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Case Law Update 2019: That Old Chestnut

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CASE LAW UPDATE 2019: THAT OLD CHESTNUT

I. Introduction

This paper provides a roundup of significant or unique developments that have occurred over the previous year (or so) in employment law. It focuses primarily on decisions from British Columbia but also considers decisions from courts across Canada*.*

II. Just Cause

A. Self-Awarded Pay Raise and Bonus Constitute Cause for Dismissal*: Böhmer v. Burns Lake Native Logging Ltd*., 2018 BCSC 1052 ("*Burns Lake Native Logging*")

For 18 years, the plaintiff employee in *Burns Lake Native Logging* held the position of operations manager with the defendant. He was 61 years old when his employment was terminated for cause on allegations that he had borrowed $100,000 from another company and made three capital acquisitions (the purchase of a truck and two trailers) on behalf of his employer, without authorization and contrary to the defendant's code of conduct.

When asked to explain his actions in procuring the loan, which were summarized in a letter to him, the employee became angry and stormed out, saying he had had enough and he was quitting. The defendant then presented him with a second letter advising him of his dismissal for cause.

Following the termination, the defendant discovered three further areas of concern and alleged each as after-acquired cause for the dismissal of the employee. The three additional grounds were as follows:

- Without authorization, the employee completed a pay raise memorandum for himself made effective approximately ten months prior to the termination and at a time when he knew that money was scarce for the defendant and layoffs might be necessary;
- The employee made a lump sum payment to himself of $6,475, which was characterized at trial as a "bonus"; and
- He used the defendant's money and equipment to buy an all-terrain vehicle (ATV) for his own use.

In the view of Justice Macintosh, it was unlikely that the original allegations of misfeasance in procuring a loan would justify cause for dismissal. The evidence at trial was that the defendant had given virtually no guidance or direction to the employee for several years. Justice Macintosh was satisfied that the employee had acted in a manner he sincerely believed was in the defendant's best interests and, despite the instances of non-compliance with the defendant's financial procedure manuals, these acts did not give rise to a breakdown in the employment relationship.

On the after-acquired grounds, however, the employee did not fare so well. In Justice Macintosh's view, the self-awarded pay raise and the bonus each individually (and certainly cumulatively) constituted lawful grounds for dismissal.

As stated by Macintosh J. at para. 31:

> *No employee can obtain a raise or a bonus without the employer's approval. To do so deprives the employer of its money, without the employer's knowledge. Whether the raise or bonus is deserved is beside the point. Either or both of the payments may have been deserved in Mr. Böhmer's case. The employee must still have permission before taking the money or else it really is a form of theft or fraud.*

The third ground, the purchase of the ATV was found to "probably" amount to cause as well, and was added to the other two grounds as cumulatively justifying dismissal for cause. Justice Macintosh did not believe that the employee had purchased the ATV for the organization given that it remained at his home for six months after the termination occurred. The employer ultimately had to seek its return.

The claim for wrongful dismissal was dismissed.

B. Salary Increase to Self Does Not Amount to Cause … But Inflammatory Emails Do: *Kirk v. Nanaimo Literacy Assn. (c.o.b. Literacy Central Vancouver Island)*, 2018 BCSC 1217 ("*Nanaimo Literacy Assn*.")

The assertion of cause in *Nanaimo Literacy Assn.* was based on "hostile and inflammatory correspondence" sent to two members of the employer society's Board of Directors as well as alleged insubordination and a pay increase the employee gave to herself.

The employee, Ms. Kirk, held the position of Executive Director and was 63 years old at the time of dismissal. She had been employed by the defendant for approximately 6.5 years.

The circumstances leading up to the dismissal were as follows. In February 2015, another employee, Ms. Chapplow, provided an 11-page complaint regarding Ms. Kirk to two members of the employer's four-person Board. The two Board members who received the complaint (Ms.

Zaback and Ms. Hunter) decided to investigate the complaint, but felt knowledge of the matter should be kept to a "small group". The other Board members and Ms. Kirk were not advised of the complaint as Ms. Zaback and Ms. Hunter pursued an investigation of it.

In March 2015, Ms. Kirk concluded she would have to terminate Ms. Chapplow's employment as parts of Ms. Chapplow's job were becoming redundant. Ms. Kirk consulted with an accountant to put together a severance package, but the termination was not effected at that time. The accountant was not called at trial to confirm Ms. Kirk's testimony that the decision had been made at this time.

In the meantime, Ms. Kirk learned of Ms. Chapplow's complaint about her. Ms. Kirk sent an email to Ms. Zaback and Ms. Hunter on May 1, 2015, to explain her perspective of the working relationship with Ms. Chapplow. Ms. Zaback and Ms. Hunter then decided to arrange a full Board meeting to discuss with the other Board members the issues raised by the complaint. In the interim, Ms. Zaback directed Ms. Kirk not to proceed with the planned termination of employment of Ms. Chapplow. Ms. Kirk was aware that the complaint would be discussed at a full Board meeting on May 13, 2015, at 4pm.

On the evening of May 12, 2015, just prior to the Board meeting that had been set to discuss the complaint, Ms. Kirk sent a lengthy communication by email to all four of the Board members, with the subject heading (in bold) "Very important to read". The email expressed Ms. Kirk's "very serious concerns" about the "independent investigation" being carried out by Ms. Zaback and Ms. Hunter. Ms. Kirk asserted in the email that the two Board members had acted "without authority" and in breach of "very basic Board protocol". She also expressed her view that she had been "kept in the dark" and that the matter had not been handled in a "fair, unbiased, or objective manner". [1]

Following Ms. Kirk's email, the two other Board members resigned and the pending meeting did not occur. In email exchanges that followed, Ms. Kirk described the Board as "non-functioning and collapsed" and encouraged Ms. Zaback and Ms. Hunter to "let go" and not "interfere" further with the organization.[2] Ms. Kirk even sent letters on her employer's letterhead to Ms. Zaback and Ms. Hunter seeking that they resign.

