

Law 503

Employment

Adams

EMPLOYMENT LAW - INTRODUCTION

Employment Law

- Individual contractual relationship - not collective, like labour
- Employment law concerns the beginning, middle, and end of relationship
- Frequently involves human rights issues
- Involves many legal areas - contract, intellectual property, tax, admin, constitutional (ss. 91 & 92 – provincially or federally regulated employees), torts (vicarious liability, duty relationship between employer and employee), fiduciary obligations, labour law, statutory interpretation

The Evolution of Canadian Employment Law

Brito v Canac Kitchens, a Division of Kohler Canada Co, 2011 ONSC

- Over the past 200 years, Canadian employment law has evolved dramatically
- Workers in the 19th Century sometimes faced jail for workplace transgressions. In other instances, legalized corporal punishment was administered if servants displeased their masters.
- The 20th Century witnessed significant changes in the way in which workers were treated. It may now be fairly and generally asserted that today, in the absence of voluntary resignation, or serious misconduct on the part of the employee, Canadian employers must dismiss their employees with proper notice or pay in lieu thereof.

Employment Law Origins & Framework

- From Master and Servant to Employment Standards
 - employment enters the concern of legislators in 14th century because wages were rising, and the power of workers was increasing (due to a shortage of workers as a result of the Black Plague) - thus, legislation is designed to swing power back to masters (employers)
 - Legislation is reformulated in 16th century (Statute of Artificers) to put in place master and servant law until the end of the 18th century – term “articles of agreement” has its origin here
 - This legislation was tilted heavily in favour of employers, but espoused three principle features of master-servant law:
 - Private contract b/w employer and employee
 - Could be enforced by the local magistrate or justice of the peace
 - Violation of the statute would result in punishment
 - 17th century judicial handbooks helped judges decide various cases – in employment, condoned repressive, abusive treatment of workers - this was incorporated into CDN law
 - *Masters and Servants Act* (AB, 1942) - based on the master-servant model - in 1950s, punitive provisions were removed
 - *Factory Act* (AB, 1917) – recognized that employment law might not be only about punishing employees, but also about protecting them
 - These two regimes melded in 1980 with the enactment of *Employment Standards Code* – however, you will occasionally still see cases where master and servant language comes up
 - Purpose of Employment Standards
 - recognizes inherent power-imbalance between employers and employees
 - helps to discourage discrimination
 - regulates the economy
 - levels the playing field among employers (clear standards enforced equally across the board)
 - the level of working poverty in your jurisdiction depends in part upon your legislated minimum wage (however, from an employer perspective, may have to pass these costs off to consumers or hire less workers)

Constitutional Overview

- s. 91

- (2)(a) - unemployment insurance
- (5) - postal service - postal workers fall under federal jurisdiction - an example of a *federal undertaking* (also military, gov't employees, national transportation)
- (10)(c) - the federal gov't can declare an area of general advantage of CAN or for the advantage of two or more provinces under this section - also aeronautics under POGG
- see *CAN Labour Code* – s. 2 defines federal work, undertaking, or business - a little different from provincial legislation, in that it covers both union and non-union work (different provincial legislation for each - *Employment Standards Code* and *Labour Relations Code*)
- s. 92
 - (13) - property and civil rights covers employment - *Parsons* says 92(13) covers contracts and employment is based on a contractual relationship
 - What about Double Aspect Doctrine? - Parl enacts some early labour leg'n, but in *Snider* PC says “no” and confirms *Parsons* – New Deal Cases, 1937 PC says regulation of minimum wages is provincial jurisdiction - however, in *Stevedoring Ref*, the Court says that the feds have jurisdiction over federal undertakings
 - There have been further attempts to bring the feds into employment regulation (e.g., *Ref re Anti-Inflation* – feds successfully argue POGG, national emergency, but power is only temporary)
 - *Northern Telecom* (1980) - provincial power over the regulation of employment is the rule, federal regulation is the exception (primarily for federal undertakings)

Modern Legislation

- Both federal and provincial, depending on the type of worker (provincial or federal)
- Provincial - *Employment Standards Code* and *Labour Relations Code*
- Federal - *Canada Labour Code*, *Employment Equity*, *Human Rights Code*

Interjurisdictional Immunity (castle)

- Core features of federal undertaking must be protected by IJI – includes employment relations
- *Bell #1* (minimum wage) & *Bell #2*
- There are still cases in which the division is not clear (e.g., airports – air traffic controllers, pilots, etc., fall under *Canada Labour Code* – but what about the workers paving the runway? – inside or outside the core features of federal undertaking? – Court said paving is outside the castle, so provincially regulated)
- *Consolidated Fastfrate* (SCC, 2009) - company in AB that is involved in freight-forwarding business - office in Edmonton consolidates the goods - contracts out the shipping - then office on the other end that de-consolidates
 - majority found that the workers in the offices, doing the consolidating and de-consolidating, are provincially regulated à the core of the business, the consolidating and de-consolidating of goods, occurs within the province(s)

One of the first Qs an employment lawyer has to turn their mind to is whether an employee is a provincial or federal worker - may not matter in the end b/c of common law

EMPLOYMENT - THE NATURE OF EMPLOYMENT

The Nature of Employment

Who is an EE?

- Why Does it Matter?
 - If you want to be protected by employment legislation being an EE is the “gateway” to protection under legislation - ie protection under *Employment Standards Code*)
 - Receive minimum wage
 - Collective bargaining
 - Employment insurance (under employment insurance legislation)
 - Common law protections for employment (notice of termination; payment in lieu of)

Employment Standards Code - Definitions - s1

- Employee - an individual employed to do work who receives or is entitled to wages and includes a former employee
- Wages - includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated

Employee vs. Independent Contractor

- The Spectrum - EEs > Dependent Contractors > ICs
 - It does not mean that the IC does not have a contract with the person who hired them, but it is not an employment contract.
- The issue of who is an EE or an IC contractor remains even today:
 - The changing nature of the workforce over the years has complicated the way employment is done - ie working from home, multiple jobs, PT jobs, etc
 - As a result, employment relationships have changed and it has become difficult to fit them within the traditional EE/IC distinction.
- Principle is that you have to ask whether the individual needs protection of the employment relationship
 - Issue arises that there are a large number of independent contractors who have no idea that they are not protected by the employment relationship
 - ERs would want to label them IC because then there is less red tape for the ER if IC is not protected by employment relationship
 - Why would someone want to be an IC? Tax benefits/advantages, not limited to work for one ER

Tests for Determining Employee vs Independent Contractor

- *Sagaz*, 2001 SCC
 - Key Test - Is this a contract OF service (EE) or a contract FOR services (indep cont)
 - “in my opinion there is not one conclusive test to determine if someone is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties.”
 - The test Uses a **comprehensive factual analysis** to determine whether a person is an EE or an independent contractor - generally comes down to **control and economic dependence**
 - Look to intentions of the parties as objectively manifested in their conduct - 4 sub-tests
 - **Control Test** - **most important test
 - does ER control only *what* is done, or also *how* it is done?
 - what is the mode and timing of payment?
 - is there an ability to sub-contract the work?
 - is there an ability for the service recipient to evaluate the performance of the service provider?

- are there indicators of an employment relationship? - ie termination protocols, vacation procedure, employment contract, etc
 - this test will be difficult to follow where the services be provided are highly technical or professional in nature
 - **Ownership of Tools Test** - **least important test
 - If service provider owns own tools, then likely IC
 - **Entrepreneurial Test** - aka Chance of Profit/Risk of Loss Test
 - for ICs, it is expected that they would bear the risk of losses
 - does not mean that being paid by the hour is entrepreneurial
 - **Integration Test** - look at from POV of service provider (not service recipient)
 - how important is a particular client to the service provider's financial well-being? - if very important, looks like EE, if not, looks more like business relationship
 - Evaluate on a continuum - the more important one client is, the more likely it looks like an employment relationship - the less important, the more likely the person is an IC - that said, having one client does not preclude you from being a business person, just one aspect of the test
 - None of these tests are conclusive - court retains discretion - therefore, it is very important to have a written contract outlining the *nature of the relationship b/w parties*
- *Alberta Permit Pro, 2008 ABQB*
 - Onus is on the person asserting they are an EE to prove such
- Dependent Contractors
 - Contractor that works exclusively for one company - cannot go to other companies for same work - therefore, DC depends on the company for work
 - ex - Truck driver who owns own truck but does work exclusively for one company - Taxi driver who owns own cab but works for exclusively one company
 - Courts have said that DCs are more like EEs than ICs b/c they are dependent on a single ER
 - *Pennock, 2008 ABCA*
 - DCs may have to be given common-law reasonable notice just like EEs.
 - However, must look at the contract to determine if there is enough dependence for them to be labeled closer to EEs.

Therrien v True North Properties Ltd, 2007 ABCA

- Facts
 - P sued ER for constructive dismissal. P was formerly a practicing chartered accountant. P left position at accounting firm and sold his part of the partnership and began working for ER under his own professional corporation.
 - Less than 1 year later ER experienced financial difficulties, and ER indicated that P would not be needed in future. P argued he was an EE and this was a constructive dismissal. ER argued P was actually an IC, as he did not have an employment contract with the ER.
- Issue - Was the P an EE or IC?
- Discussion
 - There was a relationship of employment as P was not permitted to work for other clients, had no power to hire/fire EEs, or to delegate his work. P's professional corporation was a vehicle for receiving payment (for tax purposes) and it was the P himself that was employed by the ER, and not the professional corp.
 - **The establishment of an employer-employee relationship is a prerequisite to an action for wrongful dismissal.**
 - ABCA applied *Sagaz* test for EE/IC
 - Comes down to 2 factors: control and economic dependence
 - At all times ER had the control and direction of P in respect of what work was to be done and when it would be done. ER contracted for full time personal services from P and

that is what it got. P was not, and did not consider himself, free to provide professional services to his former firm, clients or other corporations than those within the ER group of companies. Relationship between the parties was one of employment based on application of each test.

- Since P was an EE, the ER had constructively dismissed P based on the ER's statements that P in future would only be part-time and would have to look for other work
 - This begets an obligation on ER to provide reasonable notice, and an obligation on EE to mitigate his damages.
- Held - The P was an employee of the Defendant.
- Note - How could ER have Appealed this decision?
 - P Was paid through his professional corporation, and not directly to him. Therefore he is receiving his pay from the professional corporation and not ER.
 - P wanted the benefits of IC (being paid through professional corporation) and therefore cannot then ask for protection of employment relationship.
 - P held himself out to be an IC.
 - Not exclusively working for ER, as he was doing work for other companies - but extremely small (tying up loose ends with other clients). Counter argument - The fact that he was allowed to work other jobs (even if only 2) does not matter. The fact of the non-exclusivity is what matters.
 - Business card said he was a financial consultant
 - P hired an assistant, despite the court stating he did not have the ability to hire/fire
 - Based on these factors P Therrien had a fair control over his work and he was economically independent. Based on these factors, the true relationship between the parties was not one of control or economic dependence (therefore not an employment relationship and he was an independent contractor).
 - But they lost the appeal
 - Dependence – P left a lucrative employment where he was making \$150,000. Would not leave this for a non-lucrative unstable position.
 - Indefinite duration – talked about employment lasting at least 10 years. This was not a term contract but a contract of indefinite duration.
 - P was given 6 weeks vacation - IC are not given vacation time - ER was in control the entire time of the relationship.

EMPLOYMENT - THE EMPLOYMENT CONTRACT

Overview of Employment Contracts

- Contracts - offer, acceptance, and consideration are all important parts of the employment contract
 - Terms of the contract come from a variety of sources
 - Employment Contracts can have their terms varied once they are put in motion
- *Hobbs* - did solicitor's agreement form part of the employment contract?
 - No, it was a variation to the contract, so it cannot vary the original contract unless there was adequate consideration
 - *Techform* - forbearance from termination for a reasonable period of time can constitute valid consideration
 - That doesn't apply here and that line of cases should be approached with caution as they seem to be more favorable to employer
- *Globex* - application of *Techform* - forbearance from termination can constitute valid consideration in the variance of an employment contract
 - Forbearance is not sufficient on its own, however. It can only be valid consideration where the employee knows of the forbearance and understands that he will be protected from dismissal for a period of time

Forming an Employment Contract

- Need all the basics - offer, acceptance, consideration, meeting of the minds
 - consideration in the employment contract is often future consideration - will provide work if employer will provide pay
- Employment contracts are often viewed differently than most b/c the people individually and their labour are the essence of the bargain - jobs are also a key part of living and feeding your family

Terms of the Employment Contract

- Written - written terms of the bargain are the obvious and central starting point for analysis
 - when the contract is allegedly breached, turn to the terms of the contract to see
- Oral - oral promises can matter as well
 - many employment contracts are oral, and that doesn't make them any less binding
 - present unique challenges, like interpretation and agreement over terms - ie evidence
 - still subject to offer/acceptance/consideration
 - written and oral terms can be co-mingled
- Implied - some terms are included even though the parties may not have turned their minds to them at the time of forming the contract
 - Duties on employee - provide good work, provide reasonable notice when quitting
 - Duties on employer - workplace safety, will provide reasonable notice when firing
- Statutory - some terms are automatically implied into the employment contract by statute
 - Employment Standards Code ss3 & 4
 - ESC s3(1)(b) - states that all of the entitlements in the act are the bare minimum, and the employment contract can go above these minimums, but not below them
 - ESC s4 - cannot contract out of minimum standards under the code
- Conduct of the Parties

Varying the Terms of an Employment Contract

Hobbs v TDI Canada Ltd, 2004 ONCA

- Facts
 - EE is hired as a salesperson w/ ER. EE agreed verbally to commission rates and signed a written agreement stating that commission rates would be included in later agreement.

- Two weeks later EE was provided w/ a written solicitor's agreement containing the agreed upon commission rates but also a number of onerous conditions:
 - commission rates were subject to change at TDI's sole discretion
 - commissions were payable only on amounts actually paid during EE's employment and only after he had surpassed his annual draw
 - no commissions were payable on any amounts received after termination.
- Five months into employment, ER told EE that commission will only be paid once all billings have been collected. EE quit and took job w/ new company.
- EE sued for outstanding commission.
- Claim was dismissed at trial on the basis that EE had accepted, and was therefore bound by the terms of the second agreement signed shortly after he commenced active employment.
- Issue
 - Are the terms of the 2nd agreement enforceable? Are the terms regarding billing enforceable?
- Discussion
 - ONCA found that the trial judge erred in concluding that the letter agreement and the Solicitor's Agreement together constituted one contract of employment and that its provisions limited Hobbs's entitlement to commissions. For that, he cited three reasons:
 - ER did not present the first written contract as part of a more extensive contract - it was clearly an offer of employment that set out the terms of employment, except that commission rates which had already been orally agreed upon - Hobbs signed the agreement on that basis
 - The solicitor's agreement conflicted w/ the terms agreed to at the outset of the employment - it was inconsistent with the commission arrangement that the parties had already agreed upon.
 - There was no new consideration flowing to employee for the solicitor's agreement
 - Some additional benefit must flow to the EE - the new promise received by the employer must pass to the EE more than that to which the EE is entitled under the original contract
 - "...the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms... The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is **inequality of bargaining power between employees and employers**. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to [give effect to modifying agreements] only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment."
 - *Techform Products* states that forbearance from terminating an employee for a specified reasonable period can be valid consideration, but that did not happen in this case.
 - ONCA concluded that the Solicitor's Agreement was **an amendment** of the employment contract put forward by ER.
 - The ONCA also stated that ERs who wish new EEs to sign a standard agreement can incorporate the terms of a standard employment agreement into the original contract of employment by explicitly stating in their offer of employment that the offer is conditional upon the prospective EE's agreeing to accept the terms of the ER's standard form of agreement, a copy of which could be enclosed with the offering letter.
- Held - Ruling for EE - amendment not enforceable

Globex v Foreign Exchange Corp v Kelcher, 2005 ABCA

- Key Takeaway
 - An implied promise to forbear from dismissal for a reasonable period can constitute consideration - follows *Techform*
- Facts
 - Three EEs were employed by Globex. In 2003, each EE signed a noncompetition and nonsolicitation agreement containing restrictive covenants.
 - In early March 2005, the EEs were presented with a new agreement containing more onerous noncompetition and nonsolicitation restrictive covenants. Refusing to sign the new form of agreement, two EEs resigned and one was terminated.
 - The EEs joined a competing company in early April 2005, and Globex sued, alleging damages from loss of clients.
- Issue
 - Are the EEs bound by the terms of the new agreement?
- Discussion
 - For a variation to the employment contract to be enforceable, there must be consideration to support the addition or amendment. Examples of such consideration include:
 - a) an ER providing an EE with some form of benefit; or;
 - b) an ER informing an EE that the ER will exercise its right to lawfully terminate the employment relationship by providing reasonable notice or pay in lieu thereof unless the EE agrees to adopt the restrictive covenant.

Wronko v Western Inventory Service Ltd, 2008 ONCA

- Key Takeaway
 - An ER cannot make substantial and unilateral changes to the terms of the employment contract if it gives the EE reasonable notice of such changes. A fundamental change that is accompanied by reasonable notice is still constructive dismissal.
- Facts
 - EE's original employment contract with ER contained a termination provision which provided for the payment of two years salary upon termination. In 2002, ER demanded that EE sign a new employment contract which would reduce his entitlement upon termination to a maximum of 30 weeks salary.
 - EE refused to sign the employment contract and was insistent that his original employment contract remained in force. In response, ER informed EE that it was giving him 104 weeks (or 2 years) notice of the amendment to the termination provision. In essence, ER said that after the expiry of the notice period, the amended termination provision would become a term of the employment contract without EE's consent. EE continued to work but did not agree to the amended termination provision. Essentially the argument was, that if we can terminate you with 2 years notice, surely we can alter your contract with 2 years notice.
 - In 2004, four days after the expiry of the two-year notice period, ER sent EE an employment contract which contained the amended termination provision. ER informed EE that if he did not accept the new terms and conditions of employment (including the amended termination provision), ER would no longer have a job for him. EE refused to accept the new employment contract. The day after ER's ultimatum, EE explained that he understood his employment to be terminated and did not report for work.
 - EE pursued a wrongful dismissal claim against ER.
 - TJ found that ER was entitled to unilaterally amend EE's employment contract upon reasonable notice and that EE ended the employment relationship when he refused to report to work. Accordingly, TJ dismissed most of EE's claims.
- Discussion

- ONCA found that an ER is not legally entitled to give an EE an ultimatum to accept new contractual terms or quit. An EE has three options when presented with an ER's offer to amend the terms of his employment contract and each option has a specific effect on the contract:
 - Acceptance - expressly or implicitly (acquiescence) accept the amended terms; in this case, the amended terms apply - consideration must still be present to make the variation binding
 - Constructive Dismissal - refuse to accept the amended terms, and if the employer insists that the amended terms apply, sue the employer for constructive dismissal; in this case, the terms of the original employment contract apply; or
 - Rejection - refuse to accept the amended terms and continue working; if the employer allows the employee to continue working, the terms of the original employment contract apply - employer must then determine what they will do
- ONCA was clear that **an ER cannot unilaterally change the terms of an EE's contract**. If the EE accepts the amended terms, then the amended employment contract is effective without any further effort on the ER's behalf - ER has two options:
 - allow EE to continue working under original terms - terms of original contract still apply
 - terminate EE with proper notice and offer the EE re-employment on the amended terms
- Reversing the lower court's decision, the ONCA found that EE original employment contract remained in force. ONCA also found that ER's ultimatum that if EE did not accept the change to his employment contract, ER no longer had a job for him, amounted to a termination of the employment relationship. Accordingly, EE was entitled to the two years salary continuance provided for under the original employment contract.
- ONCA's decision is significant to any employer who wishes to amend the terms of employment including, for example, amendments to employee benefit and compensation arrangements.
- Held - ruling for EE

EMPLOYMENT - TERMINATION

The Right to Terminate

- ER has the right to terminate EEs
- EE has the right to reasonable notice if they are terminated
- *Dunsmere* - SCC - ER's right to terminate with reasonable notice is the flip-side of an EE's right to quit with reasonable notice
 - Liberty Interest - common law has developed in this way because the right to quit prevents slavery - quitting is an important right - likewise, ERs also need the right to be able to terminate people
- The only major asterisk to the right to terminate is human rights
 - s52 of *Employment Standards Code* - cannot terminate discriminatorily
 - s7 of *Alberta Human Rights Act* - no ER shall refuse to employ or refuse to continue to employ any person...b/c of race, religion, age, marital status, family status, gender, sexual orientation, disability, etc

Reasonable Notice

- Sources of Reasonable Notice
 - Contract - can be built into the contract of employment - cannot be lower than statutory mins
 - Statutes - set the minimum reasonable notice requirements
 - *Employment Standards Code* ss54-61
 - s56 - sets the minimum reasonable notice scale
 - Note the hard cap at 10yrs service - this raises issues for long-standing EEs
 - Common Law - sets standards above the Statutory Minimums
 - ESCs3 - NOTHING in the Act abrogates common law/civil remedies
 - If contract is silent re reasonable notice, EE falls w/i CL realm and can seek CL remedy
 - CL periods of reasonable notice are generally much longer than the statutory mins
- Two Types of Reasonable Notice:
 - Working Notice - EE is given notice of termination and works until the date of termination
 - Pay in Lieu - EE is paid for the period of their reasonable notice and dismissed immediately
 - Pay in Lieu must consider all of the relevant sources of compensation - salary, benefits, pension, allowances, commission, RRSP matching

The Common Law "Art" of Reasonable Notice

Bardal v The Globe & Mail Ltd, 1960 ONCA

- Key Takeaway
 - Reasonable notice periods are decided with reference to each particular case, having regard to character of the employment, length of EE's service to the company, EE age, and availability of alternative employment given EE's training, qualifications, and training.
- Facts - ER terminated older management EE w/o reasonable notice.
- Issue - what constitutes reasonable notice in this circumstance?
- Discussion
 - In an employment relationship, the contractual obligation of the ER is to give reasonable notice and to continue the EE in his employment. If the EE is dismissed without reasonable notice, he is entitled to the damages that flow from the failure to observe this contractual obligation, which damages the EE is bound to mitigate to the best of his ability.
 - **There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to:**

- There is no exact number for reasonable notice period - rather, there is a range of reasonableness, and that is the expectation of judges on appellate review
- Rule of Thumb - one month per year of service - TJ used the rule of thumb in this case - ONCA says that the Rule of Thumb approach suffers from two deficiencies:
 - Overemphasis on the "length of service" factor, at the expense of the others; and it risks undermining the flexibility that is the virtue of the Bardal test.
 - Rigidity - the rule of thumb approach seeks to achieve this flexibility by using the other factors to increase or decrease the period of reasonable notice from the starting point measured by length of service. But to be meaningful at all, this approach must still give unnecessary prominence to length of service.
- Despite the CoA's finding that the trial judge erred in the method of calculating the period of reasonable notice, they held that they should not interfere with the award of 12 months as such a notice period was part of the reasonable range of expected outcomes, albeit on the high end of the range. The CoA held that the notice period was justified by the following considerations:
 - the EE was 43 years old when he was fired;
 - he had little formal education and limited skills; and,
 - although he was experienced in the construction industry, because of a recession, few jobs were available in that industry at the time of his dismissal.
- Held - ruling for P - appeal dismissed with costs - 13 months reasonable notice

Just Cause for Termination

- Just Cause - ie Summary Dismissal - what can ER do when they terminate an EE w/ just cause?
 - No reasonable notice - if terminated with cause, there is no reasonable notice requirement
 - No EI Available to EE - s55(2)(a)
- Determination of whether the reason for termination was 'Just Cause' then becomes the issue for dispute - if there was no just cause, then we return to the issue of reasonable notice and analyze the *Bardal* factors
- Why is compensation not required for Just Cause termination?
 - Repudiation - In contract theory, the EE's action is essentially a repudiation of the employment agreement

Radwan v Arteif Furniture Manufacturing, 2002 ABQB

- Key Takeaway
 - Character of employment will not cap the reasonable notice period
 - Where a business is purchased as a "going concern," it is an implied term of employment that EEs will be credited for their service with the predecessor ER for the purposes of salary, bonuses, and notice of termination
 - Such an implied term could be negated by an express term to the contrary - but where the new ER has no included such a term, the ER is deemed to contract w/ the EEs to give them credit for past service
- Facts
 - EE had been working at company since 1975. Over the years, it had changed many owners. Latest owner purchased company in 1995. In 2000, EE was fired and given ESC minimum notice for 5 years.
 - EE commenced a wrongful dismissal action, arguing that his employment should be deemed to be continuous for the entire 25 years, since Arteif had taken over the business without any major interruption in work or change in operations.
 - ER countered that the 1995 purchase had severed EE's employment and that, as a result, his previous employment should not be considered in calculating the notice period. ER further asserted that its purchase of the business was not a purchase of a "going

concern,” since it did not assume the previous owner’s liabilities and obligations and had not agreed to retain EEs (purchased in bankruptcy).

