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THE LAW OF DISMISSAL IN CANADA, THIRD EDITION

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Publisher's Special Release Note 2021

The pages in this work were reissued in July 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the July 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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What's New in this Update:

This release includes updates to case law and commentary in Chapters 2 to 6, 8 to 12 and 15. New and updated cases include:

- Legal Issues Arising During The Litigation Process — Garnishment — Abuse of Process — *Hoang v. Mann Engineering Ltd.*, 2020 ONCA 808 (Ont. C.A.), additional reasons 2021 ONCA 2 (Ont. C.A.) — affirmed on appeal — "The tort of abuse of process is premised on an improper use of the civil justice process. The concept of duty of care has no role to play . . . We are satisfied there is no prima facie duty of care . . . we also see no basis in the evidence for a finding the type of harm allegedly caused to the appellant was reasonably foreseeable to someone in the position of [the respondents] *Rankin v. J.J.*, 2018 SCC 19 . . . Tort law, and specifically the tort of abuse of process, protects against the improper use of civil justice process. Policy considerations do not favour extending that protection to negligence-based claims."
- Constructive Dismissal — The Employment Agreement — Waiver By Delay — Reduced Remuneration or Refusal to Pay — Abusive Conduct; Awarding Damages — Valuation of Benefits — Automobile Allowance — Unpaid Commissions; Employment Contracts — Term of Contract — *McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)*, 2020 ONCA 816 (Ont. C.A.) — affirmed on appeal — "a reasonable person in the respondent's position would conclude that the appellant no longer intended to be bound by the TCSA [Transitional Consulting Services Agreement] . . . the respondent was subject to a non-competition clause . . . The time taken by the respondent [sick leave of two years] to make his election must be understood in this context, as well as the depression and anxiety caused by the appellant" — "The cumulative effect of the appellant's actions went to the heart of the respondent's role as General Manager at the funeral home" — re: valuation of benefits — "This approach [benefits valued at rate of 10% of salary] was reasonably followed in this case" — re: automobile allowance — among other factors, "The trial judge's decision to use the low end of the respondent's range and award him $12,000 per year for nine years, or $108,000, was reasonable" — re: unpaid commissions — "this was a reasonable approach, one that follows the instruction set out by this court in *Martin v. Goldfarb* (1998) 41 O.R. (3d) 161 (Ont.C.A.)"; affirmed re: entitlement to $1,274,173.83 respecting the balance of nine years remaining on the contract.
- Legal Issues Arising During The Litigation Process — Pleadings — *Covey v. Devon Canada Corporation*, 2020 ABCA 445 (Alta. C.A.) — affirmed the Master's and Court of Queen's Bench decisions that the appellant's claim be dismissed for long delay under rule 4.33 — "the affidavit of records served by the appellant on . . . did not significantly advance the action . . . it was too incomplete and inaccessible to the respondent's counsel (having inadvertently listed privileged documents) to have moved the action forward in a meaningful way . . . the appellant appeared to have prepared the affidavit in haste, at last minute, and that, within three or months, the appellant provided another affidavit of records with significant additional documentation." The court also noted,

"We disagree with the respondent's position. Under r. 4.33, the three years have 'to have passed' . . . the appellant had until May 12, 2018 to serve the affidavit of records" re: Rule 11.21 — s. 22 of the *Interpretation Act* failed to support the respondent's argument — we have no evidence if or when the sender received confirmation of the successfully completed transmission. While the officer of the respondent swore an affidavit which acknowledged receipt of the 5:30 pm May 11, 2018 email at its lawyer's office, on this record we cannot say *when* service was effected."

- Federal Jurisdiction Employers — Twelve Continuous Months of Employment — Judicial Review — *Ma v. Bank of Canada*, 2020 FC 1125 (F.C.) — application for judicial review dismissed — "procedural fairness does not require both parties to take advantage of these opportunities equally . . . both sides were granted a full and fair chance to present their case . . . the Adjudicator properly applied the *Pointe-Claire* approach and adjusted it to the facts of the case . . . Nor am I persuaded that the determination of who the employer is for the purposes of section 240 of the *Code* is determined by principles of unfairness, vulnerability or need of protection . . . [deference noted re:] *Vavilov* at para. 109 . . . the Applicant is merely inviting the Court to impermissibly perform a *de novo* analysis of the issues that were before the Adjudicator, see *Vavilov* at para. 125."
- Federal Jurisdiction Employers — Adjudicator's Procedural Jurisdiction — Judicial Review — *Jog v. Bank of Montreal*, 2020 FCA 218 (F.C.A.) — application for judicial review allowed and matter to be returned "to the same or another adjudicator if the first is not available" — "Because the decision does not grapple with these communications [from the appellant that 'suggest engagement with the process'], it lacks the transparent, intelligible and justified explanation required by *Vavilov* (at para. 15) and thus, is unreasonable . . . as a matter of procedural fairness, a complaint like any other claim should only be dismissed when a party's failure to participate is clear. Here, the situation was equivocal at best".
- Federal Jurisdiction Employers — Punitive Damages — Costs — Judicial Review — Bias; Legal Issues Arising During The Litigation Process — Judicial Bias — *Gardaworld Cash Services Canada Corporation v. Smith*, 2020 FC 1108 (F.C.) — application for judicial review allowed — reasonable apprehension of bias by adjudicator established — matter remitted to a different adjudicator for redetermination — re: adjudicator's award of $500,000 in punitive damages — "a reasonable observer [would] conclude that this award was made in retaliation for [the applicant's] challenge to his first decision" — court came to this conclusion "mainly because of the sequence of events leading to this award rather than its merits" — each party to bear its own costs — "the outcome is mainly the result of the adjudicator's serious misunderstanding of his role. [The respondent], who was not represented before the adjudicator, cannot be blamed for this and be made responsible for [the applicant's] costs" — "I decline to rule on the merits of the case . . . the general rule is that the matter must be returned to the decision-maker designated by Parliament: . . . *Vavilov* . . . at paragraphs 139-142 . . . among other factors, The reviewing court cannot rely on findings made by a potentially biased decision-maker" — *R. v. S. (R.D.)* cited — among other factors, "The *ex parte* communications show that he took up the role of an advocate for [the self-represented complainant]. He showed

antipathy toward [the employer's/applicant's] counsel" — *Committee for Justice and Liberty et al.* cited — among other factors, "the adjudicator had made up his mind on several crucial issues without the necessary evidence and was seeking additional facts from [the complainant] to buttress his conclusions . . . in particular, the threat to hold them in contempt is similar to, if not more serious than, the conduct of the judge that gave rise to a reasonable apprehension of bias in *Yukon Francophone School Board* . . . [the employer's/applicant's counsel] complained on several occasions of various instances of procedural unfairness . . . One cannot acquiesce in what one does not know" — matter remitted to a different adjudicator for redetermination; three Supreme Court of Canada decisions cited re: wide variety of factors related to the issue of reasonable apprehension of bias.

ProView Developments

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- The opening page is now the title page of the book as you would see in the print work
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