(a) Introduction

Ontario, and Canada for that matter, are not “at will” jurisdictions. Terminated employees enjoy a considerable array of recourse and remedies.

The Supreme Court of Canada has stated:

…not only is work fundamental to an individual’s identity, but also the manner in which employment can be terminated is equally important [Machtinger v. HOJ Industries Ltd. (1992) 40 C.C.E.L. 1]

As a matter of public policy, the common law, and the courts that interpret and enforce its precepts, has developed over the last few decades so as to afford terminated employees greater recourse against their former employers. The basic right, as noted below, is the entitlement to fair notice of termination or, more commonly, reasonable notice in lieu thereof, the proverbial severance package. The law has, however, developed and become more sophisticated and attuned to the fact that the harm arising from a termination of employment gone bad can, and often will, extend far beyond a traditional severance package, which is intended to assist a terminated employee in transitioning to comparable employment.

This development in the common law, has lead the courts to a series of “extraordinary damages”, discussed below, which are fundamentally intended to compensate aggrieved, terminated employees who are mistreated during the course of termination or thereafter, or punish the egregious acts of their former employers.

In order to properly understand the context of these developments, however, a brief survey, or introduction, to the common law precepts associated with termination of employment in Ontario, and Canada, is required.

(b) The Concept of Reasonable Notice

The history of the common law principle that a contract of employment for an indefinite period is terminable only if reasonable notice is given, traces to 1562, and the Statute of Artificers. That
statute prohibited employers from dismissing their servants unless sufficient cause had been shown, before two justices of the peace.

Today, in common law jurisdictions such as Ontario, so long as an employer is not alleging cause for termination, nor violating the human rights of the individual being terminated, it is at liberty to terminate the employment relationship for virtually any reason, on a “without just cause” basis. This would include termination for purposes of reorganization, restructuring, downsizing, poor fit or a simple unwillingness to deal with performance issues. Employers enjoy the luxury of invoking the decision to terminate employment, without cause, but it comes with a price tag.

The employer terminating without just cause is obligated to provide the employee with either reasonable advance notice of termination, or commonly, reasonable compensation in lieu thereof, in the form of a severance package. The determination of what, in any given circumstances, will represent fair compensation in lieu of notice, or severance, is unscientific, but typically based upon the principles set out in Bardal v. Globe & Mail (The) [1960] O.W.N. 253, in which the concept of reasonable notice is linked to several variables, including “the character of the employment, the length of service of the servant, the age of the servant, and the availability of similar employment”.

Myths abound as to principles on which notice periods are calculated in any given circumstances, including the most popular one month per year of service, but the courts dismiss these as unreliable and inappropriate. Typically, the courts accept that 24 months is the upper end of a notice period, although several cases have involved notice periods in excess of 24 months, but ultimately the determination of what is appropriate notice in any given circumstances is an individual determination.

On a termination without just cause, the terminated employee is entitled to be compensated, as if he or she had worked through an appropriate notice period, subject to the duty to mitigate damages. The duty to mitigate requires that a terminated employee, regardless of the reason for termination, use diligent efforts to attempt to seek other forms of employment, and employment income, as a means of mitigating what would otherwise be the economic loss flowing from the termination through a fair notice period.
Although beyond the scope of this paper, the employment relationship can also end, and effectively be terminated without cause, as a constructive dismissal. This is a dismissal where the employer does not expressly terminate the relationship but, rather, unilaterally invokes one or more fundamental changes to the existing terms and conditions of the contract of employment, such that by its actions or behaviour the employer constructively breaches the contract of employment. The employee who is subject to such unilateral action may treat the contract of employment as having been terminated, and invoke the same recourse as if he or she had been terminated, without just cause.

(c) Termination for Just Cause

In certain, but rare circumstances, an employer may have just cause to terminate an employee’s employment. This is known colloquially as the “capital punishment” of employment law, since an employer who possesses just cause for termination has no obligation to provide either notice, or compensation to the terminated employee.

The employer, however, bears the onus of establishing that it has just cause for termination. Examples of the kind of misconduct which may, in the right circumstances, constitute just cause for termination include but are not limited to theft, dishonesty, conflict of interest, gross insubordination, fraud, misappropriation of property, or significant deficiencies of performance (typically with warnings preceding termination for cause).

