Raising the Bar

Raising the Bar – Fourteenth Edition

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Dear Friends,

It is finally spring! Apart from the flowers that will be blooming and the warmer winds blowing through, spring brings with it a re-awakening of our thirst for knowledge. Fortunately, the courts have already been busy this year. We hope that the cases and topics we have highlighted in this edition of *Raising the Bar* will quench that thirst.

In this edition, we are going to shine a light on the ongoing saga with ESA-only termination clauses. This topic is receiving a lot of attention in the courts and in the cases that we see on our desk.

We are also giving you summaries of the recent cases that you need to know about, including issues such as moving for partial summary judgment, waiver of privilege, and conflicts of interest.

Finally, does a defendant's cooperation in an action or agreement to talk settlement automatically excuse a plaintiff's delay? If you don't know the answer to this question, read this edition to find out.

Please enjoy perusing the articles and summaries below. Hopefully it helps bring you out of hibernation!

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In This Issue

Part 1 – Recent Cases

***Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922 (CanLII)**

The Court of Appeal recently demonstrated its reluctance to grant partial summary judgment due to the risk of duplicative or inconsistent findings at trial.

In this case, the Court overturned a decision of the Ontario Superior Court which had granted partial summary judgment on the issue of an auditor's alleged negligence to lenders.

The litigation related to the alleged liability of the Canadian and international entities of Deloitte arising from an accounting fraud at Philip Services Corp, which resulted in the collapse of the company. It was not disputed that financial statements made by Deloitte materially misstated Philip's financial position. Among other things, the plaintiffs alleged they had relied on the defendants' statements and that the defendants ought to have known that those statements would be relied upon by them as lenders to Philip.

The defendants brought a motion for partial summary judgment to have the claim of negligent misrepresentation dismissed. The motion judge granted the motion. He agreed with the defendants' position that while they may have owed a duty of care to Philip and its shareholders "in contract for negligently preparing the audit of the financial statements," Deloitte had no duty of care to any others, including CIBC and its syndicate of lenders. Accordingly, the plaintiffs did not have a "legally tenable negligent misrepresentation claim" against the defendants.

The Court of Appeal overturned that decision. It found that in the context of the overall litigation, the claims for reckless misrepresentation and breach of contract arose out of the same "factual matrix" as the negligence claim and thus there was a real risk of duplicative or inconsistent findings at trial. The Court also confirmed some of the factors that might lead a court to refuse to grant partial summary judgment, such as the summary judgment motion was complex, it did not result in any party being released from the proceeding and it was not expected to shorten what was expected to be a lengthy trial.

***Rob Leone v Flexity Solutions Inc*., 2017 ONSC 1536 (CanLII)**

Voluntary, informed waiver of privilege must be present in order for there to be partial waiver or implied waiver of solicitor-client privilege.

Justice Kristjanson of the Ontario Superior Court of Justice recently held that the statement "[My lawyer] botched these documents up from the beginning", made by the defendants' representative at discovery, did not constitute either a partial waiver or implied waiver of solicitor-client privilege.

This action was brought by a terminated employee who claimed he was a beneficial owner of the defendant company because his employment agreement referred to entitlement to "shares" pursuant to a "Shares Plan." The Shares Plan was then introduced as an employee trust and stock option plan. On discovery, the defendants' representative stated that he consistently told "everyone" that they were entitled to options, not shares, and that the document was "botched" by the lawyer. The Master found this statement to be a partial waiver of solicitor-client privilege over the instructions the defendants gave to their law firm on what the plaintiff was to receive. He directed the defendants' lawyer to provide her recollection of the instructions given.

Justice Kristjanson overturned that decision. She reviewed the law relating to both implied waiver-partial disclosure and implied waiver-state of mind, and concluded that there was no "voluntary, informed waiver of privilege" that would constitute partial disclosure. The instructions given to counsel and counsel's response were not material elements in the defence, and fairness did not require disclosure to allow the plaintiff to respond.

***Ontario v. Chartis Insurance Company of Canada*, 2017 ONCA 59 (CanLII)**

The Ontario Court of Appeal has confirmed that there are situations where no measures are sufficient to address "the degree of professional conduct between two lawyers" such that a conflict of interest will disqualify a law firm from acting or continuing to act.

