

# Common Contractual Issues on Termination of Employment



## A summary of recent developments

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# Introduction

- A number of recent decisions of the Courts have clarified obligations of employers in connection with the termination of the employment relationship
- This presentation will review the most notable decisions to assist human resources professionals in addressing termination matters to the highest of standards
- The recent caselaw highlights the importance of well written agreements, policies and a careful strategy to avoid disputes and litigation

# Outline

- **Potential Problems Resulting from the Introduction of New Written Employment Contracts**
- **Commissions & Bonuses Payable Upon Termination**
- **Giving Notice and the Factors Influencing the Notice Period**
  - Foreshadowing
  - Age
  - Character of Employment

# Outline - continued

- **Issues affecting Employees' damages:**

- Mitigation:**

- When does an employee not have to mitigate damages?
    - When would taking a new position be unreasonable?

- Double Recovery:**

- Disability Benefits
    - Pension Payments

- **Good Faith & Honest Performance**



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# Potential Problems Resulting from the Introduction of New Written Employment Contracts

# ***Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311***



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- Demonstrates the value in written employment contracts that are well-drafted
- Also demonstrates the risk employers have in using boiler-plate terms in new written employment agreements for existing employees

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- **Facts:**

- Mr. Miller began employment in September 2003 with a written agreement
- In March 2006, he received a promotion and signed a new written agreement
- In November 2006, he received a second promotion and signed another new agreement

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- Facts:
  - Employment K had:
    - a probationary term purporting to be able to terminate Mr. Miller without notice during those 90 days;
    - a termination clause permitting the employer to terminate providing notice under the ESA; and
    - a severability clause
  - There was no evidence at trial as to the employer's intent when they included this – appeared to be included as boilerplate



# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*



- Facts:
  - Mr. Miller's employment was terminated after the probationary period
  - He sued for wrongful dismissal

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- **Arguments:**

- Mr. Miller argued he was entitled to reasonable notice at common law as his contract was in breach of the *ESA* due to inclusion of the probation clause, which “wiped out” his 3 weeks accrued notice under the *ESA* for the first 90 days of his employment
- Mr. Miller argued this breach of the *ESA* made the probationary clause (and the termination clause) unenforceable at the outset

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- Arguments:
  - Mr. Miller argued that the probation clause was tied to the termination clause, that this created ambiguity in the agreement, and that the probation clause could not be severed using the severability clause without severing the termination clause too
  - Mr. Miller alleged the contract breached the *ESA* as the probation clause was meant to apply to him

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- **Decision on Appeal:**
  - The contract was unambiguous and on its face, merely outlined the same information as the *ESA*
  - Based on the evidence at trial, a reasonable person would be unlikely to “conclude the parties intended to place Mr. Miller in a worse... position for the first 90 days in his new position.”

# *Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311*

- Decision on Appeal:
  - The parties included an unambiguous severance clause for a reason and it is appropriate to sever the probation clause without severing the termination clause
  - Mr. Miller's notice limited to the *ESA*

## *Lesson from Convergys*

- When introducing new employment agreements for existing employees, carefully consider the carry-over of boilerplate language
- Clear, carefully drafted employment contracts will be upheld by the courts



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# Commissions and Bonuses Payable Upon Termination

# Commission/Bonuses

- Common theme = confusion around payment of commissions and bonuses at the time of termination



# Commission/Bonuses

- BC *Employment Standards Act* minimums
  - Contemplate payment of “wages” under formula in s. 63(4)
    - Wages includes commissions and money that is paid or payable as an incentive and relates to hours of work, production or efficiency
    - Does not include discretionary money not tied to hours of work, production or efficiency
- Contract and common law often provide for more than these minimums

# Commission

- Claim may arise where employee claims:
  - in debt for outstanding commissions the employee alleges were owed and not paid at the time of termination; or
  - in breach of contract for failure to pay commission the employee claims are due on an ongoing basis following termination of the contract

# Payment of Commissions “earned”

- At what point has the employee “earned” the commission?
  - concluded a sale/deal before termination?
  - was the “Effective cause” of a sale before termination?
- Consider: Why is the employee being paid the commission?
  - Referring a sale?
  - Closing a sale?
  - Closing a sale *and* servicing the resulting client/customer contract?

