THE CONTINUING LEGAL EDUCATION
SOCIETY OF BRITISH COLUMBIA
CLE BC

EMPLOYMENT LAW CONFERENCE—2016
PAPER 1.1

Wrongful Dismissal Settlements and Awards: Making and Defending Mitigation Arguments, and Other Creative Solutions

These materials were prepared by Andres Esteban Barker of Kent Employment Law, Vancouver and Valerie S. Dixon of Miller Thomson LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, May 2016.

WRONGFUL DISMISSAL SETTLEMENTS AND AWARDS: MAKING AND DEFENDING MITIGATION ARGUMENTS, AND OTHER CREATIVE SOLUTIONS

I. Introduction

Wrongful dismissal damages are intended to compensate the terminated employee for the employer's failure to provide sufficient notice of termination. They are not intended to provide a windfall to the employee, although that is sometimes the result. Employers seeking to settle wrongful dismissal claims, particularly in advance of or soon after an employee's termination, must struggle to strike the appropriate balance between providing compensation for the employee's actual future loss and avoiding an overpayment which would result in a windfall to the employee. Similarly, clever plaintiff lawyers seek to bring swift summary trial applications to increase the chance that such a windfall will result. The possibility of future mitigation, particularly in a case involving a lengthy notice period, is a vexing issue for employers, employees and judges alike. This paper discusses classic approaches to the mitigation problem, including a discussion of the different methods by which courts can reduce damages, but also delves into some lesser used strategies, including the use of the mitigation expert and various approaches used to address the possibility of future mitigation.

II. Classic Methods of Reducing Damages for Failure to Mitigate: The "Full-Stop" Vs. the Reduction, in the Context of Steinebach vs. Clean Energy Compression Corp.

The duty to mitigate will be one of the issues before the court in the majority of wrongful dismissal cases. In most litigation dealing with without cause dismissals, the plaintiff's duty to mitigate may even become the primary issue in dispute. Because the duty to mitigate is sometimes the only meaningful defence available in a wrongful dismissal action, it is not surprising that many such cases take on the appearance of the plaintiff being on trial for failing to take adequate steps to secure new employment.

The fundamental basis for the duty to mitigate is found in the principle that the wronged party to a breached contact is entitled to be put in as good a position as they would have been if there had been proper performance by the defendant, but they are not entitled to payment for their own avoidable losses: *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, at para. 9.

An oft-cited starting point for defining and assessing the duty to mitigate is found in the British Columbia Court of Appeal decision *Forshaw v. Aluminex Extrusions Ltd*., 39 B.C.L.R. (2d) 140, wherein the Court describes the general duties of a dismissed employee to 'act reasonably' in looking for and accepting alternative employment. The Court summarized the duty to mitigate as follows (at para 17):

> 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 duty to mitigate is a two-part test. First, the defendant is required to demonstrate the plaintiff failed to take reasonable steps to seek alternative employment. They must then prove the plaintiff would have been successful finding other suitable employment in the job market had they taken such steps: *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376, at para. 90.

Where the court finds a failure to mitigate, it may reduce the damages to reflect the plaintiff's "avoidable loss." There are two common methods the court can apply: the first is to terminate any entitlement to the plaintiff's damages beyond a certain point in time; and the second is to apply a general reduction in damages awarded based on the court's own assessment of the value of the avoidable loss.

The application of the first "full-stop" method commonly applies to situations where a plaintiff has successfully argued they were constructively dismissed but refused to continue working for the defendant in the constructively dismissed position. These cases are generally decided with reference to the Supreme Court of Canada decision in *Evans v. Teamsters*, 2008 SCC 20, wherein the Court discussed when a terminated employee's duty to mitigate may involve accepting reemployment with the defendant. Such a result occurred in *Davies v. Fraser Collection Services Ltd*., 2008 BCSC 942 and *Besse v. Dr. A.S. Machner Inc*., 2009 BCSC 1316. In both cases the plaintiffs' damages were limited to the date they could have returned to work with the defendant.

The alternative method applies a more subjective approach to limiting the plaintiff's damages, and courts have often reduced wrongful dismissal damages in a manner seemingly proportional to the plaintiff's lack of effort.

However, reductions that appear arbitrary and not clearly tied to the specific period of reduction are common among wrongful dismissal judgments. For example, in *Lelievre v. Commerce & Industry Insurance Co. of Canada*, 2007 BCSC 253, the plaintiff did nothing to seek work for four months, and then sent three brief emails to industry employers inquiring about the availability of work. The Court reduced the period of notice from six months to three months. And in *Bates v. John Bishop Jewellers Ltd*., 2009 BCSC 158, the Court reduced the notice period from 18 months to six months without any clear connection to the specific facts of the plaintiff's failure to mitigate.

Canada's highest court has even demonstrated this method of assessment. In *Cohnstaedt v. University of Regina*, [1995] 3 S.C.R. 451 [*Cohnstaedt*], the Supreme Court of Canada instated a dissenting judgment of the Saskatchewan Court of Appeal to reduce a plaintiff's award by one-third. Within the dissenting judgment the Court found there must be some reduction for the plaintiff's failure to mitigate, and arrived at the amount of one-third by means which were acknowledged to be "quite arbitrary": *Cohnstaedt v. University of Regina*, [1994] 5 W.W.R. 154, at para. 127.

The distinction between the above methods of reducing damages for failing to mitigate was discussed by the Court in *Carlysle-Smith v. Dennison Dodge Chrysler Ltd*., 1997 CanLII 972 [*Carlysle-Smith*]. The Court considered the circumstance of a plaintiff who did not make reasonable efforts to find other work, including not following up on an opportunity provided by the defendant at the time of his dismissal where the prospective employer likely would have hired him very soon thereafter. The Court endorsed the defendant's argument that where a defendant can lead evidence of an actual alternative job offer with details of the conditions of employment, including pay, that evidence may constitute a "complete mitigation defense" and the notice period would terminate effective the start date of the alternative employment (at para. 37). In the present case, there was no formal offer made so the Court did not apply the method of refusing any damages beyond a particular point in time; however, the Court accepted that the high probability of the plaintiff's reemployment with the specific opportunity he failed to follow up on should weigh heavily into the assessment of the reduction in damages, and the Court only awarded 8 months' damages on a 20 month notice period.

Despite this distinction, courts have appeared to apply a "full-stop" assessment in cases that have not involved the plaintiff's refusal to accept an actual defined opportunity.

In *Dick v. Canadian Pacific Ltd*., 2000 NBCA 10 [*Dick*], the New Brunswick Court of Appeal upheld a trial judge's decision to not award a plaintiff any damages approximately 17 months after his termination, which is the date by which the plaintiff decided to completely cease seeking employment for personal reasons.

The British Columbia Court of Appeal has also previously endorsed this method in *Coutts v. Brian Jessel Autosport Inc*., 2005 BCCA 224 [*Coutts*]. At trial the Court ruled the plaintiff, who was dismissed in May of 2003, had not pursued alternative employment opportunities and had he done so, he would "probably" have found work by the end of August of 2003. Despite this, the Court found the plaintiff had acted reasonably and did not apply any reduction for the reason the defendant had not proven the employment opportunities that were probably available would either replace the income the plaintiff lost or could be considered comparable positions. On appeal the Court was less forgiving to the plaintiff and found the plaintiff did fail to act reasonably. *Carlysle-Smith* was mentioned in the trial decision but not cited in the appeal decision, and the Court

determined the appropriate notice period to have ended August 31, 2003, on the basis of the trial judge's finding that the plaintiff should have found work by the end of August.

