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EMPLOYMENT LAW CONFERENCE – 2008

RECOVERY OF INVESTIGATION AND PROSECUTION COSTS[1]

I. INTRODUCTION

Employers across this province incur substantial monetary costs in the course of investigating and prosecuting employee misconduct that is criminal or quasi-criminal in nature. Are such costs recoverable by way of legal process? Are such costs recoverable in whole or in part? What are the limits to cost recovery of this kind?

II. *CANADA SAFEWAY LIMITED* v. *BROWN*

The issue of recoverability of costs and expenses incurred by an employer in the course of investigating and prosecuting employee misconduct was squarely before the B.C. Supreme Court in *Canada Safeway Limited* v. *Brown*, [2007] B.C.J. No. 2400 (S.C.).

A. Facts

Sharon Brown used to be employed at a grocery store operated by Canada Safeway Limited ("Safeway") in Cranbrook, British Columbia.

She worked as a cashier and customer service representative and also in the cash office. In those capacities, she had access to cash and accounting records.

In and around summer 2005, Safeway was experiencing unexplained cash and inventory shortages at the Cranbrook store. An investigation was launched into the shortages. Refunds were closely tracked and digital surveillance cameras were installed.

[1] The purpose of this paper is to provide information as to developments in and the state of the law. This paper does not, in spite of the author's efforts to provide a full and accurate analysis of the law, constitute a legal opinion of the author or Roper Greyell LLP.

In September 2005, it was determined that Ms. Brown was stealing money from the store. After an investigative interview, she was suspended. She was subsequently dismissed from her employment.

Ms. Brown was criminally charged for theft over $5,000. She pled guilty to theft under $5,000 and was sentenced in December 2006.

B. Damages Sought By Safeway

Safeway initiated civil proceedings against Ms. Brown and claimed damages for:

(1) cash stolen by Ms. Brown from the Cranbrook store; and

(2) investigation and prosecution costs.

C. Damages in Respect of Stolen Cash

This paper does not focus on Safeway's claim for damages in respect of the stolen cash.

It is noted, however, that the claim was allowed by the Court in the amount sought by Safeway. After "consider[ing] the whole of the testimony and material before [him]", Mr. Justice Cohen found that Safeway had "proven, on a balance of probabilities, that it [was] entitled to an order for damages in the amount of $6,000 for its loss of cash" (at para. 18).

D. Damages for Investigation and Prosecution Costs

The author now turns to Safeway's claim for damages for investigation and prosecution costs.

Safeway took the position that it "incurred significant expenses … with respect to the investigation of the theft of cash and prosecution of Brown for the theft" (at para. 19).

In Safeway's submission, it was obliged to involve several of its employees in the investigation and prosecution of Ms. Brown's misconduct, including a security officer, a data analyst, a store manager and an assistant store manager.

Safeway submitted that it incurred considerable expense in relation to (at para. 19):

(1) "travel time to and from the Cranbrook store";

(2) "meetings with Safeway employees and Crown counsel with respect to the investigation and with police and Crown counsel to outline the criminal case against Brown";

(3) "setting up its surveillance"; and

> (4) "reviewing surveillance and analyzing documentation to identify and prove its loss".

Safeway put into evidence "documentation … setting out the hours expended by Safeway employees … to investigate and prosecute the theft with supporting invoices for expenses, as well as copies of invoices for expenses incurred by Safeway with respect to the surveillance" (at para. 21).

Mr. Justice Cohen articulated the law as follows (at para. 27):

> It is settled in law that a party is entitled to be reimbursed for the costs and expenses incurred when it is a victim of theft.

He addressed Safeway's claim in the following way (at para. 27):

> … I find that *awarding compensation to Safeway for the use of its corporate resources to investigate the theft and assist the Crown and the police in the prosecution of the theft is fair, appropriate and not too remote*. [emphasis added]

The judge went on to award Safeway damages for investigation and prosecution costs in the amount of $24,512.26. Needless to say, that is not an insubstantial amount of money.

