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PAPER 5.2

Interpretation or Enforcement of Termination Clauses that Limit Severance Pay

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INTERPRETATION OR ENFORCEMENT OF TERMINATION CLAUSES THAT LIMIT SEVERANCE PAY

I. Introduction

The law as it relates to the interpretation of clauses in employment contracts that limit severance pay is complex and decided cases regarding these issues can be difficult to reconcile. Below is a review of the interpretation of employment contracts that attempt to rebut the presumption of reasonable notice at common law by incorporating employment standards minimums into the contract so as to convert the statutory floor into a contractual ceiling.

Following that is a discussion of recent developments in the law regarding the duty to mitigate where a severance clause exists.

II. Rebutting the Presumption of Reasonable Notice at Common Law

It is well settled across Canada that in the absence of an express term to the contrary employment contracts of indefinite duration require an employer to give reasonable notice of dismissal in the event of a termination without cause. Further, it is well settled that parties to an employment contract can agree upon a different notice period and rebut the presumption, either expressly or impliedly.

However, a significant limitation on the ability to contract for different notice periods is that such notice periods must not provide for less than the statutory minimum notice periods prescribed in the applicable provincial or federal legislation. Generally, such notice periods failing to provide for statutory minimums are either void and/or do not rebut the presumption of reasonable notice.

III. Converting the Statutory Floor into a Contractual Ceiling

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Supreme Court of Canada confirmed that employers can referentially incorporate minimum notice periods into employment agreements which, effectively convert the statutory floor into a contractual ceiling. Mr. Justice Iacobucci wrote at para. 35:

> 35 Moreover, this approach provides protection for employees in a manner that does not disproportionately burden employers. *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.* This point was recognized by Lysyk J. in *Suleman*, *supra*, at 214:
>
> > *An employer who wishes to guard against being called upon to give any more notice or severance pay than legislation demands can readily draw a contractual clause which, in effect, converts the statutory floor into a ceiling.* But here the employer has authored a contractual term which simply fails to comply with the law. In such circumstances, it is not evident why the employee should be placed in a worse position than if the contract had said nothing at all about notice of termination. [emphasis added]

This notion of incorporating statutory minimums by reference appears to be straightforward. However, there are some BC, Ontario, and Alberta decisions that give rise to some confusion as to how these clauses must be drafted in order to effectively constitute a ceiling. Further, it is apparent from the decisions that the wording the of the applicable employment standards legislation will play in part in determining whether the incorporation of statutory minimums by reference to the legislation will constitute a ceiling. Below, is a review of decided cases on this issue.

A. British Columbia Decisions

In *McLennan v. Apollo Forest Products Ltd.* (1993), 49 C.C.E.L. 172 (B.C.S.C.), the court was required to interpret a clause which provided that the conditions of employment were to be "in accordance with the Employment Standards Act and other legislation of the Province of British Columbia."

The court found this clause did not restrict notice on termination to the minimums in the Act since minimum termination payments in the Act were set out using language which required payment "at least" a specified amount. Specifically, the court determined that the plain meaning of the relevant clause must be taken to incorporate as an express term of the employment contract the provisions of s. 42 of the BC *Employment Standards Act* then in place, which provided as follows:

> 42(1) An employer shall not terminate an employee without giving the employee, in writing, *at least*
>
> (a) 2 weeks' notice where the employee has completed a period of employment of at least 6 consecutive months, [emphasis added]

The court concluded the use of the words "at least" meant that the notice period was not fixed and, accordingly, a "determination of reasonable notice in the circumstances remains to be made ..."

Thus, it appears that the court's view was that that statutory floor could not become a ceiling when statute itself did not contain a ceiling due to the use of the words "at least."

B. McLennan Not Applied in BC

Section 42 of the former *Employment Standards Act*, S.B.C. 1980, c. 10 was replaced on November 1, 1995 by the language in s. 63 of the current Act which stipulates that termination pay is "an amount equal to ..." and that "liability is deemed to be discharged if the employee is given ..." The revised legislation contained no terms similar to the "at least" language formerly in use. That remains the case today.

There are no published decisions in BC which have followed the reasoning in *McLennan* or which have made mention of the changed language in the s. 63 as the basis of coming to a different decision.

It appears that the majority of the decisions in BC on this issue have reasoned that simply referencing the legislation is sufficient to rebut the presumption of common law reasonable notice. This is consistent with the *Matchinger* decision. That reasoning is evident in the following cases beginning with the decision of *U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong*, 2006 BCCA 49.

