

## LAW NEWSLETTER

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*This newsletter is provided to clients as a way of expressing thanks for your patronage and to provide added value to our relationship. Issued four times yearly, the newsletter attempts to bring various recent legal developments to your attention. Hopefully, some of this information is useful to know and may save your business time and money in terms of avoiding unnecessary litigation, assuring appropriate regulatory compliance with government regulations and other matters.*

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### EMPLOYEE DISMISSAL

During these difficult economic times, it may become necessary to dismiss employees. Employers should not try to dismiss “for cause” unless they have well documented evidence. The courts will find out whether a claim of poor performance is bogus. In terminating employees due to a shortage of work, care should be taken to provide adequate notice of termination or severance pay or a combination of both.

In the case of Lee v. 1554478 Ontario Inc. (Midland Seafoods Inc.), 2008, the plaintiff, Grace Lee, sued her former employer, Midland Seafoods, seeking damages for wrongful dismissal. One issue before the court was the question of what notice period should have been given to Mrs. Lee. In December, 2005, at a time when the plaintiff was 56 years old and was earning a yearly salary of approximately \$33,000.00, she was dismissed. Her job with Midland Seafoods as a clerk for approximately 16 years consisted of copying printouts of computer invoices into ledgers, depositing

cheques, and reception work. In order to determine the proper notice period for dismissal the judge turned to the Bardal case for guidance and stated:

*I am of the view that the Bardal factors, namely character of the employment, length of service, age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant, suggest a range of 12-16 months, with age and availability of similar employment pointing to the higher end and character of employment pointing to the lower end. I find that 15 months is a reasonable notice period.*

However, the plaintiff had a legal duty to mitigate the damages flowing from the dismissal. Thus the judge found that her efforts at finding a new job were “minimal and unsystematic to the point of being unreasonable”. Accordingly, the judge reduced the notice period from 15 months to 12 months and awarded damages to the plaintiff. This required Midland Seafoods to pay 12 months’ salary to the plaintiff along with a substantial portion of her legal costs.

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### TRADEMARK DISPUTE

An interesting case before the court last year involved a trademark dispute between Mars Canada Inc., the candy maker, and M&M Meat Shops Ltd., which sells a variety of specialty

foods, mostly meats and some dessert products. Mars had been selling M & M’s candy for many decades. Then, in 1986, M & M Meat applied for a trademark design, which was granted in July, 1991, for “M&M” and the words “Meat Shops” underneath the letters in connection with

meat and pastry products. In October 1991, M&M Meat applied to register a new M&M logo containing, in English, just the letters “M&M”, to which Mars objected. Dropping the words “Meat Shops” and expanding the list of pastries concerned Mars.

After much negotiation, the companies entered into a settlement agreement. M&M Meat agreed not to use or register its marks in association with candy products or toys, agreed not to use or register “M&M’s” as a business name or trading style or to abbreviate its marks in the form “M&M’s” and agreed to restrict its sales of products in the dessert, baked goods and prepared mixes categories to its company owned or franchised stores trading under the M&M Meat Shops name.

In 2001, M&M Meat entered into an arrangement with Mac’s Convenience Stores Inc. whereby Mac’s became an M&M Meat franchisee. Mac’s operates many convenience stores throughout Canada and sells a wide variety of products, including confectionary products, and in particular Mars’ M&M’s candy products. Since 2001, Mac’s has entered into franchise agreements with M&M Meat in respect of M&M Meat Shop franchises. The M&M Meat Shops operated by Mac’s are located within the same premises as a Mac’s convenience store.

In September 2005, Mars became aware of M&M Meat’s arrangement with Mac’s and took the position with M&M Meat that the sale of its ice-cream, ice-cream novelties and products in the dessert, baked goods and prepared mixes, being the “Restricted Products” in the settlement agreement in Mac’s convenience stores was a breach of the settlement agreement. As a result, Mars sought a court declaration that M&M Meat breached the settlement agreement by permitting certain restricted products to be sold other than as provided by the agreement and also sought an injunction restraining the breach.

The trial judge, after reviewing case law, concluded, “In my view, the wording in .... the settlement agreement, as amended, is clear, unambiguous and straightforward. The

paragraph provides, as it reads, that M&M Meat is prohibited from selling the Restricted Products other than in its company-owned or franchised stores trading under the names “Les Aliments M&M” and “M&M Meat Shops”.

