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PAPER 3.1

## Mitigation in Wrongful Dismissal: 30 Years after Michaels v. Red Deer College

These materials were prepared by Christopher R. Forgonson of TevlinGleadle Employment Law Strategies, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, April 2008.

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## MITIGATION IN WRONGFUL DISMISSAL: 30 YEARS AFTER MICHAELS V. RED DEER COLLEGE

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The leading Canadian common law case on the duty to mitigate in the wrongful dismissal context is *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324. A recent Quicklaw search indicates that *Michaels* has been followed in 43 subsequent Canadian decisions and mentioned in 442. *Michaels* is important because it addresses not only the issue of who bears the onus of proof in a mitigation defence (the defendant), but also the nature of the evidence required to establish this defence. A review of many of the decisions that cite *Michaels* reveal that it is cited for the onus of proof. However, there has been little judicial consideration of and inconsistent application by lower courts of what *Michaels* says about the nature of the proof required by a defendant raising mitigation as a defence.

### I. Michaels v. Red Deer College

*Michaels* was a wrongful dismissal action brought by two dismissed members of the academic staff of Red Deer College in Alberta. The plaintiffs were Marion Michaels and William Finn. The appeal to the Supreme Court of Canada by the employer—Red Deer College—was on one issue only: that the Alberta Court of Appeal erred in its reasoning regarding the plaintiff's duty to mitigate. The employees also had a number of cross appeals regarding the administrative requirements to properly dismiss academic staff. The cross appeals had nothing to do with mitigation.

The impugned reasoning of the Alberta Court of Appeal for the consideration of the Supreme Court was the following passage from the Appeal decision:

As to the obligation of the appellants to mitigate damages, the evidence does not establish that other employment opportunities were available, and of which the appellants ought reasonably to have taken advantage.

Thus, the issue before the Supreme Court was the sufficiency of evidence of mitigation and by inference, which party bears the onus of proof. Red Deer College asserted that the law was, or should be, that the dismissed employee bears the onus of proof of positive mitigation steps. Red Deer's submission was summarized as follows:

It was the appellant's contention that judgments of this Court have, if not expressly then by implication, placed upon wronged plaintiffs the burden of showing that they acted reasonably to mitigate the damages arising from a defendant's wrongful breach of contract, in this case wrongful dismissal from employment.

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The Supreme Court categorically rejected this position. It did so in its own words (the reasons were written by Laskin C.J. and concurred in by Martland, Spence and Beetz JJ) and by adopting a passage from the text *Williston on Contracts*, vol. 11, 3rd ed. (1968).

Stating the law in his own reasons, Laskin C.J. wrote:

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

This passage, by itself, could bear the interpretation that if the plaintiff's evidence was that "he has stood idly or unreasonably by," this evidence could support an adverse finding regarding the duty to mitigate without any positive proof by the defendant. Another interpretation is that in order for a mitigation defence to succeed, the defendant must establish that the plaintiff "could reasonably have avoided some part of the loss claimed." Thus, standing idly by may not be enough to support an adverse finding of failure to mitigate.

However, the above cited passage of Laskin C.J. is not the only part of the judgment. He also specifically adopted the following passage from *Williston on Contracts*, vol. 11, 3rd ed. (1968) at 312:

It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract

This statement more clearly sets out the requirement that the employer must establish not only that the dismissed employee did not act reasonably in searching for alternate employment but also that through a reasonable search the employee "could have procured other employment of an approximately similar kind." This passage seems to require proof of other opportunities.

The fact that this requirement presents a difficult hurdle for employers to overcome was also expressly addressed by Laskin C.J. in quoting from Cheshire and Fifoot's, *Law of Contract*, 8th ed. (1972) at 599:

But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

Finally, recall the statement of law from the Alberta Court of Appeal that was the subject of this appeal:

As to the obligation of the appellants to mitigate damages, the evidence does not establish that other employment opportunities were available, and of which the appellants ought reasonably to have taken advantage.

The Supreme Court of Canada ultimately dismissed the appeal without criticizing this statement in any way. Thus, it can be argued that the Supreme Court of Canada saw no error in this statement of law which also clearly requires the employer to establish the availability of other employment opportunities.

Thus, it is the writer's opinion that the law in Canada requires some admissible evidence of reasonable alternate employment in order to support a reduction in damages for failure to mitigate.

