CITATION: Clark v. BMO Nesbitt Burns Inc., 2008 ONCA 663
DATE: 20081001
DOCKET: C47952

COURT OF APPEAL FOR ONTARIO

Rosenberg, Gillese and Blair JJ.A.

BETWEEN

Richard Clark

Plaintiff (Respondent)

and

BMO Nesbitt Burns Inc.

Defendant (Appellant)

M. Mackillop and H. Nieuwland, for the appellant

D. Harris, for the respondent

Heard: August 11 and 12, 2008

On appeal from the judgment of Justice Peter G. Jarvis of the Superior Court of Justice dated October 12, 2007, with reasons reported at 61 C.C.E.L. (3d) 268.

Gillese J.A.:

OVERVIEW

[1] Richard Clark worked as an investment advisor for BMO Nesbitt Burns Inc. (the "Bank"). In early March 2004, Mr. Clark was charged with sexual assault. On April 23, 2004, the Bank announced the closure of the branch office in Mississauga, Ontario in which Mr. Clark worked.

[2] On April 24, 2004, Mr. Clark was dismissed.[1] He had worked for the Bank for seventeen years. He rejected the Bank's offer of 15 months' pay in lieu of notice and sued for wrongful dismissal.

[3] After a four-day trial, Jarvis J. concluded that Mr. Clark had been dismissed without cause. By judgment dated October 12, 2007 (the "Judgment"), he awarded Mr. Clark:

(1) damages of 18 months' pay in lieu of reasonable notice, totalling $152,544.06 (less $41,027.58 already paid under the *Employment Standards Act, 2000*);

(2) damages of $90,000 for Mr. Clark's lost opportunity to sell his "book of business";[2] and

(3) a three-month extension of the notice period on account of *Wallace* damages.[3]

[4] The Bank appeals. It argues that the trial judge erred in his calculation of the damages awarded for pay in lieu of reasonable notice. Further, it argues that the trial judge erred both in awarding damages for Mr. Clark's lost opportunity to sell his book of business and pursuant to the *Wallace* principle.

[5] For the reasons that follow, I would allow the appeal in part.

THE FACTS

[6] Mr. Clark worked at a Bank branch office in Mississauga, Ontario. He began work with the Bank in September 1987 as a mutual fund salesperson. Within a year, he became an investment advisor and remained in that position until his dismissal.

[7] Mr. Clark's income was based solely on the commissions and fees he earned by managing the assets of Bank clients that he served. Over the years, he gradually developed a client base.

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[1] There is some conflict over this date. The termination letter says April 22; the transcripts say April 23; the reasons for judgment say April 24. Nothing turns on the discrepancy in dates, however.

[2] Selling a book of business and "transitioning" client assets were both used by the parties in this appeal. The terms are used interchangeably.

[3] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[8] James Davis, also an investment advisor at the Bank, was dismissed in September 2001. He was given pay in lieu of notice and allowed to sell his book of business.

[9] Mr. Clark bought the Davis book of business. This transaction was approved and facilitated by the Bank. Mr. Clark paid Mr. Davis for the purchase of his book over time. He was still making payments when his employment with the Bank was terminated.

[10] Mr. Clark had an interest in training young elite athletes. It arose from the help he gave his son who obtained a hockey scholarship at an American university. He began a sideline business in the area. For a lengthy period while employed by the Bank, Mr. Clark considered leaving the brokerage business and pursuing his athletic training business on a fulltime basis. He spoke with Ian Leith, a fellow investment advisor, about the possibility of selling him his book of business. He had similar discussions with Felice Bontempo, his branch manager. Both expressed an interest in buying Mr. Clark's book but the discussions had not reached the point of a concluded agreement at the time Mr. Clark was dismissed.