In *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13 [*Deputat*], the Alberta Court of Appeal appears to have taken a similar approach. In that case, the defendant provided the plaintiff with 12 months working notice, and the trial judge awarded the plaintiff damages on the basis of a notice period comprising an additional six months' notice past the termination date. The evidence was that the plaintiff did little to look for work during the working notice period, and ceased looking for work entirely three months after his employment ended. The Court of Appeal, on review, found the plaintiff had failed to act reasonably and reduced the damages from six months to three months, albeit without expressly tying this reduction to the date by which he ceased looking for work.

In the case of *Blais v. Harvey Burrows & Son Ltd*., 1995 CanLII 7292 [*Blais*], the plaintiff admitted to making no efforts to find work after three months of unemployment. The Court therefore did not award any damages beyond three months on the basis the evidence did not establish the plaintiff made any earnest efforts past that point.

The reasoning in some of these decisions is arguably not beyond reproach. For example, in *Blais* the plaintiff was not entitled to any damages following the date at which he ceased looking for work. However, if the principle of a reduction for failure to mitigate is to not hold the defendant employer accountable for an avoidable loss, does this not imply that the plaintiff would otherwise have found work on the date he ceased looking? In effect, the reduction serves not to apportion out the plaintiff's avoidable loss from the damages, but instead acts as a form of punishment upon the plaintiff for their inadequate efforts.

In the recent British Columbia Court of Appeal decision *Steinebach v. Clean Energy Compression Corp.*, 2016 BCCA 112 [*Steinebach*], the Court reviewed some of the above cases as part of an appeal that centered around the method for reducing a plaintiff's damages where the court found a failure to mitigate. In that case, after approximately three months the plaintiff had abandoned looking for work in his field and commenced a two-month Securities Course in anticipation of becoming a financial investment officer. The plaintiff commenced work in his new industry approximately seven months after his dismissal at a considerably reduced rate of pay. At trial, the Court found the plaintiff's efforts were "very passive" and it criticized him for being "very single minded" about the type of work he would accept (*Steinebach v. Clean Energy Compression Corp.*, 2015 BCSC 460, at para. 76). The Court found that given the health of the plaintiff's industry and his connections, his efforts to find work were "completely unreasonable" (at para. 80). The Court then went on to find that while he did not think he should dismiss the plaintiff's claim, a reduction of the notice period in the amount of three months was appropriate to account for his failure to mitigate.

On appeal, the defendant put forward the argument that the trial judge erred in not terminating the plaintiff's damages effective the date he commenced the Securities Course. The Court considered this argument in the context of various authorities advanced by the defendant. The defendant cited *Dick*, *Deputat,* and *Coutts*, all of which the Court distinguished after declaring they were quite fact specific. The Court noted that in *Coutts* the Court ruled alternative employment could have been found by a certain date, in *Deputat* the plaintiff did nothing for a considerable period of time, and in *Dick* the plaintiff ceased all intentions to look for work for personal reasons. The defendant's situation here did not fit any of those specific circumstances.

The Court decided it was not in a position to determine whether the trial judge's approach to terminating the plaintiff's entitlement to damages was appropriate. For example, the Court found

that the trial judge could have concluded that had the plaintiff continued looking he could have found work in his industry in 13 months, but drawing this conclusion from the decision would be "mere speculation".

In attempting to resolve this issue, the Court reiterated the law as follows (at paras. 40-41):

> As was stated in *Coutts*, a dismissed employee's duty to mitigate is to take reasonable steps to find alternative employment, that is, to secure employment that will replace the employee's lost income. If the employee fails to take any steps to do so, the result may be no damages. Where the employee takes some, albeit inadequate, steps to do so, damages may be reduced to take that into account. Similarly, where an employee opts to take employment at a lower income when employment could have been secured to replace fully the lost income, damages may be reduced to take that fact into account.
>
> In the present case, the judge concluded that the respondent's decision to pursue an investment counsellor career was not reasonable and that he might have been able to replace his lost income with a more focused search. *The difficulty is that, unlike in Coutts, there is no finding of when he might have found alternative employment. In my view, that is essential to support the conclusion that the respondent did not act reasonably and to support any reduction in damages based on a failure to mitigate for a period of time.* [emphasis added]

The Court also stated it was likely that the judge concluded (at para. 43) that the plaintiff "failed to mitigate for three months or that perhaps that had he searched for a job in the natural gas industry, acceptable employment would have been secured in 13 months. The problem was a lack of analysis to support a three month failure to mitigate or the date at which new employment might have been secured." The Court then awarded a new trial, likely due to the retirement of the justice who rendered the trial decision.

Steinebach directs a subtlety in the approach to reducing damages where there is a failure to mitigate that is not always clear from the case law. The Court stated that in order to support a finding that a plaintiff did not act reasonably and to support a reduction in damages based on a failure to mitigate for a period of time, a finding of when a plaintiff may have found alternative employment is essential. The Court also clarified a common misconception through asserting that when reductions are applied it is not the notice period itself that is reduced but rather the damages awarded (at para. 15). This goes against the grain of many prior decisions, including the Supreme Court of Canada's decision in *Cohnstaedt*, wherein the reductions often have no apparent nexus to the notion that the reduction is tied to when the plaintiff would have found work had their efforts been reasonable. It is also incredibly common among all jurisdictions for the award to be framed as a reduction in the notice period.

This methodology also provides an interesting contrast to cases where a reduction is made for anticipated mitigation when a trial occurs during the notice period; in such cases the court often applies reductions in the form of nominal percentage or number of months, as opposed to being based on an analysis of how long the court believes it should take the plaintiff to find new employment.

Defence counsel should be mindful of the framing of the mitigation issue in *Steinebach* and consider strategies for establishing an evidentiary foundation for reductions for failure to mitigate based not just on the inadequacy of the plaintiff's efforts but also on when the plaintiff would have found new employment. One such strategy is discussed in the next section: the use of the "mitigation expert".

III. Use of the Mitigation Expert

The duty to mitigate creates a significant hurdle for defence counsel, as their onus goes beyond convincing the court the plaintiff's efforts did not meet the required standard. The defendant also has to establish an evidentiary foundation for the argument that had the plaintiff made better efforts they would have found other work. As per *Steinebach*, this even includes needing to lead the court to the date by which reasonable efforts would have yielded employment.

Satisfying both portions of the test is critical, as the court can make an express finding that a plaintiff failed to exercise diligence in searching for employment in their field, but then find the defendant failed to prove that had they done so the plaintiff would have actually procured other employment: see, for example, *Fisher v. Seton Lake Indian Band*, [1994] B.C.J. No. 3009, at para. 22.

Assessing an appropriate reduction in damages also often resembles guesswork, which sometimes results in reductions that are seemingly incongruous with the extent to which the plaintiff's efforts were inadequate.

