Common Law Obligations Regarding the Termination of the Employment Relationship: What you need to know before Negotiating the Sale/Purchase of a Business

Employment Issues arising On the Purchase and Sale of A Business

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The common law obligations regarding employees on the sale of a business can be significant. It is important for both the purchaser and the vendor to understand the nature and the amount of the liabilities to the employees when they are structuring the transaction and negotiating the terms of the purchase agreement.

Transactions are structured on a share purchase or an asset purchase basis.

In the case of a share purchase there is only a change in the ownership of the shares of the company that owned the business. This is no change in the company that owns the business itself, which has a separate existence from its shareholders. As such there is no change in the obligations owed to the employees of the business, since the employer remains the same. A purchaser, however, needs to understand and quantify those obligations. It may result in negotiations with respect to price or with respect to a sharing of the liability.

In the case of an asset purchase there will be issues as to whether or not all employees will be offered employment with the purchaser, the terms upon which employment will be offered, the nature of the obligations to employees that the purchaser incurs when hiring these employees and which party will bear the cost of any terminations of employment, prior to or subsequent to the purchase of the assets. Both the vendor and the purchaser will need to understand and quantify those obligations in order to successfully negotiate these issues.

Common Law Obligations Regarding the Termination of Employment

The relationship between an employer and its employees is a contractual one. In the case of non union employees the contract of employment with each employee is either a written or an oral contract of employment. In the absence of a written contract of employment that provides for

the notice or payment in lieu of notice on a termination of employment, and assuming that the contract is not a fixed term contract that ends on an agreed upon date, the law implies a term that the employer must provide reasonable notice of its intention to terminate the contract. [1]

In the seminal case of *Bardal v. The Globe & Mail Ltd.* [2] the Ontario High Court described the factors to take into account as follows:

> "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 the character of employment, the length of service, the age of the servant and the availability of similar employment having regard to the experience, training and qualifications of the servant."

Character of employment has been interpreted as the employee's status within the employer's hierarchy.[3] Later cases have added to the catalogue of factors by including whether the employee has been induced to leave secure employment, whether promises of job security were made and whether the termination of employment was accompanied by bad faith in the manner of dismissal.[4]

Determining what the reasonable period of notice is in any particular case has been described as "an exercise which involves more art than science".[5] There will be disagreement among judges and employment lawyers as to what is the reasonable period of notice that is applicable in any particular case. It is generally accepted that that there is a range to the "reasonable period of notice" and a trial judge's decision (which will determine the precise period of reasonable notice) will not be set aside simply because there is another result which could have been found, as long as it is within the reasonable range of notice.[6]

Although there is no maximum period of notice or any rule of one month per year of service, case law has, however, developed an upper range of reasonable notice of 18 to 24 months.[7]

In the absence of reasonable notice the employee is entitled to damages arising from the failure to provide the notice.[8] Damages will be calculated based on the loss of remuneration during the reasonable period of notice. This includes loss of salary, commissions, bonuses (subject to the terms of the bonus plan), deferred profit sharing, stock options (subject to the terms of the stock option plan), group insurance plans, group RRSP, pension plan, automobile benefits and club memberships.

Since the relationship between the parties is a contractual one the employee has an obligation to make reasonable efforts to mitigate the damages flowing from the employer's breach of contract.[9] An employee whose employment is terminated has an obligation to search for alternative employment. If alternative employment is found the earnings from that new employment during the reasonable period of notice will be taken into account in reducing the damages payable by the former employer. If the employee does not accept an offer of employment which would have been reasonable for the employee to have accepted, the employee will have failed to mitigate damages with the result that the employee's claim for damages, to the extent that it could have been mitigated by accepting the offer, will be dismissed.[10]

The Effect of Common Law Obligations regarding Employees on the Sale of a Business

In the case of a share purchase agreement the case law is clear that in the event of any termination of employment subsequent to the sale, the employee will be treated as if there had been unbroken service from the date of commencement of employment with the company, rather

than calculating the date of service from the date of the purchase of the shares of the company.[11] Therefore the Bardal factor of length of service is unaffected by the sale of the shares of the business.

