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A Summary of Recent Employment Law Trends Developing in Ontario and How Those Trends are Being Applied in British Columbia

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A SUMMARY OF RECENT EMPLOYMENT LAW TRENDS DEVELOPING IN ONTARIO AND HOW THOSE TRENDS ARE BEING APPLIED IN BRITISH COLUMBIA

I. Mitigation of Damages - *Brake V. PJ-M2R Restaurant Inc.*[1]

A. Introduction

The duty to mitigate is a consideration in almost all employment law cases arising out of the termination of an employee's employment. The impact that this duty has on an employee's claim can be profound and, in some circumstances, essentially dictate whether an action is commenced at all.

Recently, a trend in Ontario courts has emerged regarding the application of mitigation in employment law cases. Ontario courts have been approaching the issue of mitigation in a more

1 This section was written by Steven Baker

subtle manner as compared to the traditionally binary approach in which the duty to mitigate has been considered in employment law cases. This new approach has at once clarified the scope of the duty to mitigate while also creating potential new battlegrounds in the litigation process. While the law in this area is far from settled, some traction is being gained in British Columbia. This section of the paper will canvass the development of a recent trend in Ontario regarding mitigation of damages, how that same trend is gaining traction in British Columbia and some of the practical impacts that will be felt by employment law practitioners in British Columbia.

It does so in three parts:

1. a brief review of the duty to mitigate;
2. short case briefs of several recent Ontario and British Columbia cases; and
3. commentary on how the developing trends will impact employment law practitioners in British Columbia.

B. The Duty to Mitigate

The duty to mitigate, as it is generally referred to[2], stands for the principle that a plaintiff cannot recover damages for harm suffered that could have reasonably been avoided. While not a duty in the traditional sense, a plaintiff who fails to take reasonable steps to mitigate her or his losses will almost always prejudice their claim for damages.

Regardless of how it is characterized, the duty to mitigate one's losses is not without limits. The Supreme Court of Canada has summarized the scope of one's duty to mitigate as follows:

> 24 In *British Columbia v. Canadian Forest Products Ltd.,* 2004 SCC 38 (CanLII), [2004] 2 S.C.R. 74, at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324; *Asamera; Evans v. Teamsters Local Union No. 31,* 2008 SCC 20 (CanLII), [2008] 1 S.C.R. 661, at para. 30).
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> 25 On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1992), 13 *Advocates' Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, 1993 CanLII 3025 (FCA), [1994] 2 F.C. 279, at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and

2 Judges will also frequently characterize this as the principle of mitigation or the doctrine of mitigation.

> common sense, which seeks to do justice between the parties in the particular circumstances of the case.[3]

With specific regard to cases of wrongful dismissal, our Court of Appeal has summarized the duty to mitigate as follows:

> That "duty" – to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available – is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
>
> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests – to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.[4]

A dismissed employee will be expected to undertake a reasonable search for re-employment. The dismissed employee will also be expected to accept available employment where the salary is relatively commensurate and the working conditions substantially similar. What constitutes a 'reasonable search' requires a case-by-case analysis but, generally speaking, a dismissed employee will not materially prejudice their legal position by refusing to take a "markedly inferior" position.[5] If an employee is able to secure replacement income during the notice period, those amounts may be deducted from the damages arising out of their wrongful dismissal.[6]

A dismissed employee will be found to have failed regarding their duty to mitigate if they do not conduct a reasonable search for re-employment or if they refuse to accept a reasonable offer of employment. Deductions will be made from damages awarded in circumstances where it is found that the dismissed employee failed to mitigate their losses.[7]

Traditionally, courts have approached the issue of mitigation in a binary fashion – simply quantifying the amount of income earned during the notice period and deducting that amount from the damages claim. However, a more nuanced approach to mitigation has been

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3 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at paras 24 and 25

4 *Forshaw v. Aluminex Extrusions Ltd*., 1989 CanLII 234 (BC CA)

5 *Schamborzki v. North Shore Health Region,* 2000 BCSC 1573 at paras 45 and 46

6 *Red Deer College v. Michaels* [1976] 2 SCR 324, preamble

7 *Booton v. Synergy Plumbing and Heating Ltd*., 2019 BCSC 276 at paras 69 - 73

developing in Ontario courts which has, and will continue to have, an impact on employment law practitioners in British Columbia.

C. Cases

For the purposes of this paper, I will not undertake exhaustive summaries of the following cases. I have limited our focus to parts of the decisions dealing with the duty to mitigate.

1. Ontario

Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402

In Brake, the Plaintiff argued that she had been constructively dismissed from her managerial position with the Defendant and was awarded damages representing 20 months' compensation in lieu of notice. The Plaintiff earned income during the notice period from various sources, including a job she had maintained while employed with the Defendant as well as other employment she secured during the notice period. The new employment the Plaintiff secured was a significant step back from her prior managerial job with regard to remuneration, the degree of responsibility and authority she exercised. The trial judge did not make any deductions regarding the income earned by the Plaintiff during the notice period. Moreover, the trial judge found that the new employment secured by the Plaintiff was "so substantially inferior to the managerial position she held with the Defendant that the former does not diminish the loss of the latter."[8]

On Appeal, the Court considered whether the trial judge had erred in law by failing to deduct income that the Plaintiff earned during the notice period. Ultimately, the Court of Appeal decided that no error had been made because the income earned by the Plaintiff was not "amounts received in mitigation of loss".[9] The Court justified this finding by noting that the amounts received were not in mitigation of loss because they could have been "earned while continuing with the first [job]…"[10] Specifically, the Court refused to make deductions for income earned from part-time work that had not been mutually exclusive with her employment with the Defendant.

In concurring reasons, Feldman J.A. also found no error on the part of the trial judge. Feldman J.A. seized and expanded on the position that income earned from "substantially inferior" reemployment should not be deducted from damages arising from a wrongful dismissal and expanded upon it. Feldman J.A. noted at paragraph 158 that:

> 158 It follows, in my view, that where a wrongfully dismissed employee is effectively forced to accept a much inferior position because no comparable position is available, the amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay.[11]

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8 *Brake v. PJ-M2R Restaurant Inc.,* 2016 ONSC 1795 at para 24

9 *Brake v. PJ-M2R Restaurant Inc.,* 2017 ONCA 402 at para 97

10 Ibid, at para 140

11 Ibid, at para 158

While by no means completely novel, the Court of Appeal's consideration of the Plaintiff's duty to mitigate was more nuanced than the traditionally binary approach where income earned is simply deducted from damages awarded without further consideration.

MacKenzie v. 1785863 Ontario Ltd., 2018 ONSC 3442

An issue in *MacKenzie* was whether income earned by the Plaintiff during the notice period should be deducted from the damages awarded. The Plaintiff had occupied the most senior position with the defendant company and supervised between 40 and 50 employees. Following his termination, the Plaintiff accepted positions that paid him substantially less than what he earned during his time with the Defendant. Moreover, the Plaintiff exercised considerably less responsibility in his subsequent positions then he did with the Defendant. The decision to accept reemployment on such terms was born out of necessity as opposed to caprice.

Adopting Feldman J.A.'s concurring reasons in *Brake*, Pierce J. decided that the Plaintiff "was obliged to take positions that were inferior in responsibility and salary after his termination. Accordingly, I find that the income earned should not be deducted from the notice period awarded."[12]

Similar to the concurring reasons from the Court of Appeal in *Brake*, Pierce J.'s nuanced consideration of mitigation properly factored in the unfortunate reality that dismissed employees may be forced through necessity to accept markedly inferior re-employment.

2. British Columbia

Pakozdi v. B & B Heavy Civil Construction Ltd., 2018 BCCA 23

In *Pakozdi*, the trial judge refused to deduct income earned by the Plaintiff during the notice period from work he undertook as a consultant. The basis of the trial judge's refusal to deduct this income was because the Plaintiff had done some consulting work during his time with the Defendant and that the Defendant had knowledge of this.[13]

The Defendant appealed and our Court of Appeal had to consider the same issues as the Ontario courts did in *Brake* and *MacKenzie* – the deductibility of income earned during the notice period. As above, the Plaintiff in *Pakozdi* had undertaken supplementary consulting work while still employed by the Defendant. Following the termination of his employment the Plaintiff increased his consulting work and actually increased the income from his consulting business to such a degree that he was earning more than he would have been able to had he remained in his employment with the Defendant. None of this income was deducted at trial.

