

Back to Basics in Employment Law

**Restatement & Harmonization of Damages
in the Employment Setting**

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Overview

This paper proceeds to consider two important recent advances in the theory of damages both in common law and in unionized employment settings.

The first part of this paper discusses the significant restatement and harmonization in the law of damages for wrongful dismissal set out in the recent decision of the Supreme Court of Canada in *Honda v Keays* [2008] SCJ No 40.

The second part of this paper discusses this restatement and harmonization in the law of damages resulting in a ground-breaking award of \$100,000 in punitive damages against a trade union in *Limojet Gold v PSAC* [2008] BCCAAA No 40, 171 LAC (4th) 28 (Larson, March 2008).

It is argued that recent developments in both areas are consistent with each other and beneficial to a clarified and shared understanding of the principles according to which damages may be awarded in the employment setting.

A. Common Law - Cap's Off to SCC as Honda v Keays unlocks the door to real damages;

Before *Honda v Keays* – Employee Vulnerability and the Failed Experiment of Wallace damages

1. It is the premise of this portion of the paper that the Supreme Court of Canada tried an experiment with a number of cases, culminating in the decision of *Wallace v United Grain Growers* [1997] SCJ No. 97. The Court did this with a view to creating a tangible disincentive for an employer taking unfair advantage of vulnerability.
2. The Wallace experiment failed.
3. However the principle of employee vulnerability stands, and has been reinforced in the recent decision of the Supreme Court of Canada in *Honda v Keays* 2008 SCC 39.
4. Instead of protecting a vulnerable employee, the interpretations of Wallace by the superior courts of the provinces served to put a “cap” on any disincentive that might otherwise be applied, and remove from an injured plaintiff any ability to recover real and provable damages, other than pay in lieu of notice.
5. Some Courts made any Wallace extension subject to mitigation.
6. Some Courts held that any Wallace extension had to stay within the 24 month notional upper limit:

“However, even though *Wallace* holds that the manner of dismissal is a proper consideration in determining length of reasonable notice, the high end of the scale, even where bad faith dismissal is a factor, is still no more than 24 months.”
(*Clendenning v Lownes Lambert*, 2000 BCCA 644)

7. Some Courts have found that any Wallace extension is caught and cut off by the Termination Regulations under the provisions of the Public Sector Employers Act.
8. Some Courts have found a Wallace extension to eliminated by a written contract. (*Andrews v Sleep Country*, appeal struck out - 2000 BCCA 2760)
9. Some Courts rolled back any meaningful Wallace extensions, while at the same time holding that all other real injury claims were merged in any extension.
10. It is the respectful submission of this paper that the interpretation of the Wallace extension proved out to be no real sanction to employers and of no real assistance to employees.
11. It is the premise of this paper that the recent language of the SCC has removed the unintended cap on real harm occasioned by the unfair conduct in unjust dismissal and put firmly in place a “Vulnerability Principal” which will effectively and fairly protect employees being fired, and create real sanctions for unfair employer actions. This will lead to a more just workplace in Canada.
12. Damages will not be limited to a notional extension of the notice period which would be meaningless to a long service older employee (thus near the 24 month limit anyway), or defeated by a written contract, or a Government regulation, or which would be eliminated if the employee finds any paying work to feed her family before the case grinds its elegant way through the trial court procedures.
13. The minority judgement in Wallace from the pen of our own Justice Beverly McLachlin, (now CJC), would have made the requirement of “good faith” a real and enforceable implied term of every employment contract. The majority in Wallace would not go that whole step, choosing a softer approach, and leaving it to the superior courts of the provinces to take direction from the vulnerability principle as stated in the majority.
14. In the respectful view of this paper – that didn’t work out.
15. The Court in Honda sets a far less soft track. Making the “good faith principal” a hard and real term of every employment contract – enforceable on adequate proof – like any other clause in a commercial contract.
16. As we will outline below, the superior courts have already started off struggling with the impact of Honda, but are fast finding their way to the effective remedy intended by

the line of cases culminating in *Honda*, and to an application of an effective “vulnerability principle”.