Ms. Kirk also went on to send an email to the general membership of the society and repeated her concern about the "collapse of the current Board", and directed membership not to communicate with any former Board members.

On May 19, 2015, Ms. Kirk proceeded to effect the termination of Ms. Chapplow's employment without cause, contrary to the direction she had earlier received from Ms. Zaback. A series of meetings with respect to the composition of the Board followed, as did a demand letter from Ms. Chapplow's lawyer.

Ms. Kirk's employment was terminated for cause on July 2, 2015. Before receiving the termination letter, Ms. Kirk received no warnings of any kind that her continued employment was in jeopardy for any reason. She testified at trial that she was shocked to receive the letter.

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1 At para 55. The Court noted that at least some of the facts stated in the email were not accurate.

2 At paras 60-62.

Justice Adair found that Ms. Kirk's communications were intended to significantly impair the ability of the Board to function and, as a corollary, hamper the Board's consideration of Ms. Chapplow's complaint about her. The "chaos" created by Ms. Kirk's emails and other correspondence was incompatible with sustaining an employment relationship with the society.

Further, though only one Board member (Ms. Zaback) directed Ms. Kirk not to proceed with the termination of Ms. Chapplow, this was consistent with how Ms. Kirk generally received instructions from the Board. Direction from the whole of the Board was not required (Ms. Kirk had also accepted the instruction initially). Thus, by proceeding with the termination of Ms. Chapplow's employment, Ms. Kirk placed her own personal vulnerability above the interests of the Board; conduct the Court found to be incompatible with her duties.

These incidents established misconduct on the part of Ms. Kirk that warranted immediate dismissal. The Court held that no intermediate step (such as a warning) was required. The fact that it took approximately seven weeks (from May 12th to July 2nd) for the employer to consider how to respond to the misconduct did not amount to condonation given the chaotic circumstances created by Ms. Kirk herself.

The other grounds asserted by the employer; namely, the salary increase Ms. Kirk gave to herself, were not made out. The evidence was that Ms. Kirk had increased her own salary over the years on various occasions and had reflected the same "in a general way" in the annual budgets that were presented to and approved by the Board. While it may have been "advisable" for Ms. Kirk to be more explicit with respect to her salary, the Court found the increases, in and of themselves, did not amount to misconduct justifying dismissal.

Ms. Kirk's claim for wrongful dismissal was dismissed.

III. Damages

A. A Lesson in Costly Termination Meetings and Litigation Tactics: *Ruston v Keddco Mfg. (2011) Ltd.,* 2018 ONSC 2919 ("*Ruston v Keddco Mfg*."), aff'd 2019 ONCA 125

Ruston v Keddco Mfg. is a 2018 Ontario Superior Court decision (later unanimously upheld by the Ontario Court of Appeal) in which a wrongfully terminated employee was awarded significant damages and cost awards on account of the employer having breached its duty of good faith and fair dealing in the manner of dismissal.

In 2004, the plaintiff, Mr. JP "Scott" Ruston, was hired by the defendant, Keddco Mfg (2011) Ltd. ("Keddco") as a sales representative. Over the next several years, the plaintiff worked his way up the ranks of the company, becoming Sales Manager in 2005, Branch Manager in 2006, and President in 2011 (which was also a time when a company called Canector purchased Keddco). In 2015, Canector terminated the plaintiff's employment without giving specifics as to the reason for the termination. The company later informed him that he had been dismissed for cause as he had committed a series of accounting and financial improprieties amounting to fraud.

Following his dismissal, Mr. Ruston sued and the company responded with a statement of defence and counterclaim in which it alleged cause and claimed damages of $1,700,000 for

unjust enrichment, breach of fiduciary duty and fraud, as well as $50,000 in punitive damages. The plaintiff firmly denied these allegations.

After 11 days of trial, the trial judge concluded that the defendant had failed to establish cause after finding that the defendant was unable to prove any of its allegations of wrongdoing by the plaintiff. The trial judge found that the defendant had failed to demonstrate that the plaintiff had misrepresented the defendant's financial performance or that he made efforts to hide that he had mismanaged the company as alleged. In fact, all of the allegations made against the plaintiff were either explained away over the course of the trial, or were deemed to be unsubstantiated.

Significantly, the trial judge found that the defendant's counterclaim for damages in the amount of $1,700,000 had been a tactic to intimidate the plaintiff and that the company had breached its obligation of good faith and fair dealing in the manner of the plaintiff's dismissal. The trial judge dismissed the employer's counterclaim in its entirety and awarded the plaintiff substantial damages, including:

a) Damages in lieu of reasonable notice based on a 19-month notice period, including bonus and benefits (approximate value of $480,000);

b) Punitive damages in the amount of $100,000; and

c) 'Moral damages' in the amount of $25,000.

The trial judge made this award acknowledging that 19 months was a slightly longer notice period than in some other comparable cases.

In awarding the plaintiff $100,000 in punitive damages, the trial judge considered the following factors:

a) Hawkins, the plaintiff's direct superior, admitted that during the termination meeting she threatened the plaintiff saying that if he sued Keddco, the company would counterclaim against him. A counterclaim was then commenced against the plaintiff for $1,700,000 alleging fraud and misrepresentation but the defendant did not report the alleged fraud to the police.

b) Hawkins deposed at her examination for discovery that she had threatened another Keddco employee upon termination in the same manner.

c) Hawkins attempted to intimidate the plaintiff at the termination meeting. The plaintiff was found to be in a vulnerable position at this time. When the plaintiff advised Hawkins that he was going to consult a lawyer, she proceeded to caution him "how expensive that process could be." [3]

d) The defendant did not advise the plaintiff of its particular allegations of cause at the termination meeting. The plaintiff learned of the allegations for the first time when he received the defendant's counterclaim.

