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2021, The Year
in Review:
Employment
Litigation

**Labour, Employment and Human
Rights Group**

November 9, 2021

2021, The Year in Review: Employment Litigation



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November 9, 2021
Fasken's 2021, The Year in Review Webinar Series

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Agenda

The New

- Mandatory vaccination and employment law
- Recent update: Injunctive relief and vaccination policies
- Dismissals during the pandemic can lead to longer reasonable notice periods
- Employment aspects of remote work arrangements

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▼ Agenda

The Normal

- Employment class action certified
- When a “quit” is really a quit
- A series of individual acts of misconduct, poor judgment, and dishonesty can justify termination for cause
- Bad faith and bad behaviour: courts remind employers that their behaviour before and during dismissal matters

▼ Agenda

The Normal

- Additional damages can be awarded for “lost opportunity”
- Updates on duty to mitigate
- The impact of *Waksdale* continues
- Service and severance
- Equal wages for student employees



The New

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Mandatory vaccination and employment law

- Balance between rights of individual workers and health and safety obligations
- Scope of policy
- Enforceability issues

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▼ Mandatory vaccination and employment law

- Challenge for employers
 - What reasonable accommodations/exemptions should be available?
 - What to do with unvaccinated employees?
 - Unpaid leave
 - Termination for cause
 - Are unvaccinated employees who are ultimately terminated owed compensation?

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▼ Mandatory vaccination and employment law

- Employment Insurance Codes (Block 16 – reason for leave or separation from employment) – Federal guidelines
 - When the employee is no longer working because the business has decreased operations or closed due to COVID-19, employers should use code A (shortage of work); or
 - When the employee is sick or quarantined, employers should use code D (illness or injury)

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▼ Mandatory vaccination and employment law

- **EI Codes (Block 16 – reason for leave or separation from employment)**
 - When the employee doesn't report to work because they refuse to comply with a mandatory COVID-19 vaccination policy, employers should use code E (quit) or code N (leave of absence); or
 - When an employer suspends or terminates an employee for not complying with their mandatory COVID-19 vaccination policy, employers should use code M (dismissal), (collectively, "COVID-19 ROE Codes").

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▼ Mandatory vaccination and employment law

- **The Ministry may also inquire if the employer:**
 - adopted and clearly communicated to all employees a mandatory COVID-19 vaccination policy;
 - informed employees that failure to comply with the policy would result in loss of employment;
 - applied the policy in a reasonable fashion within the workplace context; and
 - allowed any exemptions for employees refusing to comply with the policy.

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▼ Mandatory vaccination and employment law

- Early Litigation Shows Support for Mandatory Vaccines
 - Saskatchewan Court dismissed an application for injunction relief on the basis that the province's vaccination policy is in violation of Charter rights (*Friessen and al v. Attorney General*, September 30, 2021)
 - BC Human Rights Tribunal ruled that distrust of the vaccine is not enough to exempt someone from following provincial health orders or rules (*Complainant v. Dr. Bonnie Henry*, 2021 BCHRT 119)
 - Courts have ordered that children 12 or over be vaccinated in parental disputes based on the vaccinations being in the child's best interest

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▼ Injunctive Relief and Challenge to Vaccination Policies: *Blake v. University Health Network*, 2021 ONSC 7139

- Ontario court declined to extend emergency injunctive relief to employees challenging mandatory COVID-19 vaccination policy
- Key elements of decision:
 - No standing for unionized employees – essential character of the dispute lies squarely within the ambit of labour relations
 - Labour relations remedies available – no jurisdiction to continue interim injunction for unionized employees
 - No irreparable harm caused for terminated non-unionized employees

More to come...

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Yee v. Hudson's Bay Company, 2021 ONSC 387

- Termination of employment occurred in August 2019.
- Plaintiff argued that the pandemic should be considered in the context of determining the length of reasonable and proper notice.
- The pandemic resulted in increased difficulty to obtaining comparable employment.

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Yee v. Hudson's Bay Company, 2021 ONSC 387

- The Court ruled that terminations that occurred before the COVID-19 pandemic should not attract the same consideration as termination that occurred after the beginning of the COVID-19 pandemic.
- Because of the timing of the termination of employment, the Court did not consider the pandemic as a factor in determining the reasonable length of the notice period

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Kraft v. Firepower Financial Corp., 2021 ONSC 4962

- Termination of employment occurred during the second week of March 2020.
- Evidence clearly shows that the Plaintiff's job search coincided with the closing of the economy generally during the COVID-19 pandemic.
- The Court distinguishes the *Yee* decision, since in that case the termination of employment had occurred in August 2019, before the onset of the pandemic.