The following decisions out of the BC, which nearly all provide for notice "in accordance with" or "pursuant to" the Employment Standards legislation were found to rebut the common law presumption of reasonable notice.

1. U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong, 2006 BCCA 491

> 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*.

The court in the *Wong* case decided that a plain reading of that provision was sufficient to incorporate the provisions of the *Employment Standards Act* and to displace the presumption that the contract was terminable without cause only on reasonable notice.

2. McKay v. LightRoom F/X Inc., 2009 BCPC 321

> If at any time LightRoom chooses to terminate the agreement, terms of the termination will be in accordance with the *Employment Standards Act* of British Columbia.

The court found that the language was almost identical to that in *Wong* and set out the notice period with sufficient clarity and particularity to rebut the presumption of reasonable notice.

3. Wernicke v. Altrom Canada Corp., 2009 BCSC 1533

> Altrom may terminate your employment, once the probationary period is completed, by giving you 30 days notice of termination, or, at Altrom's discretion pay in lieu thereof, or all payments or entitlements prescribed by the provincial employment standards legislation, whichever is greater, including notice of termination, or at Altrom's option pay in lieu of notice and severance pay if applicable. ... (para. 19)

The court plaintiff argued, *inter alia*, that the foregoing provisions were ambiguous and did not clearly express an enforceable maximum, or limit, to the employer's liability on dismissal. The court did not accept this argument, finding the provision was clear and unambiguous and as such, rebutted the presumption of reasonable notice at common law.

4. Van't Slot v. OncoGenex Technologies Inc., 2010 BCPC 249

> 5.5 At any time after the Probationary Period, the Company may terminate the employment of the Employee in accordance with this Article 5.5. In the event employment of the Employee is terminated by the Company for reasons other than for just cause, or the Employee resigns as a result of a Constructive Dismissal, the Employee shall be entitled to the following:
>
> a. notice or severance payments to the Employee as required pursuant to the provisions of the Employment Standards Act (British Columbia) as amended from time to time;

The claimant argued that the foregoing language did not limit her right to common law notice as it did not expressly contain a ceiling on the entitlement provided for. Specifically, the clause did not contain any limiting language such as "only" after the word "entitled" and therefore, created ambiguity. She argued that the ambiguity should be resolved in her favour by application of the *contra proferentem* principle.

The court concluded there was nothing to distinguish this clause from *Wong* or *Wernicke*. The clause was not ambiguous, so *contra proferentem* did not apply. The court also found that although the employee did not understand the significance of the termination provision, she had the opportunity to consider the agreement, ask questions and obtain independent legal advice had she chosen to do so. The clause therefore limited the notice entitlement to that required by the *Employment Standards Act*, 1996, R.S.B.C., c. 113.

C. Anomalous Decision

In *MacAlpine v. Medbroadcast Corp.*, 2003 BCPC 133, the termination clause read as follows:

> In the absence of cause, Medbroadcast may terminate your employment at any time and for any reason by providing to you, in writing such notice as is required by the termination of employment provisions of the British Columbia Employment Standards Act, as amended from time to time.

The court found that this provision was insufficient to rebut the presumption of common law reasonable notice because it merely stipulated that minimum notice as prescribed by the Act would be given. However, the court could not find that this clause constituted a "waiver by the Claimant to reasonable notice" (para. 26).

The court went on further as follows (at para. 26):

> [26] In other words I find that it was unnecessary to even include that clause in the contract because that minimum is already guaranteed under the legislation and is therefore surplusage [sic] in the contract. In my opinion the reciting of this provision of the Act in a contract merely states the minimum required by law, and should not be otherwise construed without a clear and express waiver of reasonable notice by the employee, after the implication of such waiver has been specifically brought to the attention of the employee by the employer.

It is important to note that the *MacAlpine* decision was before the court in *Van't Slot v. OncoGenex Technologies Inc.*, *supra* and the court distinguished it on the grounds that it pre-dated *Wong* and that there were elements of unconscionability in the *MacAlpine* case which were not present in the *Van't Slot v. OncoGenex Technologies Inc.* case.

D. Conclusion

The decided cases in BC give rise to a fair degree of certainty that a clause which incorporates the *Employment Standards Act* by reference will be found to rebut the presumption of common law notice and will limit any notice obligations to those provided for in the Act.