Wallace – The Vulnerability Principle and the Soft Obligation of Good Faith and Fair Dealing on Dismissal

17. In *Wallace v United Grain Growers* [1997] SCJ No 97, the Supreme Court of Canada review a line of earlier powerful cases to opine on the special nature of the employment contract supported an obligation of good faith and fair dealing on dismissal. The Court stated at paragraphs 91 to 98:

The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court...bear repeating. As K Swinton noted in “Contract Law and the Employment Relationship: The Proper Forum for Reform”, in BJ Reiter and J Swan, eds, *Studies in Contract Law* (1980), 357, at p 363:

“...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange of traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.”

“This power imbalance is not limited to the employment contract itself. Rather it informs virtually all facets of the employment relationship...”

This unequal balance of power lead the majority of the Court in *Slaight Communications*, supra, to describe employees as a vulnerable group in society...the vulnerability of employees is underscored by the level of importance which our society attaches to employment.. As Dickson CJ noted in *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313, at p 368:

“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self worth and emotional well-being.”

Thus for most people, work is one of the defining features of their lives...

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger*, supra, it was

noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself. By way of expanding on this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by the adding to the length of the notice period....

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive....

18. In the premise of this paper, this powerful statement of principle has in no way been abandoned by the SCC in *Honda*, but rather has been significantly reinforced and made potent.

***Honda v Keays* – Taking the Full Step – The Vulnerability Principle and the New Fully Compensable Implied Term of Good Faith on Dismissal**

19. In *Honda v Keays*, *supra*, the Supreme Court of Canada revisited the issue of damages in wrongful dismissal and, in particular, the issue of damages for breach of the obligation of good faith on dismissal.
20. The *Honda* decision rejects the arbitrary, and - in the premise of this paper - ineffective extension of the notice period – the so called Wallace damages – and replaces them with the basic contractual damage principle of reasonable foreseeability set out in *Hadley v Baxendale*, (1854) 9 EX 341, 156 ER 145.
21. That is to say that all reasonably foreseeable damages arising out of the employment contract are recoverable. The measure of damages is not the arbitrary extension of the notice period, but all actual provable damages.
22. The SCC in *Honda* stated:

[D]amages are recoverable for a contractual breach if the damages are ‘such as may fairly and reasonably be considered either arising naturally...from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.’...[para 54]
23. The Supreme Court of Canada in *Honda* went on to find that the obligation of good faith on termination as set out in Wallace is within the contemplation of the parties to an employment contract so that damages for breaching the obligation of good faith are reasonably foreseeable and thus compensable. The Supreme Court stated:

In *Wallace*, the Court held employers ‘to an obligation of good faith and fair dealing in the manner of dismissal’...and created the expectation that, in the course of dismissal, employers would be ‘candid, reasonable, honest and forthright with their employees....At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. [para 58]

24. The Honda decision restates principles of basic contractual damages to the employment contract affirming that all reasonably foreseeable damages are compensable.
25. The Honda decision breaks new ground in ruling damages arising out of the breach of the obligation of good faith on termination are to be taken as reasonably foreseeable and, thus, fully compensable. That is, the obligation of good faith on termination has become an implied term of the contract of employment.
26. The Supreme Court of Canada in Honda rejected the arbitrary extension of the notice period as the measure of damages for breach of the obligation of good faith on dismissal and replaced it with the actual damages resulting from the breach.
27. In some cases, there may be no compensable damages arising from the breach of the obligation of good faith on termination.
28. In other cases there may be damages well beyond the arbitrary extension of the notice period under Wallace.

***Honda v Keays* – The Vulnerability Principle and the New Availability of Punitive Damages**

29. The reliance by the Supreme Court of Canada in Honda on the Court’s ruling in *Fidler v Sun Life Assurance* 2006 SCC 30, as will be commented upon further, will also expand the availability of significant punitive damages - again as would not have been available under the interpretations of Wallace.
30. The application of *Fidler*, in our respectful view, indicates a significant change within the context of an employment contract.
31. It is from the reasoning in *Fidler* that the Supreme Court of Canada in Honda takes its clear formulation of the Hadley and Baxendale - “damages flowing directly” test.
32. The significance of this is remarkable in the extreme. The Supreme Court of Canada in *Fidler* refined the punitive damages analysis that it had undertaken in *Whiten v. Pilot Insurance* 2002 SCC 18. There the SCC had reinstated a million dollar punitive damages award in an insurance contract case, for breach of good faith. This was huge

news. That case itself was a refinement of punitive damage law as earlier set out by the SCC in *Hill v Scientology* [1995] 2 S.C.R. 1130.