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Kraft v. Firepower Financial Corp., 2021 ONSC 4962

- In this case, the termination occurred just days before the state of emergency began in Ontario. The economy was already shutting down and remained shut down during the time the Plaintiff was looking for work.
- The Court is of the opinion that the evidence demonstrates that the pandemic had an impact on the Plaintiff's job search, therefore he deserves to receive at least somewhat above the average notice period.
- The Court pegs the figure at 10 months, or one month more than the average for his circumstances during non-pandemic times.

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Iriotakis v. Peninsula Employment Services Limited, 2021 ONSC 998

- The Plaintiff is 56 years old and was employed as a business development manager, including many duties involving sales, for 28 months.
- The Plaintiff was terminated without cause on March 25, 2020.
- In determining the reasonable notice to which the plaintiff was entitled, the court considered the context of the COVID-19 pandemic.

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▼ Dismissals during the pandemic can lead to longer reasonable notice periods

Iriotakis v. Peninsula Employment Services Limited, 2021 ONSC 998

- The Court is of opinion that the Plaintiff is entitled to a 3 months notice period.
- Emergency benefits provided by the federal government in the context of a pandemic cannot be considered the same as Employment insurance benefits.
- It would not have been fair to reduce the Plaintiff's entitlement to damages from his employer by the amount of the emergency benefits.

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▼ Remote Work – Jurisdictional Issues

Remote work can create jurisdictional concerns with respect to:

- Payroll
- Health & Safety
- Employment Standards
- Human Rights

▼ Remote Work – the Practical

- Privacy & Security
- Consistency & Equity (i.e. who can work remotely & why)
- Who pays for setting EEs up for remote work?
- New term/benefit of employment? Or something that can change?
- Tracking time/overtime



The Normal

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Employment class action certified

Heller v. Uber Technologies Inc., 2021 ONSC 5518

- Brought by Uber drivers who claim they have been misclassified as independent contractors and denied employment benefits
- *Class Proceedings Act, 1992* criteria met:
 - Breach of contract and breach of the *ESA*
 - Class: “any person who ‘used’ the Uber app to transport passengers and/or to provide delivery services”
 - Common issues (not aggregate damages)
 - Common issues trial the preferable procedure

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▼ When is a Quit really a Quit?

- Resignation must be clear and unequivocal
- Emotional EE = cooling off period may be necessary
- ERs need to confirm EEs intentions if there is any ambiguity

Wong v. Polynova Industries Inc., 2021 BCSC 603

Anderson v. Total Instant Lawns Ltd., 2021 ONSC 2933

Conway v. Griff Building Supplies Ltd., 2020 BCSC 1899

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▼ A series of individual acts of misconduct, poor judgment, and dishonesty can justify termination for cause

***Goruk v. Greater Barrie Chamber of Commerce*, 2021 ONSC 5005**

- The Plaintiff was 75 years old and occupied the position of executive manager and had worked for the Chamber for 17 years.
- The Plaintiff was terminated on April 29, 2014 following an investigation into unparticularized “irregularities”.
- The Plaintiff was terminated for cause and received no compensation at the time.
- The Court accepts that Plaintiff was in the position of a fiduciary to the Chamber.

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- ▼ A series of individual acts of misconduct, poor judgment, and dishonesty can justify termination for cause

Goruk v. Greater Barrie Chamber of Commerce, 2021 ONSC 5005

- The Chamber enumerated fifteen areas of misconduct that they said supported their decision to terminate Ms. Goruk for cause.
- At Trial, the Chamber focused on six areas that cumulatively support a finding that the trust in Ms. Goruk had been irredeemably fractured:
 - Altered Bank Document
 - Unauthorized Vacation Pay
 - Unauthorized Raise
 - Related-Party Contracts
 - Suppressed Auditor's Letter
 - Reimbursement of the American Express Card

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- ▼ A series of individual acts of misconduct, poor judgment, and dishonesty can justify termination for cause

Goruk v. Greater Barrie Chamber of Commerce, 2021 ONSC 5005

- Two additional issues were addressed by the Court following the evidence:
 - Impeding Access to Financial Records
 - E-Broadcast incident
- Any one of the incidents of malfeasance or the exercise of poor judgment would not, in the Court's view, be sufficient to support a termination for cause.
- But taken together they do.
- The Court accepts that the termination was a result of a loss of faith and trust in Ms. Goruk to carry out the role of executive director.