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3 The irony might be that this was factually accurate – in large part due to the actions of the defendant.

e) The defendant relied on performance-based grounds for cause and personal attacks as a defence in the litigation. These grounds were dropped after the trial as no evidence was led to substantiate the allegations.

f) The defendant also relied on "disbursement of company funds for his own personal benefit" as a ground for termination in its defence in the litigation. No evidence was led on this ground. It too was dropped after the trial.

g) The defendant retained an expert to opine on the liability of the issues raised by its counterclaim. It did not retain an expert with respect to damages. On the seventh day of trial the defendant dropped its damage claim from $1,700,000 to $1, which it said it would waive if awarded. It does not appear that the defendant had any intention of proving damages but rather was using the claim of $1,700,000 strategically to intimidate the plaintiff.

h) The defendant accused the plaintiff of fraud and then chose not to call any witnesses who could provide direct evidence to substantiate the allegations.

i) The serious allegations made against the plaintiff were found to be entirely unfounded.

Additionally, the trial judge considered the following factors in awarding the plaintiff $25,000 in moral/aggravated damages:

a) The defendant failed to be candid with the plaintiff during the termination meeting in terms of the reasons for his termination for cause.

b) Hawkins acknowledged that facing a claim of financial fraud would negatively affect the plaintiff stating "I mean going through a lawsuit is probably very stressful and costly."

c) The defendant made personal attacks against the plaintiff in its pleadings and only dropped those allegations after trial after it was brought to its attention by the judge that no evidence was led to substantiate the allegations.

d) The defendant publicly made unfounded allegations of financial fraud against the plaintiff.

The defendant's counterclaim was dismissed.

B. Employer's Failure to Investigate and Persistence in Allegations Result in Aggravated Damages: *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 ("*O.W.L. Rehabilitation Society*")

Ms. Day, the employee in *O.W.L. Rehabilitation Society*, was the founder and Executive Director of a charitable society for which she had worked for 30 years. The purpose of the society was to rescue and care for injured owls and eagles, help them to recover, and promote their return to the wild.

Ms. Day was 63 years old at the time of her dismissal. The allegations of cause made at the time of Ms. Day's dismissal included that Ms. Day had misappropriated funds to pay for the cost of her housing and that she had mistreated two of the defendant society's employees. The society

sued for the misappropriated funds (which was ultimately dismissed). Ms. Day counterclaimed for wrongful dismissal.

Although only three grounds been set out in the termination letter delivered to Ms. Day at the time of her dismissal, ten new grounds were included in the pleadings filed in defence to her litigation. The society even sought to add an additional ground during argument at trial. The society's central submission was that cause had been established on the basis of Ms. Day's misappropriation of funds, an allegation ultimately cast as breach of contract. The society also asserted that cause arose from Ms. Day's dealings with two other employees and her general performance of her duties, including her manner of communication and her attendance record.[4]

The Court found that each of the grounds advanced by the society for Ms. Day's dismissal were without merit or were otherwise factually incorrect.

Justice Walker went on to note some of the specific missteps of the society in deciding to dismiss Ms. Day, including the failure to investigate its suspicions:

> *As an employer, O.W.L. failed to address proportionality in any sense before it dismissed Ms. Day. It failed to provide any warning or warnings to its otherwise exemplary and long-serving senior employee and founder of the society. In the absence of any investigation, the Board assumed the worst of Ms. Day's conduct when it heard Mr. Hope's account of the incident discussed in the next section. It failed to properly investigate the rent and other payments issues. Even where an employer carries out an investigation, it must be proper, otherwise the employer will be impeded in meeting its onus to establish just cause.*[5]

Ms. Day held a senior position with the employer in a highly specialized field and had been the head of the society's operations for 30 years. For these reasons, as well as her age at the time of dismissal, Justice Walker found her circumstances fell within the category of exceptional cases justifying an award of damages beyond 24 months. She was awarded 26 months as a reasonable notice period. A period of two months was deducted to account for the contingency that she would have reduced her hours during the same period to care for her husband's medical condition.

In considering an award of aggravated damages based on the employer's conduct, Justice Walker identified eleven grounds which he found "compelling". These included:

a) the making of the allegation of misappropriation of funds without conducting an adequate investigation as well as the pursuit of that allegation through to the close of evidence at trial;

b) the laying of other unfounded allegations (and persistence in them) regarding Ms. Day's performance of her job duties;

c) instructing a junior clerk to keep track of Ms. Day's attendance when it knew her regular duties took her outside the office during regular business hours; and

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4 A full list of the various circumstances alleged as cause can be found at paras 129-135 of the decision.

5 At para 147.

d) "callous and insensitive treatment" such as threatening to have Ms. Day arrested if she attended at the premises and terminating her employment at a time she was suffering personal hardship without conducting an adequate investigation.

To these grounds, Justice Walker also added that Ms. Day's role with the employer was a significant and consuming part of her life and sense of self-worth. Her life's work and purpose were intimately tied to the society, having been the founder of the organization and its public face for 30 years. Ms. Day suffered emotional and physical distress as a result of the unfounded allegations made against her by the employer and its "dogged pursuit" of those allegations in Court.

Ms. Day was awarded $30,000 in aggravated damages in addition to the award of 24 months' notice.

IV. Constructive Dismissal

A. No Constructive Dismissal Where No Changes to Terms of Contract (Yet): *Rampre v. Okanagan Halfway House Society*, 2018 BCSC 992 *("Okanagan Halfway House Society")*

The employer in *Okanagan Halfway House Society* determined it was necessary to cut operational costs due to budget constraints. After making this determination, the employer approached its employee, Mr. Rampre, a 70-year-old supervisor, and discussed with him amending his salary, changing his position, or even retiring altogether. No changes were implemented and Mr. Rampre did not communicate any objection at the time.

