The Impact of *Paquette v. TeraGo Networks* Inc. on Payment of Bonuses and Other Issues of Compensation upon Termination

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I. Overview

Bonus payments were once considered by the courts to be gratuitous payments which were non-compensable following termination. Now, bonuses are recognized as a component of wrongful dismissal damages, provided they are "integral" to the employee's remuneration package and not specifically excluded pursuant to adequately worded contractual terms in a contract or policy.

In this paper, we review the recent Canadian jurisprudence and principles governing bonus payments following termination, as well as other forms of compensation such as stock option plans and pension benefits. We consider what it really means for a bonus to be "integral" to an employee's compensation and whether the requirement for "active employment" includes the reasonable notice period. We conclude with some suggestions and considerations for policy or contract drafting in order to try to limit liability for bonus payments on termination.

II. *2016 - Paquette* and *Lin: Bonus Payments*

In 2016, the Ontario Court of Appeal released a pair of decisions considering an employee's entitlement to bonus payments following termination. In *Paquette v. TeraGo Networks Inc*.,[1] the Court of Appeal held that a term in the bonus plan that requires "active employment" when a bonus is paid, without more, is not sufficient to deprive the employee of compensation for the bonus they would have received during the reasonable common law notice period.

The employee in *Paquette*, with 14 years of service, was terminated without cause. At the time of termination, he was compensated with a base salary and bonuses. The employer's bonus plan required that an employee was had to be “actively employed" by the employer on the bonus payout date to be eligible.

The employee sued and brought a summary judgment motion to determine the notice period and wrongful dismissal damages, including compensation for the lost bonuses. The motion judge fixed the reasonable notice period at 17 months, but rejected the claim for lost bonus payments, finding as follows:

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[1] 2016 ONCA 618 [*Paquette*], reversing *Paquette v TeraGo Networks Inc*., 2015 ONSC 4189.

> *I conclude that Mr. Paquette is not entitled to any bonus payments. Although the Bonus Program at TeraGo was an integral part of Mr. Paquette's employment, there is no ambiguity in the contract terms of the Bonus Program. Mr. Paquette may be notionally an employee during the reasonable notice period; however, he will not be an "active employee" and, therefore, he does not qualify for a bonus.*[2]

The employee successfully appealed. In arriving at its decision, the Ontario Court of Appeal relied on its prior decision in *Taggart v. Canada Life Assurance Co*.[3] regarding the accrual of benefits following termination and its impact on wrongful dismissal damages. In *Taggart*, a case considering the employer's the requirement for active service as a prerequisite for the accrual of pension benefits, the Court stated at para. 16:

> *Assuming that the pension plans can be read as requiring active service as a prerequisite for the accrual of pension benefits, I find unpersuasive the argument that this precludes damages as compensation for lost pension benefits. This argument, it seems to me, ignores the legal nature of the respondent's claim. The claim is not … for the [benefits] themselves. Rather, it is for common law contract damages as compensation for the [benefits] the [employee] would have earned had the [employer] not breached the contract of employment. The [employee] had the contractual right to work and to be paid his salary and receive benefits throughout the entire … notice period.*

The result in *Taggart* was that a requirement for active service for the accrual of pension benefits did not preclude damages as compensation for the loss of such benefits.[4]

Applying this principle to the case at bar, the Court in *Paquette* noted that the employee's claim was not for the bonuses themselves, but rather for common law contract damages as compensation for the income (including bonus payments) he would have received had the employer not breached his employment contract by failing to give reasonable notice of termination.[5] The Court of Appeal thus overturned the motion Judge's denial of damages in relation to the lost bonus for the notice period.

In addition, the Court noted that damages for wrongful dismissal should place an employee in the same financial position had reasonable notice been given, stating as follows:

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[2] *Paquette v TeraGo Networks Inc*., 2015 ONSC 4189 at para. 64.
[3] 2006 CarswellOnt 1141, 50 C.C.P.B. 163 (ONCA) [*Taggart*].
[4] *Paquette* at para. 26.
[5] *Paquette* at para. 23.