An asset sale has different implications on the employer/employee relationship. Since at common law a contract of personal service cannot be assigned without the consent of both parties, a sale of the business terminates the employment contract, exposing the vendor to damages for breach of contract. If the purchaser, however, offers employment to the employee and it is accepted, there is a new contract of employment, with the result that the employee has likely mitigated any damages arising from any termination of employment by reason of the sale.[12]

What if some of the employees refuse to accept the offer of employment with the purchaser? In most cases the vendor will terminate their employment after the sale. If any of the employees then make a claim for damages for breach of contract the vendor will defend on the basis that the employee failed to mitigate damages by accepting the offer of employment from the purchaser. To the extent that the purchaser's offer of employment was on substantially the same terms and conditions as employment with the vendor the doctrine of mitigation will apply to preclude recovery, on the basis that the damages could reasonably have been avoided by accepting the purchaser's offer of employment. [13] Even if the offer is on less favourable terms than the employee's employment with the vendor, an employee who has failed to accept the offer risks the application of the doctrine of mitigation for that portion of the damages that could have been avoided.

The obligation to mitigate damages and the differing needs of the vendor and purchaser have an effect on the manner in which the transfer of employees are dealt with in an asset purchase. One way would have the vendor terminate the employment of employees that the purchaser wishes to hire prior to the close of the transaction and then the purchaser would offer employment to the employees. This would not be the preference of a vendor. Aside from immediately exposing the vendor to the termination pay and severance pay requirements of the applicable Employment Standards legislation, it also exposes a vendor to a claim for damages for an express breach of contract for failure to provide reasonable notice of the termination of employment. To the extent the employees accept employment with the purchaser the employees will have mitigated their losses, unless the remuneration offered by the purchaser is less than what they had been receiving from the vendor. Further, if the purchaser subsequently terminates the employment of any of these employees during what would have been the reasonable period of notice with the vendor, the employees may look to the vendor to recover any losses during the remainder of the reasonable period of notice.

To avoid the problems inherent in this approach, and to reduce potential liabilities as much as possible, the vendor will seek to negotiate terms which require the purchaser to make offers to all employees, prior to closing on substantially the same terms and conditions, or on no less favourable terms and conditions as were then applicable to the employees. If offers are made to the employees prior to closing and accepted by the employees there will, in effect, be a resignation from employment with the vendor and the entry into a new employment contract with the purchaser. There will be no need for the vendor to pay any termination pay and severance pay under applicable Employment Standards legislation and no breach of contract by the vendor, since there has not been a termination of employment by the vendor.

The vendor will usually seek a covenant from the purchaser that the offer of employment to employees provides a recognition for past service by the employee with the vendor. This would provide further protection to the vendor, since any calculation of the notice period subsequent to termination of employment by the purchaser would take into account the factor of service from the date of the commencement of the employees' employment with the vendor.[14]

Meanwhile the purchaser must decide how many employees and which employees it wishes to hire and must determine the potential liabilities it will incur by hiring these employees. Often the purchaser will want the workforce maintained for the continuity and performance of the business being purchased and therefore will want to make offers of employment that will likely be accepted by the employees. Sometimes the purchaser has a restructuring plan in mind subsequent to the acquisition of the business which will result in future terminations of employment. Whether it is based on the vendor's negotiating position or the purchaser's requirements, the purchaser will need to know what will be the potential cost of agreeing to hire the employees on substantially the same terms and conditions as employment with the vendor, or on agreeing to recognize past service by the employee with the vendor. The answer to this question may have a bearing on the price that the purchaser is willing to pay for the business or on the extent of the concessions it is willing to make with respect to the terms on which it will offer to hire employees of the business being purchased.

Purchasers should understand that if they contemplate a restructuring by way of changes to job positions and remuneration after the purchase of a business, whether that purchase is a share or an asset purchase, that a "constructive termination" of employment could occur. As stated in the Supreme Court of Canada decision of *Farber v. Royal Trust Co.*:

> "Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages."[15]

While more leeway is being permitted in the employer's ability to restructure its business a significant decrease in remuneration, a significant alteration in an employee's position in the employer's hierarchy and duties or a combination of a decrease in remuneration and position can result in a constructive termination of employment. However, the doctrine of mitigation may apply to require some or even all of the affected employees to work through the period of reasonable notice on the changed terms and seek damages for any loss in remuneration. [16] Some employees may accept the changes. Some employees may provide notice that they do not accept the changes and that they will work for a period of time and then seek compensation for the loss of remuneration. Some employees may commence an action for damages for the constructive termination of their employment. A prudent purchaser will seek to understand the potential termination costs of a planned restructuring in advance of the purchase. The answer may well affect whether the transaction should be structured as an asset purchase, which employees of the vendor should be offered employment and the terms on which such employment should be offered.