E. Ontario Decisions

In Ontario, there is also a fair degree of certainty that incorporation of the employment standards legislation by reference will be sufficient to displace the presumption of common law reasonable notice. However, there is also an anomalous decision from Ontario's Court of Appeal which casts some doubt on the notion that a clause which is intended to displace the common law presumption of notice must fix some other clearly defined notice period.

In *MacDonald v. ADGA Systems International Ltd.* (1999), 41 C.C.E.L. (2d) 5 (Ont. C.A.) leave to appeal to Supreme Court of Canada refused, [1999] S.C.C.A. No. 147, the Ontario Court of Appeal considered a termination clause as follows:

> ... either party to this Agreement may terminate this Agreement at any time by giving *not less than one (1) month's prior notice* sent either by registered mail or bailiff. [emphasis added]

The employee had six years' service with the employer and, upon termination, the employer provided him with 13.2 weeks' severance. Based on his length of service, Ontario's employment standards legislation required minimum notice of six weeks. The employee argued he was entitled to reasonable notice at common law. The trial judge treated the termination clause as a floor only and found it did not create a ceiling or otherwise insulate the employer from the common law requirement to provide reasonable notice. He awarded the employee 14 months' pay in lieu of reasonable notice.

This decision was reversed on appeal. Justice Abella found the notice provision did not conflict with any legislative minimum entitlement. The wording "... not less than 1 month's prior notice" did not fall below the Act's minimum of one week notice per year of service, to a maximum of eight weeks. She noted the employer had paid not only the minimum six weeks' severance required by statute, but also an additional seven weeks. She distinguished *Machtinger*, *supra* on the basis that the clause in that case set a specific notice period that, on its face, violated the four week minimum notice requirement in the Act whereas the clause before the court did not. She reasoned as follows at paras. 22-24:

> [22] While not determinative, moreover, ADGA's payment of both the minimal six weeks' compensation to which MacDonald was entitled by statute, as well as an additional seven weeks' severance pay, reflects an understanding of the termination clause as requiring, at the very least, compliance with the notice requirements under the *Employment Standards Act*. Unlike *Machtinger*, there is no "attempt to contract out of the minimum notice requirements of the Act": *Machtinger* at 502. To find that the clause in MacDonald's contract violates the *Employment Standards Act* requires an interpretation of the clause which injects an illegal term into what is, on its face, apparently legal.
>
> [23] It would no doubt have been linguistically preferable had the termination provision in MacDonald's contract contained words after the term of notice such as "in accordance with the relevant provisions of the Employment Standards Act." But while this layer of specificity might have enhanced the clarity of the parties' intentions, its absence does not detract from the provision's legality.
>
> [24] In this case, the common law presumption in favour of reasonable notice has been rebutted. There is a clear—and clearly expressed—term providing for not less than one month's notice. Neither on its face, nor inferentially, does this term

> provide for a notice period less than that required by the *Employment Standards Act*, nor reflect an attempt to contract out of that requirement. Accordingly, the contractual term prevails over the common law presumption.

The focus of this reasoning was on whether the clause violated the Ontario *Employment Standards Act*. However, by providing for notice of "not less than 1 month" the clause does not provide an objective formula for determining how much notice the employee is entitled to receive. In this case the employee's length of service entitled him to a minimum of six weeks' notice, which was greater than the 30 days indicated in the clause. The clause made no reference to the employment standards legislation, nor did it specify how notice periods longer than 30 days would be assessed. Consequently, the employer was allowed to unilaterally determine the notice period. The court's reasoning in this case appears to be that if the employer provides the employee with an amount that meets or exceeds the statutory minimums, the clause would be sufficient to displace the presumption of reasonable notice and/or create a ceiling.

Given the usual insistence of the Courts that a termination provision must clearly and unambiguously fix a notice period in order to effectively displace the presumption of reasonable notice and create a ceiling, this aspect of the decision is inconsistent with the weight of authority on this issue and difficult to reconcile with other decided cases.

1. Treatment of McLennan in Ontario

In Ontario, *McLennan*, *supra* has been cited and argued in a number of cases and, in the following cases, the court has rejected it on the basis that the legislation in Ontario did not contain "at least" language. In *Wood v. Industrial Accident Prevention Assn*, [2000] O.J. No. 2711 (S.C.J.) and *Lloyd v. Oracle Corp. Canada Inc.*, 2004 CanLII 18084 (Ont. S.C.).

