EMPLOYMENT LAW CONFERENCE—2006

REFERENCE LETTERS

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REFERENCE LETTERS

I. Introduction

The topic of reference letters was last comprehensively discussed by Shelly Mae Mitchell and Steve M. Winder, both of then Ladner Downs, at the CLE Employment Law Conference in 1999.

The B.C. Court of Appeal's decision dealing with reference letters in *Shinn v. TBC Teletheatre BC, a Partnership*, [2001] B.C.J. No. 223 (C.A.), the continuing development of "*Wallace*" damages, the enactment of privacy legislation, and recent initiatives in some U.S. states, among other things, make this topic worth revisiting at this time.

II. Analysis

A. Is there a Legal Duty to Provide a Reference Letter?

Employers do not have a duty at common law to provide a reference letter (*Kalaman v. Singer Valve Co.*, [1996] B.C.J. No. 814 (S.C.), varied on other grounds [1997] B.C.J. No. 1393 (C.A.) ("*Kalaman*"); *Kindret v. Shaw Cablesystems Ltd.* (1997), 30 C.C.E.L. (2d) 144 (S.C.) ("*Kindret*"); *Shinn v. TBC Teletheatre BC, a Partnership*, [2001] B.C.J. No. 223 (C.A.), appeal of [1999] B.C.J. No. 2973 ("*Shinn*"); *Beatty v. Canadian Mill Services Assn.*, 2003 BCSC 1053 ("*Beatty*")).

B. Are there Other Reasons to Provide a Reference Letter?

Although there is no common law legal duty to provide a reference letter, the English House of Lords has stated in a leading case on reference letters—*Spring v. Guardian Assurance* plc, [1994] 3 All E.R. 129 (H.L.)—that:

- employers have "a moral duty" to provide a reference letter because "in many cases an employee will stand no chance of getting another job, let alone a better job, unless he is given a reference" (at 161);
- employers indirectly benefit from giving a reference in that employers are dependant on the reciprocity "which exists among employers as to the giving of references on prospective recruits" and that without this reciprocity "recruitment of staff would be more difficult" (at 171); and
- an employer's refusal to provide references would "directly affect an employers' ability to recruit staff if it became known that he was not prepared to assist those he has previously engaged by them references. Employees are unlikely to regard as attractive employment at the end of which they would find themselves without a reference" (at 171).

C. Will the Court Take Into Consideration the Failure to Provide a Reference Letter or Sufficiently Favourable Reference Letter when Determining the Reasonable Notice Period Under the Bardal Factors?

1. Pre-Shinn

Prior to the B.C. Court of Appeal's decision in *Shinn* in 2001, B.C. courts would take into consideration the failure to provide a reference letter or a sufficiently favourable reference letter when determining the reasonable notice period based on the factors set out in *Bardal v. Globe & Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

For example, in *Kalaman*, the 46-year-old plaintiff with 23 years of service had his employment terminated without cause. At the time of dismissal, he requested a reference letter. The employer ignored the request.

The Court awarded the plaintiff 18 months notice (reduced to 14 months on appeal). After establishing the 18 month notice period the Court then considered the plaintiff's request for an additional two months notice because of the employer's failure to provide a reference letter. In denying the request to extend the notice period on this basis, the Court noted that:

(1) the plaintiff made only one request for the letter and did not follow up on his request;

(2) there was no evidence that the employer had refused to provide the letter; and

(3) there was no evidence that the lack of a reference had any effect on the plaintiff's ability to secure employment.

The Court also considered the employer's failure to provide a sufficiently favourable reference letter in *Kindret.* In that case, the 33-year-old plaintiff was considered a "good" employee, had almost five years of service and was also dismissed without cause. She was provided with a draft reference letter during settlement negotiations that, pursuant to the employer's policy, only provided "objective information."

The Court noted that the draft reference letter "would raise more questions than it would answer" (para. 8). It went on to say that although the employer was "well within its right" to refuse to provide more information, it must "take the consequences" arising from the letter provided (para. 8). However, the Court then stated that the issue of the reference letter was a "minor factor" in its overall consideration of what the reasonable notice period should be (para. 8).

2. Shinn

In *Shinn*, the 44-year-old plaintiff had three years of service when he was dismissed from his Director of Marketing position for "economic reasons." He requested a reference letter but was told by the employer he would not receive one unless he accepted the severance package that had been offered. The employer also advised the plaintiff that if it was contacted by a prospective employer the plaintiff had been in contact with, it would only confirm the plaintiff's employment unless he accepted the severance offer.

Eventually the plaintiff received a letter from the employer that simply confirmed his employment and the duties he performed. He was also provided with a second reference letter from the employer's general manager that the Court found to be unfavourable, stating "it is highly unlikely that any prospective employer would see that letter as other than a not particularly subtle way of warning them off" (para. 27).

The trial court stated the failure to provide a reference letter or to provide a reference letter to the dismissed employee's liking "may increase the time it takes for the employee to find new employment,

and thus may be considered when assessing the notice period" (para. 32). The Court then took the following issues into consideration in awarding the plaintiff a reasonable notice period of 10 months: (1) the employer's failure to agree to speak with the prospective employer; and (2) the fact that the employer "in effect" provided no references at all because the first letter simply confirmed the plaintiff's employment and did not comment on the quality of his work and the second letter was unfavourable. The Court refused to award bad faith/unfair dealings damages in relation to the reference issues given that it had already taken this factor into account in determining the reasonable notice period.

