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WRONGFUL DISMISSAL

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This four-volume national work provides a comprehensive treatment on the law of wrongful dismissal in Canada. Coverage includes: the contract of employment and employee status; types of dismissal and the “just cause” defence; damages and the duty to mitigate; related actions including actions tort, injunctive relief, and statutory actions; employee protections under the *Canada Labour Code*, tax considerations; the impact of statutes on the assessment of damages; practical considerations; charts of notice awards; and relevant legislation and concordance tables.

What's New in this Update

This release includes updates to Chapters 5 (Just Cause), 11 (Impact of Statute on Assessment of Damages) and 13 (The Significance of Writing in Contracts).

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Highlights

- **Chapter 5—§ 5:1—Generally**—In *Chan v. NYX Capital Corp.*, 2025 ONSC 4561, 2025 CarswellOnt 13207 (Ont. S.C.J.), the court applied the same reasoning to a termination provision that purported to allow the employer to terminate the employee during a three-month probationary period “at any time and for any reason at its discretion”, and later for cause without notice or severance. The court held that this language offended the ESA in multiple respects, including because the “for cause” language was broader than the statutory standard pertaining to wilful misconduct. Relying on *Waksdale* and the more recent decision in *Dufault v. Ignace (Township)*, 2024 ONCA 915, 2024 CarswellOnt 19727, leave to appeal refused *Corporation of the Township of Ignace v. Karen Dufault*, 2025 CarswellOnt 8986 (S.C.C.), affirmed 2024 ONSC 1029, 2024 CarswellOnt 5794 (Ont. S.C.J.), the court concluded that the entire termination provision was void and unenforceable. Importantly, that conclusion extended to the purported probationary clause itself. The employer’s attempt to argue that the employee nevertheless remained probationary, based on the parties’ intentions and other provisions of the agreement, was rejected. In the result, the employee was entitled to common law reasonable notice; the impugned probationary language did not operate to limit that entitlement. See also *Jones v. Strides Toronto*, 2025 ONSC 2482, 2025 CarswellOnt 14102, which likewise considered an “at any time” provision in a termination clause.
- **Chapter 5—§ 5:3—After-Acquired Knowledge**—A recent appeal-level review of after-acquired cause is found in *VIC Progressive Diamond Drilling Inc. v. Araneda*, 2026 NBCA 26, 2026 CarswellNB 100. In that case, the employee – who had served for 27 years in a family-run business – claimed she had been constructively dismissed when she was demoted from CEO to CFO. At trial, the judge determined that the demotion did constitute constructive dismissal and awarded damages of over \$115,000. In doing so, the judge rejected the employer’s claim of after-acquired cause (also referred to as after-discovered cause) in the form of employee dishonesty; it found the employee’s mother was aware of the employee’s actions at all material times prior to the demotion. On later appeal, the court noted there were two factors to be considered in determining whether after-acquired cause has been established: 1) the

misconduct must be sufficiently serious to warrant summary dismissal; and 2) the employer must not have been aware of the misconduct at the time of dismissal. On the facts of this case, both branches of the test had been met. In this case the after-discovered misconduct by the demoted employee was extensive and went to the core of the employment relationship. While still employed in a senior fiduciary capacity, she had covertly established and operated a competing business, diverted corporate opportunities, used confidential information and client relationships, and assumed an active management role in a competing enterprise. In addition, she had misappropriated corporate funds and made material misrepresentations concerning the employer's financial position to its lender by inflating inventory values. These acts were found to constitute both breaches of fiduciary duty and serious dishonesty. Importantly, much of this misconduct was not known to the employer at the time of the alleged dismissal. The trial judge had erred by failing to assess this evidence in the context of after-acquired cause, and by overlooking the covert nature and full scope of the employee's activities, which would have justified summary dismissal if it had been known at the time. The finding of constructive dismissal was accordingly set aside, and the employee's claim for damages failed.

- **Chapter 11—§ 11:1—Overview**—If a provision within a termination clause conflicts with the minimum standards prescribed by the *ESA*, the entire termination clause is invalid; it is not open for the employer to rely solely on a “without cause” provision, nor is it open to the court to simply strike the offending provision out. Subsequent to *Waksdale*, this approach has been reinforced by the Court of Appeal in *Dufault v. Ignace (Township)*, 2024 ONCA 915, 2024 CarswellOnt 19727, leave to appeal refused *Corporation of the Township of Ignace v. Karen Dufault*, 2025 CarswellOnt 8986 (S.C.C.). In that case, the Appeal Court affirmed the trial ruling that both the “for cause” and “without cause” clauses in an employment agreement were unenforceable on the basis they did not comply with the minimum standards set out in the *ESA*. The court maintained that “the termination provisions in an employment contract must be read as a whole. If one termination provision in an employment contract violates the *ESA* minimal standards, all termination provisions in the contract are invalid” (at paragraph 23). In reaching this conclusion, the Court of Appeal declined to revisit *Waksdale*, and entrenched the