## II. Appellate Court Consideration of Michaels

There is very little appellate court consideration of this issue. In *Edge v. Kilborn Engineering (B.C.) Ltd.*, [1988] B.C.J. No. 807 (C.A.) (which will be addressed more fully below), the Court of Appeal, citing no cases, stated:

The onus on the employer in a case such as this is to show that the employee has failed to take reasonable steps to avoid the loss.

The BC Court of Appeal mirrored the passage from *Cheshire and Fifoot* cited in the *Michaels v. Red Deer* decision in *Forshaw v. Aluminex Extrusions Ltd.*, [1989] B.C.J. No. 1527. While this case did not directly deal with the nature of the defendant's onus; the following passage supports the position that the defendant has a heavy onus to meet to raise a successful mitigation defence:

The 'duty'—to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available—is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.

The Alberta Court of Appeal has adopted the requirement that the defendant employer must establish that there was an alternate job available. In *Christianson v. North Hill News Inc.*, [1993] A.J. No. 672 (C.A.), the Alberta Court of Appeal overturned a trial decision which awarded a 17 year lower management employee 6 months for reasonable notice but reduced the 6 month award by 4 months for failure to mitigate. The Alberta Court of Appeal increased the notice period to 12 months with no reduction for mitigation. The pertinent reasons of the Court of Appeal on the mitigation issue were:

Bearing in mind the fact that wrongful dismissal suits are suits for breach of contract, assessing their damages follows familiar principles. One of the most familiar is the defence that the plaintiff failed to mitigate his or her damages, and that was pleaded and argued here. The most important and undoubted qualification on that defence is this. The efforts of the plaintiff will not be nicely weighed, particularly with hindsight. All that the plaintiff need do is to make what at the time is an objectively reasonable decision; he or she need not make the best possible decision. In particular, the courts will not usually expect one faced with a breach of contract to take steps which are risky or unsavory. The onus of proof is on the defendant (says *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324) and so any gap in the evidence accrues to the plaintiff's benefit. In wrongful dismissal cases, the courts have extended that qualification a little further: the plaintiff need not mitigate damages by taking a significant demotion, or by going back to the employer who fired him or her. All that is trite law.

The defendant's evidence at trial in support of its mitigation defence was set out as follows:

The plaintiff testified that she had diligently checked the want-ads and taken many other steps to look for work, filing a detailed diary to that end. The trial judge says nothing about that, except for the brief passages cited above which may denigrate her credibility. The day before trial, the defendant sent someone to the public library to check old newspaper want-ads on microfiche, and a number were put to the plaintiff in cross-examination. After some years she could not recall whether she had seen the specific ads, but in each case gave reasons why the job did not appear suitable. The Trial Judge does not comment upon that. Needless to say, no-one testified about the nature of those jobs or those printers, and some of the ads were very short and cryptic (as is common in want-ads). Presumably the plaintiff had expertise which

would enable her to decipher and evaluate those ads. No other evidence about them was given, except for a few lines of formal evidence from the person who went to the public library.

The Court of Appeal reviewed the evidence from the trial relating to mitigation and pointed out what was missing:

No-one testified that a single job suitable for the plaintiff had existed or gone begging during the relevant period, let alone that such jobs were common. If that had been the case, one would have thought that a defence long established in the industry could have called such evidence. We repeat that the onus of proof is on the defendant.

The Court's conclusion regarding the mitigation defence is consistent with the reasons from *Michaels*. The Alberta Court of Appeal held:

Therefore, we conclude that there was no evidence on which one could conclude that there had been any significant failure to mitigate. Still less was there any evidence that more efforts or different efforts would have found the plaintiff a suitable job any sooner, or would have been even likely to do so. Any deduction for failure to mitigate cannot be supported.

The Yukon Court of Appeal considered this issue briefly in *Evans v. Teamsters Local Union No. 31*, [2006] Y.J. No. 90 (C.A.). The plaintiff in this case was a business agent for the defendant union. The facts surrounding the dismissal are intriguing however they boil down to an outright termination without notice followed by a demand or request by the employer following the termination to have the plaintiff work out a 24 month notice period. The trial judge found that the demand/request was an attempt after the fact to impose a working notice period. The Court of Appeal disagreed and found that the demand/request was a job offer for a fixed term contract at the plaintiff's former position and salary. Regarding mitigation, the Court of Appeal determined that the plaintiff was bound to accept the re-employment by his former employer, particularly because there were no alternative jobs in the area.