III. AUTHORITIES CITED IN *CANADA SAFEWAY LIMITED* v. *BROWN*

In *Canada Safeway Limited* v. *Brown*, Mr. Justice Cohen stated it was settled law that "a party is entitled to be reimbursed for the costs and expenses incurred when it is a victim of theft". Upon what authorities did he rely in making that statement?

Mr. Justice Cohen cited a passage from a leading treatise on the law of recovery in tort actions (at para. 28):

> According to the text Lewis Klar et al., *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) vol. 1 at 4-31, 4-33, under the heading "Compensatory Damages" the author states, "In an action for conversion, the normal measure of damages is the value of the chattel at the date of conversion, together with any consequential damage flowing from the conversion, provided that it is not too remote to be recovered in law … In addition to the value of the chattel, the plaintiff is also entitled to compensation for any special damages which the law does not regard as too remote, such as loss of profits or loss of rental income".

The judge also referred with approval to the B.C. Court of Appeal case of *Insurance Corp. of British Columbia* v. *Sanghera*, [1991] B.C.J. No. 766 (C.A.). He described the facts of that case, which involved certain fraudulent insurance claims, as follows (at para. 29):

> … [T]hree “plaintiffs” sued two “defendants” for damages resulting from an alleged motor vehicle accident. I.C.B.C. then added itself as a third party and sued all five for damages for fraud, alleging that the accident never occurred or was intentionally caused.

Mr. Justice Cohen stated that, in *Insurance Corp. of British Columbia* v. *Sanghera*, “[t]he Court held, *inter alia*, that I.C.B.C. was entitled to recover the benefits paid and its expenses of processing and investigating the claims” (at para. 29).

The judge focused on the separate reasons for judgment delivered by Madam Justice Southin (at para. 29):[2]

> At page 727 Southin J.A. asks, “So, to what damages is an insurer entitled as against his insured when, as here, insureds under separate policies are part of a joint enterprise to file false proofs of loss and receive payments?” She then states that in her opinion the insured [*sic*] is entitled to, “(a) recovery of all sums paid out to those persons; *(b) the costs of processing their claims*; *(c) the costs of investigating their claims*”. Her Ladyship states, “In an action brought for the purpose of recovering those sums, the court may award such costs as, in its discretion, it considers appropriate”. [emphasis added]

IV. OTHER AUTHORITIES SUPPORTING THE RECOVERABILITY OF INVESTIGATION AND PROSECUTION COSTS

The authorities cited by Mr. Justice Cohen do not stand in isolation.

There are other authorities that could be relied upon by employers seeking to recover costs and expenses incurred in the course of investigating and prosecuting employee misconduct. Those authorities are summarized below.

A. *The Law of Damages*

In S.M. Waddams, *The Law of Damages*, looseleaf ed. (Toronto: Canada Law Book, October 2007), the author made the following statement under the heading “Costs of Investigating the Wrong” (at p. 5-47):

> *… [S]ome cases have permitted recovery, not as costs but as damages, of the expense of investigating the defendant’s wrong.* Such recovery has been allowed in cases of breach of contract and of inducing breach of contract, and nuisance, and *there seems to be no reason why recovery should not be supported wherever investigatory costs can be anticipated as a natural and probable consequence of the defendant’s wrong*. [emphasis added]

[2] The author notes that, in the reasons for judgment delivered by Mr. Justice Hutcheon and concurred in by Mr. Justice Taylor, it was simply stated that “the respondent, Insurance Corporation of British Columbia, succeeded in its claim that the defendants had conspired to defraud the Insurance Corporation of British Columbia and that it should be reimbursed to the extent that is legally possible” (at p. 2 Q.L.).

In support of the proposition that "some cases have permitted recovery … of the expense of investigating the defendant's wrong", the author of *The Law of Damages* placed reliance on two Canadian cases.

Those cases, although somewhat dated, remain good law. They are *Acme Investments Ltd.* v. *York Structural Steel Ltd.*, [1974] N.B.J. No. 145 (S.C. App. Div.) and *Nor-Video Services Ltd.* v. *Ontario Hydro*, [1978] O.J. No. 3287 (H.C.J.), aff'd [1979] O.J. No. 1792 (C.A.), and are summarized below.

