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concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.”

Crown consultation can take many forms. For example, project modifications may be required as part of environmental assessment or post-environmental assessment permitting processes. This could include route changes for linear projects, compensation for provable trapping losses, or programs to mitigate project effects on other traditional uses such as hunting or fishing.

In addition, project proponents may be able to make the issues concerning the adequacy of Crown consultation and accommodation academic by entering into economic arrangements directly with affected First Nations. In areas of Canada subject to modern land claims agreements, economic arrangements in the form of “impact benefit agreements” or land access agreements may be a regulatory requirement, and a precondition to project development activities. In other areas, less formal arrangements are often negotiated as a mechanism for achieving commercial alignment with First Nations, in return for their support for the project.

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THE AVAILABILITY OF PUNITIVE DAMAGES ARISING FROM THE BREACH OF HUMAN RIGHTS LEGISLATION

By Carman Overholt, Q.C., FMC Vancouver

It has become common for wrongful dismissal litigation to include a tort claim such as intentional infliction of mental suffering, defamation or inducing a breach of contract. Establishing a separate actionable wrong has long been viewed as necessary to maintain a claim for punitive damages, in light of law that has historically restricted the availability of such an award. In addition to the employer, individuals involved in the termination of employment are now frequently named as defendants in wrongful dismissal litigation. The increasingly complex nature of employment related litigation often includes allegations of sexual harassment, discrimination on the basis of disability or other forms of discriminatory conduct. If established, these claims may justify an award of *Wallace* damages (an extension of the notice period because of an employer’s bad faith in connection with the termination of employment), aggravated damages and punitive damages.

Counsel for employers have argued that *Bhadauria v. Seneca*

College of Applied Arts and Technology, [1981] 2 SCR 181 (“*Bhadauria*”), precludes claims for damages arising from an alleged breach of human rights legislation and that human rights tribunals have exclusive jurisdiction in this area. As well, employers have argued that wrongful dismissal litigation and simultaneous human rights proceedings constitute an abuse of process because of the duplicitous nature of the proceedings and the remedies sought. Although human rights legislation is remedial in nature, some Canadian jurisdictions have legislation giving tribunals express jurisdiction to award punitive damages in addition to compensatory damages.

The Ontario Court of Appeal in *Keays v. Honda Canada Inc.*, C43398 (September 29, 2006) (“*Keays*”), confirmed the availability of punitive damages as an appropriate remedy where an employer breaches human rights legislation in the course of terminating employment. The trial judgment in *Keays* awarding \$500,000 to Mr. Keays, captured headlines across Canada because it represented the largest award of punitive damages in a wrongful dismissal action in Canadian legal history. Although the majority of the Ontario Court of Appeal reduced the punitive damages award to \$100,000, it confirmed the availability of punitive damages where a breach of human rights legislation is established.

Mr. Keays was employed by Honda for approximately 14 years. Throughout his employment, he experienced health problems resulting in occasional absences. Mr. Keays had been on a disability leave for more than two years when the long term disability insurer terminated his benefits on the basis that he could return to work. Although Mr. Keays returned to work, he continued to experience absences due to his sickness. Mr. Keay’s physician advised that Mr. Keays would miss approximately four days per month because of his condition, known as Chronic Fatigue Syndrome. When Mr. Keays was asked to see the company physician, he took the position that he would not do so in light of advice he had received from his legal counsel and until he was provided with “clarification of the purpose, the methodology and the parameters of the assessment to be done by the doctor”. Honda responded by advising Mr. Keays that if he did not meet with the physician, his employment would be terminated. Honda did terminate the employment of Mr. Keays, allegedly for just cause. Honda took the position that the refusal to see the company physician was an act of insubordination justifying his dismissal.

At the trial of his claim, the Court found that Mr. Keays was entitled to 15 months’ notice of the termination of his employment. Because of the manner in which his employment was terminated, the Court held that Mr. Keays was entitled to *Wallace* damages of nine months. In light of the finding that Mr. Keays was harassed and that Honda had breached the *Ontario Human Rights Code*, the Court awarded Mr. Keays \$500,000 in punitive damages. In



addition, Mr. Keays' legal costs were fixed at \$610,000 inclusive of disbursements and GST.

The majority of the Court, as noted above, upheld the trial judgment but reduced the award of punitive damages to \$100,000 and reduced costs. The majority of the Court of Appeal reduced the punitive damages award on the basis of the principle of proportionality and its conclusion that findings made by the trial judge were not supported by the evidence. The Court of Appeal found that the trial judgment and award of punitive damages were consistent with the decisions of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 592 and *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 except in terms of the quantum. The majority for the Court of Appeal in *Keays* held:

The misconduct for which the Appellant must take responsibility took place over a period of seven months, and was simply not on the same scale as occurred in *Whiten*. At para. 112, Binnie J, listed seven factors, including duration of the impugned conduct, that the Court must consider in fixing the quantum of the award. The trial judge made findings against the Appellant on several of those factors, including: the misconduct was planned and deliberate and the Appellant knew that the Respondent was particularly vulnerable because of his disability. Another factor the Court must consider as described at paragraph 117 of *Whiten* was whether the conduct towards the victim was malicious and highhanded. Despite the gravity of some of the findings of misconduct the trial judge made against the Appellant, the Appellant's conduct cannot fairly be described as malicious.

The majority of the Court agreed with Mr. Justice Goudge's finding that *Bhadauria* was not applicable. Mr. Justice Goudge held:

However, in the context of punitive damages, the Appellant's conduct is not advanced to support a cause of action for breach of the Respondent's human rights, but as an independent wrong actionable by way of wrongful dismissal. What matters is that the Appellant's acts of discrimination and harassment triggered the Respondent's termination. In fact, the trial judge found that the Appellant's course of discriminatory conduct culminated in the most dramatic form of employment harassment, namely the Respondent's termination. This would give rise to a cause of action for wrongful dismissal apart altogether from any question of the Respondent's disobedience. It is in this context that the trial judge found that the Appellant's discriminatory conduct to constitute an independent actionable wrong.

The *Keays* decision has important implications for employers in how they ensure compliance with human rights legislation. The failure to comply with human rights legislation will continue to be relevant in employment related litigation and provide a basis for large awards of damages, including punitive damages. In this way, the *Keays* decision represents a harbinger of things to come.

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ADAPTING TO THE NEW TRADE PARADIGM

*By Stephen S. Poloz,
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Change is a constant in our lives today, and adaptability is highly rewarded in business. But only rarely is a change so fundamental that it changes everything – a paradigm shift.

We are living such a paradigm shift now. Managers of large companies grew up believing in the power of vertical integration. To reduce the costs associated with finding suppliers, negotiating with them and managing deliveries, companies integrated them into their operations. In the process they have built cost structures that are unsustainable in today's environment.

Why unsustainable? New technology has vastly reduced the costs of tapping and managing supply networks, regardless of geography, making it feasible to integrate new, low-cost countries into global supply chains. The advantages of vertical integration have evaporated, and companies that are not burdened with a vertically integrated legacy can outperform those that are.

Consequently, many large companies are going through a process of vertical and geographical disintegration, spreading their supply network worldwide. Whether the suppliers are independent, partners or wholly owned, the result is the same. This new production model opens up many new access points for small, nimble, specialised companies. They can compete for individual links in the global supply chains of large companies, and go global with them. Small is beautiful.

This new production model means that companies are no longer using trade just as a sales tool, they are now using trade as a tool of production, to connect the links in the chain. This is the new trade paradigm – integrative trade – and there are many signs that companies are adapting to it.

First, Canadian companies are investing heavily in new technology.

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