CHAPTER 11

Termination by "Frustration"

LEARNING OBJECTIVES

After reading this chapter, students will be able to:

- Define *frustration of contract* and identify the circumstances in which it can arise.
- Describe the implications of a finding of frustration of contract.
- Explain the test for frustration of contract.
- Explain how an employee illness or disability can bring about frustration of contract.
- Discuss the key controversies related to applying frustration of contract to employee illness or disability under an employment contract.

CHAPTER OUTLINE

I. Introduction

Frustration of contract does not fit coherently into any of the other chapters dealing with termination of employment contracts, so it gets its own short chapter. A contract that is frustrated is terminated neither by agreement of the parties nor as a result of the actions of the employer or employee. Rather, a frustrated contract comes to an end because something unexpected happens that prevents one or both of the parties from doing what they promised in the contract to do.[1] The classic examples of frustration of the employment contract include circumstances in which workplaces are destroyed by an "act of God," such as a fire. Over time, frustration has been applied to other intervening events that make performance of the contract as originally envisioned impossible, including an employee injury or disability. This chapter examines the evolution of, application of, and controversies relating to frustration of contract in the Canadian employment setting.

II. The Implications of a Finding of Frustration of Contract

The most important consequence of a finding of frustration of contract is that it instantly terminates the contract, relieving the parties of any future contractual obligations. It means most notably that both employer and employee are relieved of their contractual obligation to

frustration of contract: The termination of a contract caused by an unforeseen event that renders performance of the contract impossible.

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provide notice of termination.[2] In the common law regime, an employee who is dismissed without receiving the notice required by the contract is entitled to recover monetary damages calculated based on an assumption that the employee had worked through the notice period. However, the employer is not required to provide any notice of termination in the following scenarios:

1. When the employee terminates the contract (Chapter 15).
2. When the contract is a fixed-term or fixed-task contract, as opposed to an indefinite-term contract (Chapter 8).
3. When the employee commits a fundamental breach of the contract, which the employer treats as cause for dismissal without notice (known as summary dismissal; Chapter 12).
4. When the contract is frustrated.

Arguments about frustration of contract usually arise in the context of an employer who is defending a wrongful dismissal lawsuit: the employer announces that the contract is terminated by frustration and the employee sues for wrongful dismissal, asserting that they are entitled to receive notice of termination. The court then needs to decide if the conditions for frustration were satisfied.

Professor Geoffrey England has argued that the "doctrine of frustration is concerned with who should bear the risk of the unforeseen events."[3] When frustration exists, the burden of the risk falls on the employee, who will lose out on any contractual entitlements to which they otherwise would have been entitled to as a consequence of losing their job. On the other hand, if the unforeseen event does not frustrate the contract, the employer shoulders the financial implications of the termination of the contract. As we consider the law of frustration in the remainder of this chapter, think about who bears the risk of the event that intervenes in the performance of the contract.

III. The Test for Frustration of Contract

The modern-day test for contract frustration dates from the 1956 British House of Lords decision *Davis Contractors Ltd. v. Fareham Urban District Council*.[4] The facts of that case are not important for our purposes, but the court's statement of the legal test is:

> [F]rustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.[5]

The Supreme Court of Canada later endorsed this test.[6] It has been applied to employment contracts in a number of situations.

The classic application of frustration of contract in the employment setting involves the destruction of the workplace by an unexpected event, such as a tornado, flood, or fire. That is what occurred in the early and often-cited British case of *Taylor v. Caldwell*, in which a music hall was destroyed by fire, resulting in the cancellation of several musical performances.[7] The death of an employee during the term of a contract also frustrates the contract, since this intervening event obviously prevents further performance.[8] A change in the law that would make it unlawful for the employee to continue to perform their job would also frustrate the contract. For example, the employment contract of a casino security guard with a prior criminal record (for breaking and entering) was frustrated when a new statute was enacted prohibiting security guards from having criminal records.[9]

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Frustration does not occur when the reason the original contract cannot be performed is due to the voluntary actions of one of the parties. This is known as **self-induced frustration**. Thus, an employer's filing for bankruptcy does not frustrate an employment contract.[10] Nor does the doctrine of frustration apply to terminations or layoffs caused by a business downturn, loss of customers,[11] or a strike by some of an employer's employees.[12] These are normal events that occur within the ebb and flow of capitalist economies.