The court expressly considered and distinguished *McLennan*, *supra* on the basis that the legislation in Ontario did not contain "at least" language and further, the court found that the foregoing clause set out the applicable notice period with sufficient clarity to rebut the presumption of reasonable notice at common law.

2. More Recent Developments

In *Clarke v. Insight Components (Canada) Inc.*, [2008] O.J. No. 5025 (QL) (C.A.), the court considered the following termination clause and found it was sufficiently clear to displace the presumption of common law notice:

> Termination of Employment - Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. *Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation.* By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts shall be due and payable to you whether under statute or common law. [emphasis added]

The employee argued that the foregoing clause was ambiguous because it provided for "reasonable notice" and s. 5(2) of the *Employment Standards Act* provides that an employee is entitled to the benefit of any contractual provision for greater benefits than those conferred by the Act. Accordingly, the employee argued that he was entitled to reasonable notice at common law.

The court disagreed and this determination was upheld by the Court of Appeal which stated (at para. 4):

> [4] In our view the effect of this clause is clear. The words "reasonable notice" cannot be read in isolation. They must be read in the context of the clause as a whole. When read in their proper context, the words "reasonable notice" cannot be taken to import the general common law standard. Rather, the clause clearly provides that the reasonable notice period to which the employee is entitled is "equal to the requirements of the applicable employment or labour standards legislation." To resolve any possible doubt, the concluding words of the clause exclude any further amounts "whether under statute or common law."

By contrast, in *Dwyer v. Advanis Inc.*, [2009] O.J. 1956 (QL) (S.C.J.), the following termination clause was not upheld:

> should it be determined at any time that there is not a fit between your skills and the requirements of the job your employment with Advanis will be terminated and *you will receive severance as determined by the applicable provincial Employment Standards Act* [emphasis added]

The court found the clause was not enforceable on the basis that it no longer reflected the nature of the employment relationship between the parties. The court also went on to distinguish this clause from the one at issue in *Clarke*, *supra* and held that it did not displace the presumption of reasonable notice for two main reasons. In that regard, the court stated (at paras. 36 and 37) that:

> [36] Furthermore, the clause is at least ambiguous as to whether it limits the Plaintiff's entitlement to "the applicable *Employment Standards Act*" and nothing more. Any ambiguity should be construed against the Defendant as the author of the document, particularly given the disparity in the bargaining position of the parties. This case is distinguishable from *Clarke v. Insight Components (Canada) Inc.* on the wording of the termination clause, as well as on the facts.
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> [37] Finally, under s. 57 of the *Employment Standards Act*, the Plaintiff was entitled to four weeks' notice of termination and under s. 60 of that Act the Defendant was required to maintain his employee benefits during that period. It did not do so. The Defendant should not be afforded the protection of a contractual provision it breached itself.

It is worth noting that the court in *Dwyer*, *supra*, did not refer to or appear to consider the Court of Appeal's decision in *MacDonald*, *supra* in coming to its decision.

In *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508, the employee's contract contained the following termination clause:

> 13. With respect to termination of employment, the following terms and conditions will apply:
>
> 1. The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice;
>
> 2. The Corporation may terminate your employment without cause at any time by providing you with the 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 the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

The employee succeeded in her claim on the basis that the termination clause failed to expressly provide for the continuation of benefits during the statutory notice period which is required by s. 61(1)(b) of the Ontario employment standards legislation. This argument had achieved success in

Wright v. The Young and Rubicam Group of Companies (Wunderman), [2011] O.J. No. 4960 (QL) (S.C.J.) and the court in *Sifton*, *supra* considered *Wright*, *supra* in arriving at its decision. It stated at paras. 65-66:

> [65] The failing of the particular termination provisions in the case before me is that they attempt to "draw the circle" of employee rights and entitlements on termination with an all-encompassing specificity that results in the effective and impermissible exclusion and denial of the benefit continuation rights mandated by the legislation. This is what puts paragraph 13 offside, and requires the "termination provision package" of paragraph 13 to be regarded as null and void, in accordance with the policy considerations and directive outlined by the Supreme Court of Canada in *Machtinger*.
>
> [66] In particular, employers should be provided with incentive to ensure that their contracts comply with all aspects of the employment standards legislation, including adequate notice (or pay in lieu thereof) and mandated benefit continuation. As emphasized by Justice Low in *Wright*, *supra*, an employer's voluntary provision of additional benefits after the fact does not alter the reality that the employment contract drafted by the employer is contrary to law.

