Posted on: May 12, 2011

SETTLEMENT AND THE EFFECTIVE USE OF RELEASES

May 12, 2011

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Prepared for the Continuing Legal Education Society BC conference on May 12, 2011

I. INTRODUCTION

Lawyers and clients often assume that once they've reached agreement on the business terms of a settlement the hard work is done and the details will take care of themselves.

Don't simply assume, however, that everything will fall into place after you've reached agreement on liability and quantum. No settlement is truly complete until the parties have agreed on the wording of a comprehensive release.

It's often easier to get a consensus on the form and content of the release before you start negotiations on the business terms. If you don't resolve the form and content of the release before resolving the business terms, then you may find that the goodwill shown by all parties in the early stages of negotiations has dissipated once they have finished fighting over the business terms. If you wait until the business terms have been negotiated before you consider the wording of a release, then you may find that discussions break down and you're left with having to look at the following issues:

- Has a settlement agreement been reached (on all essential terms) or merely an agreement to agree (with key terms still to be negotiated)?
- If a settlement agreement has been reached, then what terms are implied as a part of that settlement agreement?
- What protection is afforded to the Defendants by the expiry of limitation periods?

If you want to avoid having to deal with these issues ***after*** the business terms have been negotiated, then consider what matters you need to include in a release ***before*** you negotiate the business terms.

II. HAS A SETTLEMENT AGREEMENT BEEN REACHED OR MERELY AN

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AGREEMENT TO AGREE?

In *Calvan Consolidated Oil & Gas Ltd. v. Manning*, [1959] S.C.R. 253, Mr. Justice Judson put the question in this manner, at page 261:

"Whether the parties intended to hold themselves bound until the execution of a formal judgment is a question of construction and I have no doubt in this case. The principle is well stated by Parker J. in *Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at 288-289, in these terms:

'It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.'"

In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), Robins J.A. reviewed the applicable distinctions where written documents are required to formalize a contract, at pages 103 to 104:

"As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by memorandum, by exchanging correspondence or other informal writings. The parties may 'contract to make a contract', that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, when the original contract is incomplete, because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary

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agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal contract is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself."

In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 (C.A.), the BC Court of Appeal had to consider whether a settlement agreement had been reached when there was no discussion about the provision of a release. After agreeing on the amount it would pay to settle the Plaintiff's claim, the Defendant insisted on a release being executed by the Plaintiff. At page 70, McEachern C.J.B.C. states:

"In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted, then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in the circumstances."

III. IF A SETTLEMENT AGREEMENT HAS BEEN REACHED, THEN WHAT TERMS MAY BE IMPLIED?

In *Fieguth v. Acklands Ltd.* (supra), the Plaintiff had accepted the Defendant's offer to settle in a breach of contract claim for wrongful dismissal. When the Defendant subsequently presented a release to the Plaintiff "containing covenants and indemnities that were excessive and unnecessary", and deducted income tax from the settlement funds, the Plaintiff argued that no final settlement had been reached because there had been no agreement on the terms of the release, the method and timing of payment of funds, the method of dealing with income tax implications or the terms of any indemnity agreement. At trial, the court agreed

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with the Plaintiff that there was no final settlement. On appeal, however, the Court of Appeal found that there was an enforceable agreement. At pages 70 to 72, Chief Justice McEachern summarized a number of principles on the formation and enforcement of settlement agreements. This summary of those principles from *Fieguth* is taken from paragraph 23 of Madam Justice Smith's decision in *Re Rickards Estate v. Diebold Election Systems Inc.*, 2004 B.C.S.C. 1357:

1. "It is necessary to separate the question of formation of contract from its completion.
2. Whether a contract is formed depends upon whether the parties have reached an agreement on all essential terms.
3. It is common with settlements that the deal is struck before documentation can be completed. In such cases, if there is an agreement on the essential terms a contract has been formed and the settlement is binding.
4. Generally speaking, litigation is settled on the basis that a final agreement has been reached which the parties intend to record in formal documentation, rather than on the alternative basis that the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete.
5. A settlement implies a promise to furnish a release (and a Consent Dismissal if an action has been commenced).
6. Where an agreement has been concluded with documentation to follow, either party can tender whatever documents he or she thinks appropriate without thereby rescinding the settlement agreement.
7. If the documents are not accepted, there must be further discussion, but neither party is released or discharged until the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.
8. Not every disagreement over documentation consequent upon a settlement amounts to repudiation of a settlement.
9. Parties who reach a settlement should usually be held to their bargains, and dispute should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar."