The Supreme Court of Canada has weighed in on the subject of what an employer must establish in order to meet the onus of termination for just cause in McKinley v. BC Tel [2001] S.C.J. No. 40. In that case the court essentially held that an employer seeking to discharge the onus of proving just cause must pass a two step test. First, the employer must establish an evidentiary basis for the misconduct or misbehaviour which it alleges took place. Then, that misconduct or misbehaviour is, essentially, weighed in the context of the totality of the individual’s employment relationship, so as to determine whether the “punishment fit the crime”. The court noted that certainly not all forms of misconduct or misbehaviour are deserving of termination for just cause. There are many forms of lesser discipline or sanctions which may be more appropriate, and therefore ought to have been invoked before termination for just cause.
The net result, is that most employment terminations do not provide adequate circumstances for an employer to successfully allege and prove that the termination was for just cause. Likely the policy consideration which comes into play is the fact that the consequence of a just cause termination is that the former employee is discharged with neither advance notice of termination, nor any compensation in lieu thereof. The severe consequences of an employer successfully establishing just cause for termination, in turn raise the bar or threshold that employers must meet in order to successfully prove cause for termination.

As a result, in most circumstances plaintiffs are entitled, either because they were terminated without cause or, alternatively, because their employer will be unlikely to successfully establish just cause for termination, to fair compensation in lieu of notice. While there are circumstances in which employers can and will prove cause for termination, the longer the service of the employee, generally speaking, the more reluctant a court will be to see that employee not only without future, gainful employment with the employer, but also without a severance package to bridge them to comparable employment.

(d) The *Canada Labour Code*

Briefly, it should be noted that there are certain employers who fall under the jurisdiction of the *Canada Labour Code*, which provides potentially even greater recourse for terminated employees, including reinstatement, with back pay.

The category of employers that fall under the *Canada Labour Code* include the postal service, military, airlines, railway, navigation and shipping, fisheries, banking, and Indians.

Employees who work for one of the enumerated undertakings, in the right circumstances, have the ability to lodge a complaint of unjust dismissal, pursuant to the *Canada Labour Code*. The process is akin to an arbitration hearing where the onus is on the employer to either establish some jurisdictional barrier to the employee proceeding under the Code, or just cause for termination.

An adjudicator appointed pursuant to the *Canada Labour Code*, if he or she finds the dismissal to be unjust, has a wide array of remedies available, beyond that of a traditional court, including reinstatement with back pay, in order to undue the harm occasioned by the unjust dismissal.
(e) Into the Realm of Extraordinary Damages

Over the last 15 years, the Canadian courts have developed and advanced the protection of employees in their relationship with their employers. One of the major turning points in the development of the law occurred in the decision of Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701.

In analysing the paradigm of the employment relationship, and the policy considerations which in turn influence remedies available for dismissed or impacted employees, the Supreme Court of Canada observed, as follows:

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

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

This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp. 1051-52 he quoted with approval from P. Davies and M. Freedland, Kahn-Freund’s Labour and the Law (3rd ed. 1983), at p. 18:

[T]he relation between an employer an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.

The unequal balance of power led the majority of the Court in Slaight Communications, supra, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in
Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person’s employment status is bound to have far-reaching repercussions. In “Aggravated Damages and the Employment Contract”, supra, Schai noted at p. 346 that, “[w]hen this change is involuntary, the extent of our ‘personal dislocation’ is event greater.”

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In Machtinger, supra, it was noted that the manner in which employment can be terminated is equally important to an individual’s identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one’s job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

In Wallace, the court established the obligation of an employer to act in good faith and have fair dealings when terminating an employee. Jack Wallace, a 59 year old employee, was summarily terminated from his employment for performance reasons, after being the top salesman for each of his 14 years of service to the company. Wallace had been induced from his secure employment to join United Grain Growers Ltd., and promised job security until his retirement. It was upon this basis that Wallace made the decision to leave his former, secure employment.

On August 22, 1986, Wallace was terminated for his inability to perform his duties satisfactorily, an allegation that was maintained right until the commencement of trial. The termination of his employment with these allegations of cause created emotional difficulties for Wallace, and he was forced to seek psychiatric help. His attempts to locate employment were largely unsuccessful, resulting in an assignment in personal bankruptcy.