As a result, the court held that the employee was entitled to reasonable notice at common law on this basis.

What is noteworthy about this decision is that the employee also argued that on the basis of the BC Supreme Court's decision in *McLennan*, *supra*, the termination clause should not be viewed as creating a ceiling since the current Ontario employment standards legislation language now contains "at least" language which is similar to that contained in the BC legislation at the time of the *McLennan* decision.

The employee in *Stevens*, *supra*, further presented the court with a 2011 decision from New Brunswick Court of Queen's Bench—*Cybulski v. Adecco Employment Services Ltd.*, [2011] N.B.J. No. 266 (Q.B.), which expressly considered and applied the principle in *McLennan*, *supra*. Specifically, in *Cybulski*, the employment contract contained a termination provision specifying that the contract was "subject to provincial legislation regarding termination of employment" and the governing law was that of New Brunswick.

After reviewing *McLellan*, *supra* and noting that the Employment Standards Act of New Brunswick contained "at least" language specifying minimum periods, the court found as follows (at para. 19):

> Thus the wording contained in the New Brunswick legislation is similar to the British Columbia legislation in that both contain the words "at least". In my opinion, Mr. Cybulski's employment Contract could not fix the notice period on termination to be the period set out in the *Employment Standards Act* because the statute itself, by providing that notice was required of "at least" the minimum statutory period, does not fix the notice period. The Contract only converts the provisions of the *Employment Standards Act* to be a floor for benefits rather than a ceiling. Accordingly, since the Contract failed to fix the notice period with sufficient clarity, the common law presumption of reasonable notice continues to operate. The common law presumption in favour of reasonable notice has not been rebutted with express contractual language to the contrary.

The employee in *Stevens*, *supra* argued that the older decisions of the Ontario Courts (e.g., *Wood*, *supra*) which rejected *McLennan* on the basis of differing language in the legislation should be discarded in favour of the reasoning in *McLennan*, *supra* and *Cybulski*, *supra*.

The court considered these arguments and rejected them on the following grounds (at paras. 43-46):

> [43] The problem with the plaintiff's argument is that Justice Leitch did not base her decision in *Wood* (and her rejection of *McLellan*) solely on the difference then existing between the British Columbia and Ontario legislation. At paragraphs 15-17, she also relied expressly on the Court of Appeal's decision in *MacDonald v. ADGA Systems International Ltd.*, *supra*, in which the common law presumption was displaced not by legislation incorporated by reference, but by the contract's express reference only to a *minimum* notice requirement:
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> ...
>
> [44] In the result, Justice Leitch found in *Wood*, as do I, that our Court of Appeal has held that language in an employment contract merely specifying a minimum notice period will suffice to displace the common law presumption, provided the specified minimum does not conflict with the legislative requirements.
>
> [45] *Even without Wood, it seems to me that the plaintiff is still confronted with the Court of Appeal's approach and decision in MacDonald.* Again, it must be remembered and emphasized that the relevant termination provision in that case did not purport to incorporate the applicable employment standards legislation by reference. It merely specified a minimum notice period. While not specifying a definite notice requirement, (by way of specifying a floor *and* a ceiling), the specified minimum notice also did not conflict with the requirements of the legislation. For the Court of Appeal, that was sufficient to displace the common law presumption.
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> [46] In that regard, I see no logical or meaningful distinction between the MacDonald case and the case before me. *Here as there, the termination provision in question admittedly specifies only minimum notice requirements by incorporating, via reference, the "at least" provisions of the "new" Ontario employment standards legislation.* However, incorporation of the legislative notice requirements also means the specified minimum notice requirements of the contract self-evidently will not conflict with those of the legislation. Pursuant to MacDonald, that is sufficient to displace the common law presumption. [emphasis added]

Thus, on the basis of the authority in *MacDonald*, *supra*, the Court found that despite the legislation's current use of "at least" language, incorporation by reference still displaces the presumption of common law notice.