For example, in *Dodge v. Signature Automotive Group Ltd.,* 2014 BCSC 1452, the plaintiff was a financial services dealer for a car dealership and applied for seven positions in the year before trial, four of which were in the two months previous to trial. The defendant pointed out six similar job openings and specifically identified 84 other dealerships the plaintiff could have approached to make inquiries but did not, and alluded to many more. The Court criticized the plaintiff's efforts and found a failure to mitigate, but only reduced the notice period from 17 months to 14 months primarily on the basis of the plaintiff's age being a barrier to reemployment.

In *Swanson v. Qualicum First Nation*, 1997 CarswellNat 5048, a *Canada Labour Code* adjudicator found a complainant unjustly dismissed and awarded her a notice period of five months. The complainant remained unemployed for the approximately 20 months prior to the hearing, and the only clear economic activity she engaged in was selling and bartering eggs and chicken. The adjudicator noted the complainant's evidence was "often sketchy, incomplete, and lacking detailed information" (at para. 68). The adjudicator found a failure to mitigate, but only reduced the damages by one month.

One tool that can be used to overcome these issues and establish a firmer evidentiary base for a greater reduction is the "mitigation expert". In some wrongful dismissal cases both plaintiffs and defendants have sought to introduce the testimony of a professional with experience relevant to methods of seeking employment and the general availability of work in a particular field. These experts have been given various descriptions by courts, including "employment and relocation counsellor", partner at a firm specializing in "management psychology and human resource consulting", and even "defence mitigation expert". The common theme in all cases is that the expert has extensive experience or knowledge through their profession of assessing a job-seeker's qualifications and sourcing available opportunities.

A. Method for Introducing an Expert Opinion

Part 11 of the *Supreme Court Civil Rules* governs the use of experts. The process of introducing evidence from a mitigation expert is no different from that of any other expert. Counsel will first want to find the services of a suitable professional with the requisite qualifications. The expert must then be given an instruction letter that clearly lays out the parameters of the questions they are to answer in a report setting out their opinion.

The report must be served at least 84 days before trial. Counsel receiving the report must be aware of two important dates. First, under *Rule* 11-7(2) they have 21 days from the service of the report to demand the expert attend at trial for cross-examination or they risk having the report entered without the opportunity to question the expert at trial. The second date is at *Rule* 11-6(11), which requires the party receiving an expert report to serve an objection to the admissibility of the expert's evidence on the earlier of the trial management conference or 21 days before the scheduled trial date.

At trial the questions that can be asked of the expert are limited; the party introducing the expert can ask to clarify and confirm information within the report but the report must otherwise speak for itself. Counsel on cross-examination may ask any questions that go to the admissibility and weight of the evidence.

Counsel not accustomed to the use of experts at trial should ensure they thoroughly familiarize themselves with all issues governing the admissibility of expert evidence, including common issues that may serve to exclude or lessen the weight of such evidence.

B. The Admissibility of Expert Opinion Evidence on Matters related to Employment

When considering expert opinion evidence, two issues arise: the admissibility of the opinion, and the weight which should be given to the opinion. The law in British Columbia appears well settled that in an action for wrongful dismissal the opinion of a career transition expert will be admissible to speak to the issue the issue of mitigation of damages (subject to the expert being properly qualified): *Burden v. Bank of Nova Scotia* (1997), 35 C.C.E.L. (2d) 287.

In *Findlay v. British Steel Canada Inc.*, 1992 CanLII 1457 (BCSC), the plaintiff brought an application for the pre-trial ruling on the admissibility of the opinion evidence of an employment and relocation counsellor who stated there was a very high probability that the plaintiff would be re-employed within one year of dismissal. The Court accepted the opinion as admissible, ruling as follows (at para. 9):

> In my view, this authority does not support counsel's objection to the opinion of Mr. Brown. While the opinion might have been better drawn, perhaps with greater direction from counsel (see *Hennessy* at p.325), it contains the requisite elements of an admissible expert's opinion: a statement of the basis upon which the witness can be accepted as an expert who is able to express the opinion sought, an identification of the facts assumed (Mr. Findlay's qualifications), a statement of the question upon which the opinion is sought, and a clear expression of the opinion held with supporting reasons. This is not a case, as *Sengbusch* was, where the evidence can be said to be unnecessary. The court is not in as good a position as an experienced relocation counsellor to assess the employment opportunities currently available to someone having Mr. Findlay's qualifications. Mr. Brown appears to be a witness who may be in a position to draw on his own experience in relocating executives, having the qualifications assumed, to express an opinion on the time necessary to obtain employment similar to the position from which Mr. Findlay was dismissed. Quite apart from any question of the weight that might be attached to Mr. Brown's opinion in this case, I consider it admissible for the purpose for which it is tendered.

Since a challenge to the admissibility of such expert opinions are likely to fail, the defendant can just ensure their expert has an appropriately impressive set of qualifications, and the energies of the plaintiff are best directed towards impugning the reliability of the opinion and the weight which it should be given.

An expert report accepted into evidence may still be partially or entirely disregarded if the report contains any defects that affect its reliability. On that issue the Court had the following to say in *Stalzer v. Nagai*, 2014 BCSC 1388 at para. 40:

> Before an expert's opinion is of any assistance to the Court, the facts upon which the opinion is based upon must be proven in evidence. In other words, admissible expert evidence cannot be given any weight without a proper factual foundation. The lack of such proof will have a direct effect on the weight to be given to the opinion, and if such proof is lacking, the opinion will be given little, if any, weight.

C. Examples of the Mitigation Expert at Trial

There are not many examples of the use of the mitigation expert at trial, and many of the reported decisions come from British Columbia.

In *Valentini v. Monarch Broadcasting Ltd*., 1992 CanLII 991 (BCSC), the Court found the dismissed plaintiff had started an adequate job search but stopped making diligent efforts approximately six months later when he started his own business. The defendant called an expert to give evidence of how many months it typically takes for their clients to find employment, and found in the plaintiff's case it should have taken him six months. The consultant also provided the opinion that the plaintiff could have done many things to increase the effectiveness of his job search. The Court found the expert qualified to give the opinion and the evidence admissible. The Court set the notice period at eight months, and found, based in part on the consultant's evidence, that the plaintiff would have found work in six to eight months had he continued his original efforts. However, he also found that any employment offer would have required the plaintiff to move and likely lose the equivalent of two months' salary in the process, and on this basis no reduction for failure to mitigate was considered.

