

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

BETWEEN:

<i>RAYMOND SHIRRITT-BEAUMONT</i>)	<i>C. P. McNicol</i>
)	<i>for the Appellant</i>
)	
<i>(Plaintiff) Respondent</i>)	<i>M. H. Toews</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	<i>Appeal heard:</i>
<i>FRONTIER SCHOOL DIVISION</i>)	<i>October 11, 2019</i>
)	
<i>(Defendant) Appellant</i>)	<i>Judgment delivered:</i>
)	<i>March 13, 2020</i>

On appeal from 2018 MBQB 177

SIMONSEN JA

[1] The defendant appeals the dismissal of its motion for summary judgment brought on the basis that the plaintiff's claim is barred by sections 2(1)(i) and 49(3) of *The Limitation of Actions Act*, CCSM c L150 (the LAA).

[2] The plaintiff worked or performed services for the defendant from 1981 until his retirement in 2011. From 1981 to June 1986, and briefly in 1989, he was employed as a school principal, received all wages and benefits to which he was entitled pursuant to the applicable collective agreement, and was a member of the Teachers' Retirement Allowances Fund (TRAF). From

the fall of 1986 to August 14, 1989, and from late 1989 or early 1990 to January 1, 2007 (the disputed period), he assisted the defendant with research and curriculum development pursuant to a number of agreements and was paid as an independent contractor; he did not receive vacation pay, was not a member of the Retirement Plan for Employees of Frontier School Division which had been established by the defendant for its non-teaching staff (the pension plan), and pension contributions were not made by the defendant, all to the knowledge of the plaintiff. From January 2, 2007 until his retirement in 2011, the plaintiff was employed by the defendant and continued to assist with research and curriculum development; he received all wages and benefits to which he was entitled as an employee and was a member of the pension plan.

[3] On October 27, 2016, the plaintiff issued the statement of claim, alleging that he had been an employee throughout and seeking damages on the basis that, for the disputed period, the defendant failed to hold in trust and pay to him, when he became entitled, both vacation pay (the vacation pay claim) and pension contributions (the pension claim).

[4] The defendant brought its motion for summary judgment dismissing the action on the basis that, even if the plaintiff was an employee during the disputed period, the claim is barred by the *LAA*. The motion was dismissed, and the defendant appeals.

Grounds of Appeal

[5] Although the defendant raises a number of grounds of appeal, it essentially contends that the motion judge made two errors:

1. with respect to the vacation pay claim, by finding that section 49(2)(b) of the *LAA* may apply to the plaintiff's claim that the defendant breached the statutory trust provisions in *The Vacations with Pay Act*, RSM 1987, c V20 (the *VWPA*), *The Payment of Wages Act*, RSM 1987, c P31 (the *PWA*) (both since repealed by *The Employment Standards Code and Consequential Amendments*, SM 1998, c 29, section 163), and their successor, *The Employment Standards Code*, CCSM c E110 (the *Code*), such that there is a genuine issue requiring a trial; and

2. with respect to the pension claim, by finding that the cause of action for general damages based on the defendant's alleged failure to make pension contributions and hold these funds in trust arose or crystallised on the date of the plaintiff's retirement on April 1, 2011.

The Legislation

[6] The relevant provisions of the *LAA* are:

Limitations

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

...

- (i) actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damages or otherwise, and whether a recognizance, bond, covenant, or other specialty, or on a simple contract, express or implied, and actions for an account or not accounting, within six years after the cause of action arose;

...

...

Actions by a beneficiary under a trust in respect of fraud, etc.

49(2) No period of limitation prescribed by this Act applies to an action by a beneficiary under a trust, being an action

- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

Other actions by beneficiaries under trusts

49(3) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued, but the right of action shall be deemed not to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest falls into possession.

[7] The statutory trust provisions that are alleged to have been breached in the context of the vacation pay claim are:

Section 19(2) of the *VWPA*:

Vacation pay deemed to be held in trust

19(2) Every employer shall be deemed to hold the vacation wages and vacation allowances accruing due to an employee in trust for the employee whether or not the account thereof has been kept separate and apart by the employer and the employee has a lien and charge in the amount of the vacation wages and vacation allowances on the assets of the employer.

