

# Overholt Law Inaugural Firm Seminar



## Current Legal Issues and Trends in Human Resources Management

Overholt Law Inaugural Firm Seminar  
Terminal City Club, Vancouver, BC  
April 20, 2016

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# Our Firm



- **About Us**

- Boutique Labour & Employment Law Firm:
  - “Workplace Law” – Employment, Labour, OH&S, Privacy, Human Rights, and so forth
- Founded by Carman Overholt, QC in June 2012
- 4 Lawyers
- 1 Articled Student
- 2 Paralegals
- 1 Legal Administrative Assistant

# Our Firm



- **Practice Areas:**

- Employment Law
- Labour Relations Law
- Human Rights Law
- Corporate Governance, Fiduciary Duties & Shareholder Disputes
- Workers Compensation / OH&S
- Disability Management & Duty to Accommodate
- Privacy and FOI
- Workplace Investigations
- Restrictive Covenants and Non-Competition Agreements
- Pension & Benefits

# Written Employment Contracts



## Three points to mind

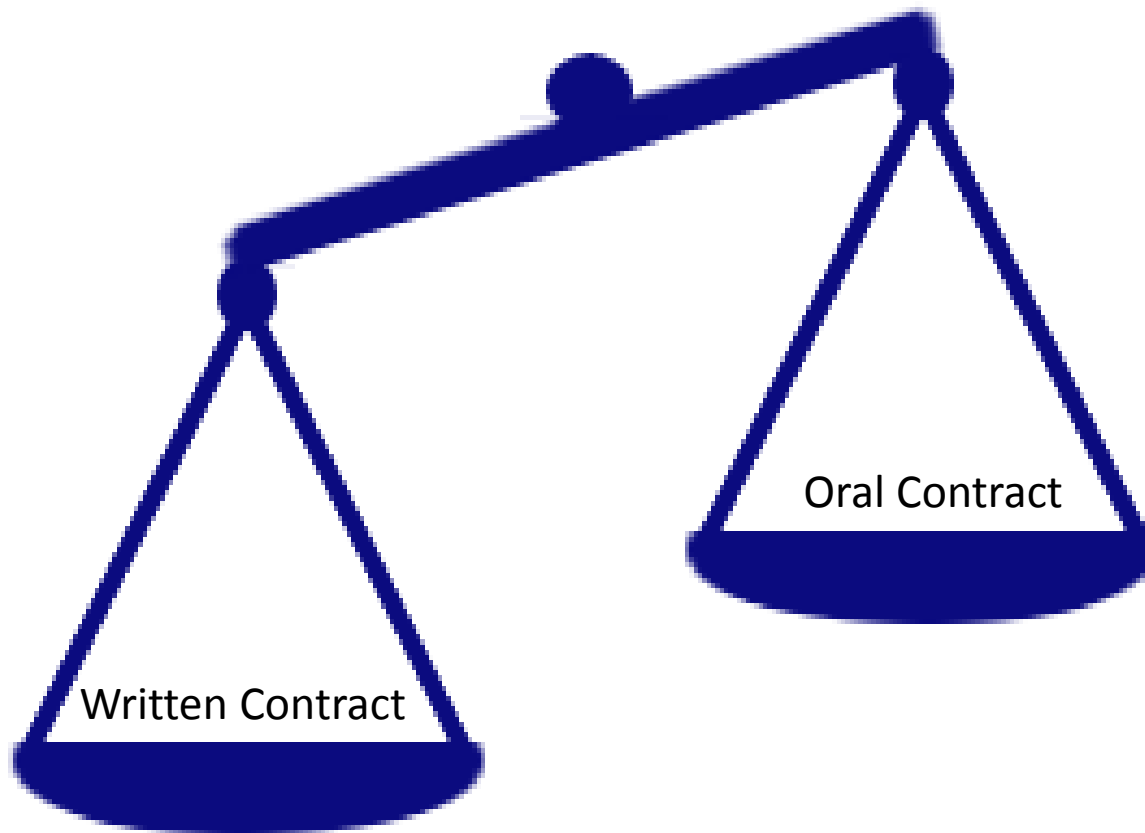
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# Introduction



# Outline

1. Introducing New Employment Contracts to Existing Employees
2. Commissions and Bonuses Payable Upon Termination of Employment
3. Employee's obligation to give notice

1.

# Potential Problems Resulting from the Introduction of New Written Employment Contracts

# Common Pitfalls

- When introducing new employment agreements for existing employees:



1. carefully consider any carry-over of boilerplate language; and
2. anything other than a pure codification of existing terms requires fresh consideration.



# ***Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311***



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- Demonstrates the value in written employment contracts that are well-drafted
- Demonstrates the risk employers have in using boiler-plate terms in new written employment agreements for existing employees

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*



- **Facts:**

- Mr. Miller began employment in September 2003 with a written agreement.
- He received two promotions in 2006.
- Each promotion required him to execute a new written contract.