> *The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given. [. . .]*
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> *Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package.*[6]

The Court went on to state that the correct approach in this case would have been to first determine the employee's common law entitlements, including whether he would have been eligible to receive a bonus had he been employed during the notice period. The second step is to determine "whether there is something in the bonus plan that would specifically remove the [employee's] common law entitlement".[7] The question is whether the wording of the plan unambiguously alters or removes the employee's common law rights to receive compensation for lost salary and bonus during the notice period.[8] Applying this two-step analysis, the court concluded that, without more, the requirement for active employment was insufficient to remove the employee's common law entitlements to compensation for the loss of his bonus.

At the time the Court of Appeal released its decision in *Paquette*, it also released its decision in *Lin v. Ontario Teachers' Pension Plan*.[9] At issue in *Lin* was whether an employer could enforce amendments it made unilaterally to its short-term and long-term incentive policies (the "Bonus Plan"), which purported to limit an employee's entitlement following termination. Despite the employer's requests, the employee had refused to "sign off" on the Bonus Plan amendments; however, the employer argued that by maintaining his employment, the employee had implicitly agreed to be bound by the new terms.

The Court of Appeal noted that by requesting "sign off" from employees, the employer recognized that employee consent was required in order for the amendments to become effective. In this case, since the employee refused to accept the amendments, he could not be bound by them. As a result, the terms of the original Bonus Plan applied.

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[6] *Paquette* at paras. 16-17.
[7] *Paquette* at para. 31.
[8] *Ibid* and para. 46.
[9] 2016 ONCA 619 [*Lin*].

Under the terms of the original Bonus Plan, an employee was not eligible for a payout if they were terminated (or resigned) before the Bonus payout date. Applying its two-step analysis in *Paquette*, the Court found that the original Bonus Plan did not clearly alter or remove the employee's common law right to damages, which included compensation for the bonuses he would have received while employed and during the notice period.[10]

Furthermore, the Court found that the Bonus Plan was an incentive to reward employees who achieved financial returns for the employer. In this case, the Bonus Plan formed approximately 60% of the employee's annual income. As a result, the trial judge held, and the Court of Appeal affirmed, that the Bonus Plan was a "significant, non-discretionary variable form of compensation, integral to Lin's compensation".[11] Therefore, he was entitled to compensation for his lost bonus payment during the reasonable notice period.

III. What does "integral" mean?

The Court of Appeal's decisions in *Paquette* and *Lin* establish that an employee is entitled to compensation during their notice period for all integral components of their remuneration. But what does "integral" really mean?

The Canadian Oxford Dictionary defines "integral" as "of a whole or necessary to the completeness of a whole". The Dictionary of Canadian Law defines "integral" as "essential to completeness, constituent."

In *Canadian Employment Law*, Stacey Ball states:

> *Even if it is not expressly agreed between the employee and the employer that a bonus is to be paid, if it becomes an integral part of the employee's remuneration, the payment of bonus will be deemed by the court as a right vesting to the employee. It has further been held that the payment of a bonus need not occur every year to become an integral part of the employee's remuneration package, if the bonus depended upon the money available to the employer at the end of the year. As few as two consecutive discretionary bonus payments may be enough to establish that bonus payments have become an integral part of the employee's compensation package [emphasis added].*[12]

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[10] *Lin* at para 89.
[11] *Lin v OTPPB*, 2015 ONSC 3494, at para. 92.
[12] Stacey Reginald Ball, *Canadian Employment Law*, (Toronto: Thomson Reuters, 2017) (Looseleaf, Release No. 72, September 2017) at 22-31.

Canadian Courts have taken several approaches in determining what forms of compensation are "integral" to the employee.

In *Bain v. UBS Securities Canada Inc*.,[13] the Superior Court articulated a general test for whether a bonus is integral to the employee's compensation:

> *The following factors are germane to whether a bonus was an integral part of an employee's compensation: (a) the bonus is received each year although in different amounts; (b) bonuses are required to remain competitive with other employers; (c) bonuses were historically awarded and the employer had never exercised its discretion against the employee; and (d) the bonus constituted a significant component of the employee's overall compensation [emphasis added].*

In *Bain*, the employee's bonus was held to be integral to his overall remuneration because it had been paid annually, though in varying amounts, and was a significant component of his income.

