Raising the Bar

Raising the Bar – Sixth Edition

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"*There are far, far better things ahead than any we leave behind.* "

C.S. Lewis

Dear Friends,

Welcome back from the summer! We hope that all of our readers had a chance to get in some rest and relaxation with friends and family over the past few months, and we are sure that you all have been anxiously waiting for us to keep you informed on the latest and greatest from the world of litigation. Well, fear not, we here at RTB have been hard at work and we are happy to present the latest edition of *Raising the Bar*.

In this issue, we *shine a light on* the oppression remedy, providing you with the key fundamentals on this interesting area of law, as well as a guide to help you navigate the interplay between oppression law and wrongful dismissal.

We have also combed through the case law reports to pick out for you the key cases that we think *you need to know*, on topics ranging from unjust dismissal claims under the *Canada Labour Code*, to the latest word from the Court of Appeal on constructive dismissal, to the ongoing trend of summary judgment motions in wrongful dismissal cases.

In our *Did You Know?* section, you will find out something that you may not know: you and your lawyer may be being recorded while you are in court, and you may be able to get a copy of the recording.

We thank Samantha Crumb and Dianne Jozefacki for all of their hard work and contributions, which were essential to the publication of this issue.

As always, please feel free to let us know what *you* think about *Raising the Bar*, and let us know if you have any questions about the topics we've covered. Happy reading!

Frank Cesario and Elisha Jamieson
Co-Editors

IN THIS ISSUE

PART 1 – CASES YOU NEED TO KNOW ABOUT

Atomic Energy of Canada Limited v. Wilson, 2013 FC 733 (CanLII)

The employer applied to the Federal Court for judicial review of a labour adjudicator's decision, in which the adjudicator had concluded that the *Canada Labour Code* ("*CLC*") only permits dismissals for cause. The Federal Court held that the adjudicator's finding was unreasonable and misinterpreted earlier decisions. Justice O'Reilly clarified that an employer may dismiss an employee without cause so long as the employer provides notice and/or severance pay pursuant to sections 230 and 235 of the *CLC*. However, he added that this does not prevent the dismissed employee from bringing a complaint pursuant to section 240 of the *CLC* on the basis that the terms of the dismissal were unjust, resulting possibly in a further remedial award pursuant to section 242(4). The court further noted that an employee who is dismissed for cause and is *not* awarded notice and/or severance may also bring a complaint pursuant to section 240 if he believes that the reason(s) given for dismissal were unjustified or that the dismissal was otherwise unjust (i.e. based on discrimination or reprisal). The application for judicial review was allowed and the matter was referred back to the adjudicator.

General Motors of Canada Limited v. Johnson, 2013 ONCA 502 (CanLII)

The respondent worked at General Motors ("GM") until he took a medical leave of absence, claiming disability due to discriminatory treatment in the workplace based on racism. His claim arose from an incident where another employee refused to train with him; Johnson presumed, based on a comment from a co-worker, that the refusal was racially-motivated. GM investigated on three separate occasions, concluding each time that there was no evidence of racially-motivated conduct. After providing no medical information to GM regarding his leave, and declining offers of different positions, GM concluded that Johnson had voluntarily resigned. Johnson then sued for constructive dismissal, alleging that the work environment was poisoned. He was successful at trial.

The Court of Appeal overturned the trial decision, concluding that the trial judge unreasonably found that the employee's absence from training was "solely racially based" and unreasonably found that the work environment was poisoned due to racism. The Court held that even if the employee's refusal to attend training was racially motivated, that alone would not support a finding of a poisoned work environment warranting a finding of constructive dismissal. A workplace becomes poisoned only where serious wrongful behaviour is demonstrated sufficient to create a hostile or intolerable work environment. Except for particularly egregious stand-alone incidents, the wrongful behaviour must be persistent or repeated. The Court concluded that GM was reasonable in treating Johnson's decision not to return to work as a voluntary resignation. Therefore, he was not constructively dismissed, as there was neither a fundamental change in his employment, nor a unilateral change in a significant term of his employment.

