



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Welcome to
Devry Smith Frank *LLP*'s
HR/Employment Seminar

October 13, 2016



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

**Termination Of Federally Regulated
Employees
And Right Of Reinstatement:
*Wilson v. Atomic Energy of Canada Ltd.***

Flora M. Poon

B. Com, JD., LL.B.

Employment Lawyer

416-446-5081

flora.poon@devrylaw.ca

Facts

- Wilson worked for Atomic Energy of Canada Limited (AECL), a federal crown corporation
- Roles: senior buyer/order administrator; promoted to procurement supervisor
- Length of employment: 4.5 years
- Terminated “without cause”+ severance: 24 weeks’ pay in lieu of notice



Termination Under *Canadian Labour Code*

Notice or wages in lieu of notice

- s. 230 (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either
- (a) notice in writing, at least *two weeks* before a date specified in the notice, of the employer's intention to terminate his employment on that date, or
 - (b) *two weeks* wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

Severance Pay

- s. 235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of
- (a) *two days wages* at the employee's regular rate of wages for his regular hours of work in respect of *each completed year of employment* that is within the term of the employee's continuous employment by the employer, and
 - (b) *five days wages* at the employee's regular rate of wages for his regular hours of work.

Canada Labour Code, RSC 1985, c L-2

Complaint to inspector for unjust dismissal

240 (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Powers of Adjudicator

Under s. 242 (2) An adjudicator to whom a complaint has been referred under subsection (1)

- (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
- (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
- (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under [paragraphs 16\(a\), \(b\) and \(c\)](#).



Where Unjust Dismissal Found

- s. 242 (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to:
- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
 - (b) reinstate the person in his employ; and
 - (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Decisions Not to be Reviewed by Court

243 (1) Every order of an adjudicator appointed under [subsection 242\(1\)](#) is final and shall not be questioned or reviewed in any court.

Findings of Supreme Court of Canada



The SCC held that a restrictive interpretation is inconsistent with the scheme set out in the CLC

- The foundational premise of the common law scheme – that there is a right to dismiss on reasonable notice without cause or reasons – has been completely replaced under the CLC by a regime *requiring* reasons for dismissal
- If an employer can dismiss without cause by simply providing adequate notice, there would be no role for the plurality of remedies available to the adjudicator

“Just Cause” Test

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee.

Regina v. Arthurs (1967), 62 D.L.R. (2d) 342 (Ont. C.A.)

***McKinley v. BC Tel*, [2001] S.C.R. 161**

2-step factual inquiry:

- a) Determine whether the conduct relied on as basis of dismissal has been determined on the balance of probabilities
- b) Assess whether the nature and degree of such conduct warrants dismissal in the specific context of the case

Summary

The *Wilson* decision confirms that a federally regulated employer recourse to termination of a non-managerial employee is limited to the following situations:

1. The employee has been employed for < 12 months.
2. The employee's dismissal is due to a lack of work or a discontinuance of a business function.
3. The employee's dismissal is for cause.

TIPS: What to do as Employers?

1. Evaluate employee's potential for success prior to end of 1st year of employment and terminate if not good fit.
2. Implement/maintain performance management programs for non-managerial employees to ensure that just cause can be established if terminated > 12 months

Questions?



Flora M. Poon

B. Com, JD., LL.B.

Employment Lawyer

416-446-5081

flora.poon@devrylaw.ca



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

**Update on the Enforceability of
Termination Clauses:**
Oudin v. Centre Francophone de Toronto

Marty Rabinovitch

B.A.H., LL.B.

Employment Lawyer

416-446-5826

marty.rabinovitch@devrylaw.ca

Agenda

1. What is a Termination Clause?
2. How to Determine Notice Upon Termination Without Cause
3. What is an Enforceable Termination Clause?
4. *Oudin v Le Centre Francophone de Toronto*, 2016 ONCA
5. State of the Law on the Validity of Termination Clauses Post-*Oudin*

What is a Termination Clause?

- Clause in an employment contract
- Sets out employee's entitlements if employer terminates employee's employment
- Typically provides employee with either fixed notice period or formula for calculating notice period based on employee's years of service
 - Should also specify benefits and variable compensation that will be continued during notice period

What is a Termination Clause?

- Common for employers to insert termination clauses in employment contracts to reduce cost of terminating employment of employees
- EXAMPLE:
“The (organization) is entitled to terminate your employment at any time for cause without notice or pay in lieu thereof. Your employment may be terminated without cause upon the provision of notice or payment in lieu of notice and severance pay in accordance with the provisions of the Employment Standards Act. You will also be entitled to continuation of all benefits and compensation for the statutory notice period as required by the Employment Standards Act. You understand and agree to waive any entitlement to additional payments to you or to any additional notice to you upon termination.”

Determining Notice (or Pay in Lieu) If Terminated Without Cause

Three Places to Look:

1. *Employment Standards Act (ESA) / Canada Labour Code (CLC)*
2. Employment Contract
3. Common Law (if no termination clause in contract)

Determining Notice (or Pay in Lieu) If Terminated Without Cause

1. Employment Standards Act

- Employee is entitled to **notice of termination** (or termination **pay instead of notice**) if he/she has been continuously employed for at least three months
- Employee qualifies for **severance pay** if employment is severed and he/she has worked for employer for ≥ 5 years, **and** employer:
 - has a payroll in Ontario of \geq \$2.5 million; **or**
 - severed employment of ≥ 50 employees in a 6-month period because all or part of the business permanently closed

Determining Notice (or Pay in Lieu) If Terminated Without Cause

1. Employment Standards Act

- Amount of notice required if an employee has been continuously employed for at least three months:

<u>Period of Employment Required</u>	<u>Notice</u>
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

Determining Notice (or Pay in Lieu) If Terminated Without Cause

1. Employment Standards Act

– During the notice period, an employer must:

- not reduce the employee's wage rate or alter any other term or condition of employment;
- continue to make whatever contributions would be required to **maintain the employee's benefits plans**; and
- pay the employee the wages he or she is entitled to, which cannot be less than the employee's regular wages for a regular work week each week.