In *Imperial Oil Ltd. v. 416169 Alberta Inc.*, 2002 A.B.Q.B. 386, (2002), 310 A.R. 338 (Q.L.), the court noted at paragraph 10 that "a release is another virtually universal requirement in the settlement of litigation". In that case, the parties had agreed to a release but not a specific form of release. When negotiations broke

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down over the form of release, the Plaintiff argued that the absence of a specific form of release created a fundamental uncertainty. At paragraph 14 of the decision, the court rejected that submission for the following reasons:

"But a release is not such an unusual document as to create a fatal level of uncertainty. A release can be fairly described as 'a conventional document that requires only the filling in of blank spaces or the completion of minor details which the parties can impliedly be taken to have agreed upon': *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991) 79 D.L.R. (4th) 97 (Ont. C.A.) at 106. The words and conduct of both parties show that it was a term of the settlement agreement that the release would be fair and commercially reasonable having regard to the context of the 1993 dispute and its resolution. This term is sufficiently certain that a Court could, if necessary, issue a binding declaration of right setting out the Plaintiff's entitlement to the release. To put it another way, if the numbered company prepared, signed and tendered a form of release, the Court could rule on whether it had complied with its obligations."

A. What is Included in a Simple or Basic Release?

In *Fieguth v. Acklands Ltd.* (supra) B.C.L.R. at page 72, the BC Court of Appeal concluded that the Plaintiff was entitled to the settlement funds "upon furnishing a general release": That begs the question, what is included in a general release?. At page 72, McEachern C.J.B.C. suggests that "insisting upon a release with covenants and indemnities may have been some evidence of unwillingness to complete the contract…".

In *Great Sandhills Terminal Marketing Centre Ltd. v. J-Sons Inc.*, 2008 S.K.C.A. 16 (CanLII), [2008] 7 W.W.R. 297, the Plaintiff commenced legal action against various Defendants seeking damages for economic losses alleged to have been suffered as the result of the negligent construction of a grain terminal. Although the parties were able to settle the action, talks broke down over the negotiation of an appropriate form of release. After concluding that the parties had entered into a binding settlement agreement, the Saskatchewan Court of Appeal described the remaining issue at paragraph 41:

"The remaining issue was the performance of the agreement by execution of releases containing fair and commercially reasonable terms consistent with the intentions of the parties, and the provision of notices of discontinuance."

In the circumstances of that case, having concluded that the parties had reached a binding settlement agreement before negotiations broke down over the form of release, the Saskatchewan Court of Appeal ordered that, if the parties couldn't settle on the appropriate form of release within 30 days, then "judgment will issue dismissing the within action and releasing the appellants from any liability to the Respondents **in relation to any cause of action pled in the Statement of Claim**": para. 48.

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In *Abouchar v. Conseil Scolaire De Langue Francaise d'Ottawa Carleton* - Section Publique (2002), 58 O.R. (3d) 675, [2002] O.J. No. 1249 (Ont. S.C.), the Defendants made a comprehensive offer to settle two wrong dismissal actions and four human rights complaints brought by the Plaintiff. In consideration for a $250,000 payment, the Plaintiff agreed to sign a "complete and final" release. The offer to settle didn't make any reference to the terms of that release. When the Defendants presented the Plaintiff with a draft release containing a non-disclosure provision, the Plaintiff refused to sign the release. At paragraph 11 of the decision, Sedgwick J. concluded:

"The terms of the release must be in accord with the offer to settle that was accepted by the Plaintiff. In my view, a 'complete and final' release does not entail the inclusion of a non-disclosure clause. Such clause does not constitute by necessary implication a term of the settlement reached by the parties. The gist of a 'complete and final' release is for the Plaintiff to discharge the Defendants (and other persons referred to therein) from any action, complaint, claim, indebtedness, etc. In my opinion, the non-disclosure clause is not part and parcel of a release. If one wishes to insert one, it must be negotiated."