Nothing further happened until February 2016, when the employer sent Mr. Rampre a letter indicating certain changes (including pay changes) would be implemented effective April 1, 2016. Although Mr. Rampre read the letter immediately, he did not communicate his displeasure with it until March 31, 2016, some seven weeks later. In the meantime, he conducted research into the law of constructive dismissal. On March 31, 2016, just prior to the changes coming into effect, Mr. Rampre claimed via email to have been constructively dismissed and announced his departure.

Importantly, no changes to the employee's terms of employment had actually been made at this point. In response to Mr. Rampre's March 31, 2016, email, the employer put the changes on hold and attempted to find a resolution. The employee indicated that such a resolution was possible. In the course of these discussions, Mr. Rampre raised the issue of a "toxic work environment" for the first time.

At trial, Mr. Rampre relied on the following occurrences as, combined together, amounting to constructive dismissal:

a) a letter sent to him in August 2014, and a meeting associated with that letter, in which various performance related concerns were addressed;

b) the communications in which the employer suggested his salary may be reduced (ultimately never implemented);

c) a comment concerning his age, which the employee felt amounted to discrimination; and

d) being requested to assemble a gazebo, a task which the employee did not wish to do.

The Court determined that neither of the branches of the two-pronged test for constructive dismissal were met. On the first branch, no changes to Mr. Rampre's terms of employment had actually been made. Within a reasonable timeframe of the employee's objection in April 2016, the employer rescinded its planned changes and so informed Mr. Rampre. Further, having told the employer he would work with it to find a solution, Mr. Rampre was obligated to do so.

The Court found it was unreasonable for Mr. Rampre to "withdraw his services" during the process, while he was continuing to be paid in full, and before any changes to his contract were made.

On the second branch of the test, the Court was not satisfied the work environment was "toxic" or that the employer had acted in a manner that was hostile, degrading or disrespectful of Mr. Rampre. On the contrary, the employer had taken Mr. Rampre's allegations of a toxic workplace seriously and had been working with Mr. Rampre to address his concerns.

The claim for constructive dismissal was dismissed, and the Court determined that the "withdrawal of services" amounted to a resignation of employment.

V. Employees vs. Independent contractors

A. Close only Counts in Horseshoes, Hand-grenades……and Independent Contractor Litigation: *Pasche v MDE Enterprises Ltd*., 2018 BCSC 701 (*"Pasche"*)

In *Pasche*, the plaintiff, Mr. Pasche, was a 67-year-old sheet metal estimator who had worked exclusively for the defendant, MDE Enterprises Ltd., for a period of 18 years, prior to the termination of his services.

Following the termination of his services, the plaintiff sued, alleging he was an employee of the business, and therefore entitled to reasonable notice of termination. The defendant took the position Mr. Pasche was an independent contractor, and thus not entitled to any common law notice of termination.

The relevant facts can be summarized as follows. Mr. Pasche:

- intended, as did the defendant, during the course of the relationship that he was an independent contractor, rather than an employee (and acted consistently with that understanding from a taxation and payroll perspective);
- was the subject of a CRA investigation which had concluded Mr. Pasche was a self-employed worker, and not an employee, during the time he worked with the defendant;
- had discretion over his hours and times of work;
- had discretion over when, and how much, vacation he would take;

- had very limited supervision and exerted a high degree of autonomy over his work;
- worked from both home and the office;
- had no real risk of loss or profit apart from the hourly payments he received (although he could earn more if he chose to work more hours);
- had a workspace at the Company office with a desk, phone, and desktop computer provided by the Company;
- used his own laptop and estimation software when preparing quotes;
- had the appearance of being an employee to customers and suppliers (he represented the defendant when dealing with clients and suppliers, and used the defendant's business cards and letterhead when communicating with these individuals);
- occasionally received a Christmas bonus; and
- worked exclusively for the defendant (although he was not expressly prohibited from doing other work), and relied on that work as his sole source of income.

The Court applied both the "fourfold test" set out in the oft-cited decision of *Montreal (City) v. Montreal Locomotive Works Ltd*., [1946] 3 W.W.R. 748 (S.C.C.), and the "business integration test" more recently set out in *Sagaz Industries Canada Inc*., 2001 SCC 49, to the facts set out above.

After applying these tests, the Court found that Mr. Pasche was not an employee, and that the parties had never intended he be one.

However, the Court also found that Mr. Pasche was heavily economically dependent on the defendant, and that this, along with the length and permanence of the arrangement, was more indicative of an employment relationship than that of a contracting arrangement. On this basis, the Court determined that Mr. Pasche was a "dependent contractor" and thus entitled to 'reasonable notice' of termination (though less than what might be awarded to an employee).

The Court assessed the period at 13 months of notice and awarded damages on this basis.

B. A Contractor in Name Only: *Kok v Adera Natural Stone Supply*, 2018 BCSC 1542 ("*Kok*")

Kok concerned a 54-year-old architectural stone fabricator, Mr. Kok, who worked exclusively for two separate companies (both owned by the same individual) from 1990 to 2012. From 2012 and until the termination of his services in 2017, Mr. Kok did some work for one other entity, but still worked almost exclusively for the defendant (the "Company") in this period.

In 2002, Mr. Kok asked for a raise, and was told he would need to be taken off payroll and become a contractor in order to receive it. He agreed, and began billing his services through a sole proprietorship at this time. He billed in this manner for the balance of the relationship.

In 2009, Mr. Kok was provided with Company business cards, office keys, and a credit card for Company purchases. He also retained an office at the Company's worksite, and was identified to customers as the head of the Company's fabrication department.

In 2017, Mr. Kok was informed that he would no longer be working with the Company. Mr. Kok commenced litigation shortly thereafter.

The principal issues for trial were:

- was Mr. Kok an independent contractor, or, alternatively, an employee or dependent contractor; and
- if an employee/dependent contractor, what period of notice would be appropriate.

At the hearing of Mr. Kok's summary trial, the evidence before the Court was that Mr. Kok did not at any point hire his own employees, set his own schedule, decline work assigned to him, determine the timelines of work that needed to be completed, invest in his own tasks, or profit from any risks taken.

