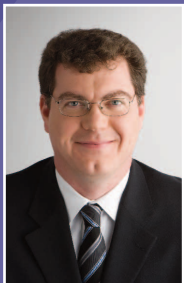


# Wrongful Dismissal - New Issues and Recent Cases

Labour, Employment and Human Right Group Seminar  
Wednesday, November 24, 2010



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## Wrongful Dismissal – New Issues and Recent Cases

November 24, 2010  
Patrick Gannon, Ian Campbell, Maria Giagilitsis

## YOU ASKED – WE TRY TO ANSWER

Today we're here to answer YOUR questions:

- 1. Just Cause**
  - what is it, can you allege it and how do you prepare for it
- 2. Terminating an employee with a disability**
  - is it ever possible?
  - does frustration of contract exist?
- 3. Damages**
  - are Wallace/bad faith damages really a thing of the past?

## 1. Just Cause: WHAT IS IT, ANYWAY?

- Legally speaking –conduct signals repudiation of employment relationship
  - Fraud/deceit
  - Theft
  - Sexual harassment
- Practically speaking – confusion arises
  - fraud is just cause...isn't it?
    - what if employee claims mistake/oversight – subjective?
    - does the amount matter?
    - *Leitner v. Wyeth Canada*, ON SCJ, 2010 - \$500 mistake

## Just Cause: CASE STUDY

- Fruit Pak is a wholesale and distribution outlet for fruits and vegetables across Canada
- Mr. Page started out as a salesperson for Fruit Pak in 1982 at age 32 – eventually, he worked his way up to COO and then Co-CEO of certain subsidiaries within Fruit Pak org.
- Page's annual salary is \$500K + bonus
- During employment, Page illegally importing wine from Italy, in Fruit Pak packaging without declaring it at customs/border
- Page misses his bonus targets in 2006 and 2007
- By 2007, Fruit Pak loses confidence his performance – productivity declines, seems less motivated
- Fruit Pak reduces his responsibilities – Page rejects reduction

## Just Cause: CASE STUDY cont'd...

**MR PAGE:**  
“constructive dismissal”

*versus*

**FRUIT PAK:**  
“resignation”

**OR**

**Just cause on the basis of fraud, deceit and breach of  
fiduciary duty**

## Just Cause: CASE STUDY cont'd...

- **QUESTIONS:**

- Is this just cause to terminate Mr. Page?
- This is a real case – what did the court do?

## Just Cause: COMPLICATING MATTERS

- Assume Page claimed his conduct was caused by alcoholism and/or other mental disability (stress, anxiety)
- Does this change things?
  - Is there a duty to accommodate?
    - Is there a disability?
    - Is the disability linked to the behaviour?
    - Did employer raise the possibility of a disability – should you?
    - Did the employer ask/offer to help?
- Can you still terminate?

## Just Cause: SHOULD YOU ALLEGE CAUSE?

- Does it ever make sense to allege just cause?
  - Know **why** you're doing it
  - Understand and accept the potential consequences
- How to prepare for alleging cause
  - PIP (performance improvement plan)
  - Document - more than just a letter campaign
  - Process - have them AND follow them
  - Ask – provide opportunity to answer to allegations
  - Consider human rights - alarm bells?
- Why prep for cause if you don't plan to make the allegation?
- In any event, part with class (or at least quietly)

## 2. Employees with disabilities: CAN YOU TERMINATE?

- Is it ever possible to terminate an employee with a disability?
  - It's a process – start early
  - Downsizing
  - Elimination of an entire department or function
- Is the employment relationship EVER frustrated?