In *MacBride v. I.C.G. Liquid Gas Ltd.,* 1992 CanLII 1975 (BCSC), the defendant provided two experts to state what they would have done had they been hired by the defendant to find a job for the plaintiff. The Court found the opinion to be of little assistance, since the issue was the standard of expected performance of persons such as the plaintiff who did not receive any assistance from their former employers in finding a job. Rather, the evidence of the defence experts was premised upon the standard of performance of employment counsellors in finding a job for dismissed employees where those counsellors were hired and paid for by the former employers. The Court discussed the experts' opinions with the general law concerning the duty to mitigate as follows (at para. 9):

> The law says that a dismissed employee must act reasonably in seeking other employment for the purpose of mitigating the damages he or she suffers on account of the employer's breach of contract. *Perfection is not the standard. Reasonable conduct is.* After getting turned down again and again and finding all doors closed, there comes a time when a fired employee is entitled to say, "I've done my best. I can do no more." That does not mean the former employee should stop pursuing obvious leads. It just means that where there is a depressed economy, fired employees need not continue pounding on doors day after day when those doors have been shut in their faces on previous occasions. Having heard the evidence, including the personal circumstances of the plaintiff, I am satisfied that he did all that was reasonably necessary to mitigate his damages. [emphasis added]

In *Dixon v. Sears Canada Inc*., 1995 CanLII 536 (BCSC), the defendant was successful in a case where they used a human resources consultant to provide expert evidence. The expert stated that the plaintiff's age should not have been a factor affecting her employability, and suggested a vast array of jobs the plaintiff could have applied for. The plaintiff introduced her own expert, a

vocational consultant, who rebutted the claims of the other expert. The Court agreed the plaintiff failed to mitigate, and should have found work within 12 months. As she had received more than that in pay in lieu, the Court dismissed the action. In this particular case the Court was not clear on what role, if any, the defendant's expert report had on the ruling. It is worth noting the plaintiff had done almost nothing to seek employment, and within the first 13 months of unemployment she had applied for only two jobs. Accordingly, a finding of a failure to mitigate with a significant reduction should have been likely in any event.

In *Lightbody v. Dicom Express Inc*., 1999 CarswellNat 6488, the defendant introduced the evidence of a professional job recruiter in the transportation sector in a *Canada Labour Code* arbitration. Part of the expert's opinion was created on the basis of a survey he had conducted of transportation companies sourced through the Yellow Pages. The arbitrator found the expert's opinion of little assistance as he had only filled three or four positions similar to those of the complainant over a two and a half year period. He was also critical of the survey method used by the expert, finding numerous flaws in how his information was collected and the assumptions inherent in his use of the information. Accordingly, the arbitrator placed no reliance on the opinion evidence.

In *Mitchell v. Westburne Supply Alberta*, 2000 ABQB 377, the defendant introduced an expert to give evidence in respect of the efforts required of someone in the plaintiff's circumstances to search for alternative employment in Calgary, as well as to critique their resume and the efforts they undertook. The expert described the plaintiff's search as informal, casual and "not really serious", as well as being too limited in scope. He also criticized the plaintiff's resume as being visually appealing but lacking in substance. The Court did not find a failure to mitigate, accepting that given the resources available to the plaintiff and his efforts, the defendant had failed to discharge its onus to show he had failed to mitigate. The Court, in what may have been a subtle jab, also pointed out that the plaintiff's job search prospects may have been brighter if the defendant had provided him with the services of a professional in the outplacement or job search field.

In *Jackson v. SNC Lavalin Engineers & Constructors Inc. et al,* 2003 BCSC 394 [*Jackson*], the Court had to consider the opinion of an expert who estimated someone in the plaintiff's position would find work in 5.7 months.

The Court found the report of the expert was of limited assistance and rejected the expert's opinion regarding the availability of opportunity, noting the following (at para. 19):

> In terms of reviewing sample jobs that had been advertised, it is fair to say that of the 25 jobs that were specifically reviewed by the expert, seven were jobs advertised during the transition period of four to six weeks and there was no evidence that these positions were advertised or available beyond the period; another four were part time, on call, or temporary maternity leave positions; one required a degree in science and three years in an environmental lab; and another nine required accounting experience, graduation from a post-secondary program or proficiency in specific computer software platforms. In my view, these jobs were not applicable to Ms. Jackson and I am unable to conclude that for the plaintiff that there was as the expert stated "a considerable supply of opportunity".

The expert's opinion in *Jackson* failed on the lack of usefulness of the specific jobs presented. As the jobs were either advertised at a time when the plaintiff was in an "adjustment period" following her loss of employment, and many others did not fall within the purview of the plaintiff's duty to mitigate, the Court could not accept the expert's opinion about the abundance of opportunities.

The decision in *Jackson* shows a clear need to ensure the expert is providing their opinion based on job advertisements the Plaintiff would actually be required to apply for.

The court again rejected an expert's evidence in *Nelson v. Aker Kvaerner Canada Inc.*, 2007 BCSC 535 [*Nelson*]. The Court found the opinion to be of little assistance, for the reason it related to an "optimum job search for someone looking for new employment". The expert's opinion was also based on a 14-year-old summary of the plaintiff's qualifications, ignoring the six promotions received in the interim. As a result, the expert's assessment related to positions as a project manager or engineer, as opposed to a top level executive position. As in *Jackson*, the foundation upon which the expert based his opinion was flawed.

In *Carter v. 1657593 Ontario Inc.*, 2014 ONSC 6761, the defendant called a human resources expert with experience finding people work in the hospitality field. The expert testified the plaintiff might have found a job sooner if he employed proper job search strategies. The expert was critical of the plaintiff's resume, said he should have pursued more contacts, and should have used on-line resources or taught himself how to use such resources by doing a Google search. The Court found the expert's strategies were the "best possible approach", but this exceeded the standard of reasonableness. They were in excess of what the plaintiff knew, and the plaintiff resorted to what he did know: pursuing opportunities through networking.

This matter was also recently decided in *McLeod v. Lifelabs BC LP*, 2015 BCSC 1857 [*McLeod*]. The expert in that case provided an opinion on the reasonableness of the plaintiff's job search. The expert was generally very positive about the plaintiff's prospects, finding she had many employment opportunities within her area of speciality. He also testified that a moderately well-managed job search yielded offers in three to five months.

The Court agreed that "at first blush" the expert's opinion supported the defendant's position that there were dozens of available jobs for which the plaintiff was qualified. However, the expert's opinion ultimately failed for a variety of reasons, including a lack of care in preparing the report through including duplicate postings and not vetting jobs that were unsuitable due to the low wage, the plaintiff's lack of qualifications, or the region in which they were available.

The Court also echoed the sentiment in *Jackson* concerning the applicable standard, stating that while the expert's comments about what an individual should be doing to look for work was illuminating, it reflected what someone would do in a perfect world with a perfect job coach.

In *Ward v. Royal Trust Corp. of Canada*, 1993 CanLII 1325 (BCSC), the plaintiff used an expert in their own favour to argue their job search was reasonable. The Court did not find a failure to mitigate, although it is not clear to what extent the expert opinion influenced this conclusion.

D. So Is it Hopeless? Effective Use of the "Mitigation Expert"

A mitigation expert has a potential use as a litigation tool, but care must be given to how the expert is used. Considerations counsel should give to the use of an expert include matters of timing, how the instructions to the expert are framed so as not to affect the weight of the opinion, and providing the expert with clear parameters so as not to create an opinion based on opportunities for which the plaintiff is not expected to apply.

1. Timing

Rule 11-6(3) requires that, unless otherwise ordered by the court, the expert's report must be served at least 84 days before trial. This presents some practical considerations for when the expert's opinion should be sought. A defendant may be emboldened by a favorable expert opinion obtained six months into a languid effort by the plaintiff. However, the report may lose its persuasiveness or

relevance if the plaintiff has subsequently stepped up their efforts to find work. Waiting too long to obtain the report can also have the consequence of minimizing its leverage for settling before trial.