The judge noted, “The evidence establishes that the M&M Meat Shops operated by Mac’s and located within or adjacent to the Mac’s convenience stores are, in every case, set up and operated separately from the Mac’s stores both from a physical and a business point of view. On the outside of each location there are one or more signs on both a sign post and the premises itself clearly and separately identifying the M&M Meat Shop (with its trademark logo). Inside the location, the M&M Meat Shop retail area is physically segregated from the Mac’s store by signage, display and counter.”

Indeed, the M&M Meat Shops located in or adjacent to the Mac’s stores have separate cashiers and point of sale systems from Mac’s. The court further stated, “This autonomy [between Mac’s stores and M & M Meat Shops] results, in my view, in the two businesses being clearly operated as separate stores regardless of the fact that they are situated within or adjacent to the same four walls.”

In conclusion the judge found M&M Meat Shops operated by Mac’s in or adjacent to its convenient stores are clearly M&M Meat franchised stores, trading under the names “LES ALIMENT M&M” and “M&M MEAT SHOPS”. Accordingly, in permitting the sale of the Restricted Products in Mac’s M&M Meat Shops, M&M Meat is not in breach of the settlement agreement. Mars’ application was therefore dismissed.

This result was clearly not what Mars wanted and they must have been surprised that the franchise structure employed by M & M Meats created a means to sell pastries in a way that Mars found objectionable. However, the intent of the settlement agreement, which was to find a way for the two companies to sell their respective products without creating confusion for consumers, was, I think fully met.

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## TERMINATING DISTRIBUTION AGREEMENTS

In reviewing court cases for this newsletter, I came across *Treen Gloves and Safety Products Ltd. v. Degil Safety Products Ltd.*, a B.C. Supreme Court decision concerning the termination of product distribution agreements. Although it is not a recent case, I felt that besides demonstrating the concept of implied contractual provisions, it is an interesting read.

The plaintiff, Treen's, claim for damages arose from a distributorship agreement in which Treen was granted an exclusive distributorship to a certain territory. The plaintiff alleged that the defendant, Degil, decided to repudiate the agreement and to remove the plaintiff as sole distributor in the territory, without cause, alleging that the defendant breached the agreement by allowing others to sell in the territory. In addition to damages for breach of contract, the plaintiff asked for an injunction forbidding the defendant from doing those things, which the plaintiff argued, were contrary to the distribution contract.

The defendant, Degil, counter-claimed for a declaration that implied that in the distributorship agreement is a term that would enable either party to terminate the agreement at any time without cause upon reasonable notice of that termination. The defendant gave such notice, being a one year notice, and the parties agreed this is appropriate if a term is implied.

The contract states, "This agreement shall remain in effect for an initial term of ten months ending December 31, 1987 and subject to the provisions of Sections 5 ..., shall renew itself automatically from year to year thereafter for succeeding renewal terms of one year each, under the same terms and conditions.

The contract goes on to provide Treen with the right to terminate the contract on 30 days' notice. The defendant, Degil, could only terminate the contract if one of the events of default listed in Clause 5 occurred. The events of default are defined as Treen's failure to observe or perform any of its covenants, Treen having materially

misrepresented to any of its customers the performance capabilities of the products, or Treen soliciting sales of or having sold products which are competitive with the product save and except as permitted by the sales policy and procedures of the manufacturers of the products, or where Treen has, during the agreement, violated any of the sales policies and procedures.

The court summarized the situation as follows: "We thus have a commercial agreement where under Treen enjoys the rights of a sub-distributor with an exclusive territory and wherein there is no termination clause permitting the distributor to terminate the agreement without cause upon the giving of a reasonable notice. The sole provisions for termination apply in the event of a default as defined in the contract and there are mechanisms in the agreement to address the situation should sales fall below a minimum level."

The issue before the court was whether, in the absence of cause (i.e.- no event of default had occurred), the distributorship agreement was perpetual or, whether, upon a true construction of the agreement, it was terminable by either party upon reasonable notice to the other.

In the Ontario Court of Appeal decision in *Robinson v. Galt Chemical Products Ltd. [1933]*, the trial judge's statement was that after considering a few cases, the court, in the subject case, held: "The plaintiff's application for summary judgment is dismissed and there will be judgment for the defendant on the counterclaim. I am implying a term in this commercial contract permitting termination without cause upon reasonable notice."

In other words, the court felt it was absurd for a contract to permit one party to terminate on short notice and hold the other party to a perpetual agreement as to the other party's part of the bargain. This should be duly noted as it is clear that the courts will not allow extremely unbalanced termination rights to exist and find no difficulty in implying a reasonable notice terminating provision so that both parties have similar termination rights.

## CONTACT INFORMATION

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