Although the four part test articulated in *Bain* is helpful in understanding what it means for a benefit to be integral, it is not always strictly applied by courts in determining whether a benefit is integral. For example, in *Schumacher v. Toronto Dominion Bank*,[14] the Court simply stated:

> *Where the bonus was promoted as an integral part of the employee's cash compensation, it would be inappropriate and unfair to the employee to be deprived of the bonus by reason of the unilateral action of the employer.*

In *Schumacher*, the employee's bonus was considerably higher than his base salary, implicitly then it was clearly an integral part of the employee's compensation.

In *Bernier v. Nygard International Partnership*,[15] the Court found that a bonus was integral because it "was a regular feature of the Plaintiff's compensation that she had come to expect."

There are a few Ontario cases where a bonus entitlement was not found to be integral to the employee's compensation. In *Wilson v. Crown Trust Co*.,[16] the employee was not entitled to a bonus during the notice period because the Court found it was not an integral part of his

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[13] *Bain v. UBS Securities Canada Inc*., 2016 ONSC 5362.
[14] *Schumacher v. Toronto Dominion Bank*, 1997 CarswellOnt 1779 (ONSC), at para. 225 [*Schumacher*]; aff'd 1999 CarswellOnt 1523 (ONCA).
[15] *Bernier v. Nygard International Partnership*, 2013 ONSC 4578 at para. 44; aff'd 2013 ONCA 780.
[16] *Wilson v. Crown Trust Co*., 1992 CarswellOnt 962 (Gen. Div.) [Wilson].

employment contract. In that case, the employee had only received a bonus once, during the year 1982, and his contract specifically provided for a bonus only in that year.

In *Stolze v. Delcan Corp*.,[17] employee bonuses were entirely at the discretion of the employer, and in the year prior to the employee's dismissal, no bonuses were paid to employees at the employee's level. The Court found that there was insufficient evidence to determine whether he would have received a bonus during the subsequent year, and as such, the Court concluded that his bonus was not integral to his overall compensation.

Recently, in *Manastersky v. Royal Bank of Canada et al*.,[18] Justice Monahan found that entitlements under a profit-sharing plan were integral to the employee's compensation. Mr. Manastersky had been employed by the Defendant employer, a division of the Royal Bank of Canada, for approximately 13 years as a Managing Director for an RBC investment fund when he was terminated without cause. At the time of termination, Mr. Manastersky's compensation included a base salary, bonus and entitlements as a participant in a profit-sharing plan. The profit-sharing plan was intend to provide investment professionals with an incentive to maximize returns for the RBC investment fund and provide a financial incentive to attract top talent.

RBC refused to provide any further entitlements under the profit-sharing plan after termination. Mr. Manastersky sued for wrongful dismissal damages.

At issue before the Court, among other things, was whether Mr. Manastersky was entitled to receive compensation representing the lost opportunity to earn additional entitlements under the profit-sharing plan during the notice period. Citing *Lin*, the court began its analysis by noting that it is settled law that damages in lieu of reasonable notice should place an employee in the same financial position he or she would have been in had such notice been given and the employee had worked to the end of the period of reasonable notice. Furthermore, damages for wrongful dismissal are not limited to claims for lost wages but may include payments on account of other forms of compensation, including bonus, stock option, pension or other benefit plans, where such benefit plans represent an integral part of the employee's compensation package.[19]

The Court followed the two step-approach set out in *Paquette*, noting that the first step in the analysis is to determine the employee's common law right to damages for breach of contract.

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[17] *Stolze v. Delcan Corp*., [1998] O.J. No. 4917 (ONSC).
[18] 2018 ONSC 966 [*Manastersky*] [decision is currently under appeal].
[19] *Manastersky* at para. 37.