***Minnie v. ICBC**, 2013 BCSC 1528 (CanLII)*

In this decision, the British Columbia Supreme Court held that a non-party witness was entitled to copies of the statements she gave to an insurance adjuster even though the statements were subject to litigation privilege. The petitioner witnessed a car accident. The respondent insured the driver. One of the respondent's adjusters interviewed the petitioner about the accident. A pedestrian brought a tort action against the driver. The petitioner was not a party to the action. The petitioner asked for a copy of her statements. The respondent refused, among other things, claiming protection under litigation privilege.

The petitioner did not dispute that the statements were subject to litigation privilege, but argued that they should still be disclosed to her. The Court agreed, finding that "fairness requires that the petitioner, as a non-party, be provided a copy of the statements to permit her to be informed and properly participate in the litigation process". The Court reasoned that a party to litigation would be entitled to production of the statements and that a non-party should not face more onerous restrictions. The Court did, however, set conditions "to recognize the litigation privilege", including that the petitioner could

not disclose the statements to other persons.

Kotecha v. Affinia, 2013 ONSC 4817 (CanLII)
Anderson v. Cardinal Health, 2013 ONSC 5226 (CanLII)

These two Superior Court decisions provide insight on when the court will grant summary judgment in actions for wrongful dismissal.

In *Kotecha*, the plaintiff brought a motion for summary judgment under the Simplified Procedure rules. The defendant admitted that the plaintiff was dismissed without cause. The live issues were the length of notice and damages. In response to the motion, the defendant brought its own motion to examine the plaintiff on discovery prior to the summary judgment motion being heard. The Court heard both motions together. While the plaintiff filed full materials in support of his motion, the defendant filed no materials on the merits of the claim. The defendant's motion was dismissed because the proposed issues for examination were addressed by the plaintiff's motion material, and the defendant did not file evidence to "put its best foot forward", as required in a summary judgment motion. Based on the plaintiff's motion material, the motion judge concluded he could achieve a full appreciation of the evidence and issues. Therefore, he granted summary judgment on the basis there was no genuine issue requiring a trial. The 70 year old employee, who worked for 20 years with a gross income of approximately $44,000 per year, was awarded 22 months notice.

In *Anderson*, the plaintiff brought a motion for summary judgment after she was paid her minimum statutory entitlements at the time of dismissal. Unlike the plaintiff in *Kotecha* however, her motion material did not provide an adequate level of detail necessary for the Court to achieve a full appreciation of the evidence and issues. In particular, the Court was unable to resolve conflicting evidence regarding the reasonableness of the plaintiff's mitigation efforts. The Court determined that there was a lack of reliable documentary evidence to evaluate the credibility of the plaintiff's statements on cross-examination regarding her efforts. Further, the Court found that the plaintiff's failure to provide particulars of the positions she applied for following her dismissal left the issue of the availability of comparable employment unresolved. The motion for summary judgment was dismissed, and a full trial was ordered.

PART 2 – SHINE A LIGHT ON…*THE OPPRESSION REMEDY AND WRONGFUL DISMISSAL*

When an employee is also a corporate stakeholder – such as a shareholder, creditor, director or officer of the corporation – employers should be particularly careful before implementing changes to, or the termination of, the employment relationship. Otherwise, the employer may face an oppression claim in addition to a wrongful dismissal action. In this piece, we shine a light on the oppression remedy in this context, and provide you with an explanation of the principles at play.

THE OPPRESSION REMEDY: THE FUNDAMENTALS

The oppression remedy is an equitable remedy available under business corporations statutes. The aim of the oppression remedy is to rectify conduct that is "burdensome, harsh and wrongful" or that is "a visible departure from standards of fair dealing" as between corporate stakeholders. Under both the Ontario *Business Corporations Act* and the *Canada Business Corporations Act*, courts have a broad, equitable jurisdiction under the oppression provisions to enforce not only what is *legal* but what is *fair* as it relates to an individual's rights as a corporate stakeholder.