[11] On March 3 or 4, 2004, Mr. Clark was charged with sexually assaulting his common law partner. This accelerated his discussions with Messrs. Leith and Bontempo about selling his book of business. Eventually, Mr. Clark agreed with Mr. Leith that at some point in the future, they would enter into an agreement to have Mr. Clark's book of business transferred to Mr. Leith. The trigger for such a development might have been the criminal charges proceeding to trial or a decision by Mr. Clark to leave the Bank, whether to pursue his own business or for some other reason.

[12] On April 23, 2004, the Bank announced that it would close the branch office in which Mr. Clark worked at the end of May 2004.

[13] In a brief meeting on April 24, 2004, Ray Lessard, the Bank's Regional Manager for Southwestern Ontario, told Mr. Clark that his employment was being terminated. He told Mr. Clark that he was not suited for the investment business and should try a new career. He offered Mr. Clark a 15-month severance package.

[14] Mr. Clark asked if he could stay on for some time so that he could arrange to sell his book of business. He told Mr. Lessard that he had had discussions with Mr. Leith about selling his book for upwards of $175,000. Mr. Lessard refused, saying that Mr. Clark's book was worth only $30,000 to $35,000 and that it had already been decided that Mr. Clark must go.

[15] Mr. Clark was ushered out of the office and not allowed access to his office or his client information.

[16] At the time of dismissal, Mr. Clark was 52 years of age and his book of business had reached a total of approximately $42 million. He estimated that it would take him seven to ten years to re-establish a similar book.

[17] After Mr. Clark's dismissal, Mr. Bontempo paid the Bank $50,000 for the right to serve the clients previously managed by Mr. Clark.

[18] Mr. Clark contacted three brokerage firms about employment opportunities as an investment advisor. He disclosed to two of the firms that he was facing criminal charges. None of the firms agreed to hire him.

[19] When he could not obtain work as an investment advisor, Mr. Clark decided to develop his athletic training business. He earned no net income from the business in the 18 months following termination of his employment.

[20] In mid-March 2005, Mr. Clark pleaded guilty to lesser charges of criminal harassment and breach of recognizance for which he received a conditional sentence.

THE TRIAL DECISION

[21] The trial judge began by setting out the factual background. He noted that at the time of his dismissal, Mr. Clark had not entered into an agreement to sell his book and "transition" the Bank clients he served to any other investment advisor. However, he found that if the Bank had given Mr. Clark time, Mr. Clark would have made an agreement to transfer his book to another investment advisor. He also found that there were no proper grounds on which management approval of such an agreement could have been denied. He placed a value of $90,000 on Mr. Clark's lost opportunity to sell his book of business.

[22] The trial judge next considered the issue of mitigation. He began by noting that the onus was on the Bank to prove a failure to mitigate. He found that no brokerage firm would have hired Mr. Clark while his criminal charges were outstanding. He concluded that since Mr. Clark must be presumed innocent of the charges at the time of dismissal, he could not be held responsible for the negative effect the charges had on his ability to secure comparable employment as an investment advisor.

[23] The trial judge found that it was rational for Mr. Clark to develop his athletic training business "in which he had some experience and interest." He further found that by the time the charges were resolved, there was no possibility of his returning to the brokerage field as a person with an existing book of business - his book had been retained by the Bank, in the hands of Mr. Bontempo. Given Mr. Clark's age, it would not have been viable for him to attempt to start anew as an investment advisor.

[24] After noting that the dismissal without cause had created many problems for Mr. Clark, and that there was no evidence of any realistic chance he might have had to substantially mitigate his loss, he found that Mr. Clark's best chance was to develop his athletic training business and that Mr. Clark's efforts in that regard had been reasonable.

[25] Thereafter, the trial judge considered the claim for *Wallace* damages. He began by stating, "While there were some difficulties with the severance interview, the main issue in this regard is the refusal to allow Mr. Clark to sell his Book." He found that there was no justification for not allowing Mr. Clark to attempt to sell his book and that a sale would almost certainly have been accomplished within a reasonable period of time had he been permitted to stay.

