EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

A YEAR IN REVIEW

Andrew Bratt, Partner – Toronto

Neena Gupta, Partner – Waterloo

Mark Josselyn, Partner – Ottawa

Elisa Scali, Partner – Ottawa

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AGENDA

Year In Review

1. The Right to Disconnect?
2. Pandemic Lay-offs & Termination Claims
3. Termination Packages
4. Fixed-Term Employment Agreements
5. Banning Non-Competition Clauses?
6. Common Employer & Employer Severance Obligations
7. Update: COVID-19 Vaccination Policies
8. Q&A

SPEAKERS

Andrew Bratt

Partner – Gowling WLG

andrew.bratt@gowlingwlg.com

+1 416 369 6641

P.A. Neena Gupta

Partner – Gowling WLG

neena.gupta@gowlingwlg.com

+1 416 862 5700

Mark Josselyn

Partner – Gowling WLG

mark.josselyn@gowlingwlg.com

+1 613 786 0148

Elisa Scali

Partner – Gowling WLG

elisa.scali@gowlingwlg.com

+1 613 786 0224

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice
- Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation
- For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information

1. THE RIGHT TO DISCONNECT?

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BILL 27 – *WORKING FOR WORKERS ACT, 2021*

- Ontario introduced this omnibus legislation in Oct. 2021
- Status: passed 2nd Reading
- Ontario first jurisdiction in Canada to propose a right to disconnect
  - requirement on employers with 25 or more employees to have a written policy with respect to disconnecting from work
  - If passed, employers will have 6 months to implement their policies
- Lacks details on: exempt employees & industries

BILL 27 – *WORKING FOR WORKERS ACT, 2021*

Best Practices

- Technological Solutions
  - delay or sequester messages that are not urgent to business hours
  - Reduce recipients on email chain
- Flexi-work
- Work Culture
  - Realistic expectations
  - Encourage disengagement during vacation time

2. PANDEMIC LAY-OFFS & TERMINATION CLAIMS

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ONTARIO REGULATION 228/20 - IDEL

O. Reg. 228/20, Infectious Disease Emergency Leave (IDEL)

- Provides temporary relief measures from the termination & severance provisions of the ESA
  - Temporary relief measures extended multiple times
- IDEL regulation **amends only the ESA rules** related to layoffs and constructive dismissal
- It does not, in theory, impact the common law, and common law constructive dismissal claims
  - MOL online materials make this clear
- Interaction between IDEL and the common law is complex and uncertain

THREE CASES

- Question: Is a layoff during the COVID period a constructive dismissal?
  - Thus far, 3 known decisions on interaction between IDEL and the common law
- Results: 2 vs 1 in favour of a constructive dismissal

Gowling Insights:
https://gowlingwlg.com/en/insights-resources/articles/2021/ontario-emergency-leave-displaces-dismissal/

CASE LAW

(1) Coutinho v. Ocular Health Centre Ltd., 2021 ONSC 3076

- Office Manager received written notice that she was being temporarily laid off without pay
  - No contractual right to lay off
- Held: An IDEL constitutes constructive dismissal at common law.
- Why?
  - **S. 8(1) of the ESA:** *Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.*

CASE LAW

(2) Fogelman v. IFG, 2021 ONSC 4042

- Managing Director of Recruiting placed on temporary lay-off
  - No contractual right to lay off
- Held: An IDEL constitutes constructive dismissal at common law
- Why?
  - *"As Mr. Fogelman was not pursuing his rights under the ESA but rather was pursing his civil remedies, O. Reg. 228/20 does not apply to Mr. Fogelman's claims made under the common law pursuant to s. 8(1) of the ESA." – Justice Vella, para 50.*

CASE LAW

***(3) Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135**

- Held: IDEL does not constitute constructive dismissal at common law
- Why?
  - Reasoned employee cannot be on a leave of absence for ESA purposes, yet terminated by constructive dismissal for common law purposes -- an absurd and untenable result
  - *"[…] no matter which authority one wants to consider on the point - it offends the rules of statutory interpretation to give an interpretation that renders legislation meaningless. That issue was never addressed in Coutinho."* – Justice Ferguson, para 21
- Currently being appealed…