Determining Notice (or Pay in Lieu) If Terminated Without Cause

1. Employment Standards Act

- To calculate the amount of severance pay an employee is entitled to receive, multiply employee's regular wages for a regular work week by the sum of:
 - the number of completed years of employment;
 - and
 - the number of completed months of employment divided by 12 for a year that is not completed.
- Maximum severance pay under *ESA* is 26 weeks.

Determining Notice (or Pay in Lieu) If Terminated Without Cause

2. Employment Contract (Termination Clause)

- Sets out employee's entitlements if employer terminates employee's employment
- Typically provides employee with either fixed notice period or formula for calculating notice period based on employee's years of service
 - Will likely specify benefits and variable compensation that will be continued during notice period

Determining Notice (or Pay in Lieu) If Terminated Without Cause

3. Common Law

- Employee entitled to **reasonable notice of dismissal**
 - Different from entitlements to notice and severance set out in *ESA*
- Calculating notice period requires individualized assessment of dismissed employee's circumstances:
 - employee's age;
 - employee's length of service;
 - character of the employment (i.e. the employee's skill set and position)
 - availability of similar employment.
- Starting point for reasonable notice is **one (1) month of notice per year of service**; guideline only; will depend on above 4 factors

Determining Notice (or Pay in Lieu) If Terminated Without Cause

- Termination clause typically allows employer to terminate employment by providing employee with a severance package that is significantly less than if the employer was required to provide the employee with reasonable notice of dismissal
 - Properly drafted termination clause will rebut presumption that the employee is entitled to reasonable notice of dismissal
 - Reasonable notice under common law is much greater than the statutory notice period under the *ESA* or *CLC*
- However, a **termination clause will not be enforced by a court unless** it provides the employee with at least his or her minimum statutory entitlements required by the *ESA* or *CLC*
 - Illegal for an employer to provide less than the minimum standards under the *ESA* or *CLC*, even if the employee has voluntarily agreed to accept a lower amount

What is an Enforceable Termination Clause?

Roden v Toronto Human Society, 2005 ONCA

Termination Clause:

Employer may terminate employment at any other time, without cause, upon providing employee with minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation

Court:

Termination Clause was **valid**

Employer can make contracts with employees which referentially incorporate minimum notice periods set out in *ESA*

Such provisions sufficient to displace presumption that contract can be terminated without cause only on reasonable notice

Fact that without cause provision did not address employer's duty to make benefit plan contributions did not render provision invalid

What is an Enforceable Termination Clause?

Wright v. Young & Rubicam Group of Cos., 2011 ONSC

– Termination Clause:

- Where employee has been employed for five years, employment can be terminated by employer at any time upon payment in lieu of notice of 13 weeks' base salary
- Payment inclusive of all other entitlements to compensation of any kind

– Court:

- Termination clause was **void**
- **Termination clause did not provide for benefits**—specifically excluded them, contrary to *ESA*

What is an Enforceable Termination Clause?

- *Stevens v. Sifton Properties Ltd.*, 2012 ONSC
 - Termination Clause:
 - Employer may terminate employment without cause at any time by providing notice or payment in lieu of notice and/or severance pay in accordance with *ESA*
 - Court:
 - Termination clause was **void**
 - Termination clause violated *ESA* because it did not confirm entitlement to benefit continuation during notice period

What is an Enforceable Termination Clause?

- *Luney v. Day & Ross Inc.*, 2015 ONSC
 - Termination Clause
 - If employment is terminated for other than ‘just cause’, you will be entitled to two weeks notice or pay in lieu of notice and a severance of one week’s regular pay for each full year of service, less statutory deductions
 - If notice and severance entitlements in contract are not in conformity with those prescribed by the *CLC*, the statutory minimum’s shall apply and be considered reasonable notice and severance
 - Court:
 - Termination clause was **valid**
 - Termination **clause fails to reference benefits entitlements** (which would make it invalid based on *Stevens* and *Wright*) **BUT the otherwise invalid provision is saved** by the clause that provides that if the severance entitlements are not in conformity with the severance prescribed by the *Code*, the statutory minimums shall apply.

Oudin v Le Centre Francophone de Toronto

- 2016 decision of the Ontario Court of Appeal
- Facts:
 - Plaintiff hired by defendant, Le Centre Francophone de Toronto (CFT) in 2000 to manage production of a magazine published by the defendant.
 - Plaintiff worked until 2007 on the basis of a series of one-year contracts that included a base salary of \$28,000/year and 20% of the value of sales of advertisements placed by him.
 - In 2007, the parties entered into an indefinite-term employment contract under which the plaintiff's base salary increased to \$50,000 and commission increased significantly to between 50 and 65 percent of the value of sales over certain established amounts.