On appeal, then Chief Justice McEachern stated that it was "wrong" for the court to consider the lack of a favourable reference letter when determining the reasonable notice period, unless:

(1) the employee's performance is already at issue, such as where cause is alleged; or

(2) the circumstances justify a special award of *Wallace* damages (paras. 11-12).

In making this ruling, Justice McEachern noted that there could be many reasons why an employer may not wish to provide a reference letter or a favourable reference letter and that if the court took this into consideration "the risk of increased damages could become an inducement to employers to give misleading references" (para. 11). On account of this finding and another error made by the trial judge, the appeal court reduced the notice period to six months.

The B.C. Court of Appeal's decision in *Shinn* was applied in *Beatty*. In that case, the employer had concerns with the plaintiff's performance but did not allege cause on dismissal and offered him salary continuance for up to 12 months. The plaintiff sought an increased notice period (not on the basis of *Wallace* damages) due the employer's failure to provide a favourable reference letter. The Court accepted the employer's position that it could not in good conscience have provided a favourable reference letter, stating: "Having concluded that this is not a case where *Wallace* damages apply, I am of the opinion the failure to provide a reference letter cannot increase the notice period" (para. 87).

3. Other Canadian jurisdictions

The B.C. Court of Appeal's decision in *Shinn* has only been mentioned in one decision outside of B.C. (*Barakett v. Levesque Beauben Geoffrion Inc.*, 2001 NSCA 157; upholding 2001 NSSC 40) and it is not clear if the Nova Scotia Appeal Court was in agreement in that case with then Chief Justice McEachern's ruling.

D. Will the Court Award Wallace Damages for the Failure to Provide a Reference Letter?

In *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 710, the Supreme Court of Canada said that the notice period could be increased where the employer displayed bad faith or unfair dealings in the manner of dismissal. In *Wallace* itself, Justice Iacobucci pointed to the decision in *Trask v. Terra Nova Motors Ltd.* (1995), N.J. No. 95 (Nfld. C.A.) and the employer's "accusations of theft combined with a refusal to provide a reference letter" as an example of bad faith (para. 97). In *Shinn*, the B.C. Court of Appeal also suggested that an employer may be susceptible to *Wallace* damages if it failed in certain undefined circumstances to provide a reference letter.

1. Failure to Provide Reference Letter the Only Factor

To date, however, *Schmidt v. Amec Earth & Environmental Ltd.*, 2004 BCSC 1012 ("*Schmidt*"), appears to be the only reported case in Canada in which *Wallace* damages have been awarded solely on the basis that the employer failed to provide a reference letter.

In that case, the 53-year-old professional engineer had been employed by the defendant employer or its predecessor for 26.5 years and was a vice president at the time of dismissal. His employment was terminated because, it appears, his position became redundant after he returned from a one year secondment with another employer. In awarding the employee one month's *Wallace* damages solely because of the employer's failure to provide a reference letter the court noted that:

(1) he was laid off only because an appropriate position could not be found for him;

(2) he had requested a reference letter and had been promised one but it was not forthcoming;

(3) there was no explanation as to why the employer had failed to provide him with the letter despite the fact he was a "good" employee; and

(4) his efforts to find other employment had not "been helped" by the employer's failure to provide a letter (para. 47).

In relation to the last point it is interesting to note that the Court, in its discussion on mitigation, stated that there were only five or six companies that could use the plaintiff's expertise and that he had been granted an interview by five of them. This would suggest that the failure to receive a reference letter was perhaps not as damaging as made out.

To date, *Schmidt* has not been cited in any subsequent decision on the issue of reference letters.

Most recently, in *Ashby v. EPI Environmental Products Inc.*, 2005 BCSC 1190, the 48-year-old plaintiff was dismissed from his Chief Legal Officer position after 13 months of service due to a restructuring of the employer's legal department. At the termination meeting, the employer offered to provide him with a "good" reference letter. A few days later the plaintiff forwarded a draft reference letter to the employer. The employer subsequently advised the plaintiff that it would not provide a reference letter until the plaintiff agreed to the severance offer (two weeks salary). The plaintiff again requested a reference letter independent of the severance issues but did not receive one.

The employer subsequently delivered a reference letter with its Statement of Defence that simply described the plaintiff's responsibilities and set out his compensation but did not speak to his abilities.

The plaintiff argued that he should be awarded three months *Wallace* damages because the employer acted in bad faith by using the reference letter as an instrument to coerce him to accept the settlement offer. In rejecting this claim, the Court stated:

> The facts in this case cannot be distinguished from *Shinn*. In both cases the employer, after initially refusing to provide a reference letter until all matters were settled, provided a reference letter, but in terms that the employee did not consider sufficiently positive to be of use in seeking further employment. As noted in *Shinn*, there may be many reasons why an employer may choose not to provide a favourable reference letter. Indeed, in this case, there is evidence that the employer was not completely satisfied with Mr. Ashby's performance. I would not extend the notice period because of the employer's failure to provide a reference letter on terms satisfactory to the employee.
>
> The evidence does not warrant a finding of bad faith or a special award pursuant to the principles in *Wallace*. It is inappropriate to use the terms of a reference letter as a bargaining chip. In this case both parties attempted to use the reference letter to advance their position. In so doing neither distinguished themselves ... (paras. 39-40)

Notably, it appears that the plaintiff did not rely on *Schmidt* in advancing his claims for *Wallace* damages, although the facts in the two cases were distinguishable in that the employer in *Schmidt* did not raise any concerns about the employee's performance.

