Judicial Treatment of Contentious Employment Contract Clauses in Canada: An Analysis of Appellate Jurisprudence Since May 2005

I. Introduction

- **Purpose and Scope of the Report:**
  - This report will conduct a detailed examination of ten specific types of contractual clauses commonly found in Canadian employment agreements. The analysis will focus on their enforceability and judicial treatment by the Supreme Court of Canada (SCC) and the Ontario Court of Appeal (ONCA) in cases decided since May 2005.
  - The scope includes an analysis of instances where clauses were struck down, particularly due to a lack of fresh consideration for existing employees, and the penalties or remedies awarded against employers. Special attention will be paid to employer conduct such as weaponizing contracts to undermine employee rights, unduly insensitive dismissals, and attempts to contract out of fundamental protections, viewed through the lens of professional ethics and power imbalances.
- **Overview of Prevailing Judicial Themes in Canadian Employment Contract Interpretation:**
  - **Power Imbalance:** A foundational principle in Canadian employment law is the judicial recognition of the inherent inequality of bargaining power that typically exists between employers and employees.[1] This understanding shapes the courts' approach to interpreting employment contracts, leading to more rigorous scrutiny of terms that seek to limit employee rights or deviate from common law protections. The Supreme Court of Canada's decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, serves as a significant modern affirmation of this principle, where an arbitration clause was deemed unconscionable and unenforceable due, in part, to the significant disparity in bargaining power between Uber and its driver, combined with an improvident bargain that effectively denied access to dispute resolution.[4] This power dynamic is a crucial lens through which courts evaluate the fairness and enforceability of various contractual provisions.
  - **Duty of Good Faith and Honest Performance:** The Supreme Court of Canada's landmark decision in *Bhasin v. Hrynew*, 2014 SCC 71, established good faith as a general organizing principle in all contractual dealings and recognized a specific duty of honest performance.[15] This principle has profound implications for employment contracts. It mandates that parties,

including employers, must perform their contractual obligations honestly and not act in a manner that undermines the legitimate contractual interests of the other party. This duty extends throughout the employment relationship and is particularly critical in the context of termination, as further emphasized in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 [24] and *Honda Canada Inc. v. Keays*, 2008 SCC 39.[33]

- **Protection of Statutory Rights:** Canadian courts are vigilant in safeguarding minimum employment standards prescribed by legislation, such as Ontario's *Employment Standards Act, 2000* (ESA). Any contractual term that attempts to waive or contract out of these statutory minimums, or provide a lesser benefit, is generally void and unenforceable. The Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, dramatically underscored this principle by holding that if any part of a termination clause in an employment agreement contravenes the ESA, the entire termination clause (including otherwise compliant portions) is rendered void.[40]
- **Clarity and Ambiguity:** A long-standing tenet of contract law, applied with particular force in the employment context, is that ambiguous terms, especially those that seek to limit an employee's rights, will be construed *contra proferentem* – against the party that drafted the contract, which is typically the employer. The Supreme Court of Canada in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, emphasized that ambiguity in a restrictive covenant renders it prima facie unreasonable and unenforceable, as its scope cannot be clearly determined.[49] This principle extends to other critical clauses, such as termination provisions.
- **Requirement for Fresh Consideration:** For amendments to an existing employment contract to be enforceable, particularly those that impose new obligations on the employee or diminish their existing rights, there must be fresh consideration flowing to the employee. Mere continued employment is often insufficient to support such changes.[52] The Ontario Court of Appeal in *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437, recently affirmed this, while noting that courts will generally assess the existence, rather than the adequacy, of consideration.[55]

These judicial themes are not merely distinct doctrines but are often interwoven in the courts' assessment of employment contracts. The recognized power imbalance frequently serves as the rationale for strictly construing ambiguous clauses against the employer or for closely scrutinizing attempts to contract out of statutory protections. For example, an employer's superior bargaining position is a key reason why ambiguous termination clauses are often struck down; it is presumed the

employee had little to no ability to negotiate the terms. This vulnerability also underpins why the ESA's minimum standards are fiercely protected, as seen in *Waksdale* [40], where the court invalidated an entire termination scheme due to a single offending provision, thereby preventing employers from leveraging their power to include terms that might mislead employees about their statutory rights. The duty of good faith, articulated in *Bhasin* [18], further acts as a check on employer power, requiring honest and reasonable conduct in the performance of all contractual terms, including those that grant discretion to the employer.This confluence of principles signals a judicial approach that seeks to ensure substantive fairness in employment relationships, moving beyond a purely formalistic interpretation of contractual language. Employers, therefore, operate in a legal landscape that demands careful, fair, and transparent contractual practices. The evolution of damages for bad faith dismissal, from the "Wallace bump-up" to the more principled assessment of moral damages under *Keays* [33], further illustrates this trend, holding employers accountable not only for the fact of termination but critically for the manner in which it is carried out. This reflects a judicial intolerance for employers who might attempt to "weaponize" the termination process or act with undue insensitivity.

II. Analysis of Contractual Clauses and Relevant Case Law (Post-May 2005)

A. Clause Type 1: Unilateral Change Authority (e.g., Section 15: employer's 'sole discretion' to change fundamental terms like position, duties, location, hours, compensation, and attempts to waive constructive dismissal).

1. **Introduction to Unilateral Change Authority Clauses:**
    - Clauses granting an employer "sole discretion" to unilaterally alter fundamental terms of an employment contract aim to provide operational flexibility. However, they directly conflict with the common law doctrine of constructive dismissal, which protects employees from substantial, unagreed-upon changes to essential employment terms. The central legal question is whether an employee can validly contract out of their right to claim constructive dismissal when faced with such changes, or if such clauses are rendered unenforceable due to power imbalances, lack of consideration, or public policy.
2. **Key Case Law Analysis:**
    - **Case 1: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10** [57]
        - **Judicial Treatment and Enforceability:** While *Potter* did not specifically adjudicate a "unilateral change" clause as described in Section 15, its pronouncements on constructive dismissal are foundational. The Supreme Court of Canada outlined a two-branch test for constructive dismissal: (1) a single unilateral act by the employer that breaches an essential term of

the contract, which breach must be substantial; or (2) a course of conduct by the employer that, when viewed in light of all circumstances, demonstrates an intention to no longer be bound by the employment contract.[57] The Court specifically addressed administrative suspensions (a form of unilateral change), holding that an employer's right to suspend an employee, even with pay, is not unfettered. Such a right must be based on an express or implied contractual term and exercised reasonably and in good faith for legitimate business reasons.[58] An unauthorized or unjustified suspension will likely be viewed as a substantial change constituting constructive dismissal.[61]

- **Relevance to "Sole Discretion" Clauses:** The principles in *Potter* strongly suggest that even if an employment contract purports to grant an employer "sole discretion" to alter fundamental terms, this discretion is not absolute. It must be exercised in good faith and for legitimate business reasons, and cannot be used to effect changes so substantial that they fundamentally alter the bargain and meet the test for constructive dismissal. An attempt to waive the right to claim constructive dismissal in the face of such changes would be subject to intense scrutiny, particularly if the employer's actions lacked transparency or were not for bona fide operational needs.[58]
- **Penalties/Remedies:** A finding of constructive dismissal entitles the employee to damages equivalent to what they would have received had they been terminated without cause, i.e., common law reasonable notice. In *Potter*, the employee was indeed found to have been constructively dismissed, and damages were awarded accordingly.[61]

- **Case 2: *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26** [24]
  - **Judicial Treatment and Enforceability:** *Matthews* affirmed that a series of unilateral actions by an employer—such as systematically reducing an employee's responsibilities, marginalizing them within the organization, and engaging in dishonest conduct—can cumulatively amount to constructive dismissal.[24] The Supreme Court reiterated the employer's duty of good faith in the performance of the employment contract.
  - **Relevance to Unilateral Change Clauses:** This case underscores that even if a contract contains a clause permitting unilateral changes, a pattern of such changes, particularly if implemented in a manner that undermines the employee's role, dignity, or is characterized by dishonesty, could still lead to a finding of constructive dismissal. The clause would not act as a shield if the employer's overall conduct, viewed objectively, demonstrates an intention to no longer be bound by the original terms of

employment or breaches the overarching duty of good faith.
        - **Penalties/Remedies:** The employee was entitled to damages for reasonable notice, which included significant bonus payments that would have accrued during that notice period. The Court also specifically commented on the employer's dishonesty as a separate matter, although in this case, it did not lead to a separate head of damages beyond the contractual entitlements during the notice period because that was the remedy sought.[24]
    - **Case 3: *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 43788 (ON CA)** [53] (Pre-2005 but principles consistently applied post-2005, especially regarding consideration for amendments. See also *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437 [55] for recent ONCA views on consideration).
        - **Fresh Consideration:** *Hobbs* is a critical Ontario Court of Appeal decision establishing that if an employer seeks to introduce new terms, such as a broad unilateral change authority, into an *existing* employment relationship, those new terms must be supported by fresh consideration flowing to the employee.[53] Simply continuing to employ the individual is generally not sufficient consideration, especially if there was no clear, communicated intention to terminate the employee's employment had they not agreed to the new terms.[53] The court in *Hobbs* highlighted the inequality of bargaining power as a reason for this requirement.[54]
        - The 2024 ONCA decision in *Giacomodonato* confirms that fresh consideration is indeed required for amendments to an employment contract. While courts will assess the *existence* of consideration, they generally do not inquire into its *adequacy*.[55] This means some new benefit must flow to the employee, but it doesn't necessarily have to be economically equivalent to the rights being relinquished.
        - **Impact on Unilateral Change Clauses:** A unilateral change authority clause, if introduced to an existing employee without any new, tangible benefit being provided to that employee in return, would very likely be deemed unenforceable for lack of consideration.
3. **Synthesis of Principles for Unilateral Change Authority Clauses:**
    - Clauses granting employers broad "sole discretion" to unilaterally alter fundamental terms of employment are viewed with significant caution by Canadian courts.
    - Despite such clauses, substantial and detrimental unilateral changes to essential terms (e.g., position, duties, compensation) are likely to be found to constitute constructive dismissal at common law, per the principles in *Potter* and *Matthews*.

- An explicit attempt within such a clause to waive an employee's right to claim constructive dismissal is unlikely to be upheld if the changes imposed are fundamental, unfair, or made without legitimate business reasons or in bad faith.
- If a unilateral change authority clause is introduced as an amendment to an existing employment contract, it must be supported by fresh, valuable consideration flowing to the employee beyond mere continued employment, as established in *Hobbs* and affirmed by the approach in *Giacomodonato*.
- The exercise of any discretion granted under such a clause is subject to the overriding duty of good faith and honest performance, as per *Bhasin* and *Matthews*.
- While clearly drafted clauses permitting specific, anticipated, and perhaps less fundamental changes might be enforceable if part of the original agreement or properly amended with consideration, this is distinct from clauses granting sweeping discretion over all core terms.