The second step is to determine whether the clear language of the profit-sharing plan alters or removes common-law entitlements.[20] Applying this analysis, the Court found that the profit-sharing plan clearly represented an integral part of Mr. Manastersky's employment. Although the entitlements under the plan depended on investment earnings and fluctuated from year to year, the calculation of a participant's share of investment proceeds was nondiscretionary. Furthermore, over the course of Mr. Manastersky's 13 years at RBC, his average share of investment proceeds per investment year was approximately $635,000, representing well over 50% of his total annual income.[21] Therefore, the Court found that the profit-sharing plan was a significant, non-discretionary variable form of compensation that represented more than half of Mr. Manastersky's income.

At the second stage of the analysis, the Court considered whether there were any provisions in the profit-sharing plan that limited or eliminated common law entitlements. Although the profit-sharing plan did make provision for the impact of employment termination, it did not eliminate or limit Mr. Manastersky's entitlements. Rather, the profit-sharing plan provided that all of Mr. Manastersky's entitlements would immediately vest in the event that he was terminated without cause. As a result, the Court found that Mr. Manastersky's termination deprived him of the opportunity to earn additional entitlements under the profit-sharing plan, for which he was entitled to be compensated in damages.

The trial judge's decision in *Manastersky* is currently under appeal.

Although the case law considering whether a bonus is integral to the employee's compensation varies in approach, some key principles are clear. A bonus will likely be considered "integral" if it is a non-discretionary, significant form of compensation in relation to the employee's overall income package. Although the payout amounts and frequency can vary, what is important is whether the bonus payment becomes a fundamental part of the employee's remuneration.

IV. Since *Paquette* and *Lin* - Recent Cases

Recent Canadian jurisprudence has raised a number of issues regarding discretionary bonuses and the language necessary to restrict or remove an employee's right to wrongful dismissal damages.

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[20] *Ibid* at para 38.
[21] *Ibid* at para 39.

Will a court review the employer's exercise of discretion not to grant a bonus following termination?

Canadian courts have taken a different approach to reviewing the discretion of employers to award bonuses following termination. In *Styles v. Alberta Investment Management Corporation*,[22] the Alberta Court of Appeal recently held that there is no "common law duty of reasonable exercise of discretionary contractual power".[23] The employee in *Styles* was terminated without cause and denied payment of bonus grants under a long-term incentive plan. During the employee's three years of service, he was granted significant discretionary bonuses under the plan. The key provision in the plan was that in order to be eligible for a bonus the participant had to be an "active employee" on the vesting date. Otherwise, the bonus grants *may* be forfeited. The employee was terminated prior to the vesting date and the employer forfeited the bonus grants.

Following the Supreme Court's decision in *Bhasin v. Hrynew*,[24] the trial court interpreted the plan as providing the employer with the discretion to forfeit the grants fairly and reasonably. However, the Court of Appeal held that *Bhasin* "does not establish any general principle of 'reasonable exercise of discretion' in contractual performance."[25] The Court went on to note that *Bhasin* is not to be used as a tool to rewrite contracts, and award damages to contracting parties that the court regards as being "fair", even though they are clearly unearned under the contract.

The Court found that the bonus plan was sufficiently clear and unambiguous to waive the employee's common law right to a payout during the reasonable notice period. The Court noted that the plan left no doubt as to whether the participant had to be actively employed on the vesting date. The Court was also clear that any period of "reasonable notice" required in lieu of notice of termination did not qualify as "active employment".[26] The Court concluded that the employee in this case contracted for bonuses that would vest only if he stayed employed for a certain period of time. Since he was terminated prior to the vesting date, he did not earn the bonuses and was therefore not entitled to any bonus-related damages.[27]

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[22] 2017 ABCA 1 [*Styles*].
[23] *Styles* at para. 55.
[24] 2014 SCC 71.
[25] *Styles* at para. 49.
[26] *Styles* at para. 6.
[27] *Styles* at para. 54.

In contrast to *Styles*, Ontario appellate courts have considered an employer's reasonable exercise of discretion in awarding bonuses under an employment contract. In *Fraser v Canerector Inc*.,[28] for example, decided by the Ontario Divisional Court just two months after the Court of Appeal's decisions in *Paquette* and *Lin*, the Court considered whether an employee was entitled to damages in respect of an annual discretionary bonus where the bonus assessment date fell during the reasonable notice period.

