

NAVIGATING NEW EMPLOYEE ENTITLEMENTS: A CRASH COURSE FOR EMPLOYERS

Presented by Members of our Employment & Labour Group
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CLARK WILSON

Thursday, June 9, 2022
Rosewood Hotel Georgia

Agenda

- 1. Employment Contracts: Avoid Ambiguity** – Andrea Raso
- 2. Overview of Recent Changes to Workplace Laws in BC** – Catherine Repel
- 3. Employee's Right to Disconnect** – Debbie Preston

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Navigating New Employee Entitlements

EMPLOYMENT CONTRACTS: AVOID AMBIGUITY
(Andrea Raso)

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Matthews v. Ocean Nutrition Canada Ltd.

Facts:

- Senior executive for 14 years
- New COO removed responsibilities and reports over a period of years and undermined his authority
- Eventually left citing constructive dismissal
- 13 months later, Company was sold and had he been employed, would have received \$1.1m under a LTIP Plan

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Matthews v. Ocean Nutrition Canada Ltd.

Employment Agreement:

With respect to payment of LTIP:

"2.03 [The Company] shall have no obligation under this Agreement to the Employee unless at the date of [the Company's purchase by another company] the Employee is a full-time employee of [the Company]. For greater certainty, this Agreement shall be of no force or effect if the Employee ceases to be an employee, (regardless of whether of Employee resigns or is terminated) with or without cause."

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Matthews v. Ocean Nutrition Canada Ltd.

Employment Agreement (cont'd)

"2.05 The [LTIP] . . . shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation."



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Matthews v. Ocean Nutrition Canada Ltd.

The Claim

Damages for constructive dismissal including payment of the LTIP on the basis that it became payable during the reasonable notice period.



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Matthews v. Ocean Nutrition Canada Ltd.

SCC:

Upheld trial judge's decision of a constructive dismissal. The reasonable notice period was 15 months, and that included payment of LTIP, after applying the following test:

1. Would the Employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period, had they continued working?
2. If so, do the terms of the employment contract or bonus plan unambiguously remove or limit that common law right?

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Matthews v. Ocean Nutrition Canada Ltd.

SCC (cont'd):

Answers:

1. But for the dismissal without reasonable notice, he would have been entitled to the LTIP payout.
2. The clauses of the Employment Agreement (slides 5 and 6) did not unambiguously remove or limit the common law right because:
 - i. had reasonable notice been provided, he would have been "full-time" or active;
 - ii. the language seeking to remove entitlement was insufficient because the termination was "unlawful"; and
 - iii. the language seeking to remove entitlement from the calculation of severance was not sufficient as the Court awarded "damages" for failing to provide adequate notice.

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Matthews v. Ocean Nutrition Canada Ltd.

SCC (cont'd):

The Court also held that it may be "appropriate in certain cases" to consider whether clauses removing or limiting common law rights were brought to the employee's attention.



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Termination Clauses

Other Pitfalls:

- Limiting entitlements to "notice or salary in lieu"
- Not stating that the notice or pay in lieu is the employee's "full entitlement"
- Not adequately addressing what happens to benefits

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Takeaway

Must be:

- mindful of common law entitlements during notice period and address them in employment agreement; and
- "absolutely clear and unambiguous"



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Employment Contracts: Avoid Ambiguity

RESTRICTIVE COVENANTS

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Restrictive Covenants

1. Non-competition* – no longer permitted in Ontario (except for Presidents and C-Suites)
2. Non-solicitation
3. Confidentiality

*Ensure the following are absolutely clear and unambiguous:

- Geographic scope
- Temporal limitation
- Nature of Business
- List competitors

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Navigating New Employee Entitlements

INTELLECTUAL PROPERTY

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Intellectual Property

Ownership Rules:

- For copyright, employer is deemed to own work by an employee (but not independent contractor)
- For patent, employee is owner of their invention unless a contract states otherwise
- IP created by one or more persons or entities will be jointly owned unless otherwise agreed to

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Intellectual Property

Key concepts to include in employment agreements:

- Exclusion of IP created prior to employment
- Assignment of all IP to employer
- Commitment of employee to co-operate with registration, maintenance, protection and enforcement of IP