The manner in which purchasers attempt to determine the potential liability is through due diligence. In conducting due diligence on behalf of a purchaser for the purpose of determining

potential liability arising from expected or future terminations of employment and to determine whether the purchaser can offer employment on similar terms as employment with the vendor, the purchaser should obtain information such as:

(a) a list of the employees;

(b) the name, position, length of service, age, salary (or hourly wage), and other form of compensation (i.e. bonus and commissions) for each employee;

(c) details of any insurance benefit plans, group RRSP, Deferred Profit Sharing Plan and Pension Plan;

(d) any employment agreements with respect to any of the employees; and

(e) any change in control or golden parachute agreements.

Normally a chart format is used which lists the names of the employee, position, age, length of service, salary and amount of bonus/commission. There will be a column for "common law notice". An employment lawyer can then approximate the amount of common law notice that each employee is entitled to. For employees with contracts of employment specifying the notice required on termination of employment, the contract term will be used. Then it is relatively simple to calculate the amount of remuneration for each of the employees during the determined common law notice period. The end result will be a number that can be significant.

In reviewing contracts the purchaser should determine whether there are any golden parachute clauses in the employment contract. Golden parachute clauses provide for payments above what normally would be required in the event of termination of employment. Such clauses often

provide that in the event of a change of control of the business and a termination of employment within a certain period subsequent to the sale of the business, the employee will be entitled to a significant payment. Termination of employment is often defined to include a termination by the employee "for good reason" which results from a unilateral change in certain terms of the employment. Knowledge of the existence of this liability may affect whether these employees are hired, or whether a contemplated restructuring plan after the purchase will change in any way.

The vendor should also undergo a similar due diligence exercise, as there may be negotiations relating to shared responsibility for the costs of termination of employment. The vendor may seek indemnification for any costs or damages arising from the purchaser's termination of employees within a certain number of months after closing or the purchaser may seek indemnification for costs of termination of employees within a certain number of months after closing. Agreeing to any such indemnities without knowing the potential liabilities to employees can be a costly mistake.

Independent Contractors

During the course of performing due diligence the purchaser may be advised that a number of persons rendering services to the vendor are not employees, only independent contractors or consultants. In such case the prudent purchaser will ask for:

(a) a list of those persons that are classified as independent contractors or consultants;

(b) the length of service and particulars of the remuneration arrangements with those persons that are classified as independent contractors or consultants; and

(c) any independent contractor or consultant agreements.

The purchaser may find that the vendor has contracts describing the relationship as one of independent contractor and not employee, that remuneration is paid on the basis of invoices rendered, GST charged and no income tax withholding and that some of the payments are made to a corporation rather than to the person who is actually rendering the services.

There has been a tremendous growth in the number of self-employed workers in Canada. While some of this growth may have been attributable to worker interest in flexibility, independence and tax advantages, many employers have been interested in the flexibility and cost savings offered by these relationships. The question for the purchaser is– are any of the people providing services to the business being sold, really "independent contractors?" The follow up questions is – "does it matter?"

Who is an Independent Contractor?

Volumes have been written about the distinction between employees and independent contractors. For common law purposes, the distinction was relevant to the issue of notice of dismissal. While employees were entitled to reasonable notice of the termination of their employment, independent contractors were not entitled to notice.

Courts over the years adopted a range of tests to determine whether a person was an employee or an independent contractor. In 2001, the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada*[17] stated that while there is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor:

> "the central question is whether the person who has been engaged to perform services is performing them as a person in business on his own account. In making this determination, the level of control the employee has over the worker's activities will always be a factor. However other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker and the worker's opportunity for profit in the performance of his or her tasks."[18]

There have been many cases, including last year's Ontario Court of Appeal decision in *Braiden v. La-Z-Boy Canada Limited*, where the employer has unsuccessfully defended on the basis that the plaintiff was not an employee as claimed, but an independent contractor and thus subject to termination without notice. [19] Three examples are set out below:

(a) In *Brown v. Western Legal Publication,*[20] the plaintiff was a digest writer who had been digesting legal cases for the defendant for twenty years. He was paid a flat amount per year, without deductions and he held himself out for income tax purposes as an independent contractor. When the defendant indicated that his remuneration would be changed to piece work, which the plaintiff calculated would reduce his remuneration by almost one-third, the plaintiff accepted the repudiation of contract and commenced an action for damages. The Court rejected the defendant's position that the plaintiff was an independent contractor and found, on the basis of the traditional analysis that the plaintiff was an employee. The plaintiff had worked exclusively for the defendant, and was subject to the control of the defendant for everything except hours of work and the place where the work was done. The plaintiff used the defendant's tools and supplies. Further, he took no risk and had no ownership share. Of interest is the fact that the Court noted expressly that "the fact that the plaintiff holds himself out as an independent contractor is

not determinative of his status. The question here is whether or not the plaintiff is an employee for wrongful dismissal purposes…not for income tax purposes." Accordingly, the plaintiff was entitled to sixteen months' compensation in lieu of reasonable notice of dismissal.

(b) In *Truong v. British Columbia,*[21] the British Columbia Court of Appeal considered the case of a court interpreter who was retained over a three year period. The plaintiff was subject to a "Court Interpreters Code of Professional Conduct," which regulated various aspects of the manner in which she would perform her work. She was called in as needed, selected on a rotational basis and paid on the basis of a non-negotiable hourly basis. No deductions were made for income tax, Unemployment Insurance or Canada Pension Plan benefits and no T4 was provided to her. She deducted expenses from her income for income tax purposes as an independent contractor. Hinds J.A., writing for a majority of the Court, upheld the trial decision that the plaintiff was an employee. The court approved of the statement reached in *Brown v. Western Legal Publication* that holding oneself out as an independent contractor is not determinative of status; and

(c) In *Braiden v. La-Z-Boy Canada Limited* [22] the plaintiff had been a sales representative for the defendant for 11 years before signing an "Independent Sales & Marketing Consultant's Agreement" that stated that Mr. Braiden was not an agent or an employee. Mr. Braiden was paid solely on commissions. Subsequently, annual Independent Sales & Marketing Consultant's Agreements were signed between a company incorporated by Mr. Braiden and the defendant. The court reviewed the factors in *671122 Ontario Ltd. v. Sagaz Industries Canada* and concluded that Mr. Braiden was not carrying on business

for himself but was carrying on the business of La-Z-Boy and was therefore an employee and not an independent contractor.

Does the difference truly Matter?

With regard to the termination of the independent contractor relationship, the law has been evolving in the last ten years in a way that sometimes makes the traditional distinction of employee and independent contractor irrelevant. There have been decisions stating that there is an "intermediate" kind of relationship, falling between an employee and an independent contractor, which requires that notice that should be provided with respect to the termination of the relationship.

In the 1999 decision of *Marbry Ltd. v. Avrecan International Inc.,*[23] Mr. Justice Braidwood, writing for the majority of the British Columbia Court of Appeal, had these insightful comments about the distinction between an employee and an independent contractor, for the purpose of reasonable notice of termination:

> "At the heart of the court's inquiry is the true nature of the relationship between the parties. All relationships in the workplace setting can perhaps be thought of as existing on a continuum. At one end of the continuum lies the employer/employee relationship where reasonable notice is required to terminate. At the other extremity are independent contracting or strict agency relationships where notice is not required. The difficulty obviously lies in determining where upon that continuum one is located. Does the relationship bear more resemblance to the employer/employee or the independent contractor status?"

Here, the court was examining the termination of an exclusive distributorship. The plaintiff corporation had been the exclusive seller of Reebok footwear and clothing in parts of British Columbia pursuant to a distributor agreement with the defendant. The plaintiff maintained its own showroom as well as a sales person. The plaintiff also performed collections for the

defendant and conducted product knowledge seminars. The sale of the defendant's products represented between 75% and 90% of the plaintiff's total commissions. The defendant terminated the distributorship agreement on one month's notice. The plaintiff's action was for damages for failure to provide reasonable notice of the termination of the agreement.