- Issues
 - Whether the business was sold as a “going concern”? What is the applicable notice period? Whether Radwan had adequately mitigated his damages.
- Discussion
 - *Employment Standards Code* - s5 - Employment Deemed Continuous - For the purposes of this Act, the employment of an EE is deemed to be continuous and uninterrupted when a business, undertaking or other activity or part of it is sold, leased, transferred or merged or if it continues to operate under a receiver or receiver-manager
 - This doesn’t really help, because if we’re imposing statute, the statutory minimum is just 8 weeks (s56) - Radwan likely deserves more - thus, turn to common law to find a better remedy
 - ABQB fixed 20 months as a reasonable notice period, stating that **credit for past service may be given if a new ER buys a business as a going concern**. In this case, the Court was satisfied that Arteif had purchased a going concern because there was continuity of the business, the trustee operated the business from the date of the bankruptcy until the day before the date of the sale, and Arteif began operating the business from the day of the purchase. It was therefore up to the new ER to expressly inform EEs that they would not be credited for past service and to give them the opportunity to take or leave their jobs on that basis. In such cases, there is an implied term in the contract of employment between the purchaser and the EEs it retains that the EEs will be given credit for past service with the vendor for the purposes of salaries, bonuses, and notice of termination.
 - Here, since Arteif had not addressed the matter of notice or continuation of employment with the EEs it kept on, it could not contest the implied agreement to credit EEs for their previous service.
 - **ABQB observed that the purpose of the Employment Standards Code is to protect EEs’ interests, and it should therefore be interpreted broadly.**
 - s5 - employment deemed continuous - the employment of an EE is deemed to be continuous and uninterrupted when a business, undertaking, or other activity or parts of it is sold, transferred or merged or if it continues to operate under a receiver
 - Accordingly, the Court deemed Radwan’s employment continuous for the purposes of the Code. At a minimum, he ruled, Radwan was entitled to termination pay appropriate to a person employed for 25 years.
 - Given Radwan’s age, lengthy service, minimal formal education, limited English, narrow skills set, and physical disabilities, the court set 20 months as a reasonable notice period.
- Held - Ruling for P - 20 month period enforced

Summary of Reasonable Notice

- Simply put, there is no magic to determining the period of notice and there is no secret formula that lawyers simply apply in giving their clients advice. You read hundreds of cases, you look at the *Bardal* factors, and others that come into favour having regard to the circumstances, and you give the client a range of what you believe would likely result if the ER were sued and the judge had to determine the period of reasonable notice.
- To the frustration of many clients, there is no science to this. Largely, it is an assessment of a range based on experience. So when you call your lawyer, you should probably have the following things available among others:
 - Does the EE have an employment agreement or letter of offer?
 - What is the EE's position?
 - What is the EE's age?

- How long has the EE been employed?
- What is the total compensation (salary, bonus, car, stock options etc.)?
- If there are documents relating to compensation matters, they should be available.
- What are the circumstances surrounding the hiring (particularly of a short service EE)?
- What are the circumstances surrounding the termination?

Just Cause Dismissal

- Why it matters - consequences
- Contextualism and Proportionality - *McKinley*
- Cumulative Misconduct - *Dowling*
- Code of Conduct - *Poloquin*
- Supervisors Beware - *Poloquin*
- Poor Performance

McKinley v. British Columbia Tel, 2001 SCC

- Key Takeaway
 - No Bright Line for Just Cause Dismissal - a single act of dishonesty by an EE may not necessarily constitute cause for dismissal.
 - Test is whether EE conduct lead to a breakdown in the employment relationship - just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the EE's obligations to his or her ER.
 - Two-Fold Analysis:
 - Was there dishonesty? ER must prove on BoP
 - Was the dishonesty sufficient to lead to a breakdown in the employment r'ship?
 - Note the *contextual* approach and the consideration of **proportionality of the dismissal** - must consider all of the surrounding circumstances - was the EE good up to point of incident in question, length of service, position, etc - ie *can terminate with just cause where that is the proportionate response in the context of the situation*
 - You can terminate for 'after-acquired cause' so long as that cause relates to the employment - cause must have come before termination, not b/w termination and lawsuit
- Facts
 - EE left work because of high blood pressure. He came back for a short period, and entered into negotiations to come back in a lesser position. ER decided to terminate him and offered him severance. EE refused offer and sued.
 - ER found out at trial during the discovery process that EE was dishonest about treatment options for his medical condition and could have used "beta blockers" and alleges that his dishonesty amounts to just cause.
 - TJ instructed the jury that in order for just cause to exist, the impugned conduct must "undermine or seriously impair the trust and confidence the ER is entitled to place in the EE in the circumstances of their particular relationship" - to justify summary dismissal, the jury would have to be satisfied that the EE was not only deceitful, "but that the dishonesty was of a degree that was incompatible with the employment relationship." The jury found in favour of the plaintiff, and awarded \$108,793 in general damages, \$1,233 in special damages, \$100,000 in aggravated damages, and \$6,091 in pension contributions, plus pre-judgement interest and costs.
 - BCCA allowed the appeal and ordered a new trial, concluding that the TJ committed a reversible error by inviting the jury to consider the extent of the dishonesty alleged, and to determine whether it was of such a degree that it was incompatible with the employment relationship. According to the Court, dishonesty within the employment contract is *always*

cause, and such cause is not dependent upon the 'degree' of the dishonesty. (hardline approach)

- Issue
 - Can the ER terminate for cause that they learned of after the dismissal?
- Discussion
 - **Case law says that you can terminate for 'after-acquired cause' so long as that cause relates to the employment** - cause must have come before termination, not b/w termination and lawsuit
 - SCC explicitly rejected the 'absolute, unqualified rule' that an ER is entitled to dismiss an EE for a single act of dishonesty, however minor. Such an approach would result in the consequences of dishonesty remaining the same, irrespective of the severity of the dishonesty, and this could foster results that are both unreasonable and unjust.
 - In addition, the SCC recognized that termination on a ground 'as morally disreputable as dishonesty' may have overly harsh and far-reaching implications for EEs, and for this reason an analysis of the circumstances surrounding the alleged dishonesty is necessary **-even where such serious misconduct is alleged, an examination of the circumstances and nature of the conduct is still necessary in order to determine whether the dishonesty was sufficiently fraudulent to justify summary dismissal.**
 - "... The test is whether the EE's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the EE's obligations to his or her ER."
 - **SCC outlined endorsed a two-fold analysis:**
 - First, the ER must first prove on BoP that the conduct of the EE was deceitful.
 - Second, the ER must demonstrate that the nature and degree of the dishonesty warranted dismissal.
 - The analysis must focus on context and proportionality - look at all the surrounding circumstances, including length of service, amount of trust vested in EE, type of job, prior work record, etc - consider from both the PoV of the ER and EE
 - SCC emphasized that an ER must still demonstrate that summary dismissal is appropriate even where dishonesty can be established. The Court also suggested that an ER may be entitled to impose 'lesser sanctions for less serious types of misconduct', in certain circumstances. This comment may indicate greater judicial acceptance of disciplinary sanctions short of termination, such as unpaid suspensions, in the non-union workplace.
- Held - SCC set aside the Judgement of the Court of Appeal and restored the TJ's decision - ruling for P

Dowling v Ontario (Workplace Safety and Insurance Board), 2004 ONCA

- Key Takeaway
 - Where the conduct of an EE is sufficiently egregious, dismissal for cause will be justified even if the EE is a long service EE.
 - Cumulative Misconduct - Need to clearly identify how the EE's conduct contributed to a breakdown in the employment relationship sufficient to vitiate the employment contract - conduct must be "incompatible with the fundamental terms of the employment relationship"
 - Conduct - examine the nature and extent of the conduct - cumulative or singular
 - Context - consider all the surrounding circumstances - type of job, length of employment, responsibility, supervision, control of finances
 - EE - age, employment history, seniority, role and responsibilities

- ER - business or activity in which the ER is engaged, any relevant ER policies or practices, the EE's position within the organization, and degree of trust reposed on EE
 - Proportionality - is termination a proportionate response - would something short of termination have been more appropriate?
- Facts
 - The P was a "dedicated" manager for the WSIB for approximately 25 years. He supervised ten EEs and had significant discretionary power over substantial sums of public monies.
 - The WSIB terminated his employment without notice for allegedly using his position to obtain a direct monetary benefit.
 - Just a few days prior to his dismissal, the Plaintiff received the WSIB's thanks for service "above and beyond". He was approximately 50 years old at the time of dismissal and was within a few months of being able to "bridge" to early retirement.
 - TJ found that the P had been wrongfully dismissed and awarded him 24 months pay in lieu of notice, using the contextual and proportional approach espoused in *Mckinley* - Considered the length of his service, his prior work history, etc
- Discussion
 - The CoA overturned the TJ's decision and found that the P had engaged in numerous incidences of misconduct over the course of his career.
 - The CoA stated that the TJ erred by failing to **consider the cumulative effect of the EE's improper conduct**. Thus, the contextualism of all of the surrounding circumstances did not all work in P's favour. He was in a position of trust, handled money, had authority, etc.
 - Thus, the Court found that the **P's actions gave rise to a breakdown of the employment relationship**. The Court found that summary dismissal was justified considering the P's position, the various acts of misconduct and the public nature of the WSIB's responsibilities.
 - **Three steps to determine whether there has been a violation of a fundamental term of the employment contract and a breakdown in the employment relationship:**
 - Determine nature and extent of misconduct - cumulative or singular?
 - Consider all of the surrounding circumstances - from PoV of EE and ER - length of service, position of trust, nature of position, etc
 - Is termination the proportionate response? - should the response fall short of termination?
- Held - appeal allowed - ruling for D - there was just cause for the dismissal

Poliquin v. Devon Canada, 2009 ABCA

- Key Takeaway
 - Breaches of ER code of conduct should not be taken lightly. ERs can set a high standard for ethical and professional behaviour in the workplace. Therefore, if an EE's misconduct is egregious and breaches the ER's policies, courts will find that the ER is justified in dismissing that EE for just cause. Well-drafted policies are therefore essential to assist in upholding discipline imposed by ERs.
 - Supervisors are held to a higher standard than other EEs - they serve as an example to other EEs - this is a factor that should be considered in determining whether there is just cause for termination.
- Facts
 - The EE worked as a senior production foreman and was responsible for supervising 20-25 EEs and was terminated for just cause for
 - (i) accepting free landscaping services at his personal residence from the ER's suppliers in violation of the ER's code of conduct; and
 - (ii) using the ER's computer equipment and Internet access to view and transmit pornographic and racist material in violation of the code of conduct. The EE had one

prior warning for accessing pornographic material. The EE nevertheless sued for wrongful dismissal.

- The TJ found that the EE did commit the alleged breaches of the code of conduct, but dismissal was not proportional to the misconduct. The Judge based this decision on the fact that one of the suppliers who provided free services to the EE was a friend of the EE; that only two of the pornographic emails actually originated from the EE; and there was only one occurrence of forwarding a racist email.
- Issue
 - Were the P's actions just cause for termination?
- Discussion
 - The CoA reversed the TJ's decision.
 - With respect to the solicitation of services from the ER's suppliers, the CoA held that the misconduct had to be considered in light of the degree of responsibility attached to the EE's position.
 - He was a senior supervisor and his duties included issuing contracts for the ER and signing all invoices related to his areas of responsibility including those from the suppliers
 - Further, the Court considered the ER's Code of Conduct. The EE's conduct was a clear violation of the Code of Conduct, which constituted a violation of an essential term in his employment contract and was inconsistent with his obligations to the ER
 - Taking this together, the CoA held that this misconduct was sufficient enough in and of itself to justify dismissal for cause.
 - With respect to the use of the computer to exchange pornographic and racist material, the Court found that the EE's conduct was egregious and offensive to his obligation of honesty and good faith. As such, this misconduct warranted dismissal.
 - P argued that the majority of the info was merely received by him - something he could not help. CoA cited the 2 emails that he did send, and the fact that he was a supervisor and did nothing to prevent the emails from being sent to him - the fact that his email address was in the "to" field painted the ER in a negative light, especially because he was a supervisor
 - Essentially, the Court applied the *Mckinley* principles of looking at the situation in context
 - Many emails, supervisory capacity, previously warned, breach of harassment policy, no expectation of privacy on ER's computer, etc
 - The CoA also made the following comment on the importance of the ER's code of conduct in governing the workplace. The Court stated:
 - "It is important to situate a document like the Code of Conduct in the larger workplace context. ERs have the right to set the ethical, professional and operational standards for their workplaces. Doing so not only falls within an ER's management rights, it also constitutes an integral component of corporate good governance."
- Held - appeal allowed - ruling for D ER

Milsom v. Corporate Computers Inc, 2003 ABQB - poor performance as just cause

- Key Takeaway
 - Poor Performance is not generally sufficient justification for just cause termination. Especially so where there are no clear and explicit warnings given by the ER or opportunity to improve performance. Even where there are warnings, with a pure performance issue, there is unlikely to be just cause.
 - ER's remedy for poor work performance is not dismissal, but the right to insist the EE take reasonable steps to improve work performance. Poor performance that has not been given the opportunity of being remedied is not cause for dismissal.
- Facts

- EE worked for ER for 6 years, and was not a very good EE. ER dismissed him b/c of poor performance and too many personal emails. ER lied about why they fired him, told him it was b/c corporate reorganization. EE had referred to his boss as a “fat bastard” in his company email. Was subsequently terminated for cause.
- Discussion
 - ABQB held that because there was no e-mail policy in the workplace, an EE had no reasonable expectation of privacy in his work e-mail and the ER was entitled to introduce it as evidence of poor performance - even where an e-mail policy outlines some EE privacy rights, there may be no reasonable expectation of privacy when the contents of e-mails are unprofessional, offensive or where access by the ER is part of an investigation of illegal activity - also, an EE may also have no reasonable expectation of privacy, regardless of a policy, if the e-mail is sent and received using corporate assets
 - see para 61 - **Progressive Discipline Model**
 - EE must be given an opportunity to improve their performance/conduct - EE may not realize their behaviour is a problem, and otherwise they will be punished for something they did not know was improper/wrong
 - EE must be given identifiable and reasonable expectations
 - Need clear and Explicit Warnings and Discipline - necessitated by the vulnerability of the EE and unequal bargaining position of the EE - also, no EI for just cause termination
 - Thus, poor performance without opportunity for improvement is not just cause - even if clear and reasonable opportunity is given, it will still be difficult to use performance as just cause - would need to be many clear warnings and obvious violation of those warnings
 - Note - **very difficult to terminate with just cause for poor performance**
- Held - ruling for P - no just cause - wrongful dismissal

Henson v Champion Feed Services Ltd, 2005 ABQB - performance issues

- Key Takeaway
 - In order to show just cause, there must either be:
 - Egregious misconduct - ie theft or fraud
 - Series of *progressive discipline* and a reasonable expectation on the part of the EE of dismissal for commission of the activity, whether through policy, standards, or past organizational behaviour
- Facts
 - Henson was employed for 7 years, and was working most recently as a shift foreman. He had had several promotions in the past. There were, however, some documented performance issues for Henson, including five verbal warnings and one written warning for safety violations and also related counselling sessions.
 - In the context of public concerns relating to mad cow disease, Mr. Henson was found to have mixed an unmarked bag of feed with other bags in a livestock feed order. The attempt to cover up his error was found to be the most serious aspect of his misconduct. Accordingly, he was dismissed by the ER for cause.
 - TJ held that the ER’s decision to terminate the employment contract was justified.
- Issue
 - Was there just cause to terminate Henson?
- Discussion
 - ABQB held that the ER did not have just cause in dismissing the Plaintiff. Summary dismissal was held to be *disproportionate to the EE’s actions*.
 - The EE was employed for seven years and had received five previous verbal warnings and one written warning. The ER, however, did not engage in a history of progressive discipline.

- EE's actions were not tied to his performance of his job, and thus is not tied to his employment
 - This was the first documented discipline issue - ie no history of progressive discipline
 - The EE's action was dismissed - court found that the ER was justified in doing so for several reasons:
 - EE's conduct demonstrated lack of integrity, deficient judgment, dishonesty, untrustworthiness and a careless disregard for client and corporate confidentiality;
 - EE lied to the ER at a time when he was sober and knew what he was saying;
 - this was part of a pattern of similar conduct and the ER was justified in requiring a strict code of conduct by those who are leaders in the company.
 - Per *McKinley*, **a single event can justify termination if the nature of it is proportionate to the dismissal** - hookers at work would be such an incident
 - A balance must be struck between severity of the EE's misconduct and sanction imposed on him by the ER. Thus, an ER is justified in such a dismissal where any lesser response would undermine confidence of EEs and clients in competence of management - courts should consider:
 - Nature of EE's duties, ER's expectations, and employment relationship
 - Nature and seriousness of Plaintiff's conduct
 - Impact of that conduct upon business and reputation of ER
 - Why was alcoholism not an issue?
 - EE had never gone to ER with issue, had never sought help before or after the incident, this was the first time the alcoholism issue had ever come up - this is how it can be distinguished from *Whitford*
- Held - Action dismissed - termination without notice was justified - ie there was just cause

Whitford v Agrium Inc - 2006 ABQB - Duty to Accommodate and Non-Culpable behaviour

- Key Takeaway
 - Alcoholism is a disability - ER has a duty to accommodate to the point of undue hardship - this is because of s7 of the *Human Rights Act* - alcoholism is a mental disability
 - Even non-culpable EE behaviour can be just cause, but the behaviour must be documented, notices and opportunity to repair must be given, and progressive discipline must be implemented
- Facts
 - The EE had worked for the ER for 22.5 years, all but 21.5 of which as a union member. In the last year, he became a supervisor. His ER recognized that he had developed an addiction to alcohol along with pre-existing depression. Due to these conditions he missed a lot of time from work over a period of some six months. His last week of absence was allegedly without leave of the ER, and he was dismissed for cause.
- Discussion
 - ER relied on the EE's alcoholism and absenteeism as just cause for termination, and noted a two-part test:
 - whether the EE's ability to fulfil his workplace duty was impaired by his alcohol problem, and
 - whether any improvement in this respect was likely in the foreseeable future.
 - ER argued that that test obviated the need for progressive discipline or warning.
 - They had tried to help him for the past six months, but the EE had only been present for 8 days in that period. They had attempted to accommodate, but at some point they reach the point of undue hardship, and they no longer required to accommodate. This point had been reached because it does not seem like he will be able to return to work - he did not have a back-to-work plan, he did not show up when he was expected to, there had been no apparent progress

- EE he had been given a written warning that if there was continued absenteeism, then he would be terminated. Thus, EE had been put on notice that if things didn't improve, he would be terminated
 - ABQB accepted the relevance of the two-part test but rejected the submission as to there being no need for warnings when termination is for alcoholism-related absenteeism, noting that the need to provide warnings and/or progressive discipline, except in the most egregious circumstances, has been recognized for both culpable and non-culpable misconduct at common law. The court also stressed that the common law holds that ER cannot use cumulative events to prove just cause without having employed clear and effective warnings.
 - Summary dismissal for incompetence is justified by significant breach of contract on the part of an EE. **Where ER alleges cumulative cause for such dismissal, it must prove:**
 - The EE was given express and clear warnings about his performance.
 - The EE was given a reasonable opportunity to improve his performance after the warning was issued.
 - Notwithstanding the foregoing, the EE failed to improve his performance.
 - The cumulative failings would prejudice the proper conduct of the ER's business
 - The ABQB ruled that EE's dismissal was wrongful and awarded him damages. They were of the view that many of his absences were not accompanied by warnings and he was granted approval for prior periods of absence.
 - The case itself is not ground-breaking, however, it does demonstrate the trend in employment litigation which favours compassion and responsibility towards people suffering with depression and substance abuse problems.
- Held - ruling for EE - no just cause shown for termination

Hodgins v St John Council for Alberta, 2007 ABQB - sexual harassment as just cause

- Key Takeaway
 - In determining whether or not harassment irreconcilably undermined the employment relationship so far as to warrant dismissal, the behaviour must be properly contextualized in order to assess its cumulative effect, and the discipline penalty must be proportionate in the circumstances
 - The perspective for evaluating harassment is a reasonable person in the position of the complainant.
- Facts
 - Bardal factors: senior EE, branch manager, \$60k salary, 50 years old, service of at least 7+ years
 - EE was a senior EE and was accused of touching the complainant's shoulder, hair and putting his arm around her. She said he lauded the virtues of her "ass" and asked her to ditch her husband. ER had just implemented a new harassment policy, which was part of the Code of Conduct, and they alleged that his harassment violated that Code.
 - EE was fired for cause, and he sued for wrongful dismissal.
- Issues
 - Did the P's behaviour justify dismissal with cause?
- Discussion
 - Court examined the definition of harassment in the Code of Conduct closely. They applied the context of the situation to that definition, and determined that the P's actions were clear instances of sexual harassment. One of the biggest things was that he was a supervisor and saying it to an EE beneath him.
 - Court found he had sexually harassed the complainant, but not so seriously as to justify dismissal, and ordered the ER to pay him \$100,000, a full year's salary plus bonus.
 - See para 47 - **"sexual harassment is a serious employment offence, but it does lead necessarily to just cause termination"** - *McKinley* says that, like dishonesty, sexual

harassment must be viewed in the context of the situation and the discipline must be proportionate to the conduct. Thus, harassment *could* be grounds for just cause dismissal in the proper context, but this is not that proper context. The proper procedure is some sort of progressive discipline.