The Court of Appeal did not cite *Michaels* but did cite the BC Supreme Court decision in *Carllyle-Smith v. Dennison Dodge Chrysler Ltd.*, [1997] B.C.J. No. 3075 (S.C.), a decision of Brenner J. (as he then was). In particular, the cited portion of the *Carllyle-Smith* decision was:

an inadequate mitigation effort coupled with a finding of the likelihood that comparable alternative employment could have been achieved had a reasonable effort been expended, requires the court to make an appropriate reduction to what would otherwise be an appropriate period of notice. Clearly the less the mitigation effort and the stronger the evidence of prospective alternative employment, the more heavily this factor will be weighted in determining the appropriate notice period.

The *Carllyle-Smith* decision will be reviewed more fully below. It is interesting that the portion the Yukon Court of Appeal cited is the portion that is consistent with the *Michaels* requirement of evidence of comparable alternative employment.

The most significant recent decision regarding the duty to mitigate in the wrongful dismissal context is the BC Court of Appeal decision in *Coutts v. Brian Jessel Autosports Inc.*, [2005] B.C.J. No. 828 (C.A.). In this case, the Court of Appeal specifically cited the reasons of Laskin C.J. from *Michaels* (but not the texts cited by Laskin C.J.) and came to the rather surprising conclusion that the duty to mitigate requires a dismissed employee to seek out and accept a lower paying job. The critical reasons of the trial judge were:

From all the evidence of both parties concerning Mr. Coutts' efforts to find replacement employment and evidence of the availability of potential employment in the high end automobile field, I conclude that Mr. Coutts was primarily interested in pursuing opportunities with a new Ferrari dealership and, on the possibly overly

optimistic view that his employment with Mr. Ross was assured, he failed to diligently pursue other opportunities. I am satisfied that Mr. Coutts did not pursue alternative employment opportunities and that had he done so he would probably have found work by the end of August 2003. However, on the evidence before me, the defendant has not proven that the employment opportunities that were probably available would replace the income that Mr. Coutts has lost.

The Court of Appeal held that this characterization of the duty to mitigate constituted a reversible error:

Thus, the judge concluded that Mr. Coutts did not have a duty to accept a position at less remuneration than he earned from his former employment. With respect, the judge was in error in making that finding. The duty of mitigation required Mr. Coutts to act reasonably and diligently, in his own interest, in pursuing alternative employment. Personal preferences and career objectives are a consideration in deciding whether an employee is entitled to turn down an alternative employment, but they are not decisive. The employee must still act reasonably. In my view, Mr. Coutts did not act reasonably in the circumstances. Refusing to follow through with employment opportunities in the employee's accustomed line of work, in this case with Weissach Motors and MCL Motors, is not reasonable. Critical to the judge's finding was that Mr. Coutts could have had alternative employment by the end of August 2003. In this case, the judge found that Mr. Coutts was primarily interested in a new Ferrari dealership that did not even come into existence until 2004. His hopes of securing employment with Ferrari were both unrealistic and unreasonable.

This appears to be a retreat from the law set out in *Michaels*. If the onus is on the defendant to establish that there was alternate employment, the fact that the plaintiff did not follow up on what he believed (rightly or wrongly) to be lower paying employment should result in a lack of evidence of alternate employment and a failure to establish the defence. In *Coutts*, the Court of Appeal seems to have reversed the onus and found a failure to mitigate based only upon the failure of the plaintiff to follow up on what may or may not have been lower paying jobs.

Significantly, in the *Coutts* trial decision ([2004] B.C.J. No. 941), the trial judge made specific factual findings relating to the evidence of alternate employment:

There is no evidence that the employment opportunities identified by the defendants were comparable. Just because those opportunities concerned high priced motor vehicles does not satisfy the burden of proof on the defendants that they were comparable. Despite the considerable evidence tendered by the defendant about employment opportunities, there was no evidence whatsoever about the level of remuneration that Mr. Coutts might earn from those identified opportunities and accordingly no basis upon which it could be said the positions were comparable. In saying this I do not disagree that it is not necessary to adduce evidence of a specific job and specific terms of employment but there must be some evidence from which one can reach the conclusion that the job opportunity is comparable.