Section 3(4) of the *PWA*:

Wages deemed held in trust

3(4) Every employer shall be deemed to hold the wages due or accruing due to an employee in trust for the employee and for payment of the wages over to the employee in the manner and at the time provided by law and the employee has a lien and charge on the property and assets of the employer whether or not the amount of the wages has been kept separate and apart by the employer and whether or not the employer is in receivership.

Sections 100 to 102.1 of the *Code*:

Employer is deemed to hold wages in trust

100 Despite any other Act, an employer is deemed to hold the wages that are due or accruing due to an employee in trust for the employee, and the employee has a lien and charge on the property and assets of the employer for the amount of the wages, whether or not the amount is kept separate and apart by the employer or the business of the employer is in receivership.

Priority of lien and charge

101 Despite any other Act and subject to sections 102 (priority of prior purchase money security interest), 102.1 (priority of certain tax liens) and 106 (priority of real property mortgage), a lien and charge under section 100 and subsection 94(2) has priority to a maximum of \$2,500., or an amount prescribed, and is payable in priority over any other claim or right in the property or assets of the employer that exists before or after the wages are due and payable, including

- (a) any claim or right of the Crown in right of Manitoba; and
- (b) any lien, charge, encumbrance, assignment, including an assignment of book debts, debenture or other security of whatever kind of any person, and any security interest, as defined in *The Personal Property Security Act* [CCSM c P35].

Priority of certain prior purchase money security interests

102 A lien and charge under section 100 and subsection 94(2) does not take priority over a purchase money security interest that is perfected

- (a) before a financing statement is registered under clause 94(1)(c); or
- (b) within 15 days after the day the debtor obtains possession of the collateral.

Priority of lien for tax collected and not remitted

102.1 A lien and charge under subsection 94(2) and section 100 does not take priority over a lien for taxes to which priority is given by subsection 66(3) of *The Tax Administration and Miscellaneous Taxes Act* [CCSM c T2].

[8] Also relevant to the question of whether the vacation pay claim is barred by the passage of time are sections 4(1), 7(3), 8(1), 9, 10, 11(1) and 11(2) of the *VWPA*, as well as sections 34(1), 35, 39(2), 39(3), 42(1), 43 and 44(2) of the *Code*, which prescribe how and when vacation pay becomes payable. These sections are included in the attached Appendix.

The Motion Judge's Decision

[9] The motion judge found that the “essence” of the plaintiff’s claim was “for the recovery of money as a result of alleged breaches of the agreements [the plaintiff] entered into with the defendant” (at para 24). He stated that, “If only s. 2(1)(i) and not s. 49 . . . applies, it would appear that the plaintiff’s claim is an action for the recovery of money on a simple contract, express or implied, and such an action must be commenced within six years after the cause of action arose” (at para 26).

[10] With respect to the vacation pay claim, he determined that the cause of action arose when the defendant failed to pay the vacation allowance from 1988 to 2006, all more than six years prior to the issuance of the statement of claim.

[11] Nonetheless, the motion judge held that the vacation pay claim may not be out of time because of the possible application of section 49(2)(b) of the *LAA*. Section 49(2)(b) provides that there is no period of limitation for an action by a beneficiary under a trust “to recover from the trustee trust property or the proceeds thereof”. The motion judge concluded that, because the defendant was alleged to have breached the statutory trust provisions prescribed by the *Code* and its predecessors, section 49(2)(b) may apply. He held that, if the plaintiff can establish that he was an employee during the disputed period, “the defendant is deemed by statute [the *VWPA*, the *PWA* and the *Code*] to hold wages that are due or accruing due in trust for the plaintiff” (at para 38). He went on to conclude, relying on *Green et al v Canada Trust Realty Inc et al*, 2005 MBQB 249, that the question of the applicability of section 49(2)(b) should be decided once the evidence is tendered at trial as to whether the plaintiff was an employee of the defendant during the disputed period (see para 40).

[12] The motion judge noted that, because section 49(3) prescribes that it is subject to section 49(2)(b), which he found may be applicable, he was not satisfied that section 49(3) applied to the vacation pay claim.