2. Failure to Provide Reference Letter One of at Least Two Factors

There are several other Canadian cases in which *Wallace* damages have been awarded due in part to the employer's failure to provide a reference letter or a sufficiently favourable reference letter. However, this factor was always one of at least two, and often several factors (with one often being unfounded allegations of just cause), that led to the finding of bad faith and/or unfair dealings (*Hampton v. Thirty-Five Charlotte Ltd.* (1999), 48 C.C.E.L. (2d) 96 (N.B.Q.B.); *Musgrave v. Levesque Securities Inc.* (2000), C.C.E.L. (2d) 59 (N.S.S.C.); *Delaquis v. College de Saint-Boniface*, 2000 MBQB 2 (Man. Q.B.); *Barakett v. Levesque Beauben Geoffrion Inc.*, 2001 N.S.S.C. 40, aff'd 2001 N.S.C.A. 157; *Chabot v. William Roper Hull Child & Family Services*, 2003 ABQB 49; *McCulloch v. IPlatform Inc.*, 2004 CarswellOnt. 5342 (S.C.) (eC); *Carter v. Packall Packaging Inc.*, [2004] O.J. No. 334 (S.C.) (QL); *Mastrogiuseppe v. Bank of Nova Scotia*, 2005 CarswellOnt 7607 (S.C.) (eC)).

E. Will the Court Take Into Consideration the Failure to Provide a Reference Letter when Assessing the Employee's Mitigation Efforts

1. Obligation to Mitigate Fulfilled

Where the employer fails to provide a reference letter, the courts are often less sympathetic to the employer's argument that the employee has failed to mitigate his or her damages (see, for example, *Tracy v. Atomic Energy of Canada Ltd.* (1997), 33 C.C.E.L. (2d) 144 (Man. Q.B.); *Watson v. Solid Wall Concrete Forming Ltd.*, 1998 CarswellOnt. 5073 (Gen. Div.) at para. 18-19 (eC); *Strickland v. Chester Dawe Ltd.* (2000), 193 Nfld. & P.E.I.R. 131 (S.C.T.D.); *Thompson v. Lex Tec Inc.*, 2000 CarswellOnt. 510 (C.J.) at para. 51 (eC); *Dubey v. CDA Industries Inc.*, [2004] O.J. No. 1174 (S.C.J.) at para. 38 (QL)).

2. Obligation to Mitigate Not Fulfilled

On the other hand, the courts have also pointed to an employee's failure to ask for a reference letter when reducing the notice period because of the employee's insufficient mitigation efforts. For example, in *Ata v. Carter Pontiac Buick Ltd.*, 2002 BCSC 531, the employee asserted that because he was not able to obtain a letter of recommendation, his chances of finding reasonable alternate employment had been diminished. In rejecting this submission and concluding that any failure by the employee to mitigate his damages was caused solely by him, the Court stated that:

(1) there was no evidence that the employee had asked for a letter of recommendation;

(2) the employee did in fact obtain some alternative employment even without a letter; and

(3) it was the employer's policy not to provide anyone with a letter of recommendation (para. 44).

The Court's reliance on the first and third points together present difficulty in that it is questionable why an obligation should have been placed on the employee to request a reference when the employer's policy was not to provide one, or at least one that could speak to his abilities and the quality of his work.

Similar results can be found in *Epsey v. Chapters Inc.*, 1998 CarswellAlta 1325 (Q.B.) (eC) and *Umansky v. Zympak Packaging Products Inc.*, 2003 CarswellOnt 2545 (S.C.) at para. 13 (eC).

F. What have the Courts Said About "Confirmation of Employment" Letters?

Some employers provide only "confirmation of employment" or "tombstone" letters that typically set out the employee's start and end date, the position held and perhaps the employee's duties/responsibilities and compensation. The courts do not look favourably on such letters.

1. The Courts' Comments Generally

As noted above, in *Kindret*, the Court stated that a confirmation of employment letter "would raise more questions than it would answer" (para. 8) and that while an employer was "well within its right to refuse to provide more" in the way of a reference letter, it must "take the consequences" arising from the letter it provided. In *Shinn*, the trial court concluded that a reference letter that confirmed the employee's employment and the duties he performed was "in effect" no reference because it did not provide "any comment on the quality" of the employee's work (para. 40).