The practical effect of these principles is that the "sole discretion" often claimed by employers in such clauses is substantially curtailed by common law doctrines. Constructive dismissal law serves as a significant check. For an employer to unilaterally impose a fundamental change, such as a demotion or a significant pay cut, and rely on a contractual clause stating they have "sole discretion" to do so and that the employee "waives constructive dismissal," would be a precarious legal position. Such a clause, especially if it attempts to oust a core common law protection like the ability to claim constructive dismissal for fundamental breach, would require exceptionally clear and unambiguous language. It would almost certainly need to have been part of the original, bargained-for agreement, or if introduced later, supported by substantial fresh consideration. Even then, its enforceability could be challenged if the exercise of that discretion was egregious, in bad faith (violating *Bhasin* principles), or if the clause itself was deemed unconscionable given the power imbalance (*Uber v. Heller* principles). The "waiver of constructive dismissal" component is particularly problematic as it seeks to eliminate a fundamental remedy for breach of contract.Employers who depend on these clauses to implement significant organizational restructuring or changes to terms and conditions of employment without facing potential constructive dismissal claims are undertaking a considerable legal risk. The judicial trend favors requiring genuine agreement or clear, pre-existing, and fairly obtained contractual rights for specific changes, rather than allowing employers to rely on blanket grants of authority to alter the core of the employment relationship at will. This necessitates greater transparency from employers, and a preparedness to negotiate changes or provide consideration, rather than imposing them by decree. The requirement for fresh consideration for any amendments, as affirmed in cases like *Giacomodonato* [55], means that even if an employee initially signed a contract containing a unilateral change clause, any subsequent attempt by the employer to broaden that authority or introduce it anew would itself need to be

supported by a fresh, tangible benefit to the employee.**Key Case Summary Table for Unilateral Change Authority:**

Case Name & Citation	Court & Year	Key Finding re: Enforceability of Unilateral Change/Discretion	Key Penalty/Remedy Awarded (Reason)	Relevance to Power Imbalance/Bad Faith/Statutory Rights
Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10 [58]	SCC, 2015	Unilateral suspension without justification can be constructive dismissal. Employer discretion must be exercised in good faith and for legitimate business reasons. Test for constructive dismissal clarified.	Damages for wrongful dismissal (constructive dismissal found).	Emphasized employer's duty of good faith and transparency in implementing changes. Recognized vulnerability of employees.
Matthews v. Ocean Nutrition Canada Ltd., 2020 SCC 26 [24]	SCC, 2020	Cumulative unilateral changes and dishonest conduct by employer led to constructive dismissal. Duty of good faith in contract performance is key.	Damages for reasonable notice, including bonuses that would have accrued.	Highlighted employer's duty of honest performance and good faith. Employer's actions viewed as undermining the employment relationship.
Hobbs v. TDI Canada Ltd., 2004 CanLII 43788 (ON CA) [53] (Principles	ONCA, 2004 (ONCA, 2024)	Amendments to existing employment contracts imposing new	Original terms of employment upheld; new onerous terms in amending	Recognized inequality of bargaining power in employment

affirmed by *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437 [55])		burdens on employees require fresh consideration beyond mere continued employment.	agreement struck down for lack of consideration.	relationships as a reason for requiring fresh consideration for detrimental amendments. *Giacomodonato* confirms existence, not adequacy, of consideration is assessed.

B. Clause Type 2: Indefinite/Overbroad Non-solicitation (e.g., Section 23: of clients/patients and employees, without reasonable limitations).

1. **Introduction to Non-solicitation Clauses:**
   - Non-solicitation clauses are a form of restrictive covenant designed to protect an employer's legitimate proprietary interests, such as their client base and workforce stability, by limiting a former employee's ability to solicit these contacts for a defined period after the employment relationship ends.
   - Unlike non-competition clauses, which face stricter scrutiny and are now largely prohibited for most employees in Ontario under s. 67.2 of the ESA (a legislative development noted in legal commentary [1]), non-solicitation clauses remain generally permissible if they are reasonably drafted to protect legitimate interests and are not overly broad or ambiguous.
2. **Key Case Law Analysis:**
   - **Case 1: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6** [49]
     - **Judicial Treatment and Enforceability:** Although *Shafron* primarily concerned the enforceability of a non-competition clause, the Supreme Court of Canada articulated fundamental principles that apply to all restrictive covenants in employment contracts, including non-solicitation clauses. The Court held that:
       - Restrictive covenants are prima facie unenforceable as being in restraint of trade, unless the party seeking to enforce the covenant can demonstrate that it is reasonable.[49]
       - Reasonableness is assessed based on factors including the geographic scope, the temporal duration, and the extent of the activity being restricted.[49]
       - Critically, for a restrictive covenant to be considered reasonable, its terms must be unambiguous. An ambiguous covenant is, by definition,

prima facie unreasonable and unenforceable because its scope cannot be clearly ascertained.[49] In *Shafron*, the term "Metropolitan City of Vancouver" was found to be ambiguous, rendering the covenant unenforceable.
        - Courts will not engage in "notional severance" to rewrite an ambiguous or overly broad restrictive covenant to make it reasonable. "Blue-pencil severance" (the striking out of offending words or parts of a clause) is available only in very limited circumstances where the part to be removed is clearly severable, trivial, not central to the covenant's main purpose, and the parties would have unquestionably agreed to the covenant as amended without varying any other terms of their bargain.[49]
    - **Relevance to Non-solicitation Clauses:** The *Shafron* principles directly impact non-solicitation clauses. A clause that is indefinite (lacks a time limit), or is overly broad or vague in defining the scope of prohibited solicitation (e.g., "all clients of the company worldwide" for an employee with limited geographic or client interaction, or "any employee of the company" without further qualification), would likely be struck down as unreasonable and/or ambiguous.
    - **Penalties/Remedies:** The primary consequence of an unenforceable non-solicitation clause is that the former employee is not bound by its restrictions. The employer loses the protection it sought to secure.
- **Case 2: *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344** [67] (Cited in materials as applying *Shafron* principles to reasonableness).
    - **Judicial Treatment and Enforceability:** This ONCA decision, referenced in McMillan LLP materials [67], affirms that the reasonableness of a covenant is determined by its geographic scope, duration, and the extent of the activity being prohibited, and its terms must be unambiguous, citing *Shafron*. It also notes that a balance must be struck between open competition and the employer's right to protect confidential information and trade connections.
    - **Relevance to Non-solicitation Clauses:** This reinforces that non-solicitation clauses must be carefully tailored. For example, a clause preventing solicitation of clients with whom the employee had no dealings, or employees who are not in key roles or do not possess confidential information, might be deemed broader than necessary to protect legitimate interests.
- **Case 3: *Henderson v. Slavkin et al.*, 2022 ONSC 2964** (affirmed 2022 ONCA 807, though the ONCA decision focused on other aspects) [69]

- **Judicial Treatment and Enforceability:** As noted previously, the primary issue in *Henderson* related to the *Waksdale* principle. However, the employment agreement in question, for a dental receptionist, contained a conflict of interest clause that included a provision: "(d) Engage in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us".[70] The ONSC found this, along with other parts of the conflict of interest provision allowing for termination without notice, to be "overly broad, unspecific and ambiguous, making it difficult for an employee to know what was expected of them to avoid termination without notice or compensation in lieu".[69] This contributed to the invalidity of the section.
- **Relevance to Non-solicitation Clauses:** This case illustrates that even language embedded within other clauses that functions as a non-solicitation or non-dealing provision will be scrutinized for clarity, reasonableness, and ambiguity. Vague prohibitions on "soliciting patients" without clear definitions of what constitutes solicitation or reasonable limitations can render such provisions problematic, especially if linked to severe consequences like termination for cause without notice. The fact that this was presented to a long-term employee in a new contract also brings the power imbalance into consideration.[70]

3. **Synthesis of Principles for Indefinite/Overbroad Non-solicitation Clauses:**
    - Non-solicitation clauses, like all restrictive covenants, are prima facie unenforceable unless proven reasonable by the employer.
    - Clarity and unambiguity are paramount; ambiguous clauses are generally unenforceable (*Shafron*).
    - Reasonableness is assessed based on the temporal limit, the scope of customers/clients covered (ideally limited to those with whom the employee had significant contact or influence), and the definition of "solicitation" and "employees" (if employee non-solicitation is included).
    - Indefinite temporal limits or overly broad geographic or client/employee scopes will likely render the clause unenforceable.
    - Courts will not rewrite overbroad or ambiguous clauses to make them reasonable; blue-pencil severance is rarely applied (*Shafron*).
    - The clause must be no wider than reasonably necessary to protect the employer's legitimate proprietary interests (e.g., trade connections, confidential information related to clients, stability of key workforce).
4. Second/Third-Order Considerations for Non-solicitation Clauses:
   The rigorous standards set by Shafron 49, particularly the emphasis on unambiguity and the reluctance to sever or read down clauses, mean that

employers must draft non-solicitation provisions with extreme precision. The "one-size-fits-all" approach to such clauses is fraught with peril. Each clause must be tailored to the specific circumstances of the employee's role, their access to sensitive information or key client relationships, and the actual business interest the employer legitimately seeks to protect. An attempt to draft an overly broad non-solicitation clause, perhaps hoping to achieve a quasi non-competition effect, is likely to backfire, resulting in the entire clause being struck down.

The legislative prohibition of most non-competition agreements in Ontario [1] may tempt some employers to draft more expansive non-solicitation clauses or other restrictive terms to achieve similar outcomes. However, courts are likely to remain vigilant, applying the *Shafron* tests for reasonableness and ambiguity strictly. An overreaching non-solicitation clause that effectively prevents an employee from working in their field by barring contact with too wide a range of potential clients or industry contacts could be viewed as an indirect non-compete and struck down accordingly. The underlying judicial concern for employee mobility and the right to earn a livelihood remains a strong counterweight to employer attempts to unduly restrict post-employment activities.

C. Clause Type 3: Common Law Rights Revocation in Termination (e.g., Section 17(d), part of Section 17: limiting termination pay to statutory minimums plus nominal amounts, attempting to oust common law reasonable notice).

1. **Introduction to Clauses Limiting Termination Entitlements:**
    - Employment contracts frequently contain clauses that attempt to displace an employee's common law entitlement to reasonable notice of termination (or pay in lieu thereof) with a lesser amount. Typically, these clauses aim to limit the employer's liability to the minimum notice periods, and where applicable, severance pay, prescribed by provincial employment standards legislation, such as Ontario's ESA. Some clauses may offer a slightly enhanced amount, such as "ESA plus one week."
    - The enforceability of such clauses is a heavily litigated area and depends critically on precise drafting and strict compliance with all aspects of the applicable employment standards legislation.
2. **Key Case Law Analysis:**
    - **Case 1: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391** [40]
        - **Judicial Treatment and Enforceability:** *Waksdale* is a seminal decision from the Ontario Court of Appeal that has had a profound impact on the enforceability of termination clauses. The Court held that termination provisions in an employment agreement must be read as a whole. If any

part of the termination scheme—including provisions dealing with termination "for cause"—contravenes the ESA, then all termination provisions in the agreement are rendered void and unenforceable.[40] This is the case regardless of whether the offending provision is directly relied upon by the employer at the time of termination, and irrespective of the presence of a severability clause.[42]

- In *Waksdale*, the "for cause" provision was found to be illegal because it purported to allow termination without notice for "just cause" as understood at common law. This common law standard is broader and potentially less stringent than the ESA's narrow exception for disentitlement to statutory notice or termination pay, which generally requires "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" (as per O. Reg. 288/01, s. 2(1) para. 3 under the ESA).[42] Because the "for cause" provision illegally attempted to contract out of the ESA by allowing for termination without statutory entitlements for conduct that might not meet this higher ESA threshold, the entire termination scheme, including the "without cause" provision (which might otherwise have validly limited notice to ESA minimums), was struck down.
- **Penalties/Remedies:** When a termination clause is voided under the *Waksdale* doctrine, the employee becomes entitled to common law reasonable notice of termination, which is typically substantially greater than the ESA minimums. The "penalty" for the employer is the loss of the contractual limitation on notice.

