

## **Breakfast Seminar Series**

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# **Employment Contracts – Enhancing Enforceability**

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## **Session Overview**

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- Employment contracts – the basics
- Termination provisions
- Restrictive covenants
- Changing terms and conditions of employment and avoiding constructive dismissal

## Employment Contracts

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- Every employment relationship is governed by an employment contract
  - The contract can be written or oral, formal or informal
- How is an employment contract formed?
  - 1) Offer
  - 2) Acceptance
  - 3) Consideration  
(something given in exchange for something else)
  - 4) Independent legal advice – opportunity

## Enforcing Contracts of Employment

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- Enforceability of a contract will depend on the existence of consideration
- Contract should be presented before employment commences
- All terms should be clear and unequivocal
  - Ambiguities interpreted against the interest of the party who drafted the contract
  - Interpretation most favourable to the employee will be used
  - Doctrine of *contra proferentem*

## Enforceability – New Employees

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- Each party receives something of value
  - i.e. employer's promise to hire and employee's promise to perform services
- Timing is everything
  - Ensure employee reviews and signs contract before starting work
  - Provide opportunity to take contract home and review
  - Provide opportunity for independent legal advice

## Enforceability – Existing Employees

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- Employer has to give something in return for updated contract
  - i.e. signing bonus, promotion, additional compensation, additional vacation
- You can give reasonable notice of change to the terms and conditions of employment, but this may take months
- Length of notice determined on case by case basis
  - Ensure employees know change(s) will be implemented after the notice period regardless of acceptance

## Fixed-Term Contracts Exercise Caution

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- Successive contracts
  - Can evolve into indefinite contract
  - Ensure signed contract for each successive term
  - Avoid “rubber stamping” of fixed-term contracts
- Working past expiry
  - Becomes an indefinite term employee, even after 1 day
  - Entitled to all associated rights
    - Reasonable notice of termination
  - Be cautious, “flag” the expiry date
- Include an “escape” clause – allows termination prior to expiry without attracting damages for the unexpired portion

## Indefinite Term Contracts Termination Clauses

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- Can displace presumption of common law reasonable notice
  - Limit damages on termination or wrongful dismissal
- 2 significant recent decisions where contractual termination clauses were interpreted against the interest of the employer
  - *Stevens v. Sifton Properties Ltd.* (2012 ONSC)
  - *Bowes v. Goss Power Products Ltd.* (2012 ONCA)

## *Stevens v. Sifton Properties Ltd.* (2012 – Ont. S.C.J.)

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### **Facts**

- Employee terminated without cause after 3 years of employment
- Employee signed an “ESA only” contract
- Employer paid employee 3 weeks’ pay and continued her benefits over the 3 week notice period
- Employee brought motion for summary judgment
  - Termination clause was unenforceable
  - Entitled to reasonable notice at common law
  - Advanced 3 arguments

## *Stevens v. Sifton Properties Ltd.* (2012 – Ont. S.C.J.)

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### **The Provision in Question:**

13. With respect to termination of employment, the following terms and conditions will apply:

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(b) The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.

(c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

## ***Stevens v. Sifton Properties Ltd.*** **(2012 – Ont. S.C.J.)**

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### Stevens' Arguments and Court's Findings:

- Failure to reference *Employment Standards Act, 2000*
  - Rejected by the Court
  - “sensible interpretation” – intended to reference province’s employment standards legislation
  - Descriptive reference, rather than an attempt at specific citation of particular legislation
- Failure to specify notice “ceiling”
  - Rejected by the Court
  - Fact employment contract specifies a minimum notice period will suffice to displace the common law presumption, provided it does not conflict with legislative requirements

## ***Stevens v. Sifton Properties Ltd.*** **(2012 – Ont. S.C.J.)**

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- Failure to mention entitlement to benefits during statutory notice period
  - Accepted by the Court
  - Relied on reasoning in *Wright v. The Young & Rubicam Group of Companies* (2011 – Ont. S.C.J.)
  - Even though employer had actually maintained benefits for the notice period, termination clause was still null and void
  - Stevens entitled to common law reasonable notice

## Practical Implications

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- Use clear and specific language in employment contracts
- Avoid “catch-all” termination clauses
- Ensure “ESA only” termination clauses are all encompassing regarding statutory requirements during the notice period
  - Termination, severance, vacation pay, continuation of benefits
- Review employment agreement templates
  - Ensure compliance with ESA
  - Ensure compliance with developments in the law

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## *Bowes v. Goss Power Products Ltd.* (2012 – ONCA)

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### Facts

- Bowes was terminated without cause
- The employment contract provided for 6 months’ notice or pay in lieu
- The employment contract was silent with respect to mitigation
- The termination letter included a requirement to seek new employment
- Bowes found employment 2 weeks after termination
- Bowes only provided with statutory minimum notice

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## ***Bowes v. Goss Power Products Ltd.*** **(2012 – ONCA)**

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### **Findings**

- The employment contract was silent with respect to mitigation
- By agreeing to fixed notice, the parties opted out of the common law including obligation to mitigate
  - Payment was to be treated as liquidated damages or contractual amount
- Nothing unfair about requiring explicit references to mitigation if an employee is required to mitigate fixed damages
- Bowes was entitled to the entire 6 months of notice