Oudin v Le Centre Francophone de Toronto

- Facts:
 - Termination Clause in New Contract:
 - *The CFT may terminate this agreement for any other reason by giving the employee 15 days notice or the minimum prescribed by the Employment Standards Act or by paying an amount of salary equal to the salary the employee would have had the right to receive during the notice period (after deduction and/or withholding at source), in the entire discretion of CFT.*
 - New contract also had a provision in the contract which expressly provided that any provision that was unlawful would be modified or nullified to the extent necessary to comply with the law and allow other contract provisions to remain in place

Oudin v Le Centre Francophone de Toronto

- Facts:
 - Plaintiff's employment was terminated in September 2013 after several years of declining sales for the magazine
 - Defendant provided plaintiff with 33 weeks of pay
 - 21 weeks under *ESA* (8 weeks of termination pay, 13 weeks of severance)
 - Additional 12 weeks of pay in exchange for a release
 - Defendant voluntarily maintained plaintiff's benefits until March 2014
 - Plaintiff refused offer

Oudin v Le Centre Francophone de Toronto

- Arguments:
 - Plaintiff sought pay in lieu of common law "reasonable notice"
 - Plaintiff argued that written contract was unenforceable because it allowed for termination on only 15 days' notice even though his service at the time entitled him to much more than 15 days' notice under the *ESA*
 - Defendant disputed that the termination clause was illegal given the mutual understanding at the time that the plaintiff would receive *ESA* minimums in excess of 15 days
 - Defendant further relied on the provision in the contract which expressly provided that any contract provision that was unlawful would be modified or nullified to the extent necessary to comply with the law and allow other contract provisions to remain in place (the "Saving Provision")

Oudin v Le Centre Francophone de Toronto

- Ontario Superior Court of Justice:
 - Parties did not intend to contract out of the minimum standards of the *ESA*
 - Court rejected Plaintiff's argument that by referring only to notice, and not other benefits the Plaintiff was entitled to under the *ESA*, the clause ought to be interpreted as an attempt to contract out of *ESA* obligations
 - Regardless, Plaintiff's challenges to the contract can be cured using the “Saving Provision” contained in the employment contract
- Ontario Court of Appeal:
 - Appeal Dismissed
 - Motion judge's interpretation of the contract is entitled to deference

State of the Law on the Validity of Termination Clauses Post-*Oudin*

Still conflicting decisions, but Oudin suggests that a termination clause which states that an employee is entitled to the “minimum prescribed by the Employment Standards Act” upon termination without cause will be enforceable

State of the Law on the Validity of Termination Clauses Post-*Oudin*

- Question: Does a termination provision in an employment contract require the word “benefits” in order to meet minimum statutory requirements and be legally binding?
 - *Oudin* suggests NO, but unclear due to conflicting decisions
 - Note that termination clause in *Oudin* contained a “saving provision”
- Question: Can a “saving provision” like the one seen in *Oudin* prevent a termination clause from being found unenforceable?

State of the Law on the Validity of Termination Clauses Post-*Oudin*

- Best Practice for Employers when Drafting Termination Clauses:
 - Careful drafting to explicitly address *ESA* / *CLC* benefits and severance entitlements
 - Include a reference to all statutory entitlements under the *ESA* / *CLC* —not just minimum notice
- Other Recommended Practice
 - Include a “Saving Provision” similar to the one in *Oudin*
 - If any provision in the employment agreement is unlawful it should be modified or nullified to the extent necessary to comply with the law and allow other contract provisions to remain in place
 - However, still unclear if this will be effective in upholding validity of termination clause—SCC has a history of not wanting to fix poorly drafted contractual provisions

Example of better drafted termination clause:

“We may terminate your employment in our sole discretion without cause, at any time during the term of your employment by providing you with all payments and entitlements (including benefits, if any) in accordance with the standards set out in the Employment Standards Act, 2000, as may be amended from time to time.

You understand and agree that provision of the notice, or pay in lieu of notice, benefit continuance and/or severance pay and any other payments required under the Employment Standards Act, 2000 shall constitute full and final satisfaction of any claim, right and/or demand that you might have arising from or related to the termination of your employment under statute or common law.”



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Thank you!

Questions?

Marty Rabinovitch

B.A.H., LL.B.

Employment Lawyer

416-446-5826

marty.rabinovitch@devrylaw.ca



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Preventing and Responding to Employee Fraud

Christopher W. Statham

B.A. (Hons.), M.A. LL.B.

Employment Lawyer

416-446-5839

christopher.statham@devrylaw.ca

What is Employee Fraud?

- Employee fraud is also commonly referred to as “occupational fraud” or “internal fraud”.
- The Association of Certified Fraud Examiners (ACFE) defines “occupational fraud” as follows:

The use of one’s occupation for personal enrichment through the deliberate misuse or misappropriation of the employing organization’s resources or assets.

“Report to the Nations on Occupational Fraud and Abuse” (Association of Certified Fraud Examiners, 2012)
online: <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rtnn/2012-report-to-nations.pdf>

Common Types of Employee Fraud

- Falsifying expense reports
- Improper use of sick leave
- Accepting bribes/kickbacks
- Theft/asset misappropriation



The Staggering Cost of Fraud

- Data from the Association of Certified Fraud Examiners' 2016 Global Fraud Study, *Report to the Nations on Occupational Fraud and Abuse*
 - Estimated that the typical organization loses 5% of annual revenues to fraud
 - The median loss from a single case of occupational fraud was \$150,000
 - The median loss in Canada was \$154,000
 - More than 23% of occupational fraud cases resulted in a loss of at least \$1 million

<http://www.acfe.com/rtn2016/costs.aspx>

What to do When Fraud is Suspected?

Two issues arise:

- When does an employer have cause to dismiss an employee who is suspected of fraud?
- What, if anything, can an employer do to recover its losses?