At trial, Wallace was awarded damages for wrongful dismissal based upon a 24 month notice period, as well as aggravated damages. On appeal to the Manitoba Court of Appeal the court
reversed the findings of the trial judge, and substituted a 15 month notice period. As well, the award of aggravated damages was overturned.

On further appeal to the Supreme Court of Canada, the court restored the trial judge’s award of 24 months. In so doing, the court observed:

In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

The court went on to comment that in discerning what employer conduct amounts to good faith and fair dealing in the “manner of dismissal”, that, at a minimum, employers need to be candid, honest and forthright with their employees. The court went on to observe:

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

Examples of the type of conduct which has subsequently attracted Wallace or moral damages, include:

- Allegations of theft;
- Reassurances about the future;
- Termination immediately following disability leave;
- Hiring a replacement while the employee is still working.

When the Supreme Court of Canada handed down the Wallace decision in 1997, no one could have predicted the effects this would have for wrongful dismissal actions in Canada. Having endorsed the principle of extending notice periods in circumstances where the employer had acted in bad faith, the court recognized that the termination of one’s employment may cause compensable injury, ranging from the damage to one’s self-esteem to difficulties in securing alternate employment.
Since the *Wallace* decision in 1997, the pendulum has swung back and forth. In most cases, the result was only an extension of the notice period by a few months. A study of 99 cases from across Canada in which Wallace damages were awarded from 1997 until 2005 indicated that the average increase to the notice period that would otherwise have been available to the dismissed employee was 3.4 months. None of the cases, by that time, had exceeded a 12 month increase in the notice period, save one.

The next dramatic development in the landscape of Canadian extraordinary damage awards came in the decision of *Honda Canada Inc. Keays* [2008] 2.S.C.R. 362. Keays had worked for 11 years for Honda, first on an assembly line and later in data entry when, in 1997, he was diagnosed with chronic fatigue syndrome. He ceased work and received disability benefits until 1998, when his employer’s insurer discontinued the benefits. Keays returned to work and was placed in a disability program that permitted employees to take absences from work if they provided doctor’s notes confirming that their absences were related to their disability. Honda became concerned about the frequency of Keays’ absences. Moreover, the notes which Keays offered to explain his absences changed in tone, leading Honda to believe that the doctor did not independently evaluate whether he missed work due to disability. As such, Honda asked Keays to meet with its doctor, an occupational medical specialist, in order to determine how Keays’ disability could be accommodated.

On the advice of his counsel, Keays refused to meet with the doctor, without explanation of the purpose, methodology and parameters of the consultation. On March 28, 2000 Honda gave Keays a letter stating that it supported Keays full return to work but that his employment would be terminated if he refused to meet with their doctor. When Keays remained unwilling to meet the doctor, his employment was terminated.

Keays sued and at trial was awarded 15 months compensation in lieu of notice. The trial judge held that Honda had committed acts of discrimination, harassment and misconduct against Keays and increased the notice period to 24 months, basing the incremental award on the manner of dismissal. The trial judge also awarded punitive damages against Honda in the amount of $500,000.00 which sent a seismic shock through the employment bar.

The Ontario Court of Appeal reduced the punitive damage award to $100,000.00, but otherwise upheld the trial judge’s decision. On appeal to the Supreme Court of Canada, the original 15
month notice period was sustained. On the other hand, the nine month increase in relation to the manner of dismissal was overturned by the Supreme Court of Canada. It found that in the employment law context, damages resulting from the manner of dismissal will be available if they result from the kind of circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”. The damages in such circumstances, however, should be awarded through an award that reflects actual damages, rather than by extending the notice period.

The Supreme Court of Canada also went on to observe that the awards for aggravated and punitive damages in the *Keays* decision ought not to have been made and overturned them as well. The court concluded that the employer’s conduct in dismissing *Keays* was in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal. The employer’s letter to *Keays* did not misrepresent the position of its doctors and it should not have been faulted for relying on the advice of its medical experts. There was no evidence that the doctor took a “hardball” attitude towards workplace absences or that *Keays* was being set up when he was asked to meet with the doctor. The employer’s request for a meeting between *Keays* and the doctor was held to be normal in the circumstances. Further, the court concluded that the employer’s decision to stop accepting doctor’s notes was not a reprisal for *Keays’* decision to retain legal counsel. The court also concluded that punitive damages should not have been awarded, recalling that the original award of $500,000.00 had been reduced on appeal to $100,000.00. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. It held that courts should only resort to punitive damages in exceptional cases and that the employer’s conduct in *Keays* was not sufficiently egregious or outrageous to warrant such damages. Interestingly, the court also observed that even if the facts had justified an award of punitive damages, the lower courts should have been alert to the fact that the compensatory damages already awarded carried an element of deterrence, and should have questioned whether punitive damages were necessary.