## Frustration: CASE STUDY

- Frank is employed by Big Box Store (BBS). BBS is a retail business establishment that sells regular household and grocery items to the public in really large quantities
- Frank employed for 17 years; returns clerk; 37 years old
- 12 years into relationship, Frank takes STD leave due to stress...leave extended to LTD and has lasted for 5+ years
- BBS is getting impatient - BBS writes to Frank's doctor, asking for details of current treatment plan and progress
- BBS receives note from Frank's doctor saying "I can't predict when Frank will be able to return to his job – referring him to different psychiatrist"
- BBS terminates the relationship

## Frustration: CASE STUDY cont'd...

**FRANK:**  
“wrongful dismissal”

*versus*

**Big Box Stores:**  
“frustration of contract”

## Frustration: CASE STUDY cont'd...

- **QUESTIONS:**

- What would you do on these facts?
- This is a real case – what did the court do?

## Frustration: COMPLICATING MATTERS

- What if doctor not giving you direct answers?
  - Detailed information - provide more, get more
  - Persistence is key – keep asking, reshape the question
  - Exhaust all possible avenues for answers
  - Provide clear warning first
- Doctor says: unlikely employee return without + absences
  - Total unfitness v. inability to fulfil basic obligations
  - Necessary evil – waiting and more waiting
    - Changes in prognosis
    - Prognosis unsure – further medical treatment underway
- What is undue hardship?
  - Does it have to be “impossible” to accommodate?

## Frustration: WHEN IS IT THE RIGHT TIME?

- No bright line (2 years, 5 years, 7 years...)
- To establish frustration, Courts are saying:
  - Stay in touch with doctors - ask the **right** questions about “reasonable likelihood of return in foreseeable future”
  - Ask yourself the right questions
    - does employment contract contemplate long absence?
    - fixed term v. indefinite employment?
    - business hardships because of continued absence?
    - have we accommodated (creative solutions)?
  - Be patient – let employee exhaust medical process
  - Offer assistance
  - Provide warning and opportunity to respond

### 3. Damages: ARE WALLACE AWARDS OLD NEWS?

- Pendulum swinging – back and forth...and back again?
  - 1997: *Wallace v. United Grain Growers* (SCC) opens the door for something less than aggravated damages – bad faith conduct
  - 1997 – 2008: routine extension of reasonable notice period to ‘remind’ employers of good faith obligation
  - 2008: *Keays v. Honda* (SCC) court scaled back wrongful dismissal damages – restriction on *Wallace* damages – actual damages must be proven
- 2008 - onwards: What's happening since *Keays*?

### Damage awards: RECENT CASES

- Rite-Pak (2010 SCJ) - AGGRAVATED
  - \$25,000.00 aggravated damages for president's comments well after termination at company party
- Nishina v. Azuma Foods (2010 BCSC) - PUNITIVE
  - Relying on *Keays*, no *Wallace*/aggravated since no quantifiable damages proven by plaintiff
  - \$20,000.00 punitive damages
    - No real investigation before termination - assumed wrong
    - Employer knew tenuous immigration status (termination = no work in Canada or US and no medical insurance) and went ahead abruptly anyways

## Damage awards: CASE STUDY

- Marta is a sales employee with 10 years service who has had a great performance but has recently declined
- Marta's manager is aggressive, loud and brash
- Employer is Big Cable and Cell (BCC)
- One day, Marta misses a meeting, manager angry; Marta tries to explain absence by showing manager an email on her blackberry; manager doesn't want to see email and pushes employee out of his way, she falls back
- Next day, manager contacts HR and files Marta's PIP explaining declining performance (doesn't mention assault)
- She refuses to sign PIP; files formal complaint about the push

## Damage awards: CASE STUDY cont'd...

- BCC response:
  - ask manager about push – he admits it
  - advise Marta she is reassigned to different manager
  - discipline letter to manager, recommends course and directs apology to Marta
  - asks Marta to come in for meeting to discuss PIP
- Marta's response:
  - won't come to meeting
  - won't return to work because manager still at location
  - submits medical doc–post traumatic stress and anxiety
- BCC doesn't want to fire manager - 8 years clean record

## Damage awards: CASE STUDY cont'd...

**MARTA:**  
“constructive dismissal”

*versus*

**Big Cable and Cell:**  
“resignation”

## Damage awards: CASE STUDY cont'd...

- What would you do?
- This is a real case

## MORE OF YOUR QUESTIONS

- Paying more to avoid legal action v. paying only ESA?
- What are the guidelines when terminating employees returning from mat leave?
- What are the risks associated with terminating underperforming elderly employees?
- Limitations Act: does the period run from termination or when breach known?
- Termination of benefits? If employee absent on LTD, can you terminate supplemental benefits? When?



