

## News

## Awards

■ Ontario has awarded the 2015 David Walter Mundell Medal for excellence in legal writing to **Julie Macfarlane** and **Justice Todd Archibald**. Macfarlane is a professor at the University of Windsor faculty of law. She has written numerous legal academic articles and books, including her ground-breaking title, *The New Lawyer*. Justice Archibald is a judge in the Superior Court of Justice. He is recognized for his outstanding legal writing that has made large contributions to the practice of law.

■ The Ontario Bar Association has recognized six members who have made significant contributions to the practice of law in the province. Receiving the OBA award for distinguished service were **Angela Swan** of *Aird & Berlis*; **Jerry Udell** of *McTague Law*; and **Frank Walwyn** of *Weirfoulds*. **Karen Perron** of *Borden Ladner Gervais* won the Linda Adlam Manning Award, while **Brock Jones** of the ministry of the attorney general won the Heather McArthur Memorial Young Lawyers Award. Also, **Susheel Gupta** of the Canadian Human Rights Tribunal won the President's Award.

## Moves

■ *Lerners* has five new partners. **Andrew Elias** and **Alfonso Campos Reales** focus on personal injury. **Leanne Zawadzki**'s practice focuses on insurance defence. **Fred Tranquilli** works in commercial litigation, health law, land development, professional regulation and municipal law. **Alysia Christiaen** focuses on personal injury, professional regulation, health law and class actions.

## Contract ruling could be 'significant'

KIM ARNOTT

Ontario employers who breach fixed term employment contracts are obliged to pay employees full wages and benefits for the unexpired portion of the contract, and that obligation is not subject to mitigation, the Ontario Court of Appeal has decided.

Legal observers say the ruling, which makes fixed term contracts a riskier proposition for employers, will likely trigger a re-examination of the drafting of such contracts and could impact on employment law across the country.

In *Howard v. Benson Group Inc.* [2016] ONCA 256, the court awarded more than three years worth of salary and benefits to a former automotive service centre manager who was terminated without cause 23 months into a five-year employment contract that didn't have an enforceable early termination clause.

"In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation," wrote Justice Bradley Miller, on behalf of the unanimous panel.

The court drew on its analysis in *Bowes v. Goss Power Products Ltd.* [2012] ONCA 425, to overturn a lower court ruling that found the common law presumption of reasonable notice and required mitigation should apply in a fixed term contract with no early termination clause.

Rather, the appellate court determined, the contract established a notice period equal to the unexpired portion of the contract and ousted the common law presumption of reasonable notice.

"There is no reason to depart from the rule in *Bowes* that there



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**Matthew Certosimo**  
Borden Ladner Gervais

is no duty to mitigate where the contract specifies the penalty for early termination," wrote Justice Miller. "It does not matter whether the penalty is specified expressly, as in *Bowes*, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally."

In *Bowes*, the court established the principle that contractually negotiated severance amounts or notice periods would not be sub-



Barnacle

ject to mitigation and *Howard* "organically expands" that principle to fixed term contracts, says Toronto employment lawyer Stacey Ball, author of the text *Canadian Employment Law*.

"What they've done is gone one step forward and applied the *Bowes* principle to fixed term contracts," said Ball. "If you have a remaining part of a fixed term, that's no longer mitigatable. It becomes like a debt."

If it stands, the decision could result in "significant unanticipated exposure" for employers using such contracts, warns Matthew Certosimo, national leader of the labour and employment group for Borden Ladner Gervais.

"*Howard* has the potential to be very significant for employers and employer counsel with respect to the drafting of employment contracts and specifically fixed term employment contracts," he said.

In the *Howard* decision, a clause establishing the employer's right to early termination without cause was found to be unenforceable due to ambiguity.

"For employers, the first message is that if you're going to have an early termination clause, you'd better make sure it's clear," says Peter Barnacle, principal revising author of the text *Employment Law in Canada*.

Given the "significant cross-pollination" of employment law across provinces, Barnacle says employment lawyers across Canada should take note of the decision. "The employment law cases, particularly from the Ontario Court of Appeal, have significant influence across the country."

Certosimo agrees that the decision offers "an obvious heads-up" to lawyers who act for employers: "It's probably a good idea to pull out any fixed term contracts currently in place with our clients and revisit them in light of the *Howard* case, as our clients could be facing significant unanticipated exposure."

But he added that says he's watching to see whether leave is sought and granted to appeal the decision to the Supreme Court of Canada, as he believes the decision is contrary to the British Columbia Court of Appeal's position in *Neilson v. Vancouver Hockey Club Ltd.* [1988] B.C.J. No. 584, and subsequently in *Mosher v. Epic Energy Inc.* [2001] BCCA 253.

The Benson Group is "giving consideration to seeking leave to appeal," said Albert Campea, a lawyer with Bernardi Human Resource Law LLP who represented the employer before the Court of Appeal.

While conflicting appellate court decisions are a consideration for leave to appeal to the Supreme Court of Canada, Ball says he isn't convinced leave would be granted, and predicts based on recent rulings that the top court would likely affirm the decision if it did consider it.

"The Supreme Court of Canada has consistently taken a view of protecting employees as a vulnerable group in society, and I think this decision of the ONCA has a good amount of logic to it and because of that, I think they'd be inclined to let it stay," he said.

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