The Defendant argued on appeal that the trial judge had erred in excluding the income earned from consulting work on the basis that the Defendant employer had knowledge of the Plaintiff's second job. The Defendant's position was that because the Plaintiff earned more from his post-employment consulting work then he would have during his employment, he successfully avoided loss. Seizing on the Ontario Court of Appeal's decision in *Brake*, the Plaintiff argued

12 *MacKenzie v. 1785863 Ontario Ltd.,* 2018 ONSC 3442 at para 14

13 *Pakozdi v. B & B Heavy Civil Construction Ltd.,* 2016 BCSC 992 at paras 81 and 82

that the income derived from his consulting work was properly excluded because it could have been earned during his time with the Defendant.

In response to the Defendant's argument, our Court of Appeal took a pragmatic approach and essentially split the difference between the two positions, as follows:

> 49 That proposition also is too categorical because it fails to take into account the fact that at least some of the consulting income earned post-termination could have been earned if the respondent's employment with B & B had continued, and therefore is not properly characterized as replacement income.[14]

Our Court of Appeal analyzed how much consulting income the Plaintiff earned during his time with the Defendant and used that as a baseline to calculate how much consulting income earned during the notice period was appropriately characterized as supplementary income and, therefore, not deductible from his damage claim.[15]

Bailey v. Service Corporation International (Canada) ULC, 2018 BCSC 235

In *Bailey*, Griffin J. had to consider whether real estate commissions earned by the Plaintiff during the notice period should be deducted from his claim for damages. The Plaintiff obtained his real estate license shortly before his employment was terminated by the Defendant but had not begun practicing as a real estate agent in earnest at that time. There was no evidence suggesting that the Plaintiff would have been barred from working part-time as a real estate agent while still carrying on his full time employment with the Defendant.

Utilizing the same nuanced approach as in *Brake, MacKenzie* and *Pakozdi*, Griffin J. found that since the Plaintiff was never expressly precluded from working part-time as a real estate agent during his time with the Defendant, the real estate commissions he earned during the notice period should be characterized as supplementary income. Accordingly, Griffen J. held at paragraph 195:

> 195 It is clear that supplementary income that could have been earned had employment continued ought not to be deducted from a claim for damages for wrongful dismissal: see *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23 (CanLII) at paras. 44-45. I find that Mr. Bailey would have been able to earn that real estate commission even while working at SCI, had his employment not been terminated. For this reason and the reasons enunciated in *Cottrill* as to why mitigation does not apply, it would be inappropriate to reduce his damages claim by this amount. [16]

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14 *Pakozdi v. B & B Heavy Civil Construction Ltd.,* 2018 BCCA 23 at para 49

15 Ibid, at para 50

16 *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235. In *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2017 BCSC 704, it was found that the common law duty of mitigation does not apply when the plaintiff is limited to the statutory termination pay under s.63 of the *Employment Standards Act*.

3. Commentary

Brake and *MacKenzie* represent a marked shift away from the traditional binary approach that one typically sees regarding the treatment of mitigation in employment law cases. The trial judge in *Brake* laid the groundwork by considering practical realities of a Plaintiff's duty to mitigate her or his damages; not all employment (and by extension, employment income) is mutually exclusive and dismissed employees may be forced out of necessity to accept reemployment on substantially inferior terms.

I am not troubled by the trial judge's conclusion in *Brake*. While it certainly has not always been applied as such, the law is that mitigation is obtaining equivalent employment and not just 'any employment'. The Court of Appeal's analysis regarding what constitutes supplementary income and the concurring reasons of Feldman J.A. set out an approach to mitigation that affords the flexibility to go beyond a binary deduction of any income earned during the notice period.

MacKenzie provides much needed buttressing and some clarification of flexible approach set out by the trial judge and Court of Appeal in *Brake*. It is not the case that all instances of dismissed employees securing inferior reemployment are motivated by necessity. It may be that a dismissed employee makes the conscious decision to take on less responsibility or duties that do not justify similar remuneration; in those circumstances a different outcome might obtain as compared to *Brake* and *MacKenzie*. Pierce J.'s treatment of the mitigation issue acknowledges this outcome, albeit inferentially, by noting that the Plaintiff was "obliged" to take inferior positions.[17] As above, the inherent flexibility afforded to judges under this approach to mitigation allows for case-by-case scrutiny of the reasons underlying a dismissed employee's decision to accept inferior reemployment.

Acknowledgement of "supplementary income" and income earned from "markedly inferior" employment as excluded income for the purposes of mitigation properly recognizes that a dismissed employee's duty to mitigate her or his losses is *not* a duty owed to the former employer. Moreover, and with specific regard to issues of income earned from "markedly inferior" employment, this approach to mitigation identifies that dismissed employees may find themselves forced to accept inferior re-employment out of necessity. In my submission, the nuanced approach to mitigation adopted by Ontario courts is the correct approach. Nevertheless, and as is the case with many developing legal trends, there are still many important questions left unanswered.

In *Brake* the Court acknowledged that "supplementary income" could, at a certain point, exceed "an amount that could reasonably be considered as "supplementary"…"[18] This question has not been answered in the time since the *Brake* decision was released. There was an opportunity for our Court of Appeal to consider this question in *Pakozdi*, but it instead took a practical approach to the issue and simply analyzed the historical amounts the Plaintiff had earned from his consulting job. This illustrates the flexibility afforded to judges under the *Brake* and *MacKenzie* approach. Some might note that scrutinizing what an employee *actually* earned

17 Supra note 11 at para 14

18 Supra note 8 at para 145

from supplementary sources is just a common sense means of addressing the question; they would not be wrong. It is important that our Court of Appeal took this step and walked back the categorical approach taken at trial. Nevertheless, the question of whether there is an upper limit to what constitutes supplementary income remains unanswered and will almost certainly be an area of contention in future cases.

The decisions canvassed in this section of the herein paper are examples of how judges in Ontario and British Columbia have recently been addressing circumstances where a dismissed employee has earned income during the notice period. While the more nuanced and flexible approach demonstrated in these decisions is in my submission a marked improvement on the binary analysis traditionally used, it is not without its problems. In *Bailey,* Griffen J. found that the Plaintiff would have been able to earn real estate commissions while working for the Defendant. The basis of this finding was that there was no express term or provision that would have barred the Plaintiff from earning said commissions. While the flexible approach to mitigation may be more aligned with the purpose and policy considerations of a Plaintiff's duty to mitigate, it can, as was the case in *Bailey* lead to speculation. Any legal analysis with speculative elements is going to open the door for broader ranges of argument and, consequently, increased costs.

A shift away from the binary approach to mitigation will impact how practitioners in British Columbia have to assess mitigation during the life of a file. In circumstances where a Plaintiff has secured reemployment early in the notice period, additional time should be spent assessing the nature of the reemployment, the Plaintiff's reasons for accepting it and whether it can reasonably be considered supplementary employment or markedly inferior employment. This will likely not be a new exercise for many practitioners, but in light of the decisions canvassed herein it may take on more significance – especially in cases giving rise to longer notice periods.[19] Plaintiffs may be more willing to commence an action and push it forward despite having secured reemployment early on in the notice period. Concomitantly, Defendants may need to spend more time discovering not only the amounts a Plaintiff has earned during the notice period but also the nature of the reemployment and the Plaintiff's reasons for accepting it. The inherent uncertainty surrounding how income earned will be characterized may give rise to areas of contention that the traditionally binary approach avoided. As is often the case, additional areas of contention may in turn drive more disputes to trial.

4. Conclusion

It is not clear how far courts in Ontario and British Columbia will be willing to expand the scope of excluded for the purposes of quantifying damages. Ontario's courts in *Brake* and *MacKenzie* demonstrated a degree of flexibility that has afforded counsel the opportunity to argue for an extremely broad scope of excluded income. Our Court of Appeal did temper its willingness to

19 This may become more of an issue moving forward. In the recent Ontario decision *Dawe v. Equitable Life Insurance Company*, 2018 ONSC 3130, the Plaintiff was awarded a 30 month notice period. In that case, the Plaintiff had only asked for 30 months. Mr. Justice Gordon, in rendering his decision, noted that he "felt this case warranted a minimum 36 month notice period." (Para 36) If notice period awards grow, even if only at the high end of the spectrum, issues of mitigation will make their way to the fore.

an overly categorical approach to the issue, but questions remain unanswered. At what point does the quantum of supplementary income earned cause it to no longer be supplementary? How does a Plaintiff's securement of supplementary employment affect her or his duty to continue searching for fulsome replacement employment? If a Plaintiff is forced out necessity to accept markedly inferior employment, are they still required to continue their attempts to secure alternative employment? These are just some of the questions arising from *Brake*, *MacKenzie*, *Pakozdi* and *Bailey*. The flexible approach to mitigation appears to be more aligned with practical and policy considerations underlying the duty to mitigate, but has also introduced uncertainty that may frustrate attempts to resolve claims early in the process.

