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PUBLICATION

# Employment Update: The Court of Appeal Provides Guidance on the Forfeiture of Equity Incentives Upon Dismissal

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For many employees, particularly those holding senior positions, equity incentives form an integral part of their remuneration. This form of compensation is often in the form of Restricted Stock Units ("**RSUs**"), which are granted pursuant to an equity incentive plan. An important consideration for employers is what happens to unvested RSUs that were granted to the employee prior to the termination of the employment relationship.

On August 7, 2026, the Ontario Court of Appeal released its decision in *Wigdor v. Facebook Canada Ltd., 2026 ONCA 572*, which provides important guidance on this area of the law. As discussed below, the decision underscores the significant financial exposure employers may face when equity forfeiture provisions fail to comply with the *Employment Standards Act*, 2000 (the "***ESA***") – in this case, resulting in an additional award of approximately US$4.7 million.

**BACKGROUND**

Dr. Wigdor, a tenured professor at the University of Toronto, founded Chatham Inc. ("**Chatham**") in 2011. In August 2016, through Chatham, Dr. Wigdor began providing services to one of Meta's subsidiaries. Facebook Canada is Meta's wholly owned Canadian subsidiary. In September 2020, following Meta's purchase of the shares of Chatham, Dr. Wigdor commenced employment with Facebook Canada pursuant to a written contract of employment (the "**Contract**").

The Contract stated that no employment with a previous employer would count toward Dr. Wigdor's period of continuous employment with Facebook Canada, except that service with Chatham Labs Inc. and its predecessors would be recognized for the purpose of determining minimum entitlements under the *Employment Standards Act*, 2000 (the "***ESA***"). Further, s. 12(a) of the Contract contained the following termination provision:

Termination without Cause. During the first three (3) months of your employment, including any prior service with Chatham Labs Inc. or its predecessors, the Company may terminate your employment at any time by providing you with two (2) weeks of advance notice or base pay in lieu of notice [the "**Termination Provision**"].

Between 2020 and 2023, Dr. Wigdor received RSU grants under two sets of RSU Agreements. Each RSU Agreement provided that all unvested RSUs are forfeited as of the termination date, regardless of any common law or statutory notice period (the "**Forfeiture Clause**"). However, the 2021–2023 RSU Agreements further stated that "if applicable employment standards legislation explicitly requires continued entitlement to vesting during a statutory notice period, Participant's right to vest in the RSUs under the Plan, if any, will terminate effective as of the last day of Participant's minimum statutory notice period."

**THE SUPERIOR COURT'S DECISION**

First, the application judge determined that the Termination Provision was unenforceable. Specifically, the Termination Provision contravened s. 9 of the *ESA*, which deems employment to be continuous subsequent to a sale of business. By virtue of the *ESA*'s sale-of-business provisions, the application judge treated Dr. Wigdor's service as continuous for *ESA* purposes and calculated his length of service as nine years. Therefore, upon the termination of his employment, the applicable statutory notice period was 8 weeks. By purporting to be able to terminate Dr. Wigdor's employment within the first 3 months of the Contract with only 2 weeks' notice, Facebook Canada contracted out of the applicable statutory notice period under the *ESA*. As a result, the application judge awarded 10 months' reasonable notice at common law.

Second, the application judge determined that the RSU Agreements were valid and enforceable, and as a result, Dr. Wigdor was not entitled to the vesting of any granted RSUs during the notice period. The application judge made two important findings in reaching this result:

1. The application judge determined that, upon termination, Dr. Wigdor was entitled to the minimum statutory entitlements provided for under s. 61 of the *ESA*. This included statutory termination pay based on the wages that the employee would otherwise have earned during the statutory notice period. However, the Court found that RSUs are not "wages" or "benefits". Accordingly, the Forfeiture Clause did not contract out of the *ESA*.

2. The application judge also found that the RSU Agreements and Meta's equity incentive plan are separate from entitlements under the *ESA*, the Contract and at common law.

Lastly, the application judge declined to award punitive damages, notwithstanding Facebook Canada's delay in paying Dr. Wigdor's *ESA* entitlements and the premature termination of his benefits. While the application judge found the employer's explanation for a roughly 10-month delay to be inadequate and the overall approach dilatory, the conduct did not meet the high threshold for punitive damages, which targets behaviour that is harsh, malicious, or otherwise reprehensible.

**THE COURT OF APPEAL'S DECISION**

First, the Court of Appeal concluded that the application judge did not err in finding that the Termination Provision contravened s. 9 of the *ESA*, and therefore, was void and unenforceable. As a result, Dr. Wigdor was entitled to reasonable notice at common law.

The Court's analysis followed the two-part framework from *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26: (1) but for the termination, would the employee have been entitled to the RSUs during the reasonable notice period? and (2) if so, does the wording of the plan unambiguously alter or remove that right? The Court answered the first question in the affirmative and found that the forfeiture provisions did not lawfully remove Dr. Wigdor's entitlement.