- As in *McKinley*, ER must establish on BOP that the nature and seriousness of the sexual harassment is not reconcilable w/ continuing the employment relationship
- The perspective for evaluating harassment is a reasonable person in the position of the complainant.
- Held - ruling for P EE

TERMINATION - CONSTRUCTIVE DISMISSAL

- What is it?
 - *Farber v Royal Trust* - **where an ER unilaterally makes a fundamental or substantial change to an EE's contract of employment – a change that violates the contract's terms – the ER is committing a fundamental breach of the contract that results in its termination and entitles the EE to consider himself or herself constructively dismissed.**
 - Important Choice - EE has choice to either accept the fundamental change and be bound by it, or to view the change as constructive dismissal and proceed accordingly
 - EXAM QUESTION - Obviously, the EE is inherently vulnerable in these situations, and as the case law shows, the courts are willing to give an EE some leeway in this context
- Definition - *Constructive Dismissal arises from fundamental Unilateral changes to the employment contract* - changes can be in terms of, Duties, Compensation, or some combination of both.
- Fixed Term Contracts

Wilkinson v T Eaton Co, 1992 ABQB - key case in Constructive Dismissal

- Key Takeaway
 - Economic circumstances are not sufficient to unilaterally alter the terms of the employment contract - a contract is a contract, and should be honored as such
 - Changes to duties, even if there are no changes to pay or status, can constitute grounds for constructive dismissal
 - Changes of a fundamental nature to an employment contract made unilaterally by an ER without the agreement of or acceptance by the EE represents a rejection by the ER of the contract and constitutes a constructive dismissal. And this is so even if the unilateral decision may have been made for corporate and financial reasons of importance to ER and w/o intention to harm the EE.
- Facts
 - EE worked for the same ER for 43 years. She reached age 65 the year her employment ended. Although hired as a cashier, she worked as a clerk typist for the majority of her employment. In 1990 the EE was required by her ER to work on the sales floor during lunch hours. The EE tried the sales position but was not effective at it.
 - When new corporate directives required that clerk typists do sales work part of the time, the EE reached an agreement with her ER that she would work part time in her old position, with no sales responsibilities. The arrangement was never documented, and upon the EE's return from holidays a new manager directed her to work as a full-time sales person. The EE did not return to work. She sought similar employment elsewhere, but at the time of trial was still unemployed.
 - The EE sued for damages for constructive dismissal.
- Issue
 - Does the ER's conduct amount to constructive dismissal?
- Discussion

- ER argued that the changes were necessitated by economic conditions, and all of the clerks were required to work the new role, so it was not prejudicial or discriminatory to EE. Also, they argued that the employment contract itself permitted 'general duties', which was a very vague and inclusive term. Thus, the change in duties was not a fundamental change in the contract, it was actually following the contract, and thus cannot permit constructive dismissal.
- ABQB did not buy any of the ER's arguments.
 - Even if changes are made for reasons of economic circumstances, that cannot dictate the terms of the employment contract. Therefore, **unless express or implied, there is a term providing for option to change the role due to economic circumstances, the contract cannot be unilaterally fundamentally changed.** It could be an implied term if it was a common practice in the industry such that it would be reasonably contemplated by the parties to the contract, but that argument was not advanced by the ER
 - Although the ER's directions to the EE might have been motivated by corporate and financial reasons of importance to the ER, the ER was not relieved of its obligation to fulfil the terms of the employment contract.
- ABQB found that the EE's duties were an implied term of the contract - ie it was an implied term of the EE's employment contract that she would perform office work as a clerk typist. Therefore, directing the EE to work as a sales clerk was a breach going to the root of the contract, since the duties of a clerk typist differed substantially from those of a sales clerk.
 - Therefore, even though there was no loss of status and no loss of pay, because the duties were changed, that fundamentally alters the employment contract.
 - Given the EE's previous, unsuccessful attempts at sales work, she was not obliged to give the new position a fair trial.
- The EE was entitled to 18 mos notice, taking into account her long years of service and good work record.
 - The ER argued that she failed to mitigate her damages because she had another job available - ie simply taking the sales job
 - Court held that she was not required to mitigate her losses by accepting the sales position offered by her ER. Given the EE's age, her job skills, the state of the economy, and her attempts to find other employment, no deduction from the award under the mitigation head was warranted.
- Held - Ruling for EE - judgement for \$37,800

Otto v Hamilton & Olsen surveys Ltd, 1993 ABCA - change in benefits and constructive dismissal

- Key Takeaway
 - ERs contemplating a change should ensure that it is a well-reasoned business decision.
 - A court may consider economic pressures as one factor among many in determining whether a change is a fundamental breach of an employment contract.
 - What is the difference b/w a change in salary that can result in constructive dismissal, and one that is merely a "**periodic adjustment in compensation**"? - Look at the contract, industry standards, size of reduction (as a %, consider cumulative reductions)
- Facts
 - The ER unilaterally cut its EEs' paid vacation time from six weeks to four, and also ceased its five percent contribution to the RRSP plans of its EEs.
 - Two EEs suffered a losses of 6.49% and 8% respectively. They quit and claimed constructive dismissal, and sued for damages.
 - TJ found that the EEs were constructively dismissed,
- Discussion

- EEs argued that the unilateral reduction in benefits was a fundamental change in the employment contract. The expectation of the EEs was such that they would be paid a certain amount, and the ER's changes to the scheme did not align with the EE's expectations.
- ABCA overturned the TJ's decision. They stated again is that **the employment contract is what matters**. The court was convinced by several factors:
 - The benefits removed were not base salary but just collateral benefits. Salaries were maintained. The benefits were a relatively small proportion of the whole compensation scheme.
 - The company had a practice of regularly increasing the benefits package during good economic times - therefore, the removal of benefits was a mere **"periodic adjustment in compensation"**
 - The company did not decrease the compensation package in bad faith, but instead decreased it because of an economic downturn. This seems different from the *Wilkinson* case, and actually strays from the contract to look at external factors. Interesting to note the two different viewpoints, BEWARE.
 - *The way that the court seems to interpret this is that changes to the compensation scheme commensurate with economic conditions is an implied term of the contract. This would fit with Wilkinson.*
 - The ER actually had one of the most generous compensation packages in the industry, even after the cuts.
- Court ruled that EEs were not constructively dismissed - rather, they simply quit.
- Note the tough stakes facing an EE in making a constructive dismissal claim - if you lose, you've quit, and you're not able to receive EI.
- Held - ruling for D ER - no constructive dismissal

Pathak v Jannock Steel Fabricating Co, 1999 ABCA

- Facts
 - ER developed a "custom fab bonus" for a particular EE. The bonus was not given, and the EE claimed constructive dismissal.
- Discussion
 - ER argued *Otto*, and claimed that this was a mere periodic adjustment to compensation
 - ABCA held that the bonus was negotiated separately and discretely and therefore was a separate and discrete obligation.
 - Court stated that the question which must be answered is **whether a reasonable person in the same situation as the EE would have felt that the essential terms of the employment contract were being substantially changed**.
 - If the answer is affirmative then the respondent has committed a fundamental breach and the EE was entitled to consider himself constructively dismissed
 - Here, a reasonable person in the EE's position would have viewed the unilateral termination of the bonus as a substantial change of the employment contract, amounting to constructive dismissal.
 - Standard is a **substantial change to an essential term**
- Held - ruling for EE - there was constructive dismissal.

FIXED TERM CONTRACTS

- Contract with an explicit end date, and requires no reasonable notice at the end of that term.
- Also, no ability to provide reasonable notice within contract - damages theory - have to pay full value of contract, unless EE gets another job so that his damages are mitigated

Alguire v Cash Canada Group, 2005 ABCA - fixed term contracts

- Key Takeaway
 - The test to determine whether a contract is actually a fixed-term contract is the reasonable expectations of the parties based on the facts of the situation
- Facts
 - ER wanted to ensure that its legal exposure to the EE limited, so when it hired EE, it carefully detailed the terms of his engagement. EE was hired for only six months. The contract made clear that, if he were terminated at its expiry, no severance was owed.
 - EE performed well. Another one-year employment contract was entered into. That scenario repeated itself for each of the next two years. In November, 2002, EE's performance faltered and ER terminated his employment on his contract's expiry.
 - EE sued, asserting that the renewals of his one-year contracts meant he was no longer limited to a fixed-term contract, but had become indefinitely employed and, as result, was entitled to severance upon termination. As president, his potential severance, bonus and car allowance, if provided beyond the expiry of his contract, would be substantial.
- Discussion
 - Alguire alleged constructive dismissal after the ER sent him home and essentially relieved him of his duties, thus fundamentally changing the terms of his agreement
 - Difficult to prove damages, because they continued to pay him his base salary
 - EE argued that ER did not give him an opportunity to earn his bonus
 - ABCA found that the EE's employment was over when the contract stated it was over. The court examined the context of EE's employment and found numerous examples of ER treating him as a one-year-term EE. Despite his repeated requests, ER had refused to make EE permanent. At trial, both EE and the ER testified they knew the contract was to end on its expiry date. Nothing beyond EE's lofty expectations supported any extension, let alone the contract converting to an indefinite one.
 - **The test to determine whether a contract is actually a fixed-term contract is the reasonable expectations of the parties based on the facts of the situation** - ie would a reasonable person believe that there was a fixed-term contract?
- Held - ruling for ER - fixed-term contract

GOVERNMENT EMPLOYEES

- The complex web
- Duty of fairness
- Triumph of contract* - *Dunsmuir*
 - still a duty of fairness that applies to pure "at pleasure" appointments
- Practice makes perfect
- Key Takeaways re Government EEs
 - In addition to looking at the employment contract, we must also look at other sources of employment obligations, including orders in Council, Statutes, and Generally Governing Legislation.
 - *Dunsmuir* - all of these sources may have a role to play in evaluating the contractual obligations of the EE, but in almost all cases, the courts will approach a gov't EE the same way it would approach a private sector EE, not imposing duty of fairness or natural justice req't where there is also a contract of employment in place
 - Caveat - pure "at pleasure" appointments will require the add'l duty of fairness because there is no employment contract in place.

Keen v Canada, 2009 FC

- Facts
 - Keen was president of Canadian Nuclear Agency - an isotope shortage occurred - all of it was blamed on Keen, and she was fired.
 - Keen sued for wrongful dismissal - because she was a gov't EE, the claim was different from other wrongful dismissal claims
- Discussion
 - Remedy of reinstatement
 - Duty of Fairness - government is a special kind of ER and thus owes a duty of fairness to its EEs that is not owed by other ERs for a couple reasons:
 - Jobs are created by statute, not just by contract - cannot contract out of statutory duties
 - Crown power must be dispensed according to the principles of natural justice - must be checks on power, and the duty of fairness is one such check - compare to *Roncarelli v Duplessis*
 - Court found that Keen was hired "at pleasure", and thus she could be dismissed - the crown still owed a duty of fairness, but it did comply in this case, and thus the dismissal was good.

Dunsmuir v New Brunswick, 2008 SCC

- Recall Theory of Private Law of Employment
 - Can terminate with cause and give nothing, or terminate without cause with reasonable notice
- Key Takeaway
 - There is no difference b/w *most* gov't employment relationships and private law relationships. There is no added duty of fairness, unless the appointment is made "at pleasure". The key point of reference remains the employment contract.
- Facts
 - Dunsmuir was employed by the Province as an office holder "at pleasure". His probationary period was extended twice and the ER reprimanded him three times during the course of employment. Finally, a formal letter of reprimand was sent to Dunsmuir warning him that failure to improve his performance would result in further disciplinary action up to and including dismissal. The ER concluded that Dunsmuir was not right for the job, and a formal letter of termination was delivered to Dunsmuir's lawyer the next day.
- Discussion
 - The Court held that **where a public EE is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law.** Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.
 - Can't contract out of a statutory duty because contracts are subject to the statutes - however, the contract will still generally lay out the obligations and responsibilities of each of the parties to the employment contract
 - Consider it this way - just like the ESC governs all employment relationships and the contract is still a key reference point, so too are other statutes that create employment relationships still tied to their respective employment contracts.
 - It would be unfair to place an added layer of protection on gov't EEs versus private EEs. The exception would be those appointments made purely "at pleasure", as seen in *Keen*, where those EEs are still subject to the duty of fairness
 - Duty of Fairness - must provide reasons for dismissal and opportunity to respond
 - Examples - judges, etc
- Held - ruling for Gov't - no added duty of fairness

QUITTING & FRUSTRATION

Employment Standards Code

- s58(1) - Except as otherwise provided in ss(2), to terminate employment an EE must give the ER a written termination notice of at least:
 - (a) one week, if EE has been employed by the ER for more than 3 mos but less than 2 yrs, or
 - (b) 2 weeks, if the EE has been employed by the ER for 2 yrs or more

Kieran v Ingram Micro Inc, 2004 ONCA

- Key Takeaway
 - Objective Standard - The standard for determining whether someone quit is the reasonable person in the circumstances - "A resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention"
 - Both an offer to resign and its acceptance by the ER must be clear and unequivocal
 - Resignation can be revoked, but the revocation must be accepted by ER.
- Facts
- In 1996, EE was told a rival might be made president of ER's corp. EE replied that he could not work with the rival. He requested a transfer to an ER company abroad and said he would leave the ER corp otherwise.
- In 1997, the rival was appointed president. EE reconsidered his position. He told ER that he was committed to staying and would give the rival his support. ER wrote a letter to EE, that suggested he had resigned and offered him a position w/ another ER company at significantly, reduced remuneration. EE reiterated he had not resigned. ER sent a letter confirming his resignation.
 - Kieran's *Bardol* factors point to a lengthy notice period - Character of employment, 8 years of service, Not old - only 36 - but this is his first job
 - Kieran didn't actually care about reasonable notice because he had mitigated by getting another job, and was being paid more. Although he had been terminated from that job too, the court required that his severance from that job be used in calculation of mitigation. Instead, his biggest concern was with the stock options he believed he was entitled to
 - At Kieran's trial for his claim of constructive dismissal, the ER was of the view that Kieran's statements amounted to a resignation due to the fact that he expressed his displeasure with having to work with Schofield. The ER said that it acted to its detriment in attempting to find new employment for Kieran. Furthermore, the ER said that Kieran could not resile from his original position because the company accepted the fact that he did not want to work with the new President and as a result had no choice but to accept this statement as his resignation.
 - TJ found in favour of the ER and dismissed Kieran's claim. TJ concluded that Kieran's initial statements amounted to an "unequivocal resignation contingent on the happening of an uncertain future event". The event was the elevation of the rival to president. According to TJ, when that event occurred, the resignation took effect.
 - TJ also found that the attempt to find Kieran work outside of Canada was tantamount to the ER acting to its detriment. Kieran therefore could not withdraw his resignation; the ER had already expended time and money in attempting to look for an alternate placement.
- Issue
 - Whether Kieran resigned or was dismissed - if he had resigned, was he free to withdraw his resignation prior to its acceptance by the company?
- Discussion
 - CoA reversed the decision and found that EE had not resigned. CoA looked carefully at the evidence and concluded that EE did not state in plain language that the appointment of rival would be the catalyst for his departure. CoA stated that had EE done so, such a statement "may have amounted to an unequivocal statement of an intention to resign".

- BCCA dismissed the appeal - Court held that the contract of employment had been frustrated and the ER was entitled to dismiss EE even though EE was not at fault and despite the terms of the company's LTD plan.
- BCCA quoted SCC **"frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes a thing radically different from that which was undertaken by the contract."**
- The doctrine of frustration can apply to employment contracts in cases where an EE is unable to work because of a disabling illness. The question is whether the disability prevents the performance of the essential functions of the EE's job for a period of time sufficient to say that, in a practical and business sense, the object of the employment has been frustrated.
 - Frustration occurs whenever the law recognizes that, without fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
 - The question is whether the contract is broad enough to apply to the changed circumstances or whether the change is such that performance of the contractual obligations in the new circumstances would be something radically different from what the parties had agreed upon.
 - Thus, it follows that the court will not declare a contract frustrated if the parties have provided that the contract will apply in the new circumstances. Therefore, **the proper approach requires an examination of the contract in order to determine whether its terms are wide enough to accommodate the P's permanent disability without termination. If not, the contract is at an end.**
- Temporary sickness is not a cause for summary dismissal at common law. **If the sickness is so enduring as to defeat the object of the employment contract, it will operate at common law to bring the contract to an end. Sickness will not frustrate an employment contract when the EE appears likely to return to work. However, the longer the sickness persists, the more likely the employment relationship has been destroyed.**
 - Since the LTD plan provided that it would continue to provide benefits to the EE even after termination of employment because of sickness, the parties must be taken to have intended to refer to a sickness that would put an end, in the business sense, their business engagement and thus frustrate the object of that engagement.
 - The court noted that a disability lasting (or a prognosis that a disability will last) not more than one year will rarely give rise to frustration. However, a disability of more than two years generally will result in frustration of the employment contract
- Held - Ruling for ER - employment contract frustrated

COMMON LAW DAMAGES

- Rationale - contract damages theory - to put X in same position as if the contract had been performed
 - Damages = financial losses that occur in that period
 - Quantification of Damages is contextual - Bardal factors,
 - Since employment contracts can be indefinite, there is an implied term that if the ER exercises their right to terminate (subject to Code and Human Rights legislation), they must pay a period of reasonable notice - ie any employment contract can be terminated with reasonable notice without breaching contract
 - What if EE was terminated, and then his group of peers won the lottery during his reasonable notice period - can he claim the lottery winnings as damages - no, that was not contemplated by parties at time of contract formation, and thus is too remote

Sylvester v British Columbia, 1997 SCC

- Key Takeaway
 - An EE who is wrongfully dismissed while absent from work due to an illness is entitled to damages for the salary the EE would have earned had the EE been working during the notice period. The fact that the EE could not have worked during the notice period is irrelevant to the assessment of damages
 - Benefits received by the EE pursuant to a disability plan that was part of the employment contract should be deducted from the award for damages in lieu of reasonable notice.
 - NOTE - any time a person is terminated while on disability, it should raise a HR flag
- Facts
 - Concerned a managerial EE dismissed due to restructuring after 19 years of service. Shortly before his dismissal, EE had fallen ill and went on LTD. The ER offered him severance of 12.5 months' salary, with any disability benefits to be deducted.
 - The EE, and the TJ increased his notice to 15 months, with benefits still to be deducted.
- Discussion
 - SCC found that **disability benefits paid to disabled EEs during the reasonable notice period are deductible from damages in lieu of notice, provided that they are paid pursuant to disability insurance schemes established and paid by the ER.** Where disability benefits are intended to be a substitute for income, an EE should not be entitled to receive salary and disability benefits at the same time, accordingly, in such circumstances, disability benefits should be deducted from the damages award. Where the employment contract fails to indicate otherwise, an EE who is dismissed when he is not working but receiving disability benefits and an EE who is working when he is dismissed should receive equal treatment.
 - this rule that disability payments are deductible from the damages award for wrongful dismissal would not apply if doing so conflicted with the express terms of the employment contract or if the disability benefit plan at issue was paid for by the EE
- Held - ruling for ER - disability benefits paid are deductible from pay in lieu of reasonable notice

Noble v Principal Consultants Ltd (Trustee of), 2000 ABCA

- Key Takeaway
 - Bankruptcy of ER does not affect length of notice period or amount of damages
 - Damages crystallize at the moment of breach of contract
 - Upon breach of contract, the injured party is entitled to damages to put them in the place they would have been had the contract been performed. The moment of breach matters, and damages (quantum and entitlement) crystallize at that moment. Determining quantum involves looking backward to a certain extent and then calculating that forward.
- Facts
 - EE was Sr VP for ER - had been there for 18+ years - terminated without cause and given 18mos reasonable notice
 - ER went bankrupt 2 mos after EE was terminated, and ER had not paid out balance of reasonable notice period.
 - KPMG takes over as trustee in bankruptcy, and claim that reasonable notice is stopped by the bankruptcy
- Discussion
 - Court wrestled with question of how to determine damages - do we look forward, or look back? - are we able to consider the bankruptcy in determining damages?
 - KPMG argued that the position the EE would have been in had the termination would not occurred would have been working for a bankrupt corp
 - Noble argued that damages crystallized at the time of termination