The employment contract stated that the employee would be “eligible to participate in [the] employee bonus plan”. However, the bonus plan was completely discretionary. The employer did not have a written bonus policy and there was no established formula for calculating bonuses. As a result, the employee’s bonus had varied significantly in the years leading up to termination.

On summary judgment, the motion judge found that the employee was not entitled to a bonus during the notice period, “both because the bonus plan in question implicitly required participants to be employees at the time the assessment process is undertaken after year end and because the plan itself was fundamentally discretionary and subjective”.[29]

Although the Divisional Court did not make reference to the Court of Appeal’s recent decisions in *Paquette* and *Lin*, they found that the implied "active employment" requirement was problematic. The Divisional Court found that this implied requirement was not clearly communicated to the employee in writing at any time. In addition, there was no evidence to support the conclusion that employees had to be present at the time of the bonus assessment to receive the payout. However, this criticism did not ultimately affect the outcome of the appeal for two reasons. First, there was no evidence that the bonus was denied because the employee was not present at the time of assessment. Second, the motion judge’s reached his conclusion on the basis that the employee was not present during the assessment and because of the discretionary nature of the plan.

The only evidence before the Court against which the bonus entitlement could be assessed was the employer's assessment of the employee's performance. At the time of termination, the employee was responsible for originating, managing and completing acquisitions. The Court noted there was no evidence that the appellant had originated or closed any acquisitions in

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[28] 2016 ONSC 6071 [*Fraser*].
[29] *Fraser* at para. 22 citing para. 58 of the motion judge's decision.

2014, the year he was terminated. There was also no evidence that the divisions the appellant managed were profitable or that his efforts had a positive impact in 2014. As this was the only evidence before the motion judge against which the bonus entitlement could be assessed, the Court concluded that the reasonable exercise of discretion did not support a bonus on these facts.[30] However in that case, the employee could not demonstrate that he would have received a bonus had he remained actively employed during the notice period.

The Court's decision in *Fraser* indicates that, at least in Ontario, courts are prepared to undertake a review of an employer's exercise of discretion to ensure such discretion was exercised fairly and reasonably, or at least in good faith.

When will Bonuses be Payable Following Termination?

It is well-established that damages for wrongful dismissal should place the employee in the same financial position they would have been in had reasonable notice been given. These damages include bonus amounts the employee would have received had his employment continued during the notice period.

Following the Court of Appeal's reasoning in both *Paquette and Lin*, if a bonus payment is an integral part of an employee's compensation package, then following termination without notice, the employee is entitled to damages for the bonus they would have earned during the notice period, unless there is clear and unambiguous language in a bonus policy or contract that limits or removes the employee's common law entitlements to the bonus.

In *Kielb v. National Money Mart Company*,[31] the restrictive language in the bonus plan was sufficient to preclude any bonus entitlements following termination. The employment contract in *Kielb* contained a non-discretionary bonus, which the Court found was an integral component of the employee's compensation. The bonus plan clause provided that the bonus did not accrue and was only earned and payable on the pay-out date. The bonus clause went on to state:

> *For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid*

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[30] *Fraser* at para. 46.
[31] 2017 ONCA 356 [*Kielb*].

> *after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.*

The employee was terminated without cause approximately 5 months before the bonus pay-out date. The employee sought damages representing the bonus accrued to date of termination and over the notice period. He did not plead a claim for any common law damages in the alternative or at all.

The Court of Appeal found that it was open to the parties to agree how and when any bonus was declared, earned, accrued and would be payable.[32] The Court upheld the trial judge's finding that no bonus entitlement had accrued by or on the date of termination, nor did it accrue during the notice period under the terms of the contract or the provisions of the *Employment Standards Act*. The Court also noted that "[p]ublic policy would be ill served by permitting the plaintiff to accept a potentially lucrative position with the full knowledge that it contained a potentially unfavourable limitation clause and then to complain when that clause was actually executed". As a result, the Court concluded that the employment contract was sufficiently clear to preclude any common law entitlement to a bonus payment.