3. TERMINATION PACKAGES

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CASE LAW

Matthews v. Ocean Nutrition Canada Ltd., 2020 SCC 26

- Senior executive, 14 years of service, earning $142,000, bonus and LTIP
- Resigned & alleged constructive dismissal. 13 months after his departure, Defendant company sold for $540M
- Issue: What is the quantum of damages for breach of implied term to provide reasonable notice of termination, including LTIP payments?
  - Sale of Defendant took place during the reasonable notice period. The value of the lost LTIP was $1,086,893.26
  - SCC suggested that in certain circumstances it may be appropriate to examine whether the clauses purporting to limit or take away an employee's common law rights were adequately brought to the employee's attention
- Employers have been busily redrafting Employment Agreements, bonus, LTIP, commission, pension and stock option provisions in light of this decision

4. FIXED-TERM EMPLOYMENT AGREEMENTS

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FIXED-TERM EMPLOYMENT AGREEMENTS

- When used properly:
  - can mitigate severance exposure

- When used improperly:
  - exposure to notice period equal to balance of remaining term

FIXED-TERM EMPLOYMENT AGREEMENTS

***McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)*, 2020 ONCA 816**

- Employee owner of family business funeral home in North Bay
- Employee sold to appellant company, with term that allowed employee to continue working at funeral home as a general manager for a fixed-term of 10 years
- Agreement did not contain any terms dealing with its early termination
- Relationship soured. Employee went on medical leave and eventually alleged constructive dismissal
- Held: Upheld lower court decision awarding former employee > $1.27M

5. BANNING NON-COMPETITION CLAUSES?

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BILL 27 – *WORKING FOR WORKERS ACT, 2021*

Non-competition Clauses

- Narrow usage of non-compete agreements in Ontario
  - only enforceable in "exceptional" circumstances
- Bill 27 proposes to bar non-compete agreements/clauses altogether
  - One exception in context of a sale of a business

6. COMMON EMPLOYER & EMPLOYER SEVERANCE OBLIGATIONS

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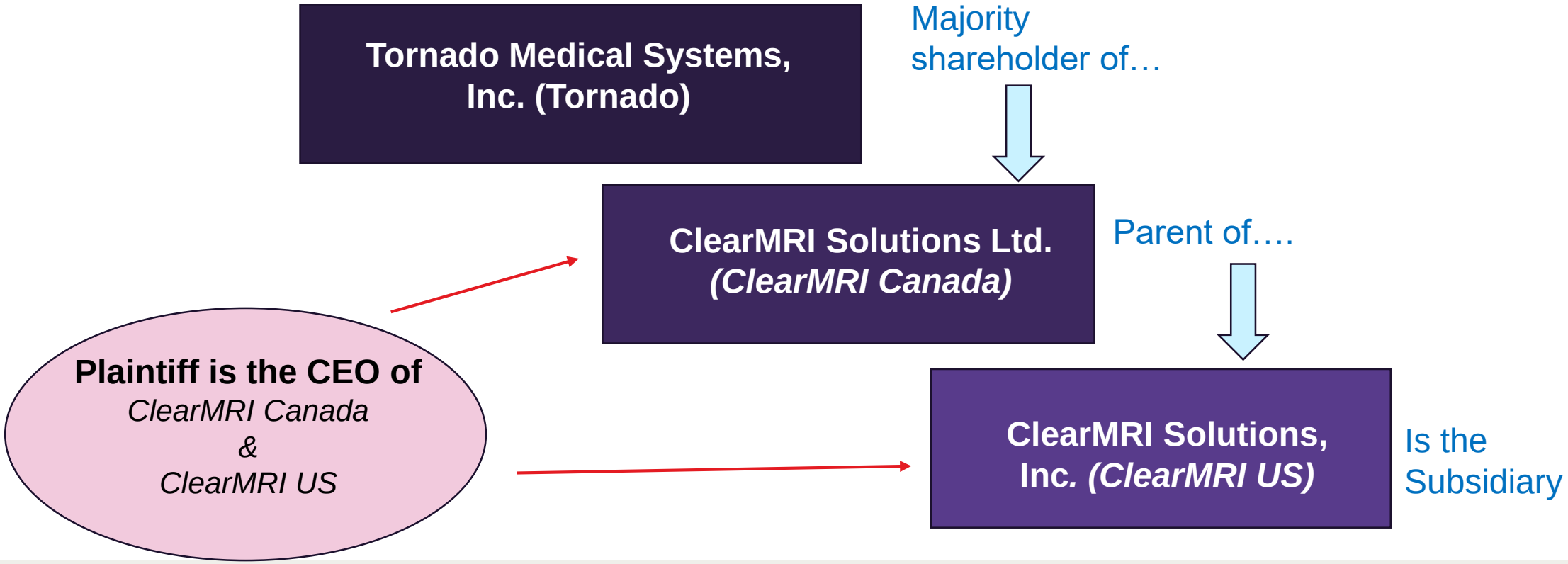
COMMON EMPLOYER