[13] As for the pension claim, the motion judge found that, “Although the statement of claim is not as clear as it could be, the plaintiff’s claim is for the alleged breach of the defendant in failing to make pension contributions and hold those funds in the TRAF [sic] plan to be paid out as a pension benefit upon the plaintiff’s retirement” (at para 28). He concluded that the cause of action arose on the date of the plaintiff’s retirement in 2011 and that the statement of claim, issued less than six years thereafter, was not statute-

barred. He relied on *Dinney v Great-West Life et al*, 2007 MBQB 120, aff'd 2009 MBCA 29 at para 117 (*Dinney No 2*), in support of this conclusion.

[14] Having so concluded, the motion judge determined that he need not address the potential applicability of section 49(2)(b) to the pension claim.

Summary Judgment

[15] As recognised by the motion judge, the principles governing summary judgment are set out in the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7. In *Hryniak*, the Court wrote (at paras 49-50):

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[16] On a summary judgment motion, the moving party bears the onus, on a balance of probabilities, of establishing that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a

trial (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at paras 108-9, 111).

The Standard of Review

[17] The standard of review applicable to a decision on summary judgment is well established. In *Joyce et al v Government of Manitoba*, 2018 MBCA 80, this Court stated as follows (at para 23):

. . . Questions of law (including the interpretation and application of the law) are reviewed on the standard of correctness, while questions of fact or mixed fact and law are reviewed on the standard of palpable and overriding error. If, from a question of mixed fact and law, there is an extricable question of law, that question of law is reviewed on the standard of correctness. The granting or denying of a motion for summary judgment is an exercise in discretion, and that discretion should not be overturned unless the judge has misdirected himself or his decision is so clearly wrong as to amount to an injustice. . . .

[18] To the extent that the questions on this appeal relate to statutory interpretation, the motion judge's decision is reviewable on a standard of correctness (see *Thunderbird Holdings Ltd v Manitoba et al*, 2013 MBCA 78 at paras 32-35).

The Positions of the Parties

The Vacation Pay Claim

[19] The defendant argues that the motion judge, having found that “[t]he plaintiff has not advanced a specific claim to recover trust property or the proceeds thereof in the possession of the trustee” (at para 36), erred when he then concluded that section 49(2)(b) may apply to the vacation pay claim. The defendant submits that section 49(2)(b) is inapplicable because there is no

claim “to recover” trust property (see *Hartman Estate v Hartfam Holdings Ltd* (2006), 263 DLR (4th) 640 (Ont CA)). That is, the plaintiff’s breach of trust claim is *in personam* and not *in rem*.

[20] In addition, the defendant asserts that the motion judge erred in concluding that section 49(2)(b) may apply because the statutory trust provisions in the *VWPA*, the *PWA* and the *Code* do not create a trust as contemplated by section 49(2)(b). Those provisions do not create a true trust because they do not deem the wages to be separate and apart; as such, the requisite certainty of property for the creation of a trust does not exist. Rather, they deem vacation pay to be subject to a lien and charge on the property and assets of the employer for the amount of the wages, such that the employee will prevail over unsecured creditors who seek to enforce their claims (see Geoffrey England, Innis Christie & Roderick Wood, *Employment Law in Canada*, 4th ed by Peter Barnacle & Michael Lynk (Toronto: LexisNexis, 2005) vol 2 (loose-leaf updated 2011, release 32-7), ch 19 at 19-73; and the concurring reasons of Huband JA in *Manitoba (Minister of Labour) v Omega Autobody Ltd (Receiver of)* (1989), 59 DLR (4th) 34 at 36 (Man CA)).

[21] The plaintiff maintains that the motion judge made no error in his determination that the claim for unpaid vacation pay based on breach of trust may not be statute-barred because of the potential applicability of section 49(2)(b).

[22] The plaintiff adds that the motion judge erred in finding that the vacation pay claim was barred by section 2(1)(i) of the *LAA* because there is no evidence that the plaintiff took vacation so it cannot be said that vacation pay became due and payable prior to his retirement.