It is also advisable to request the report after discoveries, at which point the defendant can satisfy itself that it has requested and obtained all potentially relevant materials, thereby not invalidating an opinion that has not considered all the available evidence.

An effective strategy may be to obtain a report shortly after discoveries and, prior to the deadline for service, obtain a supplementary report or request a new report encompassing the entirety of the plaintiff's efforts to that date.

2. Framing the Questions

It is imperative that an expert's opinion not simply be an attempt to answer for the court one of the issues that is before it. In *R. v. Mohan*, [1994] 2 SCR 9, the Supreme Court of Canada cautioned about the use of experts not being permitted to usurp the functions of the trier of fact (at para. 28). In *R. v. Sekhon*, 2014 SCC 15, the Court elaborated on this principle in the context of a criminal trial, but which nevertheless has applicability to expert opinions in general. The Court noted that expert evidence must not amount to nothing more than one party's theory of the case "cloaked with an aura of expertise" (at para. 75). The Court further affirmed that the decision to qualify an expert does not end the need for scrutiny of the expert's evidence to ensure it stays within the proper boundaries and maintains the integrity and independence of the court's fact finding function (at para. 76).

This guidance should carefully inform counsel in how the instructions to the expert are prepared. For example, it could be fatal to an expert opinion to merely ask if a plaintiff's job search was 'reasonable', as this is precisely the question the court is tasked with answering. The existing decisions where a mitigation expert has been used establish that having the expert state that the plaintiff's efforts were unreasonable and explain what they should have done is unlikely to succeed. The former usurps the court's role, and the second imputes an unreasonable standard.

A more effective approach is to ensure the expert is only providing the court with information it would not otherwise have, including:

- Estimates of how many other suitable employment opportunities exist;
- Discussion of the effectiveness of job search options not explored by the plaintiff (the existence of which have ideally already been raised to the plaintiff's attention); and
- Estimates of how long it should take someone in the plaintiff's position to find suitable employment based on available opportunities.

The expert should avoid providing overt opinions on such matters as whether:

- The plaintiff's efforts were in their opinion reasonable or satisfactory;
- The plaintiff should have considered moving to find employment;
- The plaintiff's age is a barrier to reemployment; and
- The plaintiff should have accepted lower paying work.

Counsel should instead consider the specific argument they intend to put before the court, and use the expert to establish the necessary facts to prove that argument. If the intended argument is that

the plaintiff failed to test the employment market before embarking on retraining or attempting to start their own business, the expert will be useful for establishing what opportunities would have been available had the plaintiff looked. If the intended argument is that a reasonable person would consider relocating given the abundance of jobs elsewhere within the plaintiff's industry, the expert should testify to the availability of work elsewhere in the province or country, and the relative poverty of jobs in the plaintiff's locale. If counsel wishes to argue that the plaintiff's opportunities are not affected by their age, the expert should present facts on age and employment in the plaintiff's field and region from which the court can easily draw their own conclusions.

Counsel can also consider using the expert's opinion for the ancillary purpose of assessing the appropriate period of notice through establishing the availability of other opportunities.

3. Providing the Expert with Clear Parameters for Identifying Available Employment Opportunities

As demonstrated in *McLeod*, *Jackson*, and *Nelson*, an expert's opinion can lose its effectiveness if the expert is focusing on available employment opportunities that fall outside of the plaintiff's duty to mitigate.

The instructions to the expert should ensure that the opinion is not based on opportunities that a court would later find the plaintiff is not required to pursue. There are a variety of reasons this may apply:

- The plaintiff may require retraining or lack the qualifications for the position;
- The job may be at a significantly lower rate of pay;
- The position may be outside of the geographical area the plaintiff should reasonably be expected to pursue at that particular stage of their job search; and
- The job may amount to a significant step-back in responsibility and loss of career momentum given the plaintiff's prior position.

It is preferable that the expert be provided with conservative parameters for their inquiry even though that may reduce the forcefulness of the report, as the alternative is to risk the wholesale disqualification of the opinion. Remember that the report must speak for itself. A flawed opinion is unlikely to be rehabilitated on redirect, and opposing counsel is entitled to quietly sit on any identified defects or deficiencies in the report until the moment of cross-examination.

IV. Other Creative Solutions to the Challenge of Dealing with Future Mitigation

All counsel acting for employers have faced these difficult situations:

- A client wants advice on how much severance to offer a long-term employee being terminated without cause where the availability of similar positions in the job market is unknown or unpredictable;
- You are at mediation trying to settle a wrongful dismissal claim that has been brought only a short time after the termination has taken place;
- Summary trial materials have been served seeking a lengthy reasonable notice period which stretches far beyond the date the summary trial will be heard.

In all of these scenarios, "crystal ball gazing" is unavoidable. Or is it? In this section of the paper, we explore different approaches to dealing with the issue of future mitigation.

A. The Approaches

In *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, Perell J. neatly summarized the three most common approaches as follows (para. 48):

- The Contingency Approach — The employee's damages are discounted by a contingency for re-employment during the balance of the notice period…
- The Trust and Accounting Approach — The employee is granted judgment but a trust in favour of the employer is impressed on the judgment funds for the balance of the notice period requiring the employee to account for any mitigatory earnings…
- The Partial Summary Judgment Approach — The employee is granted a partial summary judgment and the parties return to court during and or at the end of the notice period for further payments subject to the duty to mitigate…

A fourth, less-used approach is the "salary continuance approach", whereby the employer continues to pay the employee his or her regularly salary until the termination of the notice period, assuming the employee does not find employment during the notice period. There have also been a number of cases where these approaches have been combined.

In BC, the courts prefer the contingency approach, whereas in Ontario, the courts tend to apply either the trust approach or the partial summary judgment approach. However, all of these approaches can and should be considered for resolution of wrongful dismissal claims prior to trial.

B. The Cases

1. British Columbia

In BC, there has been little disagreement about the preferred approach: for decades, BC courts have quite consistently adopted the contingency approach.

Although some courts in BC have applied the salary continuance approach (see *Spooner v. Ridley Terminals Inc*, 1991 CanLII 349 (BCSC), discussed below), more recent decisions have rejected that approach and suggested that it is inconsistent with basic damages principles (see *Tull v. Norske Skog Canada Ltd*., 2004 BCSC 1098, discussed below).

Smith v. Pacific National Exhibition, 1991 CanLII 2366 (BCSC) [*Smith*]

Smith is considered to be one of the leading cases in BC on the contingency approach. The 49 year-old plaintiff was the general manager of the PNE and had worked for the defendant for 19 years. At the time of his termination, he was earning $110,000 per year. On a summary trial application made 8 months after the employee's termination, Bouck J. determined the reasonable notice period to be 22 months.