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- ▼ A series of individual acts of misconduct, poor judgment, and dishonesty can justify termination for cause

Goruk v. Greater Barrie Chamber of Commerce, 2021 ONSC 5005

- To keep in mind:
 - In drafting termination letters, the enumeration of each individual act could amount to cause;
 - Cumulative is strong;
 - Acts invoked must still be demonstrated by evidence.

- ▼ Bad faith and bad behaviour: courts remind employers that their behaviour before and during dismissal matters

- Aggravated/compensatory damages
 - Manner of dismissal is unfair or done in bad faith
- Punitive damages
 - Extreme conduct - so malicious and outrageous that it warrants the court's condemnation

▼ Trends in bad faith and bad behaviour

- Employers are being held to a very high standard of conduct
- Courts are prepared to look at behaviour before, during, and after the dismissal
- Litigation strategy is relevant and can be held against the employer
- Awards are generally increasing
- Courts have little patience for administrative errors

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▼ Recent Damages Awards

Awarded	The Wrongdoing
\$25,000 (aggravated)	<i>Russell v. the Brick Warehouse LP</i> , 2021 ONSC 4822 <ul style="list-style-type: none">• Poorly drafted termination letter• ESA minimums were not calculated properly• ER failed to pay ESA minimums for 7.5 months• ER didn't tell EE that his benefits had been continued• Justified aggravated but not punitive damages
\$0	<i>Leclair v. Patel Pharma Inc.</i> 2021 BCSC 1904 <ul style="list-style-type: none">• ER asked for EE's resignation – then fired her• ER did not "prepare" EE for being terminated• EE was not hired after ER gave her a "neutral" reference• No aggravated or punitive damages

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Recent Damages Awards

Awarded	The Wrongdoing
\$50,000 + (aggravated) \$25,000 (punitive)	<i>Humphrey v. Mene</i>, 2021 ONSC 2539 <ul style="list-style-type: none">• Set up EE to fail, verbally abused her, lied about the reasons for dismissal, communicated with clients & employees about her before her dismissal• Abandoned cause arguments but did not amend pleadings, led unnecessary evidence about her performance and personal life, likely hid or destroyed relevant documents

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Additional damages can be awarded for “lost opportunity”

- ***Ojanen v. Acumen Law Corporation*, 2021 BCCA 189**
- “Lost opportunity”
 - Where a dismissal deprives an employee of an opportunity they would have had but for the wrongful dismissal
 - These damages can be **significant**
 - Trial award: \$18,934 (general) and \$50,000 (aggravated)
 - Appellate award: \$118,934 (general [includes \$100,000 L.O.]), \$50,000 (aggravated) and \$25,000 (punitive)

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▼ Updates on duty to mitigate

- Reduction of notice period to account for failure to take reasonable steps to mitigate – too little, too late
- ***Lake v. La Presse (2018) Inc., 2021 ONSC 3506***
 - Reduction of notice period from 8 months to 6 months
 - Waited too long before beginning job search (1 month)
 - Applied to very few jobs
 - Aimed too high

▼ Updates on duty to mitigate

- Duty to mitigate may be challenging for employees in certain circumstances, each employee different
- Pregnancy may make it more difficult to find comparable employment, resulting in longer notice periods
- ***Nahum v. Honeycomb Hospitality., 2021 ONSC 1455***
 - Short service in HR role – pregnant at hiring and termination
 - Pregnancy will not automatically lengthen notice in every case – but it will likely increase the time it takes to find similar employment
 - Notice awarded: 5 months

▼ The impact of *Waksdale* continues

Waksdale v. Swegon North America Inc., 2020 ONCA 391

- Appeal to the SCC dismissed in Jan 2021
- In 5 out of 6 cases with a *Waksdale* problem, the court found for the plaintiff
- “Saving” language isn’t saving anything
- Severability clauses aren’t helping, either

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▼ The impact of *Waksdale* continues