# Determining Commissions Payable

- Look at:
  - any express contractual language or policies regarding what happens to commissions where a termination occurs; or
  - if no express contractual language or policies, examine:
    - past practices;
    - the sale process; and
    - any role the employee has played in securing the sale

# ***Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140***

- **Facts:**

- Employee compensation plan included:

- Commission formula
- Annual expectation/quota
- Timing for payment of commissions = when a sales is *closed, won and invoiced*

# Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140



- Facts:
  - Employee compensation plan included:
    - “Participants who [are terminated]... whether or not for cause will be paid their *base salary through the agreed upon termination date*. In addition, the Participant will be *eligible only for commission payments earned prior to their last date of employment.*”

# *Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140*

- Facts:
  - Contract did not provide for notice upon termination
  - Evidence at trial included a specific list of 27 duties (a – aa) to complete in each sales cycle
    - Employee and Employer disagreed at trial as to which duty needed to be complete to “earn” the commission:
      - Employee = up to “j” or “p”
      - Employer = up to “u”

# *Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140*



- Facts:
  - As there was no notice provision, common law reasonable notice period applied
  - Employee argued he should be paid commissions he would have earned throughout the notice period (based on his past sales)
    - Employer felt contract was clear in this regard



# *Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140*



- **Decision:**

- Clear difference in contract between “base salary till agreed upon termination date” and “commissions earned up to last day of employment.”
- Clear definition of earned: Commissions payable when closed, won & *invoiced* (agreed with employer)

# *Sciancamerli v. Comtech (Communication Technologies) Ltd., 2014 BCSC 2140*



- Decision:
  - Lack of notice provision means reasonable notice implied; however, proposition that all amounts included in notice period that employee would have earned displaced by clear, unambiguous language that only commissions earned prior to last day of employment will be paid

# Commission Calculation Summary

- Different Approaches:
  - Commissions payable for amounts “earned” already prior to termination
  - Averaging past earnings to determine lost opportunity for commissions during notice period
  - Clear, express contractual language which ousts payment obligations during notice period at common law (*Comtech*)

# Ongoing Commissions

- Claim in breach of contract for commissions argued to be accruing over time
- Typically occurs where contracts are ambiguous or poorly drafted and imply some entitlement potentially beyond termination:
  - ie. “you will be paid on a commission basis and shall receive commissions as long as we continue our supplier relationship that you secured during your employment with us”



***Gill v. Navigate Capital Corp., 2013 BCSC  
1479 (upheld on appeal 2014 BCCA 462)***



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- Mr. Gill had a commission agreement and signed a lucrative deal entitling him to max monthly commission of \$10,000.00
- Contract did not speak to what happens to commission on termination

*Gill v. Navigate Capital Corp.*, 2013 BCSC  
1479 (upheld on appeal 2014 BCCA 462)



- Mr. Gill argued termination is irrelevant to his right to earn ongoing commissions based on the wording of his contract
- Court found commissions under the deal were earned based on services he provided each month, and that he therefore could not “earn” any commissions arising after the termination date
  - Express duties showed his compensation not solely based on securing the deal

*Gill v. Navigate Capital Corp.*, 2013 BCSC  
1479 (upheld on appeal 2014 BCCA 462)



- The Court did not foreclose ongoing commission arrangements from being contractually possible

# Ongoing Commissions Summary



- Need clear, express agreement to establish employer liability for ongoing commissions post-termination
- Default position = other than amounts owed at the time of termination (“Earned Commissions”) and those that may be payable during the notice period (part of severance pay), no obligation to pay beyond termination absent express contractual term



# Payment of Commissions “earned” - continued

- **Commission Contract Drafting Tips:**
  1. Clearly identify when the company considers a commission to be “earned” and what the employee’s responsibilities are
    - Define “Earned Commission”

# Payment of Commissions “earned” - continued

- Commission Contract Drafting Tips:
  2. Clearly outline how commissions will be dealt with upon termination of employment
  3. Seek to eliminate ambiguity: if it's not clear to employees how their compensation is calculated, the business is asking for trouble
    - Goal: establish an understanding of how their compensation is calculated early
    - Warning: *contra proferentem*

# Payment of Commissions “earned” - continued

- **Contracts Drafted:**
  - Seek legal advice on current contract terms and consider any modifications for new employee contracts
  - Seek legal advice on proposed severance arrangements to minimize risk from any outstanding commissions that may be claimed

# Bonuses

- **Bonuses during notice period:**
  - If the employee would have worked throughout the notice period, would they have received a bonus payment?