IV. Frustration Due to Illness or Disability

Frustration of contract in the work context arises most often due to employee illness or disability. Common law judges long ago decided that absenteeism due to illness or disability (**innocent absenteeism**) is not "cause for summary dismissal" because the employee's behaviour is not blameworthy.[13] Employees unable to work due to illness or disability are still entitled to notice of termination, and since they cannot work the notice period through no fault of their own, the employer is obligated to provide pay in lieu of notice unless they can persuade the court that frustration applies.[14] However, these general rules do not apply if the employee's disability or illness "frustrates" the employment contract.

The courts have found that an employee's illness or disability can frustrate an employment contract if the evidence indicates that the medical condition is such that performance in the future will be impossible or "radically different" from what was contracted for.[15] A variety of factors are relevant in making this assessment, and each case is decided on its own particular facts. For example, a contract that is for a short duration or that involves a senior employee without whom the employer cannot function for long will be more easily frustrated than an indefinite-term contract involving a worker who is more easily replaced.[16]

In practice, though, most decisions boil down to an assessment of whether the medical evidence indicates that the employee's disability is *permanent rather than temporary*, *such that it will forever, or for the foreseeable future, prevent the employee from returning to the job they were hired to perform*.[17] It is the responsibility of the party alleging that frustration has occurred (usually the employer) to persuade a court.[18] Therefore, even a long absence from work due to illness will not frustrate an employment contract unless the employer can demonstrate that a return to work is unlikely in the foreseeable future.[19] By contrast, where the evidence indicates that a disability is permanent, a finding of frustration can result, even if the employee had been absent for only a short period of time prior to the employer announcing the end of the contract.[20]

Applying the doctrine of frustration to employee illness or disability under an employment contract has given rise to a number of complex and interesting legal issues and debates. Three are worth noting briefly in this chapter.

A. What Medical Evidence Is Relevant in Assessing Permanent Disability?

The first controversy relates to the medical evidence that judges should consider in deciding whether the illness will prevent the employee from performing their job for the foreseeable future. Medical conditions can change; people sometimes get better, or their condition can deteriorate over time. This point raises the question of the period of time judges should look at when assessing the employee's prognosis and potential to return to work. Should judges look only at the evidence that was available at the time the employer decided to treat the contract as

self-induced frustration: When the actions of the employer or employee make it impossible for the contract as originally envisioned to be performed. The courts have refused to apply the doctrine of frustration to self-induced frustration.

innocent absenteeism: An employee's absence from work due to reasons that are not blameworthy, such as illness, disability, or religious observance.

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having been terminated? Or should judges consider "how things actually turned out," as assessed at the date of the trial, which could be months or even years after the employment contract was initially terminated? As described in Box 11.1, judges have not always agreed on the answer.

BOX 11.1 » TALKING WORK LAW

Assessing Whether an Employee's Disability Is Permanent

An employment contract can be frustrated by a permanent disability suffered by the employee. This requires employers and the courts to assess medical evidence about the prognosis of the employee's ability to return to work. The courts have long debated whether that assessment should be based on medical evidence available at the moment the employer elects to treat the contract as having been terminated, or at the time of a trial, which could be months or even years later.

For example, imagine that at the time the employer informs the employee that the contract is over, the evidence indicates that the employee will likely be unable to return to work for the foreseeable future. However, by the time the wrongful dismissal lawsuit reaches a judge months later, the employee's condition has improved dramatically, and the employee could have returned to work after all. Which medical diagnosis should govern? Judges have disagreed on the answer.