33. This gospel was denied to the unwashed working stiffs however. A number of superior Court decisions in B.C. and elsewhere made it clear that a breach of good faith in an insurance contract – a contract of “peace of mind”- could resound in punitive damages, but this could not apply to a similar breach of an employment contract. Somehow the peace of mind provided to a citizen by her contract of employment, was of far less moment than that of her house insurance.
34. The adoption of *Fidler*, and by implication *Whiten*, by the SCC in *Honda*, in the context of a contract of employment should lead not only to real “motor vehicle accident” or tort scale emotional damages, but to significant punitive damages in a proper case.
35. With the adoption of this line of cases, it is likely that a judge sitting with a jury may be required to allow the issue of punitive damages to go to the jury, again in a proper case. The point is that more cases will now be proper ones.

RBC Dominion Securities – Application of Reasonable Foreseeability for Breach of Good Faith Damages

36. Another recent decision of the Supreme Court of Canada in *RBC Dominion Securities v Merrill Lynch Canada Inc.*, 2008 SCC 54 (October 9, 2008), is of substantial assistance. There the Supreme Court of Canada overturned our BC Court of Appeal and awarded the actual damages flowing from the breach of managerial duty and breach of duty of good faith by an employee, even where it extended beyond a reasonable notice period..
37. In *RBC*, the Court set out that the interpretation of *Hadley and Baxendale* by the BC Court of Appeal had been wrongly applied (see SCC at paragraph 12: “the majority of the Court of Appeal applied the proximity test wrongly.”).
38. The question as formulated by the BC Court of Appeal majority was that the circumstances which unfolded had never been contemplated by either party.
39. Thus it was not “foreseeable” and therefore there were no recoverable damages and the plaintiff was out of luck.
40. The Supreme Court of Canada in *RBC* made it clear that this thinking was insufficient. The correct process is to recognize that the parties did not put their minds to the eventual outcome. Then the court must proceed to make its best effort to determine what the parties would have expected if they in fact had contemplated the ultimate occurrence.

41. This is a clear direction that the plaintiff's actual provable damage must be considered, and the direct damage flowing from a breach of reasonable expectations – even in the face of outrageous eventualities – must be assessed.
42. This theory will have broad practical application.
43. The obvious situation is one where there is evidence of mental suffering or ill health caused by the breach.
44. The Supreme Court of Canada in *Honda*, supra, specifically held a Defendants' conduct may amount to a breach of the obligation of good faith on dismissal. The Court stated at paragraph 59:

Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or **dismissal meant to deprive the employee of a pension benefit or other right...** [emphasis added] [paragraph 59]

45. Other likely applications of the ratios in *Honda* and *RBS* include share options, and Long Term and Short Term Incentive Programs – S-Tips and L-Tips.
46. In *RBS* the recoverable damages were not limited to those suffered only during the period of reasonable notice which had not been given by the departing employees. It extended far beyond that, on the Hadley and Baxendale “prime mover” analysis, which had been conducted by the trial judge (and overruled by the BC Court of Appeal and reinstated by the Supreme Court of Canada. On a direct analogy to the *RBS* case to loss of options, S-Tip, L-Tip and pension milestones may and probably will become recoverable. Such damages would not have been recoverable under *Wallace*.

Recent cases after *Honda* – Transition Period Cases

47. As of January 12, 2009, there were 22 decisions reported on Quicklaw that have considered *Honda v Keays*, supra [Quicklaw - Cancite].
48. The significance of the change in the law is apparent as the Courts grapple with the vulnerability principle and the new implied term of good faith on termination. This becomes apparent in decisions pleaded and argued prior to release of the judgment in *Keays* and *Honda*, but decided since the release.
49. These may be considered, to borrow the phrase from the Ontario Court of Appeal, the “transition period cases”.

Application of Honda – Requirement of bad faith on termination to trigger possible damages

50. In *McNevan v AmeriCredit Corp* [2008] OJ No 5081, the Ontario Court of Appeal rendered two judgments considering the application of Honda on an appeal concerning Wallace damages, among other issues.
51. The majority judgment struck down any Wallace extension, in a separate analysis based on Honda. The majority held the Employer did not breach the obligation of good faith on termination and no damages arose under either Wallace or Honda. The majority stated:

(iv) The impact of the Supreme Court of Canada's decision in Keays v. Honda Canada Inc.