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# BIOGRAPHIES



## Patrick T.J. Gannon

*Partner*

### Toronto

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[www.fasken.com/patrick-gannon](http://www.fasken.com/patrick-gannon)

Patrick Gannon practises labour, employment and human rights law. He advises on various labour and employment matters, including collective agreement interpretation, union certification, employment standards, wrongful dismissal as well as workplace safety and insurance and human rights issues.

Patrick has worked as a sub-editor for Canada Law Book's Canadian Labour Arbitration Summaries publication.

Patrick joined the firm as an associate in 1998, and became a partner in 2003.

### Representative Experience

- *Grey Island Systems acquired by WebTech Wireless*  
Advised Grey Island Systems International Inc. in its acquisition by WebTech Wireless
- *FCI sells North American-based electrical division to Hubbell for US\$360 million*  
Advised FCI S.A.
- *Liqui-Box sells performance films business to Exopack*  
Advised Liqui-Box Canada Inc.
- *Silgan Holdings acquires Cousins-Currie for \$48.3 million*  
Advised Silgan Holdings Inc.
- *Vision Capital acquires businesses of AEA Technology plc for up to £76.4 million*  
Acted for Vision Capital Limited
- *GMP Capital Trust completes EdgeStone acquisition for \$155.4 million*  
Advised GMP Capital Trust
- *Ontario Ministry of Correctional Services in public-private partnership agreement with Utah corporation*  
Advised the Ontario Ministry of Correctional Services

### Presentations

- Wrongful Dismissal - New Issues and Recent Cases, Labour, Employment and Human Rights Group Seminar, November 24, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010
- Human Rights Seminar, June 4, 2009
- 24th Fasken Forum, Employment, Labour, Human Rights, Pensions & Benefits Conference, March 3, 2009
- Fasken Martineau National Human Rights Seminar, May 25, 2007

### Areas of Practice

Labour, Employment and Human Rights

Collective Bargaining

Employment Law Advice

Employment Standards

Human Rights

Labour Relations

Workers'

Compensation/Occupational

Health and Safety

### Education

BA,

Concordia University, 1993

LLB,

Queen's University, 1996

### Year of Call

Ontario, 1998

### Languages

English

French

- Employee References: Handle With Care, Speaker, Fasken Martineau Labour, Employment and Human Rights Seminar, February 8, 2007
- Recent Developments in Employment Law in Ontario, Speaker, Fasken Martineau Labour, Employment and Human Rights Seminar, October 27, 2006
- Preventing Workplace Violence, Speaker, Fasken Martineau Labour, Employment and Human Rights Seminar, October 26, 2005
- Bill 63: Proposed Amendments to the Employment Standards Act, 2000, Speaker, Fasken Martineau Labour, Employment and Human Rights Seminar, November 18, 2004
- Video Surveillance, Speaker, Fasken Martineau Labour, Employment and Human Rights Seminar, September 23, 2002

### **Publications**

- "The HR Space: Toronto's G20 Summit - Lessons for Employers About High Security Events", Labour, Employment and Human Rights Bulletin, June 15, 2010
- "Landmark Supreme Court of Canada Decision Significantly Alters the Law Regarding Damages in Wrongful Dismissal Cases", Labour, Employment and Human Rights Law Bulletin, July 2008



## Ian M. Campbell

*Partner*

### Toronto

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Facsimile: 416 364 7813

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Ian Campbell has a general and diverse labour and employment practice. Ian regularly represents employers in the Ontario Superior Court of Justice, the Federal Court of Canada and before various federal and provincial labour, employment and human rights related administrative tribunals. In particular, his practice is focused on providing his clients, who consist mainly of employers and senior executives, with strategic advice regarding various matters including employee terminations, restructurings and downsizings, employment agreements, labour relations, collective agreement interpretation and human rights. Ian also regularly assists his employer clients with reviewing and updating their workplace policies and procedures and providing the training required to ensure these policies are properly implemented and applied.

