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WRONGFUL DISMISSAL

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Release No. 10, November 2026

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 updates Chapter 2—Status as Employee, Chapter 4—Dismissal, Chapter 5—Just Cause, Chapter 6—Damages, Chapter 8—Duty to Mitigate, Chapter 13—The Significance of Writing in Contracts and Chapter 14—Practical Considerations.

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Highlights

- **Chapter 2—Status as Employee—I. At Common Law—B. Employee vs. Independent Contractor—§ 2:3—Overview—**A particularly comprehensive application of the four-factor *Lightstream* test was seen in *Salina v. Investors Group Financial Services Inc.*, 2026 BCSC 1168, 2026 CarswellBC 2180 (B.C. S.C.). The plaintiff had worked as a mutual fund and investment consultant for the defendant and its corporate predecessor for 27 years, building a book of approximately 500 clients and $92.5 million in assets under management. He was terminated for alleged cause and sued for wrongful dismissal. The threshold question was whether he had been an employee, an independent contractor, or a dependent contractor. The court examined each of the four *Lightstream* factors in turn. On the level of control, the court found this factor weighed heavily against independent contractor status: the defendant restricted the plaintiff to selling only its own products, reviewed all his trades at multiple levels, required approval of all marketing materials, and controlled the compensation structure. On ownership of equipment and tools, the court found this factor weighed only modestly in favour of independent contractor status, since although the plaintiff owned or leased his own equipment, he was required to lease defendant-specific computer hardware and use the defendant's proprietary software. On profit/loss opportunity, the court found this factor favoured independent contractor status, given the plaintiff's commission-based, uncapped compensation and his responsibility for most of his own operating expenses. Finally, as to business integration, the court found the plaintiff's practice was deeply integrated into the defendant's business—clients were legally clients of the defendant rather than of the plaintiff, and the plaintiff had no independent client base he could take with him. In addition to the four factors, the court considered objective evidence of the parties' mutual intention, including the parties' own contractual characterization of the relationship as one of "principal and agent" and the plaintiff's own tax filings as a self-employed contractor. This evidence strongly favoured independent contractor status. Nonetheless—and even though most of the individual factors favoured independent contractor status—the court ruled that the relationship feel

"between that of an employee and an independent contractor", ultimately concluding the plaintiff was a dependent contractor (at para. 84). The court focused on the substantial degree of control exercised by the defendant, together with the significant integration of the plaintiff's activities into the business. As a dependent contractor, and in the absence of an enforceable contractual notice provision, the plaintiff was entitled to reasonable notice of termination.

- **Chapter 2—Status as Employee—IV. Major Shareholders, Directors and Partners as Employees—§ 2:19—Major Shareholder-Employee—**A modern illustration of this "dual capacity" principle, in the specific context of the multi-factor test for distinguishing employees from independent contractors, is found in *Pringle v. Zenova Group PLC*, 2026 ONCA 549, 2026 CarswellOnt 12461 (Ont. C.A.). The appellant was a co-founder and 10 percent shareholder of a fire-safety products business. When he was later engaged through written agreement as Director of Product Development, he asked for income tax reasons to be classified as an independent contractor. After his termination, he sued for wrongful dismissal, with one of the key questions being whether he was an "employee". The lower court judge held that the appellant was an independent contractor, reasoning in part that, as a founder and "major" shareholder, he could "hope to profit indirectly" from his work through the appreciation of his shares, and that this indirect potential for profit weighed against true employee status. The Court of Appeal disagreed. It explained that individual's status as a shareholder—even a "major" one, and even as a founder—is analytically distinct from their status as a service-provider under a separate services agreement. It was an error to conflate the two, since an individual may still hold shares and benefit indirectly from their work. In law, an individual may have dual status: shareholder on the one hand, and employee or independent contractor on the other. The key questions that remain are those identified in the *Sagaz* and *Belton* decisions: whether the individual bore business risk or had a realistic prospect of profit, both independent contractors and employees can have dual status, whether they were integrated into the other party's organization. The question of whether they might indirectly benefit from the business's overall success as a shareholder was not a consideration. The Appeal Court ruled that the individual was an employee, notwithstanding his shareholding, his status as a co-founder, and an express contractual

statement that the agreement was not an employment contract.