The Pension Claim

[23] The defendant contends that the motion judge erred in concluding that the cause of action on the pension claim crystallised upon the plaintiff's retirement rather than at each moment in time that the contributions allegedly became due. The defendant argues that *Dinney No 2* is distinguishable as it related to the quantum of pension entitlement, which could only be determined upon retirement. The defendant relies on *Styba v University of British Columbia Employees Society, No. 116*, 1995 CarswellBC 663 (SC), where the Court found that the cause of action arose at the time the defendant failed to make the pension contributions as agreed, such that the action for pension benefits was statute-barred.

[24] The plaintiff takes the position that the motion judge correctly concluded that the cause of action for unpaid pension contributions arose upon retirement. He says that *Styba* does not reflect the current state of the law.

Analysis and Decision

[25] There are multiple avenues under the *LAA* through which the vacation pay claim and the pension claim may or may not survive an assertion that they are barred by the passage of time—sections 2(1)(i), 49(2)(b) and 49(3).

[26] As well, although not argued before the motion judge or on appeal, the statement of defence relies on the doctrine of laches. Given that the plaintiff appears to have been aware that vacation pay was not paid and pension contributions were not made, and did not act to protect his rights, it

may be that his claim is barred by laches. However, since that was not argued before us, I will not deal with it.

[27] That said, I turn to the specific errors alleged by the defendant.

The Vacation Pay Claim

[28] In order to assess the motion judge's conclusion regarding the potential applicability of section 49(2)(b), some understanding of the background and meaning of section 49 will assist.

[29] Section 49 stands alone amongst limitations legislation in Canada. It was brought into force in Manitoba by *An Act to amend The Limitation of Actions Act, 1931*, SM 1946, c 32, section 8, and traces its roots to 1939 legislation from the United Kingdom.

[30] Section 49 has received limited judicial consideration. This Court has considered the provision in *Glenko Enterprises Ltd v Keller*, 2000 MBCA 7; *Blanco et al v Canada Trust Co et al*, 2003 MBCA 64; and *Dinney v Great-West Life Assurance Co et al*, 2005 MBCA 36 (*Dinney No 1*). In *Glenko*, Huband JA remarked, in passing, that section 49(3) "specifies the six-year limitation period for a breach of trust" (at para 42). Similarly, in *Blanco*, Freedman JA observed that actions founded on breach of trust are "governed by s. 49(3)" (at para 37).

[31] In *Dinney No 1*, this Court upheld the trial judge's interpretation of section 49(2)(b). The trial judge concluded that section 49(3) applied in that case which, as I have said, involved a claim related to the quantum of pension benefits payable. The trial judge rejected the plaintiff's submission that the claim fell under section 49(2)(b) as an action to recover trust property from

the trustee. Instead, he found that “it is at best an action for breach of trust under s. 49(3) for which the limitation period is six years” (at para 20, quoting from 2000 MBQB 209 at para 59).

[32] Several lower court decisions have grappled with section 49. Beginning with the earlier cases, in *Smarzik v Bogdalik*, 1959 CarswellMan 50 (QB), Maybank J held that section 49(2)(b) (section 40(1) as it then was) “removes the claim from the operation of any period of limitation described in the Act” (at para 20). In that case, the elderly plaintiff had entrusted the defendants with his savings, which they later refused to return to him. As the defendants held the money in trust, section 49(2)(b) applied and the plaintiff’s claim was not statute-barred (see also *Rogalsky Estate v Rogalsky*, 1984 CarswellMan 197 (QB), aff’d 1986 CarswellMan 321 (CA); and *Koberlein Estate v Barral*, 1997 CarswellMan 474 (QB)).

[33] In *Friesen et al v Isaak*, 2002 MBQB 200, Beard J (as she then was) wrote (at para 11):

As the statement of claim alleges both a breach of trust under the power of attorney and a misappropriation of funds from Mrs. Penner by the defendant and asks for an order that she be required to repay the funds, s. 49 applies to remove any limitation period under the act from applying to the claim. It seems clear that there is no statutory limitation period applicable to these claims against the defendant in her role as a trustee.

[emphasis added]

[34] In *Hyczkewycz v Hupe*, 2017 MBQB 209, Kroft J concluded that a claim fell “squarely within the language of section 49(2)(b), not section 49(3)” and, thus, was not statute-barred (at para 75). He also found that section 49 includes resulting trusts (see para 73) and that “to recover” encompasses

claims for declarations of ownership rights, including resulting and constructive trusts (at para 74). “[T]o recover” is “not limited to a claim to obtain possession of property or to regain something a plaintiff has lost” (*ibid*). The trial decision was upheld on appeal (see 2019 MBCA 74).