- An EE's working notice period is not reduced when an ER makes an EE take vacation time during this period, nor is the EE's entitlement to either working notice or vacation time denied by the same combination - ACCRUED HOLIDAYS DO NOT REDUCE THE NOTICE PERIOD
- Failure to mitigate will cause the court to reduce the awarded notice period. Duty to mitigate also begins at the moment of breach - ie you need to start looking for a job ASAP - should advise clients to start a "mitigation logbook" to track their mitigation activities
- Facts
 - EE had worked for the ER for 24 years when he was terminated without cause. The ER gave the EE a notice period of one year, which he decided to work through. However, the EE had banked more than thirty days worth of holiday time. This was against an existing written policy stating that no more than thirty days of holiday time could be accumulated. The ER requested that the EE take some of this extra holiday time off during the working notice period and the EE complied. Once the period of working notice had finished, the EE sued for wrongful dismissal.
 - Bardal factors - 24 yrs of service, not young, coordinator but not manager, technical job but not particularly specialized
 - TJ decided in favour of the EE - the notice period should have been eighteen months instead of the one year which had been provided. Further, TJ found that the ER should not have combined the holiday time with the working notice period because this reduced the EE's notice period. The ER appealed this latter point.
- Issue
 - Whether EE gets consecutive holiday pay and notice? Or can letting EE stay home and be paid during working notice period suffice as holidays?
- Discussion
 - ABCA found that TJ had erred in concluding that combining holiday time and working notice resulted in a reduced notice period. Instead, ABCA found that, "Working notice and taking paid vacations are perfectly compatible. There is no inconsistency, and no double deduction. The EE lost no holiday rights. For every day of holidays he had earned, he either stayed home and was paid, or he got an extra day's pay at the end without working."
 - Additionally, the Court found that implied through the holiday policy's thirty day limit was the inability for an EE to accumulate their holidays past this limit by working through them and then receiving extra pay. The Court stated, "On the topic of holidays vs. extra pay in lieu of holidays, the ER had a clear written policy limiting banked holidays to 30 days. ...it stops the court from implying a term in the employment contract that an EE had a right to bank over 30 days. And it also bars implying a term that an EE has a right to work every working day and take extra pay instead of any holidays."
 - Essentially, working notice is not a breach of contract, and so all of the regular contractual clauses still apply, including the right of the ER to force the EE to take his holidays.
 - Note - The EE here could have argued that there was a breach because the working notice provided was not sufficient.
 - Essentially, letting EE stay home and be paid during notice period suffices as holidays - **Working notice and vacation time can run concurrently**
 - This decision demonstrates that an **EE is not permitted to use the notice period as a means to maximize the amount of money they will receive from their ER**. Instead, the notice period is to provide the EE with time to seek out new employment.
 - An EE is entitled to ensure that the amount of notice given is reasonable, but this does not permit the EE to an increase in the notice period because some of that time was spent on holiday.
 - **Failure to mitigate will cause the court to reduce the awarded notice period. Duty to mitigate also begins at the moment of breach.**
 - NOTE - how did the CoA rule that there was a duty to mitigate here? There was no breach of contract by the ER, as they provided working notice, something well within their rights. If there

was no breach, then there was no damages, and there can be no duty to mitigate those damages. Maybe the CoA realized that the notice period was insufficient and considered that to be a breach. Adams doesn't like this part of the ruling b/c it doesn't seem to make sense

- Held - Ruling for ER - holiday time cannot be added onto working notice.

Wallace v United Grain Growers, 1997 SCC

- Key Takeaway
 - There is an implied term of the employment contract of a duty of good faith in the manner of termination - ie cannot lie, misrep, etc
 - Foundational case at the time, was overruled by Keays
- Facts
 - 1972, ER hires top salesman from competitor. EE was the top salesman for 14 years and was fired at age 59. ER made a number of just cause allegations up to trial - cause argument seemed to be mostly fictitious, and there was evidence that there was no real cause
 - EE had to declare bankruptcy and had a mental breakdown - initiated wrongful dismissal claim, alleging that his reasonable notice period would not adequately compensate him because the manner in which he was terminated cause him more damages - b/c he became depressed - court should find a tort of 'bad faith termination'
- Discussion
 - SCC said ER was nasty, invented cause argument. However, they didn't want to find a tort. Instead they invented the 'Wallace Bump'. Wallace Bump is basically an increase in the notice period, where the EE can prove that the **MANNER OF TERMINATION WAS WRONGFUL**
 - ERs 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 in an addition to the reasonable notice period - **candid, reasonable, honest, and forthright, and not untruthful, misleading, or unduly insensitive** - essentially, bad conduct will lead to a lengthening of the notice period
 - Only applies where there are injuries sustained - humiliation, embarrassment, damage to self worth and self esteem.
 - Critiques of *Wallace*
 - Damages are variable - totally dependent on EE salary - not tied to actual damages
 - Aren't all of the *Wallace* Damage items already compensated for in the notice period?
 - Eventually, everyone claimed *Wallace* Damages in a wrongful dismissal claim.
 - As a result, *Wallace* damages are not dead, but Keays changes them

Keays v Honda Canada Inc, 2008 SCC

- Key Takeaway
 - Re-thinking of the *Wallace* approach - *Wallace* damages turn into *Honda* damages - compensatory amounts arising from losses related to mental distress - must be able to show the actual quantifiable loss, which is difficult - maybe look to past case law, look for actual expenses, etc
- Facts
 - Keays, a salaried EE with 14 years service, was terminated by his ER in March 2000. He had been diagnosed with Chronic Fatigue Syndrome, and his ER eventually accommodated EE by exempting him from attendance-related progressive discipline.
 - EE visited a lawyer, who wrote to the ER asking for accommodation - requested that he not have to bring in doctors notes. ER had a disability program that required doctors notes, but there was no discipline for the absences. Lawyer requested additional accommodation because CFS is chronic, and the letters are redundant and there was not true independent diagnosis - ie the disability program was not working for him and he requests additional accommodation.

- ER did not respond to the lawyer, and instead went directly to EE (court eventually said this was fine during the employment relationship, unless there was termination). They told EE that going to a lawyer was bad (court said this was not cool), and they eventually began being more aggressive with EE.
 - The ER sent a letter to EE, basically dismissing his disability.
 - ER ordered EE to meet with a company doctor (worried reporting from EE's family doc was unreliable). On the advice of his lawyer, EE refused to go to the meeting until ER clarified the purpose and methodology of this medical assessment. The ER proceeded to terminate him for insubordination.
- EE sued for wrongful dismissal.
- TJ ordered 15mos reasonable notice, 9mos *Wallace* damages, and \$500,000 in punitive damages
- Discussion
 - The SCC overturned the ONCA's finding that ER had discriminated against EE and quashed the associated \$100,000 in punitive damages awarded
 - The majority of the SCC ruled that ERs have a bona fide right to monitor absenteeism just as EEs have a bona fide right to be absent from work due to disability. SCC found:
 - that the coaching letter was a mechanism that had allowed EE to learn about the attendance plan that would accommodate his disability;
 - Adams doesn't like this - "coaching letter" - this wasn't just relaying information, it was more like a threat
 - that the requirement to bring doctors notes allowed him to be frequently absent from work without being terminated;
 - that ERs have the right to scrutinize medical documentation;
 - that ERs have the right to cancel an accommodation plan that is no longer working for the ER and to require the EE to meet with a company medical specialist whose approach is based on known medical practice and whose bona fide unwillingness to believe in EE's disability was based on the absence of any written diagnostic information in EE's file
 - Reasonable Notice damages upheld
 - For ER's breach of contractual duty to provide reasonable notice in dismissal, and in consideration of factors which will make it difficult for him to find new employment, EE will receive the 15 mos reasonable notice in back pay awarded to him by the TJ.
 - **Wallace Bump-up Eliminated**
 - The majority overturned TJ's finding of bad faith termination and its associated 9 mo *Wallace* bump-up.
 - Moreover they did away with *Wallace* bump-ups all together, stating that from now on, **EEs will receive damages for mental distress only when they can prove actual psychological loss incurred by the ER's bad faith manner of dismissal - ie compensatory damages**
 - For the reasons discussed in the critiques to *Wallace* above, *Wallace* damages are almost totally eliminated - we are not compensating for hurt feelings, embarrassment, etc because:
 - Practically, everyone has hurt feelings when they are fired
 - Legally, the ER has a right to terminate the contract - this has to be in the contemplation of the parties when the contract is formed, and thus hurt feelings on termination is not compensable - it was a legal right of the ER to terminate
 - Punitive Damages Eliminated
 - Court said that **punitive damages can still apply in some scenarios, but not where they double-compensate for the same matter**, as in this case - Compensatory damages and punitive damages, although they have different purposes (compensation vs deterral), they essentially compensate for the same thing

- Exception - para 62 - “Damages for conduct in the manner of dismissal are compensatory; **punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.**”
 - In this case, majority of SCC found that ER had acted in good faith when it dismissed EE and that EE had failed to establish that his PTSD was triggered by the *manner* in which he had been dismissed

Merrill Lynch Canada v Soost, 2010 ABCA

- Facts

- EE was 36 years old, had worked for ER for 3 years, was wrongfully dismissed
- EE sued for reasonable notice and damage to reputation and loss of book of business
- TJ set reasonable notice period at 12 months - EE had been recruited from RBC to the ER, and so the previous service of 7 years had to be taken into account - **when you are recruited from secure, long-term employment to take a position, you sacrifice that reasonable notice and so it is in the contemplation of parties that he should be considered a longer-serving EE**
 - EE had tremendous swings in income over the course of his employment - TJ used an average over the course of his employment
 - TJ awarded \$600k in reasonable notice (12 mos),
 - TJ also found that this amount undercompensated EE and that he should be entitled to further damages in the amount of \$1.6M because the consequences of his dismissal included the loss of almost the entirety of his "book of business" (largely retained by ER) and his ability to earn future income. - ie Honda damages

- Issue

- Are the \$1.6M in damages justifiable?

- Discussion

- EE argued several angles in support of the \$1.6M in damages
 - Like in *Honda*, the ER's argument that the EE was terminated with cause was fictional and invented purely for the purpose of playing hardball in litigation
 - The \$600k are not sufficient to put the EE back in the position he would have been in had the contract been properly performed - he could have used the 12 mos reasonable notice period to solidify his book of business - he was unable to do that w/o working notice, and that is precisely why ER fired him w/o working notice - therefore, his failure to solidify his book of business naturally flows from the wrongful termination
- ABCA conducted an analysis of the law concerning terminations. The Court concluded that the only breach of contract was the failure of the ER to give the EE reasonable notice.
 - Any ER can dismiss any EE for any reason, no matter how capricious or whimsical that reason may be. The only entitlement of the EE is a damage award for those losses attributable to the failure of the ER to provide reasonable notice.
 - **Only those damages which flow from the failure to give notice (and not the dismissal itself) are recoverable.** ABCA found that the extra damages awarded by the TJ were not damages which flowed from the failure of the ER to give reasonable notice, and were therefore not recoverable. *The extra damages were not something within the contemplation of the parties at the time of formation of the employment contract*
 - The Court noted that **there is an obligation on the part of the ER to ensure that in effecting the dismissal, it was not being unduly insensitive.** However, the Court found that the circumstances did not give rise to a claim in this case, nor was the conduct of the ER such that punitive damages ought to have been awarded.
 - *Honda* damages were not upheld because there was no bad faith - they honestly believed they had cause to fire him, and had not done so in bad faith

- **There is no breach of contract for termination without cause as long as there is pay in lieu**
 - [12] It is implied in the contract that the party terminating the contract without cause will give notice of reasonable length. All that need be reasonable is the amount of time which it affords. So an ER wishing to dismiss an EE without cause must either give long enough advance notice, or pay salary corresponding to that period of time:
 - [13] I emphasize the word “or”. **No EE has a right to work after dismissal. Every EE can be dismissed at once with no notice and without any grounds. That will not be a breach of the employment contract, provided that the ER gives pay in lieu of notice.**
 - This is contrary to *Noble* at ABCA which stated the exact opposite - that provision of reasonable notice is a breach of contract - the contract is an exchange of services for money, and if you can't provide the services, the contract must be breached
 - Adams believes that ABCA is wrong in this case - reasonable notice is essentially damages for the breach that arises when an EE is terminated without cause
 - Here, ABCA seems to be worried about damages flowing from the breach, so they attempt to eliminate the breach altogether
 - [41] ...Even clearly foreseeable losses are not compensated unless they are caused by a breach of contract (or a tort)...Therefore, foreseeable losses from the fact of dismissal are not compensable, because dismissal is not a breach of contract. Only those flowing from lack of reasonable notice (or true *Honda* misconduct) are compensated.
 - Again, Adams thinks this was not the appropriate mechanism to use
- The ABCA decision is a welcome one for ERs in light of a trend in the lower courts to rely on the *Honda* case to expand the range of damages visited upon ERs. The ABCA was clear that **damages must flow from the breach of the obligation to give notice or the breach of the obligation to be sensitive in the manner of dismissal. Dismissal itself is not a wrong and the negative consequences which might be attributable to the dismissal (as opposed to the failure to give notice) are not compensable.**
 - Future claims will be focused on the consequences of the failure to give notice. It will be a rare case where the damages from such failure will exceed the loss of income for the reasonable notice period. As to the obligation to be sensitive, there will have to be a palpable callousness on the part of the ER before a breach can be established. And even then, the damages must be proven.

Elgert v Home Hardware, 2011 ABCA

- Facts
 - EE was terminated with cause on the basis of that he sexually harassed other EEs
 - TJ found that the investigation into the complaint of sexual harassment was so poorly investigated that it resembled *bad faith in the manner of termination* (note these things that ERs should NOT do in a sexual harassment investigation)
 - conflicts of interest in the investigation - father of the complainant was an investigator, as were friends of the complainants
 - HR manager was inexperienced in this field
 - No official statements taken from complainants - too much hearsay - therefore there was no factual basis to the allegations
 - There was a potential motive to fabricate the stories - complainant was unhappy with the EE for altering her working arrangements and he had given her a poor performance review (which conveniently went missing)
 - Particulars of the allegations were never given to the P so he could not adequately defend himself - this violates natural justice principles of fairness

- TJ awarded EE 24 mos of salary as reasonable notice after being terminated w/o cause and without notice - 17 years of service, 48 years old, supervisor, was the only job he'd ever had.
 - also awarded \$200k in aggravated damages (ie *Honda* damages) and \$300k in punitive damages as well as \$50k and \$10k from two women in tort for defamation (independent actionable wrongs)
- Discussion
 - *Honda* Damages
 - The ER appealed on the grounds that the aggravated damages were excessive - they had an honest belief that they were terminating for cause, and they cannot be faulted for getting it wrong
 - In the alternative, the quantum is far too high - the *Honda* damages are meant to be compensatory - the onus is on the EE to prove the damages, and the EE did not show that there was \$200k of damages
 - The EE responded that he was depressed after the termination, that the allegations of sexual harassment were damaging to his reputation
 - The ER argued that the depression simply resulted from losing his job - this is not a factor in the *Honda* damages, there is a right to fire, and loss of employment is in the contemplation of the parties at the time the contract is formed - there is no proof that the depression arose from the *manner of the termination*, and not just the termination itself
 - ABCA pointed to the questioning of the EE, where the EE's lawyer simply asked him how "the termination" affected him emotionally - **should have asked "how the manner of the termination" affected him** - thus, there was no proof that the manner of termination actually affected him
 - Dissent thought that the effect of the manner of termination could be inferred from the facts and that such a literal approach should not be taken - Adams agrees
 - Important Note - from this case, **it appears as though you do not actually require medical evidence to show the cause of the psychological stress - the source can be inferred from the facts in the case**
 - Punitive Damages
 - ER argued that the punitive damages were far too high - **punitive damages are not compensatory, and so they must be grounded in precedent - also need to ask 'if deterrence is the objective of punitive damages, what is the lowest amount that could achieve that objective?'**
 - Summary - ABCA determined that the TJ's reasons on aggravated damages did not refer to evidence of actual damage but rather his reasons noted that the EE experienced intangible benefits from his employment and that the loss of his position would be 'embarrassing, humiliating and traumatic', and would impose financial hardships on him". ABCA noted that since "aggravated damages are recoverable for breach of contract if such damages were contemplated by the parties at the time they formed the contract", none of the points noted in the TJ's decision fit this requirement. Rather, they were found to be effects that many EEs would experience from simply being terminated.
 - As for punitive damages, the Appeal Court established that Home Hardware's actions were worthy of punitive damages, however the \$300,000 award was found to be inordinately high and unnecessary, resulting in the award being reduced to \$75,000.
- Held - appeal allowed in part - no *Honda* Damages

Christianson v North Hill News, 1993 ABCA

- Key Takeaway
 - Onus is on EE to prove damages flowing from wrongful termination - not from simple termination
 - Onus is on ER to prove failure to mitigate damages - all EE needs to do is make an objectively reasonable decision in the moment
- Facts
 - EE worked for 17 years for ER, was an assistant manager, and was terminated without cause. It was the only job she'd ever had, and the equipment in the office was archaic, meaning she had not been trained on new equipment in the industry. She suggested that the office could be more efficient, and so she was let go.
 - TJ awarded 2 months of notice - basically statutory minimum (8 weeks for 10+yrs service)
 - ER argued that reasonable notice is a cushion, not a license to do nothing while letting the notice period run out - *pay in lieu of reasonable notice are damages, and at CL, the EE has a duty to mitigate those damages - law should encourage efficient behaviours, and so if EE's losses are avoidable, then EE has a duty to avoid them* - EE failed to do so in this case by not applying for other jobs offered to her that were in the same industry and also went back to school instead of finding work - failure to take appropriate steps to mitigate damages
 - Standard court procedure is to reduce reasonable notice period if the EE does not mitigate
- Issue
 - Whether or not ER was able to show a failure to mitigate
- Discussion
 - ABCA did not find a failure to mitigate - the **onus is on the Defendant to prove failure to mitigate** - ie finding jobs that EE should have applied for and didn't
 - **All EE needs to do is make an objectively reasonable decision in the moment**
 - **EE need not make the best possible decision, and the decision will not be judged with hindsight** - ie the EE will not be held to a rigorous standard
 - Courts will not expect one faced with breach of contract to take steps which are risky or unsavoury
 - EE is allowed to take some time to recover - lawyer should advise EE to *record journal of mitigation efforts*
 - EE is not expected to take a significant demotion or go back to work for ER that fired him
 - Any expenses that an EE undertakes in mitigating *during the notice period* can be claimed against ER as damages - costs include postage, telephone calls, purchase of newspapers
 - **Onus to prove damages is on the EE - EE must prove that the damages are related to wrongful termination, not just regular termination of contract - The ER has the right to terminate, so the damages must be related to the wrongful termination** - this is difficult says Adams
 - EE's failure to take jobs offered does not constitute failure to mitigate - her skills were out of date, economic circumstances in the area were poor, and so going to school was a good idea - also, there is no need to take part-time work to cover the loss of a full-time position
- Held - Ruling for EE - No failure to mitigate

Evans v Teamsters Local Union No 31, 2008 SCC

- Key Takeaway
 - An EE has a duty to mitigate their losses by continuing to work for the ER who has fired her, if the ER so requests.
- Facts
 - EE was wrongfully dismissed after 23 years of employment. In a letter to the ER's president, EE's counsel advised he was entitled to reasonable notice of his termination, and he was

prepared to accept 24 mos notice. Subsequent to this letter, no resolution was reached, and the ER continued to pay EE his salary and benefits.

- Later, ER's counsel sent EE a letter requesting he return to his employment to serve out the balance of his notice period of 24 mos. EE responded by indicating he would return to work if the ER rescinded his termination letter. When the ER refused to do so, EE refused to return.

- Issue

- Whether a wrongfully dismissed EE is required to mitigate damages by returning to work for the same ER.