B. *Acme Investments Ltd.* v. *York Structural Steel Ltd.*

Acme Investments Ltd. v. *York Structural Steel Ltd.* was a case of breach of contract. The plaintiff alleged that the defendant breached the terms of a building contract relating to the design, fabrication and erection of the steel structure of a shopping mall.

The trial judge found that the steel structure was underdesigned and overstressed and failed to comply with the contract and applicable building code. He estimated the cost of repairing or reinforcing the structure to make it comply with the terms of the contract and building code, and made an award of damages for breach of contract.

The fact that the steel structure was underdesigned and overstressed only came to the plaintiff's attention after a heavy snow storm. Snow from the storm caused excessive deflection of the structure to the point that it was impossible to open or close certain sliding doors until the snow was removed from the roof of the mall.

The situation prompted the plaintiff to have a professional engineer conduct a study of the steel structure. The engineer conducted a thorough investigation and analysis of the structure and prepared an exhaustive report of the deficiencies he found in the work performed by the defendant and the estimated cost of correcting those deficiencies. The engineer's investigation extended over a considerable period of time and his report was not completed until approximately one and a half years after the investigation commenced. The engineer billed the plaintiff in excess of $30,000 for professional services rendered.

Dealing with the question of "recovery … of the expense of investigating the defendant's wrong", the judge awarded damages in the amount of $30,000. The New Brunswick Supreme Court – Appeal Division declined to interfere with that award, holding (at para. 31):

> While the plaintiff is clearly entitled to the cost of correcting deficiencies in the defendant's work on the principle of reinstatement *I do not think the plaintiff is precluded from recovering any other expense reasonably incurred in ascertaining the extent of the defendant's breaches of contract and the cost of correcting them.* [emphasis added]

The Court went on to say (at para. 32):

> In my opinion [a] reasonable person in the position of the defendant would be taken to know there was a serious possibility that in the "ordinary course of things" an owner who had reason to believe a building contract was improperly performed by the builder would seek the assistance of a professional engineer to ascertain the deficiencies and the cost of

> correcting them. In its factum the plaintiff submits that the award of $30,000 is reasonable. In my opinion the cost of such services as are reasonable would not be less than that sum and I would accordingly not disturb the award.

C. *Nor-Video Services Ltd.* v. *Ontario Hydro*

Nor-Video Services Ltd. v. *Ontario Hydro*, the second case to which reference was made in *The Law of Damages*, was a case of nuisance. The plaintiff, a cable television company, alleged that the defendant had located its electrical power installations so as to interfere with the reception and transmission of television broadcasting signals.

The trial judge ruled that the tort of nuisance had been established by the plaintiff and then turned his mind to the proper measure of damages to be assessed against the defendant.

While the judge accepted that the plaintiff had been subjected to unreasonable interference and had "a lessened capacity to receive and distribute TV signals", he underscored that the plaintiff had "lost no subscribers" and "maintained the same level of income it would have … if Hydro had not entered the picture" (at paras. 40 and 43).

The judge accordingly declined to award damages for nuisance. He did, however, award damages in respect of "the expense of investigating the defendant's wrong", stating (at paras. 46 and 47):

> Nor-Video is entitled to recover as damages certain costs and expenses it has incurred and which in my view are referable to the nuisance committed by Hydro. At Hydro's invitation it retained a consultant expert in the field to meet with Hydro in an effort to cure the situation; he developed and submitted, also at Hydro's request, a number of proposals …
>
> The plaintiff should be reimbursed the full amount it has paid to Cable Consulting Services Limited which at trial was established in the amount of $15,664.86. It is also entitled in the circumstances to be repaid [its president's] expenses in meeting with Hydro … Judging by material I have as to various meetings, I think this figure can fairly be set on a rough and ready basis at $5,000 …

The trial judgment was affirmed by the Ontario Court of Appeal, which, in a unanimous decision, stated that it was "in agreement with the conclusion of the trial judge for the reasons given by him" (at para. 1).