Ian has developed a particular expertise in the federal sector and regularly advises clients on matters involving the *Canada Labour Code* and the *Canadian Human Rights Act*.

Ian summered and articulated with the firm before joining the Labour, Employment and Human Rights Practice Group in 2003.

### Representative Experience

- *Foresters completes acquisition of Unity Life in Canada's first sponsored demutualization*  
Advised The Independent Order of Foresters
- *United Group completes US\$408 million acquisition of UNICCO*  
Advised United Group Limited
- *Providence Equity Partners acquires Decision Resources*  
Canadian counsel to Providence Equity Partners
- *Travelzest acquires iTravel2000.com for \$51.5 million*  
Acted for Travelzest plc in Canada
- *Hilton Canada sells last five Canadian hotels for \$243 million*  
Advised Hilton Canada Co.
- *CHUM completes \$265 million purchase of Craig Media and financing*  
Advised CHUM Limited
- *Employment policy and practices audits for retail and transportation clients*  
Conducted employment policy and practices audits for major national and international clients in the retail and transportation sectors.
- *Civil and administrative employment and labour related injunction proceedings*  
Regularly represents clients in various civil and administrative employment and labour related injunction proceedings, involving matters ranging from unfair competition to illegal strikes and/or picketing.

### Areas of Practice

Labour, Employment and Human Rights

Collective Bargaining

Employment Law Advice

Employment Standards

Human Rights

Labour Relations

### Education

BSc (Hons), Life Sciences  
Queen's University, 1998

LLB,  
University of Toronto, 2002

### Year of Call

Ontario, 2003

## **Presentations**

- Wrongful Dismissal - New Issues and Recent Cases, Labour, Employment and Human Rights Group Seminar, November 24, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010
- Human Rights Seminar, June 4, 2009
- 24th Fasken Forum, Employment, Labour, Human Rights, Pensions & Benefits Conference, March 3, 2009
- National Human Rights Seminar, Toronto, June 3, 2008
- Fasken Martineau National Human Rights Seminar, May 25, 2007
- 22nd Labour, Employment, Human Rights, Pension & Benefits Conference, February 8, 2007
- 21st Annual Fasken Forum on Employment, Labour, Human Rights, Pensions & Benefits, October 26, 2005

## **Publications**

- "Ontario Court Rules Class Action Not Allowed for Overtime Claim", Northern Exposure: Employment law for U.S. companies with employees in Canada, July 7, 2009
- "Judge Rejects Overtime Class Action Suit Against CIBC", Labour, Employment and Human Rights Bulletin, June 19, 2009
- "Landmark Supreme Court of Canada Decision Significantly Alters the Law Regarding Damages in Wrongful Dismissal Cases", Labour, Employment and Human Rights Law Bulletin, July 2008
- "Hours of Work and Overtime Litigation on the Rise", Labour, Employment and Human Rights Bulletin by Maria Giagilitsis and Ian Campbell, June 2007

## **Memberships and Affiliations**

- Member, Canadian Bar Association
- Member, Ontario Bar Association - Labour Relations Section



## Maria Giagilitsis

### Associate

#### Toronto

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Maria Giagilitsis has a specialized practice, which focuses on all aspects of human rights, labour and employment law. Maria works closely with corporations, human resource professionals and in-house legal counsel, providing both emergent and long-term strategic advice in connection with a broad range of complex matters including the duty to accommodate, wrongful dismissal, and the negotiation, drafting and interpretation of collective agreements, employment agreements and severance agreements.