[26] In para. 28 of the reasons for judgment, the trial judge set out a number of factors which led to his conclusion that *Wallace* damages were justified. Paragraph 28 reads as follows:

> There are a number of factors which lead me to the conclusion that a Wallace award is justified. I am satisfied that Mr. Lessard dealt with Mr. Clark in a cold and impersonal manner and his comment that Mr. Clark was not suited for the business was calculated to hurt considering Mr. Clark's 17 years of employment. Mr. Lessard's refusal to countenance Mr. Clark's transfer of his Book resulted in a windfall for Mr. Bontempo considering the advantageous price. The retention of the Book in Mr. Lessard's branch also had the affect of protecting, if not increasing Mr. Lessard's own participation in its proceeds. Mr. Clark could easily have been afforded working notice so that he could have completed the transfer of his Book and this is a factor for me to consider (see *Chan v. RBC Dominion Securities* [2004] O.J. No. 5340). I am mindful that Mr. Lessard sold the Book for $50,000 having expressed the view to Mr. Clark that it was worth only $30,000 - $35,000 at the time of the dismissal. It is my view that these factors taken together amount to a violation of the implicit covenant of fair dealing. I therefore award Wallace damages calculated at three month's notice.

[27] The trial judge awarded Mr. Clark 18 months' pay in lieu of reasonable notice. He then turned to the question of Mr. Clark's annual income. In determining that matter, he began by setting out the amounts that Mr. Clark earned in the preceding years. In 2001,

Mr. Clark's income was $81,329.60 and in 2002[4] it was $95,634.71. In the four months of 2004 which Mr. Clark worked prior to dismissal (i.e. January to April), Mr. Clark's income was $47,505.45. The trial judge noted that on an annualised basis, this indicated that Mr. Clark would have earned $150,000 in gross commissions in 2004. However, after allowing for possible seasonal fluctuations in the receipt of commissions, the trial judge arrived at an estimate of $100,000 in gross annual commissions.

[28] After finding that Mr. Clark would have earned $100,000 annually in gross commissions in 2004, the trial judge deducted secretarial expenses of $7,304 and added annual benefits valued at $9,000 leaving a figure of $101,696 for twelve months. Based on that, he awarded damages for 18 months of $152,544.06.

THE ISSUES

[29] This appeal raises three issues. Did the trial judge err in:

(1) the quantum of damages awarded in lieu of reasonable notice;

(2) awarding damages for Mr. Clark's lost opportunity to sell his book of business; or

(3) awarding *Wallace* damages.

THE QUANTUM OF DAMAGES AWARDED IN LIEU OF REASONABLE NOTICE

[30] The Bank argues that the trial judge erred in two ways in the quantum of damages awarded in lieu of reasonable notice. First, it contends that the trial judge erred in his calculation of Mr. Clark's annual income. Second, it says that the trial judge misused the presumption of innocence in finding that Mr. Clark had taken reasonable steps to mitigate.

Mr. Clark's Estimated Annual Income during the Notice Period

[31] The Bank submits that the trial judge made two errors when he determined Mr. Clark's income for the notice period. First, it says that the amounts that Mr. Clark was to pay Mr. Davis were expenses and that the trial judge erred in failing to deduct them when he calculated Mr. Clark's annual income. Second, the Bank contends that the trial judge was obliged to rely on the average income that Mr. Clark earned in the three years preceding his dismissal (i.e. 2001 to 2003), as shown on his T4 statements, in

[4] Counsel advised the court that the trial judge erred in stating that Mr. Clark earned $95,634.71 in 2002. That was his income in 2003.

determining Mr. Clark's annual income for the notice period. Had the trial judge done so, Mr. Clark's annual income would have been $78,943.87, rather than $101,696.

[32] I would not accept either submission.