O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385



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COMMON EMPLOYER

O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385

- Companies experienced cash flow problems and employment relationship ended
- Plaintiff was owed $281,315 US in unpaid salary & $50,000 US (a loan he advanced)
- The Plaintiff obtained default judgment against *ClearMRI Canada* and *ClearMRI US*
  - For deferred salary, vacation pay, performance bonus and unpaid loan in the amount of $381,103.84 US plus costs
- The Plaintiff then moved for summary judgment against *Tornado* and various corporate directors

COMMON EMPLOYER

O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385

- Motion judge identified 3 factors to consider in analyzing the Common Employer doctrine:

1. The Employment Agreement
2. Where the effective control over the employee resides
3. Whether there was common control between the legal entities

COMMON EMPLOYER

O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385

- ONCA confirmed a parent company not ordinarily liable for debts & obligations of a subsidiary
- "Corporate separateness" has exceptions and courts can "pierce the corporate veil" where the subsidiary is a mere façade:
  I. There is complete control of the subsidiary and the subsidiary is the "mere puppet" of the parent;
  II. The subsidiary was incorporated for a fraudulent or improper purpose and used as a shell for improper activity;
- The Common Employer doctrine is not the same as piercing the corporate veil
- The corporation related to the nominal employee will only be found to be a Common Employer where evidence shows an **intention to create employer/employee relationship**
- Held: ONCA found that Tornado did not exercise control over the Plaintiff as an employee

6. COMMON EMPLOYER & EMPLOYER SEVERANCE OBLIGATIONS CONTINUED…

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SEVERANCE OBLIGATIONS: ESA S. 64

Entitlement to severance pay

64 (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

Payroll

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was $2.5 million or more.

SEVERANCE OBLIGATIONS

- Previously, only ONSC decision on point was ***Paquette c. Quadraspec Inc.*, 2014 ONSC 2431**
  - contrary to OLRB decisions and in fact the guidance in the *ESA Policy and Interpretation Manual*
- Quadraspec's Canadian payroll including Quebec was $3,176,040 but Ontario payroll was only $1,515,492.
- Justice Kane disagreed with previous OLRB jurisprudence holding that this was <u>not</u> an attempt by the Ontario legislature to legislate beyond its jurisdiction
  - Rather, the definition of "payroll" should not be interpreted to add the word "Ontario" when section 64(2) provides namely: "…the total wages earned by all of the employer's employees…"

SEVERANCE OBLIGATIONS

***Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290**

- Defendant a wholly owned subsidiary of a German parent. The employee worked 38 years for companies controlled or purchased by the German parent.
- The employer's Ontario payroll was less than $2.5 million; however, the global payroll of the parent far exceeded the threshold

What does the ESA say?