Maria also represents clients before courts and administrative tribunals and has developed a particular expertise with the mediation and negotiation of human rights, labour and employment disputes. Maria's representative experience includes civil actions for wrongful dismissal as well as proceedings before administrative tribunals including Ontario's Labour Relations Board, Ontario's Employment Standards Branch, the Ontario Human Rights Commission, the Workplace Safety and Insurance Appeals Tribunal and labour arbitrators.

The most unique part of Maria's practice is her experience in corporate training. Maria regularly leads educational and training sessions for all levels of management and employees on virtually all aspects of human rights law and employment law. Maria is also a part-time professor of Human Rights and Employment Law at George Brown College.

#### Areas of Practice

Labour, Employment and Human Rights

Collective Bargaining

Employment Equity

Employment Law Advice

Employment Standards

Human Rights

Labour Relations

Pay Equity

Workers'

Compensation/Occupational Health and Safety

Research

#### Education

BA (Hons),  
University of Western Ontario, 1998

LLB,  
University of Western Ontario, 2001

#### Admitted as a Solicitor

Ontario, 2002

#### Languages

English

Greek

#### Representative Experience

- *Travelzest acquires The Cruise Professionals for \$13 million*  
Advised Travelzest plc
- *Parker Hannifin Corporation acquires Vansco Electronics*  
Advised Parker Hannifin Corporation
- *ING Canada acquires Allianz of Canada*  
Advised ING Canada

#### Presentations

- Wrongful Dismissal - New Issues and Recent Cases, Labour, Employment and Human Rights Group Seminar, November 24, 2010
- National Human Rights Seminar, Toronto, June 3, 2008
- Ontario's Employment Standards Act, 2000: Complaints, Investigations and Enforcement, Speaker, Lorman Education Services Seminar: Employment Standards Act, July 31, 2007
- Fasken Martineau National Human Rights Seminar, May 25, 2007
- Bridging the Gap: Human Rights and Workers Compensation, Speaker, Lorman Education Services Seminar: Workplace Safety and Insurance, March 30, 2007
- 22nd Labour, Employment, Human Rights, Pension & Benefits Conference, February 8, 2007
- Facing Harassment and Discrimination in Civil Actions, Fasken Martineau

Annual Labour and Employment Seminar, 2005

- The Expanding Definition of Marital Status and Family Status, Faskem Martineau Annual Human Rights Conference, 2004
- Appealing WSIB Decisions: Exploring WSIAT, Workplace Safety and Insurance, Lorman Education Services, 2004
- Gambling, Smoking and Alcohol Addiction in the Workplace, Fasken Martineau Annual Human Rights Conference, 2003

### Publications

- "The HR Space: Employees Fired for Facebook Postings", Labour, Employment and Human Rights Bulletin, November 17, 2010
- "Landmark Supreme Court of Canada Decision Significantly Alters the Law Regarding Damages in Wrongful Dismissal Cases", Labour, Employment and Human Rights Law Bulletin, July 2008
- "Arbitrator Affirms Prohibition against Random Drug Testing", Beyond Results Bulletin, August 2007
- "Hours of Work and Overtime Litigation on the Rise", Labour, Employment and Human Rights Bulletin by Maria Giagilitsis and Ian Campbell, June 2007
- "Arbitrator Affirms Prohibition Against Random Drug Testing", Labour, Employment and Human Rights Bulletin by Maria Giagilitsis and Ralph Nero, April 2007
- "The End of Mandatory Retirement in Ontario", Labour, Employment and Human Rights Bulletin, January 2007
- "Human Rights Reform is Coming to Ontario", Labour, Employment and Human Rights Bulletin by Maria Giagilitsis and Ralph Nero, December 2006
- "Changes to Family Medical Leave in Ontario", Labour, Employment and Human Rights Bulletin by Martin Denyes and Maria Giagilitsis, October 2006
- "Superior Court Affirms Limitations Upon Employers' and Unions' Duty to Accommodate Religious Beliefs", Labour, Employment and Human Rights Bulletin by Ralph N. Nero and Maria Giagilitsis, November 2002
- "Alberta Court: Proceeds on Demutualization of Insurance Carrier Belong to Employees", Labour, Employment and Human Rights Bulletin by Ralph Nero and Maria Giagilitsis, October 2002