- **Case 2: *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26** [24]
  - **Judicial Treatment and Enforceability:** While *Matthews* focused on constructive dismissal and an employee's entitlement to bonuses that would have accrued during the reasonable notice period, the Supreme Court of Canada provided important guidance on the interpretation of clauses that seek to limit common law entitlements upon termination. The SCC affirmed the principle that for such a limiting clause to be effective, its language must be "absolutely clear and unambiguous".[24] The Court found that general language, such as requiring an employee to be "full-time" or "actively employed" to receive a benefit, is typically insufficient to oust an employee's common law right to damages reflecting that benefit if they would have met those conditions during a properly provided notice period.
  - **Relevance:** This high standard of clarity ("absolutely clear and unambiguous") applies with full force to any clause attempting to limit

common law reasonable notice to ESA minimums or any other fixed amount. The clause must unequivocally state that common law rights are being displaced and clearly delineate the employee's entitlements upon termination, ensuring these entitlements meet or exceed ESA minimums in all potential future scenarios (e.g., considering future service, changes in ESA requirements).
        - **Penalties/Remedies:** If the limiting language is not sufficiently clear, or if the clause fails for any other reason (such as non-compliance with the ESA per *Waksdale*), the employee is entitled to common law reasonable notice and all forms of compensation and benefits that would have accrued during that notice period.
    - **Case 3: *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310** [42]
        - **Judicial Treatment and Enforceability:** This Ontario Court of Appeal decision directly applied the *Waksdale* analysis. The Court found that the "just cause" provision in the employment agreement was invalid because it failed to meet the ESA's "wilful misconduct" standard. Mr. Render's conduct (a single slap of a female co-worker) was found to constitute just cause for dismissal at common law, disentitling him to common law reasonable notice. However, the Court determined that this conduct did not meet the higher ESA threshold of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned."
        - Consequently, because the "just cause" provision in the contract was void for attempting to contract out of the ESA (by allowing termination without statutory entitlements for conduct less than wilful misconduct), the entire termination scheme in the contract was rendered unenforceable, following *Waksdale*.
        - **Penalties/Remedies:** Although Mr. Render was not entitled to common law notice due to the common law just cause finding, the unenforceability of the contractual termination scheme meant he was still entitled to his minimum statutory notice (or pay in lieu) under the ESA, as his conduct did not meet the ESA's standard for disentitlement. This case highlights that a defective "for cause" clause can result in an employer being liable for ESA minimums even if common law just cause for dismissal exists.
3. **Synthesis of Principles for Common Law Rights Revocation in Termination:**
    - Termination clauses purporting to limit an employee's entitlements to ESA minimums (or any amount less than common law reasonable notice) are subject to strict judicial scrutiny.
    - The entire termination scheme within an employment agreement,

encompassing both "for cause" and "without cause" provisions, must comply with the ESA in all respects and at all times. If any component of the termination scheme is found to be illegal (most commonly, a "for cause" provision that allows for termination without ESA entitlements for conduct that does not meet the statutory definition of "wilful misconduct"), the entire scheme will be deemed void and unenforceable (*Waksdale*, *Render*).
    - Any language that seeks to oust an employee's common law right to reasonable notice must be "absolutely clear and unambiguous" (*Matthews*).
    - A severability clause is generally ineffective in saving an illegal termination provision or scheme (*Waksdale*; *North v. Metaswitch Networks Corporation*, 2017 ONCA 790 [42]).
    - If a contractual termination clause is found to be void, the employee is entitled to common law reasonable notice, which is determined based on the *Bardal* factors (age, length of service, character of employment, and availability of similar employment).
4. Second/Third-Order Considerations for Common Law Rights Revocation:
   The Waksdale doctrine has created what can be described as a "domino effect" in the assessment of termination clauses. A single flaw in any part of an employer's contractual termination framework, particularly a "for cause" provision that does not align with the ESA's stringent "wilful misconduct" standard, can cause the entire structure of termination limitations to collapse. This leaves the employer exposed to providing common law reasonable notice, which is often significantly more generous than the statutory minimums they sought to contract for. This occurs because the ESA establishes a baseline of employee protections that cannot be undermined. Waksdale and its progeny interpret any contractual term that could potentially result in an employee receiving less than their ESA minimums (e.g., by being terminated "for cause" under a common law definition without receiving ESA notice because the conduct wasn't "wilful misconduct") as an illegal attempt to contract out of the ESA. This illegality then taints the entire termination scheme, including any "without cause" provisions, rendering them void. The underlying policy is to deter employers from including potentially illegal clauses that employees, due to the inherent power imbalance and lack of legal sophistication, might mistakenly believe are enforceable.40
   This judicial approach places an exceptionally high onus on employers to ensure meticulous drafting and ongoing compliance of all aspects of their termination provisions. Relying on a seemingly compliant "without cause" provision while having a faulty "for cause" definition (or any other ESA-offending term within the termination framework) is a substantial legal gamble. The result has been a significant increase in litigation challenging the enforceability of termination

clauses, as employees and their counsel scrutinize contracts for any *Waksdale*-type flaws.

Furthermore, the principles of good faith and honest performance, as articulated in *Bhasin* and *Matthews*, are relevant. An employer who attempts to enforce a termination clause that they know or ought to know is likely void under the *Waksdale* doctrine, or who misleads an employee about their entitlements upon termination, could face claims for aggravated or moral damages due to bad faith conduct in the manner of dismissal. This was seen in *Pohl v. Hudson's Bay Company* [48], where the employer's conduct post-termination, including attempts to impose unreasonable terms and failure to meet statutory payment timelines, contributed to awards for both moral and punitive damages. This underscores that not only must the clause itself be perfect, but the employer's conduct in applying it must also meet standards of good faith.

D. Clause Type 4: Unilateral Policy Change (e.g., Section 8: employer's 'sole discretion' to change policies, practices, procedures, and rules without notice or compensation).

1. **Introduction to Unilateral Policy Change Clauses:**
    - These clauses are commonly included in employment agreements or employee handbooks, granting employers the purported right to unilaterally amend, introduce, or rescind workplace policies, practices, procedures, and rules. Often, they state that such changes can be made without prior notice to employees or any additional compensation.
    - The central legal issue is the extent to which such clauses are enforceable, particularly when a policy change significantly impacts an employee's terms and conditions of employment, potentially altering the fundamental nature of the employment contract or leading to a constructive dismissal.
2. **Key Case Law Analysis:**
    - **Case 1: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10** [57]
        - **Judicial Treatment and Enforceability:** Although *Potter* did not directly address a "unilateral policy change" clause, its principles regarding unilateral employer actions that fundamentally alter employment terms are highly pertinent. If a change implemented under the guise of a policy alteration is significant and detrimental enough to breach an essential term of the employment contract or demonstrates the employer's intention to no longer be bound by the contract, it could constitute constructive dismissal.[57] This would be the case even if a general clause purports to allow such policy changes.

        - The employer's discretion in making policy changes, particularly those affecting fundamental aspects of employment, would be subject to the implied duty of good faith and fair dealing. Changes cannot be implemented arbitrarily, capriciously, or for illegitimate reasons if they substantially impact employees.
    - **Case 2: *Mifsud v. MacMillan Bathurst Inc.*, (1989) CanLII 260 (ON CA)** [76] (A pre-2005 decision, its principles on employee acquiescence to unilateral changes remain foundational and would be applied by post-2005 courts in conjunction with *Potter* and *Bhasin*).
        - **Judicial Treatment and Enforceability:** *Mifsud* established that when an employer makes a fundamental unilateral change to the terms of employment, the employee has a reasonable period to assess the change and decide whether to accept it (thereby creating a new contract or varying the old one) or to treat it as a repudiation of the contract and claim constructive dismissal.[76] If the employee continues to work under the changed terms without protest for an extended period, they may be deemed to have acquiesced to the change.
        - **Relevance to Policy Change Clauses:** If an employer utilizes a unilateral policy change clause to introduce a significant new policy that fundamentally alters terms, an employee who objects to this change must do so in a timely manner to preserve their right to claim constructive dismissal. However, the initial validity of imposing such a fundamental change via a general policy change clause, without specific consent or fresh consideration (if the clause itself was an amendment or the policy change is significant enough to be a contractual amendment), remains questionable.
    - **Case 3 (Principle: Fresh Consideration for Amendments): *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437** [55]
        - **Relevance to Policy Change Clauses:** If a broad unilateral policy change clause is introduced as an amendment to an existing employee's contract, or if the employer relies on such a clause to implement a new policy that substantially and detrimentally alters fundamental terms of employment (effectively amending the contract), the principle of fresh consideration would apply. The employer would need to demonstrate that the employee received some new, tangible benefit in exchange for agreeing to grant the employer this power or for accepting the specific impactful policy change. As *Giacomodonato* confirms, courts will look for the *existence* of such consideration, not necessarily its adequacy.[55]
3. **Synthesis of Principles for Unilateral Policy Change Clauses:**

- Clauses permitting unilateral policy changes are generally enforceable for minor, administrative, or non-fundamental policy adjustments that are reasonable and properly communicated to employees.
- However, if a policy change implemented under such a clause fundamentally alters an essential term of the employment contract to the employee's detriment (e.g., significant changes to compensation structure, core job duties, or working conditions that are integral to the bargain), it can still constitute constructive dismissal, irrespective of the clause, unless the employee genuinely consents to or acquiesces in the change after it is made.
- The employer's discretion to introduce or amend policies is not unfettered; it is subject to the duty of good faith, and the policies themselves must be reasonable and not contrary to public policy or statutory employment standards.
- If the unilateral policy change clause itself is introduced as an amendment to an existing employee's contract, or if a specific policy change implemented thereunder is so significant as to constitute a variation of fundamental contractual terms, fresh consideration flowing to the employee is required for enforceability.
- Critically, workplace policies cannot contract out of minimum statutory employment standards. Any policy that attempts to do so would be void to that extent.