- Discussion

- Hypothetical that mirrors SCC's position here: what if EE was terminated w/o cause and given pay in lieu of notice, and as soon as termination was effected, ER offered EE a fixed-term contract for the same length as the notice period doing the exact same job for the exact same pay - would the EE's failure to accept the position not constitute a failure to mitigate? Yes, and the only caveat would be where a reasonable person would not accept such an opportunity.
- SCC found that **requiring an EE to mitigate damages by accepting temporary employment with the dismissing ER is consistent with the notion that damages for wrongful dismissal are intended to compensate for lack of notice.**
 - Thus, **where the ER offers the EE a chance to mitigate damages by returning to work for him or her, the central issue is *whether a reasonable person would accept such an opportunity*** - ie where there are no barriers to re-employment
- Re Barriers to Re-employment - SCC concluded that a reasonable person should be expected to do so "where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious"
 - The Court further concluded that other relevant factors include the history and nature of the employment, whether the EE has commenced litigation, and whether the offer of re-employment was made while the EE was still working for the ER. **The critical element is that *an EE not be obliged to mitigate damages by working in an atmosphere of hostility, embarrassment or humiliation.***
- Here, there was clear evidence that the relationship between EE and ER was not acrimonious, and that the terms of his employment would have been the same.
- In obiter, the SCC also held that any ***Honda* damages awarded (the lengthening of the notice period due to the bad faith conduct in the manner of dismissal) should not be subject to the duty to mitigate.**
- SCC made a compelling argument for the uniqueness of the EE/ER relationship and the employment contract - seems like an exam question:
 - [93] This Court has recognized employment contracts as a unique subset of contracts marked by an inherent imbalance of bargaining power, making the wholesale, uncritical acceptance of principles from contract law inappropriate (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). The uniqueness of employment contracts was well explained by Professor Judy Fudge as follows:
 - Both the nature of the employment relationship, that is, the rights and duties that define it, and the nature of the commodity sold, which is the human capacity to work, create pressures that are hard to contain within the conceptual boundaries of contract. Historically, the employment contract emerged out of, and was infused with, master and servant law. Employment is an asymmetrical relationship in which the EE implicitly cedes authority to the ER. Inequality is not just a question of bargaining power; it is an essential institutional feature of employment that the ER has a unilateral and residual right of control and the EE has an open-ended duty of obedience. Moreover, concepts of contract law must accommodate the distinctive object of the exchange in employment — the capacity of human beings to labour. In a liberal society, human beings are to be treated with dignity and respect. The EE is both the subject and object of the employment contract, with the result that the employment relationship helps to define an individual EE's self-worth. (Judy Fudge, "The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?" (2007), 32*Queen's L.J.* 529, at p. 530)

- EEs argued that that the MTA was improperly varied when it was changed to the STA. There was no consideration offered to make the change, and the termination provisions (payment of \$25k) were not followed. Therefore, STA is void for lack of consideration.
- ER argued that EEs had mitigated their damages under the MTA by working under the STA and making as much money under the STA as they would have received in damages for breach of the MTA (ie at least \$25k)
- Court held that the EEs were still entitled to the \$25k because it was a contractual entitlement, and there is no requirement to mitigate them - Contractual entitlements are not damages -
 - **There is no requirement to mitigate contractual entitlements - same goes for statutory entitlements - they are not damages**
- Held - ruling for EEs

Russo v Kerr Bros, 2011 ONSC

- Facts
 - Russo - 53 years old, had worked for ER for 37 years, was a warehouse manager - had spent his entire working life working for ER
 - ER asked its EEs to accept a 10% pay cut and unilaterally dissolved their pension plan, apparently due to economic and financial difficulties. Russo, specifically, was asked to take a further salary cut and his bonus was discontinued, which reduced his total compensation by approximately 50%.
 - Usually EEs respond to that sort of change by quitting, and then sometimes suing for constructive dismissal. The twist in this case was that the EE did not quit. Instead, the EE's lawyer explicitly told the ER that the EE DID NOT ACCEPT the pay cut (ie does not accept variation to contract), and that the pay cut amounts to a constructive dismissal.
 - Genius move by lawyer - sets out the lump-sum damages ER would be required to pay if he was dismissed w/o notice - are you seriously going to pay your warehouse manager \$300k to stop working, b/c that is what he will be owed in reasonable notice!
 - However, the EE kept coming to work under the reduced compensation. The ER acted as if that meant the EE accepted the changed contract, and paid him the lower wage.
 - Accordingly, EE then commenced litigation against ER for constructive dismissal, while he continued to work for the ER.
- Issue
 - Was this constructive dismissal, and if so, is EE required to mitigate damages?
- Discussion
 - EE argued that he had been constructively dismissed when his pay was substantially unilaterally cut by the ER, but he had continued to work under the new reduced pay scheme as part of his "duty to mitigate" his losses.
 - This turns *Evans v Teamsters* on its head—in that case, the SCC ruled that an EE has a duty to mitigate his losses by continuing to work for the ER who has fired her, if the ER so requests. Here, the EE said, metaphorically, "just following the SCC's instructions". There were no barriers to returning to work - he was constructively dismissed for economic circumstances, which *Evans* says was no big deal and not a barrier to return. EE was worried about being found to have failed to have mitigated his damages if he did not return to work
 - Note that this was not a 'periodic adjustment in compensation' - there was a 10% pay cut across the board for every EE, which lends to periodic adjustment, however Russo's pay cut was much more substantial than everyone else's.
 - Note - it is hard to reduce the salary of your EEs - must get EE to agree to altered terms and offer consideration (forbearance from firing) for the alteration (what was that earlier case? Wronko? Techform?)

- The ER argued that by continuing to work under the reduced compensation scheme, the EE had consented to the ER's unilateral revision of the contract.
- ONCA ruled in favour of the EE - EE had clearly informed the ER that he did not accept the change to his contract and that if the ER cut his pay, it would amount to a constructive dismissal, and yet the ER did this anyhow. ONCA said that **once the ER had been told that the EE accepted that a constructive dismissal occurred, and that he did not accept the new terms and conditions, the ER could have told the EE to leave the workplace. Alternatively, the ER could have kept the old terms and conditions in place for the period of reasonable notice.** However, the ER did neither. It simply allowed the EE to remain in the workplace knowing that the EE took the position that he had been constructively dismissed, and that he did not accept the new terms.
- In the end, **the EE is entitled to remain in the workplace after he is constructively dismissed, as a means of mitigating his loss, for the entire period of reasonable notice. The ER can tell him to get lost, of course, but they would have to pay out the reasonable notice damages to do so.**
 - Para 47 - *"As applied to this case, the plaintiff can remain in the workplace under the changed terms as a means of mitigating his damages, but only for the period of reasonable notice. If he elects to remain in the workplace under the changed terms beyond the period of reasonable notice, with the consent of the defendant, it must then be concluded that he has accepted a new contract of employment under the changed terms after the expiry of the period of reasonable notice."*

- Held - Ruling for EE

Piresferreira v Ayotte, 2010 ONCA

- Discussion
 - Tort of NEGLIGENT infliction of mental suffering does not apply to the employment relationship
 - Tort of INTENTIONAL infliction of mental suffering is still available
- Facts
 - The 64 y/o EE had worked for ER from Jan 97 to May 05. EE received excellent performance reviews until 04 when, for reasons beyond her control, she was unable to meet her sales quota. Her sales manager, Ayotte, became increasingly frustrated at the EE's performance which resulted in verbal and physical abuse of the EE. After the abuse, the EE suffered PTSD.
 - ER made three offers to EE
 - Ayotte and EE could have meetings to resolve issues - rejected by EE
 - Ayotte could be transferred - rejected by EE
 - Ayotte was close to retirement, EE could return thereafter - rejected by EE
 - Accordingly, ER argued that EE had resigned by failing to return to work.
 - The EE brought an action against her ER and Ayotte seeking damages for assault and battery, negligence, loss of past and future income, breach of contract, intentional or negligent infliction of emotional distress, mental suffering, and nervous shock and/or PTSD. She also sought damages from her ER for wrongful or constructive dismissal.
 - TJ awarded the EE damages totalling \$500,955.
- Discussion
 - ONCA reduced the damages award to \$147,855, broken down as follows: \$15,000 for a workplace battery, \$87,855 in lost wages, and \$45,000 for the mental suffering the plaintiff experienced because of the *manner* in which she was dismissed.
 - ONCA held that the **tort of negligent infliction of mental suffering is not available in the employment context because public policy reasons weigh heavily against recognizing such a duty of care under the two-part test articulated in *Anns*.**
 - ONCA noted that **compensation for mental distress is nevertheless available under the framework set out by the Supreme Court of Canada in *Honda*.**

- Must tie damages to the MANNER of dismissal, and not the dismissal itself
- Torts Collateral/Incidental to Termination - Independent actionable wrongs
 - Intentional Infliction of Mental Suffering
 - Defamation
 - Battery
- Punitive Damages - designed to deter future conduct of ER
 - Don't require evidence of harm - not compensatory
 - Threshold for Punitive Damages - conduct that is Flagrant, outrageous, Malicious
 - \$\$\$ amount should be that which is the lowest possible amount required to achieve the desired deterrence effect
 - Can't argue punitive damages in every case - harms credibility
- Mitigation Expenses
 - Must make distinction b/w expenses related to mitigation and those related to the termination
- Costs - ie litigation costs
- Release
- Accord & Satisfaction
- Contra Proferentum
 - where a contract is ambiguous, it should be strictly construed against the drafter
- Unconscionability

Farmer v Foxridge Homes Ltd, 1992 ABQB

- Key Takeaway
 - Accord & Satisfaction - onus is on party arguing A&S to prove it - Where a defendant ER relies upon accord and satisfaction as a defence to damages for wrongful dismissal, the onus is upon ER to prove such an agreement exists.
- Facts
 - EE was 58 years old and had been employed by ER for 4 years as Sales Manager w/ extensive duties. EE been with company for 41 years. He was terminated and ER told him to calculate severance package according to Employment Standards Code.
 - ER agreed to \$2000 in holiday pay and told EE he could choose b/w:
 - the commission for possessed homes w/labor standards amount, or
 - the calculation that did not include the commissions w/ the labor standards amount.
 - Obviously, EE chose the higher, but signed no release
 - EE then sued for CL damages for reasonable notice
- Issue
 - Whether there was an agreement b/w two parties that preclude EE from claiming further damages? ie was the agreement full and final settlement of all claims?
- Discussion
 - ER argued there was a final agreement in full satisfaction of the claims that EE may have against them, or if there was no such agreement, he failed to mitigate his damages.
 - EE argued that it was not his intention to fully settle the claim and made every attempt to mitigate damages.
 - Accord & Satisfaction - ER argued accord and satisfaction
 - **Accord and satisfaction occurs when a party gives up its right to demand contractual performance in return some new benefit.**
 - **Accord - refers to the parties' new agreement**
 - **Satisfaction - new consideration provided by the party that is relieved of the need to perform the old contract**

- EE worked at for ER for 3 years as a marketing rep, and was doing extremely well, far better than the ER anticipated - commissions were through the roof. EE was terminated bc ER decided the product was selling itself and did not require a direct salesperson. ER gave EE a termination agreement to sign offering 5.25 weeks of reasonable notice - gave him time, allowed him to take it home.
- EE called the Labour Standards Board to ask what severance package he was entitled to, and was told that he was not entitled to anything and was advised to “take what he could get”
- The agreement included a lump sum payment for the amount owed up to the date of termination, and EE signed the agreement. At the time of signing, EE was depressed and demonstrated poor decision-making abilities. EE claimed he signed the letter bc ER told him he would not get a severance package otherwise.
- EE sued for proper reasonable notice - ER argued that the release was final and binding
- Issue
 - Is the release final and binding on the EE?
- Discussion
 - ABQB held that the release clause was not **ambiguous**. When given its *plain and ordinary meaning*, the release constitutes an agreement b/w EE and ER that EE has been adequately compensated for ER’s failure to give reasonable notice of termination.
 - ABQB then looked at the UNCONSCIONABILITY of the clause. **A transaction may be set aside for unconscionability where:**
 - **Inequality of Bargaining Power**
 - ER generally holds a more powerful position
 - Economic pressure - ER was withholding back-pay unless he signed agreement - this is a breach of a fundamental term of the agreement - could lead to a claim for aggravated damages for bad faith in manner of termination
 - lack of independent legal advice can contribute to inequality of bargaining power - good practice for ER would be to recommend in the termination letter that the EE visit a lawyer
 - **Stronger party has unconscientiously used a position of power to achieve an advantage**
 - Seems as though there was pressure to sign the release - ie ‘sign release or else’
 - Less likely to find unconscientious use of bargaining power if EE actively participated in the negotiation of the settlement covered by the release
 - **Agreement is substantially unfair to the weaker party**
 - Notice period of 5.25 weeks was substantially unfair to the EE
 - Remedy - Court set aside the release because it was unconscionable and gave four months average pay in lieu of notice
 - General rule is that damages are limited to the earnings lost during the period of notice to which the EE is entitled and cannot include damages for the manner of dismissal, for injured feelings, for loss sustained from the fact that the dismissal makes it more difficult for EE to obtain other employment
 - The exception to this rule are those instances in which the parties contemplated at the time of the contract that a breach in certain circumstances would cause a EE mental distress or where the conduct complained of is independently actionable
 - Only contractual breach that can be established here is the failure to give adequate notice. EE’s mental distress was the result of his termination, not as a result of inadequate notice or the manner or dismissal - for this reason, contractual damages for mental distress will not be awarded
- Held - ruling for EE

EMPLOYMENT - CONFIDENTIAL INFORMATION, NON-COMPETITION CLAUSES, INJUNCTIONS

Departing EEs - Duties and Damages

- Reasonable Notice - theory?
- Common Law Duties
 - Fidelity & Good Faith
 - Confidences
- Fiduciary Duties - who, what, when?
 - Who - D/O/EE's
 - What - not to solicit clients
 - When - for a reasonable period of time

What duties does an EE owe an ER? - what remedies are available for breach

- Sources of Duties
 - Contract - EE is governed by terms of contract - ex notice terms, confidentiality (implied by CL, may be expressed for clarity), restrictive covenants/Non-Competition clauses, etc
 - Common Law - duty of good faith & fidelity - don't harm ER's business, work in *exclusive* interests of ER, exclusivity is key
 - Statute - reasonable notice - s58 says 1-2 weeks
 - s58(1) - **Termination of Employment by EE** - except as otherwise provided in subsection (2), to terminate employment an EE must give the ER a written termination notice of at least
 - (a) one week, if the EE has been employed by the ER for more than 3 months but less than 2 years, or
 - (b) 2 weeks, if the EE has been employed by the ER for 2 years or more.
 - 59(1) - **Expediting termination of employment after an EE's termination notice** - If an EE gives a termination notice that is the minimum notice required to be given by the EE and the ER wishes to terminate the EE's employment before the end of the EE's notice period, the ER must pay the EE an amount at least equal to the wages that the EE would have earned if the EE had worked the EE's regular hours of work for the remainder of the notice period given by the EE.
 - In effect, this is the reverse of working notice - quitting is something the EE is entitled to do under the contract, but ER is entitled to send them home if they wish
 - ER is not required to give all of the normally required notice when they terminate in these circumstances - only have to put EE in position they would have been had the contract been performed, and if it had been performed, the EE would have been done in 1-2 weeks anyway

Tree Savers International v Savoy, 1992 ABCA

- Key Takeaway
 - Deals with CL breaches - duty to provide reasonable notice, duty of good faith & fidelity
 - Individuals who are "key EEs" owe a fiduciary duty to ER
 - TP's can be liable for inducing breach of contract
 - Damages include loss of profits, loss of business
- Facts
 - S and D were key EE's for Tree Savers. ER developed technology for oil wells and had a large percentage of the market in this area (only one other competitor). S was the salesman. S and D gave ER two weeks notice and then began to compete with ER. S and D took ER's customer list and other records, which they destroyed prior to trial.
 - ER sued the EE's.

- Issue
 - Was the information S and D took confidential?
- Discussion
 - The EE's were certainly able to quit their jobs - every EE has the right to quit - concomitant right to ER having the right to terminate - however, EEs must provide reasonable notice of termination of contract and realize that the fiduciary duty owed by EEs to ER continues even after termination of the contract
 - **Information gathered during the course of EE's employment by the ER becomes property of the ER, and cannot be used against their interests. If EE does take the info for their own purposes, they may be sued for conversion - ER must show damages arising from EE doing something with the information**
 - ABCA held that the information was confidential - **a reasonable person on reasonable grounds would have known the information was confidential**
 - Fiduciary Duty - Who is a fiduciary?
 - Under ABCA - D/O's are fiduciaries
 - Common Law - 'Key EEs' - those EEs who have economic power over the ER, and that power in turn creates a certain vulnerability on the ER - (see next case for test)
 - S and D breached the fiduciary duty owed to ER because they took confidential information that had been compiled by EE's for the benefit of the ER's business and it was held by them on behalf of their ER.
 - S may have been a mere salesman (implying he didn't owe a fiduciary duty), but the **title is not determinative**. The company was small and he represented the entire sales department - as such a key EE
 - Reasonable Notice Period - was the ER's 2 weeks reasonable notice before quitting sufficient?
 - No - **the statutory requirements are minimums - CL can expand the reasonable notice period requirement, especially for key EEs**
 - Not *Bardal* in reverse - roughly 2 weeks for regular EEs, 4 weeks for Key EE's, and that can be increased in certain cases (*Torcana*)
 - Was D also guilty? Yes, he was jointly and severally liable for losses because he induced S to give inadequate notice - ie liable for tort of inducing breach of contract
 - Damages - ER was given Damages to cover
 - Future loss of profits - loss of business, goodwill, profit
 - Need to bring in a business expert (on each side) to argue what the potential losses resulting from the breaches would be
 - CL can expand on the statutory minimum notice period required - damages incurred because of failure to provide reasonable notice - costs to find and replace with new EEs with sufficient skill and knowledge
- Held - ruling for P ER - EEs liable for breach of fiduciary duty

Anderson, Smyth, & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd, 1996 ABCA

- Key Takeaway
 - **Test For Fiduciary Duty owed By EE to ER** - It's the SUBSTANCE of the position, not the TITLE that determines whether an EE owes an ER a Fiduciary Duty - Look for three common characteristics: (*Frome v. Smith*)
 - 1) Fiduciary has scope for the exercise of some discretion or power - consider economic power
 - 2) Fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary legal practical interests
 - 3) Beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power

- Fiduciary Duty means fiduciary cannot solicit clients for a reasonable period of time - reasonableness will be entirely dependent on the circumstances
 - Don't have to turn away business from former clients, but can't solicit directly - can solicit indirectly
- Facts
 - EE worked for ER. He began in 1980. In 1985, EE became director, officer, shareholder and the head of the Edmonton Office. ER Terminated EE's employment in 1989 and he went to work for competitor
 - EE solicited old clients from ER. 21 Clients transferred to competitor and 4 transferred but would have whether or not solicited. There was no contractual provision prohibiting solicitation. EE did not take client list, he knew who all the clients were b/c of personal dealings w/ them.
 - ER sued Kelly for breach of fiduciary duty and competitor for having knowingly participated and benefited.
 - TJ ruled that since no client list was taken, there was no wrongdoing.
- Discussion
 - ABCA ruled that EE was a fiduciary of ER under the Business Corporation Act, but his role as key EE at Edmonton office was also sufficient to give rise to fiduciary obligations.
 - **Test For Fiduciary Duty owed By EE to ER** - It's the SUBSTANCE of the position, not the TITLE that determines whether an EE owes an ER a Fiduciary Duty - Look for three common characteristics: (*Frome v. Smith*)
 - 1) Fiduciary has scope for the exercise of some discretion or power
 - 2) Fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary legal practical interests
 - 3) Beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power
 - EE was the manager of the ER's Edmonton firm. He was one of three of EEs in Edmonton, with the other two being clerical staff. He was responsible for day-to-day business. He could delegate his authority to affect ER's business and legal interests. Therefore, EE was a fiduciary.
 - EE owed a fiduciary duty to ER not to solicit former clients notwithstanding the absence of an express contractual provision
 - **Duty means fiduciary can't compete for a reasonable period of time**
 - Court determined this duty would last for 1 year so that the P could minimize its vulnerability to solicitation - the period was long b/c of Kelly's long standing and personal relationships w/ clients
 - Duty of a departing fiduciary subsists for so long after his termination as is reasonable in the circumstances to enable the former ER to him to contact his clients and attempt to retain their loyalty. **Length will be affected by nature of departing EE's position.**
 - Higher level of trust and confidence vested in EE and corresponding vulnerability of ER leads to a longer period. Following the period, EE is in the same position as anyone else and can contact clients.
 - Competitor was held liable because they had actual knowledge of EE's conduct and was content to accept benefit of his breach of duty. Companies must be aware that when they hire a fiduciary EE of another ER, they can be held liable.
 - Damages - Loss of profit based on the one-year period b/c EE should not have solicited.
 - **Upon his resignation and departure, that person is entitled to accept business from former client, direct solicitation of that business is not permissible**
- Held - ruling for ER - EE was a fiduciary

Torcana Valve Services v Anderson, 2007 ABQB

- Key Takeaway
 - A fiduciary has heightened obligations beyond the employment relationship. The Scope of the fiduciary's duties need to be analyzed on an individual basis and will depend on the nature of the relationship and the expectations of the parties
- Facts
 - D was a former EE of P who left his employment w/o notice and set up a competing company w/ another former EE of P. EE had been face of the company, had client relationships, held financial information on ER, shared the profits of the ER (whole business, not just his own commissions, thus has financial interest in whole business)
 - ER sued EE and his company for damages arising out of allegations of a breach of fiduciary duty and breach of contractual obligations.
- Discussion
 - Did D owe a fiduciary duty to the P, and did he breach it?
 - Was D a 'Key EE' of the P?
 - Where it is established that an EE held a position of senior management or could be described as a "key" EE, he will be precluded from exploiting "that particular vulnerability that flows from the special or unique relationship b/w himself and his ER" for his own business interests.
 - Although EE was not a director or an officer, and he had only worked w/them for 17 months:
 - he was face and personification of company - he was the only sales rep,
 - he possessed info not normally available to mere EEs, and
 - he received a share in the profits of the business
 - he was in a position of power and trust
 - Therefore, EE was a Key EE and thus in the position of a fiduciary.
 - EE breached his fiduciary obligations when he began competing w/ ER almost immediately following his resignation and directly soliciting clients.
 - Period of Non-Solicitation - Court found that a period of non-solicitation of 6 months was reasonable for Torcana to train a replacement and cement relationships w/ existing clients before being faced w/direct solicitations from Mr. Anderson and his new company.
 - Customer information is sensitive and proprietary. Taking this information with him was a breach of ordinary duties owed by an EE to his former ER - Not a breach of fiduciary duty - ie duty of good faith and fidelity
 - Period of Non-Competition - court found 1 month of non-competition was reasonable bc any business obtained by him, and any efforts at obtaining business, until after that date were the result of his breach of his duty to give reasonable notice
 - Approaching the person he had recommended for a promotion to leave and join him in a new business venture was a also breach of fiduciary duty to P.
 - Breached fiduciary duties by soliciting fellow EE, but no separate head of damages flowed from that particular breach of duty.
 - EE also breached his duty to give reasonable notice to ER , which should have received at least 1 mo notice - this is not synonymous w/ the notice period owed by ERs to EEs
 - Damages calculation: having regard to the possibility of lawful competition after one month, and lawful solicitation after 6 months 33% contingency should be applied to one year calculation of \$154,616.
 - **A fiduciary has heightened obligations beyond the employment relationship. The Scope of the fiduciary's duties need to be analyzed on an individual basis and "will depend on**

the nature of the relationship and the expectations of the parties”. The following principles help determine the scope of the fiduciary’s duty:

- A fiduciary cannot take a maturing business opportunity from ER either while he is EE or after employment relationship has been terminated
 - In such opportunity cases, there must be a misuse of fiduciary’s power before liability attaches
- Competition with ER after employment relationship has ceased does not in and of itself constitute a breach of fiduciary duty
 - Right to compete is qualified - EE must not actively solicit the business of specific customers of ER - the restriction continues “for a reasonable period of time after termination of employment”
- After the employment relationship is terminated, EE must not use or disclose confidential info learned in the course of his or her employment
 - EEs who are fiduciaries of their former ER breach those obligations when they take confidential customer list and use trade secrets of former ER for use of a competing enterprise
 - Fiduciary must not directly solicit the former ER’s clients during or after the employment for a reasonable period of time. A relationship developed out of trust and confidence that leaves the ER’s legal and/or economic interests vulnerable to the actions of the fiduciary even after termination of employment relationship.
 - Reasonable Period Non-Solicitation (non-competition) is based on:
 - Level of responsibility of the fiduciaries and those recruited to leave
 - Period of service
 - Nature and scope of pre-planning
 - Degree or lack of candor
 - Timing in terms of relative vulnerability of the operation
 - Steps required to react, particularly given the business significance of personal relationships to clients
 - Period of Non-Competition:
- Held - EE individual and company were jointly and severally liable - ER awarded \$122,144 in damages.