In *Ditchburn v. Landis & Gyr Powers Ltd.*, [1995] O.J. No. 2882 (Gen. Div.) (QL), appeal allowed in part [1997] O.J. No. 2401 (C.A) (QL), the 59-year-old sales employee with 27 years service was dismissed for cause (getting into a physical altercation with a client, who was also a friend, after the two had spent the afternoon drinking in a strip club) but was offered a two-month gratuitous payment. The employer also provided him with a reference letter that stated only that he had worked for the company for 27 years and in what capacity. The Court noted that this letter "would likely hurt rather than help any efforts to secure alternate employment" and on this basis increased the notice period from 22 to 24 months. Although the Ontario Court of Appeal reversed the trial judge's damages award on this point it did state that such an award might be appropriate if the employee demonstrates that the lack of a reference letter "in fact made it more difficult for him to obtain alternative employment" (at 3).

2. The Need to Take Note of the Distinction as it Relates to Settlement Agreements

The distinction between a reference letter or recommendation letter and a confirmation of employment letter was driven home in *Brown v. Arbutus Manufacturing Ltd.*, 2000 BCSC 1475. In that case, an employee who had been on an extended medical leave offered to resign instead of returning to work if the employer would pay him six weeks severance and provide a "letter of recommendation." The employer accepted the offer subject to the employee signing a release.

The employer subsequently provided the employee with two letters of recommendation, with the view that the employee could choose which one he wanted to use. The first letter stated that the employee left his employment with the company for medical reasons and that after a prolonged recuperation it was mutually agreed that he would not return to work with the company. The second letter listed the employee's start and end date and position held. Neither letter commented on the employee's abilities or positive attributes.

In light of the letters, the employee took the position that a settlement had not been reached and filed a wrongful dismissal claim. Among other defences, the employer pleaded accord and satisfaction. The Court determined that a settlement had not been achieved on the basis that neither letter could be described as a letter of *recommendation* and that the letters provided likely hurt rather than assisted the employee in finding alternative employment. The Court further stated:

> Whether these forms of letter are those commonly provided to former employees by Arbutus is not the question. Rather, it is whether either of them can be described as letters of reference in the sense that they imply anything positive on behalf of Mr. Brown. A careful reading of both of them leaves me with the impression that there is silence as to anything that could remotely be described as a recommendation and would more likely be taken as a negative factor rather than a positive one by a prospective employer. That being as it may, the letters are not letters of recommendation and thus Arbutus did not fulfil the terms of its arrangement with Mr. Brown. Therefore, Arbutus fails in its defence that it has settled with Mr. Brown for six weeks' termination pay and a reference letter ... (para. 25)

G. Can a Positive Reference Letter be Used Against an Employer who Subsequently Takes the Position it had Just Cause for Dismissal?

If an employer provides a positive reference letter it may well be precluded from establishing cause for dismissal. For example, in *Battell v. Canem Systems Ltd.* (1981), 31 B.C.L.R. 345 (S.C.), the employee was dismissed for cause on the basis of performance issues. The Court found that no cause existed partly on the basis that the employer had offered to provide the employee with a "good reference" (para. 19). A similar finding was made in *Tataryn v. Dueck on Broadway Ltd.*, 1982 CarswellBC 1526 (S.C.) (eC).

The difficulty of course lies in the fact that if the employer does not provide a reference, the employee's ability to find new employment is impaired and the employer's exposure to damages if the court should find that cause did not exist is increased.

In order to try to minimize this problem, Howard A. Levitt, the author of *The Law of Dismissal in Canada* (3rd Ed.) (Ontario; Canada Law Book), suggests the following:

(1) an "honest credible" reference letter should be drafted with the assistance of a third party, such as a relocation counsellor or legal counsel, who can act as a mediator in attempting to develop the reference (the obvious benefit of having legal counsel do it is that the negotiations can be undertaken on a privileged basis); and

(2) the employer should try to obtain a release for the reference itself "even in the absence of any agreement as to the remaining terms of the severance" (at 12-37 and 13-6).

Levitt further advises that when an employer dismisses an employee for cause, it should not provide references to prospective employers unless the authenticity of the prospective employer has been verified. This will protect the former employer from providing a positive reference to an associate of the dismissed employee who is "setting up" the former employer and who may later be called as witness against the employer in a wrongful dismissal action (at 14-31). (In light of the privacy concerns that now surround references, employers may now be less willing to give out information and thus less susceptible to falling into this trap.)

Finally, if acting for the plaintiff, Levitt advises:

> The time of termination is a useful opportunity to obtain evidence. Generally, the employer is feeling embarrassed, even remorseful, about having to terminate the employee. Guilt or embarrassment generally makes the employer far more conciliatory than it might otherwise be. As a result, it is useful to ask the employer at that time for a reference letter. Such a letter will effectively preclude the employer's later argument that it had cause to terminate the employee (at 13-3).

H. Can an Employer be Sued by the Employee for the Contents of a Reference Letter?

In addition to being exposed to an increased notice period in a wrongful dismissal action, an employer who inaccurately, carelessly or maliciously prepares a reference letter could be exposed to tort claims in defamation or negligence.

I. Defamation

The tort of defamation involves the injury to a person or organization's reputation.

There are several defences to a defamation claim: (1) the comments were true; (2) absolute privilege—this applies to, for example, statements given in evidence at a trial and statements made in Parliament; (3) fair comment—individuals are free to comment, even harshly, about issues of public interest as long as the comments are honest, not malicious and based on fact; and (4) qualified privilege.