Approach One: Consider Only Medical Evidence Available on the Date of Termination

One line of cases rules that only evidence known at the date of the employer's decision to terminate the contract should be considered, since that is the point at which the employer was required to demonstrate frustration existed and that the employee would be unable to return to work for the foreseeable future. Examples of this approach include *Wilmot v. Ulnooweg Development Group Inc.*, 2007 NSCA 49; *Altman v. Steve's Music,* 2011 ONSC 1480; *Marshall v. Harland & Wolff Ltd.*, [1972] 1 WLR 899 (CA); *White v. Woolworth (F.W.) Co.,* 1996 CanLII 11076 (Nfld. CA); and *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73.

Approach Two: Consider All Medical Evidence up to the Date of the Trial

Another line of cases argues that post-termination medical evidence is relevant. This approach argues that insofar as medical evidence obtained after the termination of the contract can shed light on the question of whether the employee was able to return to work, it is relevant and should be considered by a court in assessing whether the contract was frustrated. Examples of this approach include *Yeager v. R.J. Hastings Agencies Ltd.,* 1984 CanLII 533 (BCSC) and *Demuynck v. Agentis Information Services Inc.,* 2003 BCSC 96.

Whether one approach or the other benefits the employee or the employer will depend on the facts and circumstances of the case. Can you think of scenarios in which an employer would prefer the first line of argument and then other scenarios in which the employer would prefer the second approach?

B. Does Frustration of Contract Apply When a Contract Provides for Sickness and Disability Benefits?

Another controversy relates to the relevance of contract terms that entitle an employee to receive disability benefits if they become ill or disabled. The doctrine of frustration usually applies to "unforeseen circumstances"[21] that were not in the "reasonable contemplation of the parties" when the contract was formed and that have the effect of rendering performance as originally anticipated impossible.[22] If the contract sets out in detail what happens when the employee becomes ill or disabled, then the parties clearly *have* contemplated the possibility that the employee may be felled by illness and unable to work. Consider the case of the factory that burns to rubble, leaving the factory employees with no work to perform. If their employment contracts specifically contemplate the possibility that the factory may be destroyed by fire, and also describes what will happen in that event, then the doctrine of frustration would not apply. Similarly, if an employment contract contemplates that an employee unable to work due to illness will remain employed throughout the absence while they receive sickness or disability insurance benefits, then frustration is unlikely to result from the illness.[23]

However, many employment contracts envision that an employee unable to work due to illness or disability can be terminated even if they are entitled to continue to receive insurance benefits after the termination. In those cases, courts have ruled that frustration can terminate the contract, as explained in the decision discussed in Box 11.2.[24]

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BOX 11.2 » CASE LAW HIGHLIGHT

Frustration Caused by Employee Disability When the Contract Provides Long-Term Disability Benefits

Wightman Estate v. 2774046 Canada Inc.
2006 BCCA 424

Key Facts: The employment contract between Wightman and 2774046 Canada Inc. (the employer) required the employer to provide "reasonable notice" of termination and provided for long-term disability benefits until age 65 or Wightman's death, whichever came first. Wightman suffered from a series of medical problems and began to receive disability benefits. While he was receiving disability benefits, he was dismissed without notice. One year later, at the age of 61, Wightman died. His estate executor filed a lawsuit for wrongful dismissal on Wightman's behalf, claiming damages for failure of the employer to give Wightman reasonable notice of termination. The employer argued that the contract was frustrated by Wightman's illnesses.

Issue: Can an employee disability cause frustration of contract when the contract itself contemplates that an employee may become permanently disabled?

Decision: Yes. The court found that the proper test for frustration is not whether the parties contemplated the possibility that a long-term disability might occur—which here they clearly did—but whether "*the parties have provided that their contractual relationship will continue despite the radical change in circumstances brought about by the event*" (emphasis added). The court must ask whether the disability is such that it will be impossible for the employee to perform his duties or the performance of those duties would be radically different than what was originally agreed. Frustration of contract will not result from a short-term illness or disability. However, when the evidence discloses that the employee will be unable to perform the job he was hired to do for the foreseeable future, the contract can become frustrated.