- The 1 beacon of hope: *Rahman v. Cannon Design Architecture Inc.*, 2021 ONSC 5961
- Problem is only in jurisdictions that define just cause – e.g. not an issue in Sask. or B.C.
- Review your employment contracts in Ontario for *Waksdale* issues & revise if necessary

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▼ Service and Severance Update

- Courts will consider a variety of factors in deciding what impact a **break in service** will have on **length of service** for calculating common law termination entitlements
- ***Hetherington v Saskatchewan Liquor and Gaming Authority*, 2020 SKQB 110**
 - Public sector employee – 28 years, 2 year gap in service
 - All 28 years should have been included in calculating notice
 - Employment agreement not determinative on credit for prior service
 - Break in service relatively short as compared to 28 years of service

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▼ Equal wages required for student employees

***Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beudry et autres)*, 2021 QCCA 989**

- The Court of Appeal upholds a decision rendered by the Human Rights Tribunal which ordered the Aluminerie de Bécancour, following an action brought by the *Commission des droits de la personne et de la jeunesse*, to pay the victims damages for injury to their dignity.
- In 1995, student wages were reduced to 85% of the lowest wage index and this reduction has been maintained in subsequent collective agreements.

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▼ Equal wages required for student employees

Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres), 2021 QCCA 989

- The Commission's position was:
 - The students are the lowest paid of all the employees;
 - The difference in salary is justified, by the employer, because of their age and social condition;
 - Although the students perform the same work as other employees, who receive a higher salary.

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▼ Equal wages required for student employees

Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres), 2021 QCCA 989

- The Court of appeal upholds the decision rendered by the Human Rights Tribunal based on the following elements:
 - Students are part of the "social condition" set out in s. 10 of the Quebec Charter and that they are victims of discrimination;
 - It is because of this status that students do not receive equal treatment for equivalent work compared to other categories of employees;
 - Evidence shows, by analyzing the tasks of the categories of employees according to the sectors of activity, that students sometimes assume higher responsibilities than occasional or regular employees;
 - The difference in remuneration for the performance of equivalent tasks between different categories of employees violates section 19 of the Quebec Charter.

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▼ Equal wages required for student employees

Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres), 2021 QCCA 989

- The Court of Appeal found no reasons for the employer to pay students a lower wage for equivalent work.
- The students have suffered moral prejudice and that they have been victims of injustice, belittled and diminished.
- This attack on their dignity justifies the award of \$1 000 for each of the students involved.

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▼
Questions?

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Biographies



Areas of Expertise

Labour Relations and Collective Bargaining | Workplace Equity | Labour, Employment & Human Rights | Employment Advice and Litigation | Labour Mergers, Acquisitions and Sales of Business | Human Rights & Discrimination | Health | Aviation Law

Education

1995, LLB, University of Toronto
1992, B Comm (Hons), University of British Columbia

Jurisdictions

Ontario, 1997 | British Columbia, 1996

Language

English

Karen Sargeant is co-leader of the Labour, Employment and Human Rights Group, she is also the Chair of Fasken's Ontario Labour, Employment and Human Rights Group. She has represented employers in all aspects of workplace law for more than 20 years.

Karen frequently appears before arbitrators, mediators, the Ontario Labour Relations Board, the Canada Industrial Relations Board, the Human Rights Tribunal of Ontario and the Canadian Human Rights Tribunal. She has many winning decisions from all of these administrative bodies, for clients like Air Canada, Gate Gourmet Canada Inc., Humber River Hospital and Sunnybrook Health Sciences Centre.

Karen fiercely represents her clients' interests. Although she is a fierce advocate, she also knows when and when to pursue settlement. At the appropriate time, and when appropriate for our client's interests, she engages in negotiations with an objective of agreement. Karen has been able to assist employers in all sectors achieve negotiated settlements that are acceptable to them, while saving them significant litigation time and expense.

In addition to her appearance work, Karen provides clients with exceptionally high quality day-to-day legal advice. She presents an accurate picture of outcomes to clients and provides practical solutions to clients' workplace problems. In this way, she knows clients' workplaces and has an active interest in helping them manage their employment issues.

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Karen regularly lectures and teaches at conferences and to groups of management employees on employment and labour matters. She is also a frequent writer and was a founding editor of Fasken's weekly bulletin, HR Space.