62 After oral argument and while this decision was still under reserve, the Supreme Court of Canada released its decision in *Keays*. The court altered the approach to bad faith damages holding, at para. 59, that "in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid." Rather, bad faith damages are to be compensatory based upon actual damages the employee suffers.

63 At this court's request, counsel made further written submissions based upon *Keays*. In their submissions, the parties were divided as to whether this court should consider *Keays* and the legal propositions it stands for. I need not resolve that debate due to my conclusion that the record does not support a finding that AmeriCredit acted in bad faith in its dismissal of McNevan. There can no justification for an extended notice period under *Wallace*, or a separate damage award under *Keays*, without a finding of bad faith.

52. The minority, upholding the finding of bad faith, would have awarded damages for mental distress (coincidentally equal to the quantum of the earlier Wallace award). The minority concurred in setting aside the Wallace extended notice period and its effect on entitlement under the employee stock option plan. The minority stated:

110 Given that this case falls within the transition period from the *Wallace* regime to the *Honda* regime, this court must assess the respondent's mental distress according to the findings of the trial judge. I would award the respondent \$30,000 to compensate him for the mental distress he suffered beyond what might be normally expected upon termination from employment. The elimination of the extended notice granted by the trial judge under *Wallace* affects the respondent's entitlement under the employee stock purchase plan. His entitlement must be calculated on the basis of only six months notice. As stated in my introduction I concur with Epstein J.A.'s approach to the calculation of the respondent's damages arising from the employee stock purchase plan.

111 In conclusion, I would dispose of the appeal as Epstein J.A. does, except in regard to the damages for mental distress. In that regard, I agree the trial judge's award of six months' extended notice under *Wallace* should be set aside, but I would replace that award with an award of \$30,000 for mental distress. I agree with Epstein J.A.'s disposition of costs as success is divided.

53. Similarly, in *Desforge v E-D Roofing* [2008] OJ No 3720 (Sup Ct Justice), the Court held certain conduct did not amount to bad faith, nor was there evidence of actual loss. In determining what amounted to bad faith conduct, the Court considered examples of bad faith conduct that would have triggered *Wallace* damages.

Application of *Honda* – Requirement of evidence of actual damages

54. In other recent cases, damages that would have been awarded under the old law as an increased notice period (“*Wallace* damages”) were no longer compensable without evidence of actual loss.
55. For example, in *Fox v Silver Sage Housing Corp* [2008] SJ No 477, the Saskatchewan Court of Queen’s Bench held the employer breached its duty of good faith on dismissal by failing to be candid with the employee for the reasons for dismissal. However, no damages were awarded as counsel (pre *Honda*) had led no evidence of the measure of damages arising from the breach.
56. Similarly, in *Dawson v FAG Bearings* [2008] OJ No 4305, the Ontario Superior Court of Justice found the employer had “acted unfairly”, but declined to award extra damages where there was no evidence of to quantify specific damages.
57. Similarly, in *Desforge v E-D Roofing* [2008] OJ No 3720 (Sup Ct Justice), the Court held certain conduct did not amount to bad faith. The Court and applied jurisprudence considering of conduct by the employer did not amount to bad faith. The court considered examples of bad faith following *Wallace* in holding the employer had not breached the implied term of good faith. The Court also held there was no evidence of loss.

Application of *Honda* – *Wallace* Damages awarded as *Honda*

58. Some decisions have cited *Keays v Honda*, but appear to have simply awarded damages for a few extra months of salary similar to *Wallace*.
59. For example, in *Peoples v Ontario* [2008] OJ No 5102, the Ontario Superior Court of Justice appears to have simply awarded an extra 4 months salary for bad faith over and above the 24 months damages for reasonable notice.

Application of Honda – Vulnerability Principle informs interpretation of contract

60. In *Bru v AGM Enterprises* [2008] BCJ No 2380, the BC Supreme Court considered *Keays v Honda* and the vulnerability principle in the context of a plea of resignation.
61. The Court found an implied duty of good faith on termination applied to an employer in the context of handling an apparent employee ‘resignation’. The Court found that the employer had a contractual obligation to consider employee vulnerability within the context of an apparent resignation.
62. The Court in *Bru* reinforced the separate and distinct implied term of good faith on termination, and awarded damages for mental suffering of the resigning employee, even in the absence of expert medical evidence.