4. Second/Third-Order Considerations for Unilateral Policy Change:
   A crucial distinction exists between policies that are genuinely "terms of employment" – those that are either expressly incorporated into the contract, implied by conduct, or are so fundamental that they form part of the contractual bargain – and policies that are merely "work rules" or operational guidelines. A general unilateral policy change clause is far more likely to be upheld for changes to the latter category. For instance, updating IT security protocols or modifying expense claim procedures might fall under acceptable unilateral changes. However, if a "policy change" is used as a vehicle to fundamentally alter a core contractual term – such as a new "policy" that drastically reduces a previously established bonus structure considered an integral part of compensation, or a "policy" mandating a significant, uncompensated increase in working hours or a relocation to a distant office – then it is not merely a policy change but an attempted unilateral amendment of the employment contract itself. In such scenarios, the principles of constructive dismissal as articulated in Potter 57, and the requirement for consent or fresh consideration for contractual amendments as per Hobbs 53 and Giacomodonato 55, would likely take precedence over a general "unilateral policy change" clause.

Employers should therefore exercise caution and clearly differentiate between what constitutes a fundamental term of employment and what is a changeable work rule or guideline. For policy changes that could reasonably be perceived as altering fundamental terms, seeking express employee consent or providing fresh consideration is a more prudent approach than relying solely on a broad unilateral policy change clause. Furthermore, the duty of good faith, as per *Bhasin* [18], dictates that even if a unilateral policy change clause is technically available for certain types of policies, the employer must implement such changes honestly, reasonably, with adequate notice, and not in a manner that is arbitrary, capricious, or designed to unfairly undermine an employee's role or entitlements. An employer who uses such a clause to impose unreasonable or punitive policies could face challenges not only on grounds of constructive dismissal but also for breach of the duty of good faith.

E. Clause Type 5: Imbalanced or Problematic Termination Provisions (e.g., Section 17 - Full: including disparate notice periods for employee vs. employer, limited recourse if 'for cause' termination is overturned, ESA-only entitlements during probation).

1. **Introduction to Imbalanced or Problematic Termination Provisions:**
    - This category encompasses a range of termination-related clauses that may be deemed unenforceable due to unfairness, ambiguity, or attempts to circumvent statutory or common law rights. Specific examples include:
        - **Disparate Notice Periods:** Clauses requiring employees to provide significantly more notice of resignation than the employer is contractually (or statutorily) obligated to provide upon termination without cause.
        - **Limited Recourse if 'For Cause' Termination is Overturned:** Provisions that attempt to convert a "for cause" termination, if later found to be unjustified, into a "without cause" termination with only minimum statutory entitlements, thereby precluding common law reasonable notice.
        - **ESA-Only Entitlements During Probation:** Clauses that restrict employees on probation to only their minimum ESA entitlements upon termination, even if the ESA itself might provide for more in certain circumstances or if the clause is otherwise improperly drafted in a way that contravenes the ESA.
2. **Key Case Law Analysis:**
    - **Case 1: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391** [40]
        - **Judicial Treatment and Enforceability:** The *Waksdale* doctrine is central to analyzing many problematic termination provisions. Its core holding—that any ESA-offending part of a termination scheme voids the

entire scheme—directly impacts the enforceability of:

- **Limited recourse if 'for cause' termination is overturned:** If the "for cause" provision within the contract is itself illegal (e.g., because it defines "cause" more broadly than the ESA's "wilful misconduct" standard, thereby allowing termination without statutory pay for conduct that doesn't meet this high threshold), then any clause attempting to convert a failed "for cause" termination into an ESA-only "without cause" termination would be part of that illegal scheme and thus void. In such a scenario, the employee would be entitled to common law reasonable notice.
- **ESA-only entitlements during probation:** A probationary clause, like any termination provision, must comply with the ESA. If it attempts to provide less than ESA minimum notice or termination pay where the ESA would require it (e.g., for employees employed for three months or more, even if on probation, ESA notice is typically required unless an exemption applies), or if the probationary termination is linked to an illegal "for cause" definition, the clause could be void. The *Waksdale* reasoning suggests that an illegal probationary termination provision could taint and void other termination provisions in the agreement. While [65] mentions a case (*Miller*) where a probation clause breaching the ESA was argued to make the whole contract unenforceable, the court in that instance found the clause distinguishable or severable; however, *Waksdale*'s holistic approach makes such severance less likely for termination provisions now.

- **Penalties/Remedies:** If the entire termination scheme is voided due to an offending provision, the employee is entitled to common law reasonable notice.

- **Case 2: *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230** [48] (An ONSC decision, but highly illustrative of judicial attitudes towards employer conduct and ESA compliance).
  - **Judicial Treatment and Enforceability:** While Mr. Pohl did not have a written contract limiting his notice entitlements [48], this case is significant for its discussion of damages awarded for bad faith conduct and ESA breaches by the employer. HBC's offer of alternative employment to Mr. Pohl contained what the court termed a "breathtaking" unilateral change clause [48], and HBC also failed to pay Mr. Pohl's final wages and provide his Record of Employment (ROE) in a timely manner as mandated by the ESA.
  - **Penalties/Remedies:** Mr. Pohl was awarded 24 months' common law reasonable notice. Additionally, he received $45,000 in moral

(aggravated) damages for the manner of his termination (being escorted off the premises despite no misconduct) and $10,000 in punitive damages specifically for HBC's breaches of the ESA regarding timely payment of wages and provision of the ROE.[48] This demonstrates a judicial willingness to award substantial additional damages when an employer's conduct is unfair or disregards statutory obligations, which could be relevant if an employer aggressively attempts to enforce imbalanced or illegal termination clauses.

- **Case 3: *Uber Technologies Inc. v. Heller*, 2020 SCC 16** [2]
  - **Judicial Treatment and Enforceability:** *Heller* established that contractual clauses can be found unconscionable and therefore unenforceable if they arise from a significant inequality of bargaining power and result in an improvident bargain for the weaker party.[4]
  - **Relevance to Imbalanced Clauses:** While *Heller* dealt with an arbitration clause, its principles are applicable to other types of contractual terms that are excessively one-sided. Disparate notice periods (e.g., an employee is required to give extensive notice of resignation while the employer can terminate with only statutory minimums) or clauses that severely limit an employee's recourse upon termination could potentially be challenged as unconscionable if they are part of a standard form contract, not subject to negotiation, and create a grossly unfair outcome for the employee. The arbitration clause in *Heller* was deemed improvident because its associated costs and logistical hurdles effectively denied Mr. Heller access to justice. Similarly, a termination provision that is overwhelmingly skewed in the employer's favor might be attacked on these grounds.

3. **Synthesis of Principles for Imbalanced or Problematic Termination Provisions:**
   - All components of a termination scheme are read collectively; an ESA-non-compliant part (often a "for cause" definition that falls short of the ESA's "wilful misconduct" standard, or a probationary clause that provides less than ESA minimums) can invalidate the entire scheme (*Waksdale*).
   - Probationary clauses must, at a minimum, adhere to ESA requirements for notice and termination pay once an employee has completed three months of continuous employment (unless a specific ESA exemption applies).
   - Clauses that attempt to limit an employee's recourse if a "for cause" termination is subsequently found to be wrongful are particularly vulnerable if the initial "for cause" definition itself is flawed under the *Waksdale* analysis.
   - Grossly disparate notice obligations or other terms that are so one-sided as

to be improvident, especially in the context of a standard form contract where there is a clear power imbalance, may be challenged as unconscionable under the *Heller* doctrine.
    - Aggressive or bad faith attempts by an employer to enforce problematic or illegal termination clauses, or failure to meet basic statutory obligations during the termination process, can attract awards for aggravated/moral damages and, in egregious cases of statutory breach, punitive damages (*Pohl*, *Keays*).
4. Second/Third-Order Considerations for Imbalanced Termination Provisions:
   The Waksdale principle serves as a significant check against various forms of problematic termination provisions, extending beyond just those clauses that directly attempt to limit "without cause" notice. Any clause integrated into the termination process that fails to meet ESA standards can jeopardize the employer's attempt to rely on any contractual limitations, thereby defaulting the employee to their more generous common law entitlements. This holistic reading of termination provisions means that a clause stating, for instance, "if a termination for cause is found to be invalid, the employee will only receive ESA minimums," will not be assessed in isolation. If the contractual definition of "for cause" itself is invalid (e.g., it permits termination without ESA pay for conduct that does not amount to "wilful misconduct"), then the entire scheme, including such a "fallback" provision, becomes void. Similarly, a probationary clause that allows for termination without ESA-mandated entitlements, where such entitlements would otherwise apply, constitutes an illegal provision that can infect and invalidate the remaining termination clauses. This comprehensive approach by the courts aims to prevent employers from drafting a series of individually problematic clauses that, in their cumulative effect, strip employees of their fundamental rights.
   Consequently, employers must ensure that every single component of their termination clauses—including definitions of "cause," terms applicable during probation, and any provisions addressing the consequences of a disputed termination—is meticulously drafted to be fully compliant with the ESA. A single deficiency can unravel the entire contractual framework for termination.
   Furthermore, the doctrine of unconscionability, as articulated in *Heller* [4], provides an additional avenue for challenging imbalanced termination provisions. Even if a clause technically meets ESA minimums, if it is grossly unfair in other respects (such as requiring an exceptionally long notice period from a junior employee while the employer provides only the statutory minimum, or severely limiting an employee's ability to challenge a termination), it could be struck down. This is particularly relevant for standard form contracts where the employee has no

genuine opportunity to negotiate terms, highlighting the judiciary's concern with substantive fairness beyond mere technical compliance in situations of significant power disparity.

F. Clause Type 6: Temporary Layoff Clauses (e.g., Section 16: employer's 'sole discretion' for unpaid layoffs not constituting termination, up to ESA limits).

1. **Introduction to Temporary Layoff Clauses:**
    - These clauses are intended to provide employers with the contractual right to temporarily lay off employees without pay, typically stipulating that such a layoff will not be considered a termination or constructive dismissal, provided it adheres to the maximum durations permitted under the ESA.
    - The common law position is that an employer has no inherent right to lay off an employee; a unilateral layoff, even if temporary and unpaid, constitutes a fundamental breach of the employment contract and amounts to constructive dismissal, unless such a right is expressly or, in rare cases, impliedly part of the employment contract, or is consented to by the employee at the time.
2. **Key Case Law Analysis:**
    - **Case 1: *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831** [79]
        - **Judicial Treatment and Enforceability:** The Ontario Court of Appeal in *Elsegood* unequivocally affirmed the common law principle that an employer has no right to lay off an employee unless that right is specifically agreed upon in the contract of employment.[79]
        - The Court explicitly stated that, absent an express or implied contractual term to the contrary (with an implied term being difficult to establish and requiring evidence that such a right is "notorious, even obvious, from the facts of a particular situation" [79]), a unilateral layoff by an employer is a substantial change in the employee's employment and...source constructive dismissal.
        - Crucially, the Court held that the fact that a layoff may be conducted in accordance with the temporary layoff provisions of the ESA is "irrelevant to the question of whether it is constructive dismissal" at common law.[79] The ESA provisions define when a layoff is deemed a statutory termination for the purposes of ESA entitlements (e.g., notice, severance); they do not grant employers a common law right to lay off if one does not otherwise exist in the contract.
        - **Penalties/Remedies:** If a layoff is found to be a constructive dismissal because it was not contractually authorized, the employee is entitled to damages in lieu of common law reasonable notice.