V. Other Forms of Compensations: Stock Option Plans and Pension Plans

An employee's entitlement to wrongful dismissal damages includes not only bonus payments, but other forms of monetary compensation, such as stock options and pension benefits, that would put the employee in the same financial positon they would have been in had they been working during the notice period. The case law has established that an employee is entitled to compensation for the loss of the right to exercise stock options during the notice period. The exception to this general rule, as stated in *Paquette*, is clear contractual provisions that limit or remove such entitlement.

Stock Option Plans

In *Kieran v. Ingram Micro Inc.*,[33] the issue was whether Mr. Kieran's time for exercising stock options upon the termination of his employment was extended by the common law notice period where he had been dismissed without cause. The stock option plans provided that he had 60 days from the date of termination for any reason other than death, disability or retirement to

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[32] *Kielb* at para 12.
[33] 2004 CarswellOnt 3117, 33 CCEL (3d) 157 (ONCA) [Kieran] affirming *Kieran v. Ingram Micro Inc*. (2001), 2001 CarswellOnt 3906 (Ont. SCJ).

exercise any rights then vested. “Termination of employment” was defined as the date the employee “ceases to perform services for” the employer “without regard to whether the employee continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination.”[34] Mr. Kieran argued that the stock option plans should be interpreted to find that they do not address a situation of dismissal without cause. As a result, he should be considered an employee during the nine months of notice after his termination and entitled, during that period, to exercise his options.

The Court noted that under Ontario law, Mr. Kieran would be entitled to damages for the loss of the Plans, as they formed part of his compensation, absent contractual terms to the contrary.[35] The Court found that there was no ambiguity in the stock option plans. The stock option plans differentiated between termination for death, permanent and total disability, and retirement and termination for *any other reason*. Mr. Kieran's employment was terminated for another reason: he was wrongfully dismissed.[36] As a result, the Court concluded that Mr. Kieran was bound by the plain language of the stock option plans. His right to exercise those options was not extended by the notice period.[37]

In *Paquette,* the Court explained the approach often seen in cases regarding whether the loss of rights under stock option plans are compensable as damages. Although stock options are similar to bonuses, stock options may be subject to different considerations. At paras. 40-42, the Court in *Paquette* noted as follows:

> *Like bonus plans, stock option plans will contain terms and conditions for eligibility, and both types of plans can provide valuable compensation to reward, incent and retain employees. Typically, bonuses are in amounts fixed by the employer and based to some extent on an employee’s past performance. With stock options, however, employees who hold vested rights are able to exercise their options when they see fit to do so, in order to maximize value. The timing of the exercise of an option is key to its value to the employee. And stock option plans prescribe and limit the timing of the exercise of options, typically including provisions for the termination of the options when certain events occur, including termination of employment.*

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[34] *Kieran* at para. 53.
[35] *Kieran* at para. 56.
[36] *Kieran* at para. 59.
[37] *Kieran* at para. 61.

> *Recognizing that the loss of the right to exercise stock options during the notice period is compensable in wrongful dismissal actions, the stock option cases have required clear language to limit the right to exercise stock options on termination. In a number of cases, the courts have found that the time for the exercise of stock options following the "termination" or "cessation" of employment was extended by the reasonable notice period: see Gryba v. Moneta Porcupine Mines Ltd. (2000), 2000 CanLII 16997 (ON CA), 5 C.C.E.L. (3d) 43 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 92 (the "effective date" of termination occurred at the end of the notice period); Veer v. Dover Corporation (Canada) Limited (1999), 1999 CanLII 3008 (ON CA), 45 C.C.E.L. (2d) 183 (Ont. C.A.) ("whether such termination be voluntary or involuntary" not sufficient to oust presumption that termination would be lawful); and Schumacher (recovery of damages for lost opportunity to exercise stock options was permitted under a "phantom" stock option plan referring to cessation of employment, but not in respect of a second plan providing for the exercise of options within 60 days following the employee's termination "without cause"). By contrast, in Brock v. Matthews Group, this court held that there was no recovery of damages for the lost opportunity to exercise certain stock options where the plan required the exercise of options within "15 days from the date notice of dismissal is given".*
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> *The approach in these cases can be summed up in the words of Goudge J.A. in Veer, at para. 14, "the parties must be taken to have intended that the triggering actions [for the cancellation of an employee's stock option rights] would comply with the law in the absence of clear language to the contrary."* [emphasis added]

Similar to the court's treatment of bonus plans, the loss of the right to exercise stock options during the notice period is compensable in wrongful dismissal actions. However, clear language which limits or removes an employee's common law entitlements will be upheld.