II. Enforceability of Termination Provisions - *Wood v. Fred Deeley Imports Ltd.*[20]

… Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.[21]

A. Introduction

When interpreting whether a termination clause that limits an employee's entitlement to the statutory minimums is valid and enforceable, the analysis typically starts with Justice Iacobucci's 1992 comments in *Machtinger v. HOJ Industries Ltd.* Absent a valid contractual termination provision, the common law presumes that employment can be terminated upon reasonable notice. With the insertion of a valid termination clause, limiting the employee to their statutory entitlements only, the statutory floor set out in provincial Employment Standards legislation is converted into a contractual ceiling. However, where that contractual termination provision is ambiguous and uncertain or purports to contravene the employee's statutory entitlements, courts will be asked to render the clause void and unenforceable.

In its seminal decision *Shore v Ladner Downs ("Ladner Downs")*[22], British Columbia's Court of Appeal, was asked to rule on the enforceability of a termination clause which read:

> … Firm policy dictates your employment to be probationary for the first 6 months during which employment may be terminated at the sole discretion of the Firm without cause. Notice period within and after the probation period to be 30 days by either party.[23]

Shore was dismissed after less than a year. However, he argued that had he remained employed for five years or more, the termination clause would provide for less than his statutory minimums and thus it was unenforceable as it contravened his statutory entitlements.

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20 This section was written by Catherine Milne

21 *Machtinger v HOJ Industries Ltd.* [1992] 1 SCR 986 at para 35.

22 [1998] BCJ No. 1045 (C.A.).

23 *Ibid* at para 2.

Though his employer argued that the term would be void only "from the point in time when the notice provided for in the contract is no longer adequate under the Act"[24], B.C.'s Court of Appeal rejected the that argument and found that the termination clause was unenforceable on the basis that it *could* contravene his statutory entitlements at some point in the future.

Since *Ladner Downs*, courts in Ontario and British Columbia have been regularly asked to rule on the validity and enforceability of contractual termination provisions. Particularly in Ontario this has become a bit of a sport of late. Plaintiff counsel regularly attend before the courts attempting to argue around language which may, in any way, offend their client's statutory rights and so revert to a common law notice period[25]. This portion of the paper will review the current state of Ontario and British Columbia's jurisprudence around enforceability of termination provisions, and offer some key takeaways for British Columbia counsel.

B. The Ontario Perspective

Pre-*Wood v. Fred Deeley Imports Ltd.* – Mandatory Inclusion of all Statutory Entitlements

Between 2011 and 2015, Ontario courts were repeatedly asked to rule on the enforceability of termination clauses which did not specifically provide for continuation of all entitlements through the statutory notice period.[26] One such decision was *Stevens v. Sifton Properties Ltd.*, ("*Stevens*")[27] where the termination clause in the Plaintiff's employment agreement provided:

> (b) [Sifton] may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.
>
> (c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against [Sifton] which may arise out of statute or common law with respect to the termination of your employment with [Sifton].

The Court accepted Stevens' argument that the termination clause was unenforceable because it did not provide for the continuation of her group benefits during the statutory notice period, finding that the failure to include benefits continuation in the termination clause meant that she would receive less than the ESA's minimum entitlements upon termination of employment. As a result, the termination clause was rendered null and void. Notwithstanding Sifton's voluntary provision of Stevens' benefits after the fact [of termination] the reality was that the employment agreement drafted by the employer was contrary to law.[28]

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24 *Ibid* at para 10.

25 See for example *Ceccol v. Ontario Gymnastic Federation* (2001), 204 D.L.R. (4th) 688 (Ont. C.A), *Hosford v. Warren Gibson Limited* 2014 CanLII 34392 (ON SCSM), Howard v. Benson Group 2015 ONSC 2638 (CanLII), rev'd 2016 ONCA 256 (CanLII) on other grounds, and *Musoni v. Logitek Technology Ltd*. 2013 ONCA 622.

26 Note: Section 61 (1) (b) of the Ontario *Employment Standards Act* ("the Ont. ESA") provides for continuation of all employee's entitlements and benefits through their statutory notice period.

27 *Stevens v. Sifton Properties Ltd*. 2012 ONSC 5508 ("*Sifton*")

28 *Sifton*, supra, para. 65.

Following a series of cases[29] that seemed to regularly render termination provisions unenforceable by applying the *Sifton* and *Ladner Downs* principles, the law suddenly shifted significantly in Ontario in *Oudin v. Centre Francophone de Toronto*[30] ("*Oudin*"). Contrary to the cases that had preceded it, in *Oudin* Ontario's Court of Appeal enforced a termination clause which didn't specifically reference either benefits continuation or statutory severance[31], but which contained a saving provision that read:

> 12.2 If any of the provisions of the present agreement is invalid or unable to be performed by virtue of any law, regulation, order or any other requirement or other principle of law, this modality shall in such case be considered to be modified or nullified, but only to the extent necessary to comply with the statute, regulation, order, legal requirement or principle and the other dispositions of the present agreement shall remain in force.

In addition to relying on the saving clause language, somewhat surprisingly, the Court was swayed by evidence demonstrating that the Centre had historically provided employees with the greater of the 15 days notice period or the ESA prescribed by that termination clause. Taken together, the Court found that the Centre had complied with the ESA. The decision of the motions judge was appealed, and the Court of Appeal confirmed that the termination clause was enforceable, notwithstanding that the only statutory entitlement it referred to was notice. Following *Oudin,* the law in Ontario was anything but settled.

Wood v. Fred Deeley Imports Ltd. – An Attempt at Clarity

A year after Oudin, the Court of Appeal attempted to clarify the requirements of a valid and enforceable termination clause in Wood v. Fred Deeley Imports Ltd.[32] ("Fred Deeley"). Wood had been employed for eight years and three months at the time her employment was terminated without cause. Her termination clause read:

> [The company] is entitled to terminate your employment at any time without cause by providing you with two weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the company. If the company terminates your employment without cause, the company shall not be obliged to make any payments to you other than those provided for in this paragraph… The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.

Wood commenced an action for wrongful dismissal and brought a motion for summary judgment. Relying on *Sifton*, she argued that the termination clause was unenforceable because it contracted out of the ESA by failing to provide for the continuation of benefits during the statutory notice period and potentially contracted out of the requirement to provide statutory

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29 See for example *Miller v. A.B.M. Canada Inc*., 2014 ONSC 4062, aff'd 2015 ONSC 1566 (Div. Ct.) and *Wright v. The Young and Rubicam Group* 2011 ONSC 4720 (S.C.J.) (CanLII)

30 *Oudin v. Centre Francophone de Toronto,* 2016 ONCA 514.

31 Note: Section 64 of the Ont. ESA provides employees who are terminated after five (5) years of service and who work for an employer with an annual payroll of $2.5 Million in the province, an additional week per year of service (or part thereof) as statutory severance, to a maximum of 26 weeks.

32 *Wood v. Fred Deeley Imports Ltd.* 2017 ONCA 158 ("Fred Deeley")

severance pay. The motions judge dismissed her motion. Wood appealed to the Court of Appeal and her appeal was successful.

In its decision, the Court of Appeal analyzed the state of Ontario's law as it applies to interpreting employment agreements. It clarified that a termination clause can rebut the presumption of common law reasonable notice only if its wording is clear. The Court went on to state that employees should know at the beginning of their employment what their entitlement will be at the end of their employment. It reiterated that when faced with a termination clause that could reasonably be interpreted in more than one way, Courts should prefer the interpretation that gives the greater benefit to the employee.[33]

Against this backdrop, the Court of Appeal found that the termination clause was unenforceable because it *excluded* benefits continuation during the statutory notice period. Similarly, the Court also rejected the employer's argument that the word "pay" in the termination clause was sufficiently broad to capture both salary and benefits. In this regard, the Court held that the term did not clearly incorporate benefits continuation and that the ambiguity was to be interpreted in favour of the plaintiff.

Additionally, the Court rejected the employer's argument that it had satisfied its obligations under the ESA because, although the employment agreement did not clearly state that benefits would be continued during the statutory notice period, the employer had nonetheless continued Wood's benefits for that period. In response, the Court held that the enforceability of a termination clause depends only on the wording of the clause itself, and not on what the employer may have done post-termination. Ultimately, the Court of Appeal held that because the termination clause excluded an obligation to continue benefits during the ESA notice period, the clause was unenforceable.

Ontario Decisions Post-*Fred Deeley* - No Absolute Clarity

Since *Fred Deeley*, Ontario trial and appellate courts have been asked to further clarify the state of the law regarding the enforceability of termination clauses in employment agreements, particularly when they are silent on the employer's obligation to provide statutory entitlements. In *Nemeth v. Hatch*[34] *("Nemeth"),* Nemeth's employment was terminated after 19 years of service. The termination clause in question provided simply:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

Nemeth was unsuccessful at trial and appealed, advancing three arguments before the Court of Appeal:

- the termination clause was unenforceable because it didn't explicitly displace the common law presumption of reasonable notice;

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33 Fred Deeley, supra, para 28.