[33] In relation to the first submission, the evidence was that Mr. Clark was paying Mr. Davis for the purchase of the latter's book of business by means of monthly payments. Although Mr. Clark testified that in the years prior to his dismissal, for income tax purposes he deducted the payments he made to Mr. Davis from his gross commissions and that he benefited from doing so because this lowered his taxable income, that does not mean that the trial judge was obliged to treat such costs as expenses.

[34] The trial judge recognized that damages were properly calculated on the basis not of gross commissions but, rather, net commissions after deduction of expenses.[5] However, he did not view the payments to be expenses because, he said, they were "personal" to Mr. Clark. From this I understand the trial judge to have found that, despite termination of his employment, Mr. Clark remained personally obliged to honour his contractual obligations to Mr. Davis. There is nothing in the record to suggest that at the time of trial Mr. Clark no longer bore such an obligation. Accordingly, it was open to the trial judge to refuse to reduce Mr. Clark's estimated income by the amount that remained owing by Mr. Clark to Mr. Davis.

[35] I turn next to the question of whether the trial judge was obliged to estimate Mr. Clark's income based on the average of Mr. Clark's net income in the three years prior to dismissal. Certainly courts in the past have used this approach[6] and it was open to the trial judge to have done so. However, in my view, he was not obliged to do so.

[36] Having found that Mr. Clark's employment had been terminated without cause, the trial judge was obliged to determine what Mr. Clark's income would have been during the notice period. When a person's income is based on commissions, as Mr. Clark's was, it can be challenging to make that determination. Although not stated explicitly, it is clear from the reasons as a whole that the trial judge accepted that Mr. Clark's annual income had been increasing in the years leading up to dismissal, that it was likely to continue at the increased or a higher level and that he viewed the commissions Mr. Clark earned in the first trimester of 2004 to be the best indication of what his earnings would have been in 2004 had he remained employed with the Bank.

[37] The trial judge properly understood the principles to be followed in determining Mr. Clark's income during the notice period. He was not obliged to estimate Mr. Clark's income based on the average income earned in the three years preceding dismissal and he

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[5] *Jaremko v. A.E. LePage Real Estate Services Ltd.* (1989), 69 O.R. (2d) 323 (C.A.).

[6] See, for example, *Jaremko v. A.E. LePage Real Estate Services Ltd.* (1987), 59 O.R. (2d) 757 (H.C.J.), at p. 765, aff'd (1989), 69 O.R. (2d) 323 (C.A.), and *Nacu v. Watmec Ltd*., [2003] O.J. No. 3102 (Div. Ct.), at para.28.

did take into account all the relevant factors, including past earnings, when making his determination. Accordingly, there is no basis on which to interfere with that determination.

Mitigation

[38] The chain of reasoning employed by the trial judge is central to the Bank's argument on this matter so I begin by setting it out.

[39] The trial judge found that no brokerage firm would hire Mr. Clark while his criminal charges were outstanding. He concluded that since Mr. Clark must be presumed innocent of the charges, Mr. Clark could not be held responsible for the negative effect the charges had on his ability to secure comparable employment as an investment advisor. In addition to finding that the criminal charges prevented Mr. Clark from obtaining a position as an investment advisor after dismissal, the trial judge found that Mr. Clark would have been unable to obtain such a position later in the notice period after he pleaded guilty. He went on to find that, in the circumstances, Mr. Clark had made reasonable efforts to mitigate by developing his athletic training business, notwithstanding that he earned no income from that business in the relevant period.

[40] The appellant contends that it was the trial judge's application of the presumption of innocence which led him to conclude that Mr. Clark had met his duty to mitigate and that the trial judge erred by applying the presumption in this manner. It argues that Mr. Clark waived the presumption of innocence when, during the notice period, he pleaded guilty to the offences of criminal harassment and breach of recognizance. Consequently, the Bank argues, the trial judge was in error to apply the presumption of innocence as he did. Further, the Bank says that it was Mr. Clark's own criminal conduct in assaulting his common law spouse that led to his inability to obtain alternative employment as an investment advisor. At law, the Bank argues, this is a failure on Mr. Clark's part to satisfy his duty to mitigate which justifies a reduction in the notice period by 50% (or nine months).