[35] Most recently, in *Costik et al v Shipp*, 2018 MBQB 59, Abra J dealt with the limitation issues in the following manner (at paras 38-39):

. . . [Section] 49(3) is subject to s. 49(2) and therefore s. 49(2) takes precedence.

Secondly, s. 49(2)(b) specifically provides that there is no limitation period in a situation wherein a trustee converts trust property to his or her own use. . . .

[36] To summarise, according to section 49(2), there is no limitation period applicable to actions by beneficiaries under trusts for fraud (or fraudulent breach of trust) involving the trustee, or to recover from the trustee trust property or the proceeds thereof (whether in the trustee’s possession or converted to his or her use). Pursuant to section 49(3), all other actions by beneficiaries to recover trust property or in respect of any breach of trust are subject to a six-year limitation period.

[37] Returning to the motion judge’s decision regarding the potential application of section 49(2)(b) to the vacation pay claim, the statement of claim, in its key paragraphs, states (at paras 11, 13):

The vacation pay, which was required to be held in trust by the Defendant, was to be paid to the Plaintiff in advance of any vacation the Plaintiff was entitled to take. Any vacation pay that was to be held, or was required to be held, in trust by the Defendant that remained unpaid was payable to the Plaintiff at the cessation of the Plaintiff’s employment with the Defendant.

The Defendant failed to pay all amounts that were held, or were required to be held, in trust for the Plaintiff with respect to vacation pay as well as any pension contributions that should have been accumulated from 1988 up to and including 2006.

[38] The motion judge characterised the vacation pay claim and the pension claim, based on breach of trust, as follows (at para 36):

The statement of claim is a claim for general damages, special damages and solicitor and client costs. The plaintiff has not advanced a specific claim to recover trust property or the proceeds thereof in the possession of the trustee. However, the plaintiff has advanced a claim for breach of trust based on the defendant's failure to hold the vacation allowance and pension contributions in trust for the benefit of the plaintiff.

[39] In my view, the motion judge may have adopted an overly narrow characterisation of these trust claims. It cannot necessarily be said, based on the statement of claim, that there is no claim to recover trust property or the proceeds thereof. However, if the motion judge did err in his characterisation, I am not satisfied that such an error is palpable and overriding, as will be seen.

[40] As a matter of statutory interpretation, the trusts created under section 19(2) of the *VWPA*, section 3(4) of the *PWA* and section 100 of the *Code* are trusts for the purpose of section 49 of the *LAA*. Those provisions prescribe that vacation pay that is due or accruing due is impressed with a trust, despite there being no requirement on the part of the employer to keep the funds separate and apart. As stated by Philp JA, speaking for the majority in *Manitoba (Minister of Labour) v Omega Autobody Ltd (Receiver of)* (1989), 59 DLR (4th) 34 (Man CA), about section 3(4) of the *PWA* (at p 39):

There can be no doubt that the words “shall be deemed to hold the wages due or accruing due to an employee in trust for the employee” indicate an intention to create a trust. The following words: “for payment of the wages over to the employee in the manner and at the time provided by law”, define with certainty the beneficiaries of the trust as well as its purpose. The final requirement for the creation of a trust, that the subject-matter be certain, is, in my view, met by the words: “[h]as a lien and charge on the property and the assets of the employer whether or not the amount of the wages has been kept separate and apart by the employer . . .”. These words obviate the requirement upon the beneficiaries to point to a separate trust fund, or to trace the trust property.

[41] The defendant’s attempt to distinguish *Omega* based on cases about fraudulent preference and priority under a different legislative scheme, namely, the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, (see *Re Clarkson Gordon and the Queen* (1986), 31 DLR (4th) 701 (Man CA); and *Cargill Ltd v Compton Agro Inc*, 2000 CarswellMan 42 (CA)), is not of assistance. What was before the motion judge was decided in *Omega* and we are bound by it.