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Navigating New Employee Entitlements

OVERVIEW OF RECENT CHANGES TO WORKPLACE LAWS IN BC

(Catherine Repel)

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Overview of Recent Changes to Workplace Laws in BC

1. Employment Standards Act
2. Workers Compensation Act
3. Labour Relations Code
4. Human Rights Code
5. Canada Labour Code

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Overview of Recent Changes to Workplace Laws in BC

Employment Standards Act

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Employment Standards Act

- Sick leave (aka illness or injury leave)
 - After 90 consecutive days of employment, an employee is entitled to paid leave for up to five days in each calendar year or personal illness or injury and unpaid leave of up to 3 days
 - Employer may ask for reasonably sufficient proof
 - Applies to all employees: full-time, part-time, casual

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Employment Standards Act

- **COVID-19-related leave**

- Unpaid leave for as long as prescribed circumstances apply:
 - o Employee diagnosed with COVID-19 and is acting in accordance with public health orders or advice of medical practitioner
 - o Employee is in quarantine or self-isolation in accordance with public health orders, laws or guidelines
 - o The employer has directed the employee not to work
 - o The employee is providing care to an eligible person
 - o Employee is outside the province and cannot return to BC

Employment Standards Act

- **Leave for COVID-19 vaccination**

- An employee who requests this leave is entitled to paid leave for up to 3 hours for each request made
- Can request proof of entitlement to leave
- Cannot request note from medical practitioner, nurse practitioner or registered nurse

Employment Standards Act

- **Hiring children under 16 years of age**

- Cannot employ a child under 14 years of age without permission from Employment Standards Branch
- Children 14 or 15 years old can only perform light work and the employer must have written consent of the child's parent or guardian



Employment Standards Act

- **Complaint Procedures and Investigations**
 - Clearer powers to investigate, whether related to a complaint or otherwise
 - Complaints now proceed through first stage investigation
 - Investigation may involve ADR
 - No requirement for an oral hearing
 - Findings made after investigation with written report presented to Director
 - Director must consider the report making a determination

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Overview of Recent Changes to Workplace Laws in BC

Workers Compensation Act

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Workers Compensation Act

- **Expanded liability for directors of corporations**
 - Now jointly and severally liable for debts owed to WorkSafe BC, including unpaid premiums, assessments, or, potentially, claims paid out



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Workers Compensation Act

- **Ability for WorkSafe BC to demand unpaid amounts from third parties indebted to the employer**
 - WSBC can demand that the third party pay WSBC on account of the employer's liability to WSBC
 - That third party must pay within 15 days of the later of the date the demand is served and the date the person served with the demand becomes indebted to the employer
 - If demand not complied with, recovery may be enforced as if owed to WSBC by the third party

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Workers Compensation Act

- **Increase to benefits for workers**
 - Increased maximum insurable earnings
 - Ability to determine worker's retirement
 - Altered test for determining benefit calculations
 - Allowing WSBC to facilitate treatment before a claim is accepted
 - Ability to extend limitation period for mental health claims beyond one year

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Overview of Recent Changes to Workplace Laws in BC

Labour Relations Code

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Labour Relations Code

• **Current rules for certification:**

- Can apply for certification if at least 45% of employees in proposed bargaining unit to sign union cards
- Secret ballot certification vote within 5 days from application for certification (down from 10 days prior to 2019) which requires majority vote

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Labour Relations Code

• **Proposed change:**

- Union requires membership cards from at least 55% of employees in proposed bargaining unit
- No requirement for a secret ballot vote unless membership cards from only between 45% and 55% of employees in proposed bargaining unit



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Overview of Recent Changes to Workplace Laws in BC

Human Rights Code

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Human Rights Code

- **Addition of “Indigenous identity” as a protected ground**
 - Added to:
 - “...add further protections to the rights of Indigenous Peoples in BC and help advance reconciliation in our province.”
 - Murray Rankin, Minister of Indigenous Relations and Reconciliation

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Human Rights Code

- **New procedures for Indigenous complaints**
 - Option for self-identification
 - More information about the process and options
 - Possibility to include Indigenous protocols
 - Discussion of Indigenous ways to deal with the complaint