34 *Nemeth v. Hatch,* 2018 ONCA 7 ("Nemeth")

- the termination clause was unenforceable because it attempted to contract out of statutory severance because it was silent on severance, and;
- there were two possible readings of the provision, and he should get the greater benefit as the employee where there are two possible interpretations.

Nemeth was only successful on his final argument and was awarded – a paltry - 19 weeks.

Shortly after *Nemeth*, Ontario's Divisional Court was asked to review the following termination provision in *Movati Athletic (Group) Inc. v. Bergeron*[35] *("Movati")*:

> Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the Employment *Standards Act, 2000*, and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act, 2000,* as amended from time to time.

Bergeron was successful in her motion for summary judgment on the basis that although the termination clause complied with the ESA, it did not clearly oust her entitlement to reasonable notice at common law. In this regard, the motions judge stated that if the termination provision had contained wording such as, "upon termination, severance, if applicable will be paid **only** pursuant to the ESA … **only** for the minimum required period required by the ESA…" the language would be rendered clear such that the presumption of reasonable notice at common law could be rebutted.[36] The Divisional Court agreed.

In a similar vein, in *Hampton Securities v. Dean*[37] *("Dean*") the Ontario Court of Appeal recently held that, as in *Sifton* and *Fred Deeley,* a termination clause that excludes the continuation of benefits during the statutory notice period will violate the ESA and be rendered unenforceable.

The termination clause in *Dean* read:

> In the event Hampton wishes to terminate your employment without cause they may do so by paying you the minimum amounts required pursuant to the Employment Standards Act of Ontario in force at the time of termination; no further compensation shall or will be provided. You agree by signing this agreement that such amounts are the total compensation you will receive if terminated without cause.

In this regard, the Court of Appeal held that the trial judge correctly analogized the termination clause in the employment contract to the termination clause in *Fred Deeley* because both clauses provided for pay after termination without cause, but specifically excluded further compensation.[38]

Accordingly, while this issue has certainly been before the courts of Ontario regularly, there is no absolute certainty as to how termination provisions will be read. What is somewhat clear, is that a termination clause that is silent on providing all of the Ontario ESA's statutory

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35 *Movati Athletic (Group) Inc. v. Bergeron,* 2018 ONSC 7258 (CanLii) ("Movati")

36 para. 11.

37 *Hampton Securities v. Dean,* 2018 ONCA 901.

38 *Dean, supra,* para. 7.

entitlements will more likely be enforceable, while termination clauses that specifically exclude benefits or further entitlements and include a statement to that effect will likely be deemed unenforceable.

C. The British Columbia Perspective

Unlike Ontario, the current trend in B.C. jurisprudence suggests that as long as the B.C. *Employment Standards Act*[39] (*"*the B.C. ESA*"*) is referred to in the contractual termination provision without more, it is likely that the Court will find that the termination clause is valid and enforceable.[40] Though this was not always the case, it currently appears to be more difficult to argue against contractual language in B.C. than it is in Ontario. Furthermore, B.C. Courts are quite prepared to sever termination clauses, or portions thereof, to remedy any ambiguity such that the offending provision is read down to the extent of the invalidity to render it enforceable.

Post *Lader Downs* – A Trend Towards Uneforceability

Following *Ladner Downs,* the B.C. Court of Appeal rendered a termination provision void where it referenced Ontario's Employment Standards Act (for a B.C. based employee). In *Waddell v Cintas Corp.* ("*Waddell*")[41] the Court wrote "a termination clause should not put employees to a complex calculation to ascertain what they may be entitled to when they are terminated."[42]

Similarly, in *MacAlpine v Medbroadcast Corp*. ("*MacAlpine"*)[43] the Court determined that a termination clause inserted into a fifth employment contract just weeks prior to MacAlpine's termination was not enforceable as it did not displace the common law presumption. Instead, it merely established that the statutory minimums would be given, but it did not represent a waiver by the employee to reasonable notice. The Court also noted that MacAlpine was under duress when he accepted the new contractual term as his employer had threatened to terminate his employment if he didn't sign.

In *Dodich v Leisure Care Canada* (*"Dodich")*[44], the employee was terminated without cause after less than two years of employment and was provided with three weeks of salary for payment in lieu of notice based on a termination clause which stated:

> Should it be necessary, Lifestyle may end the employment relationship by providing you with a minimum of two (2) weeks notice, or pay in lieu of notice,

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39 RSBC 1996, c 113.

40 Note: Unlike Ontario's ESA the B.C. ESA does not provide for statutory severance pay or a statutory entitlement to continuation of benefits during the notice period. Under the B.C. ESA employers are only required to provide notice or pay in lieu of notice pursuant to the prescribed statutory entitlements when terminating an employee. Absent the requirement to provide severance pay or continuation of benefits, termination clauses in B.C. employment agreements that limit an employee's entitlement to the statutory minimums are more likely to be found valid and enforceable. This is primarily because there is less opportunity for ambiguity and therefore attack by employee's counsel.

41 *Waddell v Cintas Corp. ("Waddell")* 2001 BCCA 711.

42 *Ibid.* at para 11.

43 *MacAlpine v Medbroadcast Corp. ("MacAlpine")* 2003 BCPC 133

44 *Dodich v Leisure Care Canada ("Dodich")* 2006 BCSC 93

> or such that is required by the *Employment Standards Act*, whichever is greater. In any event, we guarantee that you will be provided with compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the *Employment Standards Act*.[45]

The Court determined that the termination provision only purported to provide a minimum amount to Dodich and a guarantee payment that would not be less than a specified amount. However, the wording of the guarantee payment did not suggest a maximum or upper limit and thus, "the presumption of reasonable notice is not clearly displaced by another notice period".[46] The termination provision was therefore unenforceable due to ambiguity.

1. A Shift towards Enforceability

Notwithstanding its earlier decisions which found that termination clauses which referred to prescribed entitlements under the B.C. ESA upon termination without more, would likely be found ambiguous, the B.C. Courts began shifting away from this approach as evident in the following cases. In *University of British Columbia v Assn of Administrative & Professional Staff on behalf of Wong*[47] ("Wong"), Wong was terminated after less than one year of employment. Wong's termination provision stated:

> An employee terminated during the probationary period for reasons other than just cause shall receive notice or pay in lieu of notice in accordance with the provisions of the *Employment Standards Act.* [48]

The B.C. Court of Appeal determined that the plain reading of the contractual termination provision sufficiently incorporated the provisions of the B.C. ESA and was enough to displace the presumption of reasonable notice upon termination without cause.[49]

Wong was followed in the 2009 decision of *McKay v LightRoom F/X Inc.* ("*McKay*")[50] where the Court noted that the termination clause "sets out the applicable notice period with sufficient clarity and particularity to rebut the presumption of reasonable notice."[51]

In the 2014 decision of *Brown v Utopia Day Spas and Salons Ltd* ("*Brown*")[52] the Court found that even if there are grammatical errors in a termination provision which creates ambiguity, the termination clause can still be enforceable. That termination clause stated:

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45 *Ibid* at para 6.

46 *Ibid* at para 11.

47 *University of British Columbia v Assn of Administrative & Professional Staff on behalf of Wong ("Wong")* 2006 BCCA 491.

48 *Ibid* at para 8.

49 *Ibid* at para 34.

50 *McKay v LightRoom F/X Inc. ("McKay")* 2009 BCPC 321.

51 *Ibid* at para 45.

52 *Brown v Utopia Day Spas and Salons Ltd ("Brown")* 2014 BCSC 1400

> The Employer may terminate the Employment of the Employee without cause or notice in accordance of [*sic*] the *Employment Standards Act* of British Columbia.[53]

Brown attempted to argue that the termination clause was unenforceable because it suggested that the Defendant employer could terminate her without notice in accordance with the B.C. ESA and was therefore ambiguous and uncertain. Furthermore, the Plaintiff argued that the termination clause created further ambiguity as it did not provide for the alternative of compensation in lieu of notice. As such, the *contra proferentem* rule should apply and the ambiguity should be resolved in favour of the Brown. B.C's Court disagreed with Brown and found that parties' intentions were clear in limiting Brown's termination entitlements to the statutory minimums. The Court wrote at para 22:

> I find the termination clause is not open to reasonable interpretation other than the parties intended to incorporate the *ESA*'s statutory terms for notice and wages instead of notice. The minor grammatical errors contained in the clause do not create a material ambiguity. The word "or" could be substituted with the word "on", and the word "with", instead of "of", which shows just how fine the point of distinction becomes. So long as the parties' intentions are discernible, imperfect language that does not create ambiguity or uncertainty regarding the parties' intentions is not material.