In order to succeed on the defence of qualified privilege, the defendant must show that: (1) there is a legal, social or moral duty to make the statement; (2) the recipient has a corresponding interest to receive the statement; (3) the statement was made without "malice"; and (4) the statement was made with an honest belief: *R.M. Giza Inc. v. British Columbia (Minister of Management Services*, 2004 BCSC 103 at paras. 25 and 34. Notably, "carelessness in forming an honest belief does not take away the defence of qualified privilege. The honest belief can be formed on the slimmest of evidence" (*Leverman v. Campbell Sharp Ltd.* (1987), 36 D.L.R. (4th) 401 (B.C.C.A.) at 404).

As set out in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 145, malice can be established where: (1) the publication was made with spite or ill-will; (2) there was an indirect motive or ulterior purpose that conflicted with the sense of duty or the mutual interest which the occasion (i.e., the providing of the reference) created; and (3) by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

a. Application to Reference Letters

An employer is seen as having a moral duty to provide a reference letter and a prospective employer is seen as having a corresponding interest in receiving the reference (*Sapiro v. Leader Publishing Co. Ltd.*, [1926] 3 D.L.R. 68 (Sask. C.A.)). As such, if an employer provides a negative and/or untrue reference, but does so based on a honest belief and without malice, it will be able to rely on the defence of qualified privilege to defeat a defamation action.

This was illustrated in *Porter v. Tsewultun Police Service Board*, 2000 BCSC 967. In that case, the plaintiff/police officer was terminated for cause. Subsequently, the Chief Constable became aware that the plaintiff was applying for employment with other police forces. He initiated telephone calls to the police forces within proximity to his own for the purposes of discouraging them from hiring the plaintiff. The Court found that the Chief Constable took this action in order to protect his own reputation; if the plaintiff was hired by another police force his judgment with respect to her dismissal would be called into question.

Despite these findings, the Court held that the action in defamation against the Chief Constable personally must fail as his communications were protected by qualified privilege. Specifically, the court found that: (1) he spoke to the prospective employers in his role as Chief Constable; (2) he was entitled to tell them of his opinion of the plaintiff as an employee and police officer; (3) his opinion that it might have reflected badly on the police service if she was employed by another police force within proximity to his own may have been correct; and (4) the court was not persuaded that he spoke to the other police forces with malice, recklessly or that he intentionally misled any of them or knowingly made false accusations against the plaintiff (para. 75).

For another case involving employment references in which qualified privilege was seen to be a complete defence to a claim for defamation see *Phutela v. University of Alberta*, 1996 CarswellAlta 933 (C.A.) (eC).[1]

2. Negligence

Until relatively recently it was uncertain if an employer could be liable in negligence to an employee for the preparation and contents of an inaccurate reference letter or whether the employee was confined to seeking damages for defamation. In *Spring*, the English House of Lords ruled that both causes of action could be brought in such cases.

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1 The trial judge's decision is not reported.

The plaintiff had been employed[2] as the office manager and a sales director for a company, Cornium, that sold life assurance policies on behalf of Guardian Assurance. After Cornium was purchased by another company the plaintiff's employment was terminated. He subsequently decided to go into business on his own selling the policies of Scottish Amicable Life Insurance Society plc.

Pursuant to the UK insurance industry's code of conduct: (1) Scottish could not hire the plaintiff until it obtained a reference from Guardian about his experience and character and (2) Guardian was obligated to provide a reference that made "full and frank disclosure of all relevant matters that are believed to be true."

Guardian supplied Scottish with a reference letter that stated among other things that: (1) the plaintiff "kept the best leads for himself with little regard for the sales team that he was supposedly to manage"; (2) "his former superior has further stated that he is a man of little or no integrity and could not regarded as honest" and; (3) "since [his] departure, we have found a serious case of mis-selling [to his clients] where the concept of 'best advice' was ignored and the polices sold yielded the highest commissions" (at 134).

Based on the letter, Scottish declined to hire the plaintiff. Two other companies that the plaintiff had applied to received the same letter from Guardian and also rejected the plaintiff.

The plaintiff sued Cornium, Guardian and two associated companies for malicious falsehood, breach of contract and negligence. The trial judge found that none of the defendants had acted maliciously and rejected the first claim. He also found that there was no implied contractual term that a reference letter should be prepared with reasonable care. He did, however, allow the claim in negligence (with damages to be assessed).

The decision was overturned on appeal but the majority (4/1) of the House of Lords restored the trial judge's decision issuing five separate reasons.

The House of Lords was only concerned with the plaintiff's claims for breach of contract and negligence. Specifically, the two sub-issues in front of the House of Lords were: (1) was there a duty on an employer in contract or tort to take reasonable care in preparing a reference letter; and (2) if so, should the duty nevertheless be "negatived" for policy reasons, being that such a duty could undermine the rationale behind the qualified privilege defence in defamation claims.

a. Does an Employer have a Duty of Care in Preparing a Reference Letter?