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Human Rights Code

- **Changes to complaints procedure and dismissal applications**
 - Mediations automatically set
 - Expect changes to applications to dismiss
 - Further changes coming to streamline the process and move cases along to resolution



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Overview of Recent Changes to Workplace Laws in BC

Canada Labour Code

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Canada Labour Code

- **Pay equity and transparency**
 - Various new requirements for employers to take proactive steps to ensure they are providing equal pay for work of equal value and measures to address the wage gap



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Canada Labour Code

- **Workplace harassment and violence**
 - Changes streamline and consolidate harassment and violence provisions
 - Strengthen and define prevention, resolution and support mechanisms to manage occurrences of harassment and violence in the workplace

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Navigating New Employee Entitlements

EMPLOYEE'S RIGHT TO DISCONNECT
(Debbie Preston)

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Right to Disconnect

1. Ontario Right to Disconnect
2. Flexible Work Arrangements
3. Overtime Considerations

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Right to Disconnect

Ontario Right to Disconnect

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Employment Standards Act - Ontario

“disconnecting from work” means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.”



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What does it mean?

Written Policy on Disconnecting from Work:

- The ESA does not specify that the policy provide a right for the employee to disconnect from work and be free from the obligation to engage in work-related communications
- ER with 25 or more employees required to have written policy in place for all employees regarding disconnecting from work
- Must provide policy to employees

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Right to Disconnect in BC

“The ministry is watching with interest but there are no plans at this time to establish a similar law in B.C.”

– B.C.’s Minister of Labour



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Right to Disconnect

Flexible Work Arrangements

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Flexible Work Arrangements

Examples:

- Flex time
- Reduced hours
- Compressed work week
- Remote work

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Flexible Work Arrangements

Benefits:

- May improve satisfaction in workplace
- Decrease employee absences
- Provides flexibility for work/life balance

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Flexible Work Arrangements

Other considerations:

- Can muddle the line between work and home life
- Employees experiencing burnout as a negative effect of being constantly accessible and "plugged" into work
- Can introduce OT issues



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Four Day Work Weeks

Employees work same amount of hours, spread over shorter amount of time

- Pilot programs underway in UK, US, Ontario
 - Some programs employees work less hours but promise to maintain productivity
 - Some programs employees work longer days, less days a week
 - o E.g. four 10-hour days

Employers must consider OT obligations

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BC Overtime Requirements

BC Employment Standards Act:

- Employees who work more than 8 hours a day or 40 hours a week must be paid overtime
- Employers must pay overtime, even if employee agrees not to claim overtime pay
- Overtime is paid regardless of how employee is paid (hourly, salary, commission, etc.)

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BC Overtime Requirements

Exemptions:

- Under BC ESA certain positions are exempt from OT

Examples:

- Most managers and supervisors
 - "Management" title alone not sufficient
- Certain licensed professionals
- Some farm workers

Seek legal advice to determine if position is exempt

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Right to Disconnect

Averaging Agreements

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Averaging Agreements

Section 37:

Standard work day is 8 hours, standard work week is 40 hours

- The overtime averaging provision allows employers to schedule employees to work non-standard shifts without having to pay them at overtime (time-and-a-half or double-time) rates
- Intended for situations where employee are regularly scheduled for non-standard work days

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Averaging Agreements

An employer and employee may agree to average the employee's hours of work

- Must be in writing
- Signed by employer and employee
- Specifies number of weeks
- Specifies work schedule
- Specifies number of times agreement is repeated
- Provides start date and expiry date
- Employee must receive a copy before date on which it begins

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Averaging Agreements

Does not completely eliminate obligation to pay OT:

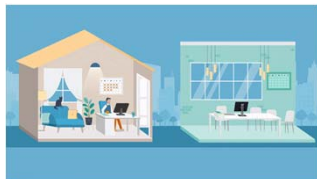
- Must not provide more than 40 hours per week
 - Employer must pay time-and-a-half for anything over 40 hours a week
- Time-and-a-half for time worked outside of scheduled day (if more than 8 hours)
- Double-time for all time worked over 12 hours a day

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Averaging Agreements


Through the introduction of flexible work arrangements and with the use of tools like averaging agreements, employers can adjust their work environments as needed without introducing overtime obligations




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QUESTIONS?



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