More recently, in *Bailey v Service Corporation International (Canada) ULC ("Bailey")*[54], the Court rejected the employee's arguments of ambiguity in a provision which read:

> 6. TERMINATION. Counselor's employment may be terminated by either party without cause, upon giving written notice to the other party as required under the Employment Standards Act of British Columbia…[55]

The Court found that the clause was clear as it provided that notice would be given in accordance to the *ESA*. Further, the B.C. Court stated that though the clause did not mention payment of wages in lieu of notice, the termination clause did not preclude paying wages in lieu of notice.[56] As such, the termination provision was not ambiguous and thereby enforceable.

Even if a termination provision is arguably long and convoluted, the B.C. Court may still find that it is enforceable as long as it does not contradict the provisions in the B.C. ESA. This was evident in *Damani v. Stuart Olson Construction Ltd. ("Damani").*[57] The termination clause at issue stated:

> 16. Termination Without Just Cause — After your probationary period, Stuart Olson shall be entitled to terminate your employment at any time without just cause on giving you notice of the termination or, at Stuart Olson's absolute discretion, by paying you compensation in lieu of notice of an amount

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53 *Ibid* at para 5.

54 *Bailey v Service Corporation International (Canada) ULC ("Bailey")* 2018 BCSC 235.

55 *Ibid* at para 120.

56 *Ibid* at para 174.

57 *Damani v. Stuart Olson Construction Ltd. ("Damani")* 2015 BCSC 2322 (CanLII)

> equivalent to the regular wages that you would have received during the applicable notice period, or any combination thereof. Your notice, or payment in lieu of notice, will be calculated from the Start Date and Stuart Olson shall provide you with 2 weeks' for every year (or part year) worked with Stuart Olson, to a maximum of 3 months' notice or pay, or your entitlement for termination notice or termination pay pursuant to the applicable employment standards legislation, as amended, whichever is greater.

Though the B.C. Court determined that "although the termination without notice clause in the contract is long and complicated, it is not ambiguous" as it did not violate the B.C. ESA.[58] The Court also distinguished this case from *Dodich* on the basis that this termination provision provided for a maximum limit in terms of entitlement upon termination without cause.[59]

2. The Use of Severability Provisions

If a termination clause purports to contravene the B.C. ESA and the employment agreement provides for a severability clause, the B.C. Courts are inclined to elect to sever parts of the termination provision. In *Krieser v Active Chemicals Ltd* ("*Krieser*")[60] the employee was dismissed after 16 years of employment. The employer relied on the termination clause in the employment agreement, which set out a year-by-year formula for notice. Krieser argued that the termination clause was in breach of the B.C. ESA because one of the sub-paragraphs contravened the minimum requirement providing that employees who are dismissed between three and six months of their employment are entitled to one week of notice. The Court rejected Krieser's argument, and instead elected to sever the offending sub-paragraph from the contract. In doing so, the Court noted that the offending sub-paragraph had no application to Krieser at the time of dismissal and that its severance resulted in the termination clause being enforceable.

Similarly, in *Miller v Convergys CMG Canada Limited Partnership* ("*Miller*")[61] the B.C. Court of Appeal permitted the severance of a probationary clause to remedy the ambiguity which existed in the termination clause. At the time the Plaintiff signed his employment contract, he had been employed by the Defendant for three years, yet his contract included a probationary term. Though he was terminated after seven years of employment and he was provided seven weeks' of pay in lieu of notice, Miller argued that the probationary clause was not enforceable because when he signed the contract he had already worked for his employer for three years (and therefore could not have been terminated without notice or pay in lieu of notice). Furthermore, he argued that the inclusion of the probationary language rendered the entire termination clause unenforceable because it was "inextricably intertwined" with the probationary clause.[62] The B.C. Court of Appeal rejected those arguments, and upheld the trial

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58 *Ibid* at para 17.

59 *Ibid* at para 18.

60 *Krieser v Active Chemicals Ltd ("Krieser") 2005* BCSC 1370.

61 *Miller v Convergys CMG Canada Limited Partnership* ("*Miller*") 2014 BCCA 311, leave to appeal to the SCC denied on February 2015.

62 *Ibid* at para 38.

judge's decision severing the probationary clause from the Agreement without impacting the termination clause, the balance of the contract, or the employment relationship.[63]

3. Conclusions and Best Practices

As employment counsel, we are regularly called upon to draft, enforce, and challenge termination provisions to suit our client's legal position. Though the current state of B.C. jurisprudence appears to lean towards the enforcement and deference to contractual termination language, if the trend in Ontario makes its way west, that may change, and termination clauses in employment agreements may be subject to increased scrutiny.

Accordingly, for those who draft employment agreements, it is more important than ever to ensure absolute clarity, avoiding any ambiguity or potential reading which might be in breach of statutory entitlements. Furthermore, the inclusion of severing language is a recommended practice, as B.C.'s Courts appear to be prepared to rely on it to remedy ambiguities. Keep termination provisions short and clear as, if overly complicated, there is more chance that the clause may be subject to scrutiny.

A further takeaway for all counsel, though one that our clients generally don't like to hear from us, is that litigation is uncertain and just because most - but not all judges - in one province see things one way does not mean that others, particularly in another province, will agree. That said, we should all keep in mind the Court's recent pronouncements in *Dean* referencing *Machtinger*:

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so;
- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship;
- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment;
- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee.[64]

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63 *Ibid* at para 45.

64 *Dean,* supra at para 102.

III. Mental Distress & Punitive Damages[65]

This section of the paper examines the trend of increasingly high awards for mental distress damages[66] and punitive damages in Ontario wrongful dismissal cases. It then considers the influence of these cases in British Columbia to date and discusses whether we should expect a similar increase. The short answer is "likely not". Despite this trend from the east, BC courts have remained conservative in both the approach to proof and quantum of such damages.

A. The Trend in Ontario

The Ontario courts have historically been as conservative as BC. In the years leading up to and immediately following the seminal case of *Honda Canada Inc. v. Keays*, 2008 SCC 391 (*"Honda*"), moral damages awards ranged from $5,000 to $45,000[67] and punitive damage awards between $15,000 and $50,000.[68]

In recent years however, substantial awards in a few significant cases have seemingly signalled a judicial willingness to increase the stakes for employers.[69] The trend was kick-started by the decisions of *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669 (*"Pate"*) and *Wal-Mart v. Boucher,* 2014 ONCA 419 (*"Boucher"*). *Pate* was a complicated piece of litigation that involved a trial, an appeal, two re-trials[70], and a second appeal. Mr. Pate had been the chief building officer for the defendant township for nine years. The defendant dismissed him for cause due to alleged discrepancies regarding permit fees he collected but seemed not to have remitted. It also reported him to the police. Mr. Pate was charged criminally but ultimately acquitted. It was discovered that the township withheld exculpatory evidence from the police which if disclosed would have prevented his prosecution. Mr. Pate's marriage and business were ruined and he suffered public humiliation in a small community. He sued the township for wrongful dismissal and malicious prosecution. The township conceded

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65 This section was written by Christopher Drinovz

66 This paper follows the suggestion of the Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30, at para. 53 which urges mental distress damages be adopted in preference to "aggravated damages" which should be abandoned as confusing. Various courts, including the Ontario Court of Appeal, also use the term "moral damages" as well.

67 *Altman v. Steve's Music Store,* 2011 ONSC 1480 ("Altman") [$35,000]; Piresferreira v. Ayotte, 2010 ONCA 384 [$45,000]; Pagliaroli v. Rite-Pak Produce Co., 2010 ONSC 3729 [$25,000]; Pilato v. Hamilton Place Convention Centre Inc. (1984), 7 D.L.R. (4th) 342 [$25,000]; Thom Estate v. Goodhost Foods Ltd. (1987), 17 C.C.E.L. 89 [$25,000]; Ribeiro v. Canadian Imperial Bank of Commerce (1992), 13 O.R. (3d) 278 (C.A.) ("Ribeiro") [$20,000]; Desseroit v. Delta Hotels Ltd., [1985] O.J. No. 1062 (H.C.) [$20,000]; Tremblay v. Goddard (1996), 23 C.C.E.L. (2d) 315 [$15,000]; Speck v. Greater Niagara General Hospital (1983), 43 O.R. (2d) 611 (H.C.) aff'd (1985), 51 O.R. (2d) 192 (C.A.) [$15,000].