Application of Honda – Cited for other principles

63. Review of the subsequent case law also shows *Keays v Honda* cited for other principles including:

Requirements for punitive damages: *Carney v Pabedinskas* [2008] OJ No 4818; *Tain v Leahy* [2008] OJ No 4898 (Sup Ct Justice).

Breach of human rights obligations alone not actionable: *Magnan v Brandt Tractor* [2008] AL No 1109 (CA); *Ahmed v Edmonton Public School Board* [2008] AJ No 809.

Prohibition on double-recovery: *Clark v BMO Nesbitt Burns* [2008] OJ No 3789 (CA).

Application of Honda – General principles and future directions

64. From the recent cases one can see some principles emerging.
65. *Keays v Honda* restated the law of employment, recognizing the principle of vulnerability, setting out that unequal bargaining informs the complete interpretation and application of the employment contract.
66. The principles of vulnerability and unequal bargaining as cited in *Wallace* were used to justify (in rare cases) an arbitrary extension of the notice period. This has now hardened into a separate and distinct implied term of the employment contract.
67. Further, breach of the separate and distinct term of good faith on dismissal will result in liability for all natural and reasonably foreseeable damages according to *Hadley v Baxendale* principles.
68. There was an implied term for reasonable notice and that remains a separate and distinct term of every employment contract.

69. However, in Honda we see the recognition of a new implied term of good faith on dismissal. This resolves the inherent difficulty from Wallace of blending implied term of reasonable notice with a duty of good faith on dismissal falling short of an implied term.
70. Breach of the new separate and distinct implied term of good faith on dismissal makes any cap on reasonable notice irrelevant.
71. Damages may well extend beyond the notice period and has the potential to greatly expand damages in the proper case.
72. The direction from the SCC in Honda will require counsel in appropriate cases to consider the calling of expert evidence to prove medical claims, stock loss claims and present value of pension loss claims in a proper case. It is submitted that such losses will not be restricted to those occurring during a notice period, but rather will be all proven damages flowing from a proven breach.
73. We note that there is a reference to the “Vulnerability Principle” in the just released unanimous decision from the SCC , overturning the BCCA, in *Shafon v. KRG Insurance*, Jan 23, 2009, 2009 SCC 6, where the Court, addressing the issue of restrictive covenants says this, at para 41:
 74. Having regard to the generally accepted imbalance of power between employers and employees, to introduce the doctrine of notional severance to read down an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant and inappropriately increases the risk that the employee will be forced to abide by an unreasonable covenant.
75. This latest word from the SCC makes it clear that the Court intends to continue to protect vulnerable employees, and has in no way abandoned the earlier thrust of its guidance in this regard.

B. Unionized – Arbitrator Awards \$100,000 Punitive Damages in Illegal Strike – Limo Jet Strikes Gold

Unionized Punitive Damages for an Illegal Strike

76. It is the premise of this aspect of the paper that a collective agreement Arbitrator has jurisdiction to award significant punitive damages for breach of a collective agreement in a proper case. In this part of the paper we take the instance of an illegal strike, and the jurisdiction and principles for awarding damages in that context.

77. Where liability for an illegal strike is found, general principles of damages apply to put the Employer back into the position it would have been in, but for the illegal strike. As stated in *Brown and Beatty*:
78. [I]n applying the basic contract principle of attempting to return the innocent party to the same position it would have been in but for the breach of the agreement, arbitrators have held unions liable to the company for those proven losses that were occasioned by, and attributable to, the unlawful strike for which the union was found to have been responsible. [p. 9-28; para 9:2500]
79. In *Pacific Press v. CEPU, Local 2000* [2000] BCCAAA No. 509, Arbitrator Diebolt, QC, summarized the principles of damages for an illegal strike as follows:
- The basic principle is the measure of damages should place the innocent party in the position it would have occupied if the defendant had performed without breach. This basic principle, of course, is subject to the doctrines of foreseeability, causation and mitigation. [para 30]
80. In finding the union was liable for an illegal strike in breach of both the Labour Code and the relevant Collective Agreement, the Arbitrator awarded damages to the employer totalling approximately \$35,000 for a work stoppage that lasted just a few hours.