Worth noting is that the evidence in this respect was somewhat one-sided. The action was heard by way of summary trial and the evidence of Mr. Kok was not contradicted on these points.[6]

On the basis of the largely uncontested facts, enunciated above, the Court found that Mr. Kok was a contractor in name only, and the nature of the relationship was one of employment. As a result, Mr. Kok was awarded an award of 22 months' reasonable notice, less any earnings in mitigation.

VI. Good Faith

A. Good Faith Obligations and the Right to Terminate Contractual Relations: *Lightstream Telecommunications v Telecon Inc.*, 2018 BCSC 1940 ("*Lightstream Communications*")

The plaintiffs in *Lightstream Communications* were a telecom technician ("Wray") and the private company Lightstream Telecommunications. Wray was an employee of Lightstream and the company was owned by Wray's brother in law.

In July 2015, Lightstream (through Wray) entered into a services agreement with the defendant, Telecon, whereby Wray would act as a subcontractor to Telecon, performing telecommunication services for Telus.

In December 2015, the business relationship deteriorated when Wray was accused of theft at a Telecon Warehouse in Richmond.

Following the alleged theft, Telecon advised various employees by email that Wray would no longer be working with them, and informed Lightstream that Wray was no longer eligible for work with Telecon. Telecon then ceased offering any work to Lightstream (although whether the services contract had been terminated was a matter of dispute at trial).

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6 The Defendant in *Kok* had not conducted an examination for discovery, and there were various evidentiary issues associated with the Defendant's affidavit materials.

In March 2016, Wray was laid off from Lightstream for lack of work.

At trial, Lightstream claimed breach of contract and tort damages against Telecon. Wray claimed he was a dependent contractor or employee of Telecon, who had been wrongfully dismissed, as well as claiming aggravated and punitive damages.

On the issue of contractual damages, the Court found that although Telecon did not expressly terminate its agreement with Wray, the removal of Wray from their workplace was a breach of that agreement.

The Court further found that Wray's removal, in light of the seriousness of the allegations made and the failure to conduct an adequate investigation, breached the implied duty of "good faith" in contractual performance. Worth noting is that the allegation of theft was maintained until the fourth day of trial, at which point it was abandoned.

As a result, contractual damages were awarded to Lightstream for the breach of its contract with Wray.

Wray's claim for damages, however, was dismissed. The Court found the level of worker control indicated Wray was an independent contractor of Telecon rather than an employee. The Court noted in particular that Mr. Wray was not economically dependent on Telecon, as he received a salary from Lightstream as its sole employee and did not receive benefits or workers' compensation coverage from Telecon. Although Telecon did enforce particular standards, the relationship between Wray and Telecon was not exclusive and the defendant was largely "hands-off" when it came to considering the method of how Wray did his work. Telecon did not provide or pay for Wray's training.

The ownership of equipment and tools also clearly indicated independent contractor status as Lightstream was required to pay for and own any tools for services and installation. Lightstream also purchased Wray's computer and paid for vehicles.

The question of chance of profit / risk of loss also clearly indicated independent contractor status as Wray was paid on a piecework basis and thus had an opportunity to profit from his own hard work and efficiency. Wray was able to work for other companies and therefore not limited in his ability to profit in this manner. The piecework rates, however, left open a potential opportunity for Wray to lose money after business expenses, deductions, and other costs were accounted for.

Finally, the fourth factor, business integration, also indicated an independent contractor relationship. Wray was not a crucial element of Telecon's business, as it had other employees and contractors who did the same work. He was not irreplaceable or integrally integrated into the business. His removal did not materially affect Telecon's operations. The relationship was not permanent in nature, nor was it particularly long (just over 5 months). The parties also did not particularly rely on each other or closely coordinate their conduct. Wray largely operated independently of Telecon.

The Court concluded Wray was properly characterized as an independent contractor in relation to Telecon, and therefore not entitled to notice of termination.

B. Another Good Faith in Contractual Performance Case? Why Not! *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428 ("*Information Systems Architects Inc.*")

In *Information Systems Architects Inc.,* the plaintiff, a security engineer, left a full time position for a six-month fixed term posting as an independent contractor with Information Systems Architects Inc. ("ISA"). The plaintiff had a record of a criminal conviction and he informed ISA of this prior to accepting the position.

The plaintiff was assigned to work at Canadian Tire. This presented a problem due to Canadian Tire's service agreement with ISA, which included a term prohibiting ISA from providing any consultant with a criminal record to Canadian Tire without the consent of Canadian Tire.

Shortly following the plaintiff's assignment to Canadian Tire, his criminal background check was completed, showing his prior criminal conviction. Canadian Tire requested ISA replace him at their site. ISA terminated the plaintiff, rather than re-assigning him elsewhere.

The contractual provision ISA relied on in terminating the arrangement was as follows:

> This agreement and its Term shall terminate upon the earlier occurrence of:
>
> I. ISA, at their sole discretion, determines the Consultant's work quality to be substandard.
>
> II. ISA's project with Customer gets cancelled, experiences reduced or altered scope and/or timeline.
>
> III. ISA determines it is in ISA's best interest to replace the Consultant for any reason.
>
> IV. Immediately, upon written notice from ISA, for any breach of this Agreement by the Consultant.

The trial judge found that ISA had breached the contract on the basis that the decision to terminate was not done in accordance with the implied term of good faith. As the agreement was a fixed term contract, the plaintiff was awarded damages for the remainder of the term and no duty to mitigate was found.

The Court of Appeal disagreed with portions of the decision, but upheld the result. The Court of Appeal found that although the contract provided an unfettered right to terminate the agreement it was required to perform – and therefore terminate – the contract in good faith, on the basis of *Bhasin v Hrynew,* 2014 SCC 71.

In the circumstances of the case, the Court of Appeal found that the contract had been breached, and upheld the trial decision.