### Memberships and Affiliations

- Member, Canadian Bar Association
- Member, Hellenic Canadian Lawyers' Association

### Community Involvement

- CHILD YOUTH ADVOCACY PROGRAM, PRO BONO COUNSEL (2003 - PRESENT)  
Maria has been retained as pro-bono counsel and has provided legal advice for numerous clients of this leading provider of legal advocacy services for underprivileged children in Toronto
- LORMAN EDUCATION SERVICES, VOLUNTEER EDUCATOR (2004 - PRESENT)  
Maria has been invited to lead various continuing education seminars for this organization's members, consisting of human resource professionals from various industries across Ontario.



TORONTO

# Fasken Martineau Institute Seminars Fall 2010



# Fasken Martineau Institute Seminars

## Fall 2010

Welcome to Fasken Martineau Institute! We are excited to announce the fall 2010 program of educational seminars designed to keep you abreast of the key legal issues facing senior business leaders in the GTA.

The course calendar in this brochure provides an overview of the current seminars planned for the fall of 2010. We hope this makes it easier for you to plan which seminars you would like to attend. Save the date for any topics of interest and then keep an eye out for the e-invitations coming to you shortly with further details about each seminar.

Please also visit us online at [www.fasken.com](http://www.fasken.com) to see a list of our upcoming seminars and to register. You will also find more details about each seminar as well as additional seminars added to the program.

We hope you can attend these informative seminars with Fasken Martineau Institute.

Area	Seminar Dates
Antitrust, Competition & Marketing	November 18
Financial Institutions & Services	October 13
Investment Products and Wealth Management	September 17, November 26, November 30
Labour, Employment & Human Rights	September 22, October 20, November 24
Pensions and Benefits	November 16
Product Liability	September 29
Securities and Mergers & Acquisitions	October 5, November 18, November 23
Technology & Intellectual Property	September 15, November 17

## SEPTEMBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15 <b>Generating Revenue and Reducing Risk: Our IP Survey Results Are In</b> 8:00 am - 10:00 am	16	17 <b>Regulatory Update - NI 31-103 Registration Reform and Other Matters</b> 12:00 pm - 2:00 pm	18
19	20	21	22 <b>Tips for Accommodating Disability</b> 8:00 am - 10:00 am	23	24	25
26	27	28	29 <b>The Canada Consumer Product Safety Act - Let the Seller Beware!</b> 8:00 am - 10:00 am	30		

## OCTOBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5 <b>What to Do When You Have Allegations of Wrongdoing</b> 8:00 am - 10:00 am	6	7	8	9
10	11	12	13 <b>Legal and Regulatory Developments Affecting Financial Institutions</b> 4:30 pm - 7:30 pm	14	15	16
17	18	19	20 <b>Workplace Violence and Harassment Laws - Are You in Compliance?</b> 8:00 am - 10:00 am	21	22	23
24	25	26	27	28	29	30
31						

# NOVEMBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16 <b>Pension Reforms - Part II</b> 8:00 am - 10:00 am	17 <b>Modern Software Licensing: New Trends and Options</b> 12:00 pm - 2:00 pm	18 <b>Strategic Considerations in Acquisitions by State Owned Enterprises</b> 8:00 am - 10:00 am	19	20
21	22	23 <b>Special Committees and Lessons from Magna</b> 8:00 am - 10:00 am	24 <b>Wrongful Dismissal - New Issues and Recent Cases</b> 8:00 am - 10:00 am	25	26 <b>Mutual Funds Point-of- Sale Regime</b> 12:00 pm - 2:00 pm	27
28	29	30 <b>Registration Reform Update</b> 12:00 pm - 2:00 pm				

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