In this case, the contract recognized the possibility that benefits could continue beyond the date at which the employment contract ends. For example, the benefits plan, which was part of the contract, referred to the possibility that the employee might "change employers" and provided for payment of benefits "[i]f … employment ends." Therefore, the parties contemplated that the employment contract could come to an end for some reason even though the employee was disabled at the time of termination. The evidence indicated that Wightman would not be able to return to any job for the foreseeable future. Therefore, the contract had become frustrated as a result of Wightman's illness.

C. Is the Duty to Accommodate a Disabled Worker a Precondition for Frustration of Contract?

A third controversy that arises from the application of the doctrine of frustration of contract to ill or disabled employees raises an interesting question about the intersection of the three regimes of work law (the common law regime, the regulatory standards regime, and the collective bargaining regime) introduced in Chapter 1.

Under Canadian human rights law, an employer cannot dismiss an employee for absenteeism due to a disability unless it can first demonstrate that it is not possible to accommodate the employee's disability without incurring undue hardship.[25] (Part III explores human rights legislation.) Volumes of human rights law decisions explore this standard. The *Canadian Charter of Rights and Freedoms* (Chapter 38), which governs the actions of government, similarly prohibits discrimination against workers on the basis of disability and requires accommodation of disabilities to the point of undue hardship.[26] As we will learn in Part IV, unionized workers who are governed by collective agreements are also entitled to accommodation to the point of undue hardship if they become disabled and unable to perform their normal job.

Most people have at least a vague awareness that Canadian law imposes on employers a requirement to accommodate employee disabilities, even if they are not aware of the specific legal source of the requirement. If disability prevents an employee from performing their original job, but the employer could modify the job or move the employee into a different vacant position that they could perform, the expectation is that the employer will take that step. Human rights statutes, collective agreements, and the Charter all require at least that much.

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However, the common law regime has not yet recognized a parallel requirement for accommodation to be explored as a precondition for a finding of frustration due to disability. The job contemplated by the original contract is taken as fixed, and judges ask only whether the disability will for the foreseeable future prevent the employee from performing it or require that the job be performed in a "radically different" manner than originally envisioned. If so, then the contract is frustrated. The fact that the employee could return to work if the job were modified in some manner or if offered a different job has been treated as irrelevant in the application of the doctrine of frustration.[27] The employer's implied prerogative to decide what job an employee will perform is left untouched by the contract law doctrine of frustration.

The result is that frustration of contract, a contract law doctrine with 19th-century roots, is today at odds with modern-day expectations and sentiments on the appropriate treatment of workers with a disability. A common law judge could agree with an employer that an employee's disability frustrated the contract, even though the employer had ignored its statutory obligation to accommodate the employee's disability.[28] We noted in Chapter 2 that the three regimes of work law are not blind to developments in the other regimes. Sometimes legal rules developed in one regime can penetrate and influence the evolution of laws in the other regimes. An interesting question is whether the common law regime's doctrine of frustration of contract will evolve to recognize a duty to accommodate employee disabilities that parallels the statutory duty to accommodate. As noted in Box 11.3, there has been movement in this direction already.

BOX 11.3 » TALKING WORK LAW

Frustration of Contract and the Interaction of Legal Regimes

Chapter 2 introduced a framework for analyzing the law of work. It noted that work law comprises three distinct regimes: the common law regime, the regulatory standards regime, and the collective bargaining regime. Those three regimes have their own legal rules, actors, and institutions and produce their own legal outputs. However, we noted too that through an internal feedback loop, legal rules and norms produced by one regime can influence developments in other regimes. The doctrine of frustration of contract offers an example of the complexity of interactions among regimes.

The Influence of the Common Law Regime on the Regulatory Standards Regime

Frustration of contract is an output of the common law regime, a legal rule developed in 19th-century Britain, later adopted by Canadian common law judges and applied to employment contracts. As noted above, frustration brings a contract to an end without any need for the parties to give the usual common law notice of termination and without creating any liability arising from the termination. The contract just ends. This concept was later incorporated into employment standards statutes (in the regulatory regime).

