **Implications:**
  - Bring termination provisions limiting employees' rights to their attention
  - **Corporate documents need to be redrafted**
  - Failure to notify **explicitly** may be enough to nullify an effective termination provision

HEY YOU!

READ THIS

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BATTISTON V MICROSOFT CANADA INC., 2020 ONSC 4286, 2021 ONCA 727

- **Implications:**
  - Keep records of presentations and signed agreements
  - Be careful of “click through” agreements

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SPEAKERS

MELANIE POLOWIN

Partner

melanie.polowin@gowlingwlg.com
+1 613 786 0244

CRISTINA BORBELY

Associate

cristina.borbely@gowlingwlg.com
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