# Bonuses

- **Employee must establish:**
  - they would have been entitled, by contract or past conduct, to receive the bonus; and
  - how to calculate the amount of it

# Bonuses

- *Ostrow v. Abacus Management Corporation*  
*Mergers & Acquisitions, 2014 BCSC 938*
  - 9 month employee awarded contractual discretionary bonus during the 6 month notice period despite having a track record of only 1 paid bonus
  - Ruled it was an integral part of his contract

# Giving Notice and the Factors Influencing the Notice Period



# “Foreshadowing” Termination



- Can foreshadowing termination, or giving advanced warning that termination may come or will come at some point in the future reduce the notice period?





# “Foreshadowing” Termination



- Some case law from Saskatchewan and New Brunswick where the Courts reduced the notice period where significant forewarning provided
- In *Ostrow*, employee provided with approximately 3 months “foreshadowing”
  - Told he needed to begin looking for new employment and manager assisted him in looking for new job
  - No termination date given



# “Foreshadowing” Termination



- Court in *Ostrow* found that in BC, notice is “a binary concept; an employee is either given notice of termination or they are not; and that notice must not be ambiguous. The reasonable notice period begins on the date unambiguous notice is given.”
- Notice must be **clear** and **specific** as to the date of termination

# Calculating the Notice Period

- Common law reasonable notice:
  - Primary analysis of 4 primary features:
    - Character of Employment\*;
    - Age\*;
    - Length of Service;
    - Availability of Comparable Employment
  - Undue emphasis should not be placed on any of the four

# Age

- Is increased age still an important factor?
  - Recent arguments about age being less important failed - *Matusiak v. IBM Canada Ltd.*, 2012 BCSC 1784 (CanLII)
    - Defendant argued age should be consider “from a more modern perspective” given that more people are working longer
    - Court’s interest was piqued.... but not willing to depart (in this case) from established view at law that older employees have a more difficult time

# Character of Employment

- Character of employment – Does the employee have to be supervisory and managerial to get a lengthy notice period?
  - General proposition = people in senior, managerial positions with supervisory responsibilities will attract longer notice periods
  - Non-supervisory employees are not barred from receiving lengthy notice period awards though
    - *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469

# What could lengthen the notice period?

- “vulnerability” of the employee at the time of termination (medical leave, treatment from serious illness)
- restrictive covenants (non-compete)
- dismissal within the first 2 years of employment (short-service)
- particularly specialized skill set
- outdated skill set

# What could lengthen the notice period? - continued

- evidence of a poor job market
- inducements away from a secure position into a short term role
- assurances of job security
- bad faith conduct

# Overarching Principle

- How long it will reasonably take *this employee* to find a comparable position
- Employee is not entitled to notice base on the length of time required to find other employment



# Employee Damages

# Mitigation

- Default position:
  - Employee has a duty at law to mitigate damages flowing from the loss of employment
  - Duty to accept “comparable employment”
- May reduce or eliminate the employer’s liability for damages if:
  - employee obtains another job during the notice period; or
  - employee fails to mitigate for all or part of the notice period

# Mitigation - continued

- **Employee has no obligation to mitigate where:**
  - employment contract identifies an amount to be paid by Employer on termination (ie. “on termination of employment without cause, you will receive a payment of \$50,000.00); or
  - employment contract outlines a formula to determine severance pay on termination (ie. “on termination of employment without cause, you will receive two weeks of salary for each completed year of service”)

# Mitigation - continued

- Both contracts are likely to be interpreted as creating an obligation on the Employer to pay a fixed amount at termination

# *Maxwell v. British Columbia,* **2014 BCCA 339**

- Recent Case where employee did not have to mitigate
- **Facts:**
  - Employment contract provided specifically for the consequences of termination
  - “If [terminated]... the College shall provide an all-inclusive payment in lieu of notice, based upon...salary and...benefits...that would have been provided to the Employee during the period of notice of the Employee at the time of termination.”