68 *Altman* [$20,000]; *Brito v. Canac Kitchens,* 2011 ONSC 1011 [$15,000]; *Boyd v. Wright Environmental Management Inc.,* 2008 ONCA 779 [$25,000]; *Mastrogiuseppe v. Bank of Nova Scotia*, 2007 ONCA 726 [$25,000]; *Bouma v. Flex-N-Gate Canada Co.* [2004] O.J. No. 5664 [$15,000]; *Fedele v. Windsor Teachers Credit Union Ltd.*, [2001] O.J. No. 2951 (C.A.) [$15,000]; *Lukowski v. Hatch Associates Ltd.*, [1998] O.J. No. 5345 (C.A.) [$25,000]; *Francis v. Canadian Imperial Bank of Commerce* [1994] O.J. No. 2657 (C.A.) [$40,000]; *Ribeiro: [$*50,000].

69 Alan Whyte, 2018 Update on Extraordinary/ Moral/ Aggravated Damages, The six-minute employment lawyer 2018, Law Society of Ontario, Continuing Professional Development, [2018]

70 2009 CanLII 70502 (ONSC); 2011 ONCA 329; 2011 ONSC 6620; 2012 ONSC 6740

wrongful dismissal and a 12 month notice period but contested the tort claim and mental distress/punitive damages claims. Despite the urgings of the township that punitive damages awards had been historically modest in Ontario and Canada, it was ordered to pay a total of $75,000 in mental distress damages and a whopping $550,000 in punitive damages (increased from the $25,000 ordered in the first trial). The trial judge relied on a case called *McNeil v. Brewers Retail Inc.* where a jury awarded $500,000 in punitive damages for a malicious prosecution action with similar facts.[71] The ONCA gave deference to this reasoning and upheld the *Pate* trial award.

On *Pate's* heels came *Boucher.* Here, an Ontario jury awarded employee Meredith Boucher a record $1,450,000 in damages upon finding that she had been repeatedly bullied and harassed by her manager. Wal-Mart management had ignored her complaints in breach of its harassment policy. The manager continued to bully Ms. Boucher in front of co-workers and customers and vowed to continue until she resigned. Ms. Boucher suffered from loss of appetite, insomnia, and weight loss until she left and did not return. The jury found she had been constructively dismissed and awarded $100,000 for intentional inflection of mental suffering and $150,000 in punitives against the manager along with and $200,000 mental distress damages and $1,000,000 in punitives against Wal-Mart.

Not surprisingly, both defendants appealed. Laskin J.A., for the ONCA majority, upheld the moral damages award in spite of Wal-Mart's submission that it was *"excessive"* and *"unprecedented in Canadian employment law"* noting that *"this award against Wal-Mart is very high, reflecting the jury's strong disapproval of its conduct…in light of Wal-Mart's conduct, I am not persuaded that the jury's view of the amount is so plainly unreasonable that it ought to be reduced."*[72] Note the emphasis on the conduct of Wal-Mart in the justification of the (supposedly) compensatory award as opposed to consideration of what harm was suffered by the plaintiff.

Associate Chief Justice Hoy parted company with her colleagues on the issue of mental distress damages and would have reduced the award to $25,000. Her ladyship started with the fundamental principle established in *Honda* that: *"in an employment context, aggravated damages compensate a plaintiff for her mental distress caused by the manner of dismissal."*[73] She actually focused on Ms. Boucher's harm, noting that Boucher's symptoms did not last long and had *"cleared up once the person who caused them – Pinnock – was no longer part of her life".*[74] Accordingly, $25,000 (coupled with the $100,000 already awarded for the tort) sufficiently compensated the plaintiff. In my respectful view, her ladyship took the correct approach.

On punitive damages, the ONCA panel unanimously reduced the award against Wal-Mart by 90% to $100,000. It did so concluding that the jury's award, when coupled with the compensatory damages, produced a sum that was inordinately large and higher than what was rationally needed to punish both defendants. Wal-Mart's misconduct in failing to investigate

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71 Upheld by the Ontario Court of Appeal, 2008 ONCA 405

72 *Boucher,* paras. 76-77

73 *Boucher,* para. 115

74 *Ibid,* para. 122

and ignoring the bullying lasted less than six months; it did not profit from its wrong nor did it set out to force Ms. Boucher's resignation. The circumstances were therefore not comparable to *Pate* or its even more serious predecessors decided by the Supreme Court of Canada outside the employment law context.[75]

The proverbial floodgates had opened! Seemingly emboldened by these decisions, plaintiffs in Ontario continued to pursue, and achieve, higher mental distress and punitive awards. For example, in *Gordon v. Altus,* 2015 ONSC 5663, the judge awarded $100,000 in punitive damages for the employer's fabrication of allegations designed to justify the plaintiff's summary dismissal. In *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520*,* a case similar to *Boucher,* the ONCA ordered $70,000 in mental distress damages and $55,000 in punitive damages against an employer who commenced a campaign of abuse towards a disabled employee designed to force her resignation. In *Doyle v. Zochem Inc.,* 2017 ONCA 130, the Court upheld a $60,000 mental distress award for a sexually harassed employee. Finally, in *Colistro v. Tbaytel*, 2017 ONSC 2731 (aff'd 2019 ONCA 197), the Court awarded $100,000 in mental distress damages to a long-time city employee found to have been constructively dismissed due to a toxic work environment.

The path to mental distress damages was further smoothened upon the Supreme Court of Canada's release of *Saadati v. Moorhead*, 2017 SCC 28 ("*Saadati*"). Here, the Court ruled that litigants were not required to prove a recognized psychiatric illness through expert evidence. Mental illness in the more generic form may be established through the vive voce testimony of a litigant or other fact witnesses such as family or friends. While *Saadati* was a motor vehicle case decided in the context of negligence law, its principles naturally extend to the proof of mental distress damages in employment law.[76]

B. Galea v. Wal-Mart Canada Corp

All of this set the stage for *Galea v. Wal-Mart Canada Corp*, 2017 ONSC 245 (*"Galea"*), another record-breaking case making an example of Wal-Mart. Ms. Galea started her career with Wal-Mart in 2002. By 2008, she had worked her way up to VP of general merchandising. In 2010, Wal-Mart eliminated her position due to restructuring. From that time on, Wal-Mart unceremoniously allowed her to "twist in the wind" by assuring her she had a future with the company while internally labelling her "non-promotable". After demoting her to a "roving vice president of little substance", Wal-Mart proceeded to evict her from her office while she was away at a conference. The CEO then gave her an ultimatum to either accept a further demotion or take her severance package. Before she elected, Wal-Mart dismissed her. Half-way through the contractual salary continuance period, Wal-Mart stopped the payments without explanation.

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75 *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 [$800,000 awarded in defamation action] and *Whiten v. Pilot Insurance Co,* 2002 SCC 18 [$1M awarded in breach of insurance contract case]

76 For an excellent and thorough treatment of this topic, see *"Proving Mental Distress Damages in the Wrongful Dismissal Context"* by Thomas A. Posyniak, Continuing Legal Education Society of British Columbia, May 2018 ("*Posyniak*").

Ms. Galea sued Wal-Mart for severance and mental distress and punitive damages. She succeeded on all claims and received a record-breaking $250,000 in "moral" (mental distress) damages plus $500,000 in punitives. In an unprecedented analysis, the Court broke down the mental distress damages into two parts: the employer's pre and post-termination bad faith conduct. The pre-termination conduct included the internal announcement of Ms. Galea's re-assignment (which humiliated her), making her non-promotable, and misleading her about her career prospects. This conduct was worth $200,000. The Court then awarded an additional $50,000 for post-termination conduct. Interestingly, this included Wal-Mart's conduct in the course of the litigation consisting of purposeful delays during document and oral discovery.

Two interesting points arise. As in *Boucher,* analysis of what actual harm the plaintiff suffered was largely absent. While the court applied *Sadaati* and confirmed that medical evidence was not a prerequisite, it did not detail any of the non-medical/expert evidence supporting that Ms. Galea suffered mental distress beyond the non-compensable hurt feelings one would expect after a termination. As observed by Mr. Posyniak, *"the damages side of the analysis appears to be inferred or presumed in [Wal-Mart's] conduct."*[77] Second, the Court awarded mental distress damages caused by the employer's specific litigation strategy, which was viewed as an extension of the post-termination conduct. Generally, objectionable litigation conduct was reserved for special costs and only where it rose to the level of *"reprehensible".*[78] *Galea* created a precedent whereby typical employer defence tactics not rising to the level of special costs (such as delay and obfuscation in discovery) could still be compensable under the mental distress analysis.