Imperial Oil Limited v. 416169 Alberta Inc., (supra), had to consider the contents of a release in the settlement of an action in damages for hydrocarbon contamination of certain lands. The Defendant owned a shopping centre in west Edmonton. The Plaintiff, Imperial Oil, owned and operated a gas station on adjacent lands. The gasoline was stored in underground storage tanks and at some point some leakage occurred. It was subsequently discovered that the leaked hydrocarbons had migrated across the property line and contaminated a part of the shopping centre site. The numbered company commenced an action against Imperial Oil claiming damages for the contamination. The parties subsequently worked out the terms of a remediation agreement to clean up the contamination. After the terms of the remediation agreement were settled, Imperial Oil stipulated that execution of a release and indemnity with respect to any claims brought against it would be required, upon completion of the remediation work. The numbered company responded to that request as follows, at para. 5 of the judgment:

"I have some difficulty in understanding the release and indemnity agreement which you drafted. If you require a release I am willing to provide you with a release upon my acceptance of the remediation report, which release will be a general release in connection with all matters arising out of the lawsuit commenced by 416169 Alberta Inc. The form of release which you have drafted releases future claims which may arise, for example, should there be subsequent seepage of hydrocarbon contamination from your client's lands onto the shopping centre site. There was never any intention to grant a release in that situation."

The content of the release was left unresolved but the terms of settlement were carried out. Imperial Oil remediated the contamination and obtained and provided remediation reports confirming that the work had

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been completed. Nothing was done to advance the lawsuit that had been commenced by the numbered company. Eventually Imperial Oil, frustrated by its inability to resolve the litigation that had been started in 1993, commenced its own action seeking a declaration that there had been a settlement agreement reached in 1997 and that it had performed all of its obligations under that settlement agreement. The court concluded that a settlement agreement had in fact been reached. It was a term of the settlement agreement that a release would be provided and the court concluded that the release had to be "fair and commercially reasonable having regard to the context of the 1993 dispute and its resolution". At paragraph 17 of the judgment, the court found that there was a "covenant to provide a commercially reasonable release". It then reviewed the specific areas of dispute between the parties about the release and found as follows:

1. the release should not include future claims but should cover all matters up to the date of the discontinuance of the 1993 action: paras. 21 and 23;
2. the numbered company was not required to sign a release containing an indemnity clause. Any indemnity agreement was inconsistent with the covenant to provide a general release for the claims arising out of the 1993 litigation: para. 22;
3. the release had to encompass all of the matters alleged in the original Statement of Claim and all of the work carried out pursuant to the settlement agreement: para. 24;
4. the parties entitled to the benefit of the release included Imperial Oil Limited and its partner, McColl-Frontenac Petroleum Inc., even though McColl-Frontenac wasn't a party to the original action: para. 25.

B. What is Covered by a Consent Dismissal Order?

A Consent Dismissal Order is a final determination of the cause of action as if it had been decided on the merits. In order to understand what protection is provided by a Consent Dismissal Order, it is important to examine the specific cause(s) of action involved.

IV. WHAT PROTECTION IS AFFORDED BY LIMITATION PERIODS?

A. Common Law Causes of Action

Under s. 3(5) of the *Limitation Act*, R.S.B.C. 1996, c. 266, the limitation period for most employment related claims, including wrongful dismissal (breach of contract) actions, is six years. For common law causes of action, limitation periods generally run from the time the cause of action arose. Pursuant to s. 6 of the *Limitation Act*, R.S.B.C. 1996, c. 266, the running of time with respect to a limitation period for various actions, including actions based on fraud or deceit, or in which material facts relating to the cause of action

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have been wilfully concealed does not begin to run until a reasonable person would discover that damage giving rise to a cause of action has occurred. Thus, discoverability, incorporated into s. 6 of the *Limitation Act*, postpones the running of the limitation period up to the maximum thirty year ultimate limitation period. Once the ultimate thirty year limitation period is reached, the common law cause of action would expire, regardless of whether damage was discovered.