VII. Restrictive Covenants and Confidential Information

A. Injunctions are Tough to Get, Even in the Face of a Departed Employee's Threats: *Quick Pass Master Tutorial School Ltd. v. Zhao*, 2018 BCSC 683 ("Quick Pass")

The plaintiff, Quick Pass, offered tutorials to assist individuals in passing the BC Real Estate course and exam. Mr. Zhao was an independent contractor with Quick Pass for just under two years.

Mr. Zhao signed two contracts with Quick Pass, which included restrictions relating to "confidential and proprietary information" as well as competition and solicitation. Specifically: following the termination of his contract, Mr. Zhao was restricted from being involved in "a business which is the same as, or competitive with, the business of" Quick Pass in Vancouver, Burnaby and Richmond, for a period of 18 months. Mr. Zhao was also restricted from soliciting business that Quick Pass had "enjoyed, solicited or attempted to solicit, from its customers" for a period of two years.

Mr. Zhao was paid $35 per hour for his work plus an additional payment tied directly to his obligations not to compete:

> For as long as this Non-Competition Agreement is in effect, the Contractor may charge an additional $15.00 per hour on each invoice issued to the Company pursuant to the terms and conditions of the Independent Contractor Agreement.

Mr. Zhao was entitled to terminate the contract early and he did so. The day after the contract ended, he opened his own school, the Richard Zhao Real Estate School Limited, in Burnaby. Mr. Zhao promoted his school to students of Quick Pass using WeChat and described the program as superior to Quick Pass (he also criticized the principal of Quick Pass).

Mr. Zhao even told Quick Pass that he intended to compete with it directly in Vancouver and Richmond (both mentioned in his restrictive covenants) and that if Quick Pass took legal action against him he would post its teaching materials on YouTube for free for the purposes of destroying the market.

Quick Pass sued Mr. Zhao and sought an interlocutory injunction related to his restrictions from competition and solicitation, as well as to protect its confidential information.

Turning to the injunction analysis and with respect to confidential information, the Court explained as follows:

> [30] The Confidential Information Clause is not a restrictive covenant. Rather, it is "intended to protect the right of a business to keep confidential the information it hopes will help it to compete so the usual relatively low threshold applies to it" (*Phoenix Restorations Ltd. v. Drisdelle*, 2014 BCSC 1497 at para. 17). This means that Quick Pass need only prove that its claim with respect to this clause is not frivolous or vexatious and the court need not engage in an extensive review of the merits of the claim (*Phoenix* at para. 22).

Given that Mr. Zhao opened his school the day after his resignation, the Court inferred that he must have used material he developed while working for Quick Pass. However, the breadth of the definition of confidential information was concerning to the Court as it would cover all

"teaching material" as well as associated documents thus rendering Mr. Zhao unable to operate a business at all.

With respect to the restriction on solicitation, Quick Pass did not lead evidence to justify it was no broader than necessary. For example, it did not explain why the term was two years and there was no geographic restriction. The Court concluded Quick Pass failed to establish a strong *prima facie* case that the non-solicitation clause was enforceable.

The restriction on competition was restricted specifically to the type of work done by Quick Pass in the areas that Quick Pass did business:

> … Naming the cities identifies the geographic restriction as the area within the city limits of the named municipalities. The provision specifies the prohibited activity as the business of "pre-licensing real estate training and real estate educating," which corresponds directly to the services Mr. Zhao provided to Quick Pass.

Further, the clause at issue did not restrict Mr. Zhao from advertising his services in the geographical areas for which it restricted other competitive activities. In the Court's view, these facts—as well as the $15 per hour consideration – established a strong *prima facie* case of enforceability notwithstanding the 18-month duration of the term.

The plaintiff's application for an interlocutory injunction respecting the non-competition clause was granted. The relief sought with respect to the non-solicitation clause and the confidential information clause was declined.

B. *Non-Solicitation Clause Not Enforceable Against Investment Advisors*: *National Bank Financial Inc. v. Canaccord Genuity Corp.*, 2018 BCSC 857 ("*National Bank*")

The defendants in this case were investment advisors (and one cold caller) working with National Bank Financial Inc. ("National Bank") under the informal moniker of the "Mann Group" and with the more formal leadership of the defendant, Dwight Mann.

Mr. Mann worked for National Bank for 18 years. At the time he was hired, he brought approximately 100 clients and a $50,000,000 book of business. At the time he was fired, Mr. Mann and the Mann Group had grown this to a book of business representing approximately $725,000,000 in assets and 2,500 clients.

The Mann Group kept a database of client information using a program called "Salesforce". The evidence was that the Mann Group had set up and even paid the licensing fees for Salesforce and that National Bank was aware of this. The information kept in Salesforce included the names and contact information of clients, as well as general notes of discussions. The Mann Group used Salesforce to communicate with clients (in fact, it was the only place up to date contact information was kept as National Bank's forms did not include email addresses). Outside of the Mann Group, only one person was granted access to Salesforce – National Bank's Vice President and Regional Manager.

In 2016—approximately 16 years into his tenure—Mr. Mann contemplated leaving the employ of the plaintiff and moving to the defendant, Canaccord Genuity Corp ("Canaccord"). At this time Mr. Mann provided Canaccord with flash drives containing more than 23,000 files of

information about the Mann Group's clients. He ultimately opted to remain with National Bank. In early 2018, Mr. Mann again copied onto flash drives a substantial amount of confidential and private information regarding clients, this time comprising more than 27,000 records.

On April 18, 2018, National Bank terminated Mr. Mann's employment (by the time of the injunction application this termination was alleged as for cause). Following his termination, Mr. Mann refused National Bank's offer to purchase his book of business. Within two days of his dismissal, another employee of National Bank, the defendant, Jordan James, had locked out the National Bank representative who had access to Salesforce by changing the password.

Within a few days, Mr. James, another of the defendants, Ilia Nizker, and four other members of the Mann Group had resigned from National Bank and moved to work at Canaccord under the new informal moniker of the "Mann Team". The Mann Team set about contacting clients using Salesforce and moving their business to Canaccord.