[42] Therefore, I am not persuaded that the motion judge erred in his conclusion that section 49(2)(b) may apply to the vacation pay claim and that the issue of its applicability should be determined at trial.

[43] Because the vacation pay claim will be proceeding to trial, I am of the view that it is appropriate, and proportionate, that the potential applicability of sections 49(3) and 2(1)(i) of the *LAA* to that claim also be addressed at trial.

[44] Section 2(1)(i), which governs claims for breach of contract, prescribes that an action must be commenced within six years of when the

cause of action arose. A determination as to when the cause of action for breach of contract arose in relation to vacation pay is governed by the relatively detailed provisions in the *Code* and its predecessor in the attached Appendix, and involves a determination of mixed fact and law, which, in my view, is best made on a full evidentiary record. That record would include evidence as to the specific duration of the plaintiff's employment and when, if at all, he took vacation. With the benefit of such a record, the trial judge may or may not adopt the conclusion of the motion judge as to when the cause of action arose.

The Pension Claim

[45] Similarly, a decision as to whether the pension claim is statute-barred should be made at trial on a complete record. The trial judge will have to consider the potential applicability of sections 2(1)(i) and 49, whether *Dinney No 1* and *Dinney No 2* are distinguishable, and when the cause of action arose, whether in breach of contract or breach of trust. My conclusion that these issues are best left for trial is particularly appropriate given that the matter will be proceeding to trial, in any event, on the questions of whether the plaintiff was an employee during the disputed period and whether the vacation pay claim is statute-barred.

[46] If the trial judge concludes that section 49(3) of the *LAA* applies to the pension claim, I reiterate that it provides for a six-year limitation period from when the right of action accrued. However, it also states that "the right of action shall be deemed not to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest falls into possession." The trial judge will have to address whether a pension plan member only "falls

into possession” of the “trust property” when he or she becomes entitled to pension payments upon retirement. Provisions of *The Pension Benefits Act*, CCSM c P32, will have to be considered. Section 21(1) states that “[a] member of a pension plan becomes entitled to a pension under the plan upon ceasing to be an active member of the plan while employed in Manitoba.” A “member” of a pension plan is defined in section 1(1) to mean “an employee or former employee who is accruing, entitled to or receiving a pension under the plan”. And section 21(1.1) provides that a member of a pension plan ceases to be an active member when, *inter alia*, his or her employment ends.

Conclusion

[47] To conclude, the foundational question of whether the plaintiff was an employee during the disputed period will have to be determined at trial. In my view, so too should the questions of whether the plaintiff’s claim is, in whole or in part, barred by any provision of the *LAA*. An evidentiary record is required to determine the legal ramifications.

[48] The defendant has not persuaded me that this Court should intervene with respect to the motion judge’s dismissal of the summary judgment motion. I would dismiss the appeal with costs.

Simonsen JA

I agree: _____
Steel JA

I agree: _____
Mainella JA

APPENDIX

The Vacations with Pay Act, RSM 1987, c V20 (at sections 4(1), 7(3), 8(1), 9-11(2))

Annual Vacation

4(1) Subject as herein otherwise provided, every employer shall give to each of his employees to whom this Act applies and who becomes entitled thereto, an annual vacation with pay.

Vacation within ten months of entitlement

7(3) Every employee entitled to a vacation with pay shall receive the vacation within 10 months after the date on which he became entitled to it.

Vacation wages payable

8(1) Subject as herein otherwise provided, every employer shall pay to each of his employees who is entitled to a vacation with pay, wages in respect of the vacation in an amount equal to the wages that the employee would earn if he worked during the whole of the regular working hours of the vacation at the rate of wages prevailing in respect of the employee at the beginning of the vacation.

Time of payment of vacation wages

9 Every employer shall pay to each of his employees the vacation wages to which he is entitled under section 8 not later than the day immediately preceding the beginning of the vacation, except that, in the case of an employee whose wages are paid fortnightly, semi-monthly, or less frequently, if the employee so agrees the employer may pay to such employee his vacation wages at the time when his wages are regularly paid to him.