The Court upheld a decision to disqualify a small boutique litigation firm (LBM) from continuing to act for an insurance company (AIG) involved in litigation with the government of Ontario (Ontario Litigation). The government was represented by the Theall Group. Foulds, a Theall lawyer who was working on the Ontario Litigation, left Theall to join LBM and to work closely with McInnis, who was opposing counsel on the Ontario Litigation. Ethical screens were set up at LBM to prevent disclosure of confidential information between Foulds and McInnis regarding the Ontario Litigation. However, Foulds continued to work on AIG files (not related to the Ontario Litigation) and spent 50-60% of his time working with McInnis.

The application judge found LBM could continue to act, as appropriate steps had been taken. The Divisional Court overturned that decision, finding the relationship was "too close for comfort." The Court found that the "presumption is that lawyers who work together share confidences, absent clear and convincing evidence that all reasonable measures have been taken to ensure no disclosure will occur. The evidence in this case is neither clear nor convincing." The application judge erred in

asking what more could be done to protect the confidentiality of Ontario's information. There are situations where no measures would be sufficient to address "the degree of professional conduct between two lawyers". A reasonably informed person could not be satisfied that no use of confidential information would occur between two people with such an intense working relationship.

Part 2 – Shine a Light on… Termination Clauses in Employment Contracts

The enforceability of termination clauses in employment contracts is a front-of-mind issue for most employers, and it is an area where the law is evolving weekly. In that realm, a particularly important issue is the enforceability of termination clauses that seek to limit an employee to the minimum entitlements set out in the Ontario *Employment Standards Act, 2000* (ESA). Many employers carefully draft clauses within employment contracts with the intention of limiting an employee to ESA entitlements and rebutting the presumption that an employee should be entitled at common law to reasonable notice.

Generally speaking, and absent unusual circumstances, termination provisions that incorporate statutory minimum entitlements are effective and will be enforced if they are drafted properly. As explained by the Supreme Court of Canada in Machtinger v. HOJ Industries:

Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.
So, how can an employer draft an **enforceable** ESA minimum standards only termination clause?

Recent Case Law

Recent decisions give us guidance on drafting parameters. Let us start with the decision of the Ontario Court of Appeal in Oudin v Centre Francophone de Toronto Inc, in which the Court upheld the enforceability of a minimum standards-only termination clause. In this case, the employment contract stated that on termination, the employee would be entitled to "15 days notice or minimum [notice] prescribed by the ESA." The employee argued that this clause was not enforceable because it provided for only minimum notice under the ESA, and not severance. In rejecting the employee's argument, the Court concluded it was clear that the parties intended the greater of the two notice periods to apply. The Court held there was no error in the lower court's finding, which had stated that "there was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA was manifest" (at para 54). The provision was therefore enforceable. The Supreme Court of Canada recently denied the employee's application for leave to appeal

Oudin is important for employers. The lower court, upheld by the Court of Appeal, emphasized that employment contracts should be read not as a treasure hunt to find unenforceability, but rather rationally as a means to determine the parties' intentions. The lower court noted that it is not the law that "if any potential interpretation can be posited that might in some hypothetical circumstance entail a potential violation of the ESA, however absurd or implausible the interpretation may be, then the only possible result is to strike out the entire section of the agreement"(at para 50).

Oudin serves as a reminder to employers of the importance of having clear, well-drafted employment agreements lending certainty to the parties' intentions.

The reasoning in *Oudin* is similar to the Court of Appeal's earlier decision in Roden v Toronto Humane Society. The employee in this case was provided her ESA entitlements based on a clause entitling her to the "minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation." The employee argued that the clause was void as it did not specify that benefit plan contributions would be provided to terminated employees. Despite accepting that benefit contributions were not specifically provided for in the clause, the Court noted that silence with respect to benefits was in no way an attempt to limit payments below ESA entitlements.

As recently as January 2017, in Cook v Hatch Ltd, the Ontario Superior Court of Justice deemed a minimum standards-only clause enforceable and granted summary judgment to a defendant employer. The employment contract stated that "the notice period shall amount to one week per year of service with a minimum of four weeks of notice or the notice required by the applicable labour legislation." The Court found that it was not necessary to refer to any specific legislation and further emphasized that in assessing whether a clause is enforceable, a court need only determine if the clause clearly attempts to contract out of the minimum benefits an employer is obligated to provide.

In *Cook*, the employee alleged that the termination clause's silence with respect to severance and benefit entitlements was an attempt by the employer to contract out of minimum statutory entitlements. This argument was rejected by the Court, as it found that in light of the terms of the clause, "silence demonstrated acceptance and reliance on what is provided for by the ESA, in respect of severance" (para 44). In coming to this conclusion, the Court again stressed that clauses will only be unenforceable if they clearly attempt to limit entitlement below the statutory minimums.