The $500,000 punitive award was justified on the basis that Wal-Mart's conduct was *"deplorable"* and worse than that in *Boucher.* Deterrence was required given that this had occurred at the executive level. Further, Wal-Mart could afford it, having earned $135 billion worldwide in 2016. Consider also whether the Court felt Wal-Mart had not yet learned its lesson after *Boucher.*

C. Post-*Galea* in Ontario

Several cases have followed *Galea* in Ontario. In *Ruston v. Keddco Mfg (2011) Ltd*, 2018 ONSC 2919 (*"Ruston"*), the plaintiff, who had worked his way up to become president of the organization, was terminated for just cause due to alleged fraud. The employer did not provide any explanation at the time of dismissal but threatened the plaintiff with a counterclaim and expensive litigation if he dared retain a lawyer. The plaintiff sued for wrongful dismissal and the employer responded with a 1.7 million dollar counterclaim alleging fraud and breach of fiduciary duty on the basis of manipulated financial statements and negligent inventory purchases. These claims were meritless and the Court found that the employer created them

77 Posyniak, page 8.1.15

78 *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177. Note also, that punitive damages can only flow from egregious conduct of the defendant at the time of the breach and not conduct during the litigation. For example, in *Marchen v. Dams Ford Lincoln Sales,* 2010 BCCA 29, the BCCA overturned the trial judge's award of punitive damages relating to the defendant's pursuit of a bogus claim for cause through the trial. This was appropriately addressed by special costs and not punitive damages.

after termination. In addition to severance, the Court ordered $100,000 in punitives and $25,000 mental distress.

In assessing damages, the Court relied heavily on *Galea* and its predecessors. The employer's failure to be candid and threats at the time of termination were contributors. However, the Court placed more emphasis on the meritless counterclaim and dubious litigation tactics. This included making personal attacks and performance-based allegations against the plaintiff in the pleadings but dropping them at trial, reducing its counterclaim from 1.7M to $1 at trial, and listing 25 witnesses for a pre-trial conference (causing an adjournment), subsequently reducing that list to five, and then ultimately only calling two fact witnesses and one expert. As in *Galea,* the employer's litigation conduct formed part of the mental distress award. While the award modest, there was again little analysis of actual harm to the plaintiff. While the trial judge noted the fraud allegations *"will follow him on his career path for the rest of his life",* the only hard evidence referred to was the plaintiff's statements that the termination, allegations of cause, and 1.7M counterclaim had been *"devastating", "very stressful"* and *"weighs on you a lot".*[79] The ONCA upheld the *Ruston* awards in near summary fashion.[80]

Most recently, *Johnston v. The Corporation of the Municipality of Arran-Elderslie,* 2018 ONSC 7616 (*"Johnston"*) involved another chief building official dismissed by a small municipality for cause, as in *Pate*. In this case, the plaintiff had started his own private design company while employed with the city. The employer was fully aware of this, having even allowed the plaintiff to inspect buildings he himself had designed. In a pre-mediated campaign to oust the plaintiff, the employer suddenly raised the private design business as a conflict of interest. The manner of termination was particularly distasteful. The employer interrogated the plaintiff, gave him a prepared termination letter, and had him escorted out by police. It then issued misleading press release incorrectly suggesting the plaintiff was barred from designing buildings. Plaintiff's counsel sought punitive damages between $100,000 and $200,000. Not surprisingly, the Court looked back at *Pate* as a comparable and awarded $200,000.[81] The judge found the suggested range *"on the low side"* implying he would have awarded more had it been sought. On mental distress, the plaintiff testified as to suffering weight loss, loss of appetite, irritability, sleeping problems, marital breakdown, and social isolation as a result of the harsh dismissal. This was corroborated by his mother and a co-worker, though no medical evidence was led. The Court awarded $100,000 in mental distress damages, citing proportionality and the rule against double recovery, given the sizeable punitive award.[82]

It is worth mentioning that Ontario saw a comparable increase in the quantum of injury to dignity damages awarded by its Human Rights Tribunal in the same time period. For example, in 2015, the Tribunal awarded damages of $150,000 and $50,000 to two employees that were sexually harassed by their former employer. Most recently, an employer/landlord was ordered to pay $200,000.[83]

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79 *Ruston,* para. 150

80 2019 ONCA 125

81 *Johnston,* para. 163

82 *Ibid,* para. 169

83 *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675; A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

Before leaving Ontario, it should be noted that by no means does there now exist a damages free-for-all. In 2018, there were only six successful bad faith claims[84] with seven denials.[85]

D. British Columbia

To what extent, if any, have these upward trends from Ontario influenced the analysis of mental distress and punitive damages in British Columbia? It has been observed that BC had been experiencing its own increase in the frequency of mental distress damages awards in the years 2013 to 2017.[86] The authors of this paper noted that between 2015 and 2017, mental distress damages were awarded in nine cases[87] and denied in 10, contrasted to a similar analysis from 2008 to 2013, which had only three awards 24 denials. In contrast, for the same period of time, punitive damages were pleaded and denied in twelve cases and awarded only in two cases.[88] The awards were $20,000 (2013) and $100,000 (2015). Neither of these cases relied on the Ontario jurisprudence, despite *Pate* (550K punitives) having been released in 2013 and *Boucher* (110K punitives) in 2014.

The high frequency of mental distress awards was not accompanied by an increase in the average quantum. In seven of the nine 2015-2017 cases, damages were between $25,000 and $35,000, with one $10,000 award (*Johnson*) and one $50,000 award (*Price*). Indeed, several judges noted that aggravated damages in BC are generally *"quite modest"*[89] though none gave reasons for this view. Interestingly, **none** of these cases referenced Ontario cases or the upward trend occurring to the east at that very time. Most BC cases followed *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133 which appeared to establish a $30,000 benchmark.

The release of *Sadaati* did not open any floodgates. If any momentum was to be gained, the BC Court of Appeal quickly tapered it. In *Lau v. Royal Bank of Canada,* 2017 BCCA 253 ("*Lau*"), the appellate Court overturned the plaintiff's $30,000 mental distress award. The trial judge had based the award solely on Mr. Lau's *"slow, quiet, and almost monotone"* testimony that he felt *"lost"* and *"horrible"* after his termination for allegedly falsifying bank records. The BCCA

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84 *Ruston*, supra, *Johnston*, supra; *Dang v. JBC Coach Lines Inc*. 2018 CanLII 70335 (ON SCSM) [$10,000 MDD, $5,000 PD]; *Mackenzie v. 1785863 Ontario Ltd.,* 2018 ONSC 3442 [$7,500 MDD]; *West v. Mex Precision Wire Corporation*, 2018 ONSC 6572 [$10,000 MDD] *Hampton Securities Limited v. Dean*, 2018 ONSC 101 [$25,000 PD]

85 *Messier v. Lifelabs Medical Laboratory Services*, 2018 ONSC 6230; *R*ouse v. Drake & Drake et al*.,* 2018 ONSC 939; *Fernandez v. Tangam Systems Inc.*, 2018 CanLII 99185 (ON SCSM); *Quigley v. Greyfair Flooring Inc.*, 2018 ONSC 2199; *Sankreacha v. Cameron J. and Beach Sales Ltd.*, 2018 ONSC 7216; *Bogar v. March Ford Inc.*, 2018 CanLII 3441 (ON SCSM); *Hales v Niagara Neighbourhood Housing Co-Operative Inc.*, 2018 CanLII 109750 (ON SCSM)

86 "*Case Law Update: Aggravated and Punitive Damages in BC from 2013-2017"* by Ian Kennedy & Steven Barker, Continuing Legal Education Society of British Columbia, May 2017

87 *Davies v. Canada Shineray Suppliers Group Inc*., 2017 BCSC 304; *Ram v. The Michael Lacombe Group Inc*., 2017 BCSC 212; *Price v. 481530 B.C. Ltd.*, 2016 BCSC 1940; *Pepin v. Telecommunications Workers Union*, 2016 BCSC 790; *Lau v. Royal Bank of Canada*, 2015 BCSC 1639 (overturned 2017 BCCA 253); *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328 ("Kong"); *Dhatt v. Kal Tire Ltd.*, 2015 BCSC 1177; *George v. Cowichan Tribes*, 2015 BCSC 513; *Johnson v. Marine Roofing Repair & Maintenance Service (2003) Ltd.*, 2015 BCSC 472

88 *True Colors Painting Ltd. v. 0846747 BC Ltd.*, 2015 BCSC 278; *Kelly v. Norsemont Mining Inc.* 2013 BCSC 147

89 *Davies*, para. 105; *Kong*, para. 64

acknowledged *Sadaati,* but returned to first principles of mental distress damages holding that: "*while the importance of the employer's conduct in the manner of dismissal should not be understated, that does not mean compensation on this basis is without limitations, or that damages can be assumed."*[90] Mr. Lau's testimony alone did not establish mental distress beyond what might be ordinarily expected in a termination. Tellingly, the BCCA made no reference to the recent case law in Ontario. Shortly thereafter, it overturned another mental distress trial award for lack of evidence in *Cotrill v. Utopia Day Spas and Salons Ltd.*[91] Following *Lau* and/or *Cotrill,* claims for aggravated damages were denied at the Supreme Court level in *Kerr v. Arpac Storage Systems Corporation*, 2018 BCSC 704 and *Spalti v. MDA Systems Ltd.* 2018 BCSC 2296, neither of which mentioned an Ontario case.