B. Claims Under the BC Employment Standards Act

Section 74 of the BC *Employment Standards Act,* R.S.B.C. 1996, c. 113 sets out the time limits for filing of complaints under the Act. In particular, under s. 74(3), an employee whose employment has been terminated must file a complaint within six months[1] after their last day of employment. Subsection 3.1 of the *Employment Standards Act* clarifies that for an employee whose employment is terminated following a temporary layoff, the six month period for filing a complaint begins to run from the end of the 13 week temporary layoff period, which is deemed to be the last day of work.

The time limit for filing of complaints under Part 2 of the *Employment Standards Act*, relating to the hiring of employees (including claims filed under s. 8 regarding false representations, and sections 10 and 11 regarding the charging of fees to prospective employees in connection with their hiring) is six months from the date of the alleged contravention.

The time limits in s. 74(3) of the *Employment Standards Act* have been strictly applied against complainants. For example in *South Surrey Hotel Ltd. operating as Best Western Pacific Inn Resort & Conference Centre*, BC EST #D365/99, a complaint filed after the Christmas holidays on December 29, 1998 was dismissed because it was not filed within the six month time limit which expired on December 24, 1998. Similarly, in *Balshine*, B.C. EST #D067/97, the Tribunal dismissed the complaint for being filed out of time and expressly affirmed that "The *Act* does not provide for exceptions to the time limits in Section 74(3)".

It should also be noted that under s. 124 of the *Employment Standards Act* there is a two year time-limit on the start of court proceedings based on offences under the *Act*. This two year period starts to run from the date on which the Director of Employment Standards first has knowledge of the facts on which the proceedings are based.

C. Human Rights Complaints

The time limit for filing of a complaint under the BC *Human Rights Code,* R.S.B.C. 1996, c. 210 is also six months. Section 22(1) of the *Code* states that "a complaint must be filed within 6 months of the alleged contravention". Section 22(2) clarifies that "if a continuing contravention is alleged in a complaint, the

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complaint must be filed within 6 months of the last alleged instance of the contravention." However, unlike the *Employment Standard Act*, the *Human Rights Code* specifically provides in s. 22(3) for discretion to be exercised in admitting complaints that are filed outside the six month time limit "... if the member or panel determines that (a) it is in the public interest to accept the complaint, and (b) no substantial prejudice will result to any person because of the delay."

The discretion to admit late filed complaints under s. 22(3) of the *Code* has been exercised with relative frequency, and therefore relatively little protection is afforded to respondents by the expiry of the six month time limitation period.

V. WHAT MATTERS SHOULD BE SPECIFICALLY NEGOTIATED TO INCLUDE IN A RELEASE?

A. Indemnities

In *Fieguth v. Acklands Ltd.* (supra), the form of release presented by the Defendant's lawyer was described by McEachern C.J.B.C., B.C.L.R. at page 65 as "an unusual one containing covenants and indemnities that were excessive and unnecessary". At page 67 he concluded it was an implied term of the settlement agreement that the employer was entitled to a simple release of the claim for wrongful dismissal but "the Defendant, not having stipulated for an indemnity agreement, was not entitled to anything of the kind".

If one of the parties to a settlement wants an indemnity included in a release, then it must be specifically negotiated. An agreement to provide a release in exchange for a sum of money does not require the Plaintiff to indemnify the Defendant in the event another party pursues a related claim against that same Defendant: *Witzke (Guardian ad Litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (Q.L.) (S.C.). In that case, the court concluded that since there had been no discussion of an indemnity, the two parties were not at ad idem and, therefore, there was no binding settlement agreement.