- **Case 2: Application of *Potter* and *Bhasin* principles to layoff clauses** (No specific post-2005 ONCA/SCC case directly on the *enforceability of a layoff clause itself* is prominent in the provided materials beyond *Elsegood*'s statement of the common law. The typical dispute is whether a layoff *without* a clause is a dismissal.)
  - **Anticipated Judicial Treatment of a Layoff Clause:** If an employment contract contains a clearly worded temporary layoff clause that the employee has knowingly agreed to (and which was supported by consideration if introduced as an amendment to an existing contract), courts are likely to uphold it, provided the layoff is implemented in strict accordance with the terms of that clause and the minimum requirements of the ESA.
  - However, even with such a clause, the employer's exercise of the right to lay off would be subject to the duty of good faith, as per *Bhasin v. Hrynew*.[18] This means the layoff cannot be implemented dishonestly, for an improper motive, or in a manner that is unduly insensitive or arbitrary. For example, selectively laying off an employee for punitive reasons under the guise of a shortage of work, when such a shortage does not exist or others are not similarly affected, could be challenged.
  - If the layoff clause grants the employer "sole discretion," this discretion would still need to be exercised reasonably and in good faith (*Potter* principles regarding employer discretion [58]). An indefinite layoff, or one imposed for reasons far beyond what was reasonably contemplated by the clause, could still potentially be challenged as a constructive dismissal.
- **Case 3: Relevance of COVID-19 IDEL Regulations** [52]
  - Legal commentary [52] regarding the Infectious Disease Emergency Leave (IDEL) regulations under the ESA during the COVID-19 pandemic noted that while these regulations deemed certain COVID-related layoffs or reductions in hours not to be constructive dismissals *for the purposes of the ESA*, they did not oust an employee's common law right to claim constructive dismissal. This reinforces the *Elsegood* principle that ESA provisions concerning layoffs do not automatically alter common law rights unless the employment contract itself permits the layoff.

3. **Synthesis of Principles for Temporary Layoff Clauses:**
   - At common law, employers do not possess an inherent right to temporarily lay off employees. A unilateral layoff will constitute constructive dismissal unless contractually authorized (*Elsegood*).
   - A clearly drafted and validly incorporated contractual clause explicitly

permitting temporary layoffs can displace this common law rule. Such a clause must be unambiguous.
    - If introduced as an amendment to an existing employment contract, a clause granting the employer the right to lay off would require fresh consideration to be enforceable.
    - Compliance with the ESA's temporary layoff duration limits is necessary to prevent the layoff from automatically becoming a statutory termination under the ESA, but such compliance does not, in itself, authorize the layoff at common law or preclude a common law claim for constructive dismissal if no contractual right to lay off exists (*Elsegood*).
    - The exercise of a contractual right to lay off is subject to the employer's duty of good faith.
4. Second/Third-Order Considerations for Temporary Layoff Clauses:
   The distinction between ESA provisions regarding layoffs and an employer's common law rights and obligations is paramount. A contractual clause that merely states layoffs will be conducted "in accordance with the ESA" may be insufficient to grant the employer a positive right to implement a layoff at common law without it being deemed a constructive dismissal. This is because, as Elsegood clarified 79, the ESA framework primarily defines when a "temporary layoff" transitions into a "termination" for the purpose of statutory entitlements like notice and severance pay; it does not bestow upon employers a substantive common law right to lay off if the contract is silent or deficient on this point. At common law, any unilateral suspension of work without pay (which a layoff inherently is) is considered a fundamental breach of the employment contract unless the contract explicitly permits such action. Therefore, a clause that simply references ESA compliance for layoffs might be interpreted by a court as addressing only the duration and statutory consequences of a layoff, rather than creating an enforceable contractual right for the employer to impose a layoff in the first instance without it triggering common law constructive dismissal. To effectively shield against common law claims, the layoff clause should explicitly state that the employer possesses the right to implement temporary layoffs under specified conditions (or at its discretion, though this would be subject to good faith) and that such contractually permitted layoffs will not constitute constructive dismissal.
   Given this, employers seeking the flexibility to implement temporary layoffs without incurring liability for constructive dismissal must ensure their employment contracts contain very explicit, clear, and unambiguous language granting this right. Furthermore, if such a clause is introduced to an existing employee mid-employment, it represents a significant alteration of their common law rights

(from a position where the employer has no right to lay them off, to one where the employer does). Such an amendment would undoubtedly require fresh, valuable consideration flowing to the employee to be enforceable, consistent with the principles from *Hobbs* [53] and the ONCA's more recent affirmation in *Giacomodonato*.[55] Relying on implied terms or past practice to justify a layoff is a precarious strategy, as the threshold for implying such a right is very high ("notorious, even obvious" [79]).

G. Clause Type 7: Exclusivity Clauses (e.g., Section 9: requiring devotion of whole working time and restricting other activities without consent).

1. **Introduction to Exclusivity Clauses:**
    - Exclusivity clauses in employment contracts typically require employees to dedicate their full working time, attention, and skills to the employer's business. They often further restrict employees from engaging in any other employment, business, or professional activities, whether paid or unpaid, without obtaining the employer's prior written consent.
    - The general purpose of such clauses is to ensure employee loyalty, prevent conflicts of interest, protect confidential information, and ensure that the employer receives the full benefit of the employee's services for which they are compensated.
    - While these clauses are generally considered enforceable during the term of employment, particularly concerning activities that could directly compete with or harm the employer's interests, their enforceability can be challenged if they are overly broad, unreasonable, or unduly impinge on an employee's personal time and activities unrelated to their employment duties.
2. **Key Case Law Analysis:** (Specific SCC or ONCA cases post-May 2005 that directly dissect the nuances of "exclusivity clauses" during employment are not prominent in the provided research materials. The analysis will therefore draw upon general principles governing restrictive covenants, the implied duty of fidelity, and overarching contractual interpretation maxims.)
    - **Case 1 (Principle: Reasonableness of Restraint – *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6)** [49]
        - **Judicial Treatment and Enforceability:** Although *Shafron* primarily addressed post-employment restrictive covenants (a non-competition clause), the principles it established regarding reasonableness and ambiguity are instructive for any contractual term that restricts an individual's activities. The Supreme Court of Canada emphasized that any covenant in restraint of trade is prima facie unenforceable unless it is shown to be reasonable in the interests of the parties and the public.

Reasonableness is assessed by considering the scope of the restricted activity, its duration, and its geographic reach.[49] Crucially, the terms of the covenant must be clear and unambiguous.[49]

- **Relevance to Exclusivity Clauses:** An exclusivity clause that is excessively broad—for example, one that attempts to prohibit any and all unpaid volunteer activities or personal hobbies that are entirely unrelated to the employer's business and pose no conceivable conflict or harm—could be challenged as an unreasonable restraint. Similarly, if the clause is ambiguously worded, making it difficult for an employee to understand what activities are permissible without consent, it could be found unenforceable. The employer would bear the onus of demonstrating that the breadth of the exclusivity clause is reasonably necessary to protect its legitimate business interests.

- **Case 2 (Implied Duty of Fidelity):** (This is a general common law principle, not tied to a specific post-2005 case from the snippets for this particular clause type, but it forms the backdrop against which express exclusivity clauses are assessed.)
  - **Judicial Treatment and Enforceability:** Even in the absence of an express exclusivity clause, employees owe their employer an implied duty of fidelity. This duty requires employees to act in the best interests of their employer, to be loyal, and to avoid situations where their personal interests conflict with their duties to the employer. This includes refraining from competing with the employer, misusing confidential information, or diverting business opportunities during their employment.
  - An express exclusivity clause often serves to codify and, in some cases, expand upon this implied duty. If an exclusivity clause goes significantly beyond what would be encompassed by the implied duty of fidelity—for instance, by attempting to regulate off-duty conduct that has no bearing on the employment relationship or the employer's legitimate interests—its reasonableness could be questioned.
- **Case 3 (Principle: Fresh Consideration for New or Broader Clauses – *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437)** [55]
  - **Judicial Treatment and Enforceability:** If an employer seeks to introduce an exclusivity clause into an existing employment relationship, or to amend an existing one to make it significantly more restrictive than what was originally agreed upon or implied by law, such an amendment would require fresh consideration to be enforceable. As per *Giacomodonato*, the courts will verify the existence of some new benefit flowing to the employee in exchange for the new restriction, though they

may not assess the adequacy of that consideration.[55]

3. **Synthesis of Principles for Exclusivity Clauses:**
    - Exclusivity clauses requiring employees to devote their whole working time to the employer and to avoid conflicts of interest or direct competition during employment are generally enforceable as reflecting the implied duty of fidelity.
    - The reasonableness of an exclusivity clause is paramount. It must not be wider than necessary to protect the employer's legitimate business interests.
    - Clauses that are overly broad, seeking to control an employee's unrelated personal activities outside of working hours without a clear link to the employer's interests, may be challenged as an unreasonable restraint of trade or an unwarranted intrusion.
    - Ambiguity in the scope of prohibited activities or the requirement for consent can render the clause unenforceable.
    - If an exclusivity clause that imposes significant new restrictions is introduced to an existing employee, it must be supported by fresh consideration.
    - The employer's exercise of discretion in granting or withholding consent for outside activities under such a clause would be subject to the duty of good faith.
4. Second/Third-Order Considerations for Exclusivity Clauses:
   The evolving nature of work, particularly with the rise of the "gig economy," portfolio careers, and increased remote work, may lead to greater judicial scrutiny of traditionally broad exclusivity clauses. For employees whose primary role does not fully utilize their skills or earning capacity, or where "side hustles" or personal projects are entirely unrelated to and pose no competitive threat or conflict with the employer's business, a sweeping prohibition on all external activities could be viewed as an unreasonable restraint. Courts might increasingly consider whether the employer has a legitimate proprietary interest that justifies such a broad restriction, particularly if the clause is part of a standard form contract imposed with little room for negotiation, thereby engaging considerations of power imbalance as seen in Uber v. Heller.4 The "reasonableness" standard, borrowed from the analysis of restrictive covenants like those in Shafron 49, would require the employer to demonstrate that the specific prohibitions are necessary to protect identifiable business interests, rather than merely asserting a general right to the employee's undivided attention for all pursuits.
   Furthermore, if an employer unreasonably withholds consent for an employee to engage in an unrelated, non-conflicting external activity, particularly one that does not impinge on work performance, this could potentially be challenged as a breach of the duty of good faith in the performance and administration of the

contract, as established by *Bhasin v. Hrynew*.[18] This implies that even if an exclusivity clause grants the employer discretion to approve or deny outside activities, that discretion cannot be exercised arbitrarily, capriciously, or for reasons unrelated to the protection of legitimate business interests. Employers may need to draft these clauses more narrowly, focusing on specific types of activities that genuinely pose a risk (e.g., working for a competitor, using confidential information for personal gain) rather than imposing blanket bans that may not withstand judicial scrutiny in all circumstances.