Plaintiffs in BC have had some success post-*Lau* without relying on Ontario case law, although quantum has stayed in line with the *Vernon* benchmark. In *Ensign v. Price's Alarm Systems (2009) Ltd.,* 2017 BCSC 2137, the Court awarded $25,000 in mental distress damages following a summary trial. The employer was untruthful in the manner of termination and made subsequent offers of re-employment on less favourable terms, found to be aggressively designed. The judge accepted the uncontradicted affidavit evidence of the plaintiff and his wife that the manner of the termination was devastating, very distressing, and caused a loss of self-confidence, sleep issues, and marriage difficulties.

In *Bailey v. Service Corporation International (Canada) ULC,* 2018 BCSC 235, the plaintiff was terminated during his stress-related medical leave. The employer based the termination on the fact that the plaintiff's WorkSafeBC and disability claims had been denied; it also incorrectly believed the plaintiff had been selling real-estate while off. The Court relied solely on the evidence of the plaintiff and his wife to conclude the employer's bad faith in the manner of the termination had aggravated the plaintiff's pre-existing medical conditions of anxiety and depression. That being said, the judge was "unable to award a significant sum for aggravated damages…due to the difficulty in parsing out the causes of his mental distress." Relying on Ram and the now-overturned trial decision in Cotrill, the judge awarded $25,000.[92]

E. Cases Considering Ontario Law

Ontario's influence was finally felt in British Columbia in the case of *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day,* 2018 BCSC 1724 (*"O.W.L.")*. Here the employer, a charitable non-profit, had initiated the lawsuit against its founder and long-time executive director for unjust enrichment arising from alleged misappropriation of funds for personal expenses. Ms. Day counterclaimed for wrongful dismissal. The employer's claim was dismissed as having no merit whatsoever. Ms. Day's claim was allowed. Similar to *Galea,* the plaintiff alleged that her mental

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90 *Lau,* para. 24

91 2018 BCCA 383 (*"Cotrill"*), leave to SCC denied. As in *Lau*, there was no evidence from the plaintiff or from family members, friends or third parties concerning the impact of the termination on the plaintiff and her mental state. Although not required, there was no expert evidence, medical or otherwise. The only evidence of mental distress was that the plaintiff had become upset during two meetings associated with the termination which *"at its highest establishes a transient upset. It falls well short of the legal standard that requires a serious and prolonged disruption that transcends ordinary emotional upset or distress."* (para. 18)

92 At paras 207-214

distress was caused by the employer's egregious conduct before and after the dismissal, including its litigation conduct. Justice Walker agreed. He found that *"employer conduct during termination as well as after have been considered by courts in determining whether to award aggravated damages so long as the conduct is relevant to this dismissal."*[93] The employer's unfounded allegations in the pleadings and the fact that it persisted with those allegations through to the conclusion of trial without evidence formed part of the conduct causing mental distress. The crucial difference between Ontario and BC is well-illustrated however, in the quantum analysis. The trial judge was clearly appalled by the employer's behaviour:

> …Ms. Day's role with O.W.L. was a significant and consuming part of her life and sense of self-worth and her vulnerability at the time of termination and thereafter as she was forced to defend meritless claims concerning her honesty and character. It was more than her 30-year vocation with O.W.L. Her life's work and purpose were intimately tied with O.W.L. She was more than the public face of O.W.L. For herself and to the public, she was O.W.L.'s driving force. She has suffered emotional and physical distress from the nature of the grounds O.W.L. advanced for her dismissal along with O.W.L.'s dogged pursuit of its meritless claim for unauthorized payments and defences to her wrongful dismissal claim. (para. 289)

Indeed, he accepted (in the absence of medical opinion evidence) that the employer's conduct had *"significantly aggravated and substantially worsened the emotional and physical distress"* that the plaintiff was already suffering due to the death of her daughter and her husband's illness. While Ms. Day had tried to introduce a letter from her family doctor late in the day, the employer objected and it was not admitted. The Court therefore concluded that: "*in the circumstances, and in the absence of any admissible medical opinion evidence, I have determined that an appropriate award in this case is $30,000."*[94] Query how Ms. Day would have fared had the medical evidence been allowed or if she had called her doctor as a witness. Could she have received $50,000 then? How about if this case was heard in Ontario? Does the fact that the defendant was a charitable society and not a multinational corporation matter? Should it?

The Court declined to award punitive damages. The plaintiff relied on *Boucher*, but Justice Walker found that the employer's post-dismissal conduct was properly addressed through the mental distress award. Further, he noted that the plaintiff intended to pursue special costs for much of the same conduct relied on for punitives. He adopted the comments from *Honda* that claims for punitive damages should *"receive the most careful consideration"* and its discretion should be *"cautiously exercised"*; double-compensation of *"double-punishment"* must be avoided where aggravated damages have been awarded.[95] Again, query whether an Ontario court would have exercised the same restraint on these facts.

The only BC case to consider *Galea* to date is *Avelin v. Aya Lasers Inc*, 2018 BCSC 2313 ("*Avelin*"). The plaintiff was a salesperson terminated after only seven months. Shortly after filing its RTCC, the Ontario-based employer sued the plaintiff separately in that jurisdiction for

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93 *O.W.L.*, para. 286

94 Ibid, para. 295

95 Ibid. para. 302

allegedly deleting/destroying the company property contained on her work laptop. In addition to this tactic, the defendant had adjourned the trial twice due to a change of counsel, and had sought to do so a third time, which was denied. While the termination itself was done by an insensitive text-message, the plaintiff relied primarily on Aya's post-termination litigation conduct in seeking moral/mental distress damages. The Court accepting these arguments, finding: *"Aya was attempting to take advantage of its corporate presence in Ontario to obtain an advantage over an unemployed plaintiff, resident in British Columbia"* and that *"this was not a proper litigation strategy."* Mr. Justice Gomery cited *Galea* and *O.W.L.* to conclude that *"the defendant's dealings with the plaintiff after the dismissal, including its conduct in litigating the plaintiff's claim, may be considered as an element in the court's consideration of the manner of dismissal."*[96]

Quantum was again illustrative of BC's conservatism. The Court accepted (without medical evidence) Ms. Avelin's testimony that the financial turmoil caused by the manner of the termination and the defendant's legal manoeuvring caused her humiliation, embarrassment, anxiety, loss of sleep, and upset. Significantly, the unresolved litigation had caused her to file a consumer proposal. Despite those circumstances, the Court found that *"only a relatively modest award"* of $5,000 was required.[97] How would the Ontario courts have treated this plaintiff driven to bankruptcy by her former employer's bad faith conduct? The plaintiff advanced a creative argument for punitive damages in response to the fact that Aya had proceeded to trial despite receiving legal advice that its defence would fail. The plaintiff argued Aya's decision to maintain its defence in the face of this advice should be denounced with a view to discouraging such conduct in the future. The judge disagreed, holding that legal advice was just advice and Aya should not be penalized for exercising its right to defend the case.[98]

F. Closing Remarks

It is difficult to say why the quantum of extraordinary damages awards has increased in Ontario but not in British Columbia. In a recent article examining the disparity in damages awarded in medical negligence cases across Canada, the author observed that Ontario was the exception from an otherwise *"conservative culture"* in most provinces, "*even though they are all working from the same case law from the Supreme Court of Canada."* The author was of the view that "*no real principled reason for such a large discrepancy other than a difference in how damages cases are being advanced by lawyers in the different provinces, which is in turn impacting different judicial attitudes and perceptions about what is reasonable and what is not*." [99]

With the precedents now established, there is little doubt that the Ontario courts will continue to make high extraordinary damages awards in wrongful dismissal cases. While punitive damages awards in British Columbia continue to be extremely rare, the frequency of mental distress damage awards is increasing. Further, our courts have followed Ontario judges in their willingness to compensate mental distress caused by the employer's litigation conduct. That

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96 *Avelin,* para. 56

97 Ibid, para. 57

98 Ibid, para.62

96 Jennifer Brown, Challenging disparity in medical malpractice, Canadian Lawyer Magazine, February, 2018

said, the quantum of mental distress awards has not kept up with our eastern counterpart. In light of our well-established benchmark and recent appellate authority recognizing the compensatory nature of mental distress damages and setting a high evidentiary threshold for proof of harm, it unlikely that we will see a substantial increase in these awards in the near future.