F. Summary

It would appear from the decided cases in Ontario that as a result of the Ontario Court of Appeal's decision in *MacDonald* and its subsequent application in *Stevens*, *supra*, clauses providing for "at least" or "not less than" a particular amount will be deemed to have displaced the common law presumption of reasonable notice as long as they do not fall below statutory minimums and the employer provides an amount on termination which either meets or exceeds these minimums. This appears to be the case despite that: (a) these clauses do not fix a formula for assessing notice; and (b) the Ontario legislation currently contains "at least" wording in relation to statutory minimum payments upon dismissal.

G. Alberta Decisions

In *Kosowan v. Concept Electric Ltd.*, 2007 ABCA 85, the Alberta Court of Appeal considered a termination clause which incorporated the minimum requirements in the employment standards legislation by reference. That clause read as follows:

> The company reserves the right to terminate your employment at any time. Should you be terminated for cause, then you will not be entitled to any advance notice of termination or severance pay in lieu thereof. *Should you be terminated for reasons other [than] cause then you will be entitled to advance notice or severance pay thereof in accordance with the Employment Standards Act of Alberta.*

The termination provision in Alberta's *Employment Standards Code* when the case was being considered by the Alberta Court of Appeal was as follows:

> 56 To terminate employment an employer must give an employee written termination notice of *at least*
>
> ...
>
> (c) 4 weeks, if the employee has been employed by the employer for 4 years or more but less than 6 years, ...

The Alberta Court of Appeal concluded that the language in the clause did not displace common law reasonable notice. In essence, the court applied the same reasoning as the BC Supreme Court in *McLennan*, *supra* and in *Cybulski*, *supra*, although it did not refer to these cases. It stated, at para. 4:

> The question to be decided is whether the termination clause in the letter agreement renders inapplicable s. 3(1) of the Code. As we read it, the term of the agreement provides only that in the event of termination without cause, the Appellant is entitled to severance pay "in accordance with the *Employment Standards Act of Alberta.*" (It is conceded here that the reference is to the Code.) *The clause does not, on its face, confine the Appellant to compensation pursuant to ss. 56 and 57(1) of the Code. On the contrary, the choice of language leaves open to the employee the ability to pursue an action. To do so, in our opinion, would be "in accordance with the Employment Standards Code." The provision is clear and unambiguous.* [emphasis added]

The Alberta Court of Appeal's decision is brief and contains no reference to BC or Ontario decisions considering similar clauses and the impact of legislation with similar language. As such, it is unclear whether the court was aware of these decisions or guided by them at all.

The *Kosowan*, *supra*, decision was followed in *Joseph v. June Warren Publishing Ltd.*, 2007 ABPC 309.

H. Summary

Based on a review of the foregoing cases, it is clear that when seeking to displace the presumption of common law notice, drafters of contracts should consider taking the following steps in creating such contracts:

- review the current legislation in the applicable province and ensure the language does not contain the words "at least" in reference to minimum payments on termination. While this is possibly not as problematic in Ontario because of the *MacDonald* and *Stevens* decisions, it nevertheless leaves open a persuasive argument that the common law has not been displaced since there is no fixed formula and no ceiling where the legislation is drafted in terms requiring amounts of "at least" on termination (which Ontario's legislation current contains);
- in jurisdictions in which there is "at least" language, add a provision clarifying that the statutory minimums provide for the employee's full entitlement under the statute and at common law. Consider adding such a provision even where "at least" language is not in place as: (a) legislation changes from time to time; and (b) such a statement creates a further layer of certainty;

- review the applicable statute carefully and ensure that the termination clause expressly provides for everything the dismissed employee is entitled to upon dismissal, including benefits or other entitlements; and
- incorporate the legislation by reference and avoid the use of superfluous language or words which may give rise to any risk of ambiguity.

On the flipside, those seeking to attack such clauses may do so by considering whether the termination provision contains failures to take any of the above-noted steps or any related deficiencies. Any such failings or deficiencies will leave it vulnerable to attack.

IV. Mitigation and Severance Payments—Update

Mr. Blair Curtis prepared a paper entitled *Revisiting the Employee's Mitigation Duty where Contractual Severance Clauses Exist* for the 2013 CLEBC Employment Law Conference. In his paper, Mr. Curtis provided an overview of the law relating to the duty to mitigate in cases where there is a pre-agreed contractual severance payment. Further, he provided a detailed review of the 2012 Ontario Court of Appeal decision in *Bowes v. Goss Power Products* and its potential implications.

Below is a recap of *Bowes v. Goss Power Products*, 2012 ONCA 425 and a review of subsequent cases which have followed that decision.