Vacation wages on termination of employment

10 Where the employment of an employee is terminated and, at the time of the termination

- (a) he is entitled to two weeks' vacation with pay for a period of service in respect of which he has not yet received two weeks' vacation with pay, the employer shall, at the time of the termination, pay to him two weeks' vacation wages calculated in accordance with section 8 in addition to any amount he is required to pay to him under section 11;
- (b) he is entitled to three weeks' vacation with pay for a period of service in respect of which he has not yet received three weeks' vacation with pay, the employer shall, at the time of the termination, pay to him three weeks' vacation wages calculated in accordance with section 8

in addition to any amount he is required to pay to him under section 11.

Vacation allowance on termination of employment

11(1) Where the employment of an employee is terminated and at the time of the termination

- (a) he has not been employed for a sufficient length of time since the date on which his employment with the same employer actually began to become entitled to a vacation with pay under section 5; or
- (b) he has not been employed for a sufficient length of time since the date on which he last became entitled to an annual vacation with pay under this Act or under any other Act, law, custom, or agreement, or under his contract of service;

the employer shall, at the time of the termination, pay to the employee

- (c) not less than 4% of the wages paid to the employee during the regular working hours worked by him since his employment with the employer began or since the date he last became entitled to a vacation with pay, as the case may be; or
- (d) where the employee has been employed by the employer for five or more years and has worked for at least 50% of the regular working hours in each of four years in the preceding 10 years, an amount not less than 6% of the wages paid to the employee during the regular working hours worked by him since he last became entitled to a vacation with pay.

Vacation wages after 12 months

11(2) Where an employee has worked for an employer during a period of 12 months but has not worked sufficient time in that period to be entitled to a vacation with pay under section 5, the employer shall, at the end of that period of 12 months, pay to the employee

- (a) an amount not less than 4% of the wages paid to the employee in respect of regular working hours worked by him during that 12 month period; or
- (b) where the employee has been employed by the employer for five or more years and has worked for at least 50% of the regular working hours in each of four years in the preceding 10 years, an amount not

less than 6% of the wages paid to the employee in respect of regular working hours worked by him during that 12 month period.

The Employment Standards Code (at sections 34(1), 35, 39(2)-(3), 42(1), 43, 44(2))

Employee entitlement to annual vacation

34(1) An employee is entitled to an annual vacation of at least

- (a) two weeks after each of the first four years of employment; and
- (b) three weeks after five consecutive years of employment and each year of employment after that.

When annual vacation to be given

35 An employer shall give an employee an annual vacation not later than 10 months after the employee becomes entitled to it.

Amount of vacation allowance

39(2) An employer shall pay to an employee who is entitled to an annual vacation, for each week of the vacation, a vacation allowance consisting of

- (a) 2% of the wages that the employee earned in the year of employment in respect of which the employee is entitled to the annual vacation; and
- (b) if the employer provides board and lodging, or pays an allowance in lieu of board and lodging, as part of the usual remuneration of the employee, an amount equal to 2% of the cash value of the board and lodging or allowance that the employee received in the year of employment in respect of his or her regular hours of work.

Time of payment of vacation allowance

39(3) Unless the employee otherwise agrees, the employer shall pay the vacation allowance to the employee not later than the last working day before the employee's annual vacation begins.

Employer may use common anniversary date

42(1) Despite sections 34 (annual vacation) and 39 (vacation allowance), an employer may establish a common anniversary date for all employees or a group of employees for the purpose of calculating their annual vacations and vacation allowances.

Effect of notice of termination

43 Where an employer or employee gives notice of termination of the employee's employment,

- (a) no part of the employee's annual vacation may be used to calculate the required notice period unless, in the case of an employee giving notice, the employer otherwise agrees; and
- (b) the payment of a vacation allowance to the employee does not affect any other amount payable to the employee in respect of the termination.

Payment of vacation allowance on termination

44(2) If an employee's employment terminates before he or she is entitled to an annual vacation, the employer shall pay the employee a vacation allowance equal to

- (a) if the employee has not completed five consecutive years of employment with the employer, 4% of the wages earned since the date the employee became employed by the employer or the date the employee last became entitled to an annual vacation, whichever is later; and
- (b) if the employee has completed five consecutive years of employment with the employer, an additional 2% of the wages earned from the date the employee last became entitled to an annual vacation to the date of termination.