[41] The court did not call on the respondent on this issue.

[42] The Bank relied on two cases in support of its submission that the trial judge erred in his application of the presumption of innocence: *R. v. Moser* (2002), 163 C.C.C. (3d) 286 (S.C.), at para. 34, and *R. v. Hoang* (2003), 182 C.C.C. (3d) 69 (C.A.), at para. 17. Both cases describe a guilty plea as constituting an admission of guilt with the result that the presumption of innocence is gone. There can be no quarrel with that principle. However, neither case suggests that entering a guilty plea operates retroactively so as to negate the presumption of innocence right from the time that a criminal charge is laid.

[43] In the present case, once the trial judge determined that Mr. Clark had been wrongfully dismissed, he was required to determine the reasonable notice period. At the time of dismissal, Mr. Clark had been charged with a criminal offence. He had not been convicted of any offence. The fact that Mr. Clark later pleaded guilty does not change the fact that at the time of dismissal, the presumption of innocence applied. Accordingly, I reject the appellant's submission that the trial judge erred in concluding that since Mr. Clark must be presumed innocent of the charges at the time of dismissal, Mr. Clark could not be held responsible for the negative effect the charges had on his ability to secure comparable employment as an investment advisor at that time.

[44] The Bank relies on *Queensbury Enterprises Inc. v. J.R. Corporate Planning Associates Inc.*, [1987] O.J. No. 1227 (H.C.J.), aff'd [1989] O.J. No. 663 (C.A.), in making its second argument on the issue of mitigation. To reiterate, this argument is that it was Mr. Clark's own criminal conduct that led to his inability to obtain alternative employment as an investment advisor and, in law, that amounts to a failure on Mr. Clark's part to satisfy his duty to mitigate.

[45] In *Queensbury*, the plaintiff corporation contracted to provide the defendant with financial planning and consulting services. The defendant terminated the agreement unilaterally and the plaintiff sued for wrongful termination. The plaintiff corporation's sole principal and shareholder was Hugh McLelland. Before the defendant terminated the agreement, Mr. McLelland was charged and convicted of criminal offences.

[46] In *Queensbury*, Catzman J. found that an employment relationship existed between the parties and that the plaintiff was entitled to reasonable notice of five months. When dealing with the matter of mitigation, he found that had Mr. McLelland made "greater and more efforts" to find comparable employment and had he not been burdened in seeking such employment by the criminal conviction, he would have found employment within three months of the date of termination. Accordingly, he reduced the notice period to three months.

[47] I do not accept the Bank's contention that because Mr. Clark was ultimately convicted of a criminal offence, his inability to find comparable employment necessarily means he failed in his duty to mitigate nor do I accept that *Queensbury* dictates such a result. The facts in the present case are materially different from those in *Queensbury*. In the latter, at the time of termination Mr. McLelland had been convicted of a criminal offence. As has already been noted, at the time Mr. Clark's employment was terminated, he had only been charged with a criminal offence and the presumption of innocence applied. Moreover, unlike *Queensbury*, in the present case the trial judge made no finding that Mr. Clark had failed to make reasonable efforts to find alternate employment. While an argument could be made that Mr. Clark's inability to obtain employment after the conviction was due to his own conduct, such an argument cannot succeed in light of

the trial judge's finding that by the time the conviction was entered, Mr. Clark would have been unable to take up a position as an investment advisor because his book of business had been retained by the Bank and, given his age, it was not viable for Mr. Clark to start afresh in such a position.

[48] In *Evans v. Teamsters Local Union No. 31* (2008), S.C.C. 20, the Supreme Court of Canada recently reviewed the principles that govern mitigation. Justice Bastarache, writing for the majority, reiterated that where reasonable notice has not been given, the employer is required to pay damages in lieu of notice but that requirement is subject to the employee's obligation to make reasonable efforts to mitigate damages by seeking an alternate source of income (para. 28). He also reiterated that the employer bears the onus of demonstrating both that the employee failed to make such reasonable efforts to find work and that work could have been found (para. 30).