Despite this finding, the Court of Appeal focused on the trial judge's finding that "Mr. Coutts did not pursue alternative employment opportunities and that had he done so he would probably have found work by the end of August 2003" without any evidence at all about the remuneration of any possible replacement jobs.

### III. Trial Court Decisions

Some trial judge's have required evidence of a job "gone begging" without citing *Michaels v. Red Deer*. In *Bird v. Warnock Hersey Professional Services Ltd.*, [1980] B.C.J. No. 2057 (S.C.), Locke J. expressed dissatisfaction with the plaintiff's mitigation efforts but held that lack of efforts alone could not support a deduction for failure to mitigate. Although this was a post *Michaels* decision, the only case cited for this proposition was *Munana v. MacMillan Bloedel Ltd.* (1977), 2 A.C.W.S. 364 (B.C.S.C.). The relevant reasons from Locke J. were:

I was not much impressed, however, with the efforts—I should say lack of effort—by the plaintiff to obtain other reasonably comparable employment. But the onus here is on the defendant to prove not only failure in fact, but that had the plaintiff taken reasonable steps to mitigate, he would have been likely to obtain comparable alternate employment: see *Munana v. MacMillan Bloedel Ltd.* (1977), 2 A.C.W.S. 364 (B.C.S.C.). I do not think the defendant satisfied the burden on the latter point so I will not reduce the award.

The reasoning in *Bird v. Warnock Hersey* was adopted and followed in *Cook v. Royal Trust*, [1990] B.C.J. No. 1493 (S.C.) without citing *Michaels*.

More recently in *Jost v. Western Railco Products Ltd.*, [2000] B.C.J. No. 2074 (S.C.) the Court cited *Michaels* for the proposition:

... the onus is on the defendants in this case to prove firstly, that there was a failure on the employee's part; and secondly, that the employee would have likely found another comparable position if one had been searched for.

In *Bartholomay v. Sportica Internet Technologies Inc.*, [2004] B.C.J. No. 750 (S.C.), the Court (without citing any authority) relied on the following statement in rejecting a mitigation defence:

I am satisfied on the evidence that the plaintiff took all reasonable steps to mitigate his losses after his contract was breached. In any event, in order to succeed on this defence, the defendants must prove not only that the plaintiff failed to reasonably seek out new employment in a timely fashion after he was discharged, but also that, had he done so, he probably would have obtained employment then. The defendants have not discharged the onus upon them in either respect.

A general review of the trial level decision on the topic of mitigation discloses a general tendency to follow *Michaels* as far as stating that the onus of proof is on the defendant but a very mixed approach in requiring evidence of a missed opportunity.

*Cimpan v. Kolumbia Inn Daycare Society*, CanLII, 2006 BCSC 1828 is an example of how the strong words in *Michaels*;

But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

have been watered down at the trial level. In *Cimpan, supra*, the Court stated:

While the onus is on the defendant to prove the plaintiff has not mitigated, it would be impossible for any employer to prove that the employee would have been able to secure a particular job.

#### **IV. What Must an Employer Prove and How to Prove It**

On the presumption that *Michaels* still has some teeth and the employer has some onus, the next question is “what must the employer prove.”

The Court of Appeal decision in *Coutts, supra*, doesn't really help answer this question as that case seems to instruct us that one thing an employer need not establish is the remuneration of any alternate employment. *Michaels* only goes so far as to require some proof that a proper job search would have resulted in a replacement job.

One tactic is to call evidence of other positions through newspaper or other job postings. This practice was criticized by Bouck J. in *Edge v. Kilborn Engineering (B.C.) Ltd.*, [1987] B.C.J. No. 992 (S.C.):

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Turning now to the question of other potential job opportunities. Copies of ads from various newspapers were put into evidence for the purpose of indicating jobs that could have been obtained by the plaintiff had he only tried. By way of reply, the plaintiff said many of these were outside his field of expertise or were at a lower level of employment, were outside of British Columbia, or were unsuitable for various reasons. Again, it seems to me the defendant must do more than just produce newspaper ads. If it relies on these ads, it should produce the employer who placed them so he can be cross-examined. A newspaper cannot be cross-examined. The defendant must prove the job was available, the lengths of its term, its nature and the rate of pay. Only then can a judge decide whether or not it was unreasonable for the plaintiff to turn the offer down.