A. Recap of Bowes v. Goss Power Products, 2012 ONCA 425

In *Bowes*, the employee had worked for the employer for 3.5 years as its Vice President of Sales and Marketing. Paragraph 30(c) of his employment contract described Bowes' entitlements on termination without cause as follows:

> 30. The Employee's employment may be terminated in the following manner and in the following circumstances:
>
> ...
>
> (c)By the Employer at any time without cause by providing the Employee with the following period of notice, or pay in lieu thereof:
>
> ...
>
> Six (6) months if the Employee's employment is terminated prior to the completion of forty-eight (48) months of service; and

The employment contract also provided that pay in lieu of notice for purposes of para. 30(c) consisted of base salary only. Further, the employment contract did not make reference to the obligation to mitigate and nor was the word "mitigation" contained anywhere in the contract.

Finally, the employment agreement also contained a broad release which read as follows:

> The Employee agrees that the notice period provided in subsection 30(c) is in compliance with and in excess of the statutory minimum standards owed to the Employee and set out in the *Employment Standards Act* and constitutes full and complete satisfaction of any claim he/she may have to notice or compensation in lieu thereof, and to any other payments whatsoever (including any and all damages for wrongful dismissal) as a result of the termination of employment and the Employee agrees to release the Employer from any and all claims whatsoever which the Employee may have arising out of the termination, save and except for compliance with the terms herein set out. It is agreed that the notice provided in

> subsection 30(c) shall be an absolute, full and complete defence to any action or claim which the Employee may advance against the Employer as a consequence of any termination without cause, including, without limitation, any claim for constructive dismissal.

A five judge panel of the Ontario Court found that if an employment agreement specifies the amount of notice that the employee is to receive in the event of a without cause dismissal and that agreement is silent on the duty to mitigate, the employee is then not required to mitigate his or her damages.

The court's conclusion was based on the following considerations:

- By contracting for a specified notice period, the parties choose to opt out of the obligation to provide common law reasonable notice or damages in lieu thereof. Since a fixed notice period is not the same as common law damages for reasonable notice, the common law principle of mitigation should not apply in the absence of a clear and express intention to the contrary;
- A fixed amount to which an employee is entitled in the event of a without cause dismissal is characterized either as liquidated damages or a contractual sum. The duty to mitigate does not apply to either of these;
- Mitigation will remain a live issue in circumstances where the parties have not agreed to a specified notice period in the event of dismissal and the employee is required to seek damages at common law in lieu of reasonable notice;
- There is an inherent unfairness in allowing the employer to rely on the certainty of fixed damages and then permitting the employer to also seek a lower amount by raising the issue of mitigation where the agreement is otherwise silent in relation to the duty to mitigate; and

  It is inconsistent and counterintuitive that the parties to the contract have, on the one hand, sought finality and certainty and on the other hand, have left mitigation as a live issue giving rise to uncertainty, litigation risk, and lack of finality.

Nearly two years later, a handful of decisions indicate that the principles set down in *Bowes*, *supra*, have gained acceptance across Canada.

In *Freudenberg Household Products Inc. v. DiGiammorino*, 2012 ONSC 5725, the court was required to consider whether the duty to mitigate applied where the employment contract provided for "an indemnity compensation of two (2) years' salary including the [sic] bonuses."

In regard to the question of the duty to mitigate, the court found that *Bowes*, *supra*, is the "controlling authority." The court concluded that the employee had no obligation to mitigate her losses and was entitled to the full amount under her contract on the basis of the principle in *Bowes*, *supra*.

In *Allen v. Ainsworth Lumber*, 2013 BCCA 271, the principle in *Bowes*, *supra* was extended to a situation in which an employer sought to avoid making full payments on a severance clause providing for 15 months' notice by providing an employee with working notice and attempting to take the benefit of his mitigation eight months into the notice period.

In that case, the termination clause read as follows:

> Should it become necessary for Ainsworth Lumber Co. Ltd to sever our relationship, without cause, we will provide you with 15 months notice or pay in lieu pursuant to this paragraph shall discharge Ainsworth Lumber from any and all obligations which it may have to you arising from or in connection with this severance relationship.