Arbitrator has jurisdiction to award Aggravated and Punitive damages

81. While not clearly recognized in the past, it is now generally accepted that an arbitrator has jurisdiction to award aggravated and punitive damages: *Seneca College* [2004] 133 LAC (4th) 193 (Ont. Superior Court); *City of Surrey* [2003] BCCAAA No. 243 (Beattie), upheld [2004] BCLRBD No. 155; *Vancouver Shipyards* [2005] BCCAAA No. 296 (Hope).
82. As stated by Arbitrator Hope in *Vancouver Shipyards*, supra:

The contemporary jurisprudence favours the conclusion that arbitrators have a jurisdiction to award punitive and aggravated damages in appropriate circumstances. [para 45]

The General Principles of Punitive Damages

83. Punitive damages are non-compensatory damages by which the Adjudicator expresses outrage at reprehensible conduct. The principles are the same as at common law, and referred to in the earlier section of this paper, about the SCC decision in *Honda*.

84. Punitive damages will be awarded where there is an independent or separate actionable wrong and the conduct of the defendant is so high-handed and reprehensible that it offends decency: *Whiten v. Pilot Insurance* [2002] 1 SCR 595; *City of Surrey*, supra.
85. Punitive damages are also intended to have a deterrent effect on the community at large, sending a message that certain conduct will not be tolerated.
86. We note the following punitive damage awards:
87. In *Matusiak*, supra, the Court awarded each of two plaintiffs \$100,000 (\$200,000 total) punitive damages arising from an illegal strike where there was evidence of violence, intimidation and threats. The Court noted, “the [union] defendants not only condoned the misconduct, they encouraged it.” [paragraph 145] In awarding the punitive damages, the Court made it clear that violence and intimidation would not be tolerated.
88. In *Whiten v. Pilot Insurance*, supra, the Supreme Court of Canada upheld an award of punitive damages of \$1,000,000 arising from a breach of contract (insurance). In upholding the punitive damages award, the Supreme Court noted the duty of good faith arising from an insurance contract was a separately actionable wrong.
89. In the view of this paper, we suggest that there is an analogous duty of good faith imposed in labour law between a union and an employer.

Arbitrator Dalton Larson’s Award

90. Although a number of Arbitrators have commented on the availability of significant punitive damages in a proper case at arbitration, the facts came together in a perfect storm before Arbitrator Dalton Larson in *LimoJet Gold v. PSAC* [2008] BCCAAA No 40 and 171 LAC (4th) 28, (Larson March 2008) [there are filed appeals outstanding at the time of this writing].
91. A significant illegal strike, apparently orchestrated by union officials, and resulting in violence, property damage and loss of business revenue, was proven.
92. Damages of a compensatory nature were proven and awarded.
93. The Arbitrator then faced the employer’s claims for aggravated and punitive damages.
94. The Arbitrator determined that he did have jurisdiction to award aggravated and punitive damages in a proper case, at page 29, as follows:

Having precipitated the grievance by the Employer, Counsel says that the Union then took the ultimate step of flaunting the authority of this arbitration

board by refusing to appear for the hearings which, he says, amounts to contempt and a serious abuse of process: *Steve Walters and United Steelworkers of America Local 2952 and L-M Equipment Co. (1981) Ltd.* [2006] BCLRB No. B242/2006.

While at one time arbitrators were considered to have jurisdiction only to award compensatory damages, it is now settled that they can award aggravated and punitive damages in appropriate cases: *Seneca College* [2004] 133 LAC (4th) 193 (Ont. SCJ). In that case, the court adopted the test laid down by the Supreme Court of Canada in *Weber v. Ontario Hydro* dealing with the jurisdiction of arbitrators generally, including claims in tort, that if the essential character of the issue of aggravated or punitive damages arises out of the collective agreement, the arbitration board has exclusive jurisdiction to deal with it. It held that it is well established that labour arbitrators have broad remedial power, including the power to award damages which must necessarily include the jurisdiction to award aggravated and punitive damages.

95. The Arbitrator then faced the employer's claims for aggravated and punitive damages.

Firstly, it is important to understand that aggravated damages differ from punitive damages in that they are regarded as compensatory in nature. Therefore, they are general damages that have been aggravated in some material particular by the conduct of the wrongdoer that is regarded as oppressive or high-handed. This was explained by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130 at para 188 to 190:

Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libelous statement. The nature of these damages was aptly described by Robins JA in *Walker v. CFTO Ltd.*, supra, in these words at p.111:

Where the defendant is guilty of insulting, high handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as aggravated damages.