- **Chapter 4—Dismissal—I. In General—§ 4:1—Overview—**In *O'Donoghue v. Fluid Energy Group Ltd.*, 2026 ABKB 428, 2026 CarswellAlta 1505 (Alta. K.B.), the court considered whether a valid termination could be achieved by way of an informal text message. The plaintiff was the company's chief operating officer. He exchanged a series of text messages with the company's CEO three days after a major corporate asset sale closed. In response to the plaintiff's message, in which he asserted that his executive employment agreement should be honoured, the CEO texted back, in part: "In any case I'm done being nice. Legal will get your package done. Turn in your laptop, key cards, etc." The employer later took the position that these texts did not constitute a dismissal at all, characterizing them as an acceptance of the plaintiff's purported resignation. The employer claimed that an actual for-cause termination did not occur until more than a week later, by way of a formal letter. The court disagreed with the employer's characterization, finding that the texts, when viewed objectively, amounted to actual or constructive dismissal, and without cause or notice. The court reasoned that a demand to return a laptop and key cards, coupled with the statement that "legal will get your package done," would lead a reasonable person in the employee's position to understand that his employment had ended, regardless of the informality of the medium or the absence of any express, formal statement of dismissal. Notably, the court held that the CEO's subjective intentions were not relevant, since "an employer's actions can constitute a repudiation of the employment agreement even if there was no intention to do so" (at para. 94).
- **Chapter 5—Just Cause—II. Doctrines Applicable to Just Cause Cases Generally—§ 5:6—Proportionality—**Another illustration of the "proportionality" aspect for policy-based just cause is seen in *McCarthy v. Bison Transport Inc.*, 2026 ONSC 3729, 2026 CarswellOnt 10766 (Ont. S.C.J.), which focused on an employer's drug and alcohol policy. The plaintiff was a long-haul truck driver whose routes included cross-border trips between Canada and the United States. As a condition of his employment, he signed acknowledgments confirming his understanding of the employer's Drug and Alcohol Policy, which subjected drivers in "safety sensitive positions" to mandatory random testing and warned that violations could lead to termination.

In 2014, the plaintiff failed a random drug test, was placed on unpaid leave, completed a return-to-work program, which included an assessment confirming that he had substance dependency. He was reinstated with a written warning that any further violation "could face immediate termination." In 2017, he failed a second random test for the same substance. At a meeting to discuss the result, he described the use as a one-time, casual incident and gave no indication of any addiction requiring accommodation. He was terminated for cause days later. The court upheld the termination, finding that the workplace policy had been well-known to the employee, and consistently enforced. The consequences of the policy breach were a proportionate response, and the random drug and alcohol testing was a reasonable road-safety measure in the long-haul trucking industry provided that employees who were found to be drug- or alcohol-dependent were accommodated. On the question of accommodation, the court held that no such duty arose on these facts, since the plaintiff had neither an actual nor a perceived drug-related disability. His termination for cause was upheld.

- **Chapter 6—Damages—VI. Break in Service; Malice—§ 6:25—Malice—**There is a related procedural question as to the intersection between *Wallace/Keays*-style claim for mental distress arising from the manner of dismissal on the one hand, and the exclusive-jurisdiction provisions found in workers' compensation legislation, on the other. In *Schmegelsky v. Scansa Construction Ltd.*, 2026 BCSC 1386, 2026 CarswellBC 2519 (B.C.S.C.), the plaintiff's pleadings included allegations that the timing and manner of his dismissal had caused him psychological injury and undermined his dignity. These claims were framed as a breach of the employer's duty of good faith and honest performance toward him. In response, the defendant sought to strike these pleadings, on the basis that the provincial workers' compensation regime gave the designated Board the exclusive jurisdiction over any claim for personal injury arising out of and in the course of employment. As such, the defendant argued, the court's jurisdiction to entertain the plaintiff's claim had been ousted altogether. The court dismissed the application as premature; while admittedly there may be an overlap between the roles of the court and the administrative tribunal in these kinds of mental distress scenarios, there were built-in statutory and regulatory mechanisms for addressing it. For example, the workers' compensation legislation allowed a court or a party to a civil action to request the

administrative tribunal to determine and certify whether an alleged injury fell within the Board's jurisdiction.