[49] Although *Evans* was decided after the trial decision was handed down, it can be seen that the reasoning of the trial judge is consistent with these principles.

[50] The reasons of the trial judge for finding that Mr. Clark had made reasonable efforts to mitigate have already been set out. As previously discussed, the trial judge found that Mr. Clark could not have found work as an investment advisor at the time of dismissal because of the criminal charges. By the time the charges were resolved, there would have been no possibility of Mr. Clark returning to the brokerage business as a person with an existing book. Mr. Clark's book had been retained by Mr. Bontempo and/or his clients might have moved in the meantime. Mr. Clark would have been starting anew and given his age, that was not a viable option. In the circumstances, there is no basis on which to take issue with the trial judge's finding that Mr. Clark's decision to develop his athletic training business was rational or his determination that Mr. Clark took reasonable steps to mitigate.

[51] Furthermore and in any event, the trial judge expressly found that there was no evidence of any realistic chance that Mr. Clark might have secured alternative employment. Thus, the Bank failed to discharge its burden of demonstrating that Mr. Clark could have found work. As *Evans* makes clear, the Bank bore not only the burden of demonstrating that Mr. Clark failed to make reasonable efforts to find comparable work but also that such work could have been found.

[52] Accordingly, I see no basis on which to interfere with the matter of mitigation.

DAMAGES FOR LOST OPPORTUNITY

[53] The Bank argues that the trial judge erred in two ways in awarding damages for Mr. Clark's lost opportunity to sell his book of business. First, it contends that the trial judge stepped outside the boundaries of the pleadings in making the award. It says that

the causes of action pleaded in the amended statement were breach of fiduciary duty, mental distress and failure to provide reasonable notice of termination but that the claim for lost opportunity damages was based on an alleged breach of fiduciary duty and not as part of the Bank's failure to provide reasonable notice. Second, it submits that it was not open to the trial judge to make such an award because Mr. Clark had no right to be paid for his book of business.

The Pleadings

[54] I see nothing in this argument. The Bank did not make this argument below. There is an obligation to put such submissions to the trial judge, to allow for an appealable issue. That not having been done, the argument ought not to be raised on appeal: see *Scarborough Golf & Country Club v. Scarborough (City)* (1988), 66 O.R. (2d) 257 (C.A.), at pp. 268-69, leave to appeal to S.C.C. refused, (1989), 69 O.R. (2d) xi; *Perez (Litigation Guardian of) v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229 (C.A.), at p. 233.

[55] Further, although it would have been preferable had the amended statement of claim made clear that damages for lost opportunity were sought as part of its claim for compensation for a failure to give reasonable notice, it is worthy of note that 24 months' damages were sought in the statement of claim and the prayer for relief seeks $300,000 as damages for such a claim. While not explicit, given that the Bank viewed Mr. Clark as earning less than $100,000 annually, this suggests a claim for something in addition to lost commissions. Finally, I see no evidence of prejudice to the Bank given that the claim for such damages was fully argued below. If the Bank felt it was prejudiced by such an argument, the time to raise it was at trial when the evidence was called and the argument on point was made. At that time, the trial judge could have decided whether to allow an amendment to the pleadings. In that regard, it is useful to recall that pursuant to rule 26.01 of the Rules of Civil Procedure, on motion at any stage of an action, the court *shall* grant leave to amend, absent prejudice that is not compensable by costs or an adjournment.