Second, the Court of Appeal overturned the application judge's finding that the Forfeiture Clause did not contract out of the *ESA*. The Court of Appeal's ruling on this point turned on the proper interpretation of ss. 60 and 61 of the *ESA*.

Pursuant to s. 60 of the ESA, employers are not permitted to reduce an employee's <u>wage rate or alter any other term or condition of employment</u> during a working notice period. Pursuant to s. 61 of the ESA, if an employer provides pay in lieu of notice, the employer is required to pay the employee termination pay in a lump sum <u>equal to the amount the employee would have been entitled to receive under s. 60</u> had notice been given in accordance with that section. Taken together, the Court of Appeal confirmed that pay in lieu of notice under s. 61 is not limited to regular wages. Rather, it incorporates the obligation not to alter any terms or conditions of employment during the statutory notice period. Therefore, the application judge failed to consider whether the Forfeiture Clause purported to contract out of the *ESA* by depriving Dr. Wigdor of the vesting of RSUs during the statutory notice period because it alters a term or condition of employment.

In applying the proper interpretation of ss. 60 and 61 of the *ESA*, the Court of Appeal held that the Forfeiture Clause contracted out of the *ESA*. As a starting point, the vesting of RSUs was incorporated into the Contract, formed a part of Dr. Wigdor's compensation, and was taxed as employment income. Therefore, the Court of Appeal found that the vesting of RSUs was a term or condition of employment within the meaning of s. 61 of the *ESA*.

The Forfeiture Clause in the 2021–2023 RSU Agreements stated that:

[U]nless explicitly required by applicable legislation, the date on which a Termination of Employment occurs and all unvested RSUs are forfeited will not be extended by any period during which notice, pay in lieu of notice or related payments or damages are provided or required to be provided under local law (including, without limitation, statute, contract, regulatory law, and/or common or civil law).

…

[I]f applicable employment standards legislation explicitly requires continued entitlement to vesting during a statutory notice period, Participant's right to vest in the RSUs under the Plan, if any, will terminate effective as of the last day of Participant's minimum statutory notice period.

The Court of Appeal stated that, by purporting to remove Dr. Wigdor's entitlement to continued RSU vesting during the statutory notice period, the Forfeiture Clause unlawfully contracted out of the *ESA*. Although the Forfeiture Clause includes a saving provision with the language "unless explicitly required by applicable legislation", the Court of Appeal confirmed that there is nothing "explicit" in the *ESA* about continued vesting of RSUs during the statutory notice period. The saving language was therefore not engaged. The Court also emphasized that compliance with the *ESA* is assessed at the time the contract is entered into, not at the time of termination.

In the result, Dr. Wigdor was entitled to continued vesting of RSUs during the 10-month common law notice period, which amounted to damages in the amount of $4,711,647 USD.

Third, the Court of Appeal found that the application judge made no error in declining to award punitive damages. The application judge found that Facebook Canada's conduct did not rise to the level of harsh or malicious. She was entitled to exercise her discretion to make this finding, which was rationally supported by the record and the case law.

Lastly, the intervener, the Canadian Association of Counsel to Employers, asked the Court of Appeal to find that any form of equity-based compensation can never constitute "wages" within the definition in s. 1(1) of the *ESA*. The Court of Appeal declined to address this issue because it was not necessary to determine the appeal as a result of finding that the vesting of RSUs constituted a term or condition of Dr. Wigdor's employment. However, the Court of Appeal noted that the answer to this question may be more nuanced than a blanket determination that all forms of equity-based compensation are or are not "wages" under the *ESA*.

The Court also rejected the argument that Dr. Wigdor's legal representation during contract negotiations was relevant to the enforceability analysis, confirming that an employee's sophistication does not affect whether a provision contravenes the *ESA*.

**KEY TAKEAWAYS FOR ONTARIO EMPLOYERS**

This decision serves as an important reminder for employers to regularly review and update their employment agreements to ensure they contain enforceable language and comply with the *ESA*. Termination clauses are a critical part of any employment contract and getting them right can save employers from costly disputes and significant damages awards.

With respect to equity incentives, employers should review their equity incentive plans and grant agreements to ensure that they are drafted in a way that is clear, unambiguous, and limits liability upon an employee's termination of employment.

Employers should also ensure that statutory entitlements are paid promptly upon termination. In *Wigdor*, Facebook Canada's 10-month delay in paying *ESA* entitlements was heavily criticized by the Court, even though punitive damages were ultimately denied.

The question of whether RSUs constitute "wages" under the *ESA* remains open. The Court declined to decide the issue but noted that the answer may be more nuanced than a blanket determination.

For specifically tailored advice on your equity incentive plans, please reach out to a member of Blaney's Labour and Employment Group.

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