Two other recent decisions must be reconciled within this framework: the Court of Appeal's decision in Wood v Fred Deeley Imports Ltd and an unreported decision of the Ontario Superior Court in *Vinette v Delta Printing Limited*.

In the *Wood* case, a motion judge determined that a termination clause which provided greater notice than that required under the ESA was enforceable. That decision was overturned by the Court of Appeal. The Court found that despite the fact the employee received a greater entitlement than that mandated by the ESA, the language of the termination clause could have resulted in entitlements below the ESA minimum standards. The termination clause at issue stated:

[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.

The Court of Appeal determined that this clause was an attempt to limit payments to amounts that were less than the ESA requirements, and therefore was unenforceable.

The Court also rejected the employer's argument that despite the wording of the clause, they had provided the employee with a termination package greater than the entitlement mandated by the ESA. It emphasized that the enforceability of the clause stands or falls on its own wording and is not affected by the employer's actions after termination. The Court noted that "if employers can always remedy illegal termination clauses by making payments to employees on termination of employment, then employers will have little incentive to draft legal and enforceable termination clauses at the beginning of the employment relationship" (para 28).

Similarly, in *Vinette*, the Ontario Superior Court of Justice held that a minimum standards termination clause did not oust the common law entitlement to reasonable notice. The termination clause at issue stated that an employee would be entitled to "written notice of termination or payment in lieu of that notice and severance pay, if applicable, mandated by the ESA." In deeming the clause to be unenforceable, the Court found that neither the wording of the termination clause nor any evidence of intention rebutted the presumption of entitlement to common law damages. The Court stated that in order to do so, "the words of limitation must be clear and the significance of the provision must be made clear" (para 16).

In comparing *Oudin* and *Wood*, a clear distinction appears. The difference in language between the two clauses relates to the "all inclusive" language used in *Wood* against the broader language – or the absence of language – used in *Oudin*. For example, in *Oudin*, the motion judge concluded that the language used made it clear that there was "no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest." That conclusion could be reached because there was no express language that ousted additional entitlements pursuant to the ESA. In contrast, the Court of Appeal in *Wood* found that the "all inclusive" language may have resulted in termination entitlements below the minimum standards.

With respect to *Vinette*, it appears to be an outlier in terms of the type of language needed to oust the common law. Similar wording has been found by the courts to be enough to oust the common law in several cases including: *MacDonald v. ADGA Systems International Ltd.*, *Wood v. Industrial Accident Prevention Assn*.[1], Mesgarlou v. 3XS Enterprises and others.

It should be noted as well that in a recent case, Covenoho v. Pendylum Ltd., the Court of Appeal again found that a termination provision in an employment contract was unenforceable for failure to comply with the ESA. In that case, the contract had a one year fixed-term. Damages were awarded in the amount of the remainder of the salary which would have been owing to the end of the contract.

A Checklist for Employers

Based on this review of recent case law, it is clear that the enforceability of an ESA minimum termination clause will be dependent on the specific language of the clause, which highlights the importance of a well-drafted termination provision in an employment contract.

Where it is intended that an employee will be limited to minimum standards entitlements upon termination, employers may want to consider this top five checklist:

1. The clause should be carefully drafted to ensure that the language clearly reflects the intention to limit entitlement to ESA minimums.
2. The clause should address all of the employee's entitlements under the ESA including notice, benefit contributions and severance; it should not be limited to notice.
3. The clause should not contain language that could be read to oust other obligations under the ESA.
4. Although courts have held, in certain instances, that a clause without reference to the applicable statute can still be enforceable, reference to the ESA should be included in the clause for Ontario-only employers.
5. Providing payments post-termination that are greater than or equal to those mandated by the ESA will not preclude an employer's liability for common law notice in the event that a termination clause is deemed to be unenforceable.

Part 3 – Did You Know?

…the fact that a defendant takes procedural steps and enters into settlement discussions does not automatically "excuse" the plaintiff's delay in a motion for dismissal of an action for delay. Rather, whether a defendant excused the delay at any point is a fact-sensitive matter. Accordingly, procedural steps and settlement discussions will be included in an assessment of the delay in its global context (Ticchiarelli v. Ticchiarelli).

[1] 2000 CarswellOnt 2609