The court noted that the fact that the plaintiff/employee is a corporation is not a bar to recovery. The court also adopted the principle in the Ontario Court of Appeal's decision in *Carter v. Bell & Sons (Canada) Ltd.*, which held that "there are many cases of an intermediate nature where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied."[24] The court noted that, in *Carter*, emphasis was placed on factors indicating a more permanent relationship in finding that the relationship was more akin to one of employer/employee than that of independent contractor. The court concluded that the relationship between *Marbry* and *Avrecan* was more akin to employee/employer than independent contractor and therefore rested in that intermediate category requiring termination upon reasonable notice. In coming to this conclusion, the court highlighted the following factors:

(i) the parties were in a relationship of permanency, lasting for 10 years;

(ii) the plaintiff invested resources in the business that indicated reliance;

(iii) at least 75% of the plaintiff's sales were earned from this relationship; and

(iv) the plaintiff's business formed "an integral part of" the defendant's business.

The court awarded damages of nine months notice, which was a reduction from the 15 months found by the trial judge.

A number of subsequent cases have pointed out that employment law has recognized hybrid relationships in which a reasonable notice of termination in the absence of contractual provision for termination is required, even if a full employer/employee relationship does not exist.[25]

In *Job v. Re/Max Metro-City Realty Ltd.,*[26] a Re/Max real estate agent claimed damages for the termination of his employment without reasonable notice. Re/Max contended that Job was an independent contractor and the relationship could be terminated without notice. The court found that the Re/Max real estate agent was not an employee based upon a consideration of the factors of control, ownership of tools, chance of profit and risk of loss. However, the court cited both the *Marbry Ltd. v. Avrecan International Inc.* and *Carter v. Bell & Sons (Canada) Ltd.,* decisions in concluding that the relationship was one of a permanent character and therefore subject to an implied term that it could only be terminated upon reasonable notice. The plaintiff was awarded six months notice based upon a six year relationship, the exclusivity of the relationship, the inventory of advertising and brochures that had been acquired and the time needed to re-establish the plaintiff with another broker.

In the 2008 Ontario decision of *Moseley-Williams v. Hansler Industries Ltd.*[27] the plaintiff had been a commissioned salesperson for the defendant for two years. The employer took the position that there was an independent contract relationship. The court reviewed the relevant factors, concluded that the relationship was close to the employee/employer end of the spectrum and awarded three months damages.

The results in the above cases do not appear much different from the results that might be obtained from the application of the traditional *Bardal* factors to a termination of employment situation. However other cases have shown a marked difference. In New Brunswick, courts

seem to be of the view that, one gets one half as much notice as if he or she had been an employee. In *Erb v. Expert Delivery,*[28], the plaintiff, a four year driver, was awarded one month's notice of termination. The court noted expressly that he would have been entitled to two months notice had he been an employee. Similarly, in *Jackson v. Norman W. Francis Ltd.,*[29] an accountant who had been employed for eighteen years was awarded damages based upon nine months notice instead of eighteen months notice, because he was found to be an independent contractor.

The point to be made regarding independent contractors is that upon entering into negotiations for the sale of a business it is important for both the purchaser and the vendor to understand the liabilities that may occur on a termination of the relationship of those persons whom the vendor describes as "independent contactors". In performing due diligence to estimate potential liabilities I recommend a conservative approach that takes into account the notice periods for termination that are part of any written independent contractor agreement as well as a calculation based on reasonable notice where there are no written termination provisions governing the relationship. Then the parties will be ready for the negotiations relating to employees and independent contractors in the context of the agreement for the purchase of the business.

FOOTNOTES

[1] *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701

[2] *Bardal v. The Globe & Mail Ltd.*, supra

[3] *McKay v. Eaton Yale Ltd.* (1996), 31 O.R. (3d) 216 (Ont. Gen. Div.); *Cronk v. Canadian General Insurance Co.* (1985), 25 O.R. (3d) 505 (C.A.)

[4] *Wallace v. United Grain Growers Ltd.*, supra

[5] *McKay v. Eaton Yale Ltd.*, supra

[6] *MacLean v. Audiovox Corporation* (1994), 15 C.C.E.L. (2d) 71 (B.C.C.A.); *Northwood v. Bristol Aerospace Limited*, [2004] M.J. No. 110 (Man. Q.B.) affd. [2004] M.J. No. 389

[7] *Bishop v. Carleton Co-Operative Limited* (1996), 21 C.C.E.L. (2d) (N.B.C.A.); *Sorel v. Tomenson* (1987), 16 C.C.E.L. 223 (B.C.C.A.); *Donovan v. New Brunswick Publishing Co. Ltd.* 1996 CanLII 4832 (N.B.C.A.)