For example, in Ontario, the *Employment Standards Act* (ESA) requires employers to provide employees with notice of termination and sometimes an additional payment known as severance pay (see Chapter 20). However, employers are exempted from these requirements when the employment contract has become "frustrated."* In a 2005 decision, the Ontario Court of Appeal ruled that this exemption violated the *Charter of Rights and Freedoms* equality rights section (s. 15) insofar as it punished disabled workers.† As a result, today the "frustration" exemption in the Ontario ESA does not apply when the frustration is due to the employee's illness or injury.‡ Therefore, the Ontario government has incorporated into the statute a modified version of the common law doctrine of frustration.

The Influence of the Regulatory Standards Regime on the Common Law Regime

Canadian courts have found that an employee's disability can frustrate a contract if, for the foreseeable future, that disability will prevent the employee from performing the job they were hired to do. In applying the doctrine of frustration to employee disabilities, common law judges have not usually considered whether the employee's disability could have been accommodated in such a way that would enable the employee to return to work. Within the regulatory standards regime (as we will learn in Part III), human rights legislation prohibits an employer from treating the employment contract as frustrated unless the employer first establishes that there is no way to accommodate the employee's disability without incurring undue hardship.

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In the 1998 decision *Antonacci v. Great Atlantic & Pacific Co. of Canada*, Justice Swinton appeared to modify the common law doctrine of frustration by incorporating the human rights statute concept of "accommodation." The employer argued in that case that the employment contract had been frustrated by the employee's disability. Justice Swinton rejected that argument, and in doing so introduced a duty to accommodate:

> Section 5 of the Ontario *Human Rights Code* prohibits discrimination on the basis of handicap … [Evidence indicated that the employee's] job as a Store Manager could be modified to accommodate a worker with a back injury. Even if that did not turn out to be the case, given the extent of the plaintiff's back problems, A & P, with 24,000 workers in Ontario, might well have been able to find alternative suitable work for him. Given these facts, it could not be said that the plaintiff's contract was frustrated.§

It remains to be seen whether this approach requiring exploration of possible accommodation as a condition for finding frustration of contract will take hold in Canadian common law. For example, the courts could conclude that before frustration can be made out, an employer must first exhaust accommodation efforts, including modifying the employee's job or considering whether the employee could be offered a different job within their capabilities. This approach would produce a more coherent legal model than exists at present. It would also be consistent with the Supreme Court of Canada's observation that the common law should evolve in a manner consistent with "Charter values."#

* See Ontario Regulation 288/01, ss. 2(1)4, 9(1)4.

† *Ontario Nurses' Association v. Mount Sinai Hospital*, 2005 CanLII 14437 (Ont. CA).

‡ Ontario Regulation 288/01, ss. 2(3), 9(2)b.

§ *Antonacci v. Great Atlantic & Pacific Co. of Canada*, 1998 CanLII 14734 (Ont. Sup Ct J) at para 41, aff'd 2000 CanLII 5496 (Ont. CA).

\# See *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156; and *Lemesani v. Lowerys Inc.*, 2017 ONSC 1808 (judge finding a common law duty to accommodate a disabled worker in the context of a frustration argument).

V. Chapter Summary

Frustration of contract terminates a contract through no fault of either party, extinguishing any future contractual obligations the parties owed one another. Frustration usually requires an intervening event that was not contemplated by the parties that makes it impossible for the contract to be performed as originally envisioned. The most noteworthy consequence of a finding of frustration is that the employer is relieved of its obligation to give the employee notice of termination. Since the implications are so serious, the courts have been cautious in applying the doctrine. However, they have been prepared to find frustration arising from employee illness or disability, provided that the evidence establishes the employee will be unable to perform the job they were hired to do for the foreseeable future. Traditionally, common law judges have not considered whether the employee's disability can be accommodated as a precondition of a finding of frustration. This approach puts the common law regime in tension with human rights laws, which prohibit termination of employment contracts for disability-related absences unless accommodation would incur undue hardship on the employer.