Separate persons treated as one employer

- **4 (1)** Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.
- **(2)** The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act

SEVERANCE OBLIGATIONS

***Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290**

- Held: The Ontario Divisional Court reversed the OLRB decision and relied upon the **global payroll** to award the employee severance pay under the *Employment Standards Act*
  - While section 3.1 of the ESA has geographical limitations with respect to the scope of to whom the Act applies, section 64 has no such limitation
  - No jurisdictional impediment to Ontario legislating with respect to the definition of "size" when assessing an employer's ability to pay severance pay.
- Employment outside Ontario, including outside of Canada, must be included in the calculation of the payroll for the purposes of section 64

6. COMMON EMPLOYER & EMPLOYER SEVERANCE OBLIGATIONS CONTINUED…

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COVID BUMP

Yee v. Hudson's Bay Company, 2021 ONSC 387

- First COVID notice period case following the onset of the pandemic
- Plaintiff was 62 years old, nearly 12 years of service, lacked contract that limited his entitlements when terminated
- At trial, argued that reasonable notice period should be extended to reflect impact of the pandemic on his prospects for re-employment
  - Relied on reasoning in *Paquette v. TeraGo Networks Inc*. (2015 ONSC 4189)
  - However, *Holland v. Hostopia.com Inc*. (2015 ONCA 762), noted that reasonable notice of termination was to be determined "by the circumstances **existing at the time of termination**"
- Since the pandemic was not in effect at the time of Mr. Yee's termination in August of 2019, it was not to be taken into account in calculating his entitlement to reasonable notice of termination
  - *"It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment." - Justice Dow*

COVID BUMP

***Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998**

- 56-year old Business Development Manager employed ~2 years at the time of dismissal on March 20, 2020 -- one week after Ontario declared a state of emergency due to COVID-19 pandemic.
- Awarded 3 months of reasonable notice. Why?
  - Uncertainties in the job market did tilt the reasonable notice period away from the short-end
  - But court ultimately refused to put significant weight on the pandemic given that its impact was “highly speculative and uncertain” at the time of termination
  - Need to be alert to the dangers of applying hindsight to the measure of reasonable notice at the time when the decision to terminate was made

COVID BUMP

***Kraft v. Firepower Financial Corp.*, 2021 ONSC 4962**

- 34-year salesperson in financial industry, 5.5 years service. Terminated March 2020 – same week Ontario declared a state of emergency
- Awarded 10 months. Why? Justice Morgan followed 3-step process:
  1. Determined relevant case law showed range of 4 to 12 months
  2. Determined average was 9 months
  3. Added a month to the notice period because “there was evidence that the pandemic impacted on the plaintiff’s ability to secure new employment.”
- Differentiated case from the *Hudson’s Bay* case based on timing of termination
- Agreed with Justice Dunphy’s caution about applying hindsight but indicated that uncertainty that existed at the time was one of many factors he considered in assessing the notice period

COVID BUMP

***Pavlov v. The New Zealand and Australian Lamb Company Limited*, 2021 ONSC 7362**

- 47 year old Director of Marketing and Communication, nearly 3 years service. Terminated on May 28, 2020.
- Awarded 10 months of reasonable notice. Why? Court said the following about the availability of similar employment:
  - "*At the time of Pavlov's dismissal, the initial effects of the global pandemic were being experienced by industries of all sorts, including those associated with international importing and distribution. It is a reasonable inference to draw from the evidence and the timing of the dismissal that the effects and uncertainties of the pandemic were obstacles to Pavlov's efforts to obtain alternate employment. These obstacles would, or should, have been known to NZAL Co. at the time of Pavlov's dismissal*."
- Justice Stewart did not indicate how much of a bump was attributed to the pandemic

7. UPDATE: COVID-19 VACCINATION POLICIES

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VACCINATION POLICIES

UFCW, Canada, Local 333 v. Paragon Protection Ltd.