96. Arbitrator Larson, after making a number of references to the evidence and additional case law, turned his attention to the issue of punitive damages, at page 31, as follows:

By contrast, punitive damages are not compensatory. They are intended to have a deterrent effect on the community at large sending a message that certain

conduct will not be tolerated. They may be awarded where there is an independent or separate actionable wrong and the conduct of the wrongdoer is so high-handed and reprehensible that it offends the arbitrator's sense of decency. In the *Hill* case, the Supreme Court of Canada described this remedy at p.42 as follows:

Punitive damages may be awarded in situations where the defendant's conduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

In *Whiten v. Pilot Insurance* [2002] 1 SCR 595 the Supreme Court of Canada upheld an award of punitive damages of \$1 million by a jury where it was found that the insurance company had contrived a defense of arson in an attempt to pressure the plaintiff to settle the claim on terms favourable to the insurance company. The Court held that, in addition to the contractual obligation to pay the claim, the respondent was under a distinct and separate obligation to deal with its policyholders in good faith. A breach of the contractual duty of good faith was therefore independent of and in addition to the breach of the contractual duty to pay the loss. It said that the award by the jury was more than it would have awarded but was within the high end of the range where juries are free to make their assessment.

97. The Arbitrator again held up the background of the somewhat extreme proven facts of the LimojetGold case as against the legal background and at page 32 came to the following analysis:

While employers do not typically seek punitive damages against a union for engaging in an illegal strike, there are cases where punitive damages have been awarded against a union for an illegal strike which was accompanied by violence and intimidation. In *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council* [1999] BCJ No. 2416 the Supreme Court of British Columbia awarded each of the two plaintiffs general damages of \$20,000, wage loss of \$25,500, aggravated damages of \$25,000 and punitive damages of \$100,000 by reason of threats made to their personal safety, infliction of mental suffering, nuisance, intimidation and conspiracy to injury.

While the wrongful acts were committed by individual members of the Building Trades Union who were, in turn members of the BCYT, the court held that the latter materially enhanced the risk of harm to the plaintiffs by contributing to it such that there was a significant connection between the creation and the enhancement of the risk and the wrongs committed. They were found to have induced, procured and exhorted their members to picket unlawfully and to commit other unlawful acts.

98. In summary on the issue of punitive damages, the Arbitrator concluded as follows:

I find that punitive damages are justified in all the circumstances of this case. In addition to the work stoppage that was prohibited by the collective agreement, there are a myriad of separate actionable claims both on the contract for breach of the duty of good faith and fair dealing and in tort for such things as interference with economic relations, nuisance, and intimidation. The conduct of the Local Union was not only oppressive but malicious. Its actions in the conduct of the strike were intended to cause economic harm to the Employer to coerce it to give into claims that are required by statute and the collective agreement to be determined by arbitration. In the course of the work stoppage, not only did the table officers contribute to threats, intimidation and violence against the Employer but also against its own members, but they were directly involved in it. Then when the Employer sought a remedy at law, the Local Union refused to participate and demonstrated contempt for the arbitral processes.

While Counsel argued that punitive damages should be fixed at the high end of the scale, there is a requirement of proportionality that must be weighed against any compensatory damages that may have been awarded in the form of general and aggravated damages. Mr. Tevlin argued that those damages should be assessed in the range of \$500,000 but I consider that would be an excessive response to accomplish the goal of deterrence in this case. Accordingly, I fix the punitive damages at \$100,000.00

Conclusion – Restatement and Harmonization of Damages

99. We suggest that the analysis by Arbitrator Larson in *LimojetGold* is entirely consistent with, and in fact anticipated by a number of weeks, important guidance from the SCC in *Honda*. In our view, the SCC in *Honda*, and Arbitrator Larson in *LimojetGold*, adopted the punitive damages analyses from *Fidler*, incorporating *Whiten*, in turn refining *Hill*.

100. Thus in both the unionized context and the common law context, we have seen an announcement the re-opening of the door to real damages for proven injury and a restatement and harmonization of the principles by which damages are assessed.