Dismissal for Cause

- An employee has a duty of good faith and fidelity to his or her employer.
- Ultimately, an employee who has engaged in fraud may be dismissed without notice.



Dismissal for Cause

- Mere dishonesty by an employee, however, is not sufficient to give rise to cause for dismissal.
- It is necessary that the dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

Some Examples: Falsifying Expense Reports

- Falsely claiming the costs of entertaining clients at dinner: *Laverty v. Cooper Plating Inc.*, 1987 CarswellOnt 897 (Dist. Ct.).
- Forging receipts and failing to correct expense reports after being questioned by employer: *Thompson v. Boise Cascade Canada Ltd.*, 1994 CanLII 7385 (Ont. S.C.J.).
- Exaggerating mileage travelled: *Cosman v. Viacom Entertainment Canada Inc.*, 2002 CarswellOnt 1569 (S.C.J.).

Other Examples of Cause

- Bank employee falsifying loan documentation contrary to employer policy despite receiving no personal gain: *Ivanore v. Canadian Imperial Bank of Commerce*, 1983 CarswellNat 101 (Adjudicator under the *Canada Labour Code*).
- Taking extended sick leave in order to work at a second job: *Gill v. IKO Industries Ltd.*, 1996 CarswellOnt 1537 (Gen. Div).

Theft, Bribery and Kickbacks

- Theft is generally regarded as a repudiation of the contract of employment and therefore justifies dismissal.
- However, not all theft will give rise to cause for dismissal. Courts will take a qualitative approach, looking at the quantum involved, the employee's disciplinary record and other mitigating factors such as length of service and past performance.

Theft, Bribery and Kickbacks

See, for example *Bravo v. Etobicoke Ironworks Ltd.*, 2005 CanLII 18276 (Ont. S.C.J.): A long-term employee with a good work record who stole two bolts from his employer and was insubordinate and insolent upon being questioned was found to have been wrongfully dismissed.

Theft, Bribery and Kickbacks

Similarly, in *Kreager v. Davidson*, 1992 CanLII 198 (B.C.C.A.) an employee who was dismissed after accepting a television as a promotional gift from a supplier was found to have been wrongfully terminated.

Theft, Bribery and Kickbacks

Contrast *Kreager* with *Poliquin v. Devon Canada Corp.*, 2009 CarswellAlta 903 (C.A.):
The employee solicited and accepted landscaping services at his personal residence from one of the employer's suppliers. The employer's code of conduct prohibited acceptance or solicitation of gifts in excess of a nominal amount. As a result, the employee was found to have been dismissed with cause.

Theft, Bribery and Kickbacks

- An employee who handles her employer's money occupies a position of trust and has a fiduciary duty to deal properly with that money. Stealing the employer's money is a breach of that fiduciary duty: *Re McNabb*, 1995 CarswellAlta 31 (Q.B.).
- Where an employee steals money from her employer she becomes a trustee for her employer: *Re Kolari*, 1981 CarswellOnt 201 (Dist. Ct.)

How can Employers Recover?

- Confront the employee?
- Terminate the employee?
- Take legal action?
 - Call the police?
 - Sue the employee?



Recovery: Confronting the Fraudster

- An employer must determine when and if it is appropriate to confront an employee who is suspected of fraud.
- Control the flow of information.

Recovery: Confronting the Fraudster

- Does the employee already know that the fraud has been discovered?
 - If the employee is “tipped off” by the employer, this may lead to destruction of evidence and/or dissipation of assets.
 - By the time the fraud is exposed, the employee may be impecunious.

Recovery: Some Tools in the Legal Toolkit

- Document the fraud (*Norwich* order and *Anton Piller* order)
 - Production of key documents and computer information may be necessary
- Locate and freeze assets (*Mareva* injunction, *Bank Act* freeze and order for interim preservation of property)
- Trust claims, tracing and knowing receipt
 - Third party claims

Recovery: *Norwich Pharmacal* Orders

- A *Norwich* order is a pre-action discovery mechanism which can be used to obtain information from third parties who may have innocently facilitated the fraud.
 - Typically against banks.

Recovery: *Norwich Pharmacal* Orders

- A *Norwich* order may be granted:
 - To locate or identify fraudsters;
 - To find and preserve evidence of fraud; and
 - To provide evidence necessary to trace and preserve assets.
- A *Norwich* order may be obtained without notice to the fraudster.

Recovery: *Norwich Pharmacal* Orders

- There are five factors or questions which must be considered by the court:
 - Is there sufficient evidence to raise a valid, *bona fide* or reasonable claim?
 - Is the third party somehow involved in the acts complained of?
 - Is the third party the only practical source of the information available?
 - Can the third party be indemnified for costs to which it might be exposed as a result of complying with the order?
 - Do the interests of justice favour granting the order?

GEA Group AG v. Ventra Group Co., 2009 CarswellOnt 7755 (C.A.).

Recovery: *Anton Piller* Orders

- Also known as a “civil search warrant”.
- Provides authority to enter into a defendant’s home or place of business to search and seize evidence.
- *Anton Piller* orders are granted only where there is a real risk of destruction of documents, computer records or other evidence by the fraudster.

Recovery: *Anton Piller* Orders

- Four essential conditions for the granting of an *Anton Piller* order:
 - The plaintiff must demonstrate a strong *prima facie* case;
 - The damage to the plaintiff of the defendant's alleged misconduct must be very serious;
 - There must be convincing evidence that the defendant has in its possession incriminating documents or things; and
 - It must be shown that there is a real possibility that the defendant will destroy such material before the ordinary discovery process can do its work.