Unsurprisingly, National Bank sued and brought an application for an injunction related to confidential information, non-solicitation covenants and alleged defamation of National Bank by the Mann Team. In the injunction application, the parties came to agreement with respect to some of the information sought to be protected (the flash drives and information related to them) and National Bank opted not to seriously pursue an injunction for alleged defamation at the hearing (the Court pointed out that this is difficult relief to obtain in any event).

With respect to the covenants against solicitation, the Court identified several issues, including:

a) Mr. Mann and Mr. James's covenants were embedded in a 23-page policy manual they signed multiple times but only after they had become employees;

b) Mr. Nizker's covenant was located in his employment contract but that was executed a month into his employment;

c) Mr. Nizker, the most junior employee of the three, was restricted from solicitation for twice as long as Mr. Mann and Mr. James;

d) No evidence was led to justify the duration of the solicitation provisions; and

e) Mr. Mann and Mr. James's covenants were written in the first person plural, making it difficult to ascertain their meaning.

As a result of the foregoing, and particularly the lack of consideration given, the Court held that National Bank had not made out the necessary *prima facie* case of enforceability for the covenants against solicitation.

The Court also relied on and applied law that is (and will continue to be) very helpful to investment advisors who move firms. For example:

> [49] In the context of clients being served by investment advisors who move firms, the interests of the clients must be put ahead of those of the firm. Investment advisors are entitled to maintain client information so as to enable them to immediately contact the client after the move. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al,* 2007 BCCA 22, rev'd in part on other grounds 2008 SCC 54, Madam Justice Southin stated, at paras. 81–82:
>
> > [81] In my opinion, a client is entitled to know immediately upon his advisor leaving one firm for another where that

> advisor has gone so that he or she can decide whether to change to the new firm or remain with the old.
>
> [82] Because of the important interest of the client, an advisor should be able, without fear of litigation, to prepare a list of his own book of business from the records of the brokerage house. To hold in the 21st century that an advisor, who usually, by considerable personal diligence, has built up a book of business, must rely on his memory for the full names, addresses, telephone numbers and e-mail addresses of his clients, is not, in my opinion, in the interests of the clients and, therefore, is not in the public interest. I emphasise "his own book of business". He is not entitled to take a list of other advisors' clients. To put it another way, the interests of the brokerage house should not be put ahead of the interests of the clients.

[50] The forgoing principle was followed by this Court in [*Edward Jones v. Voldeng*, 2012 BCSC 497] at para. 24 and in *Stenner v. Scotia Capital Inc.*, 2007 BCSC 1377 where it was stated, at para. 149:

> The personal possession of a client list, invariably kept on a computer so it may easily be accessed, updated, and the data manipulated electronically if needed is a standard practice of financial advisors. It is acknowledged in the industry that one of the reasons for maintaining a personal client list is if a rapid change in firms should occur.

The Court stated further:

> [54] There is also a public interest factor to consider. Brokerage houses do not "own" their clients. Clients should be free to receive information from all competitive sources and to have the ability to decide if they wish to follow their investment advisor to the new brokerage house or stay with the old one: [citations omitted].
>
> [55] In addition, employee mobility and the ability to compete and earn a livelihood in a chosen field are in the public interest and should not be lightly restrained: *Prodigy Wealth Management Corp. v. Raymond James Ltd.*, 2005 BCSC 1863 at para. 39.

And finally, turning to the analysis of irreparable harm:

> [90] In [*Edward Jones v. Voldeng*, 2012 BCCA 295], the Court held that damages flowing from the breach of an investment advisor's non-solicitation clause are generally calculable. It stated, at para. 36:
>
> > The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. <u>The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio</u>. The evidence in this case illustrates the point. The respondent is able to state exactly

> the value of the accounts of Mr. Voldeng's former clients that have been transferred to RBC. As the chambers judge noted, the evidence before her showed that accounts totalling an approximate value of $4 million had been transferred to RBC. In a statement of facts filed on this appeal, the parties agreed that as of April 13, 2012, the respondent had received instructions to transfer client accounts with the approximate total value of $20.2 million. In my view, in this case the potential damages arising out of solicitation, being calculable, do not constitute irreparable harm.
>
> [Emphasis in *National Bank*]
>
> [91] This Court has often held that the loss of clients in the investment context does not constitute irreparable harm: see for example *RBC Dominion Sec. v. Merrill Lynch et al,* 2000 BCSC 1750 at para. 13 and the cases cited therein.

In the end, the Court was only prepared to grant an order requiring the defendants to return the documents and data from the flash drives. The balance of the plaintiff's application, including the injunctive relief sought, was dismissed.

C. Good's Deeds go Unpunished: *EMW Industrial Ltd. v. Good,* 2019 SKQB 47 ("*EMW*")

In this case an employee, shareholder and director—Mr. Derek Good—communicated his resignation to the defendant, EMW, in favour of work with a competitor or partial competitor. The background of Mr. Good's involvement in EMW is somewhat complicated but, in brief summary, Mr. Good was involved as a shareholder and director and an employee who worked almost exclusively in servicing a single large client.

Mr. Good became a shareholder of EMW in 2007 when the then owners sold their shares to "key" employees. Mr. Good signed shareholders agreements in 2016 and 2017, the latter of which being at a time when other "key" employees were invited to join in shareholdings through a separate corporate vehicle.

Later in 2017, Mr. Good communicated his resignation in favour of moving to a company that competed—at least partially—with EMW. The large client that Mr. Good serviced while he worked at EMW was also a client of the competitor.