In relation to the first point, a synthesized summary of the majority's reasoning is as follows:

- *prima facie*, an employer who provides an employee reference to a prospective employer will ordinarily owe a duty of care in the preparation of the reference letter (at 146-47);
- in an employer/employee relationship the duty to exercise due care and skill in the preparation of a reference letter could also arise from an implied term in the employment contract. Such a term may be implied despite the absence of a common law duty to provide a reference letter and would remain in effect even after the employee has left his employment with the employer (at 147, 165-66 and 179);
- in relation to the duty of care, "the central requirement is that reasonable care and skill should be exercised by the employer in ensuring the accuracy of any facts which either: (1) are communicated to the recipient of the reference from which he may form an adverse opinion of the employee, or (2) are the basis of adverse opinion expressed by the employer himself about the employee" (at 147);

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2 There is some discussion in relation to whether the plaintiff was in fact a contractor but the Court stated that distinction had no bearing on its decision (at 148; 163-64 and 167).

- the duty of care placed on an employer does not require that the employer to "warrant absolutely the accuracy of the facts or the incontrovertible validity of the opinions expressed but to take reasonable care in compiling or giving the reference and in verifying the information on which it is based" (at 162);
- in order to reduce its exposure to liability, the employer could make clear in the letter "the parameters within which the reference is given such as stating their limited acquaintance with the individual either as to time or as to situation" (at 162). The employer could also advise the employee that a reference will only be provided if the employee accepts that there will be a disclaimer of liability to him and the recipient (at 162).

b. Should the Duty of Care in Preparing a Reference Letter be Negatived?

In relation to the second issue—whether the duty of care should be negatived—the concern was that an employer should be able to speak freely and frankly in providing a reference and that the protection employers have from defamation claims, because of the qualified privilege defence, would be subverted if they could be held liable in negligence (at 150 and 152). As a result, employers would refuse to provide references or references that are of any value (at 162).

In relation to this issue, the House of Lords stated (again synthesized):

- The underlying principles of liability are different in defamation and negligence (at 152 and 176). In defamation it is that the person's reputation that has been injured; it may *or may not* involve the loss of a job or economic loss. A claim is negligence is based not on the fact that the person's reputation has been injured but that a job or opportunity has been lost (at 161).
- The test for establishing defamation and negligence are different: in order to succeed in defamation, the employee must establish that the employer was motivated by malice, which is extremely difficult to prove (at 172). In order to succeed in negligence, it is sufficient to simply establish that the inaccurate reference letter was due to a lack of care by the employer in ascertaining the facts on which the reference was based, or lack of care in preparing the reference (at 166).
- There is no reason why an employer's duty to exercise due skill and care in preparing a reference letter should be negatived for policy reasons (at 151).

Until recently it was far from settled whether the "concurrency model" set out in *Spring* (i.e., the ability to assert a defamation and a negligence claim together) was applicable in Canada, although it had been adopted in at least one decision in B.C. (see *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 225, a case not involving employee references).

Any doubt, however, was put to rest by the Supreme of Canada in *Young v. Bella*, 2006 SCC 3, as the Court stated "the possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out" (para. 56).

I. Is an Employer Liable to a Future Employer if it Prepares a False or Misleading Reference?

In *Spring*, the House of Lords clearly contemplated that, just as an employer could be exposed to liability to a former employee for preparing a negligently unfavourable reference letter, the employer could also be liable in negligence to a prospective employer if it negligently prepared an overly favourable reference letter that the new employer relied on to hire the employee (at 147, 161, 172 and 177). To date, however, there does not appear to be any reported decisions in Canada on this issue.

J. What is the Impact of the B.C. Personal Information Protection Act on an Employer's Ability to Provide and Obtain Reference Letters?

To date, there do not appear to have been any decisions dealing with reference letters by the respective privacy commissioners under the B.C. *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("B.C. *PIPA*"), the Alberta *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("Alberta *PIPA*") or the federal *Personal Information Protection and Electronic Documents Act*, L.S.C. 2000, c. 5.

However, the B.C. Privacy Commissioner's Office has recently (April 10, 2006) issued a publication "PIPA and the Hiring Process" that addresses employee references.[3] (The Alberta Government has also issued a privacy FAQ that address employee references.[4])

1. Whose Personal Information is it?

The information contained in a reference letter is considered to be the personal information of the subject of the reference letter, not the author of the letter. Thus, when an employer provides a reference it is "disclosing" the employee's personal information and subject to privacy legislation. Similarly, when a prospective employer obtains a reference it is "collecting" personal information and subject to the legislation.

2. Does a Prospective Employer Need Consent Prior to Asking a Former Employer for a Reference Letter?

A prospective employer will not typically need a job applicant's consent prior to requesting a reference letter from a former employer, as in most cases this information will be considered to be "employee personal information" (s. 13). The B.C. *PIPA* defines "employee personal information" as:

> personal information about an individual that is collected, used or disclosed solely for the purposes *reasonably required to establish*, manage or terminate *an employment relationship between the organization and that individual*, but does not include personal information that is not about an individual's employment (s. 1) [emphasis added]

However, the prospective employer must advise the job applicant in advance that it will be seeking a reference and the reasons for doing so (s. 13(3)). This can be done by adding a notice on the application form or by verbally advising the employee.

3. Does a Current/Former Employer Need Employee Consent Prior to Providing a Reference Letter to a Prospective Employer?

A current or former employer needs employee consent prior to providing a reference to a prospective employer. The consent can be express or implicit.