H. Clause Type 8: Broad Intellectual Property Assignment (e.g., Section 19: automatic assignment to the employer of all work product conceived or developed during employment).

1. **Introduction to IP Assignment Clauses in Employment:**
    - Intellectual Property (IP) assignment clauses in employment contracts aim to clarify ownership of IP created by employees. Typically, these clauses provide that any inventions, discoveries, designs, software code, written materials, or other "work product" conceived or developed by an employee during the term of their employment automatically becomes the property of the employer.
    - At common law, there is a distinction: IP created by an employee *in the course of their employment duties* generally belongs to the employer, while IP created by an employee outside the scope of their duties, on their own time, and without the use of employer resources, generally belongs to the employee. Broad assignment clauses often seek to capture IP beyond what the common law would automatically assign to the employer.
2. **Key Case Law Analysis:**
    - **Case 1: *Techform Products Ltd. v. Wolda*, 2001 CanLII 8549 (ON CA)** [82] (This is a pre-May 2005 Ontario Court of Appeal decision, but it remains a leading Canadian case on IP assignment in an employment-like context, particularly concerning the issue of consideration for such assignments. Its principles are foundational and would inform post-2005 judicial analysis.)
        - **Judicial Treatment and Enforceability:** In *Wolda*, an independent contractor (formerly an employee) was asked to sign an "Employment Technology Agreement" (ETA) which assigned all rights in any of his inventions to the company. The Court of Appeal found this ETA to be enforceable.
        - A crucial issue was **consideration**. Wolda argued the ETA lacked consideration. However, the Court found that Techform's implicit promise not to exercise its right to terminate Wolda's consultancy agreement (which required 60 days' notice) if he signed the ETA, coupled with

evidence that Techform did intend to terminate him if he refused and did continue his engagement for four years after he signed, constituted valid consideration.[82] This specific form of consideration—forbearance from exercising a legal right to terminate—was key.

- The Court also rejected Wolda's argument of **duress**, noting his status as an independent contractor, the opportunity he had to seek legal advice, and Techform's bona fide (though perhaps mistaken, absent the ETA) belief that it was entitled to his inventions.[82]
- **Relevance:** *Wolda* demonstrates that broad IP assignment clauses *can* be enforceable. However, if such a clause is introduced mid-relationship (to an existing employee or contractor), the requirement for fresh consideration is paramount. The "forbearance as consideration" argument is highly fact-specific and depends on evidence of a genuine, communicated intention to terminate that is then withdrawn in exchange for the new IP assignment.

- **Case 2 (Application of Post-2005 Principles to IP Assignment):** (Specific post-May 2005 SCC or ONCA decisions detailing the enforceability of broad IP assignment clauses like Section 19 are not prominent in the provided research materials. The analysis must therefore apply principles from *Wolda* alongside more recent jurisprudence on contractual fairness, consideration, and ambiguity.)
  - **Anticipated Judicial Treatment and Enforceability:**
    - **Scope of "During Employment":** A clause assigning "all work product conceived or developed *during employment*" would be subject to interpretation. Courts would likely scrutinize whether "during employment" means 24/7, irrespective of any connection to work duties or company resources, or if it is implicitly limited to activities related to the employer's business or performed using the employer's time and resources. An attempt by an employer to claim ownership of IP that is entirely unrelated to the employee's job, developed by the employee on their own personal time, using their own resources, and not drawing upon confidential employer information, might be challenged as overbroad, an unreasonable restraint of trade, or even unconscionable, despite the presence of a general assignment clause.
    - **Fresh Consideration (Post-2005 Context):** If a broad IP assignment clause like Section 19 is introduced to an *existing employee*, the principles regarding fresh consideration would be critical. Following *Giacomodonato v. PearTree Securities Inc.*, 2024 ONCA 437 [55], the employer would need to provide some new, tangible benefit to the

employee in exchange for the assignment of rights that go beyond common law ownership. While *Giacomodonato* states courts assess the *existence* rather than the *adequacy* of consideration, the specific "forbearance" argument successfully used in *Wolda* might be more difficult to sustain in a typical employment scenario unless there is very clear evidence of a pre-existing, communicated intention to terminate the employee, which was then rescinded solely in exchange for the IP assignment.
        - **Ambiguity and Clarity:** As with all contractual terms, particularly those that assign valuable rights, clarity is essential. The definitions of "work product," "conceived," "developed," and the precise scope of the assignment must be unambiguous. Any ambiguity would likely be construed against the employer (*contra proferentem*).
        - **Duty of Good Faith:** The employer's enforcement of a broad IP assignment clause would also be subject to the general duty of good faith in contractual performance, as per *Bhasin v. Hrynew*.[18] An attempt to enforce the clause in a manner that is opportunistic or overly aggressive, particularly for IP with a tenuous link to the employment, could be challenged.
3. **Synthesis of Principles for Broad IP Assignment Clauses:**
    - IP assignment clauses that clearly transfer ownership of IP created by an employee *within the scope of their employment duties*, or using the employer's resources, time, or confidential information, are generally enforceable.
    - Broad clauses that purport to assign *all* IP developed by an employee during the entire period of employment, irrespective of its connection to the employee's job responsibilities or the use of company resources, may be challenged as overbroad, an unreasonable restraint on the employee's future endeavors, or potentially unconscionable.
    - If such broad IP assignment clauses are introduced as an amendment to an existing employment contract, they must be supported by fresh, valuable consideration flowing to the employee. The *Wolda* precedent for "forbearance as consideration" is a possibility but is fact-dependent and requires clear evidence.
    - The language of the IP assignment clause must be clear and unambiguous regarding the scope of IP being assigned.
4. Second/Third-Order Considerations for IP Assignment Clauses:
   A significant tension can arise between broadly drafted IP assignment clauses and an employee's right to utilize their own general "skill and knowledge"

acquired throughout their career, including during their tenure with a particular employer. Courts tend to draw a distinction between specific, identifiable IP created for the employer (which the employer has a legitimate claim to if it falls within the scope of employment or is covered by a valid assignment clause) and the general know-how, expertise, and skills that an employee develops and which form part of their human capital. A clause that is so expansive that it effectively seeks to assign not just discrete work products but also the very essence of an employee's accumulated professional knowledge, particularly if that knowledge could be applied in non-competing future roles, might be viewed as an unreasonable restraint on their ability to earn a livelihood. The interpretation of phrases like "conceived or developed during employment" becomes critical. If interpreted by an employer to capture personal development projects, independent research, or creative works undertaken on an employee's own time and with their own resources, and which are entirely unrelated to the employer's actual or anticipated business, the clause could be challenged as overreaching. Employers should therefore draft IP assignment clauses with a clear focus on linking the assignment to work performed *for the employer*, or work that is directly derived from the employee's duties, or that utilizes the employer's confidential information or resources. Attempting to cast the net so wide as to capture truly independent, off-duty inventions or creations may not only be difficult to enforce but could also be seen as contrary to public policy by unduly restricting innovation and employee mobility. The increasing prevalence of employees engaging in personal projects, open-source contributions, or developing personal intellectual property portfolios alongside their formal employment may lead to more frequent disputes over the scope and enforceability of these clauses. In such disputes, the duty of good faith as per *Bhasin* [18] might require employers to be reasonable and transparent in asserting ownership claims, particularly where the connection between the IP and the employment is tenuous.

I. Clause Type 9: Severability Clauses (e.g., Section 22(i): particularly how courts treat clauses that attempt to 'save' illegal provisions by severing parts or by reading them down to ESA minimums).

1. **Introduction to Severability Clauses:**
    - Severability clauses, also known as "saving clauses," are standard contractual provisions which state that if any term or part of the contract is found to be illegal, invalid, or unenforceable by a court, the remaining terms of the contract will continue to be valid and enforceable, with the offending part being "severed" or removed from the agreement.

- In the context of employment law, a crucial question has been whether a severability clause can be used to "save" an employment contract that contains an illegal termination provision (e.g., one that contravenes the ESA) by allowing a court to excise the illegal portion or read it down to comply with minimum statutory requirements.

2. **Key Case Law Analysis:**
   - **Case 1: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391** [40]
     - **Judicial Treatment and Efficacy:** The Ontario Court of Appeal in *Waksdale* delivered a decisive judgment on the effect of severability clauses in the context of illegal termination provisions. The Court held that a severability clause "has no impact on contracts that have been rendered unlawful by legislation".[42]
     - The Court reasoned that if a termination provision (when its constituent parts, such as "for cause" and "without cause" sections, are read together as a whole) is found to be illegal because it contravenes the ESA, the entire termination scheme is void. A severability clause cannot be invoked to dissect the termination provisions, remove the offending part, and thereby salvage the remainder of the termination scheme.
     - The underlying public policy rationale is to deter employers from including illegal clauses in employment contracts. Allowing severance would undermine this objective, as employers might be incentivized to draft employer-favourable (but potentially illegal) terms, knowing that if challenged, the worst outcome might be that the illegal part is simply removed, leaving the employer in no worse a position than if they had drafted a compliant clause initially.[40]
   - **Case 2: *North v. Metaswitch Networks Corporation*, 2017 ONCA 790** [42]
     - **Judicial Treatment and Efficacy:** This ONCA decision, which was cited and relied upon in *Waksdale* [42], supports the principle that a severability clause cannot rescue contractual provisions that have been rendered void by statute.
     - Legal commentary on *North* and *Waksdale* indicates a clear judicial stance: "neither savings clauses or severability clauses can fix an otherwise illegal termination provision." For a termination clause to be enforceable, it must be compliant with the ESA on its face, without reliance on subsequent judicial modification via severance.[74]
   - **Case 3 (SCC Context on Severance Generally – Pre-*Waksdale* but Relevant to Employment Contracts): *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6** [49]
     - **Judicial Treatment and Efficacy:** While *Shafron* dealt with the severance

of restrictive covenants rather than termination clauses directly, the Supreme Court of Canada's approach is instructive. The SCC rejected the use of "notional severance" (the judicial rewriting of an unreasonable clause to make it reasonable) for restrictive covenants in employment contracts. It also severely limited the application of "blue-pencil severance" (striking out specific words or sub-clauses) to situations where the part to be removed is clearly severable, trivial, not part of the main purport of the covenant, and where it is evident the parties would have unquestionably agreed to the covenant as amended without varying any other terms of their bargain.[49]

- Although *Waksdale* provides a more direct rule for termination clauses violating the ESA, *Shafron*'s general skepticism towards easily severing problematic terms in employment contracts aligns with the policy considerations underpinning the *Waksdale* decision.