Unfortunately, EMW waited approximately six months to pursue their application for an injunction against Mr. Good. This factor, and others, resulted in the dismissal of all of the injunctive relief they sought, including:

a) with respect to fiduciary duties related to Mr. Good's directorship given that he had clearly communicated his resignation and his status as a director was not the "primary relationship" that drove the analysis;

b) with respect to confidential information as it was defined (in part) in a way that expanded it beyond 'confidential' material and had no temporal restriction; and

c) with respect to the restrictive covenants in agreements Mr. Good signed as many were overbroad, not temporally restricted, and, notably, that one agreement relied on by EMW was even superseded by an 'entire agreement' clause in the agreement

subsequent (the Court also held that a severability provision was unworkable given the Supreme Court of Canada's decision in *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6).

EMW was able to establish that, although he was appropriately described as a "middle manager", Mr. Good was a fiduciary given the focus of his position on a single client and the vulnerability that arose therefrom. However, solicitation restrictions arising from fiduciary duties expire following a reasonable amount of time and, given the time that had already passed and the lack of evidence of solicitation during it, EMW could not establish the necessary *prima facie* case of breach.

In the result, EMW's application for an interim injunction against Mr. Good as well as other relief was dismissed.

D. Satisfaction and Your Money Back: *The North West Company LP v. Nutall*, 2019 MBQB 43 ("*The North West Company*")

This case dealt with a departed employee who was alleged to have made secret profits while working with the plaintiff, The North West Company LP ("North West").

The defendant employee had been in charge of staff housing for North West, including being in charge of the selection of contractors to perform services on that staff housing. While he was working in this capacity he incorporated a company, Far North Construction Inc. ("Far North"), hired four employees and began contracting for work servicing North West's staff housing through his company. When this was discovered, the employee resigned immediately.

While the employee paid back some of the profit he had made through Far North (under threat of criminal prosecution), approximately $150,000 was left outstanding. North West sued and sought an equitable accounting as it had not suffered a loss (the work was of acceptable quality and was done appropriately under set budgets). The employee claimed that given his lack of fiduciary status equitable doctrines could not be applied and—even if they could—North West could not claim them as a result of its unclean hands from the threats of criminal prosecution.

The Court then relied on the duties of good faith and fidelity borne by all employees (as well as the BC decision in *Zoic Studios BC Inc. v. Gannon*, 2015 BCCA 334) in finding that an equitable remedy could be granted. In the result, the Court ordered the repayment of all profits made by Far North to North West, but declined to order punitive damages or solicitor-client costs given the extent of that remedy and that the employee had already lost his job.

VIII. Potpourri

A. A Release May Not Preclude Litigation Against Management/Supervisors: *Watson v The Governing Council of the Salvation Army of Canada and David Court, 2018 ONSC 1066 ("Salvation Army of Canada")*

In *Salvation Army of Canada*, the plaintiff, Emma Watson, had been employed as a Manager at a thrift store in Cambridge, Ontario.[7] Following the end of her employment relationship, Ms. Watson signed a memorandum of settlement and a release in exchange for the sum of $10,000. Those documents provided:

> … The Employer and Employee having regard to their respective rights, duties and obligations, have determined that they wish to resolve any and all claims, complaints, actions, disputes etc. between them arising out of the employment relationship or the termination of that employment;

and:

> In accordance with the terms of settlement outlined in the attached letter dated August 8, 2011, I, Emma Oliveira Watson, agree to release any and all claims I have or may have against The Salvation Army, past, present or future, known or unknown, which arise out of or which are in any way related to or connected with my employment or the ending of my employment.
>
> This release of claims shall include any claims against anyone or any organization in any way associated with The Salvation Army which arise out of or which are in any way related to or connected with my employment or the ending of my employment.

Subsequently, Ms. Watson commenced an action against both her former employer and Mr. Court, who held the position of National Director of Operations, alleging various acts of sexual harassment perpetrated by Mr. Court throughout her employment.

Mr. Court brought a motion for summary basis on the basis, inter alia, the release executed by Ms. Watson precluded the action.

The Court found that the release only pertained to matters related to the employment relationship, and although the allegations of sexual harassment occurred in the workplace, they did not arise from the employment relationship:

> I conclude the Release cannot be considered all inclusive, including the claims herein, as the scope was the employment relationship. While many of the alleged events occurred at the place of employment and, perhaps, because of the employment, sexual harassment, intimidation and other improper conduct are not connected to employment. They are clearly separate matters.[8]

The Court concluded that specific language would need to be added to the release in order to bar the claim. The motion for summary judgement was dismissed.

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7 The plaintiff <u>was not</u> the movie star who shares the same name. You could hardly have *expelliarmus*'ed something different.

8 At para 22.

B. A Reminder on the Principles of Contractual Interpretation from Ontario: *Amberber v. IBM Canada Ltd*., 2018 ONCA 571 (*"Amberber"*)

The Ontario Court of Appeal in *Amberber* overruled a trial judge's determination that a termination clause was ambiguous and therefore unenforceable.

At trial, IBM brought a motion for summary judgment concerning the enforceability of a termination clause in an employment contract. The motions judge found the termination clause was ambiguous and unenforceable on the basis it did not expressly exclude common law damages[9]. IBM appealed.

The termination provision in the plaintiff's contract of employment provided as follows:

> **TERMINATION OF EMPLOYMENT**
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

The motions judge analyzed the termination provision as three separate provisions, as follows:

> **Options Provision**
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary.
>
> **Inclusive Payment Provision**
>
> This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.

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9 2017 ONSC 6470

Failsafe Provision

In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

The motions judge concluded that the “inclusive payment” applied to the “options” provision but did not necessarily apply to the “failsafe” provision. The judge went on to find that the “failsafe” provision, read on its own, did not rebut the presumption of reasonable notice. On that basis, the clause was determined to be invalid.

The Court of Appeal found that termination clauses must be read as a whole, and analyzing them in a piecemeal fashion offended the accepted principles of contractual interpretation. In overturning the lower Court’s decision, of which it was highly critical, the Court of Appeal also cautioned against straining to create an ambiguity where none exists.

Mr. Amberber’s action for pay in lieu of notice at common law was dismissed.