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- Facts:
  - Newest contract had (all boilerplate):
    - a probationary term purporting to be able to terminate Mr. Miller without notice during those 90 days;
    - a termination clause permitting the employer to terminate providing notice under the *ESA*; and
    - a severability clause.
  - Mr. Miller's employment was terminated *after* the "probationary period"
  - He sued for wrongful dismissal

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- **Mr. Miller's Arguments:**

1. Convergys meant for the probationary period to apply to him;
2. Entitled to reasonable notice at common law as contract breached the *ESA*:
  - a) the probation clause "wiped out" his 3 weeks' accrued notice under the *ESA* for the first 90 days of his employment;
  - b) probation clause was tied to the termination clause;
  - c) this created ambiguity in the agreement;
  - d) probation clause could not be severed using the severability clause without severing the termination clause too; and
  - e) the breach of the *ESA* thus made the probationary clause (and the termination clause) unenforceable at the outset.

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- **Decision on Appeal:**

- The contract was unambiguous and on its face, merely outlined the same information as the *ESA*
- A reasonable person would be *unlikely* to “conclude the parties intended to place Mr. Miller in a worse... position for the first 90 days in his new position.”
- *Unambiguous severance clause* exists and it is appropriate to sever the probation clause without severing the termination clause
- Mr. Miller’s notice limited to the *ESA*

2.

# Commissions and Bonuses Payable Upon Termination

# Commission/Bonuses

- Common theme = confusion around payment of commissions and bonuses at the time of termination

# Commission/Bonuses

- BC *Employment Standards Act* minimums
  - Contemplate payment of “wages” under formula in s. 63(4)
    - Wages includes commissions and money that is paid or payable as an incentive and relates to hours of work, production or efficiency
    - Does not include discretionary money not tied to hours of work, production or efficiency
- Contract and common law often provide for more than these minimums



# Commission

- Claim may arise where employee claims:
  1. in debt for outstanding commissions the employee alleges were owed and not paid at the time of termination; or
  2. in breach of contract for failure to pay commission the employee claims are due on an ongoing basis following termination of the contract

# Payment of Commissions “earned”

- At what point has the employee “earned” the commission?
  - concluded a sale/deal before termination?
  - was the “Effective cause” of a sale before termination?
- Consider: Why is the employee being paid the commission?
  - Referring a sale?
  - Closing a sale?
  - Closing a sale *and* servicing the resulting client/customer contract?

# Determining Commissions Payable

- Look at:
  - any express contractual language or policies regarding what happens to commissions where a termination occurs; or
  - if no express contractual language or policies, examine:
    - past practices;
    - the sale process; and
    - any role the employee has played in securing the sale

# Commission Calculation Summary

- Different Approaches:
  - Commissions payable for amounts “earned” already prior to termination
  - Averaging past earnings to determine lost opportunity for commissions during notice period
  - Clear, express contractual language which ousts payment obligations during notice period at common law (*Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140)

# Ongoing Commissions

- Claim in breach of contract for commissions argued to be accruing over time
- Typically occurs where contracts are ambiguous or poorly drafted and imply some entitlement potentially beyond termination:
  - ie. “you will be paid on a commission basis and shall receive commissions as long as we continue our supplier relationship that you secured during your employment with us”



# Ongoing Commissions Summary



- Need clear, express agreement to establish employer liability for ongoing commissions post-termination
- Default position = other than amounts owed at the time of termination (“Earned Commissions”) and those that may be payable during the notice period (part of severance pay), no obligation to pay beyond termination absent express contractual term

# Payment of Commissions “earned” - continued

- **Commission Contract Drafting Tips:**
  1. Clearly identify when the company considers a commission to be “earned” and what the employee’s responsibilities are
    - Define “Earned Commission”

# Payment of Commissions “earned” - continued

- Commission Contract Drafting Tips:
  2. Clearly outline how commissions will be dealt with upon termination of employment
  3. Seek to eliminate ambiguity: if it's not clear to employees how their compensation is calculated, the business is asking for trouble
    - Goal: establish an understanding of how their compensation is calculated early
    - Warning: *contra proferentem*



# Payment of Commissions “earned” - continued

- **Contracts Drafted:**

- Seek legal advice on current contract terms and consider any modifications for new employee contracts
- Seek legal advice on proposed severance arrangements to minimize risk from any outstanding commissions that may be claimed

# Bonuses

- **Bonuses during notice period:**
  - If the employee would have worked throughout the notice period, would they have received a bonus payment?
- **Employee must establish:**
  - they would have been entitled, by contract or past conduct, to receive the bonus; and
  - how to calculate the amount of it

### 3.

**Employees' obligation to give  
notice of termination at  
common law**

# Notice upon resignation

- **Scenarios:**

1. Written employment contract

- No term included regarding notice to be given by employee upon resignation

2. Verbal employment contract

- No term discussed regarding notice to be given by employee upon resignation

***Q: In the scenarios above, can the employee resign with no notice at all?***

# Notice upon resignation

- **A:** *If the contract (written or oral) does not expressly stipulate the amount of notice an employee must give when resigning, the employee is obliged to give reasonable notice.*

# Notice upon resignation

- **Calculating “reasonable notice” of resignation**
  - Two Factors:
    1. *Nature of the employee’s position* with the employer; and
    2. *Length of time* it would reasonably take the employer to replace the employee or otherwise take steps to adjust to the loss.
- *Gagnon & Associates Inc. et. al. v Jesso et. al.* 2016 ONSC 209 – EE failed to give any notice; damages to ER set-off against amounts owing to EE.

# QUESTIONS?

## Thank you for attending!

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