3. **Synthesis of Principles for Severability Clauses:**
   - In Ontario, particularly in the context of termination provisions in employment contracts, a severability clause cannot be used to save or validate a provision that is void for contravening the *Employment Standards Act, 2000* (*Waksdale*, *North*).
   - The entire termination scheme within an agreement is read as a whole. If any part of this scheme is found to be illegal (e.g., by allowing for termination without ESA entitlements in circumstances where the ESA would require them), the entire scheme fails, and the severability clause cannot rescue the non-offending parts of that scheme.
   - This judicial approach is rooted in public policy considerations aimed at protecting employees and deterring employers from including illegal or potentially misleading terms in employment contracts.
   - The limited forms of severance, such as blue-pencil severance discussed in *Shafron*, are unlikely to be applied to salvage core aspects of an illegal termination clause, as such clauses are typically not considered "trivial" and their modification often alters the fundamental bargain regarding termination.
4. Second/Third-Order Considerations for Severability Clauses:
   The decisions in Waksdale 40 and North 42 have rendered severability clauses largely toothless in Ontario when it comes to curing termination provisions that offend the ESA. Their presence in an employment contract concerning termination entitlements is now almost a non-factor if a Waksdale-type illegality is found. This is a direct consequence of the courts prioritizing the protective purpose of employment standards legislation over general contractual interpretation principles that might otherwise favor severability. The rationale is

clear: the ESA establishes a floor of rights that cannot be contracted out of. When a termination clause attempts to do so, it is not merely an "invalid" term in isolation; it represents an attempt to undermine a statutory protection. Waksdale determined that such an attempt renders the entire scheme of termination provisions void due to public policy. The court in Waksdale, quoting North, explicitly stated that "a severability clause cannot have any effect on clauses of a contract that have been made void by statute".42 To allow severance would be to permit employers to include potentially illegal (but employer-favourable) terms with little downside, as they might hope such terms are either not challenged or, if challenged, simply severed, leaving the employer no worse off than if they had drafted a compliant clause from the start.40 This would undermine the ESA's protective mandate.

Therefore, the specific statutory context of employment standards and the power imbalance inherent in the employment relationship have led courts to largely neutralize the effect of severability clauses in this domain. Employers cannot rely on these clauses as a "safety net" for poorly drafted or ESA-non-compliant termination provisions. The entire focus must be on ensuring that all termination provisions are fully lawful and compliant with the ESA from their inception. This judicial stance underscores a commitment to ensuring that employment contracts are not used as instruments to mislead employees about their statutory rights or to dilute fundamental protections.

J. Clause Type 10: Entire Agreement Clauses (e.g., Section 22(e): its effect on the interpretation of the contract when other clauses are challenged as unenforceable).

1. **Introduction to Entire Agreement Clauses:**
    - Entire agreement clauses (also known as "integration clauses" or "merger clauses") are contractual provisions stating that the written document constitutes the complete and final agreement between the parties. They typically stipulate that the written contract supersedes all prior oral or written discussions, negotiations, representations, understandings, or collateral agreements that are not expressly incorporated into the final written document.
    - The primary purpose of an entire agreement clause is to promote certainty and prevent parties from later attempting to introduce extrinsic evidence to vary, contradict, or add to the terms of the written contract.
    - In employment law, the effect of these clauses is often considered when other substantive clauses (like termination provisions) are challenged as unenforceable, or when issues such as pre-contractual misrepresentation or

the overarching duty of good faith arise.

2. **Key Case Law Analysis:**
    - **Case 1: *Bhasin v. Hrynew*, 2014 SCC 71** [15]
        - **Judicial Treatment and Effect:** The Supreme Court of Canada in *Bhasin* recognized good faith as a general organizing principle of contract law and established a specific common law duty of honest performance applicable to all contracts, including employment agreements. The Court indicated that this duty of honest performance operates irrespective of the intentions of the parties and is not generally excludable by boilerplate language such as an entire agreement clause.[18] An entire agreement clause does not absolve parties from their obligation to perform their contractual duties honestly and in good faith.
        - While legal commentary preceding the final SCC decision in *Bhasin* noted that some appellate courts had found entire agreement clauses could preclude the implication of a broad duty of good faith into an unambiguous contract [15], the SCC's subsequent ruling clarified that the duty of honest performance is a general doctrine that imposes a minimum standard of honesty.
    - **Case 2: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (and its implications for entire agreement clauses)**
        - **Judicial Treatment and Effect (Inferred):** If a termination clause within an employment contract is rendered void for illegality (e.g., because it contravenes the ESA, as per the *Waksdale* doctrine), an entire agreement clause cannot "save" that illegal provision or prevent the application of common law principles to fill the resulting void. The illegality makes the specific contractual term unenforceable as a matter of statute and public policy. An entire agreement clause functions to define the scope of *agreed-upon terms*, not to validate terms that are unlawful. Once a termination clause is voided, the contract effectively becomes silent on the issue of lawful termination notice, and the common law implied term of reasonable notice applies. The entire agreement clause does not prevent this implication.
    - **Case 3: *North v. Metaswitch Networks Corporation*, 2017 ONCA 790** [42]
        - **Judicial Treatment and Effect:** As discussed in the context of severability clauses, *North* reinforces the principle that contractual mechanisms cannot be used to validate provisions that are void by statute. Legal commentary [74] notes that "neither savings clauses or severability clauses can fix an otherwise illegal termination provision." By analogy, an entire agreement clause would similarly be ineffective in

preventing a court from striking down an illegal termination provision or from considering the impact of that illegality on the contract as a whole. Its purpose is not to shield illegal terms from judicial scrutiny.

3. **Synthesis of Principles for Entire Agreement Clauses:**
    - An entire agreement clause generally serves to prevent parties from relying on extrinsic evidence of prior or collateral agreements, representations, or understandings that were not incorporated into the final written contract.
    - It cannot be used to exclude the operation of mandatory legal principles that apply to all contracts, such as the duty of honest performance established in *Bhasin*.
    - It cannot validate or give effect to clauses within the written contract that are illegal or otherwise unenforceable as a matter of statute or public policy (e.g., an ESA-non-compliant termination provision).
    - If a core contractual term (such as a termination provision) is struck down for illegality, an entire agreement clause will not prevent the courts from implying necessary common law terms (such as reasonable notice of termination) to fill the resulting gap in the contract.
    - While an entire agreement clause may make it more difficult to prove reliance on a pre-contractual misrepresentation (as it suggests the written terms are exhaustive), it does not automatically shield a party from liability if the elements of actionable misrepresentation can be established.
4. Second/Third-Order Considerations for Entire Agreement Clauses:
   The primary function of entire agreement clauses is to delineate the boundaries of the contractual obligations by confining them to the written terms of the document, thereby excluding prior or collateral promises or representations.15 However, their power is significantly limited when confronted with overriding legal duties or statutory illegality affecting terms within the agreement itself. Certain legal principles, such as the minimum standards mandated by the ESA, operate externally to the parties' specifically negotiated terms and cannot be waived or contracted out of. If a provision within the written contract is itself illegal—for example, a termination clause that violates the ESA as per Waksdale 40—the entire agreement clause cannot imbue that provision with legality. The illegality stems from a conflict with statute or fundamental public policy, not from a dispute over whether an unwritten term forms part of the deal.
   Similarly, the duty of honest performance, recognized by the Supreme Court in *Bhasin* [18] as a general doctrine of contract law, imposes a minimum standard of conduct in the execution of contractual obligations. An entire agreement clause cannot logically exclude a duty that the law itself imposes upon the performance of the very agreement it purports to define. Thus, while an entire agreement

clause might effectively prevent an employee from successfully arguing, "my employer verbally promised me a larger bonus than what is written in the contract," it will not stop that employee from arguing, "the termination clause in this written contract is illegal under the ESA," or "my employer breached its duty of honest performance in how it applied the performance review clause." Therefore, employers should not view entire agreement clauses as a panacea for all contractual defects or as a shield against fundamental duties like good faith and honest performance. Their principal utility lies in preventing disputes arising from alleged unwritten promises or understandings made during the negotiation phase. In the context of contractual amendments, if an amending agreement contains an entire agreement clause, that clause itself is subject to the same scrutiny as the amendment. If the amendment as a whole lacks fresh consideration when introduced to existing employees (as per *Giacomodonato* [55]), the entire agreement clause within that flawed amendment cannot validate the problematic new terms or prevent the employee from relying on the terms of the original, unamended contract.

III. Overarching Judicial Considerations and Employer Best Practices

- **The Pervasive Impact of the Duty of Good Faith (*Bhasin*, *Matthews*):**
  - The Supreme Court of Canada's decision in *Bhasin v. Hrynew* [15] fundamentally reshaped Canadian contract law by recognizing good faith as a general organizing principle and establishing a specific duty of honest performance applicable to all contracts, including those governing employment. This means parties must perform their contractual duties honestly and reasonably, and not act capriciously, arbitrarily, or in a manner that undermines the legitimate contractual interests of the other party.[18]
  - In the employment context, *Matthews v. Ocean Nutrition Canada Ltd.* [24] further illustrated the application of these principles, particularly concerning an employer's conduct leading up to a constructive dismissal and ensuring that employees receive all entitlements that would have accrued during a proper reasonable notice period. The Court in *Matthews* explicitly noted the employer's dishonesty towards the employee, separate from the acts constituting constructive dismissal, reinforcing that the manner of contract performance is subject to this duty.[24]
  - The duty of good faith is not confined to the point of termination; it is a continuous obligation that permeates the entire employment relationship. This has significant implications for how employers exercise any discretion afforded to them under various contractual clauses, such as those related to unilateral changes in job duties or compensation, policy amendments, or the

administration of benefits and incentive plans. Even if a contract clause appears to grant an employer broad discretion (e.g., "sole discretion"), that discretion must be exercised honestly, reasonably, and not in a way that is intended to defeat the employee's legitimate contractual expectations or to act in bad faith. An arbitrary or dishonest exercise of such discretion could constitute a breach of the duty of good faith, potentially leading to damages or rendering the employer's action invalid. Employers must, therefore, be mindful that their conduct in administering and performing the employment contract will be viewed through this lens of good faith and honesty.

- **The Critical Importance of ESA Compliance and the *Waksdale* Doctrine:**
  - The Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc.* [40] has established a stringent standard for the enforceability of termination clauses. The core principle is that if any provision within an employment agreement's termination scheme (encompassing both "for cause" and "without cause" terminations) contravenes the *Employment Standards Act, 2000* (ESA), then the entire termination scheme is rendered void and unenforceable. This means the employee becomes entitled to common law reasonable notice, which is typically far more generous than ESA minimums.
  - Subsequent decisions, such as *Render v. ThyssenKrupp Elevator (Canada) Limited* [42] and *Henderson v. Slavkin et al.* [69], have consistently applied and, in some respects, broadened the application of the *Waksdale* principle. These cases demonstrate that courts will scrutinize various clauses that have termination implications, even those not directly labelled as "termination clauses" (e.g., conflict of interest or confidentiality clauses that specify termination as a penalty for breach, as seen in *Henderson* [69]), for compliance with the ESA.
  - The *Waksdale* line of cases reflects a strong judicial policy of protecting employees from contractual terms that might, even potentially, result in them receiving less than their minimum statutory entitlements. The ESA establishes a mandatory floor of rights, and courts are intolerant of attempts to contract below this floor. The reasoning is that, due to the inherent power imbalance in employment relationships, employees may not fully understand their rights or may feel compelled to accept terms that are, in fact, illegal.[40] By voiding the entire termination scheme when any part of it is offensive, courts aim to incentivize employers to draft contracts that are fully compliant with the ESA from the outset, rather than risking the inclusion of employer-favourable but illegal terms. This has led to a significant increase in litigation challenging termination clauses and places a high burden on employers to ensure

meticulous drafting and regular review of their employment agreements.