The dispute began in or around October of 2009 when the employer directed the employee to go home and relieved him of his duties while it continued to pay him. The employee found a better paying job 8 months into his 15 month notice period. The former employer ceased making payments to him. The former employer's argument as to why it was entitled to cease paying the former employee was summarized by the Court of Appeal as follows (at para. 19):

> While Ainsworth does not dispute the trial judge's findings of fact, Ainsworth submits those findings cannot support a conclusion that its withdrawal of Mr. Allen's duties on October 14, 2009 represented a clear and unequivocal termination of his employment contract that day. Instead, Ainsworth says that letter placed Mr. Allen on working notice for 15 months. It accepts that the concurrent removal of his employment duties constituted a repudiation of his employment agreement, but says this alone did not terminate that agreement. The consequences of the repudiation depended on Mr. Allen's response to it. If he did not accept it, he could claim he was constructively dismissed and sue for wrongful dismissal in accord with the principles affirmed by the Supreme Court in *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846 at para. 34, 145 D.L.R. (4th) 1:

The Court of Appeal found that, in the circumstances, the employee was dismissed on October 14, 2009 when he was relieved of his duties, and that he was entitled to 15 months' salary and benefits in lieu of notice.

The court concluded, on the authority of *Bowes*, *supra* (and *Philp v. Expo 86 Corp.* (1987), 45 D.L.R. (4th) 449 (B.C.C.A.)) that the employment agreement did not impose a duty to mitigate and, as such, he was entitled to the balance of the 15 months' pay owing to him.

In *Maxwell v. British Columbia*, 2013 BCSC 1386, the court applied both *Bowes*, *supra* and *Allen*, *supra* in concluding that the employee was not required to mitigate given that the contract provided for a fixed lump sum payment upon termination. Of note is the fact that the employee's decision to decline alternate employment following her termination did not affect this result.

Finally, in *Prestige v. Lovely Travel*, 2013 ABQB 467, the dispute centered around a fixed term contract without a provision for early termination. The main issue was the enforceability of the contract. Once the court concluded the concluded that a valid contract existed between the parties, it considered the employer's obligation in regard to severance. At the time the contract ended, the employee was one year into a two year contract. The court ordered payment to the employee of the sum he would have received had he worked the remainder of the contract (i.e., 12 months).

The court made the following comments regarding mitigation and its application to fixed term contracts:

> As I do not have to decide this point on account of my determination that the defendants failed to establish that mitigation principles assist them, I will only observe that a very sound argument can be made that mitigation principles do not apply to fixed-term contracts with no early termination provisions unless the contrary position is stated. The reasons which Chief Justice Winkler adopted in *Bowes v. Bowes Power Products Ltd.*, 351 D.L.R. (4th) 219 (Ont. C.A. 2012) dismissing an employer's argument that mitigation values modified its express contractual obligation to pay the employee six months' salary if it terminated his indefinite duration employment during the employee's third year of service are cogent in other fact patterns. Chief Justice Winkler stated that "[i]t is counter-intuitive and inconsistent for the parties to contract for certainty and finality, and yet leave mitigation as a live issue with the uncertainty, lack of finality, risk and litigation that would ensure as a consequence". 351 D.L.R. (4th) 219, 237 (Ont. C.A. 2012). Certainty is just as much a feature of a fixed-term contract with no early termination provision as a contract term requiring an employer to pay an employee a stipulated sum if it wishes to invoke an early termination provision in

> a fixed-term contract or a termination provision in an indefinite-duration agreement. An employer who ends the employment relationship in a fixed-term contract before its term expires must pay the employee the value of the salary and benefits the employee would have received had he or she worked throughout the remaining term of the contract. If the parties wish to modify that obligation they should unambiguously say so. 351 D.L.R. (4th) 219, 237-38 (Ont. C.A. 2012). This approach is logically sound and has the added benefit of simplifying the law and encouraging people to work.

V. Conclusion

It appears on the basis of the foregoing decisions that mitigation will not apply in cases where there is a severance clause which pre-determines the notice period and does not expressly refer to mitigation. Consequently, both employee and employer-side counsel will need to be alive this when handling disputes involving such clauses.

Further, extra care and consideration will need to be taken in drafting employment contracts. In his 2013 paper, Mr. Curtis provides some drafting considerations. The two major considerations that Mr. Curtis raises are:

(a) in drafting contracts, expressly include both the duty to mitigate and the actual mitigation deductions; and

(b) consider all potential sources of mitigation income and ensure they are addressed in the contract.

Counsel are also well-advised to continually review the developments in this area.