- Employer a security services contractor providing security personnel to third party clients
- Many of employer's clients had implemented vaccination requirements for contractors. Employer introduced its own COVID-19 Vaccination Policy required employees to be fully vaccinated subject to valid exceptions under the *Human Rights Code*
- Union filed a policy grievance alleging (among other things) breach of the collective agreement and the *Code*, and violated the *Health Care Consent Act*
- Vaccination policy upheld
  - Policy consistent with employer's obligations under OHSA, *Code* and HCCA had no application as employer not a "health care practitioner"
  - Notably, collective agreement contained unique language regarding vaccination since *before* the pandemic

VACCINATION POLICIES

Electrical Safety Authority v. Power Workers' Union

- Employer regulates and promotes public electrical safety in the province
- First, introduced their Vaccination or Testing COVID-19 vaccination policy – found reasonable by union
- Then, revised policy to Mandatory Vaccination (testing only for valid exemptions).
  - Non-compliant employees may be disciplined, put on an unpaid administrative leave and/or discharged for failing to get fully vaccinated.
- Mandatory Policy was unreasonable. Directed the employer to amend the Mandatory Policy to provide a testing alternative for the unvaccinated
  - Arbitrator Stout took a contextual analysis and a balancing of interests approach
  - mandatory vaccination policies may be necessary in workplaces where the risks are high and there are vulnerable populations. These circumstances did not apply

VACCINATION POLICIES

Ontario Power Generation v The Power Workers Union

- *Policy*: if employee refused to be vaccinated then they must undergo a twice weekly test at the employee's cost
  - Ruled that **OPG must cover the cost** of the test but that the employee must do the test on their own time for which they will not be compensated
- *Policy*: if employee both refuses to get vaccinated and refuses the testing, then they would be placed on an unpaid leave of absence for 6 weeks and then if they still refuse, the employee would be terminated with just cause
  - This part of the policy was upheld
- Certain employees allowed 1 hour paid time to attend indoor gym for exercise. *Policy*: restricts the use of the indoor gym to only those fully vaccinated
  - This part of the policy was upheld, with a note that the unvaccinated could still exercise outside

2 – HUMAN RIGHTS: GUIDANCE

Ontario Human Rights Commission:

While receiving a COVID-19 vaccine remains voluntary, the OHRC takes the position that **mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the Human Rights Code (Code) as long as protections are put in place** to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated. This applies to all organizations.

Organizations with a proven need for COVID-related health and safety requirements might also put **COVID testing in place as an alternative to mandatory vaccinations** or as an option for accommodating people who are unable to receive a vaccine for medical reasons. Organizations should cover the costs of COVID testing as part of the duty to accommodate.

Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

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2 – HUMAN RIGHTS - CREED EXEMPTIONS

Ontario Human Rights Commission:

Personal preferences and singular beliefs <u>not</u> protected

Receiving a COVID-19 vaccine is voluntary. At the same time, the OHRC's position is that **a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code**. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the Code.

While the Code prohibits discrimination based on creed, **personal preferences or singular beliefs do not amount to a creed for the purposes of the Code**.

Ontario
Human Rights Commission
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2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

Ontario

1. Pre-existing Conditions
   - Severe allergic reaction; myocarditis
2. Contraindications to AstraZeneca/Covishield Vaccine Series
   - Capillary leak syndrome; thrombosis; thrombocytopenia
3. Adverse Events Following C-19 Immunization
   - Thrombosis with thrombocytopenia; Myocarditis, pericarditis; serious adverse event after
4. Actively receiving monoclonal antibody therapy OR convalescent plasma therapy

MOH Medical Exemptions to COVID-19 Vaccination:
https://health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/vaccine/medical_exemptions_to_vaccination.pdf

TO BE DETERMINED…

- Do not yet know is whether we can terminate people for cause for refusing to be vaccinated
- Cases will get resolved 12 to 36 months from now
  - by then, courts may forget the real impact of the pandemic
- So, use all the tools you have:
  - Persuasion
  - Education
  - Working notice
  - Money

8. Q&A SESSION

Andrew Bratt

Partner – Gowling WLG

andrew.bratt@gowlingwlg.com

+1 416 369 6641

P.A. Neena Gupta

Partner – Gowling WLG

neena.gupta@gowlingwlg.com

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