Bouck J. then considered the issue of how to deal with the potential for future mitigation since at the date of judgment, approximately 16 months remained in the notice period. He reviewed multiple BC decisions, all of which used the contingency approach (at paras. 24-27). He noted (at para. 30) that:

> [T]he exercise of reducing an award in these circumstances is essentially based on a possibility or contingency that the plaintiff will find a new position prior to May 11, 1992. Like the assessment of any contingency, it is possible this may happen, but it is also possible he might not find any work until long after May 11, 1992. In fairness, both negative and positive contingencies should be taken into account.

Using the contingency approach, Bouck J. concluded that 1 month should be deducted from the 22-month notice period.

Spooner v. Ridley Terminals, 1991 CanLII 349 (BCSC) *[Spooner]*

Spooner is an example of the application of the salary continuance approach. The plaintiff was employed by the defendant for approximately 8 years. At the time of her termination, she was 52 years old and held the position of human resources manager. On a summary trial application heard 7 months after termination, the Court determined the reasonable notice period to be 12 months. The defendant had continued to pay the plaintiff on her regularly scheduled pay days up to the date of the summary trial.

The defendant took the position that salary continuance was the proper means of paying the damages to which the plaintiff was entitled. The Court agreed but supplemented that order with a strange twist: should the plaintiff obtain employment during the balance of the reasonable notice period, the monthly payment due to the plaintiff would be reduced by 50% (which, probably not so coincidentally, was a term of a settlement offer made by the defendant to the plaintiff before trial). The Court seemed to suggest that such reduction would adequately address any future mitigation by the plaintiff.

Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc., 1993 CanLII 1440 (BCCA) [*Foster*]

Foster is another leading case in BC in which the contingency approach was used. The plaintiff was 46 years old with a high school education. He began working for the defendant at the age of 20 and had never been employed with anyone other than the defendant. When he was terminated, he held the position of senior sale manager and was earning approximately $60,000 - $75,000 per year.

On a summary trial application made 4 months after the employee was terminated, the chambers judge held that the reasonable notice period was 20 months. The defendant employer appealed.

The Court of Appeal found that a 20-month reasonable notice period was "outside the range of reasonableness to a degree warranting this Court's intervention" (at para. 15). The Court further noted (at para. 14) that "[w]ith this summary trial being heard just short of five months after the dismissal I think there must be built into the notice period a contingency factor that recognizes the possibility that the employee will obtain employment within the notice period."

Hollinrake J.A. concluded that the reasonable notice period (including a contingency for the possibility of future mitigation) was 15 months. Unfortunately, the Court did not specify exactly how many months it deducted from the notice period as a result of the contingency and since there were other factors which the Court considered in reducing the reasonable notice period, it is impossible to know exactly the impact of the contingency factor.

Aside from the application of the contingency approach, *Foster* is notable for another reason. The order granted by the trial judge had specified the reasonable notice period but the quantum of the plaintiff's damages was not determined. Therefore, the order entered in the Supreme Court expressly preserved the parties' right to go back before the trial judge in the event that quantum could not be agreed. As a result of their failure to agree on quantum, the matter was scheduled for

hearing before the trial judge. Two days before that hearing, the defendant learned that the plaintiff had secured employment five days earlier. The defendant attempted to place evidence of that new employment before the trial judge but the trial judge refused to consider it on the basis that he was *functus officio.*

The Court of Appeal disagreed and held that the trial judge was not *functus officio* because damages had not been assessed and there had thus been no judicial determination of the issue. Therefore, it was open to him to hear the evidence and take it into account in the assessment of damages (at para. 21). The Court of Appeal did not determine whether the trial judge should have admitted the new evidence but remitted that issue back to the trial judge for determination.

Tull v. Norske Skog Canada Ltd., 2004 BCSC 1098 [*Tull*]

Tull is another, more recent, widely cited case. The 51 year-old plaintiff held a Bachelor of Science degree in chemical engineering and worked for the defendant for 13.5 years as a manager of operations. At the time of his dismissal, he was earning $148,625 per year.

In his reasons for judgment on the plaintiff's summary trial application, Pitfield J. set the plaintiff's reasonable notice period at 20 months. At the time of trial, approximately 10 months remained in the notice period. In the 10 months preceding trial, the plaintiff had attempted to mitigate his losses, but was unable to secure new employment. At trial, he argued that there should be no reduction to the notice period because there was no evidence that the positive contingencies outweighed the negative. The employer argued that a reduction should be made to the length of the period to reflect the fact that income might be earned in the 10 months following the hearing of the summary trial application.

Pitfield J. noted the Court's decision in *Smith*, but refused to deduct any time from the notice period. He found that there was only a remote possibility that the plaintiff would find suitable employment within the remainder of the notice period given the nature of his former position and the circumstances of the industry in which he was involved in (at para. 44).

Pitfield J. also considered the use of the salary continuance approach used in *Spooner*. In rejecting the use of that approach, he stated (at para. 60) that:

> In my opinion, the principle that damages must be assessed on a once and for all, one-time basis, the requirement that the court resort to a kind of mandatory injunction or adjourn judgment to a point following expiry of the notice period if the effectiveness of a salary continuance arrangement is to be assured, and the fact that a salary continuance arrangement to which the employee does not agree reflects the employer's attempt to unilaterally amend the employment contract, suggest that *such arrangements should not be endorsed as a means of compensating an employee for damages in a wrongful dismissal action*. It is obvious, of course, that nothing should prevent an employer and employee from agreeing to enter into a salary continuance arrangement. [emphasis added]

However, he did comment that the salary continuance approach could be exercised "if the amount to be paid to the employee in accordance with its terms is equivalent to that which the employee would have received had he or she been dismissed with working notice" (at para. 62). In the case at bar though, he refused to apply that approach because of the substantial departure in the notice period as determined by the employer from that which was found to be reasonable, among other reasons (at para. 63).

Pitfield J. closed by stating (at para. 65) that:

> Acceptance of salary continuance arrangements, whether in the exercise of discretion or otherwise, represents a modification of the established principle that damages for wrongful dismissal are to be assessed as a lump sum, once and for all. Whether the law can and should be revised in that manner is a topic that should be addressed by the Court of Appeal.

The following are other recent BC decisions where the contingency approach was used:

