

## Member's Quarterly

## Spring 2024 Edition

### Feature

# Reasonable Notice Period

*Uncertainty beyond 24 months*

### Introduction

It would appear that the Ontario Court of Appeal has raised doubt as to the purpose of the common law reasonable notice period, and what would constitute "exceptional circumstances" that would support a reasonable notice exceeding 24 months.

In *Lynch v Avaya Canada Corporation*, 2023 ONCA 696 ("Lynch"), the Court of Appeal upheld a 30-month reasonable notice period determined on summary judgment.

### Background

Mr. Lynch was employed with Avaya Canada Corporation (and its predecessor) for nearly 39 years at the time he was dismissed from his employment. Mr. Lynch sought 26 months of notice in his Statement of Claim; however, he argued for a 36-month notice period on motion for summary judgment.

The motion judge awarded Mr. Lynch with a notice period of 30 months. The Company appealed, first arguing that the motion judge erred by (1) awarding a greater notice period than what had been sought in the Statement of Claim; (2) finding there to have been no failure on Mr. Lynch's part to mitigate his damages; and (3) that there were "no exceptional circumstances" warranting a notice period in excess of 24 months, contrary to the Court of Appeal's previous findings in *Lowndes v Summit Ford Sales Ltd*, 2006 CanLii 14 (ONCA).

### The Decision

In short, the Court found that the issue related to the Statement of Claim was moot given that the Company had conceded that there was no litigation prejudice suffered. With respect to mitigation, the Court reinforced the state of the law, noting that the employer has the onus to provide sufficient evidence to demonstrate insufficient mitigation efforts. In this regard, the Court of Appeal deferred to the previous judge's assessment.

Most interesting, however, was the Court's assessment as it related to the Company's argument that the motion judge did not identify the "exceptional circumstances" upon which to justify a notice period in excess of 24 months. The Court held that such factors were discernable based on the factors the motion judge had listed, which included:

- That Mr. Lynch's skillset had been tailored to the Company, which included specialization with the Company's unique hardware;
- Mr. Lynch had developed at least one patent per year for the Company;
- Mr. Lynch had been a "key performer"; and
- Comparable employment opportunities were far enough away such that relocation would potentially be required.

The Court of Appeal ultimately dismissed the case, upholding the 30-month notice period.

### Takeaways for Employers

While there has never been a real "cap" at 24 months of common law reasonable notice, practically the concept is often assumed.



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Lynch serves as an important reminder that the courts will not only award a notice period in excess of 24 months, but that the circumstances which they may deem to be "exceptional" are now somewhat unpredictable, specifically as it relates to the factors that a Court will rely upon as justification.

While the Court of Appeal in Lynch did cite some factors that have traditionally led to a longer notice period, such as factors that could lead to greater difficulty securing alternative employment, others were arguably "new" to the analysis. For example, The Court of Appeal considered Mr. Lynch's good performance to be one of the exceptional circumstances justifying a longer notice period. This is somewhat contradictory given the assumption that a strong performer would have an easier time securing new work.

In short, Lynch inserts new uncertainty into the reasonable notice analysis, thus rendering all tools to limit potential costs when dismissing an employee, such as employment contracts with defensible termination provisions, of the utmost importance.

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