principle that severability has no application in this context. Following *Waksdale* and *Dufault*, there have been a series of cases that affirm and refine these principles. In *De Castro v. Arista Homes Limited*, 2025 ONCA 260, 2025 CarswellOnt 4712, the Court of Appeal emphasized that disjunctive or expansive language – including references to breaches of an employment agreement that are not necessarily “wilful” or serious – will still offend the *ESA*. Where such language is present, the termination provision will be rendered unenforceable in its entirety. In *Ghazvini et al v. Canadian Imperial Bank of Commerce*, 2025 ONSC 5218, 2025 CarswellOnt 18401, the court considered both “for cause” and “without cause” provisions, this time under the *Canada Labour Code* and reached a similar conclusion. The court held that language permitting termination “at any time” and enumerating causes that may or may not meet the statutory threshold created a risk of non-compliance. This potential violation was sufficient to invalidate the termination provision. The court also rejected the effectiveness of a “saving clause”, noting that such provisions do not cure otherwise non-compliant language and may undermine the incentive for employers to draft compliant agreements. Finally, see *Li v. Wayfair Canada ULC.*, 2025 ONSC 2959, 2025 CarswellOnt 12271, where the court again invalidated termination clauses that either excluded statutory entitlements or combined entitlements in a manner that created uncertainty as to compliance. These decisions focus on situations where an employment contract purports to expand the employer’s entitlement to dismiss an employee. Conversely, there have been other situations where the agreement attempts to limit the employee’s notice to merely his or her *severance* pay under employment standards legislation.

- **Chapter 11—§ 11:2—ESA Legislation and Constructive Dismissal**In *Webb v. SDT North America*, 2023 ONSC 7170, 2023 CarswellOnt 19792, the employer argued that the plaintiff’s layoff fell within the Infectious Disease Emergency Leave (IDEL) provisions under the *ESA* and therefore could not constitute constructive dismissal. The court rejected that submission, holding that while the layoff may have satisfied the statutory definition of IDEL, the *ESA* does not extinguish an employee’s common law rights. Section 8 of the *ESA* expressly preserves those rights, and the employee remained entitled to pursue a claim for constructive dismissal. A similar conclusion was reached in *Richard Turcotte v. Grenville Management Inc.*, 2025

ONSC 3087, 2025 CarswellOnt 8873, where the court held that a temporary layoff imposed without contractual authority constituted constructive dismissal, notwithstanding the employer's reliance on *ESA* provisions and related regulations. The court further confirmed that statutory frameworks governing layoffs do not, in themselves, create a right to lay off at common law. Even where the employer purported to rely on the *ESA* to structure the layoff, the absence of contractual authority was determinative. Likewise, in *Lachapelle v. St. Laurent Automotive Group Inc.*, 2025 ONSC 1956, 2025 CarswellOnt 4710, additional reasons 2025 CarswellOnt 7272 (Ont. S.C.J.), the court held that a temporary layoff imposed during the COVID-19 pandemic constituted constructive dismissal where the employment contract contained no provision authorizing such a layoff. The court emphasized that, even in the face of significant business disruption, the employer could not unilaterally alter a fundamental term of the employment relationship. A reasonable person in the employee's position would conclude that the employment contract had been breached. Collectively, these cases confirm that external or extraordinary circumstances (such as the COVID-19 pandemic) do not, in themselves, alter the common law analysis. In both *Webb* and *Turcotte*, the courts rejected arguments that the pandemic created an implied right to lay off employees or otherwise justified unilateral changes to the employment relationship. While such circumstances may explain an employer's conduct, they did not displace the requirement for contractual authority or negate the legal consequences of its absence.

Chapter 13—§ 13:5—Certainty—In some cases, the courts may be asked to consider the impact of an *amendment* or update to an employer-drafted agreement, particularly where it may impinge on the employee's termination rights or ability to assert constructive dismissal. In *Timothy Comeau v. Valcom Consulting Ltd.*, 2025 NBKB 253, 2025 CarswellNB 749 (N.B. C.K.B.), the employer presented the employee with a revised written agreement shortly before the expiry of a fixed-term contract. The new agreement introduced materially different provisions governing layoff, suspension and termination. It also included language limiting the employee's entitlements to statutory minimums and purported to preclude the employee from claiming constructive dismissal in the event of unilateral changes. The employee declined to sign the revised agreement. Among other things, he asserted that the newly-injected

contractual provisions constituted fundamental changes to the employment relationship, and since they reduced his security of employment and post-termination entitlements. As such, he had effectively been constructively dismissed. The court agreed with the employee. The terms unilaterally imposed by the employer as part of the agreement “update” introduced new written terms affecting termination, layoff, and the employer’s ability to make change to the employment relationship. These were all changes to core employment terms, which the employer did not explain or even discuss with the employee. This employer’s failure to draw the employee’s attention to what were substantive changes, coupled with the lack of negotiation or explanation, amounted to a unilateral alteration of the essential terms of the agreement. The court accordingly ruled that the employee had been constructively dismissed.