QUESTIONS AND ISSUES FOR DISCUSSION

1. Explain the test for frustration of contract, and provide some examples of how it might arise in the employment setting.
2. What must an employer prove in order to persuade a court that a contract has been frustrated due to the employee's illness?
3. Why would an employer want to argue that an employment contract has become frustrated?
4. What is "self-induced frustration"? Provide examples.
5. Can an employment contract that entitles an employee to receive long-term disability benefits until the age of 65 be frustrated while the employee is collecting those benefits? How does the *Wightman Estate* case described in Box 11.2 affect your answer?

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APPLYING THE LAW

1. Bridget suffered a back injury that prevented her from performing her job with her employer ABC Plumbing Services. She has already missed eight months of work. Last week, Bridget's doctor wrote a letter for the employer that states he does not expect Bridget to be able to return for the foreseeable future. The employer decides to terminate Bridget's employment. The contract says nothing about notice of termination. Must the employer provide Bridget with reasonable notice of termination? Explain your answer.
2. Would your answer to question 1 be different if you learned that the employment contract between Bridget and ABC Plumbing included a clause that entitled Bridget to long-term disability benefits if she becomes ill and that she may not be terminated while receiving those benefits?

NOTES AND REFERENCES

1. See *Chilagan v. Island Lake Band No. 161,* 1994 CanLII 4787 (Sask. QB); *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424 at 24; and *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] AC 696 at 728. The Supreme Court of Canada described the doctrine of frustration in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58; and *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] SCR 361. See also J. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at chapter 14.
2. See the discussion in *McLean v. City of Miramichi*, 2011 NBCA 80.
3. G. England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 418. See also, McCamus, supra note 1 at 612-22.
4. *Davis Contractors Ltd. v. Fareham Urban District Council*, supra note 1.
5. Ibid. at 728-29.
6. *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, supra note 1 at 368; and *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, supra note 1.
7. *Taylor v. Caldwell*, [1893] 122 ER 309 (QB). See also *Polyco Window Manufacturers Ltd. v. Saskatchewan (Director of Labour Standards),* 1994 CanLII 5008 (Sask. QB).
8. *McLean v. City of Miramichi*, supra note 2 at para 25; *Wingfield Estate v. Conroy*, [1996] BCJ No. 799 (QL) (SC); and *MacDonald v. School District No. 39*, 2004 BCSC 1611.
9. *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357. See also *Reilly v. The King*, 1933 CanLII 379 (UK JCPC); and *Thomas v. Lafleche Union Hospital*, 1989 CanLII 5078 (Sask. QB); aff'd. 1991 CanLII 8039 (Sask. CA) (a nurse's contract frustrated after her nursing licence was revoked).
10. *Optenia Inc. (In Bankruptcy) (Re)*, 2002 CanLII 5308 (Ont. Sup Ct J).
11. *Smith v. Tamblyn (Alberta) Limited*, 1979 CanLII 1036 (Alta. QB).
12. *St. John v. TNT Canada Inc.*, 1991 CanLII 420 (BCSC). See also the discussion in R.S. Echlin and J. Fantini, *Quitting for Good Reason* (Toronto: Canada Law Book, 2001) at 118-19.
13. See *Yeager v. R.J. Hastings Agencies Ltd.*, 1984 CanLII 533 (BCSC), at paras 71-72.
14. *Sylvester v. British Columbia*, [1997] 2 SCR 315 at paras 9, 15; and *McRae v. Dodge City Auto (1984) Ltd.*, 1994 CanLII 4955 (Sask. QB). See also the discussion in England, supra note 3 at 420-21.
15. *Dartmouth Ferry Commission v. Marks* 34 SCR 366; *Wightman Estate v. 2774046 Canada Inc.*, supra note 1; *Marshall v. Harland & Wolff Ltd.*, [1972] 1 WLR 899 (CA); *Yeager v. R.J. Hastings Agencies Ltd.*, supra note 13; *Skopitz v. Intercorp Excelle Foods Inc.*, 1999 CanLII 14852 (Ont. Sup Ct J); *Ryhorski v. Commercial Industrial Manufacturing Ltd.*, 2019 SKQB 85; *Fraser v. UBS,* 2011 ONSC 5448; *Lemesani v. Lowerys Inc.*, 2017 ONSC 1808; *Roskaft v. RONA Inc.*, 2018 ONSC 2934; and *Duong v. Linamar Corporation*, 2010 ONSC 3159.
16. The leading case that describes the factors courts should consider in assessing whether an employment contract has been frustrated is *Marshall v. Harland & Wolff Ltd.*, supra note 15 at 718-19. See also *Dragone v. Riva Plumbing Limited*, 2007 CanLII 40543 (Ont. Sup Ct J) at para 21.
17. This distinction between temporary and permanent disability has deep roots and was noted in *Dartmouth Ferry Commission v. Marks*, supra note 15.
18. *Dragone v. Riva Plumbing Limited*, supra note 16.
19. For example, in *Yeager v. R.J. Hastings Agencies Ltd.*, supra note 13, the employee had been absent for two years due to illness, but the contract was not frustrated since the evidence did not establish that illness would persist for the foreseeable future. Other cases in which courts found no frustration due to lack of evidence that the employee would be unable to return to work include *Lippa v. Can-Cell Industries Inc.*, 2009 ABQB 684; *Antonacci v. Great Atlantic & Pacific Co. of Canada,* 1998 CanLII 14734