The Supreme Court of Canada set out the key principles for courts assessing an oppression claim in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. In *BCE*, the Court emphasized that the core concept underlying oppression law is the assessment of the "reasonable expectations" of the parties. On an oppression application, the court will consider two principal questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

There are several factors useful in determining whether a reasonable expectation exists, including: general commercial practice; the nature of the corporation; the relationship between the parties (e.g. family or friendship); past practice between the parties; steps the claimant could have taken to protect herself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

If a claimant establishes a reasonable expectation, she must show that the failure to meet this expectation involved conduct that falls within the concepts of “oppression”, “unfair prejudice” or “unfair disregard” of the claimant’s interest. Not every failure to meet a reasonable expectation will give rise to a successful claim for a remedy. The Court in *BCE* noted that these concepts are “adjectival … they do not represent watertight compartments, and often overlap and intermingle”. Several types of conduct have successfully grounded an oppression remedy, including: a transaction without a valid corporate purpose (e.g. one aimed at benefitting some directors of a corporation rather than the corporation itself); a lack of good faith on the part of the directors in corporate decision-making; failing to disclose related party transactions; and a plan or design to eliminate a minority shareholder.

OPPRESSION CLAIMS AND WRONGFUL DISMISSAL

Generally speaking, wrongful dismissal, standing alone, will not justify a finding of oppression. The courts have traditionally found that the oppression remedy is not designed to provide a remedy for the termination of employment. Instead, it is meant to redress oppressive conduct in relation to the applicant’s position as a shareholder, creditor, director or officer of a corporation.

In limited circumstances, however, an employee may be able to assert that a change to employment constitutes oppression. Specifically, where a shareholder can demonstrate a “reasonable expectation” of employment or employment-related entitlements in addition to her position as a shareholder, she may be able to claim that any change to these entitlements or the termination of employment is not only a violation of the employment contract but also of her expectations as a corporate stakeholder.

In such cases, as Nordheimer J. wrote in *Walters v. Harris Partners Ltd.*, 2001 CarswellOnt 1424 (ON SC), the court must determine whether it the claim is “at its heart, an oppression claim with a wrongful dismissal component . . . or whether it is a wrongful dismissal claim that happens to have an oppression component to it”. An oppression remedy may be available in the former situation, but not in the latter. In order to do so, the courts will consider whether the interests of the individual as an employee of the corporation were so closely intertwined with her interests as a shareholder, and whether the dismissal forms part of a pattern of conduct meant to exclude the individual from participation in the corporation.

Several cases illustrate the courts’ approach to oppression claims in this context. In a leading early Ontario case, *Naneff v Con?Crete Holdings Ltd.*, 1995 CanLII 959, (ON CA), the plaintiff was closely involved in a family business as a manager, director and shareholder, and had worked in the business all of his adult life. The trial judge found that this unique employment was closely connected with the plaintiff’s shareholder rights, and that the dismissal was part of an overall pattern of oppression. Among other things, the trial judge ordered damages akin to wrongful dismissal damages. An appeal was brought as to the remedial orders, which is addressed below, although no appeal was brought from this portion of the decision.

In *Clitheroe v. Hydro One Inc.*, [2002] O.J. No. 4383, the Chief Executive Officer of the corporation was terminated allegedly for just cause. However, instead of commencing an action for damages for wrongful dismissal, she commenced a proceeding under the oppression remedy provisions of the Ontario *Business Corporations Act*. The Court struck out her oppression claim because it failed to allege a *pattern* of oppressive conduct. The Plaintiff had not plead any facts beyond the termination of her employment that could be considered “oppressive” to her as an officer of the corporation.

By contrast, in *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.*, 2009 CanLII 14394 (ON SC), the individual claimant agreed to become a minority shareholder of the corporation *on the condition* that he would be President of the company and employed as manager. These terms were set out in the Unanimous Shareholder Agreement (the “USA”). When he fell ill and

was hospitalized, the majority shareholder unilaterally ended his salary payments, and eventually had him removed as President two days after his return to work, despite the fact that the USA required his consent to such actions. The court determined that there was an “intimate connection between the employment contract and the shareholders’ agreement” such that the wrongful dismissal was sufficient to ground a finding of oppression.