D. *Sydney Co-operative Society Ltd.* v. *Coopers & Lybrand*

Sydney Co-operative Society Ltd. v. *Coopers & Lybrand*, [2002] N.S.J. No. 578 (S.C.) is a more recent case than *Acme Investments Ltd.* v. *York Structural Steel Ltd.* and *Nor-Video Services Ltd.* v. *Ontario Hydro*. The plaintiffs advanced a claim for breach of contract and negligence against the defendant.

The claim arose out of the defendant's performance of annual audits of the Sydney Co-operative Society (the "Society") and misappropriation of over $500,000, over a period of six years, by one of the Society's

employees. Over the entire period of time, the defendant provided unqualified audit opinions to the Society.

The Nova Scotia Supreme Court awarded damages in excess of $500,000 for funds misappropriated by the Society's employee.

In addition, the trial judge awarded damages in the amount of $9,839.40[3] for the "costs of investigating the claim" (at para. 226). He made the following statement (at para. 228):

> *I find that the costs incurred by the plaintiffs to establish the extent of the loss and the approach it [*sic*] should take to mitigate its [*sic*] loss are expenses which in the ordinary course of things would have been expended by the plaintiffs to advance this claim.* [emphasis added]

The judge took into account (at para. 226) costs and expenses incurred by the plaintiffs in relation to:

(1) "obtain[ing] copies of … documents";

(2) "additional time spent by staff of the Society in preparing the claim and copying material"; and

(3) "processing [of] an insurance claim or fidelity bond".

Significantly, the judge referred with approval to both *The Law of Damages* and *Acme Investments Ltd.* v. *York Structural Steel Ltd.* and, specifically, to the passages from those authorities that have been quoted above.

V. PRACTICAL AND STRATEGIC CONSIDERATIONS

Counsel should be alive to a host of practical and strategic considerations when deciding whether and how to advance a claim for recovery of costs and expenses incurred in the investigation and prosecution of employee misconduct, or when thinking about how to defend against such a claim. Some of those considerations are outlined below.

A. Test for Recovery of Investigation and Prosecution Costs

What is the test that must be satisfied by an employer seeking damages for investigation and prosecution costs?

[3] In passing, and for the sake of thoroughness, the author notes that the Court reduced the award of damages for the "costs of investigating the claim" by 50 percent. That was because of contributory negligence on the part of the plaintiffs.

These are damages that flow out of breach of the employment contract. Damages for breach of contract, being compensatory in nature, should, as far as money can do it, place the wronged party in the same position as it would have been in had the contract not been broken.[4]

However, compensatory contractual damages must, as was made clear in *Hadley* v. *Baxendale* (1854), 156 E.R. 145 (Ex. Ct.), be "such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from [the] breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (at p. 151). The measure of compensatory damages is, of course, subject to the principle of remoteness. That was confirmed by the Supreme Court of Canada in *Fidler* v. *Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30 and, specifically, at paragraph 44 of that decision.

In the authorities cited in this paper that deal with recovery of investigation and prosecution costs in the context of breach of contract, it is clear that regard was had to the *Hadley* v. *Baxendale* test and the remoteness principle:

(1) In *Canada Safeway Limited* v. *Brown*, after turning his mind to whether it would be fair and appropriate to award compensation to Safeway in the circumstances of the case, Mr. Justice Cohen also had regard to the remoteness principle. He found that "awarding compensation to Safeway for the use of its corporate resources to investigate the theft and assist the Crown and the police in the prosecution of the theft [was] … not too remote".

(2) The author of *The Law of Damages* stated, "… [T]here seems to be no reason why recovery should not be supported wherever investigatory costs can be anticipated as a natural and probable consequence of the defendant's wrong."

(3) In *Acme Investments Ltd.* v. *York Structural Steel Ltd.*, the Court:

  (a) spoke of "the plaintiff [not being] precluded from recovering any other expense reasonably incurred in ascertaining the extent of the defendant's breaches of contract and the cost of correcting them"; and

  (b) articulated a test in which the question was whether a "reasonable person in the position of the defendant would be taken to know there was a serious possibility that in the 'ordinary course of things' an owner who had reason to believe a building contract was improperly performed by the builder would seek the assistance of a professional engineer to ascertain the deficiencies and the cost of correcting them".