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## **Practical Implications**

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- Employees presumed not to be subject to common law duty to mitigate damages under contracts with fixed notice periods
- Fixed notice contracts should include an employee's obligation to mitigate
- Offer new consideration in exchange for adding a mitigation requirement into current contracts

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## Restrictive Covenants

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## Restrictive Covenants

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- Important tool to protect business
  - Non-solicitation
  - Non-compete
  - Non-disclosure
- Must be reasonable and practical in protecting interests from departing employees
- Most often found in 2 types of agreements – employment agreements and sale of business agreements

## *Smilecorp Inc. v. Pesin (2012 – ONCA)*

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### **Facts**

- Pesin worked at Smilecorp, a dental centre, as a dentist
- Relationship governed by a confidentiality agreement and a management agreement
- Smilecorp terminated its arrangements with Pesin
- Pesin opened his own dental practice 5 km away from the centre
- Prior to his termination, Pesin made copies of Smilecorp's patient lists
- Pesin took lists with him with intention of informing patients of his new practice
- Pesin prohibited from soliciting Smilecorp patients in any manner within 24 months of termination
- Smilecorp received an interim and permanent injunction restraining Pesin from soliciting its patients - Pesin appealed

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## *Smilecorp Inc. v. Pesin (2012 – ONCA)*

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### **Findings**

- Non-solicitation clause was reasonable
- Smilecorp was obliged to provide Pesin's contact information to patients on their request
- Pesin was not prevented from conducting general advertising regarding his new dental practice or from generally soliciting new patients
- No restrictions on where Pesin could set up his dental practice
- Scope of clause was very limited – only clients of dentists that operated out of Smilecorp's premises

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## ***Eagle Professional Resources v. MacMullin and Maplesoft Group (2013 – ONCA)***

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### **Facts**

- Eagle and Maplesoft are competitors in the staffing business
- 3 of Eagle's employees resigned and went to work for Maplesoft. All signed employment contracts with non-competition (including non-solicitation) clauses
- Eagle alleged 3 individuals breached their employment agreements by soliciting Eagle's clients and using Eagle's confidential information
- Eagle alleged Maplesoft induced these breaches of contract
- Maplesoft and 3 individuals brought a motion for summary judgment on grounds no evidence of a breach of contract

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## ***Eagle Professional Resources v. MacMullin and Maplesoft Group (2013 – ONCA)***

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### **Findings**

- ONCA upheld motion judge's findings and dismissed Eagle's appeal
- Non-competition clauses were unenforceable
- Eagle failed to bring any evidence, other than "bald allegations" that it had any proprietary interest entitled to protection
- According to former employees, information they learned at Eagle was publicly available, obtained from such sources as social media sites
- Eagle did not cross-examine or otherwise challenge 3 individuals' explanations
- Court commented a party "must put their best foot forward"
- Clauses were also unenforceable
  - "Spatial features" were too broad, simply no geographic limit
  - Prohibited competition, not just mere solicitation

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## ***Martin v. ConCreate USL Limited Partnership (2013 – ONCA)***

- Complex case involving a commercial transaction
- Restrictive covenants are *prima facie* unenforceable
- Determining reasonableness in context of the sale of business and an employment agreement, courts consider same 3 factors:
  - Geographic scope
  - Duration
  - Extent of the activity prohibited
- Court agreed with application judge, covenants were not ambiguous and geographic scope was not unreasonable
- Duration of restriction was unreasonable – indeterminate period with no fixed, outside limit

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## **Creating an Enforceable Restrictive Covenant**

- Be reasonable, be clear
- Personalize – no “standard” clause, no “boiler plate”
- Do not go further than necessary – “less is more”
- Do not use “cascading” or “in the alternative” clauses
- Legitimate need for scope of protection (scope of business, duration, geographic scope)
- Demonstrate danger from unfair competition by former employee
- Acknowledge that the employee had the opportunity to obtain legal advice
- Indicate manner of dismissal does not affect operation of restrictive covenant

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## Changing Terms and Conditions of Employment and Avoiding Constructive Dismissal

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### Constructive Dismissal

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- Unilateral change to a fundamental term of an employment contract
- Does it amount to constructive dismissal if the employer provides employee with reasonable notice of the change?
  - Leading case *Farber v. Royal Trust Co.* (1997 – SCC)
  - *Wronko v. Western Inventory Service Ltd.* (2008 – ONCA)
  - *Kafka v. Allstate Insurance Company of Canada* (2012 – Ont. Div. Ct.)

## Distinguishing the *Wronko* Decision

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- In *Wronko*:
  - Can reject an anticipated change within a reasonable time
  - Rejecting the change and continuing to work during notice is not condoning the change
  - The Employer failed to make it clear that changes would take effect after the notice period
- In *Kafka*:
  - Reasonable notice was provided
  - Employees knew changes would be implemented after the notice period regardless of acceptance

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## Practical Implications

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- Length of reasonable notice depends on each case
- Fundamental changes may not amount to a constructive dismissal if reasonable notice of the change is provided
- Inform employees that conditions will change at the end of reasonable notice whether there is acceptance or not
- Incorporate flexibility for changes into employment contracts

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**Questions?**

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