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Areas of Expertise

Labour, Employment & Human Rights | Employment Advice and Litigation | Private Equity & Venture Capital | Health

Education

2016, Attestation, Mediating disputes, Harvard Law School, Executive Education

1995, LLB, Université de Montréal

Jurisdiction

Quebec, 1997

Languages

French | English

Magali Cournoyer-Proulx provides top-level strategic advice and has an unmatched reputation in the area of employment law. She represents clients from various sectors, including banking and insurance, as well as a number of financial institutions, tech companies and manufacturing companies. She advises clients on all aspects of individual employment relationships: contracts of employment, clauses restricting employment, compensation packages, labour standards, policies, termination, human rights, workplace harassment, misconduct, and difficult work environments.

She regularly appears before the civil courts and administrative tribunals of both provincial and federal jurisdiction. Magali also completed a mediation program offered by Harvard Law School (Executive Education) and is a certified civil, commercial and labour mediator with the Barreau du Québec.

Her expertise in employment law is recognized year after year by various directories, including Chambers Canada, Canadian Lexpert Legal Directory, Best Lawyers and Who's Who Legal.

Magali also has expertise in professional and health law. She has co-authored the *Code des professions annoté* since 2015. Her expertise in health law has been recognized in numerous directories, including Best Lawyers, which named her Lawyer of the Year for her practice in Health Law in Montreal.



Area of Expertise

Labour, Employment & Human Rights

Education

LLB, University of Victoria

BSc (Hons), University of Victoria

BFA, Theatre, University of Victoria

Jurisdictions

Yukon, 2015 | British Columbia, 2006

Language

English

Elizabeth Reid is a labour, employment and human rights lawyer in Vancouver. Clients appreciate Elizabeth's technical expertise and engaging personality as they navigate through the complex employment and human rights laws that impact their relationships with their employees.

Elizabeth's approach starts with prevention. Her focus is creating clear and accessible contracts and policies that can be understood by employees and employers alike. She is a skilled advisor for day-to-day concerns and compliance issues that occur during the employment relationship, and works collaboratively to get results that meet her clients' needs.

If formal proceedings are necessary, Elizabeth represents clients at all levels of court in British Columbia, as well as in front of provincial and federal human rights and employment standards tribunals. A former judicial law clerk at the British Columbia Court of Appeal, Elizabeth brings valuable insight into the judicial decision-making process to her litigation work.

Seen as someone who can explain complex areas of law in a clear and compelling way, Elizabeth is regularly asked to provide legal commentary for television, radio, and print media.



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Area of Expertise

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Education

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Language

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Maria-Cristina Cavicchia graduated Cum Laude from the Faculty of Law at the University of Ottawa, where she was on the Dean's Honour List. Maria graduated as the recipient of the Goldblatt Partners Prize for superior overall performance in labour, employment and human rights courses, the Emond Harnden LLP prize for the highest standing in Labour Law, and the Clarey B. Sproule Memorial for her role as Caseworker at the University of Ottawa Community Legal Aid Clinic. Prior to law school, Maria obtained a Bachelor of Arts in Criminology from Ryerson University, where she graduated with Distinction. During the summer of 2017, Maria worked as a 1L Summer Law Student for Revera Inc. Maria has held a number of legal writing and research positions, most recently as a Law Student Clerk to judges at the Ontario Court of Justice in Ottawa. Some of her other experiences include Assistant Editor for the Ottawa Law Review, and Research Assistant for the Ryerson Law Research Centre and the Centre for Law, Technology & Society. At law school, Maria undertook a directed-research project on the constitutionality of laws governing prison labour in Canada, as well as a paper exploring medical cannabis use in safety-sensitive workplaces while a student in Canada's first Cannabis Law course. As a law student, Maria also developed her passion for advocacy, appeared before the Criminal Injuries Compensation Board on behalf of her legal aid clients, and placed second in the 2018 Hicks Morley Moot Competition at the University of Ottawa. Maria is committed to community involvement and equity-seeking initiatives, having volunteered with the Ontario Justice Education Network in Toronto, Downtown Women's Centre in Los Angeles, and Women's Legal Mentorship Program in Ottawa. Maria enjoys playing and watching live music, hiking, and walking her dogs.

Maria-Cristina summered at the Firm in 2018 and was seconded to Holt Renfrew.



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