RBC Dominion Securities v Merrill Lynch Canada, 2008 SCC

- Key Takeaways
 - Case describes the nature of CL duties on departing EEs - even though none of the EEs were fiduciaries, extensive CL damages flowed from their breach of various duties
 - SCC seems to increase the scope of duty of good faith owed by EEs to an ER, even if they are not fiduciaries - ie Non-Key EEs can have a duty of good faith & fidelity
 - Planning to leave is not a breach of contract - provided it happens off-hours
 - Court implied a contractual duty on Manager not to induce EEs to leave
 - There is no CL duty not to compete (or not to compete during the notice period) - former EEs can compete - just can’t use the confidential info and must provide reasonable notice - there is no bar on competing, and can be liable for failure to provide reasonable notice
- Facts
 - A dispute arose in Nov 00, when branch manager EE and all but two investment advisors resigned without notice from ER and joined a competing office. The mass departure was coordinated by the branch manager of ER. Prior to the mass departure, the EEs removed or copied documents containing client info from ER and sent them directly to competitor.
 - The competitor used the client info to prepare documentation for all of the clients in the departing investment advisors’ client books. This preparation facilitated the opening and handling of accounts at the competitor for the large portion of clients expected to follow the

investment advisors departing ER. This process was completed well before ER learned of the investment advisors' plans to move.

- The net effect of these actions was the collapse of ER operations. ER sued the former branch manager, its former investment advisors, the competitor, and competitor manager who recruited ER's former EEs.
- RBC sued a number of parties
 - Competitor - TP - inducement of breach of contract
 - EEs - breach of contract - failure to provide reasonable notice - breach of implied reasonable notice term in their contract
 - breach of good faith & fidelity - stole confidential client info belonging to RBC
 - breach of duty not to compete unfairly - based on theory that EEs should provide reasonable notice, and by competing w/ old ER during notice period, they breached another duty - this was imposed by TJ, but dismissed by SCC
 - Manager EE - breach of fiduciary duty - soliciting clients of ER - soliciting other EEs
 - breach of implied duty of good faith & fidelity - duty to retain the EEs for ER
 - All Parties - punitive damages
- TJ held that the EEs had breached implied terms of their agreements by failing to give notice of resignation, by breaching duties of confidentiality and by breaching duties of good faith owed to their ER. Significant damages were awarded. Damages for improperly copying information and providing it to competitor were awarded by the TJ and were not appealed. There is no real legal issue or difficulty with these types of damages. Similarly, damages for failure to give proper notice of resignation were also relatively reasonable and legally supportable.
 - TJ also found that Manager was not a "key EE" for RBC, and therefore he was not a fiduciary. He was not a Key EE because he did not have power/discretion, and did not impose any economic vulnerability on ER - his manager title was not indicative of his actual role

- Issue

- Whether the Manager owed a duty of good faith to RBC and whether he breached that duty by leaving with a number of other EEs to go work for Merrill Lynch.

- Discussion

- SCC confirmed that **there is no general duty of the EE to refrain from competing with a former ER after termination of the employment relationship, subject to specific wrongdoing, such as the misuse of confidential information or the failure to give reasonable notice.**
- These damage awards are profound for ERs that seek to hire EEs from a competitor.
 - First, the written employment contracts between ER and their former EEs did not contain terms requiring the EEs to provide advance notice of termination. They also did not contain restrictive covenants in the form of non-competition and non-solicitation clauses. RBC's former branch manager and investment advisors, thus, had an implied duty to not breach residual duties owed to RBC. **These residual duties include performing their employment functions in good faith, to give reasonable notice of their termination and to not misuse confidential information.**
 - Second, none of ER's former EEs were deemed fiduciaries by the Court. Although certain EEs maintained some managerial functions, each was primarily an investment advisor, and thus, not a fiduciary. The court confirmed that **the absence of a fiduciary relationship does not shield investment advisors from civil liability if they breach residual duties owed to their ER.**
 - Third, the competitor and its branch manager were ordered to pay significant punitive damages to ER for their role in the misuse of ER's confidential client information. SCC noted that most, if not all, of the documents contained client info, the confidentiality of which ER and its investment advisors were bound to protect. Without the clients' consent

or knowledge and with the assistance of the competitor the investment advisors transferred confidential info from ER's protection and to the competitor with whom the clients may not have wished to deal with. SCC made clear that **when recruiting EEs from a competitor, ERs must now consider the residual and contractual duties that those EEs owe to their former ER. An ER cannot simply refrain from facilitating that EE's breach of those duties. An ER should be proactive.** ERs should make best efforts to ensure that these duties are not breached, such as requiring new EEs to give reasonable notice to their former ERs and to abide by reasonable restrictive covenants. ERs should also make best efforts to ensure that the new EEs do not have and will not remove confidential information from their former ER.

- Damages - ER was awarded the following:
 - \$40,000 in damages as a result of the investment advisors' failure to give ER 2.5 weeks notice of their departure - ie breach of contract
 - \$1,483,239 in damages by ER's former branch manager based on an estimate of lost profits to ER's operations over a five-year period.
 - \$250,000 in punitive damages by Competitor;
 - \$10,000 in punitive damages by competitor's branch manager;
 - \$10,000 in punitive damages by ER's former branch manager
 - \$5,000 in punitive damages by each of ER's former investment advisors, all based on the conversion of ER's confidential information.
 - NOTE - Competitor had agreed to indemnify the other parties for their losses
- Dissent - Justice Abella had a strong dissent
 - The \$1.5M awarded against the manager makes no sense - seems to be a remoteness problem, the damages are too remote
 - The court seems to be creating a quasi-fiduciary status - Manager was ruled not to be a fiduciary, but still had fiduciary duties imposed on him
 - There was no restrictive covenant in his employment contract, and this ruling seems to impose one in anyway - the parties didn't bargain for it themselves
 - First Principles - EEs are allowed to quit - the lost profits are tied to the loss of the EEs, and so the understanding and expectation of the parties must be that these things could, and often do happen - how can he be sued for lost profits given that he had a right to leave?
 - Compare this to Abella's dissent in *Edmonton Teamsters* - seems to distance himself from the majority of the court on these matters - defers to strict contract interpretation
- Held - Ruling for RBC

Jones v Klassen, 2006 ABQB

- Facts
 - EE was the sole investment representative for ER. EE had signed an employment agreement that he was not to use information acquired by him during the course of his employment in a manner that would harm ER. This agreement also provided that, following termination of the agreement, EE would not solicit the clients of ER for six months.
 - After 4 yrs of employment, EE decided to move to a competitor company. Before tendering his resignation, EE copied client information and potential contact lists. He later claimed to have returned this information, but then admitted he had kept copies that he had used to solicit clients.
 - ER sued EE for:
 - Breach of Contract - breaching the non-solicitation clause
 - Breach of Contract - failure to give reasonable notice
 - Breach of Fiduciary Duty - EE was a fiduciary
 - Breach of Confidences - both the CL and contractual duty - took the client list
- Discussion

- Contractual Duties
 - EE argued that he did not breach the non-solicitation clause - he did not solicit the customers, he was just contacting them to indicate he was leaving. Clients have a free right to make decisions about where they go and what they do. Also argued that he owed a fiduciary duty to his clients - basically, he wasn't soliciting, he was merely communicating
 - ER argued that the communication with his clients did actually amount to solicitation - the letter he sent to clients was certainly a soft-sell - downplayed the quality of ER, extolled values of competitor.
 - ABQB says the letter was certainly solicitation - ABQB advised that the EE should have allowed ER to review the letter prior to sending it out
 - Adams thinks this is kind of implausible - should advise client to write the most neutral letter possible, but still risk opening yourself up to liability
 - After determining that EE had breached his contractual duties to ER, ABQB went on to determine whether EE also owed fiduciary duties to ER.
 - Recalling that a fiduciary relationship involves having a special position of trust, the Court identified three general characteristics of a fiduciary relationship:
 - 1. The fiduciary has the scope to exercise some discretion or power.
 - 2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
 - 3. The beneficiary is peculiarly vulnerable to, or at the mercy of the fiduciary holding the discretion or power.
 - ABQB found that EE was the "**face**" of ER in his territory and that he was indeed in a fiduciary relationship with ER. EE was able to exercise considerable discretion in day-to-day decisions relating to ER's clients and these decisions affected the practical and legal interests of ER. The Court also found that the conditions in the employment agreement demonstrated that ER was vulnerable to his exercise of discretion.
 - ABQB went on to consider the nature of the duties owed by fiduciaries. **A fiduciary must not allow their self-interest to conflict with the responsibilities imposed by the relationship.** This may include a duty not to compete directly with the former ER for a reasonable period of time after the end of the employment relationship. Direct solicitation of a former ER's clients is not acceptable when a fiduciary relationship is established.
 - On this basis, EE had breached his fiduciary duty to the ER
 - Damages - EE had breached both fiduciary and contractual duties. The Court also found that the flagrant manner in which EE breached these duties warranted punitive damages.
 - don't compensate for all of the breaches bc they all amount to the same thing - look to the actual damages sustained - Court calculated the number of
- Held - Ruling for ER

Metis National Council Secretariat v Dumont, 2008 MBCA

- Key Takeaway
 - Courts articulate a tension b/w freedom to contract and the court intervening in the public interest to state that restrictive covenants some contractual terms are unenforceable
- Discussion
 - TJ dismissed the action, holding that the term was a covenant in restraint of trade. While he held that the restrictive covenant was reasonable as between the parties, he found that it was unenforceable for being *against the public interest*. In any case, ER failed to prove any damages arising from respondent's breach of the terms of reference.
 - ER appealed the decision, seeking damages for breach of a restrictive covenant in an employment contract.

- MBCA held that even if the contract was in restraint of trade, the TJ erred in holding that the restrictive covenant *was unenforceable because it was contrary to the public interest*. TJ erred in looking only to the Métis community in his analysis of the public interest and not extending his inquiry to the public in general. Consequently, the contract was valid and enforceable.
 - Further, as the judge found that respondent breached the term in the contract but no damages had been proven, he should have made an award of nominal damages.
- Held - appeal allowed - ruling for Council - nominal damages of \$1 awarded

Elsley v JG Collins Insurance Agencies Ltd, 1978 SCC

- Key Takeaway
 - A restrictive covenant in trade is ONLY enforceable if it is reasonable between the parties with reference to the public interest - consider clause, overall contract, and all surrounding circumstances
 - Test for determining whether or not a restrictive covenant is enforceable
 - Rationale - Is the RC protecting a legitimate proprietary interest entitled of the ER?
 - Reasonableness - Is the scope of the RC reasonable between the parties, or is it too broad? Consider Temporal scope, Coverage, geographic scope
 - Public Policy Considerations - Is it contrary to the public interest?
 - Notes the distinction b/w non-competition clauses and non-solicitation clauses
- Facts
 - EE ran his own insurance agency. In 1956, his company was bought by ER. EE signed a management agreement including a restrictive covenant stating that EE could not act as an insurance agent within a specified geographic area when his employment relationship ended for five years. The restrictive covenant contained a liquidated damages provision of \$1,000/breach.
 - ER wanted the restrictive covenant bc they wanted to protect their investment - wanted to ensure that after buying the business, EE did not just leave again and start a new business. EE was the face of the business and had the relationship with the clients.
 - The restrictive covenant basically amounted to a non-competition clause - restriction on trade in a specified geographic area in a specified area of trade for a specified period of time
 - For 17 years, EE dealt with w/ all customers and got to know them on a personal basis. In 1973, EE left ER and took two salesmen and a clerk to start his company. Over 200 customers followed EE and transferred their business. EE never solicited customers.
 - ER sued EE for breaching restrictive covenant
- Issue
 - Was the restrictive covenant contained in the employment contract valid?
- Discussion
 - SCC stated that a “**covenant is restriction in trade is ONLY enforceable if it is reasonable between the parties with reference to the public interest**”. Have to look at the clause, agreement within it that it was found and all of the surrounding circumstances. Test for determining whether or not a restrictive covenant is enforceable:
 - Rationale - Is the RC protecting a legitimate proprietary interest entitled of the ER?
 - Proprietary interest includes connection to clients, book of business, goodwill, confidential information, and trade secrets
 - Most common thing is business relationships w clients
 - Reasonableness - Is the scope of the RC reasonable between the parties, or is it too broad?
 - “Does it protect ER’s interest but not go beyond that?” - Adams
 - Temporal - consider the duration of the agreement
 - Coverage - does it cover only EE’s clients or all of ER’s clients?
 - Geographic - is it a local RC, or far-reaching?

- RC only restricts soliciting. Non-competing RC will be upheld in exceptional cases where it is necessary to protect ER from former EE appropriating customers b/c of close relationship against him
- **Public Policy Considerations** - Is the RC unenforceable because it is contrary to the public interests - onus shifts to EE to argue RC against public policy. Public policy reasons to consider:
 - Monopoly considerations
 - Interests of consumers - ie consumers want EE to be their broker
 - Whether or not there was a shortage of people in EE's job - consider sophistication of the parties and the relative shortage
 - Don't want to restrict free marketplace b/c competition is better for society
 - Protect EE's autonomy
 - Preventing EE from working increases community costs (EI)
 - Freedom to contract - ER can argue that EE freely entered contract - EE can argue that at the time of contracting, there was a power imbalance b/w EE and ER (here, there was not a power imbalance b/c E sold his company and was in a position of power. There would be little incentive to buy businesses w/o a RC preventing competition)
- **NOTE** - party attempting to uphold RC must prove first two points, party trying to strike down must prove public policy argument
- The Court seems to mark a clear distinction here b/w **Non-Competition** and **Non-Solicitation** clauses. Non-Competition clauses are far more onerous b/c it limits the choice of consumers and therefore is against the public interest. Non-Solicitation clauses still protect the business of the ER and do not constitute such a major restraint on trade.
 - However, in this case, the court upholds the RC because EE was the face of the business to clients, and JG had nothing to do with them. Non-Solicitation would really be of no protective benefit to JG.
- Generally, ERs will have difficult time enforcing RC where ER terminated employment without cause - however, where there is a sale of a business, they will be far more likely to be upheld because of sophistication of parties and fact that the buyer is purchasing the goodwill as part of the purchase price
 - Damages - Limited to \$1000 per breach as stipulated in RC and injunction
- Held - ruling against D - restrictive covenant upheld.

HL Stabler v Allan, 2008 ONCA

- Key Takeaway
 - Courts prefer non-solicitation agreements that are clear, narrow in scope and reasonable in their execution.
 - Non-solicitation clauses are preferred over non-competition agreements - Non-competition clauses will only be supported in certain circumstances - as in *Elsley*, personification of business, and the duration of the relationship - speaks to vulnerability of the ER
- Facts
 - When a group of EEs "jumped ship" and went to work for a competitor, their former ER, a respected insurance broker, sought to invoke the terms of a restrictive covenant in their employment agreement that stated that for a two year period, the EEs would not conduct business with "any clients or customers...handled or serviced" by them at the time of the termination (no geographical scope, so it must mean the whole world)
 - Duration - 2 yrs
 - Geographic - no scope mentioned, so assume whole world
 - Coverage - conduct any business with any former clients

- The ER was initially successful with an injunction application that stopped the exodus of clients to the competitor.
- Discussion
 - ONCA held that the restrictive covenant was not enforceable and therefore damages did not flow to the former ER. ONCA's reasoning was straightforward.
 - RC was over-broad
 - RC agreement lacked a geographical limit making it overbroad and unenforceable.
 - RC did not limit the type of business that could be conducted - language of the covenant explicitly stated that the former EEs could not conduct any business - this was overreaching, broad and unreasonable in its scope.
 - ONCA went on to say that **the effect of protecting a business from being raided by disgruntled ex-EEs and their new masters can be achieved by a well-crafted non-solicitation clause**. Generally, salespeople are not fiduciaries—they do not have a special relationship in the company nor are they key persons such as managers or directors. Therefore, a non-solicitation clause would be viewed as an efficient tool to govern conventional ER/EE relationships.
 - Courts have always attempted to draw a balance between the right to free and unrestricted completion and the rights of individuals to exercise their right to enter into enforceable contracts. While restraint in trade is meant to be limited, there is a desire to allow for the reasonable protection of trade secrets, confidential information and trade connections (client and customer lists) belonging to the ER. The court therefore has demonstrated in a series of cases the desire to protect the ER without compromising the EE's right to work through well-balanced and appropriately limited non-solicitation clauses. These are more likely to be enforceable than a clause that restricts an EE's ability to work.
 - In essence, the court will say that an EE may work for the competition but hands-off the old ER's customer list. For the ER, it is time to shelve the old language and employ less restrictive but more meaningful terms intended to protect the ER's business. In a mobile employment market, this will become increasingly difficult and will require clear and unequivocal language that can be easily interpreted by a compliant judiciary.
- Held - ruling for EEs - RC was too broad to be enforceable

KRG Insurance Brokers v Shafron, 2009 SCC

- Key Takeaway
 - SCC reinforces traditional approach to restrictive covenants.
 - In order to be enforceable, the RC must be reasonable and unambiguous, because an ambiguous clause cannot be a reasonable clause, and will not be enforceable.
 - Notional Severance is not proper for making an RC reasonable
- Facts
 - In 1987, EE joined ER after ER bought his insurance agency. EE was subject to a restrictive covenant that prevented him from competing with ER within the "Metropolitan City of Vancouver" for a period of three years following the termination of his employment (ie a non-compete clause)
 - In 2001, EE left ER to join an insurance broker practising in the neighbouring suburb of Richmond. A significant number of customers moved their business with EE.
 - ER sued EE to enforce the restrictive covenant prohibiting competition.
 - EE challenged the enforceability of the non-compete clause on the basis that the "Metropolitan City of Vancouver" was not "a legally recognized location (ie it doesn't actually exist."

- TJ ruled for EE, striking down the clause, however the BCCA overturned that decision on the basis that the reference to the "Metropolitan City of Vancouver" should be construed as "the City of Vancouver and the municipalities directly neighbouring it."
- Issue
 - Is the non-compete clause enforceable?
- Discussion
 - EE appealed to the SCC. SCC stated that Restrictive covenants are a restraint of trade that courts have always been very cautious to apply. In order for an ER to be permitted to hold a former EE to a restrictive covenant, the clause must be **reasonable and unambiguous**. In particular, the clause must be reasonable in respect to three primary factors:
 - The clause must have a reasonable geographical scope.
 - The clause must have a reasonable time limit.
 - The clause must be reasonable in the activities it seeks to restrict.
 - The SCC made it very clear that **an ambiguous clause cannot be a reasonable clause, and will not be enforceable**.
 - The BCCA applied a legal doctrine known as "notional severance" in order to give meaning to an ambiguous phrase. The SCC recognized that the BCCA was following a practice of "fixing" an otherwise defective contractual provision to make it legal and enforceable, and determined that this practice was not appropriate in the employment context.
 - Notional Severance - reading-down a contractual provision to make it enforceable. SCC didn't want to employ notional severance bc it would give drafters the ability to make broad sweeping clauses that could later just be read-down by the courts
 - Blue Pencil - striking a portion of a clause in order to make it enforceable - SCC did not want to employ blue pencil in all cases because it wouldn't be fair to the intention of the parties - ie the parties meant more than just "Metropolitan City of Vancouver"
 - Although the SCC indicated that there may be cases where a "blue pencil" can be used to strike out (i.e., completely remove) a problematic portion of a clause, this will be done sparingly and only in a situation where the portion being removed is clearly trivial and not part of the main purpose of the restrictive covenant.
- Held - Ruling for EE - clause was too ambiguous to be enforceable

Avva Light Corp v Komonoski, 1997 ABQB

- Key Takeaway
 - Go-to case on bringing an interlocutory injunction
 - Three Part Test
 - Serious Issue to be tried
 - Irreparable Harm
 - Convenience favors granting of injunction
 - In the matter of an interim injunction, the court tends to take a superficial look at the matter because it is interim and is not permanent - idea is to quickly stop the undesired behaviour
- Facts
 - EE leaves corporation. Had been president, VP and ended up sales agent. EE took records from ER and started up competing business.
 - ER sought an injunction to halt the competing business
- Discussion
 - Injunction - court order by a party seeking to stop some activity - ie ER seeks injunction to stop EE from violating RC - can be sought before the activity takes place so no damage occurs.
 - Interim injunction can be granted *ex parte* - ie granted w/o knowledge or argument from the other party - P marshals all his evidence, puts it before the court, judge can grant interim injunction prior to causing any damages

- **To obtain an interim injunction the applicant must satisfy three conditions:**
 - 1) **Is there a serious issue to be tried**
 - Is there a real issue to be tried - ie proprietary interest to be protected, RC that needs enforcement
 - Not some frivolous ground to try to halt the EE
 - 2) **Applicant will suffer irreparable harm if the injunction is not granted before trial**
 - Irreparable harm - damages that cannot (w/o difficulty) be undone - includes jobs that didn't come to you, loss of goodwill, erosion of customer base
 - Courts have softened their stance on this step by stating that you may not need to show irreparable harm in these cases where there is a CLEAR BREACH OF A CLEAR COVENANT
 - RC must be clear, and it must have been breached
 - Basically, must show that irreparable harm will almost certainly flow from the breach of a valid RC
 - Insert the traditional RC analysis at this step (reasonableness/ambiguity/public policy argument)
 - 3) **Balance of convenience favors granting the injunction**
 - P will suffer reputation, goodwill customer base and revenue damage. D will suffer loss of profit from doing what he said he would not do.
- **A covenant in the restraint of trade will be enforced if it found to be reasonable b/w the parties and w/ reference to the public interest**
- Held - Injunction granted - ruling for P.