[8] *Bardal v. The Globe & Mail Ltd.*, supra; *Wallace v. United Grain Growers Ltd.*, supra

[9] *Red Deer College v. Michaels et al.*, [1976] 2 S.C.R. 324; *Nevin v. British Columbia Hazardous Waste Management Corporation* (1995), 15 C.C.E.L. (2d) 165

[10] *Pombert v. Brunswick Mining and Smelting Corp.* (1987), 79 N.B.R. (2d) 79; *Sawarin v. Canadian Acceptance Corporation Limited* (1983), Sask. R. 234 (C.A.); *Schalwyk v. Hyundai Auto Canada Inc.* (1995), 16 C.C.E.L. (2d) 132 (Ont. Gen. Div.)

[11] *Lingelbach v. James Tire Centres Ltd.* (1994), 7 C.C.E.L (2d) 297 (Sask. C.A.); *Addison v. M. Loeb Ltd.* (1986), 53 O.R. (2d) 602 (C.A.)

[12] *Lingelbach v. James Tire Centres Ltd.*, supra; *Addison v. M. Loeb Ltd.*, supra

[13] *Sotnick v. Lyphomed, Inc.*, [1991] O.J. No. 146 (Ont. Gen. Div.); *O'Connell v. Canadian National Institute for the Blind*, [1998] O.J. No. 3430 (Ont. Gen. Div.)

[14] *Brouillard v. Rostrust Investments Inc*. (1997),32 C.C.E.L. (2d) 55 (Ont. Gen. Div.); *Kontopidis v. Coventry lane Automobiles Ltd.* (2004), 33 C.C.E.L. (3D) 131 (Ont. S.C.J.)

[15] *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 24; *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661

[16] *Evans v. Teamsters Local Union No. 31*, supra; *Misfud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (C.A.)

[17] *671122 Ontario Ltd. v. Sagaz Industries Canada*, [2001] 2 S.C.R. 983

[18] *671122 Ontario Ltd. v. Sagaz Industries Canada*, supra at para. 48

[19] *Braiden v. La-Z-Boy Canada Limited* (2008), 294 D.L.R. (4th) 172 (Ont. C.A.); *Brown v. Western Legal Publication* (1998), 51 B.C.L.R. (3d) 345 (B.C.S.C.); *Truong v. British Columbia* (1999), 47 C.C.E.L. (2d) 307 (B.C.C.A.); Belton v. Liberty Insurance Co. of Canada (2004), 72 O.R. (3d) 81 (C.A.)

[20] *Brown v. Western Legal Publication*, supra

[21] *Truong v. British Columbia*, supra

[22] *Braiden v. La-Z-Boy Canada Limited*, supra

[23] *Marbry Ltd. v. Avrecan International Inc.* (1999), 44 C.C.E.L. (2d) 76 (B.C.C.A.)

[24] *Carter v. Bell & Sons (Canada) Ltd.*, [1936] 2 D.L.R. 438 (Ont. C.A.) at 440

[25] *Greenland v. Ogunkoya*, 2009 CarswellOnt 2138 (Ont. S.C.J.); *Job v. Re/Max Metro-City Realty Ltd.*, [1999] O.J. No. 5029 (Ont. S.C.J.); *Carter v. Bell & Son (Canada) Ltd.*, supra; *Regal Produce Brokerage (1990) Ltd. v. Fowler Packing Co.*, [2000] O.J. No. 676 (Ont. S.C.J.); *Moseley-Williams v. Hansler Industries Ltd.* 2008 CanLII 57457 (Ont. S.C.J.)

[26] *Job v. Re/Max Metro-City Realty Ltd.*, supra

[27] *Moseley-Williams v. Hansler Industries Ltd.*, supra

[28] *Erb v. Expert Delivery*, [1995] N.B.J. No. 381 (N.B.Q.B.)

[29] *Jackson v. Norman W. Francis Ltd.*, [1999] N.B.J. No. 147 (N.B.Q.B.)