# *Maxwell v. British Columbia,* 2014 BCCA 339

- **The Court reviewed the Law on this subject as follows:**
  - BC Law is settled
    - Where there exists a contractual severance provision, a dismissed employee is entitled to the specified amount and is not required to mitigate absent a duty to do so imposed by the contract

# *Maxwell v. British Columbia,* 2014 BCCA 339

- **Decision:**

“In the present case, the contract specifically provides that if the [employee] was terminated without cause, “the College shall provide an all-inclusive payment in lieu of notice.” It continues to specify the components of the payment. I see no basis on which it could be contented that the [employee] was obliged to mitigate and that her failure to do so would relieve [the College] from...contractual obligations”



# Mitigation - continued

- When is taking a new position offered by the employer unreasonable?
- Recent case:
  - *Shirbigi v. JM Foods Ltd.*, 2014 BCSC 1927



# *Shirbigi v. JM Food Services Ltd.,* **2014 BCSC 1927**

- Example of a scenario where an employee is found to have acted reasonably by refusing a new position with a related company which would net her higher income
- Also:
  - What notice can be implied into a contract that only refers to a termination period for the employee?
  - Fixed-term contract – a result of poor drafting?

# *Shirbigi v. JM Food Services Ltd.,* 2014 BCSC 1927



- **Facts:**

- Ms. Shirbigi worked as a Freshslice store manager and was hired as a district manager for Freshslice in January 2010.
- Her 1 page employment contract stated:
  - “requires a 3 year commitment to this position” and guaranteed minimum income for years 1-3.
  - Employee must give at least 1 month notice before leaving employment

# *Shirbigi v. JM Food Services Ltd.,* 2014 BCSC 1927

- **Facts:**

- Soon after starting the district manager position, Mr. Russell (CEO) got close to Ms. Shirbigi and they began an affair
- Mr. Russell's wife also worked there, but was away on maternity leave
- Mr. Russell gave Ms. Shirbigi one of his apartments rent free and asked her to keep it secret
- Eventually the affair ended (about the time Mrs. Russell was returning from mat leave...)

# *Shirbigi v. JM Food Services Ltd.,* 2014 BCSC 1927



- **Facts:**

- After the affair ended, Ms. Shirbigi's job performance began to be criticized
- Ms. Shirbigi was told that she would need to train new district managers and then her employment would terminate
- She appealed to the CEO for another position and he offered her the position of store manager in a store owned by his brother

# *Shirbigi v. JM Food Services Ltd.*, 2014 BCSC 1927



- **Facts:**

- Ms. Shirbigi quit and sued for wrongful dismissal

- **Arguments:**

- Freshslice argued:
  - she was limited to 1 month notice as it was reasonable to imply they had a mirrored obligation on termination
  - She failed to mitigate by refusing employment with the CEO's brother

# *Shirbigi v. JM Food Services Ltd.,* 2014 BCSC 1927

- **Decision:**

- It was not reasonable for her to take a demotion to work with the brother of the person she had the secret affair with. It was reasonable for her to infer she was being pushed out
- It was also not reasonable to imply a mirrored notice obligation. The employer owed notice at common law.
- The wording of the contract created a 3 year fixed term contract. Ms. Shirbigi was owed the remainder of her contract: 20.5 months income

# The Relevance of Disability Benefits & Pension Payments

- Contractual disputes may arise over whether a dismissed employee is entitled to disability benefits and pension payments during the notice period
- The Supreme Court of Canada in *Waterman* clarified the law in this area

# Disability + Severance

- Primer Scenario:
  - Doug was off work on LTD when his employment came to an end without cause due to the closure of his factory.
  - Are the LTD payments he receives deductible from any claim for damages for wrongful dismissal?



# *Sylvester v. British Columbia,* [1997] 2 S.C.R. 315

- Supreme Court of Canada (“**SCC**”) clarified the law regarding disability benefits and “double recovery” issues

## **FACTS:**

- Employee was terminated because of a reorganization during a period when he was receiving short-term disability benefits
- The Short Term Illness & Injury Plan (“**STIIP**”) was established solely by the employer and the employee did not make any contributions to the plan

# *Sylvester* - continued

- The employer offered the employee 12.5 months salary as severance, less any benefits received under the STIP during this period
- The employee sued for wrongful dismissal and claimed 24 months' notice

## **ISSUE:**

- Should the disability payments received by the employee during the notice period be deducted from damages awarded for wrongful dismissal?

# *Sylvester* - continued

## **CONCLUSION:**

- As disability benefits are contractual, the answer depends on the terms of the employment contract and the intention of the parties.
- In this case, the terms of the contract demonstrated that the parties did not intend that the employee receive both amounts.
- Therefore, the disability benefits should be deducted.