For example, if the employee verbally requests that the former employer act "as a referee" the employee will have implicitly consented to the employer providing references to a prospective employer.

Similarly, if the employee lists the former employer as a reference on his or her resume the employee will have implicitly consented to the provision of a reference. In such cases, however, the former employer should ask the prospective employer to provide it with a copy of the employee's resume (at

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3 <http://www.oipcbc.org/pdfs/private/PIPAHiringFAQ(10APR06).pdf>

4 <http://www.pipa.gov.ab.ca/index.cfm?page=faqs/index.html#Workplace>

least the part containing the references) so that it can verify that implicit consent has been given before providing the reference.

(Note: The Alberta *PIPA* is different than the B.C. *PIPA* in this regard. Pursuant to s. 15(3) of the Alberta *PIPA* a former employer does not need employee consent prior to disclosing employee personal information/providing a reference to a prospective employer who is collecting the information for the purposes of establishing an employment relationship.)

Finally, the B.C. Privacy Commissioner states that although not strictly required, it is good practice for a prospective employer who is doing a reference check on a job applicant to also confirm with the former employer that the job applicant has authorized the former employer to provide the reference (at 4).

4. Can an Employee or Unsuccessful Candidate Obtain Access to a Reference Letter?

In most cases, the individual will already have a copy of the reference letter that is drafted by their former employer. However, as noted, a former employer who has been asked to be a referee could find itself in a situation where it provides a reference letter to a prospective employer that the individual has not seen. In such cases, the individual may be interested in seeing the contents of the letter, particularly if he does not obtain the new position.

Under the B.C. *PIPA*, individuals are entitled to review their personal information that is under the control of the employer (s. 23) with some limited exceptions, such as where the disclosure would reveal personal information about another individual (s. 23(4)(c)) or where it would reveal the identity of the individual who has provided the personal information and that person has not consented to the disclosure of his or her identity (s. 23(4)(d)). If the "offending" information can be redacted, the individual must then be allowed access to the remaining information.

In light of these provisions, the B.C. Privacy Commissioner advises that if an employer prefers not to reveal the contents of a reference to a job applicant, it would be best if the employer:

(1) makes it clear to the referee/former employer in advance that "his or her opinions will be received in confidence";

(2) documents this understanding with the former employer; and

(3) advises the job applicant that all references will be received in confidence.

However, the B.C. Privacy Commissioner emphasizes that even if these steps are taken there is still no guarantee that the job applicant will not be entitled to access to at least some, if not all, of the referee's opinions.

K. Can an Adjudicator Order the Employer Provide a Reference Letter?

1. Courts

In *Schimp v. RCR Catering Ltd.*, 2003 NSSC 116, appeal allowed in part 2004 NSCA, the 25-year-old plaintiff worked as a bartender/server at the employer's hotel for three years prior to being dismissed for stealing alcohol. At the time of his dismissal, he was escorted from the hotel in view of other employees and was told he was banned from the premises for six months. As a result of losing his employment, he was forced to move back home with his parents and take on a more physically demanding job which exacerbated a previous knee injury resulting in surgery.

The trial judge held that the employee had been wrongfully dismissed and awarded him 10 months notice and $10,000 in aggravated damages. It also ordered the employer to provide a "favourable letter of recommendation" that was acceptable to the plaintiff and his lawyer.

On appeal, the employer argued, among other things, that the court did not have jurisdiction to order the employer to provide a reference letter. Although it did not address the "jurisdiction" issue, the appeal court noted that the "practical implications of enforcing" such an order did not appear to have been taken into consideration by the trial judge and that "it was not appropriate in the circumstances here to make such an order, particularly where failure of the appellants to provide the letter is taken into account by the award of aggravated damages, as I have done" (para. 78).

No other court cases were located where this issue has been considered.

2. Unjust Dismissals Complaints Under the Canada Labour Code

In contrast, it is clear that *Canada Labour Code* Part III adjudicators have the power to order employers to provide a reference letter in relation to an unjust dismissal complaint.

Section 242(4) of the Code has been interpreted to give adjudicators broad "make-whole" powers (*Wygant v. Regional Cablesystems Inc.*, [2001] C.L.A.D. No. 427 ("*Wygant*") at para. 18). It provides that an adjudicator can order the employer to:

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

In *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416, the Supreme Court of Canada held that it was within an adjudicator's powers under the previous s. 240(4) [s. 61.5(9)] of the Code to order an employer to:

(1) provide a reference letter with prescribed contents; and

(2) not provide any further information to prospective employers other than that contained in the letter.

Based on *Slaight*, adjudicators have ordered employers to provide reference letters with prescribed language. For example, in *Favilla and Mayne Nickless Transport Inc.*, [1997] C.L.A.D. No. 719, the adjudicator ordered the employer to provide the employee with a reference letter that "should include":

(1) a description of her duties and responsibilities over the course of her employment;

(2) a statement that she was terminated solely due to a reorganization of the employer's operations rather than as a result of any shortcomings on her part;

(3) an evaluation of her performance that is consistent with the reference letters provided by two of her former supervisors; and

(4) a statement that the employer recommends the employee to other employers, without any qualifying reservation.