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(Ont. Sup Ct J), varied on other grounds 2000 CanLII 5496 (Ont. CA); *Dragone v. Riva Plumbing Limited*, supra note 16; *Naccarato v. Costco*, 2010 ONSC 2651; *Altman v. Steve's Music*, 2011 ONSC 1480; *White v. Woolworth (F. W.) Canada,* 1996 CanLII 11076 (Nfld. CA); and *Bishop v. Carleton Cooperative Ltd.* (1996), 21 CCEL (2d) 1 (NBCA).

20. In *McRae v. Dodge City Auto (1984) Ltd.*, supra note 14, frustration of contract was found when an employee had been absent for less than three months due to illness, but the court was persuaded that the disability was permanent.

21. G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed (Scarborough, ON: Carswell, 1999) at 677.

22. *Davis Contractors Ltd. v. Fareham Urban District Council*, supra note 1; *St. John v. TNT Canada Inc.*, supra note 12; *O'Connell v. Harkema Express Lines Ltd.,* 1982 CanLII 3198 (Ont. Sup Ct J); and *Polyco Window Manufacturers Ltd. v. Saskatchewan (Director of Labour Standards)*, supra note 7.

23. See England, supra note 3 at 421: "If an employee absent because of sickness is entitled to and is in receipt of long-term disability benefits under an employment contract, the contract almost certainly cannot be regarded as frustrated, since the parties will have foreseen the alleged frustrating event and have expressly contracted for it." See also *Antonacci v. Great Atlantic & Pacific Co. of Canada*, which varied on other grounds, supra note 19.

24. See also: *Duong v. Linamar Corporation*, supra note 15; and *Fraser v. UBS,* supra note 15.

25. *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43. An example of a typical statutory requirement to accommodate employee disability is found in s. 17 of the *Human Rights Code*, RSO 1990, c. H.19.

26. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 15(1). See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624; *Ontario Nurses' Association v. Mount Sinai Hospital*, 2005 CanLII 14437 (Ont. CA) (the section of the Ontario *Employment Standards Act* that excludes from severance pay employees whose contract has become frustrated violated Section 15 of the Charter).

27. See *Wightman Estate v. 2774046 Canada Inc.*, supra note 1 at paras 55-56.

28. A human rights tribunal may accept that a contract was frustrated by an employee disability and was therefore not a violation of the statutory duty to accommodate, but it must first assess whether accommodation would have been possible. See *Barboutis v. Singer Valve*, 2012 BCHRT 244; *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376; and *Gahagan v. James Campbell Inc.*, 2014 HRTO 14.

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