Another interesting decision in the development of extraordinary damages in Canada is *Piresferreira v. Ayotte* [2010] O.N.C.A. 384. In this case the 60 year old employee, *Piresferreira*, worked for Bell Mobility for 10 years as an account manager. She typically received excellent performance reviews. However, her supervisor, *Ayotte* was an aggressive
manager who often used temper and profanity in managing his workers. In 2004, the supervisor gave Piresferreira a critical performance appraisal. In May 2005, the supervisor criticized Piresferreira for failing to arrange a client meeting and pushed her forcefully when she attempted to show him an email. Following that event, Piresferreira took time off. When she returned to work, Ayotte refused to apologize for the incident and presented her with a performance improvement plan. Piresferreira never returned to work again. She was diagnosed with post-traumatic stress disorder and major depressive disorder. She made a formal complaint to human resources and the supervisor received a written warning. Management ultimately accepted Ayotte’s version of events.

Piresferreira sued for general and punitive damages. At trial, Ayotte, the supervisor, was found personally liable for battery and intentional and negligent infliction of mental suffering. The employer, Bell Mobility, was found vicariously liable for the torts committed by Ayotte, and directly liable for negligence and constructive dismissal. As a result, Piresferreira was awarded 12 months pay in lieu of notice, plus $40,000.00 in general damages and additional damages for lost wages, resulting in a total damage award of just over $500,000.00.

Subsequently, the Ontario Court of Appeal allowed parts of the employer’s appeal, finding that the tort of negligent infliction of mental suffering was not available against the employer and supervisor for the conduct that occurred in the course of Piresferreira’s employment, as policy reasons militated against finding that a common law duty of care was derived from the parties contractual obligation. Damages for mental distress in the employment context were already available under the Honda framework. Further, the court concluded that the trial judge erred in finding that the employee had established the tort of intentional infliction of mental suffering. It was not established that the supervisor’s conduct following the battery was undertaken with the intent to cause mental suffering or the knowledge that it would result. As a result, the trial judge had erred in the assessment of damages for battery by conflating the employee’s employment-related losses with the battery. In isolation, the employee was entitled to $15,000.00 in general damages for the battery. The 12 months pay awarded for constructive dismissal was upheld, but the additional lost wages awarded as tort damages were set aside. The court did, however, conclude that there was sufficient basis to award mental distress damages under the Honda framework, resulting in an additional $45,000.00 payable to the employee.
The debate rages on in Ontario, and Canada at large, in terms of the breadth and significance of extraordinary damage awards. Generally speaking, the trial courts have shown a propensity to react aggressively to protect employees dismissed under harsh circumstances or in a bad faith manner. Appeal courts, however, have taken a more clinical view of the legal issues and have, with some regularity, reduced significant awards made in favour of employees, perhaps to moderate the policy considerations involved and strike a more appropriate balance between the rights of employers and employees.

That said, the spectrum of torts and bases for awards of extraordinary damages in Canada is on the upswing. More and more often extraordinary damage claims are pleaded in claims brought on behalf of dismissed employees. The purpose of so doing is not limited to the prospect of recovering actual extraordinary damages at trial but, is often introduced as a plaintiff’s strategy for one or more purposes, including bringing individual defendants into the action, increasing the pressure upon employers to reach settlement, and finally for the purpose of moving a portion of the monies associated with any settlement into a more tax effective category, of general damages.

The landscape of Canadian employment law has, in the last 15 years, shown a dramatic shift towards the development of extraordinary damages. Claims for compensation in lieu of notice on a termination without cause are no longer the focal point of most employment litigation. Employers are now obliged to approach the ending of an employment relationship with greater sensitivity, always erring on the side of acting in a good faith, fair and truthful manner. The consequences of failing to do so, are ever increasing.