Celanese Canada v. Murray Demolition Corp., 2006, 269 D.L.R. (4th)
193 (S.C.C.)

Recovery: Freezing Assets

- A *Mareva* injunction may be obtained on application to the court in order to freeze the fraudster's assets.
 - Initially, this may be done without notice to the fraudster provided that certain conditions are met.
- The court may also make an order for custody or preservation of property under Rule 45.01 of the *Rules of Civil Procedure*.
- A certificate of pending litigation may be obtained on application to the court and then registered on title to any land owned by the fraudster.
- Bank accounts may be frozen under s. 437(2) of the *Bank Act*, S.C. 1991, c. 46.

Recovery: *Mareva* Injunction Requirements

- There is a strong prima facie case of fraud or other misconduct;
- There is a real risk that assets will be removed from the jurisdiction or will otherwise be dissipated in a manner that is outside of the defendant's usual and ordinary course of business;
- The balance of convenience favours granting the injunction;
- There are assets within the jurisdiction;
- The plaintiff makes full and frank disclosure of all material facts within its knowledge; and
- The plaintiff must provide an undertaking as to damages.

Aetna Financial Services v. Feigelman, 1985 CanLII 55, 1 S.C.R. 2.; *Chitel v. Rothbart* 1982 CarswellOnt 508, 39 O.R. (2d) 513 (C.A.); *Bank of Montreal v. Misir*, 2004 CanLII 48172 (Ont. S.C.J.).

Trust Claims, Tracing and Knowing Receipt

- Tracing orders arise from breach of fiduciary duty, constructive trust or conversion (theft).
- Where funds which are fraudulently misappropriated from an employer can be traced into assets or into the hands of third parties who “knowingly received” them then recovery may be had against these assets or the third parties (e.g. spouses or other family members).
- See, for example: *Treaty Group Inc. v. Simpson*, 2001 CarswellOnt 617 (S.C.J.).

Preventing Employee Fraud

- Raise awareness: Educate management and employees.
- Maintain an active interest in prevention and detection.
- Develop clear and uniform accounting procedures.
- Conduct frequent financial reviews and/or reconciliations.

Preventing Employee Fraud

- Provide ongoing anti-fraud training to all employees of the organization.
- Institute a fraud reporting mechanism.
- Manage risk by purchasing fidelity insurance.
- Ask questions!





Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Thank you!

Questions?

Christopher W. Statham

B.A. (Hons.), M.A. LL.B.

Employment Lawyer

416-446-5839

christopher.statham@devrylaw.ca

Networking Break!



Time for coffee ☺



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Immigration Issues for Cross-Border Employees

Asher Frankel

B.A., M.S., J.D.

Head of the Immigration Law Group

416-446-4041

asher.frankel@devrylaw.ca



THE PLAYERS

IRCC (formerly known as CIC – Citizenship and Immigration Canada)

- Immigration, Refugees and Citizenship Canada;
- Primary responsibility for setting immigration policy;
- Immigration offices in Canada and posts abroad.

CBSA

- Canada Border Services Agency;
- Implementation and enforcement of customs policy;
- Implementation and enforcement of immigration policy;
- Some involvement in immigration policy making;
- All former immigration officers at port of entry are now CBSA officers.

THE PLAYERS - cont'd

Service Canada (Employment and Social Development Canada)

- Assesses and issues a Labour Market Impact Assessment (LMIA), which is a document allowing an employer to hire a foreign worker, based on consideration of various labour market factors, as described below.

IMMIGRATION DOCUMENTS

Temporary Resident Visa (TRV)

A foil containing security features stamped into the passport of a foreign national by an officer outside of Canada, authorizing the foreign national to enter and remain in Canada as a member of the visitor, worker or student class. Certain foreign nationals are exempt from the requirement to obtain a TRV, as explained below.



IMMIGRATION DOCUMENTS – cont'd

Visitor Record (VR)

A written authorization to remain in Canada as a visitor issued by an officer to a foreign national; initially issued at a port of entry, can be extended inland; stipulates duration as well as terms and conditions. Work activities not requiring a WP may be documented on a VR.

CANADA
Citizenship and Immigration Canada / Citoyenneté et Immigration Canada
PROTECTED WHEN COMPLETED - PROTÉGÉ UNE FOIS REMPLI - B
DD185 484
C30017
THORNHILL ON CANADA
Application/Demande: V305
UCI/IUC: 9241
VISITOR RECORD/FICHE DE VISITEUR
CLIENT INFORMATION/INFORMATION DU CLIENT
Family Name/Nom de Famille: [REDACTED]
Given Name(s)/Prénom(s): [REDACTED]
Date of Birth/Date de naissance: [REDACTED]
Sex/Sexe: FEMALE
Country of Birth/Pays de naissance: TAJIKISTAN
Country of Citizenship/Citoyen de: UNITED STATES OF AMERICA
Travel Doc No./N° du document de voyage: PASSPORT
ADDITIONAL INFORMATION/INFORMATION SUPPLÉMENTAIRE
Date Issued/Déjà le: 2014/12/30
Expiry Date/Date d'expiration: 2015/12/01
Case Type/Genre de cas: 10
In Force From/En vigueur le: 2014/12/30
Conditions:
1. UNLESS AUTHORIZED, PROHIBITED FROM ENGAGING IN EMPLOYMENT IN CANADA.
2. MUST LEAVE CANADA BY 2015/12/01
3. UNLESS AUTHORIZED, PROHIBITED FROM ATTENDING ANY EDUCATIONAL INSTITUTION, OR TAKING ANY ACADEMIC, PROFESSIONAL OR VOCATIONAL TRAINING COURSE.
Remarks/Observations:
TEMPORARY RESIDENT STATUS MAINTAINED AS PER R183(S). LM/OSC
THIS DOES NOT AUTHORIZE RE-ENTRY/CECI N'AUTORISE PAS LA RÉ-ENTRÉE
THIS FORM HAS BEEN ESTABLISHED BY THE MINISTER OF CITIZENSHIP AND IMMIGRATION - THIS DOCUMENT IS THE PROPERTY OF THE GOVERNMENT OF CANADA
FORMULAIRE ÉTABLI PAR LE MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION - LE PRÉSENT DOCUMENT EST LA PROPRIÉTÉ DU GOUVERNEMENT DU CANADA
R01 14529 (06-2013)
O-111 C101
Canada