Dreco Energy Services v Wenzel, 2004 ABCA

- Key Takeaway
 - Doesn't add much new info, but is an application of *Avva Light*
 - Including a severance provision can help to uphold a broad RC - good idea for drafter to include it as insurance in the agreement
- Facts
 - EE was an inventor of oil tools. ER purchased EE's business for lots of money. Sale contract had strong non-compete clause. Company employed EE as an inventor. EE quit w/o notice, hired the ER's other EEs and opened a competing shop.
 - EE argued restrictive covenant was overly broad.
- Discussion
 - Severance provisions in an agreement nullify over breadth complaint.
 - Injunction Argument:
 - Seriousness of Issue to Be Tried - was there an RC?
 - EE argued that RCs presumed to be void in employment context. Court rejects argument b/c this was a sale of business and RC is more likely to be upheld. Also, it would mean no interim injunctions would ever issue when employment contracts were involved.
 - Irreparable harm
 - Court found irreparable harm b/c ER made out the case that EE was marketing inventions w/i scope of the goodwill and employment using technical ex-EEs of ER and selling to ER's customers
 - Balance of convenience
 - Favours ER - there should be an injunction b/c ERs can keep track of business coming to them, but cannot keep business not coming to them. Also, the harm to ER w/o an injunction is likely be much greater than the harm to EEs if the injunction is given but later set aside
- Held - ruling for ER - injunction granted

Globex Foreign Exchange Corp v Kelcher (re-visited from earlier in course)

- Key Takeaway
 - ERs should not be permitted to draft unreasonably broad restrictive covenants w/ expectation that should the matter ever come to trial, the court will simply rewrite the clause as to make it enforceable.
- Facts
 - Three employees were employed by Globex. In 2003, each EE signed a noncompetition and nonsolicitation agreement containing restrictive covenants.
 - In early March 2005, the employees were presented with a new agreement containing more onerous noncompetition and nonsolicitation restrictive covenants. Refusing to sign the new form of agreement, two EEs resigned and one was terminated.
 - The EEs joined a competing company in early April 2005, and Globex sued, alleging damages from loss of clients.
- Discussion
 - ABCA found that Kelcher's non-solicitation covenant was unenforceable as it was both ambiguous and overbroad. Practically speaking, the non-solicitation covenant prohibited contact with all clients that Kelcher ever had "dealings" with and Kelcher would be unable to predict whether he may be in breach of the covenant which rendered the covenant unreasonable.
 - Furthermore, the non-solicitation covenant was found overbroad and unreasonable due to the prohibition against soliciting any client of Globex for any reason whatsoever. Finding that ABQB made no further reviewable errors, the majority discussed, and affirmed, that **wrongful dismissal of an EE renders that EE's restrictive covenants unenforceable.**
 - **For a restrictive covenant to be enforceable, the ABCA found three requirements.**
 - There must be consideration to support the addition or amendment of the restrictive covenant. Examples of such consideration include:
 - a) an ER providing an EE with some form of benefit; or;
 - b) an ER informing an EE that the ER will exercise its right to lawfully terminate the employment relationship by providing reasonable notice or pay in lieu thereof unless the EE agrees to adopt the restrictive covenant.
 - Lawful termination of the employment relationship must have occurred. "Lawful termination" includes:
 - a) an EE's resignation;
 - b) just cause for dismissal; or
 - c) provision of reasonable notice of termination or pay in lieu thereof.
 - The restrictive covenant must be reasonable. The "reasonableness" of the restrictive covenant is enhanced if:
 - a) the ER has a proprietary interest entitled to protection;
 - b) if there is a non-competition covenant, it is used only because a non-solicitation covenant will not provide adequate protection to the ER;
 - c) the prohibited activities and their geographic and temporal scope of the restrictive covenant are no broader than necessary to ensure the protection of the ER;
 - d) the EE is capable of knowing the terms, and when they are in breach, of the restrictive covenant; and
 - e) the restraint on trade is in the public interest.
 - The non-solicitation covenants were sufficient to protect ER's proprietary interest in its clients and goodwill. (Did not enforce non-compete clause). The doctrine of notional severance could not be used to rewrite the restrictive non-competition covenant as b/w ER and Oliverio. The portion of the injunction-prohibiting solicitor of ER clients was to remain in force.
 - 1. Was there consideration for the non-competition agreement?

EMPLOYMENT - *EMPLOYMENT STANDARDS CODE*

Employment Standards Code

- Why? Risks & Rewards
 - Addresses power imbalance by setting minimums (floors) below which ERs cannot exert their position of power to contract with EEs
 - Do not have to go to court to enforce provisions of ESC - saves cost for EE - self-represented
ESC administrative process - increases efficiency
 - However, administrative process can only provide remedies under ESC, not under common law - sometimes the remedies are very different, and far better under common law
- Purpose & Interpretation
- Sections 3,4,5,9
- Bankruptcy - *Stanton v Reliable* [1998] AJ No 229

Possible Essay Question

- Courts today seem to be interested in viewing the employment relationship as a contractual relationship with specific reference to the intentions of the parties to the contract - *RBC, Dunsmuir,...*
- Interesting to note the pendulum of case law swinging from the historic position of protecting EEs to a more even-handed approach that honours the intentions of the parties to a contract

Machtinger v HOJ Industries Ltd, 1992 SCC

- Key Takeaway
 - Enunciates and articulates a certain set of purposes of employment legislation - court uses these purposes to guide interpretation of the ESC
 - Purpose - provide a protective regime to EEs bc of their vulnerability - interpretation of the ESC should follow that spirit - should protect as many EEs as possible, should provide cushion, compensation to EE at the time of termination
 - Where an ER falls below the min stds with a term of the employment contract, that provision will be void. When a provision is void, court will not impute the intentions of the ER, they will simply insert the common law standards.
- Facts
 - EE Worked for ER for 7 years, first as a car salesman, then as a credit manager and rustproofing manager. ER dismissed EE w/o giving notice. He had a written contract for an indefinite period. The termination clause in EE's contract provided for dismissal w/o notice and w/o cause. Under ESC, the EE would have been entitled to 4 weeks notice or pay in lieu. Accordingly, after termination, ER paid 4 weeks salary in lieu of notice.
 - EE sued for wrongful dismissal.
 - TJ held EE was entitled to reasonable notice of 7 months.
 - CA - reversed saying ER gave 4 weeks salary that was in compliance w/ statute.
- Issue
 - What effect, if any is to be given to a term of an employment contract that does not comply w/ minimum notice requirements?
- Discussion
 - ER's argument was that their intention was to give the EE's as little as possible, and since the EE's agreed to the contract, that must have been their intention as well. Therefore, the remedy should be *as little as possible* - ie the statutory minimum. This is a compelling argument
 - SCC restored TJ's decision, and stated that the **CL principle of termination with reasonable notice is a presumption, rebuttable if the employment contract clearly specifies some other period of notice**, whether expressly or impliedly.
 - If an employment contract fails to comply with the Act, the presumption of reasonable notice will not have been rebutted, and the CL reasonable notice period will apply.

- Policy arguments - ESC is designed to protect EEs, ER usually writes contract - it makes sense for ER to be specific and expressly taking away CL entitlements that they otherwise might have.
- Held - ruling for EE - clause too vague

Rizzo v Rizzo Shoes Ltd, 1998 SCC

- Key Takeaway
 - Like *Machtinger*, this case deals with interpretation and application of ESC as a mechanism of protection for EEs
 - ESC should be interpreted as a whole, outrageous results should be avoided, and it should be interpreted in light of the overall purpose of the legislation - that is, protection of EEs
 - Seeking CL damages in the event of a bankruptcy will depend how the bankruptcy came about - may be difficult to recover any remedy out of bankruptcy anyway, so may not be worth pursuing in court.
- Facts
 - Appeal by former EEs of a now bankrupt ER from an order disallowing their claims for termination pay, and severance pay. Trustee thought bankruptcy of ER did not constitute a dismissal from employment and thus, no entitlement to severance, termination, or vacation pay was created under ESA.
- Issue
 - Does the termination of employment caused by the bankruptcy of ER give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance w/ ESA?
- Discussion
 - Court interpreted legislation in a “purposive way” - looked at the purpose of the Code which is to protect EEs. The need is exactly the same, whether terminated by bankruptcy or not by bankruptcy. It is unfair to distinguish b/w the method of termination.
 - Purpose of termination pay is to compensate service and to cushion the EE while they find other employment. Termination is a shocking moment in a person’s life, and there should be some cushion provided to them.
 - Therefore, the words “terminated by an ER” must be interpreted to include termination resulting from the bankruptcy of ER. All dismissed EEs are equally in need of the protections provided by ESC, any distinction b/w EEs whose termination was from ER’s bankruptcy and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of ESC.
 - Problem with remedy - entitlement to termination pay from a bankrupt ER does not give rise to a secured claim in bankruptcy, so the EE may not be able to recover their full remedy.
 - However, the EE does retain their right to the full amount, so it will depend how the bankruptcy plays out.
 - Similar language in ESC s56 in AB of “terminated by ER”, so this case would apply to AB - slightly different wording, but can be construed in the same way
 - *Stanton v. Reliable Printing*, [1998] AJ No. 229 (QB) - adopted the *Rizzo* decision in AB - if bankruptcy is termination of employment by ER and will trigger termination pay.
- Held - ruling for EEs - eligible for claim of reasonable notice in bankruptcy

Smith v Hostess Frito-Lay, 1994 ABCA

- Key Takeaway
 - Statutory minimums are minimums. EE may still sue for wrongful dismissal and have the question of reasonable notice determined by CL.
- Facts
 - EE resigned from his employment giving ER 6 mos notice. ER then terminated EE and gave him 8 weeks pay in lieu of notice. ER wanted get rid of EE because of concerns about

confidential info, productivity issues - also, ER might have another person ready and didn't want to pay two EEs the same job.

- EE sued for wrongful dismissal, seeking more damages than statutory minimum.
- Issue
 - Could EE bring civil action even though ER had paid statutory minimum?
- Discussion
 - ER argued that they did not terminate EE, instead, he had quit
 - Court found that EE is fully in compliance with the contract to provide working notice. He did not quit, he simply provided reasonable notice that he intended to vacate the contract in six months. This is fully acceptable.
 - ABCA also stated that there is nothing in the language of the provision that indicates that EE cannot also pursue a CL action to determine issue of reasonable notice.
 - ESC s3 - NOTHING in this act affects the ability of an EE to pursue a civil claim
 - Note - ER should def argue that any CL damages for wrongful dismissal should be limited to six months - ie limited to the position he would have been in had the contract not had been breached, which was with six months notice
- Held - Ruling for EE

ESC Sections worth Noting:

- s82(1)(a) - limitation period to make a complaint under the act is w/i 6 mos
 - Officer can mediate or just make a decision under the case w/o a hearing
- s85(1) - Decision of Officer -
 - (2) - EE can appeal using s88 if there is a refusal
- s88(1) - Appeal to Director - w/i 21 days of Officer decision
 - (3) - Director can review matter personally, or refer to another officer
 - (4) - Director or reviewing officer may make any decision Officer could have made, or direct the original officer to accept/investigate the complaint if the original refusal was not justified
 - (5) - there is no appeal of a decisions of the Director or the reviewing officer if the decision is that EE is not entitled to earnings, or the original officer was justified in refusing to investigate complaint
 - (6) ER or EE may appeal to an Umpire an order to pay earnings
- s87 - officer can make an order
 - s87(3) - gives ER or EE to appeal to the umpire if there has been order made.
 - EE may appeal if there is dispute over the amount
- s95 and s96 - appeals to umpire is almost a full hearing
 - s98, 100 - not bound by CL rules of evidence - Umpire must issue decision in writing
 - s. 107 - powers of umpire

EC&M Electric Ltd. v. Alberta (Employment Standards Officer), [1994] ABPC

- Key Takeaway
 - Know the procedural steps by which a claim must proceed. This will almost certainly be an exam question.
- Facts
 - EE was fired for insubordination (not recording his time, poor performance) but court held it was insufficient conduct for termination. EE made complaint under ESC. EE found a new job w/i 6 days
 - Follow the Claim - [likely an EXAM QUESTION]
 - ER fires EE for cause - s58(1)(e) - not liable for severance pay
 - EE brought a complaint that he was wrongfully terminated and should be eligible for termination pay under s56(f) - 8 weeks for 14 years service
 - s82(1)(a) - EE can make written complaint to officer

- s101(j) - 'earnings' means wages, OT pay, vacation pay, general holiday pay, and termination pay
 - Note the six month limitation period - s82(2)
 - Mediation - s84(1) - possibility of mediation by an Officer - merely a possibility, not a requirement
 - s87(1) - officer makes an order - order to pay the 8 weeks here
 - s87(3) - ER/EE can appeal award to Umpire - ER appeals here
 - s95(2) - Time limit - written notice of appeal must be filed w/i 21 days
 - Must be in form of certificate - s112(4)(b)
 - Process of Appeal - s98-s102
 - s98 - Fair process - each party must be given a chance to present their case and to respond - right to counsel for assistance - impartial arbiter
 - Form of Award - s104(1) - decision must be in writing
 - s107(3) - There is no appeal of an Umpire's award
- Issue
 - Do you require mitigation for statutory minimums to be awarded?
- Discussion
 - No. **You do not require mitigation for statutory minimums to be awarded.**
 - Contractual damages ARE subject to mitigation, statutory entitlements ARE NOT

Wong v. Shell Canada, 1995 ABCA

- Key Takeaway
 - Know the advantages to choosing one forum over another.
 - Issue Estoppel - to determine the applicability of issue estoppel
 - 1) SAME ISSUE has been decided in a prior judicial decision
 - 2) That the judicial DECISION which is said to create the estoppel was FINAL; and
 - 3) That the PARTIES to the judicial decision are the same persons as the parties to the proceedings in which the estoppel was raised
- Facts
 - EE terminated by ER for what ER thought was just cause (breached conflict of interest policy by becoming a Director in his wife's company)
 - EE brought complaint under ESC seeking ESC minimum. ESC Officer who investigated felt ER had just cause for dismissal and denied the EE minimum ESC notice.
 - EE appealed under s. 88, Director also agreed - s88(5) there is no appeal of a decision of the Director if ruling is that EE is not entitled to earnings
 - EE could have filed an application for judicial review, however, EE sued for wrongful dismissal under CL.
- Issue
 - Can Wong have another kick at the can by suing in CL? Does issue estoppel applies?
- Discussion
 - Issue estoppel - available where the question has already been answered. Promotes finality of the issue, because it would waste the court's time and the parties' resources.
 - TEST FOR ISSUE ESTOPPEL - to determine the applicability of issue estoppel:
 - 1) SAME ISSUE has been decided in a prior judicial decision
 - 2) That the judicial DECISION which is said to create the estoppel was FINAL; and
 - Was the decision final for the purpose of the ESC?
 - 3) That the PARTIES to the judicial decision are the same persons as the parties to the proceedings in which the estoppel was raised
 - In this case, it was the same question (whether Shell had just cause for dismissal), was decided in an earlier proceeding involving the same two parties. By clear legislative provision, the

decision on review is final and binding on the EE. **The decision of the review officer is a final judicial decision and the principle of issue estoppel applies.**

- You don't have to exhaust the appeal process for something to be a final decision. Rather, the decision must simply be binding on the parties.
- Don't need to exhaust all your internal appeals, just as long as the decision is final will give rise to issue estoppel. Therefore, CL claim cannot proceed.
- Held - ruling for ER - issue estoppel prevents the case from being litigated in court

Bringing Employment Complaints - Whether to bring Complaint under ESC or in Court

- Advantages to ESC
 - Process can be done w/o counsel - relatively less expensive
 - Speed of resolution is generally faster
 - Officer has specialized knowledge
 - Mediation and investigation does not require special rules of evidence
- Disadvantages to ESC
 - Amounts recovered are limited under the ESC - cannot get CL damages in ESC hearing - no entitlements to punitive, aggravated damages
 - Shorter limitation period under ESC - 6 mos
 - Lack of legal expertise by employment standards officer can cause problems where issue is legally complex
 - May exhaust appeal process without being able to present evidence - ie officer refuses to hear complaint, Director refuses to hear complaint, Umpire refuses to hear complaint

Danyluk v. Ainsworth Technologies Inc., 2001 SCC

- Key Takeaway
 - Modifies the *Wong* issue estoppel test - original steps are right, but adds an additional step which provides deference to courts to ensure that justice is done.
- Facts
 - EE claimed she had not been paid \$300k in commissions and filed a complaint under ESA. ER wrote EE rejecting her claim for commissions and took the position that she had resigned.
 - ESC officer spoke w/ EE, and six months after filing complaint under ESA, there was no ESC decision. EE commenced a court action for wrongful dismissal and claimed the unpaid wages and commission that were already under subject matter of ESC claim.
 - Then ER sent documents to ESC Officer substantiating its claims. However, EE did not know about this and did not see the documents. Then ESC officer advised ER, but not EE that she had rejected EE's claim for unpaid commissions. At the same time, ordered ER to pay two weeks in lieu of notice. Ten days later, ESC officer tells EE this and that EE could apply to the Director for the review of the decision.
 - EE decides to carry on her wrongful dismissal action in the courts. ER claims issue of estoppel barred the claim for unpaid wages and commissions.
- Discussion
 - On the matter of Issue Estoppel:
 - Same Question Has Been Decided?
 - Yes, same question of \$300,000 in unpaid commissions
 - That the Judicial Decision Which is Said to Create the Estoppel was Final
 - Decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of giving rise to estoppel.
 - That the Parties to the Judicial Decision were the Same Parties in which Estoppel was raised
 - Yes
 - Conclusion: Preconditions to issue estoppel are met in this case.

- SCC found other considerations for the matter of issue estoppel:
 - *Wording of statute from which the power to issue the administrative order applies* - EE commenced her civil action against ER before the ESA officer reached a decision and this was authorized by statute.
 - *Purpose of legislation* - Purpose of the ESA is to provide a quick and cheap means of resolving employment disputes. Putting excessive weight on ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full scale trial type offence and defence, thus defeating the expeditious operation of the ESA scheme as a whole. Would undermine fulfilment of purpose of the legislation.
 - *Availability of appeal* - EE had no right to appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her
 - *Safeguards available to the parties in the admin procedure* - Quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may be inadequate to deal w/ complex issues of fact or law. EE has breach of natural justice.
 - *Expertise of the admin decision maker* - ESA officer was non-legally trained individual to decide a potentially complicated issue of contract law - \$300k is SIGNIFICANT! Need a judge, not just an officer.
 - *Circumstances giving rise to the prior admin proceedings* - she invoked ESA procedure of personal vulnerability w/her dismissal looming but including her \$300,000 claim must shoulder at least part of the responsibility for resulting difficulties.
 - *Potential injustice* - claim to commissions worth \$300,000 has never been properly considered and adjudicated.
- On the balance of these factors, although there was a prima facie case for applying issue estoppel, the SCC used its **discretion** to refuse to apply issue estoppel and allowed litigation.
- Ratio - SCC stated that court retains discretion to grant estoppel or not based on fairness b/c it's an equitable remedy
 - Adams - doesn't overturn *Wong*, but likely a matter will be estopped if you start under ESC and go under CL.
- EXAM QUESTION - choosing your forum - ESC vs CL
 - Where the dollars and complexity are high, go to CL!

Gordon v CAM Distributors Ltd, 2002 ABQB

- Key Takeaway
 - You cannot claim CL damages under the ESC - if you make a claim under the Code you are limited to the remedies available under the Code.
 - This case asks the reverse question - can you claim statutory remedies in a civil claim? Yes - s83(b) expressly contemplates such an action
 - EE is statutorily entitled to OT pay under ss21-23, but can seek a civil remedy for that statutory right under the CL because of s3 and s83
- Facts
 - EE wanted overtime pay, which ER did not want to give because the only right to compensation for overtime came from the Code and the Code said ER did not need to pay overtime. EE claimed that the Code is not exhaustive wrt EE's remedies and EE can bring an action in Court.
- Issue
 - Can EE go through the courts to get his remedy?
- Discussion
 - EE chose to proceed through the Courts because the Code limited his recovery to six months from the termination of employment (s90(4)) while the claim for overtime pay goes back about two years.