Compensation for his Book of Business

[56] At the time of Mr. Clark's dismissal, the Bank had a policy that set out when and how an investment advisor who was leaving the brokerage business might "transition" management of his or her Bank client assets to another investment advisor. The transition policy stipulated that the departing investment advisor had to have an agreement to transition the client assets to a successor investment advisor and that the agreement had to have Bank approval. The policy set out minimum eligibility criteria and stated that the Bank had the discretion to determine that an investment advisor was not eligible to participate in a transition agreement, even in circumstances where the eligibility criteria appeared to be met. If Bank approval was obtained, the policy required

that the Bank be made a party to the agreement and that all payments under the agreement were to be through the Bank's payroll system.

[57] The Bank submits that, in light of the policy, Mr. Clark had no contractual right to enter into an agreement to sell his book of business. Accordingly, it argues, the proceeds of such an agreement are not a benefit provided by Mr. Clark's employment contract that was lost by reason of the Bank's failure to provide Mr. Clark with reasonable notice of termination and he cannot recover damages for them.

[58] I do not accept this submission. The fact that Mr. Clark did not have a contractual right to sell his book of business at the time his employment was terminated is not determinative of the matter, in my view.

[59] Once the trial judge found that Mr. Clark had been wrongfully dismissed, his task was to determine what damage award would put Mr. Clark in the same position he would have been in had he received reasonable notice of termination.

[60] The trial judge considered the evidence and concluded it was reasonably probable that Mr. Clark would have sold his book to Mr. Leith or Mr. Bontempo had he been given the time in which to do so. He was also satisfied that there were no proper grounds on which Bank approval could have been withheld. Finally, he was satisfied that a reasonable price for the sale of the book would have been reached. Consequently, it was open to the trial judge to find, as he did, that the Bank's failure to provide Mr. Clark with reasonable notice of termination caused him to lose the opportunity to sell his book of business, a benefit that he would have had during the notice period.

[61] This principle underpins the award of damages for losses in addition to lost income in other instances. So, for example, in *Veer v. Dover* (1999), 120 O.A.C. 394, this court ratified the award of damages for unexercised options under a stock option agreement which were found to be available during the notice period, despite a clause in the agreement which provided that the option would be cancelled on termination of employment. Similarly, in *Taggart v. Canada Life* (2005), 39 C.C.E.L. (3d) 48 (S.C.), aff'd (2006), 50 C.C.P.B. 163 (C.A.), damages were awarded for the loss of value that would have been added to the employee's pension had he worked through the notice period.

[62] Accordingly, I see no error in the award of damages for lost opportunity.

***WALLACE* DAMAGES**

[63] The Bank made a number of arguments as to why it was an error for the trial judge to have made an award of *Wallace* damages. Some of its arguments are based on the *Wallace* decision. Others are based on *Honda Canada Inc. v. Keays*, 2008 SCC 39, a

recent Supreme Court of Canada decision which, the Bank submits, materially changed the law on *Wallace* damages.

[64] I will not recount the various arguments as, in my view, the award of *Wallace* damages must be set aside for one simple reason: in the circumstances of this case, it amounted to double recovery for Mr. Clark.

[65] As has already been discussed, the trial judge awarded Mr. Clark damages of $90,000 as compensation for loss of the opportunity to sell his book of business. It will be recalled that the trial judge made the award of damages because of the Bank's refusal to permit Mr. Clark to sell his book of business. In so doing, he compensated Mr. Clark twice for the same thing. Compensation for the lost opportunity having been properly made as part of the damage award for failure to give reasonable notice, it was not correct to award compensation for it again by way of a *Wallace* award.

DISPOSITION

[66] Accordingly, I would allow the appeal in part by setting aside paragraph 2 of the Judgment, that being the award of *Wallace* damages.

[67] Although the appellant succeeded in part, the respondent was successful in defending against the majority of the matters in dispute on appeal. In the circumstances, I would make no order as to costs of the appeal. I would not disturb the costs order below.

RELEASED:
"MR"
"OCT -1 2008"

"E.E. Gillese J.A."
"I agree M. Rosenberg J.A."
"I agree R.A. Blair J.A."