IMMIGRATION DOCUMENTS – cont'd

Work Permit (WP)

A written authorization to work in Canada issued by an officer to a foreign national; is generally employer, occupation and location specific; in certain circumstances may be issued on an “open” basis (e.g., spousal WP); generally issued at a port of entry or within Canada if renewal or under certain other circumstances. Certain work activities do not require a WP, as described below.

CANADA
Citizenship and Immigration Canada / Citoyenneté et Immigration Canada

100-95 BARBER GREENE ROAD
TORONTO ON M3C 3E9
CANADA

Application/Demande: W302
UCI/IUC: 9526

WORK PERMIT/PERMIS DE TRAVAIL

CLIENT INFORMATION/INFORMATION DU CLIENT

Family Name/Nom de Famille: [REDACTED]
Given Name(s)/Prénom(s): [REDACTED]
Date of Birth/Date de naissance: [REDACTED] (yyyy/mm/dd - aaaa/mm/dd)
Sex/Sexe: MALE
Country of Birth/Pays de naissance: PHILIPPINES
Country of Citizenship/Citoyen de: PHILIPPINES
Travel Doc No./N° du document de voyage: [REDACTED] PASSPORT

ADDITIONAL INFORMATION/INFORMATION SUPPLÉMENTAIRE

Date Issued/Délivré le: 2016/09/05 (yyyy/mm/dd - aaaa/mm/dd)
Expiry Date/Date d'expiration: 2018/02/25 (yyyy/mm/dd - aaaa/mm/dd)
Case Type/Genre de cas: 53
ESDC/EDSC #: [REDACTED]
Employer/Employeur: [REDACTED]
Employment Location/Emplacement de l'emploi: TORONTO
Occupation/Profession: [REDACTED]
In Force From/En vigueur le: 2016/09/05 (yyyy/mm/dd - aaaa/mm/dd)

Conditions:

1. NOT AUTHORIZED TO WORK IN CHILDCARE, PRIMARY/SECONDARY SCHOOL TEACHING, HEALTH SERVICE FIELD OCCUPATIONS.
2. MUST LEAVE CANADA BY 2018/02/25
3. UNLESS AUTHORIZED, PROHIBITED FROM ATTENDING ANY EDUCATIONAL INSTITUTION, OR TAKING ANY ACADEMIC, PROFESSIONAL OR VOCATIONAL TRAINING COURSE.
4. NOT AUTHORIZED TO WORK IN ANY OCCUPATION OTHER THAN STATED.
5. NOT AUTHORIZED TO WORK FOR ANY EMPLOYER OTHER THAN STATED.

Remarks/Observations:
SXC847

THIS DOES NOT AUTHORIZE RE-ENTRY/CECI N'AUTORISE PAS LA RÉ-ENTRÉE

THIS FORM HAS BEEN ESTABLISHED BY THE MINISTER OF CITIZENSHIP AND IMMIGRATION - THIS DOCUMENT IS THE PROPERTY OF THE GOVERNMENT OF CANADA
FORMULAIRE ÉTABLI PAR LE MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION - LE PRÉSENT DOCUMENT EST LA PROPRIÉTÉ DU GOUVERNEMENT DU CANADA

BSM 1442B (06-2012)
CANADA

TRV EXEMPTIONS

Not every foreign national requires a visa to enter Canada. Visa exemptions are based primarily on nationality, but can also be based on other factors such as purpose of entry.

- **Nationality**

- Citizens of Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Brunei Darussalam, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Portugal, Samoa, San Marino, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sweden or Switzerland.

TRV EXEMPTIONS - cont'd

- British citizen;
- British overseas citizen who is re-admissible to the U.K.;
- British overseas territory citizen who derives that citizenship through birth, descent, naturalization or registration in one of the British overseas territories;
- holder of a passport issued by the U.K. to a British National (Overseas), as a person born, naturalized or registered in Hong Kong;
- Holder of a passport issued by the U.K. to a British Subject which contains the observation that the holder has the right of abode in the U.K.;
- national of the U.S.A. or a person who has been lawfully admitted to the U.S. for permanent residence;
- Holder of a passport or travel document issued by the Holy See;
- holder of a passport issued by the Hong Kong Special Administrative Region;
- Israeli citizen holding a national Israeli passport;
- Taiwanese citizen holding an ordinary passport issued by the Ministry of Foreign Affairs in Taiwan that includes their personal identification number.

TRV EXEMPTIONS - cont'd

- **Purpose of entry**

- To re-enter Canada following a visit solely to the United States or St. Pierre and Miquelon, if the foreign national:
 - Held a study permit or a work permit that was issued before they left Canada on such a visit or were authorized to enter and remain in Canada as a temporary resident, and
 - Returns to Canada prior to the end of the period initially authorized for their stay or any extension to it.