- Earl v. Canada Bread Co., 2007 BCSC 1574: 49 year old plaintiff employed by the defendant for nearly 19 years as a territory manager – reasonable notice determined to be 17 months - summary trial heard 4 months after termination – contingency approach applied and notice period reduced by 2 months (at para. 14) – salary continuance approach considered and rejected (relying on Tull) (at paras. 15-18).
- Lewis v. Lehigh Northwest Cement Ltd., 2008 BCSC 542: plaintiff in his late 50s employed by the defendant for 24 years as a manager – reasonable notice determined to be 22 months – summary trial heard approximately 16 months after termination – contingency approach approved but no reduction in notice period because there was "no reason to think that he is going to be more successful finding a job between now and then than he has been in the past" (at para. 68).
- Zaitsoff v. Zellstoff Celgar Ltd. Partnership, 2009 BCSC 346: 46 year old plaintiff employed by the defendant for 19 years as a production manager – reasonable notice determined to be 20 months – summary trial heard 15 months after termination - contingency approach approved but no reduction in notice period because "[t]aking into account the five months remaining in the notice period … and the state of the pulp and paper industry", it was unlikely that the plaintiff would find work within the notice period (at para. 15).
- Jamieson v. Finning International Inc., 2009 BCSC 861: 53 years old plaintiff employed by the defendant for approximately 20 years as a manager – reasonable notice determined to be 19 months – summary trial heard 7 months after termination - contingency approach applied and notice period reduced by 1 month (at para. 23).
- Szczypiorkowski v Coast Capital Savings Credit Union, 2011 BCSC 1376: 62 year old plaintiff employed by the defendant for 18.5 years as a senior manager – reasonable notice determined to be 18 months – summary trial heard 9 months after termination - contingency approach approved but did no deduction from notice period because the employer had not established that the plaintiff would likely obtain "suitable alternative employment" in the same industry (at para. 97) because the negative contingencies faced by the plaintiff (his age and lack of positive reference from the defendant) outweighed the positive ones (at para. 99).
- Systad v Ray-Mont Logistics Canada Inc., 2011 BCSC 1202: 65 year old plaintiff employed by the defendant for 18 years as a specialized equipment operator - reasonable notice determined to be 18 months – summary trial heard 5.5 months after termination – contingency approach applied and notice period reduced by 2 weeks on the basis that if employment was available to the plaintiff, it would pay the plaintiff less than 40% of what he earned with the defendant – the Court noted that "[i]f I had any confidence in predicting that [the plaintiff] would find employment at the salary he was receiving, I would have assessed the contingency factor at six weeks." (at para. 28).

- Matusiak v IBM Canada Ltd, 2012 BCSC 1784: 60 year old plaintiff employed by the defendant for 9.5 years in a senior sales position - reasonable notice determined to be 14 months – fast track 2 day trial heard 6 months after termination – contingency approach applied and notice period reduced by 1 month (as sought by the defendant).

One interesting set of decisions that should also be considered is *Kindret v. Shaw Cablesystems Ltd.,* 1997 CanLII 4346; 1997 CanLII 4359; 1997 CanLII 4390 (all BCSC). The case originally came before the Court as a summary trial application for wrongful dismissal. The only issue before the Court was the amount of reasonable notice to which the plaintiff was entitled. In the first decision (which was rendered approximately five months after the plaintiff's termination), the Court concluded that the appropriate period of reasonable notice was seven months. There was no argument made by counsel for either party as to the monetary award or quantification of damages. Other issues, such as the value of employment benefits and entitlement to special damages, were expressly not dealt with by the Court in its original reasons for judgment. An order to that effect was filed with the Court.

After that occurred, the defendant learned that the plaintiff had obtained new employment. It was subsequently disclosed that the plaintiff had obtained new employment approximately three weeks after the trial decision was released. Relying on the decision in *Cronk v. Canadian General Insurance Co.,* 1995 CanLII 814 (ON CA), discussed below, and the *Foster* decision, the defendant sought to have the amounts the plaintiff had earned and would earn during the remainder of the notice period deducted from the damages payable by the defendant. In the second set of reasons for judgment, the Court, relying on *Foster,* held that given the manner in which the order had been drafted, it was not *functus officio* and therefore, it was open to the defendant to make an application to adduce new evidence as to the plaintiff's new employment.

In the third set of reasons for judgment, the Court allowed the defendant's application to adduce new evidence as to the plaintiff's earnings during the notice period previously determined by the Court. As a result, the Court ordered that the plaintiff's earnings be deducted in the calculation of the damages. The moral of this story is that if damages have not yet been assessed (and in very rare cases, even if they have been), it may be open to the defendant to seek to have new evidence admitted about the plaintiff's earnings during the notice period and to have those earnings deducted from the award.

Lastly, if the plaintiff has found new employment by the time the quantum of damages is assessed, the defendant is entitled to a deduction of not only the amount that the plaintiff has earned at the time of the assessment of damages but also what the plaintiff will earn during the balance of the notice period (*Sowden v. Manulife Canada Ltd.,* 2015 BCSC 629).

In sum, it is clear that in British Columbia, the contingency approach is preferred by the courts. Unfortunately, it is rare to find a decision where the court provides detailed reasoning as to why a particular deduction is made. The trend appears to be in favour of minimal reductions but no real reasoning is forthcoming. As a result, contingency reductions can appear arbitrary (a criticism raised by one Ontario judge in a case discussed below).

2. Ontario

Unlike BC, the Ontario courts cannot seem to collectively decide on one approach and seem to favour both the trust approach and the partial judgment approach (or a modification of those

approaches). It is clear, however, that the Ontario courts have effectively rejected the contingency approach, placing that province's jurisprudence in direct conflict with BC's.

The Trust Approach

Cronk v. Canadian General Insurance Co., 1995 CanLII 814 (ONCA) [Cronk]

Cronk had spent nearly her entire career with the defendant and was 55 years old when she was terminated without cause. At the time of termination, she held a relatively junior position doing clerical work.

Approximately nine months after termination, on a summary judgment application, the Court awarded Cronk 20 months reasonable notice. In making his decision, MacPherson J. found that Cronk had undertaken reasonable mitigation steps in the nine months preceding the summary judgment. The employer appealed.

One of the arguments raised by the employer on appeal was that the summary judgment unfairly released Cronk from her obligation to mitigate her damages by seeking other employment. Although the Court allowed the appeal on other grounds and reduced the notice period to 12 months, it rejected the employer's mitigation argument and adopted the trust approach, stating that Cronk's duty to mitigate continued until the end of the notice period and she "remain[ed] accountable to the appellant for any income earned during that post-judgment period" (at para. 12).

Bullen v. Protor & Redern Ltd., 1996 CanLII 8135 (ONSC) [Bullen]

The trust approach taken in *Cronk* was adopted in *Bullen*. This case involved a 41 year-old plaintiff who worked as a surveyor for the defendant for nearly 21 years. At the time of his termination, Bullen was earning approximately $43,000 per year plus benefits. Bullen brought a motion for summary judgment.

Molloy J. determined that the reasonable notice period was 16 months. At the time of judgment, there were still 7 months remaining in the notice period. On the issue of mitigation, the employer suggested that Bullen should be required to report every month as to his efforts to mitigate. This proposal was rejected by the Court (at para. 40). The employer argued that alternatively, the Court should follow the contingency approach used by the BC Supreme Court in *Smith*. In rejecting this suggestion, Molloy J. commented that there was no Ontario authority for such an approach and in her view, "any contingency deduction [she] could make would be completely arbitrary" (at para. 41).

Instead, she found the trust approach to be preferable and ordered that Bullen hold in trust for the employer any monies earned from employment during the notice period. This amount was not to exceed the total amount of Bullen's judgment against the employer. Further, Molloy J. ordered Bullen to provide an accounting to the employer on a monthly basis with respect to his earnings during the notice period (at para. 49).

Correa v. Dow Jones Markets Canada Inc., 1997 CanLII 12268 (ONSC) [Correa]

The 42 year old plaintiff had worked for the defendant for over 16.5 years, held the position of Director of Operations, and earned an annual salary of $109,630 plus benefits.