# *Sylvester* - continued

## **REASONS:**

1. The terms of the STIP showed an intention that the benefits were intended to be a substitute to the employee's regular salary
  - The STIP was designed to continue an employee's earnings for up to seven months for an employee unable to work in the event of illness or injury

# *Sylvester* - continued

## REASONS - continued:

- Clear in the STIIP brochure that the disability benefits would be reduced by other income received, including wage continuation plan benefits, pension benefits, workers' compensation benefits and salary from other employment

# Sylvester - continued

## REASONS - continued:

2. The simultaneous payment of disability benefits and damages for wrongful dismissal was inconsistent with the terms of the employment contract
  - Damages for wrongful dismissal are based on the premise that the employee would have *worked during the notice period*
  - Disability payments were payable to the employee only because he *could not work*

# *Sylvester* - continued

## REASONS - continued:

- The parties did not intend the employee to receive both damages and disability benefits
- Both contractual provisions could not operate simultaneously when each was based on a contrary assumption about the ability of the employee to work

# Sylvester - continued

## OTHER CONCLUSIONS:

- Parties to an employment contract *can agree* that the employee is to receive *both* disability benefits and damages for wrongful dismissal
- There may also be cases in which this intention can be inferred
  - Example: when the disability benefits are akin to benefits from a private insurance plan for which the employee has paid/provided consideration for
  - Here, Sylvester had not contributed to the benefit



# Disability Issues

## General Summary:

- Disability benefits may impose a separate contractual obligation on an employer, in addition to that of providing reasonable notice of termination
- A dismissed employee may be entitled to damages for the loss of both reasonable notice and disability benefits if the employer dismisses the employee without notice or cause

# Double Recovery

## General Summary, cont'd:

- Whether disability benefits received by a disabled employee are deductible from an award of damages for wrongful dismissal depends on:
  - the terms of the employment contract; and
  - the intention of the parties

# Recent Cases

- *Sylvester* updated by *Waterman v. IBM Canada Ltd.*
- Recent case on disability benefits and double recovery post *Waterman* is:
  - *Morris v. ACL Services Ltd.*, 2014 BCSC 1580
    - Followed approach in *Sylvester*, as updated in *Waterman*

# *Morris v. ACL Services Ltd.,* 2014 BCSC 1580

- **Facts:**

- Employer terminated Mr. Morris' employment at the end of the three months and provided him with his 7 weeks under the *ESA*

- **Key Issues:**

- When was notice operative?
- How should the overlapping disability benefits and any wrongful dismissal damages be handled?

# *Morris v. ACL Services Ltd.,* 2014 BCSC 1580

- **Facts:**

- Mr. Morris employed as a software engineer for 7 years
- Took leave due to medical issues for approximately one year
- Employer advised him that unless he returned to work, his unpaid leave of absence and employment would be terminated within 3 months

# *Morris v. ACL Services Ltd.,* 2014 BCSC 1580

- **Decision:**

- Concept of “working notice” means that the employee will be *working*
  - The 3 months’ notice was null given the *ESA*’s s. 67(1) prohibition against counting notice when an employee is away for medical reasons
- Court found disability benefits again deductible like in *Sylvester*

# Pension + Severance

- Primer Scenario:
  - Sue's employment is terminated without cause. She is eligible to retire for full pension. Are the pension payments deductible from any claim for wrongful dismissal damages?



# *Waterman v. IBM Canada Ltd.,* 2013 SCC 70

- Most recent SCC case on the issue of double recovery and pensions – released on December 13, 2013

## **FACTS:**

- IBM dismissed Mr. W without cause
- 65 years old; 42 years of service
- Long-standing member of IBM's defined benefit pension plan
- IBM contributed a percentage of his salary to the plan on his behalf



# Waterman - continued

## FACTS - continued:

- At the time of termination, there was no longer a mandatory retirement policy in place
- Mr. W was entitled to a full pension under the plan and his termination had no impact on the amount of his pension benefits
- IBM told Mr. W that on termination, he *must* begin receiving monthly pension payments as of that date

# Waterman - continued

## FACTS - continued:

- IBM policy:
  - an employee who is entitled to retire with a full pension but has not reached age 71 cannot receive both pension and employment income from IBM at the same time
  - At age 71, the employee *must* start drawing benefits and may continue working and earning employment income from IBM

# Waterman - continued

## ISSUE:

- Does Mr. W's receipt of his pension benefits reduce the damages otherwise payable by IBM for wrongful dismissal?