ACTIVITIES NOT REQUIRING A WORK PERMIT

- Is the Activity “Work”
 - “Work” is defined as an activity for which wages are paid or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.
- Some Activities Are Not Considered Work
 - Volunteer work for which one would not normally be remunerated, e.g. sitting on the board of a charity or religious institution;
 - Long distance work done by telephone or internet in Canada where the employer is outside of Canada and the remuneration is sourced outside of Canada;
 - Self-employment where the work performed has no real impact on the Canadian labour market or on an opportunity for Canadians, e.g. a miner working on his own claim.

ACTIVITIES NOT REQUIRING A WORK PERMIT - cont'd

- Business Visitors
 - A Business Visitor is a foreign national who seeks to engage in international business activities in Canada without directly entering into the Canadian labour market;
 - The activity of the foreign national must be international in scope, generally involving a cross-border business activity;
 - There must be no intent to enter the Canadian labour market, which means no gainful employment in Canada;
 - There must be a foreign employer whose principal place of business is outside of Canada and thus the primary source of the employee's remuneration is outside of Canada;
 - The profits from the employee's activities in Canada accrues to the foreign employer outside of Canada.

ACTIVITIES NOT REQUIRING A WORK PERMIT - cont'd

- Business Visitors Activities – some examples
 - Foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization in respect of such goods or services;
 - Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the company that employs them outside Canada, if any production of goods or services that results from the training is incidental;
 - Foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, provided the foreign national is not engaged in making sales to the general public in Canada.



KEY WORK PERMIT CLASSIFICATIONS

- Labour Market Impact Assessment (LMIA) required;
- LMIA not required.

LABOUR MARKET IMPACT ASSESSMENT (LMIA)

- An LMIA verifies that there is a need for a temporary worker and that no Canadians are available to do the job;
- Test Canadian labour market by recruiting Canadians;
- Is time consuming and expensive process.

LMIA EXEMPTIONS

- Lets employers hire temporary workers without an LMIA. Exemptions from the LMIA process are based on:
 - Broader economic, cultural or other competitive advantages for Canada; and
 - Reciprocal benefits enjoyed by Canadians and permanent residents.

LMIA EXEMPTION – INTRA-COMPANY TRANSFEREES

- Subsidiary, branch, affiliate or parent relationship between foreign employer and Canadian employer – relationship must continue for duration of the WP term;
- Executive / Senior Manager;
- Specialized knowledge worker;
- Currently employed by foreign employer;
- Employed continuously by foreign employer for one year during the preceding three years;
- Special rules apply for new start-ups.

LMIA EXEMPTION – NAFTA PROFESSIONALS

- US / Mexican citizenship;
- Qualifies under one of the 60+ NAFTA professional occupations;
- Most listed occupations require an undergraduate degree;
- Prior work experience abroad and intended occupation in Canada must be related;
- Must have prior work experience in the NAFTA professional occupation or a related field.

ELECTRONIC TRAVEL AUTHORIZATION (eTA)

- A new entry requirement introduced on August 1, 2015 for visa-exempt foreign nationals flying to or transiting through Canada;
- eTA was set up to allow the Government of Canada to screen foreign travellers and ensure they are admissible to enter Canada before they travel;
- First mandatory date March 15, 2016;
- An initial six-month leniency period was put in place which ended on September 29, 2016, but has recently been extended to November 9, 2016.

ELECTRONIC TRAVEL AUTHORIZATION (eTA)-cont'd

- Exceptions: U.S. citizens and travellers with a valid Canadian visa;
non-air travellers – border crossers by land or water.
- Simple online process
 - Apply through **official** Government of Canada website (<http://www.cic.gc.ca/english/visit/eta-start.asp>);
 - Form: online (takes a few minutes);
 - Cost: CAN\$7;
 - Requirements: a passport, a credit card, and an email address;
 - Most applications are approved within minutes of applying, but some can take several days to process.

ELECTRONIC TRAVEL AUTHORIZATION (eTA)-cont'd

- If approved, will receive an email that includes an eTA number (keep the number in case need to check status of the eTA in the future);
- Approval electronically linked to applicant's passport;
- An eTA is valid for five years, or until expiry date of passport, whichever comes first;
- Starting November 10, 2016, visa-exempt foreign travellers will no longer be able to board their flight without an eTA.

eTA IMPACT ON CANADIAN CITIZENS

- Starting November 10, 2016, Canadian citizen **air** travellers must have a Canadian passport to board a flight to travel to Canada:
 - Canadian citizens are not subject to immigration screening and cannot apply for an eTA, must have a valid Canadian passport, the only reliable and universally accepted travel document;
 - also acceptable are a valid Canadian Temporary Passport or a valid Canadian Emergency Travel Document;
(temporary passports and emergency travel documents are only issued under strict conditions and on a case-by-case basis)

eTA IMPACT ON CANADIAN CITIZENS - cont'd

- Dual citizens (Canadian and another foreign citizenship) – a valid Canadian passport; cannot use non-Canadian passport or apply for an eTA;
- Dual U.S.-Canadian citizens – a valid Canadian or U.S. passport;
- Workaround for dual citizens entering Canada without a Canadian passport on or after November 10, 2016 – drive across the land border using a non-Canadian passport.

WHERE TO GET HELP

- Canada Border Services Agency's web site:
www.cbsa-asfc.gc.ca
- Immigration, Refugees and Citizenship Canada's web site: www.cic.gc.ca
- Call Centre for immigration related information:
1-888-242-2100



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Thank you!
Questions?

Asher Frankel

B.A., M.S., J.D.