By way of another example, in *Malec v. Tank Truck Transport Inc.*, [2005] C.L.A.D. No. 236, the adjudicator ordered the employer to provide the employee with a reference letter that: (1) accurately set out the employee's periods of employment, remuneration, raises, and position held before and after the 2003 lay off and recall; (2) confirmed satisfactory performance of her duties, consistent with

previous performance evaluations; and (3) stated that the termination of her employment was unrelated to the performance of her duties. This adjudicator further ordered that the letter should form part of the employee's personnel file to ensure that consistent information was provided by the employer if it was contacted by telephone and asked to provide a reference.

L. What Initiatives have Other Jurisdictions Taken to Deal with the Issue of Reference Letters?

In separate articles, U.S. lawyers John Stevason[5] and Janice L. Hirsch[6] detail legislative initiatives that have been undertaken in Alaska, Washington and Oregon concerning employee references. Each of these states has enacted legislation that offers protection to an employer who discloses information about a former employee's job performance to a prospective employer.

According to Hirsch, the legislation in Oregon was enacted because:

(1) The fear of defamation lawsuits had "caused many employers to adopt policies strictly limiting the information a company will disclose about employees"; and

(2) At the same time, employers who were fearful of "negligent hiring" lawsuits, were frustrated that other employers were failing "to reveal pertinent information about employees" pursuant to their own restrictive disclosure policy.

The Washington State legislation (RCW 4.24.730) was enacted in 2005 to, according to Stevason, "encourage employers to reveal substantive information about their experiences with employees and enable prospective employers to learn more about applicants before making hiring decisions." Pursuant to the legislation, employers are presumed to be acting in good faith and are protected from civil and criminal liability for the disclosure of information about employees or "its consequences" where, according to Stevason:

- they provide references in response to a specific request from a prospective employer or employment agency;
- the disclosure includes only: (1) the employee's ability to perform his or her job; (2) the diligence, skill, or reliability with which the employee carried out his or her duties; and (3) any illegal or wrongful act committed by the employee elated to his or her job; and
- they maintain written records of all job references given, the records contain certain prescribed information, are kept in the employee's personnel file for two years and current and former employee's are given access to the records.

Stevason further advises that while the Alaska (AS 09.65.160) and Oregon (ORS 30.178) legislation offer similar protections, they are somewhat weaker than those in the Washington State legislation.

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5 "To Give Or Not To Give - A Job Reference? *The Employer Adviser*, Winter 2005-2006, Lane Powell (Portland), http://www.lanepowell.com/pdf/pubs/eaf_2006_0001.pdf

6 "Getting and Giving Job References" Jordan Schrader (Portland) http://www.jordanschrader.com/articles/article0193.html

III. Recommendations

(1) Employers would be wise to develop a reference letter policy that provides:

- all employees are entitled, on request, to a confirmation of employment letter that sets out objective information such as the employee's start and end date, the positions held, and the key responsibilities;
- the employer reserves the right, at its sole discretion, to provide a more detailed reference letter that speaks to the employee's ability to perform his or her job and the diligence, skill and reliability with which he or she carried out his or her duties;
- the employer will provide the letter in a timely fashion; and
- the employer will ensure that it has the employee's express or implicit consent prior to providing a reference to a prospective employer.

(2) In exercising their discretion to provide a more detailed reference letter employers should consider the following:

- in cases where the employee is dismissed without cause or resigns and where there are no concerns about the employee's performance, employers should not hesitate to provide a reference letter. In doing so, the employer will: (i) further protect itself from *Wallace* damages; (ii) bolster the argument that the employee has failed to mitigate his or her damages; (iii) comply with its "moral duty" to the employee; (iv) ensure that it remains an attractive employer to work for; and (v) ensure that, based on the principle of reciprocity, it continues to benefit from receiving references from other employers.
- in cases where the employee is dismissed without cause but the employer has minor concerns about the employee's performance, the employer should consider providing a reference letter that simply focuses on the employee's positive attributes. If the performance issues are significant, the employer should consider pointing this out in generalized language (i.e., "while employee has the aforementioned positive qualities, his attendance could be improved"; "employee Y always met deadlines but he worked most effectively when he worked alone").
- in cases where the employee is dismissed for cause, the employer should provide only a confirmation of employment letter. However, if the employee threatens or commences legal action, the employer should be open to working with legal counsel to see if a reference letter can be drafted that could assist the employee in finding new employment but that does not misrepresent the situation (including by omission).

(3) In cases where the employee is dismissed without cause, the employer should *not* make the provision of the reference letter contingent on the employee accepting the severance package offered/signing a release.

(4) In preparing the reference letter, the employer must take reasonable care in both ascertaining the facts on which the reference is made and in drafting the letter itself. This could include discussing the employee's performance with his or her direct supervisor and reviewing and referencing the employee's recent performance appraisals.

(5) The employer should qualify the statements in the reference letter by setting out how long it has known the employee, in what capacity it supervised the employee and how well it is able to assess the employee's skills and abilities.

(6) The employer should include a notice on its application forms or otherwise advise job applicant's in advance that it will be contacting the referees supplied by the applicant and, possibly, referees not supplied by the employee.