On a summary judgment application, the Court awarded 18 months reasonable notice and found that Correa reasonably mitigated his losses to the date of the judgment (at para 42). At the time of judgment, there were approximately 10 months remaining in the notice period. The employer argued the appropriate approach would be to award damages by way of periodic payments to be

made subject to Correa's obligation to mitigate during the notice period (the salary continuance approach). While Sanderson J. acknowledged a number of BC cases that used this approach (*Spooner; Marshall v. Artek Group Ltd.* (1993), 47 C.C.E.L. 229 (BCSC); *Polak v. Surrey Memorial Hospital Society*, 1996 CanLII 884 (BCSC) (at paras. 44-48), she concluded that she did not have jurisdiction to make an order for salary continuance because of the principle that a plaintiff is entitled to a once-and-for-all lump sum award of damages (at para. 53). Instead, Sanderson J. applied the trust approach used in *Bullen* (at para 56).

Paquette v TeraGo Networks Inc., 2015 ONSC 4189 [*Paquette*]

This recent Ontario case involved a 49 year-old employee, Paquette, who had worked for the defendant for over 14 years when he was terminated without cause. At the time of his termination, he held a position in upper-middle management with an annual salary of $125,000 plus bonuses and benefits. At a motion for summary judgment, Paquette was awarded 17 months reasonable notice (at para 62). Ten months remained in the notice period at the time the summary judgment decision was rendered.

Perell J. acknowledged the three main approaches for dealing with the issue of mitigation during the balance of the notice period and chose to apply the trust approach (at para 66). This case is notable particularly because of the Court's comments about the partial summary judgment approach (discussed below). That approach was rejected on the Court's assessment that it was "cynical, patronizing, unfair, impractical, and expensive" (at para 69). He qualified his comment by stating that:

> Mr. Paquette has had no employment income since November 2014. He has made diligent, albeit unsuccessful, efforts to mitigate, and it is cynical to assume that with many years of future employment both possible and needed, that he will sit on his hands and wait out the reasonable notice period rather than getting on with his career. If he earns mitigatory income, he will have to simply account for it or be liable for breach of trust. (at para 70)

The Partial Judgment Approach

Russo v. Kerr, 2010 ONSC 6053 [Russo]

Russo was 53 years old and had been employed by the defendant for 37 years as a warehouse manager . His annual salary was $114,000. He had no formal training and had not completed high school. In 2009, in an effort to cut costs, the employer reduced Russo's salary to $60,000 and discontinued his bonus. Russo retained counsel who wrote to the employer saying that he was not consenting to the unilateral alteration of the terms of his employment. Russo then continued his employment in the same position and continued to accept the reduced pay.

In a motion for summary judgment, the Court found that Russo was constructively dismissed and set the notice period at 22 months (at para 54). At the time of judgment, four months remained in the notice period. Gray J. accepted the approach set out in Correa but found that she did not have jurisdiction to make an order for salary continuance. However, he did not think that the imposition of a trust was a satisfactory way of dealing with the problem either:

> If the plaintiff is awarded full damages after the motion for summary judgment is heard, the plaintiff remains under a theoretical duty to continue to act reasonably to mitigate his or her damages. However, as a practical matter, the plaintiff will have no real incentive to earn anything. He or she will have received full payment, and will have to hand over anything earned to the employer. Any "duty" to mitigate will exist at the theoretical level only.

> Furthermore, the Court will have no real ability to assess the reasonableness of the plaintiff's conduct. Once the money is paid, the ability to get the matter back before the Court is practically non-existent. … The imposition of a trust, in my view, provides no real solution. (at paras. 60-61)

Gray J. held that there was a fundamental difference between wrongful dismissal awards made at full trials versus those made on summary judgment applications. He noted that in full trials, a court is restricted to making a lump sum award of damages (at para 63). However, under the Ontario Rules of Civil Procedure, the summary judgment rule provides the court with more flexibility in granting awards; specifically, Rule 20 allows the court to grant summary judgment on all or part of a claim (at para 64).

Gray J. therefore decided to grant summary judgment for the damages that had accrued up to his decision and adjourn the balance of the motion, to be determined after the expiry of the notice period (the partial summary judgment approach). The Court's rationale was as follows:

> In that way, the plaintiff's damages for the balance of the notice period can be determined exactly, based on evidence rather than on speculation, and without the somewhat unsatisfactory alternative of imposing a trust on the plaintiff to pay over to the defendant any amount he has received in mitigation. (at para. 65)

It should be noted that in BC, while Rule 9-7(2) does allow for a party to apply for summary trial of "an issue or generally", the Court of Appeal has warned of the danger of "litigating in slices" because it "may become a hindrance to the 'just, speedy and inexpensive determination' of the dispute 'on its merits'" (*Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.,* 2002 BCCA 138 at para. 7).

Examples of "Modified" Approaches

Markoulakis v Snc-lavalin Inc., 2015 ONSC 1081 [Markoulakis]

The plaintiff was 65 years old and had been employed by the defendant for over 40 years when he was terminated without cause. At the time of termination, Markoulakis was a Senior Civil Engineer earning over $129,000 per year. The defendant continued to pay the plaintiff up to the date of the summary judgment application, which occurred approximately 8 months after termination.

Pollak J. determined the reasonable notice period to be 27 months (at para. 37). At the time of judgment, approximately 18 months was left in the notice period. To address the issue of possible future mitigation, the Court applied the salary continuance approach and ordered the employer to pay the agreed upon monthly compensation for the balance of the notice period. However, the defendant's obligation to pay was subject to the plaintiff's obligation to mitigate his damages and a deduction of the monthly payments could be made for any earnings from employment or a business (at para. 40). Pollak J. also stated that if the employer wished to challenge the mitigation efforts during the notice period, a further motion for summary judgment could be made or the issue could be referred for a full trial (at para. 40).

Drysdale v Panasonic Canada Inc., 2015 ONSC 6878 [Drysdale]

In this case, 58 year-old Drysdale was terminated without cause from his position as a warehouse shipper. He had worked for the defendant for nearly 23 years and was earning $62,000 plus benefits. On an application for summary judgment, the Court found the reasonable notice period to be 22 months (at para. 17). Approximately 14 months remained in the notice period at the time of judgment.

In considering the appropriate method to address the possibility of future mitigation, Lederman J. acknowledged that courts in Ontario have used both the trust and the partial judgment approaches. He chose to take, what he referred to as the "trust and accounting approach" (at para. 27) but which might actually be considered to be a hybrid between the trust and salary continuance approaches. He ordered that the employer pay Drysdale all monies owing for the notice period up to the date of the application. The balance of the monies owing were to be paid to Drysdale's counsel in trust and were to be paid out to Drysdale in monthly installments, subject to any income earned by him during each month.

C. The Takeaway

While the contingency approach has been favoured by the courts in BC, there is an obvious disconnect between the case law in BC and the case law in Ontario, with no apparent rationale as to why the law should be so inconsistent between the two jurisdictions. Unless a more significant body of appellate jurisprudence is developed, it is likely the inconsistency will persist (until some brave soul tries to have it resolved before the Supreme Court of Canada).

However, that should not stop counsel, on either side of the table, from using any and all of the approaches espoused in both BC and Ontario in crafting creative resolutions to wrongful dismissal claims which promote fairness and justice for both employers and employees.