Head of the Immigration Law Group

416-446-4041

asher.frankel@devrylaw.ca



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Tax Issues for Cross-Border Employees

Sabina Mexis

LL.B. TEP

Tax Lawyer

416-446-3348

sabina.mexis@devrylaw.ca

Overview – Tax Issues Cross-Border Employees

1. What are the different categories of residency for tax purposes?
 1. Factual residents;
 2. Deemed residents;
 3. Non-residents.
2. What is the different tax treatment of each category?
3. What are the income tax obligations of the employer and the employee in each category?

What are the different categories of residency for tax purposes?

- Canada taxes on the basis of residency, not citizenship, unlike the U.S. which taxes its citizens on their worldwide income regardless of where they reside
- The status of a taxpayer as a resident or non-resident for Canadian tax purposes will affect whether they are taxable in Canada and the type of income subject to Canadian tax

Types of residency for Canadian tax purposes:

- 1. Factual resident;**
- 2. Deemed resident; and**
- 3. Non-resident**

Factual Residency

The most important factor to be taken into consideration in determining whether an individual entering Canada become resident in Canada for tax purposes is whether the individual establishes residential ties with Canada.

– **Significant residential ties**

- Dwelling place;
- Spouse or common law partner; and
- Dependents.

– **Secondary indicia of residency:**

- Personal property in Canada ;
- Social ties with Canada;
- Economic ties with Canada;
- Landed immigrant status or appropriate work permits in Canada;
- Hospitalization and medical insurance coverage from a province or territory of Canada;
- A driver's license from a province or territory of Canada;
- A seasonal dwelling place in Canada;
- A Canadian passport;
- Memberships in Canadian unions or professional organizations
- Other factors: mailing address, telephone listing in Canada, Canadian newspaper and magazine subscriptions, etc.

Deemed Residency:

- A deemed resident of Canada is a person who has been determined is not a factual resident of Canada
- A factual resident of Canada cannot be deemed a resident of Canada under the Income Tax Act.
- Significant tax differences between factual and deemed residents;
- Sojourners are deemed residents for tax purposes
 - Sojourners are those individuals who are temporarily present in Canada for a total of 183 days or more in any calendar year
 - The CRA considers any part of a day to be a day for the purpose of counting the number of days in which a person is present in Canada
 - Difference between a commuter and sojourner

Non residents

- A person who has not established sufficient residential ties to Canada
- A person may also be deemed to be a non-resident of Canada at a particular time if, although otherwise resident in Canada (either factual or deemed), the individual is considered to be a resident in another country pursuant to an income tax treaty.
- Tie-breaker rules
 - Residence – permanent home test
 - “liable to tax”
 - Centre of vital interests test

Tax treatment of different categories of residents

- Factual resident: subject to Canadian income tax on his or her worldwide income
- Deemed resident:
 - Not a factual resident for provincial tax purposes;
 - A deemed resident under the Income Tax Act is also liable for tax on his or her worldwide income throughout the year
- Non resident: subject to Canadian income tax only on income from a Canadian-source (business and property income)

Income Tax Implications - Employer:

- Employer is required to withhold and remit income tax, source deductions (CPP, EI)
- If the employer is a non-resident corporation, depending on the nature of the services being performed by the employee, the corporation may be found to have a permanent establishment in Canada and thereby subject to Canadian tax on any of its Canadian-source income
- The *Income Tax Act*: An employer who fails to withhold and remit an employee's taxes is subject to significant penalties and interest on the unpaid taxes.
 - Penalties and interest will not be deductible to the company
 - Company may be liable for Employer Health Tax, under the *Employer Health Tax Act* (Ontario) if the worker reports to a permanent establishment of the company in Ontario

Tax Implications (cont'd)

- Possible the CRA will assess individual members of company's Board (jointly and severally) for the following:
 - Income tax which the company was required to withhold and remit
 - Employer and employee CPP contributions which the company was required to remit
 - Employer and employee EI premiums which the company was required to remit
- There may be penalties and interest on all of the above
- Due diligence defence available under the *ITA*, *CPPA* and *EIA*
- CRA cannot assess the company for GST/HST/QST purposes for services rendered by the worker if the worker is found to be an employee
- From the worker's perspective, there could be considerable issues or assessments re GST/HST/QST if the worker is invoicing the company for services performed

Regulation 102 and Regulation 105

- Depending on whether the employee is found to be a resident or a non-resident of Canada, the employer may be required to withhold and remit under Regulations 102 and 105 of the Income Tax Act
- These provisions impose withholding, remittance and reporting obligations on anyone paying a non-resident person for services rendered in Canada

Income tax implications - Employee

- Depending on whether the employee is a factual resident, a deemed resident, or a non-resident of Canada for tax purposes, income tax filings, remittances and reporting will be required.
- Foreign tax credits will be available to offset taxes payable in other jurisdictions (i.e., US)

Minimizing the Risk

- It is vitally important for both the employer and the employee to seek tax advice prior to commencing work in Canada.
- The repercussions to both the employer and the employee for non-filing, such as extensive penalties and interest, and potential directors' liability for unremitted taxes and payroll deductions can be significant
- For assistance in determining the best manner in which one should carry on business operations in Canada, please feel free to contact our Tax Department.



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Thank you!
Questions?

Sabina Mexis

LL.B. TEP

Tax Lawyer

416-446-3348

sabina.mexis@devrylaw.ca



Devry Smith Frank *LLP*
Lawyers & Mediators

www.devrylaw.ca

Larry Keown

B.A., LL.B.

Employment Lawyer

416-446-5815

larry.keown@devrylaw.ca