[4] In *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C.), the Privy Council asserted that "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed" (at p. 307).

In advancing or defending against a claim for damages for investigation and prosecution costs, counsel should keep the rules relating to recovery of compensatory contractual damages at the forefront of their minds and be guided by same.

B. Distinction Between Damages for Investigation and Prosecution Costs and Litigation Costs

Counsel must recognize the limits to recovery of investigation and prosecution costs. The courts are generally not prepared to award damages for costs and expenses incurred in relation to civil proceedings. Such costs and expenses are properly addressed through an award of costs.

That was made clear by Mr. Justice Cohen in *Canada Safeway Limited* v. *Brown*, when he declined to award damages for "items relating to the civil litigation" such as "[p]reparation of documents and video for civil litigation" (at para. 31). The judge drew a distinction between costs and expenses incurred by Safeway in the course of the civil action against Ms. Brown and "consequential damages for the expenditure of [Safeway's] corporate resources on the criminal investigation and prosecution of Brown's conduct" (at para. 31).

The distinction that Mr. Justice Cohen drew between damages for investigation and prosecution costs and litigation costs was also drawn by the author of *The Law of Damages*. When discussing "recovery … of the expense of investigating the defendant's wrong", the author was careful to highlight the difference between "damages" and "litigation costs". Specifically, he stated, "Litigation costs are not generally considered to be part of the law of damages …" (at p. 5-47).

C. Where to Commence an Action for Recovery of Investigation and Prosecution Costs

The author would imagine that most claims for damages for investigation and prosecution costs would be for $25,000 or less. The B.C. Provincial Court has jurisdiction to hear cases worth anywhere up to $25,000. That raises the question of whether to commence an action for recovery of investigation and prosecution costs in the B.C. Supreme Court or the Provincial Court.[5]

It is not necessarily the case that claims for $25,000 or less should be commenced in the Provincial Court. The following are *some* of the things that counsel should consider:

(1) A party with a claim worth less than $25,000 may be better served by bringing the claim in the Supreme Court. *Canada Safeway Limited* v. *Brown* is an illustration of this.

Because Safeway availed itself of Rule 18A, it was able to secure judgment perhaps more quickly than would have been the case had it brought its claim against Ms. Brown in the Provincial Court.

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[5] The author acknowledges that there may be cases where an employer, separate and apart from damages for investigation and prosecution costs, sustains far more loss as a result of employee misconduct than Safeway did in *Canada Safeway Limited* v. *Brown* (recall that Safeway brought a claim for and was awarded "damages in the amount of $6,000 for its loss of cash"). In those kinds of cases, it may be a given that the action, including the claim for recovery of investigation and prosecution costs, should be commenced in the Supreme Court.

Also, provisions for discovery in the Supreme Court Rules allowed Safeway to obtain valuable admissions from Ms. Brown. When asked on discovery when she began taking money from Safeway, she answered, "As far as I can recall, the June/July, more so in August of 2005" (at para. 9). In response to a question about whether there was a typical amount of money she would take, she said, "Well, I – I can't say for sure but I guess it's a hundred dollars a day …" (at para. 9). When asked whether once she began taking money, she did so every shift, she responded, "Yes, at the end, yes, I did" (at para. 9).

(2) In the Provincial Court, the parties will have to attend a settlement conference.[6] For cases that are expected to require more than half a day of trial time, the parties will also have to attend a trial preparation settlement conference, a working session to examine evidence and determine issues for trial. Time spent preparing for and attending at these conferences may be unduly burdensome in a forum that does not provide for the payment of costs to the successful party.

(3) Generally speaking, the rules of evidence and procedure tend to be less rigid in the Provincial Court than in the Supreme Court. That may work in favour of or against an employer seeking damages for investigation and prosecution costs.

(4) The Provincial Court is not able to award certain remedies that the Supreme Court has the power to award.

(5) The Supreme Court has the power to award costs and disbursements to a successful party. In contrast, in the Provincial Court, the successful party is generally only able to recover:

(a) fees paid for filing documents;

(b) any reasonable amount paid for serving documents; and

(c) any other reasonable charges or expenses that the Court considers directly relate to the conduct of the proceeding.