## DECISION:

- Employee pension payments, including payments from a defined benefits plan are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal

# Waterman - continued

## ANALYSIS:

- A potential compensating advantage (“double recovery”) problem exists if the plaintiff received a benefit that would result in compensation beyond his or her actual loss and *either*:

# Waterman - continued

## ANALYSIS:

- a. The plaintiff would not have received the benefit but for the defendant's breach; *or*
- b. The benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach (which was the case in *Sylvester*)

# Waterman - continued

- Here, there was clearly a double recovery issue:
  - Had IBM not breached the contract of employment and instead given Mr. W working notice, he would have received only his salary during that period and not his pension
  - There is a “but for” causal relationship between IBM’s breach of contract and Mr. W’s receipt of the pension benefits

# Waterman - continued

- Given that there was double recovery, the SCC had to decide whether the pension payments should be deducted from damages payable by IBM
- As in *Sylvester*, the SCC looked first to the contract to determine the issue of whether the pension benefits should be deducted from wrongful dismissal damages, and then at the parties' intentions in light of the terms of the contract

# Waterman - continued

## CONCLUSIONS:

- Generally, a plaintiff will only be compensated for the actual loss arising from the breach by the defendant (the Compensation Principle)
- But, this principle cannot be applied strictly or inflexibly
  - i.e. There are exceptions to the rule



# Waterman - continued

## The Private Insurance Exception:

- Benefits received by a plaintiff through private insurance should not be deductible from damage awards
- These benefits have come about because the plaintiff has prudently obtained and paid for insurance, and should not be deducted

# Waterman - continued

- Retirement pension benefits fall within the private insurance exception
- Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings
- Pension benefits are not meant to compensate the plaintiff for injury or breach of contract or to act as wage replacement

# Waterman - continued

- The SCC Court gave this example:
  - A plaintiff who has been injured by a defendant's negligence buys a lottery ticket and wins a large sum of money
  - No one would argue that the amount of the winnings should be deducted from the damages payable by the defendant

# Waterman - continued

- Mr. W's pension benefit was not intended to be an indemnity for lost wages
  - Mr. W contributed to his pension through his years of service (i.e. he paid for the benefit)
  - The parties could not have intended Mr. W's retirement savings would subsidize his wrongful dismissal
- Pension payments are regarded as belonging to the employee, and are essentially delayed remuneration for the employee's work – they are earned income

# Waterman - continued

## SUMMARY (for Disability & Pension Benefits):

1. There is no one single marker to sort which benefits fall within the private insurance exception
2. One factor relates to the nature and purpose of the benefit – the more closely the benefit is an indemnity against the loss caused by the defendant's breach, the stronger the case for deduction

# Waterman - continued

3. Whether the plaintiff has contributed to the benefit remains a relevant consideration
4. A benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it
5. Disability Benefits = tend to be deductible
6. Pension Benefits = tend not to be deductible

# Organizing Principle of Good Faith & Duty of Honest Performance

# Change to Contract Law

- In November 2014, the SCC was faced with a case where a party had been wronged and the law needed to develop in order to provide the innocent party with justice
- Outlined the “organizing principle of good faith” and the “duty of honest performance” between contracting parties



# *Bhasin v. Hrynew, 2014 SCC 71*

- **Facts:**

- C markets educational savings plans through retail dealers. B was a one of C's retail dealers, and so was H. B & H were competitors
- 3 year Contract between C & B had an automatic renewal clause unless terminated with 6 months notice
- H had proposed mergers with B to gain access to B's lucrative niche market, but B repeatedly declined. H encouraged C to force the merger

# *Bhasin v. Hrynew*, 2014 SCC 71

- **Facts:**

- C appointed H as Provincial Trading Officer (“PTO”) to review C’s dealers. C needed to appoint a PTO to review compliance with Alberta Securities laws
  - B objected, as C, its competitor, would have access to review B’s confidential business records
- During C’s discussions with AB Securities Commission on compliance, C outlined plans which included B working for H

# *Bhasin v. Hrynew*, 2014 SCC 71

- **Facts:**

- C repeatedly misled B about H's role, and about what it was telling the Securities Commission
- B refused to allow H to audit its records
  - In response, C threatened to terminate the contract and so afterwards
- B lost the value in his business without the agreement and the majority of B's sales agents were solicited by H to work for H
- B sued C&H