However, this statement of the law was criticized by the Court of Appeal on appeal of this decision ([1988] B.C.J. No. 807):

That might indicate an error of law. The onus on the employer in a case such as this is to show that the employee has failed to take reasonable steps to avoid the loss. I see no reason to add to that onus.

It is interesting to note that the Court of Appeal's criticism was leveled at the "onus" rather than the treatment of the evidence. It is also interesting to note that the Court of Appeal did not interfere with the ruling of the trial judge. It seems that what we can take from this is that the onus on the defendant does not require the defendant to "prove the job was available, the lengths of its term, its nature and the rate of pay."

As to what proof will be sufficient, we don't really have much more guidance from the Court of Appeal.

In *Carlyle-Smith, supra*, Brenner J. (as he then was) reviewed *Edge v. Kilborn* through both levels of Court and drew the following conclusions:

In my view if an employer can lead evidence of actual alternative job offers with the particularity of detail as set out in *Edge* then that evidence may well constitute a complete mitigation defense and the notice period would terminate effective the start date of such offers.

However if an employer does not lead evidence with such particularity, I do not conclude that the mitigation defense must necessarily fail in its entirety. It is still open to the employer to lead evidence in support of its defense that had the plaintiff taken reasonable steps to mitigate he would have been likely to obtain comparable alternative employment. In such a case the task of the court will be to assess the steps taken by the plaintiff to mitigate and to weigh the likelihood that such steps would have led to comparable alternative employment. In my view the result should then be considered as one of the factors in determining an appropriate notice period.

If an employee has taken reasonable steps, then clearly the mitigation defense should fail. If an employee has not taken reasonable steps, but if the court is satisfied that even if such steps were taken that it is unlikely that such alternative employment would have been achieved, then presumably little or no reduction in the notice period would be appropriate.

But an inadequate mitigation effort coupled with a finding of the likelihood that comparable alternative employment could have been achieved had a reasonable effort been expended, requires the court to make an appropriate reduction to what would otherwise be an appropriate period of notice. Clearly the less the mitigation effort and the stronger the evidence of prospective alternative employment, the more heavily this factor will be weighted in determining the appropriate notice period.

It is interesting to note that the Yukon Court of Appeal in *Evans, supra* did not cite this entire analysis, only the last paragraph. With respect, the writer suggests that Brenner J.'s analysis is not in step with the principles enunciated by the Supreme Court of Canada in *Michaels*. Just prior to the above quoted reasons in *Carlyle-Smith, supra* Brenner J. wrote:

Since the ability to mitigate is solely within the power of the plaintiff it would be a harsh burden to require an employer to prove that there were specific jobs available to the degree of specificity as contended by the plaintiff as a precondition to any mitigation whatsoever.

Compared to the words of the Supreme Court of Canada in *Michaels*:

But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

Despite the fact that the analysis proposed by Brenner J. in *Carlyle-Smith* appears to be a retreat from the principles set out in *Michaels*, it is a judicial approach that increases the impact of judicial discretion and thereby decreases the predictability that encourages settlement.

Under the *Michaels* approach, a defendant will not have a realistic expectation of a reduction in the notice period unless the defendant has some specific evidence of a job “gone begging.” The plaintiff’s job search efforts, no matter how bad, will not have any significant impact unless there is proof of a lost opportunity.

Under the *Carlyle-Smith* approach, each job search will be weighed against some spectrum of evidence of general job opportunities and the trial judge will choose whether and how much to reduce a notice period. If there is some chance that a notice period might be reduced based on this discretionary approach, it makes sense to put each mitigation experience before the Court.

## V. Conclusion

*Michaels* set a predictable and high threshold on what an employer must prove in order to satisfy its onus of proof to succeed with a mitigation defence. That threshold has been inconsistently applied. The most recent decision from the BC Court of Appeal (*Coutts*) is a retreat from the predictable high threshold set out in *Michaels*. The result of this discord is uncertainty. Following *Michaels*, it used to be the case that a plaintiff wouldn’t have to worry too much about having to fight a mitigation battle in court unless there was evidence of a missed or rejected job opportunity. However, due to the inconsistent application of *Michaels*, it seems that a resourceful defendant armed with a stack of newspaper clippings may still have a realistic chance to reduce damages if the trial judge is not satisfied with the plaintiff’s job search efforts.