The author is not unaware of Rule 57(10) of the Supreme Court Rules which provides, "A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, *unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders*." [emphasis added]

"Sufficient reason for bringing the proceeding in the Supreme Court" may, however, be established if a defendant "created an aura of suspicion" about himself or herself such that a reasonable plaintiff would have believed that it was the victim of a fraud or misrepresentation. In this regard, reference is made to *Hodson & Hodson Construction Ltd.*

[6] With respect to claims worth more than $10,000, more time will generally be scheduled for the settlement conference in order to explore settlement by way of judicially assisted mediation.

v. *Harrison*, [2005] B.C.J. No. 1396 (S.C.), where the B.C. Supreme Court held (at paras. 89, 93 and 94 to 96):

> Counsel for the defendants raise the question of whether, given that the plaintiff [*sic*] had recovered an amount that was within the jurisdiction of the Small Claims Court, they should be awarded costs at all ….
>
> … I am of the view that the plaintiffs were justified in proceeding in this court.
>
> … It was only through the trial that … a proper accounting occurred.
>
> … [T]hese defendants through their unwillingness or inability to respond to inquiries over the discovery process, quite apart from their failure to account at the end of the project, *created an aura of suspicion about themselves that would have given anyone in the position of the plaintiffs to reasonably conclude that they had been victims of a fraud or misrepresentation and thus commence action in this court rather than in the Small Claims Court*.
>
> For these reasons, I am satisfied that the plaintiffs had sufficient reason to bring these proceedings in the Supreme Court and they are entitled to costs as I have ordered. [emphasis added]

D. Employer Must Prove Costs and Expenses Incurred in the Investigation and Prosecution of Employee Misconduct

At the risk of stating the obvious, as with any other claim for compensatory damages, an employer seeking damages for investigation and prosecution costs will have to prove its loss, i.e. the costs and expenses incurred in the investigation and prosecution of employee misconduct. Employers that intend on seeking recovery of investigation and prosecution costs are best advised to keep, and put into evidence, a clear and specific written record of costs and expenses they have incurred.

In *Canada Safeway Limited* v. *Brown*, Safeway put before the Court "supporting invoices for expenses [relating to the investigation and prosecution of Ms. Brown's misconduct]" and "copies of invoices for expenses incurred by Safeway with respect to the surveillance" (at para. 21). That documentation proved to be tremendously helpful in terms of advancing Safeway's case.

It is fair to say, however, that Safeway encountered more difficulty in establishing how much time was spent by its employees in the investigation and prosecution of Ms. Brown's misconduct. That is because no specific records were kept in this regard.

Safeway's security officer deposed in an affidavit that "Safeway incurred significant expenses directly with respect to the investigation of the theft of cash and prosecution of Brown for the theft" (at para. 19). He attached to his affidavit an estimate of "the hours expended by Safeway employees … to investigate

and prosecute the theft" and, in his affidavit, described the estimate as "Safeway's best and reasonable estimate of the amount of time spent on the investigation" (at para. 21).

Ms. Brown questioned the admissibility of the security officer's affidavit evidence. She argued that his evidence "as to the number of hours spent in the investigation … [was] inadmissible since it [was] opinion, hearsay and not based on business records" (at para. 22).

While Mr. Justice Cohen ultimately disagreed with the position taken by Ms. Brown[7], Safeway would have been spared a lot of hassle and inconvenience had specific records of time spent by employees in the investigation and prosecution of Ms. Brown's misconduct simply been kept.

E. Potential for Claim of Unfair or Bad Faith Conduct

A claim for recovery of investigation and prosecution costs should not be lightly levelled against an individual employee. To put it otherwise, an employer that intends on bringing a claim for damages for investigation and prosecution costs should not do so in the absence of an evidentiary foundation. The employer must give careful thought to whether it will be able to prove its case.