More recently, in *Chan v. 160466 Ontario Inc.*, 2011 ONSC 5654, the court appeared to endorse a “flexible rule” when dealing with an oppression claim in the context of the termination of an employee in a closely-held private company. This flexibility is based on the following three “realities of employee investments in private companies”: the absence of a market for the shares; share ownership is part of an overall compensation package; and share purchases in a private company are often not entirely voluntary (i.e. “[t]hey are designed as both a discipline and an incentive to encourage performance”). Still, on the facts of the case (i.e. an employee/shareholder in a closely hold corporation whose employment was terminated), the Court found that the termination of employment did not amount to oppression. The applicant’s claimed “expectation” was that upon his termination the other shareholders should have bought out his shares. However, the Court disagreed and found that: the parties’ shareholders agreement contemplated the “diminution in the employment position of any shareholder”; the events at issue did not cause the applicant financial harm; and the shareholders’ agreement did not require share purchase upon termination.

The decisions in *BCE*, *Naneff* and *Chan* were very recently applied in an Alberta decision, *Luebke v. Manluk Industries Inc.*, 2013 ABQB 264. The Applicant was a shareholder and director in a successful family business. His father and brother decided to remove him as a director and employee. The Court noted that “exclusion of a family member from shareholdings or employment in these types of businesses may well defeat entirely reasonable expectations that a certain income will continue indefinitely” but also noted that this does not require “a forced continuation of a dissident as an active business participant”. The Court cited *Naneff* for the proposition that “the broad remedial discretion is only for the specific purpose of rectifying oppression and must protect the applicant’s interests as shareholder or director [and] is not intended as a means of redress with respect to personal or family interests”. The Court noted that the applicant had commenced a separate wrongful dismissal action and found that “although his employment was intertwined with his status as shareholder and director, his dismissal is best addressed in the context of that other action”. The Court concluded that the steps taken to remove the Applicant as a director and terminate his employment, although “arguably personally harsh”, were not oppressive and were taken to protect the best interests of the company “in the face of irreconcilable conflict”.

A WORD ON REMEDIES

If the court agrees that the dismissal amounts to (or is part of a pattern of) oppressive conduct, a broad array of remedies beyond wrongful dismissal damages may be available to the employee/shareholder. The court may make orders, for example, restraining the “oppressive” conduct, compensating the employee/shareholder, or directing the corporation to purchase the shares of the employee/shareholder at fair market value.

In *Naneff*, the Court imposed two important limits on this broad discretionary power afforded to the courts: (1) it must only *rectify* oppressive conduct rather than punish it; and (ii) it may protect only the person’s interest as a shareholder, director or officer *as such* rather than any other personal interests. The Court noted that in rectifying the oppressive conduct, courts should also consider the parties’ reasonable expectations in fashioning the remedy – that is, an aggrieved party should not be provided with a remedy that is more favourable than what was within her reasonable expectations. For example, in this case, the Court of Appeal overturned the trial judge’s order that the business be sold in a public sale, because it gave the plaintiff something that he could not have reasonably expected (i.e. the chance to control the business) and was more punitive than remedial.

CONCLUSION

When an employee is also a corporate stakeholder, employers need to carefully consider the nature of these dual roles and any applicable shareholders’ agreement prior to taking steps to modify or terminate the employment relationship. In these situations, the employer must ensure that no reasonable expectations of continued employment or specific entitlements upon

the termination of such employment have been created or, alternatively, that such expectations are honoured. Otherwise, the employer may not only face wrongful dismissal damages, but may also be subject to the broad remedial discretion afforded to the courts on an application for oppression.

PART 3 – DID YOU KNOW?

Did you know that…you may be being recorded in the Ontario Superior Court of Justice *and* that you may be able to get access to the digital recording?

Some courthouses and courtrooms are already equipped with operational digital recording devices that are recording matters heard in court. Some of the recordings continue beyond the departure of the judge from the courtroom. The Court has issued a policy stating that “The release of digital recordings will be at the Court’s discretion and the use of all digital recordings will be subject to any court order and any common law or statutory restriction on publication applicable to the particular proceeding.” Generally, you just execute an undertaking with the Court to access the digital recordings. The undertaking prescribes how the digital recording can be used and the terms and conditions under which it is provided. Be mindful that section 136 of the *Courts of Justice Act* prohibits (with penalties) the broadcast, reproduction and dissemination of audio recordings, and applies to these digital recordings. Any person who contravenes s. 136 is guilty of an offence and subject to a penalty, in accordance with s. 136(4) of the *Courts of Justice Act*. We would be happy to provide you with a copy of the policy and to speak with you about it.