- EE argued that s83 gave him the option to proceed under the Code or through the Courts. s83(b) expressly contemplates that there could be more than one avenue pursued in s21 of ESC.
 - Court agreed with this agreement - action in the court is expressly contemplated by s83
- It is worth noting that under the ESC Regulations, Manager/Supervisory EEs are exempted from the overtime provisions under ss21-23
 - EE's contract says he is a manager, but we must look at his actual job and the surrounding circumstances. (Why did he get his remedy here?)
- Held - ruling for EE

Vrana v Procor, 2004 ABCA

- Key Takeaway
 - How do you layoff an EE under ss62-63 - reads in a specific technical requirement to properly invoke it - must be specifically cited and the 60 day requirement must be clearly noted
- Facts
 - EE was temporarily laid off, but none of the EEs was ever recalled to work.
 - ESC Provisions
 - s62 - If an ER wishes to maintain an employment relationship without terminating the employment of an EE, the ER may temporarily lay-off the EE
 - s63(1) - on the 60th consecutive day of temporary layoff, an EE's employment terminates and ER must pay the EE termination pay on that day.
 - EE served a statement of claim for wrongful dismissal approx two weeks prior to expiry of the 60 day period. ER believed this constituted repudiation of the employment contract, and did not believe it had to pay damages in lieu.
- Issue
 - Does serving a statement of claim before 60 days constitute a repudiation of the contract?
- Discussion
 - Note - Layoffs are not allowed under common law, because permitting them would violate a fundamental term of the employment contract - ie continuous work for continuous pay
 - Thus, ESC imputes the right to layoff on ERs un ss62-63
 - ER argued that by serving a claim for wrongful dismissal prior to the end of the 60 days, the EE had repudiated of the employment contract.
 - EE countered that **s3 states that "nothing in this act affects any civil remedy of an EE or ER" - thus, s63(1) does not prevent him from seeking an action for wrongful dismissal - also, the purpose of the Act is to protect EEs (*Machtiger, Rizzo, etc*) and thus we should prefer the interpretation that provides choice to the EE to seek a remedy of their choosing.**
 - Adams suggests ER could have countered that such an interpretation of s3 would totally abrogate the purpose of s63 - every EE being laid off could consider himself constructively dismissed
 - ABCA decided that serving a statement of claim before the 60 days did not constitute a repudiation of the contract. During the 60 day period, EE's life is put economically and legally on hold. No notice was given of the temporary layoff was given.
 - EE's action was based on the understanding that ER had constructively dismissed him, and since ER did not provide the required notice to EE, it would be unfair in the circumstances to treat EE's issuance of the statement of claim as repudiation of employment contract. The real problem is that ER did not provide the required notice to EE.
 - If you want to lay off an EE, in order to be in accordance with *Vrana*, you must provide a letter which sets out the exact timing, the precise relevant sections of the Code.

agrees that he/she will NOT receive recognition or credit from the Corporation for his/her past service with [Vendor], aside from any statutory entitlements the EE might have.”

- In the event that the above clause is added to the employment contracts of any EEs that are hired by the new entity and the EEs have been made aware of the clause and its ramifications, it should avoid the additional common law notice required for EEs for past service with the Vendor in an asset transaction. However, the Purchaser and the EEs cannot contract out of the minimum severance standards outlined in the ESC, nor from s5 which deems continuous service for the purposes of the ES Code

- Held - ruling for ER

Cathedral Village Restaurant v McLeod, 2008 SKCA

- Key Takeaway

- Facts

- EE went on maternity leave, and while she was gone, ER appointed another EE to the position of GM. The EE on maternity leave claimed she would have been appointed the position but for her absence on maternity leave.
- EE brought a civil action against the ER claiming constructive dismissal, and alternatively, breach of ss. 26, 27 and 29 of the *Act*; and in the further alternative, breach of s. 16(1) of *The Saskatchewan Human Rights Code*.
- TJ found that EE had not been constructively dismissed, but that the ER's appointment of another EE to the position of GM amounted to discrimination on account of pregnancy contrary to s27 of the *Act*, and awarded damages equivalent to five months of salary. In finding liability on the basis of discrimination because of pregnancy, when the EE was no longer pregnant, but absent on maternity leave, the TJ reasoned as follows: "The plaintiff must establish that her pregnancy, and by necessary implication her maternity leave, had a bearing on the board's decision not to appoint her to the position of general manager"

- Issue

- Whether the ER violated the provisions of the *Labour Standards Act* (SK) by appointing the other EE to the GM position.

- Discussion

- SKCA held that the TJ erred in finding the terms "pregnancy" and "has applied for maternity leave" as used in s27 by necessary implication applied to the EE when she was no longer working because she had commenced her maternity leave and was no longer pregnant because the child had been born and that s27 applied to the EE in this case.
 - A reading of ss26 and 27 together makes it clear that s27 applies while an EE is pregnant, disabled by pregnancy or has applied for maternity leave, while s26 applies when the EE in fact takes her maternity leave. S27 provides a complete statement of the obligations of the ER during the EE's pregnancy, while s26 provides a complete statement of the obligations of the ER during, and upon the completion of the period of maternity leave.
- On the facts as found by the TJ, the ER met all of its obligations under ss26 and 27. And, it should be noted that the obligation under s26, preservation of the position of the EE for a considerable amount of time with all seniority rights, is an onerous obligation, one which the ER in this case honoured.

- Held - Ruling for ER

- Note - AB ESC s45 - A pregnant EE who has been employed by an ER for at least 52 consecutive weeks is entitled to maternity leave without pay.
 - This seems to impart a really onerous weight on EE that they must be employed for a full year. This is weird legislation
 - This section is balanced out by s7 of HRA that prevents discrimination on basis of pregnancy

EMPLOYMENT - HUMAN RIGHTS IN THE WORKPLACE

British Columbia v BCGSEU, 1999 SCC - aka *Meiorin* Grievance

- Key Takeaway
 - Discrimination and bona fide occupational requirements
 - Example - you can terminate someone with a disability, but you cannot terminate them because of the disability - is this right?
- Facts
 - EE was employed as a firefighter by the ER. Three years after being hired, the ER adopted a series of fitness tests that all EEs were required to pass. She passed all the tests except for one that required her to run 2.5 km in 11 min. After four attempts, her best time was 11:49. As a result, she was fired.
- Issue
 - Whether the government improperly dismissed Meiorin from her job as a forest firefighter?
- Discussion
 - SCC found that although the fitness tests had a valid purpose of ensuring safety, the research that the tests were based on was incomplete and "impressionistic" and did not take into account the differences between men and women in establishing a standard.
 - To reach this conclusion, SCC examined previous methods of analyzing Human Rights violations, noting where they were deficient, and then proposed a new *Meiorin* Test.
 - STEP ONE - Is There Prima Facie Discrimination?
 - Is there a distinction based on a protected ground denying some benefit or advantage? - point to a directed ground in the Code.
 - Onus is on complainant to show that there is prima facie discrimination.
 - STEP TWO - An ER can justify the impugned standard by establishing on the BoP:
 - 1) That the ER adopted the standard for a purpose **rationally connected** to the performance of the job
 - In practice, this step has been shown to be easily satisfied. It is mostly used to motivate the parties to identify what the general purpose or goal of the standard is, and will only fail in the most egregious cases.
 - 2) That the ER adopted the particular standard in an **honest and good faith belief** that it was necessary to the fulfilment of that legitimate work-related purpose
 - This step addresses the subjective element of test. Though it is not essential to the determination of a BFOR it captures many "direct discrimination" cases.
 - 3) That the standard was is **reasonably necessary** to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to **accommodate** individual EEs sharing the characteristics of the claimant without imposing **undue hardship** upon the ER.
 - This step is the most decisive of them all. ER must show that reasonable alternatives and accommodations have been looked into and reasonably dismissed due to "undue hardship".
 - The term 'undue' infers that some hardship is acceptable - only 'undue' hardship that satisfies this test. The exact measurement of undue hardship is the combination of a variety of factors - proof of undue hardship is entirely fact based and highly circumstantial
 - Factors that can be used to demonstrate undue hardship
 - Cost - not absolute cost, but relative cost - small ER in a more difficult position than a large ER - from *Honda*
 - Changes in routine or structure
 - EE morale

- All of these factors on their own are not likely sufficient to constitute undue hardship, but if they are sufficiently extreme or substantial in combination, they may constitute undue hardship
- Six lines of inquiry to consider:
 - Has ER investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
 - If alternative standards were investigated and found to be capable of fulfilling the ER's purpose, why were they not implemented?
 - Individuality of DTA - Is it necessary to have all EEs meet the single standard for the ER to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
 - Is there a way to do the job that is less discriminatory while still accomplishing the ER's legitimate purpose?
 - Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
 - Has EE assisted in the search for possible accommodation?
- Note - Duty to Accommodate is PROCESS BASED - find the process, stick to it, work with EE to develop the process - INDIVIDUAL ASSESSMENT - must tailor accommodation to fit that EE, there is no generic approach to accommodation, although at a basic level, an ER can have a generic accommodation policy
- p66 - look at this - PROCESS of Accommodation matters - need to be innovative but practical
 - ER must be prepared to think outside their own box - can't rely on "this is the way we've always done things"
 - Look at the individual specific circumstances of the EE - not a one-size-fits-all approach
- SCC determined that the aerobic standard was prima facie discriminatory, and the Gov't had failed to establish that it is a bona fide occupational requirement (BFOR). The ER was unable to meet the Reasonable Necessity step because the standard relied upon was not sufficiently based in fact.
- Held - ruling for EE - ER standard was discriminatory - EE reinstated

Hydro Quebec v Syndicat des employes de techniques professionnelles, 2008 SCC

- Key Takeaway
 - Shifting of the focus from when an ER has a duty to accommodate to what is the line b/w hardship and undue hardship - if *Meiorin* was on the DTA side, *Hydro Quebec* is on the undue hardship side
 - The duty to accommodate does not distort the contract of employment and in particular, the EE's duty to perform his or her tasks through regular work attendance. The ER does not have the burden to establish that it is absolutely impossible to accommodate the EE or that the EE is totally disabled on a permanent basis. Also, SCC affirms that the ER does not have to fundamentally alter existing conditions of employment in the workplace.
 - The duty to accommodate remains an individualized duty and that ERs must always take into account the particular circumstances and specific characteristics of each situation.
 - Point of undue hardship is where EE can no longer perform the basic functions of his job
 - An ER faced with a case of excessive absenteeism can take the entire situation into consideration, including the disabled EE's record and all of the efforts already made in assessing its duty to accommodate.
- Facts

- Unionized EE suffered from a number of physical and mental conditions that caused her miss work on a regular basis. EE's record showed that she had missed 960 days of work over the last 7.5 yrs.
- ER had made several unsuccessful attempts to adjust EE's working conditions so that she would be able to perform her work.
- At the time of her dismissal on July 19, 2001, EE had been off work for over 5 mos, and her treating Doc had recommended that she remain off work for an indefinite period. In addition, the company's psychiatrist was of the opinion that the EE would not be able to return to work on a regular and continuous basis without continuing to have a significant attendance problem.
- EE was dismissed, and Union filed a grievance
- Arbitrator dismissed her grievance on the grounds that he did not believe the EE would be capable of performing regular and consistent work for the foreseeable future and that the solutions proposed by the union constituted undue hardship.
- QBSC dismissed Union's application for judicial review. However QBCA allowed the appeal and reversed arbitrator's decision.
- Issue
 - What is the standard for proving undue hardship? What is the appropriate time for assessing whether the duty to accommodate has been met?
- Discussion
 - Standard for Proving Undue Hardship
 - SCC held that the ER is not required to prove that it is impossible to integrate an EE who does not meet its attendance standards, but only that doing so would result in undue hardship. What constitutes undue hardship can take as many forms as there are circumstances.
 - Therefore, SCC denounced the approach effectively requiring the ER to prove the EE's total unfitness for work to discharge its burden - "the purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship."
 - According to SCC, the duty to accommodate cannot have the effect of completely altering the essence of the employment contract.
 - As such, the test is not whether it is impossible for the ER to accommodate the EE's characteristics. Moreover, the ER is not required to change working conditions in a fundamental way, but rather to adjust the EE's existing working conditions or duties, provided that this can be done without causing the ER undue hardship.
 - "Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the EE a variable work schedule or lighten his or her duties - or even authorize staff transfers - to ensure that the EE can do his or her work, it must do so to accommodate the EE. ...However, in a case involving chronic absenteeism, if the ER shows that, despite measures taken to accommodate the EE, the EE will be unable to resume his or her work in the reasonably foreseeable future, the ER will have discharged its burden of proof and established undue hardship."
 - In all cases, if, despite the measures taken by the ER, the EE remains unable to perform his or her fundamental duties for the reasonably foreseeable future, the ER will have established undue hardship and will be justified in terminating employment. In other words, **"The ER's duty to accommodate ends where the EE is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."**

- Time of Accommodation
 - SCC also held that QBCA also erred when it held that the duty to accommodate had to be assessed at the point where the decision to terminate is made.
 - Rather, SCC opted for a global evaluation of the duty to accommodate that takes into consideration the entire duration of the EE's absence.
 - SCC also rejected the 'compartmentalized approach', especially given that, in this case, the ER had implemented a number of measures to accommodate the EE, which ultimately proved unsuccessful. All of these measures had to be taken into consideration.
- SCC therefore allowed the appeal, the arbitrator's initial decision.
- Held - ruling for ER - point of undue hardship met
- NOTE - Adams believes this seems to drift pretty far from *Meiorin*,
 - Adams believes there needs to be both a PAST and a FUTURE - "The past must mirror the foreseeable future" - ie if the EE has been accommodated and imposed a hardship due to a disability in the past, and seems likely to remain for the foreseeable future, accommodation may impose an undue hardship.
 - Undue hardship cannot be based on discriminatory grounds

Vantage Contracting Inc v Marcil, 2004 ABQB - perceived disability

- Key Takeaway
 - EE in raising an HR complaint can rely on multiple grounds of discrimination (ie age and disability) in bringing the complaint - ie an 'intersection of grounds'
 - Perceived Disability is still a disability - Don't need actual disability, only need perception of disability because the effect of discrimination still flows from that perception. Therefore, need to add perceived disability as an enumerated ground for discrimination.
- Facts
 - EE was a journeyman and was 68 years old, he suffered an accident at work in late Oct 99. He was hospitalized for 11 days and was further required to be off work until Feb 18, 2000, when he was deemed fit to work by WCB. ER terminated his employment on Feb 23, 2000.
 - EE submitted a complaint to the HR Commission on the grounds of age and physical disability. Panel upheld his complaint.
 - ER appealed from Human Rights Panel.
 - *Alberta Human Rights, Citizenship, and Multiculturalism Act* s37 gives right to appeal, not merely judicial review.
- Discussion
 - ABQB upheld the panel's decision - ER discriminating against EE b/c of his age and perceived disability was not permissible. **Mere business considerations cannot override Human Rights legislation.**
 - Note - time b/w complaint and hearing was 3 years, which shows that tribunals are not any faster than court process
 - ER was unable to present any evidence justifying termination of the EE, so on the facts ABQB assumed the ER was discriminatory - Reversed onus of proof
 - Perception of Disability - Code is designed to capture erroneous perceptions. If ER is terminating EE bc ER believes he has an injury and is not suited for work, even if EE doesn't have that injury, he is still discriminated against. **Don't need actual disability, only need perception of disability because the effect of discrimination still flows from that perception.** Therefore, need to add perceived disability as an enumerated ground for discrimination.
 - Remedy
 - s34 - remedy limited to two years from date of complaint
 - Damages awarded is NOT reasonable notice, b/c it doesn't create a disincentive for the company to not discriminate because they should award reasonable notice anyway

- Can also award special damages for injury to self-respect and dignity - not subject to mitigation
 - Court also has power to reinstate the EE into their former position
- Held - Ruling for EE
 - NOTE - in deciding whether to advance a claim under HR legislation or Employment legislation, look to the remedial provisions of both Acts. **The most likely approach EE will take is to bring a civil claim seeking *Honda* damages, if the evidence is available to backup such a claim.

Brewer v FMC LLP, 2006 ABQB

- Key Takeaway
 - Lessons here for both EEs and ERs - seems like it could have gone either way
 - ERs - the process of accommodation is important - cannot simply abandon a process that has been worked on for some period - don't have to follow all advice of a doctor, but must have some reason, likely based on UDH for not following that advice
 - EEs - should provide some access to doctors so that the medical issues can be properly assessed - EEs must cooperate in the process
 - Keep in mind the competing rights b/w EE (privacy, accommodation) and ER (info necessary to accommodate and operate business)
 - Lack of firm diagnosis does not mean that something cannot be captured as a physical disability
- Facts
 - EE had multiple chemical sensitivities. ER accommodated prior to 2001. Despite those steps, she was still affected. EE asked ER to bring specialist to assess her workplace to determine if further reasonable steps to accommodate her might be taken. ER agreed to that proposal. Doctor inspected EE's workspace and made specific recommendations. EE requested some of them to be implemented. Before there was implementation of Doc's recommendations, EE was moved to newly renovated workplace, which made her symptoms worse and left after two days.
- Issue
 - Whether ER's efforts to accommodate EE were adequate?
- Discussion
 - This was a judicial review of Director's decision. Thus, standard of review is reasonableness
 - Is Environmental Sensitivity a protected condition under the Code?
 - s44(l) - Physical Disability - means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing...
 - Highly inclusive definition
 - Also, Act should be given a purposive interpretation - purpose is EE protection
 - **Lack of firm diagnosis does not mean that it is not captured as a physical disability**
 - Definition does not say that the disability needs to be diagnosed and Director was incorrect on point of law.
 - Therefore, EE should be protected under the Code.
 - Apply *Meiorin* Test
 - What is the workplace standard that is discriminatory toward EE?
 - That EE come to work - this EE is having trouble meeting that standard, but it is still discriminatory insofar as some people have more difficulty reaching it.
 - Therefore, there is prima facie discrimination, that engages the DTA
- Rational Connection - Yes
- Honest and Good Faith Belief - Yes.
- Impossible to Accommodate w/o imposing undue Hardship
 - Without taking any position on the reasonableness of Doc's recommendations, and w/o responding to EE's request that some of them be implemented, and w/o further consultation w/ EE, ER determined her work assignment would be changed. ER

expected EE to return to work to try out environment that accompanied new assignment w/o any prior assessment being obtained as to whether the move would be a reasonable substitute for the measures the Doc had recommended.

- ER appears to have abandoned the course of action to which it had initially agreed. After the recommendations were made, ER completely ignored them. ER did not say they were unreasonable or too costly. They just didn't respond. To expect EE to participate in this experiment when there had been no satisfactory conclusion to the course of action previously agreed, and no explanation as to why ER was abandoning the course of action, was unreasonable.
- EE denied access to her Doc when there was ER investigator. However, it was held, that in these circumstances, it was not appropriate to draw an adverse inference from her refusal to consent to direct exclusive access.
- ABQB held that the dismissal of the complaint by the Director was not unreasonable. The Director had held that the EE's refusal to cooperate with the investigator by providing medical records was detrimental.
- ABCA, however, held that the QB judge held the case to too stringent a standard of review - ER's failure to participate in the process of accommodation was not reasonable.
- Held - Ruling for EE - ER's accommodation efforts were not adequate

Richards v Canadian National Railway, 2010 CHRT - re: Family Status

- Key Takeaway
 - Requests for accommodation on the basis of family status should be treated in the same way as requests for accommodation based on other protected grounds. When an EE raises a concern about conflict between work and family obligations, talk with the EE. Find out the employee's particular problems and needs. If it appears to be a situation that could require accommodation, consider and discuss possible forms of accommodation.
 - Cannot contract out of your Human Rights. HR Code supersedes contract
- Facts
 - EE was asked by ER to move across country as per terms in the Collective Agreement. EE stated that her children were in school and she had a child custody arrangement with her former spouse, and thus could not move. EE argued that if ER forced her to move it would be discrimination on the basis of family status.
 - Note - federally regulated EE
- Discussion
 - Family status is an enumerated ground in the Code. In addition, the Act is intended to be given a broad, purposive interpretation, and EEs should be protected
 - CHRT concluded that the EE had duties and obligations generally incurred by parents and as a consequence of those duties and obligations, the EE, because of CNR's rules and practices, was unable to participate equally and fully in employment with CNR. As such, EE had established a *prima facie* case of discrimination, and thus CNR had the DTA to the point of undue hardship.
 - Family Status, like all other grounds, should be approached with *Meiorin* Analysis
 - What is the workplace standard that is affecting the EE? - the req't that EE's relocate to address manpower shortages
 - Onus shifts to ER to show that standard is a BFOR - process, process, process
 - Rational Connection
 - Good Faith
 - Was there Undue Hardship
 - CHRT was unimpressed with CNR's efforts at accommodation. CNR had not taken the EE's concerns seriously, failed to meet with her, failed to address her letters, hadn't followed CNR's

own accommodation policies, and had treated family status accommodation as a lesser type of accommodation than accommodation for other grounds protected by human rights legislation.

- As a result, the EE was successful, and the CHRT granted substantial remedies. The EE was awarded reinstatement, compensation for lost wages back from the date of reinstatement (5 yrs), \$15,000 in compensation for pain and suffering, and \$20,000 in compensation for willful or reckless conduct. Also, CHRT ordered CNR to review its accommodation policy.
- Held - ruling for EE

Alberta (Human Rights & Citizenship Commission) v Kellogg Brown & Root Co, 2007 ABQB

- Key Takeaway
 - Human rights protection does not apply to recreational use of drugs or alcohol
 - If an EE is not addicted, and there is no perception of addiction, drug testing policies are not discriminatory - ie you're better to be an addict than a recreational user.
 - Also, ABCA diverged from ONCA decision in *Entrop* with this decision
 - Drug testing is prima facie discriminatory with respect to addicted persons
- Facts
 - KBR was a construction company for the oilfield industry. KBR's hiring policy required all persons seeking non-unionized positions at KBR to take and pass a post-offer/ pre-employment drug test before they would be hired. If the prospective EE failed the test, he or she would not be hired. EE was hired and ended up failing the test.
- Issue
 - Does the KBR drug testing policy discriminate against casual cannabis users based on perceived disability?
- Discussion
 - ABCA stated that there was no evidence that EE was addicted to marijuana or that his termination by ER was based on a perception that he was addicted to marijuana. Given these findings, ABCA determined that the ER policy could only be discriminatory if the effect of it was that anyone testing positive was perceived as addicted and therefore disabled.
 - As to the purpose of the KBR policy, the Court of Appeal stated that the purpose of the policy was to reduce workplace accidents by prohibiting workplace impairment. There was a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict. To the extent that this conclusion is at odds with the decision of the Ontario Court of Appeal in *Entrop* ... we decline to follow that decision.
 - In speaking of the interaction between human rights legislation and workplace safety, the Court of Appeal stated that the *Act* prohibits certain, but not all, treatment based on human characteristics as discriminatory. The jurisprudence has extended the prohibited grounds to include instances where an ER incorrectly perceives that an EE has a prescribed disability. In this case the ER's policy does not perceive EE to be an addict. Rather it perceives that persons who use drugs at all are a safety risk in an already dangerous workplace. Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic.
 - As there was no discrimination, the ABCA did not consider all of the arguments raised in the appeal.
- Held - Ruling for ER, no discrimination