- **Chapter 8—Duty to Mitigate—VI. Miscellaneous—§ 8:17—Calculating Any Set-Off—**The deductibility of workers' compensation benefits from an award of wrongful dismissal damages—occasionally framed as a "compensating advantages" issue—was recently addressed in *Hedrick v. Johnson Meier Insurance Agencies Ltd.*, 2026 BCSC 1250, 2026 CarswellBC 2288 (B.C.S.C.). The court had awarded the employee about $116,000 in damages, representing nine months' reasonable notice. The employer argued that all WorkSafeBC benefits paid to the plaintiff should be deducted from that award. The court acknowledged the existence of divided appellate authority across Canada on this question and drew a distinction between benefits paid to replace wage loss during a period of disability on the one hand and benefits attributable to a permanent disability determination and referral to vocational rehabilitation, on the other. In the court's view, only the former category gave rise to a true compensating-advantages problem if left undeducted, since wage-loss benefits and wrongful dismissal damages both serve to replace the same lost income over the same period. Benefits tied to permanent disability and vocational rehabilitation, by contrast, were found to compensate for loss of function, impaired recovery, and diminished future earning capacity. These included losses distinct from, and not duplicated by, an award of reasonable notice damages. Because the benefits the plaintiff continued to receive after her termination date were no longer wage-loss benefits but were instead attributable to her permanent disability finding and vocational rehabilitation referral, the court declined to deduct any portion of them from the damage award.
- **Chapter 13—The Significance of Writing in Contracts—III. Parol Evidence Rule—§ 13:16—Generally—**The interaction between a primary employment agreement and a separate equity agreement (that has been incorporated by reference) was the focus of *Friel v. HUB International Limited*, 2026 ONCA 313, 2026 CarswellOnt 6885 (Ont. C.A.). The appellant's employment agreement contained an arbitration clause governing disputes "arising out of or in connection with" that agreement. Several years into his employment, he was separately granted stock options pursuant to a share option agreement, which in turn incorporated an equity-holders' agreement containing its own forum-

selection clause designating a particular court in the state of Delaware. The appellant had not personally signed the equity-holders' agreement, though he did not dispute having had access to it before signing the option agreement—a fact the motion judge treated as sufficient to bind him to its terms. When a dispute arose over the appellant's entitlement to exercise his vested options, he argued that it fell within the ADR clause of his employment agreement, since the option grant was, in his submission, "inextricably linked" to his employment. The Court of Appeal disagreed, upholding the motion judge's finding that the option agreement was a free-standing instrument: it contained explicit language stating that the grant of options did not constitute employment compensation, was not a term or condition of employment, and did not form part of the employment agreement. Reading the three documents together and giving effect to their unambiguous language, the court held that the dispute was not "in connection with" the employment agreement, such that the Delaware forum-selection clause in the incorporated equity-holders' agreement (rather than the arbitration clause in the primary employment agreement) governed. The court further rejected an argument that the forum-selection clause was unconscionable, notwithstanding an acknowledged inequality of bargaining power, on the basis that the bargain itself was not improvident, and no evidence suggested the clause would place a remedy out of the appellant's reach.

- **Chapter 14—Practical Considerations—§ 14:4—Common Employer—**Although the "common employer" doctrine is discussed throughout this section primarily in the wrongful dismissal context, a very detailed articulation of its elements can be found in an unrelated Alberta decision. In *Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd.*, 2015 ABQB 518, 2015 CarswellAlta 1515 (Alta. Q.B.), the issue before the court was one of one of vicarious liability and insurance subrogation. The plaintiff hotel operator's insurer sought, by way of subrogated claim, to recover monies paid out after a fire allegedly caused by the negligence of a handyman, In the course of determining the issues, the court reviewed the leading wrongful dismissal authorities on common employer status, including *Downtown Eatery (1993) Ltd. v. Ontario* and *Sinclair v. Dover Engineering Service*, and distilled from them a non-exhaustive list of factors as follows (at para. 29): a) whether the worker performs services for other entities in the group; (ii) the closeness or integration of the rela-

tionship between the entities; b) whether there are common shareholders and directors of (or common control over) the entities; c) whether one entity holds the worker out as an employee; d) whether an entity exercises control over the worker; (vi) whether an employment contract exists between one entity and the worker, though a written contract is not determinative on its own; e) evidence of an intention to create an employer/employee relationship with the respective corporations in the group; and f) the worker's relationship with and conduct towards the various entities. The court also confirmed that the key factors determining whether two entities may be considered a single employer are whether there is common control over both entities, and whether they both exercise control over the employee. The "key factors" identified in *Shamac* were expressly applied and clarified in the wrongful dismissal context more recent in *O'Donoghue v. Fluid Energy Group Ltd.*, 2026 ABKB 428, 2026 CarswellAlta 1505 (Alta. K.B.), which was an appeal from a decision refusing summary judgment. The court confirmed that, while all eight *Shamac* factors remain relevant, they are not to be given equal or independent weight: it is the two "key factors", meaning common control over the entities, and control exercised by those entities over the employee, that drive the analysis. The remaining factors inform that determination, rather than standing as independent tests.