That is because, the author would think, the vast majority of claims for damages for investigation and prosecution costs would be brought in the period of time following dismissal of an employee from employment. According to *Wallace* v. *United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701, "[t]he point at which the employment relationship ruptures is the time when the employee is most vulnerable and, hence, most in need of protection" and, at that time, the courts will strive to "encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal" (at para. 95). Employers will 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" (at para. 95).

Should an employer advance a *baseless* or *unmeritorious* claim for recovery of investigation and prosecution costs, it will be exposed to a potential claim for so-called *Wallace* damages.

The Ontario Superior Court of Justice case of *Kitzman* v. *Babcock & Wilcox Canada Ltd.*, [2006] O.J. No. 3799 (S.C.J.), var'd [2007] O.J. No. 2870 (C.A.) is instructive in this regard. In that case, the employer, in addition to defending on the basis of cause against a wrongful dismissal claim, counterclaimed against the employee for $350,000 for losses allegedly stemming out of the employee's negligence in performing his duties.

The Court looked very dimly on the counterclaim, finding that "the evidence [did] not establish any loss whatsoever by the Defendant occasioned in any manner by the Plaintiff's conduct" and "there [was] no evidence which amount[ed] to proof of any real loss by the company" (at paras. 11 and 14). In dismissing the counterclaim, the trial judge stated (at paras. 12 and 13):

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[7] The judge held that the security officer's evidence "[stood] unchallenged as Brown chose not to cross-examine him on his affidavit" and "[was] based on the best evidence available and … a reasonable and fair approach" (at paras. 16, 17 and 27).

> It seems to me that the bringing and pressing of this counterclaim right to the end of the trial was a deliberate strategem by the Defendant meant to make an example out of this former employee …
>
> In my view, the bringing of the counterclaim can be seen as a loud and clear warning to any employee who dares to sue Babcock & Wilcox Ltd. for wrongful dismissal.

Significantly, the employee was awarded *Wallace* damages on account of the employer's "hardball" conduct in commencing and pressing the counterclaim. The judge justified the award on the following basis (at paras. 85 and 91)*:*

> When one considers that in the context of the commencement and pressing of the counterclaim one sees a picture of the kind of unfair, harsh, vindictive and malicious conduct that can qualify for consideration of *Wallace* damages. It demonstrates that the Defendant breached its "obligation of good faith and fair dealing", both in the way in which it dismissed the Plaintiff and in the way it reacted to his claim for wrongful dismissal. It is quite one thing to defend an action for wrongful dismissal on the basis of the adequacy of notice, it is another thing to allege cause in that defence, and it is yet taken to another level to raise the spectre of a counterclaim several times greater than the amount of the Plaintiff's legitimate claim ….
>
> Accordingly, I find that the Defendant engaged in the kind of "hardball" with its employee, Robert Kitzman, that the Supreme Court of Canada warned about in *Wallace*. Accordingly, he is entitled to extra damages. I extend the notice period by an additional three months and award damages under that head …

The award of *Wallace* damages by the trial judge was ultimately set aside by the Ontario Court of Appeal. That was because, in making the award, the trial judge "focused on … matters not pleaded or argued by the respondent" (at para. 8). The trial judgment was upheld in all other respects.

Notwithstanding that it was varied by the Court of Appeal, the trial judgment in *Kitzman* v. *Babcock & Wilcox Canada Ltd.* remains instructive to the extent it suggests that an employer that brings and maintains a baseless or unmeritorious claim may end up having *Wallace* damages awarded against it. That is apparent from the Ontario Superior Court of Justice's decision in *Movileanu* v. *Valcom Manufacturing Group Inc.*, [2007] O.J. No. 4414 (S.C.J.) and, specifically, paragraphs 74 and 75 of that decision.

VI. CONCLUSION

Canada Safeway Limited v. *Brown* is a significant case for employers in British Columbia.

Whereas previously it might have appeared to employers in this province that they had to shoulder the entire monetary burden associated with the investigation and prosecution of employee misconduct, there

is now B.C. Supreme Court authority supporting the recoverability, to the extent loss can be proven, of investigation and prosecution costs.

This is still a developing area of employment law and the full ramifications of *Canada Safeway Limited* v. *Brown* have yet to be seen.