# *Bhasin v. Hrynew*, 2014 SCC 71

- **Lower Courts:**

- Trial judge found C was in breach of the implied term of good faith, H had induced breach of contract, and C & H were liable for civil conspiracy.
- Court of Appeal overturned the judgment and dismissed B's claim entirely

# *Bhasin v. Hrynew*, 2014 SCC 71

- **SCC Decision:**

- SCC found Canadian common law needed to develop more:

- Acknowledged “good faith contractual performance” as a general organizing principle of the common law
    - Recognized a common law “duty to act honestly in the performance of contractual obligations”

# *Bhasin v. Hrynew*, 2014 SCC 71

- **SCC Decision:**

- Organizing Principle of “good faith contractual performance”
  - A contracting party should have “appropriate regard to the legitimate contractual interests of the contracting partner”
  - “...merely requires that a party not seek to undermine those interests in bad faith”
  - Conceptually different from fiduciary obligations, which are a much higher standard

# *Bhasin v. Hrynew*, 2014 SCC 71

- **SCC Decision:**

- “Duty to act honestly in the performance of contractual obligations.”
  - Highly context specific
  - “...parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”
  - “...does not impose a duty of loyalty or of disclosure... it is a simple requirement not to lie or mislead the other party about one’s contractual performance”

# *Bhasin v. Hrynew*, 2014 SCC 71

- Has yet to be cited in the employment context
- Employment law already recognizes a duty of good faith in some instances, specifically at the time of termination of someone's employment



# SUMMARY

- The common law continues to develop to refine the employment relationship and guide the parties on structuring their relationship
- Good drafting and being clear about the meaning of compensation terms can help avoid lots of problems when the time comes to end an employment relationship

# QUESTIONS?

## Thank you for attending!

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# Scenarios for Discussion

# Payment of Commissions “earned”

- **Example #1:**

- Employee A is a salesperson who sells Case tractors for commission at a well-established dealership. He works without a written contract. The dealership has a credit department that frequently arranges financing.

- When would commission be considered “earned”?

- When the customer purchases the tractor?; or...
- When the dealership receives payment from the customer for the tractor?



# Payment of Commissions “earned” - continued

- Example #1:

- Answer:

- Salespersons in this case have likely completed their responsibilities at the time of the sale.
    - Subject to any (enforceable) policies that payment needs to be obtained for the tractor (partial, in full, etc.), commission likely payable to salesperson



# Payment of Commissions “earned” - continued

- **Example #2:**
  - Employee B sells copiers on a commission basis to small businesses in the Lower Mainland. Her employer exists around the world, but did not provide her with a written employment contract
  - Each copier B sells comes with a mandatory 2 year service contract
  - B’s responsibilities include both sales and being the primary liaison for the customer after the sale until the expiration of the service contract. This typically results in 1-2 calls per 2 year service contract

# Payment of Commissions “earned” - continued

- Example #2 - continued:
  - B sells a copier to a business in Richmond on February 1, 2015. The customer pays for the copier within 30 days and pays the service contract on a monthly basis
  - On February 1, 2016, B’s contract of employment is terminated. B’s customer has not needed any assistance with the product up until that time
  - When would commission be considered “earned”?
    - At the time of the sale?
    - At the end of the service contract term?



# Payment of Commissions “earned” - continued

- Example #2:
  - Answer:
    - Without an employment contract, this scenario can cause problems
    - Argument for employee that commissions should be paid as waiting 2 years to receive payment as a commission salesperson illogical
    - Argument for employer that job duties expressly contemplate servicing the contract through 2 year term (but that servicing admittedly minimal)
    - If by Feb 1, 2017, customer never needed servicing, should the employee be paid then?

# Bonuses

- Bonuses during notice period:
  - Example:
    - Joe's 11 year employment is terminated without cause, despite excellent reviews. The company is suffering temporary cash flow issues and offers 2 months' severance
    - The termination occurred 1 month before Joe's regular biannual bonus payment was scheduled to occur
    - Joe believes a reasonable notice period is 12 months, rejects the offer, and litigates

# Bonuses - continued

- Bonuses during notice period:
  - At trial, Joe is awarded a 12 month notice period
  - The evidence showed that during the 12 months following the termination of his employment, biannual bonuses were paid out to all company employees who had good reviews
  - Would Joe be awarded any bonus payments?
    - Likely, Yes (subject to contract disentitling him)