Pension Plans

Pension benefits, like other forms of compensation, form part of an employee's remuneration, for which an employee can seek damages. Similar to the principle governing bonuses and stock options, the requirement of clear, unambiguous language equally applies to pension plans in order to restrict or limit common law rights.

In *Taggart*,[38] the Ontario Court of Appeal held that the pension plan was ambiguous, at best, and accordingly, insufficient to limit the employee's common law right to damages for loss of pension benefits during the notice period. The employee in *Taggart* had been employed for 30 years before he was terminated without cause. He was enrolled in the employer's defined benefit pension plan, under which benefits were determined on the basis of a formula that incorporates the employee's years of service and earnings.

On termination, the employee was offered 2 months of working notice and 22 months' pay in lieu of notice; however, pension benefits were only offered for the 2 months of working notice on the basis that the pension accruals required active employment. The loss of 22 months service made a significant difference to the employee's pension benefits and his ability to retire early with a full pension.

The employer also relied on language contained in the pension plan that precluded pension benefits from being used to increase wrongful dismissal damages.

The pension plan, the Court held, did not increase the employee's damages beyond his common law entitlements. Rather, the language of the pension plan was attempting to limit the employee's rights to common law damages. In addition, the Court noted the contract did not say that a dismissed employee was not entitled to damages as compensation for the loss of pension benefits that would have accrued during the notice period. As a result, the Court found the limiting language was vague and ambiguous and insufficient to limit the employee's common law rights.

Wrongful dismissal damages are also, arguably, distinct from pension benefits. The Supreme Court of Canada has found that pension payments (under a defined benefit pension plan) are not deductible from wrongful dismissal damages. In *IBM Canada Limited v. Waterman*,[39] the Supreme Court held that pension benefits are distinct from claims arising from termination of employment. Specifically, the Court noted that "pension benefits are a form of deferred compensation for the employee’s service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment."[40]

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[38] *Supra* note 4 (remove once footnotes finalized: 2006 CarswellOnt 1141, 50 C.C.P.B. 163 (ONCA) [*Taggart*]).
[39] 2013 SCC 70 [*IBM*].
[40] *IBM* at para. 4.

Although pension plan benefits are often treated like other forms of compensation, there are different considerations at play when determining wrongful dismissal damages. Other factors, such as calculating damages under defined benefit plans vs. defined contribution plans will also require consideration.

VI. Advice on Policy Drafting

Clear, Unambiguous Language

The case law emphasizes that only clear, unambiguous language will suffice to restrict or remove an employee's common law entitlements. When drafting bonus, stock option or pension benefit plans, ensure that the language in your plan is carefully drafted to remove or restrict the employee's common law entitlements following termination if desired. Simply stating that a bonus or stock option requires "active employment" is insufficient to preclude an employee from successfully pursuing damages for the lost opportunity following termination.

Furthermore, to avoid future disputes regarding the limits of the bonus or benefit plan, ensure that employees are made aware of any limitations in the policy at the start of the employment relationship.

Amendments to Bonus Plan

If an amendment to your bonus or benefit plan is required, seek legal advice to ensure that the amendments will be enforceable. It is not sufficient to unilaterally change the plan and request that existing employees "sign off" on amendments. New consideration may be required in order for the amendments to become effective.

Calculating Bonus Payment

Courts have applied an averaging formula to calculate bonus payments following termination. In order to avoid an averaging formula or some other disadvantageous calculation proffered by the employee in litigation, ensure that you submit evidence of an alternative, more appropriate calculation.

VII. Conclusion

Paquette and the recent decisions of Canadian Courts make it clear that unambiguous language is important when interpreting bonus or benefit plans. Although the loss of a bonus or stock option can constitute wrongful dismissal damages, provided it is "integral" to the

employee's remuneration package, clear language limiting an employee's common law right to recover damages will be enforced.