- **Judicial Scrutiny of Power Imbalances and Unconscionability (*Uber v Heller*):**
  - The Supreme Court of Canada in *Uber Technologies Inc. v. Heller* [4] provided a modern framework for the doctrine of unconscionability, particularly as it applies to standard form contracts where there is a significant inequality of bargaining power. The Court established a two-part test: (1) proof of inequality in the positions of the parties (arising from factors such as one party's lack of sophistication, vulnerability, or the absence of any opportunity to negotiate terms); and (2) proof of an improvident bargain (a contract that unduly advantages the stronger party or unduly disadvantages the weaker party at the time of contract formation).[4]
  - While *Heller* involved an arbitration clause in a contract with a gig economy worker, its principles have broader implications for employment contracts, especially those presented to employees on a "take-it-or-leave-it" basis. The decision signals that courts will intervene to prevent the enforcement of contractual terms that are not only non-compliant with statute but are also substantively unfair due to the circumstances of their formation and their harsh impact on the weaker party.
  - *Heller* may thus provide an avenue to challenge various types of unduly onerous terms in standard form employment contracts, beyond just termination clauses, if the criteria for unconscionability are met. This could include, for example, excessively broad restrictive covenants, clauses imposing significant financial burdens on employees to enforce their rights, or other terms that are so one-sided as to be considered oppressive. Employers using standard form contracts must therefore be concerned not only with statutory compliance but also with the overall fairness and conscionability of the terms they impose, particularly when dealing with less sophisticated employees or those in vulnerable positions.
- **The Necessity of Fresh Consideration for Contractual Amendments:**
  - A fundamental principle of contract law, applied rigorously in the employment context, is that any variation or amendment to an existing employment contract that imposes new burdens on an employee or diminishes their existing rights must be supported by fresh consideration flowing from the employer to the employee. As established in foundational cases like *Hobbs v. TDI Canada Ltd.* [53], merely continuing to employ the employee is generally not considered sufficient new consideration to support such detrimental changes.
  - The Ontario Court of Appeal's recent decision in *Giacomodonato v. PearTree Securities Inc.* [55] affirmed this requirement for fresh consideration.

Importantly, the Court in *Giacomodonato* also reiterated the principle that courts will typically assess the *existence* of consideration, rather than its *adequacy*. This means that as long as some new, tangible benefit is provided to the employee in exchange for agreeing to the amended terms, the court may not delve into whether that benefit was economically equivalent to the rights the employee relinquished.

- However, for consideration to be valid, it must be something of value to which the employee was not already entitled. A nominal or illusory benefit offered in exchange for significant new burdens or the surrender of important rights might still be challenged, particularly if the circumstances suggest pressure or a lack of genuine bargaining. While courts may not weigh the "adequacy" in a precise economic sense, the context of the power imbalance in employment relationships remains a relevant background factor. If an employer attempts to impose substantial new obligations (such as a broader IP assignment, a new restrictive covenant, or a clause granting extensive unilateral change authority) on an existing employee, they must ensure that the employee receives a clear, new benefit—such as a raise, a one-time bonus, new stock options, or significantly enhanced benefits—to support the enforceability of those new terms.

- **Consequences of Bad Faith Conduct and Unduly Insensitive Dismissals (*Keays*, *Pohl*, *Krmpotic*):**
  - The Supreme Court of Canada in *Honda Canada Inc. v. Keays* [33] reformed the approach to damages for employer misconduct in the manner of dismissal. The previous practice of extending the reasonable notice period (the "Wallace bump-up") was replaced with the availability of "moral damages" (often referred to as aggravated damages in this context). These damages are awarded to compensate an employee for mental distress suffered as a result of the employer's conduct during the course of dismissal, provided that conduct was "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" [38], and the employee proves that they suffered actual damages beyond the normal distress and hurt feelings associated with any job loss.
  - The Ontario Court of Appeal in *Krmpotic v. Thunder Bay Electronics Limited* [84] clarified that while medical evidence of a diagnosable psychological injury can be helpful, it is not strictly necessary to ground an award for aggravated damages. Credible testimony from the employee and corroborating evidence of harm beyond normal distress can suffice if the employer's bad faith conduct is established. In *Krmpotic*, the employer's lack of candour regarding the true reason for termination was found to be bad faith conduct warranting

$50,000 in aggravated damages.
    - Punitive damages, which are intended to punish and deter egregious misconduct rather than compensate for loss, remain available but are awarded only in exceptional circumstances. As affirmed in *Keays*, punitive damages generally require an independent actionable wrong (beyond the breach of the employment contract itself, such as deceit or defamation) and conduct that is so malicious, oppressive, and high-handed that it offends the court's sense of decency.[38] However, the ONSC decision in *Pohl v. Hudson's Bay Company* [48] demonstrates that punitive damages can also be awarded for breaches of statutory obligations, such as the employer's failure to comply with ESA requirements for timely payment of wages and provision of an ROE, where such failures are part of a pattern of disregard for employee rights or cause significant hardship. In *Pohl*, $10,000 in punitive damages were awarded for these ESA breaches, in addition to $45,000 in moral damages for the unduly insensitive manner of dismissal.
    - These cases collectively indicate a judicial intolerance for employers who "weaponize" the dismissal process, act dishonestly, or treat employees with undue insensitivity at the point of termination. Courts are prepared to award significant damages beyond basic notice entitlements to address such misconduct, reflecting the importance of dignity and fairness in the employment relationship, especially at its conclusion.

IV. Conclusion and Recommendations

The landscape of Canadian employment contract law, as shaped by appellate courts since May 2005, reveals a consistent judicial effort to balance contractual freedom with the protection of employees, who are typically in a position of lesser bargaining power. Several key themes emerge: the paramountcy of statutory employment standards, the pervasive duty of good faith and honest performance, the rigorous scrutiny of clauses that limit employee rights, and the necessity of fresh consideration for detrimental amendments to existing contracts.

Key Conclusions:

1. **ESA Compliance is Non-Negotiable:** Attempts to contract out of minimum standards under the *Employment Standards Act, 2000* (ESA) are highly likely to fail. The *Waksdale* doctrine, in particular, has made it clear that any ESA-offending provision within a termination scheme can void the entire scheme, defaulting the employee to more generous common law entitlements. Severability clauses offer no refuge in such circumstances.

2. **Good Faith and Honesty are Implied:** The duty of good faith and, more specifically, the duty of honest performance, as established in *Bhasin v. Hrynew*, applies to all aspects of the employment contract, from its performance to its termination. Employers cannot act dishonestly, capriciously, or arbitrarily in exercising their contractual rights or in the manner of dismissal.
3. **Unilateral Employer Discretion is Limited:** Clauses purporting to grant employers "sole discretion" to make fundamental changes to employment terms or policies are significantly constrained by the doctrine of constructive dismissal and the duty of good faith. Such changes, if substantial and detrimental, will likely trigger constructive dismissal unless clearly agreed to with fresh consideration.
4. **Restrictive Covenants Must Be Reasonable and Unambiguous:** Non-solicitation clauses (and other restrictive covenants where still permissible) must be demonstrably reasonable in scope, duration, and activity restricted, and free from ambiguity, to be enforceable, as per *Shafron v. KRG*. Courts will not rewrite overbroad or vague covenants.
5. **Fresh Consideration is Essential for Amendments:** Introducing new terms or policies that are detrimental to an existing employee or expand employer rights requires fresh, tangible consideration beyond mere continued employment.
6. **Power Imbalances and Unconscionability Matter:** The *Uber v. Heller* decision has reinforced that grossly unfair or improvident terms in standard form contracts, resulting from an inequality of bargaining power, can be struck down as unconscionable.
7. **Manner of Dismissal Carries Financial Risk:** Employers who engage in bad faith conduct, are untruthful, misleading, or unduly insensitive during the termination process face significant liability for aggravated/moral damages, as established in *Keays* and affirmed in cases like *Krmpotic* and *Pohl*. Punitive damages may also be awarded for egregious statutory breaches or other independent actionable wrongs.

Recommendations for Employers:

1. **Prioritize ESA Compliance in All Termination Provisions:**
    - Ensure that "for cause" termination provisions explicitly align with the ESA's "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned" standard for disentitlement to statutory notice and severance. Avoid using generic "just cause" language if it could be interpreted more broadly than the ESA standard.
    - Verify that probationary clauses and any other termination-related provisions meet or exceed all applicable ESA minimums in every potential scenario.
2. **Draft Clearly and Unambiguously:**

- All contractual terms, especially those limiting employee rights (termination clauses, restrictive covenants, IP assignments), must be drafted with utmost clarity and precision to avoid ambiguity, which will likely be resolved in favour of the employee.

3. **Exercise Discretion in Good Faith:**
   - Recognize that any contractual discretion (e.g., to change duties, policies, or award bonuses) must be exercised honestly, reasonably, and not in a manner that undermines the employee's legitimate contractual interests. Document the rationale for significant discretionary decisions.
4. **Provide Fresh Consideration for Contractual Amendments:**
   - When seeking to amend an existing employment contract to introduce new obligations for the employee or reduce their rights (e.g., adding a restrictive covenant, a layoff clause, or a broad IP assignment), provide clear, new, and valuable consideration (e.g., a raise, bonus, stock options, promotion). Document this exchange clearly.
5. **Tailor Restrictive Covenants Narrowly:**
   - Ensure non-solicitation clauses are no broader than reasonably necessary to protect legitimate proprietary interests, with clear and reasonable limitations on duration, scope of clients/employees, and prohibited activities. Avoid indefinite or overly vague terms.
6. **Review and Update Standard Form Contracts Regularly:**
   - Given the evolving case law, regularly review and update template employment agreements with legal counsel to ensure ongoing compliance and mitigate risks of unenforceability, particularly concerning termination provisions in light of *Waksdale* and unconscionability principles from *Heller*.
7. **Manage Terminations with Professionalism and Candour:**
   - Ensure the termination process is handled fairly, respectfully, and honestly. Provide clear reasons for termination (where appropriate and truthful). Avoid misleading statements or unduly insensitive conduct to minimize the risk of aggravated/moral damages.
   - Comply strictly with all statutory obligations upon termination, including timely payment of final wages, vacation pay, and provision of the Record of Employment, to avoid potential punitive damages or other penalties.
8. **Approach Unilateral Changes Cautiously:**
   - For fundamental changes to employment terms, seek employee consent or provide fresh consideration rather than relying solely on broad "unilateral change" or "policy change" clauses. Clearly communicate significant policy changes and their rationale.

By adhering to these principles and seeking ongoing legal advice, employers can better navigate the complexities of Canadian employment law, foster fairer employment relationships, and reduce their exposure to costly litigation and significant damage awards.

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