Norwich Union Life Insurance Co. (Canada) v. MGM Insurance Group Inc., [2005] 1 W.W.R. 196 (Man. Q.B.) confirms that a Defendant who wants the benefit of an indemnity from a Plaintiff against potential claims by third parties, must specifically bargain for that indemnity as part of the settlement agreement, because it will not be implied. In *Norwich*, five separate actions had been commenced against various Defendants. Three of those Defendants reached an agreement to settle the Plaintiff's claim against them. Under the terms of the settlement agreement reached, the Plaintiff agreed to release the Defendants in respect of the claims advanced by the Plaintiff in all five actions. The settlement offer which was accepted to create the settlement agreement did not stipulate the provision of an indemnity as well as a release. There was simply no discussion about the provision of an indemnity. When counsel for the Defendants sent a release and

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indemnity to counsel for the Plaintiff, the Plaintiff refused to provide the indemnity. At paragraph 23, McCawley J. states:

"I do not accept that, because there were multiple actions, the broad indemnification sought should have been in the mind of Plaintiff's counsel and is part of the normal practice such that it should be an implied term as was argued."

See also *Imperial Oil Limited v. 416169 Alberta Inc.* (supra) at para. 22 which concluded that an indemnity is not considered part of a release and should not be included, unless specifically negotiated.

Including an indemnity in a release from liability for a wrongful dismissal claim may be of particular importance, given the potential for claims against the employer for both income tax and employment insurance benefits. In particular, the *Employment Insurance Act*, S.C. 1996, c. 23, in section 46 imposes potential liability on employers to withhold from a wrongful dismissal settlement, any overpayment of employment insurance benefits resulting from such settlement, and to remit such overpayment to the Receiver General:

"Return of benefits by employer or other person

46. (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits."

Given these potential liabilities, many employers insist on including a specific indemnity in their release, under which the former employee will agree to indemnify the employer for any future income tax or employment insurance claims made against the employer.

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B. Causes of Action Not Pleaded

In *Harris v. Braithwaite*, 2006 CanLII 51172 (Ont. S.C.), the Plaintiffs initiated a shareholder's oppression action against the Defendants and two of the Defendants counterclaimed alleging misappropriation of assets from the company. Before settlement discussions were entered, one of the Defendants learned of the existence of an alleged $40,000 debt owing to him by one of the Plaintiffs. The Defendants' counterclaim, however, was never amended to raise that additional claim in debt. The debt claim was disclosed to Plaintiff's counsel before the action was settled. The action was settled on terms that required execution of mutual releases. The form of release prepared by Plaintiff's counsel was a full and final release of all claims between all of the parties to the litigation and would have precluded the Defendant from attempting to recover the alleged debt owing to him by the Plaintiff. Counsel for the Defendants submitted that the form of release presented by Plaintiff's counsel was too wide and should be limited to only cover those issues pleaded in the Statement of Claim, Statement of Defence and Counterclaim. The court agreed and found there was no evidence that the settlement was intended to include issues which had not been pleaded. The settlement was limited to the matters at issue in the action. The terms of the implied release to complete the settlement had to reflect the agreement reached between the parties. In the absence of any evidence to suggest that the parties intended to provide a release which would cover all potential claims between the parties, the court concluded that the release had to be restricted to the causes of action set forth in the pleadings: paras. 25 and 26.

C. Statutory Claims under the BC *Employment Standards Act* and the BC *Human Rights Code*

Employment related claims often also contain alleged claims under the BC *Employment Standards Act* and/or the BC *Human Rights Code*. The statutory nature of these claims gives rise to further issues that must be considered in the settlement of such claims and the release of the employer from liability for these claims.

As a general proposition it seems clear that parties cannot "contract out" of their statutory obligations and rights under the *Employment Standards Act* and the *Human Rights Code*. In the case of the *Employment Standards Act,* this is specifically confirmed in s. 4 of the *Act*, which states that "The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect." While there is no express provision to this effect in the *Human Rights Code*, s. 4 of the *Code* confirms that the *Code* will prevail over any conflicting enactments, and the Supreme Court of Canada has more than once affirmed that parties cannot rely on discriminatory provisions contained in an agreement: see *Insurance Company of B.C. v. Heerspink*, [1982] 2

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S.C.R. 145; *Zurich Insurance Company v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161.

Given these constraints:

1. is it therefore possible to settle claims which raise either Employment Standards or Human Rights issues; and
2. is it possible to enter into binding agreements to release these claims?

There are in fact many decisions on these issues, particularly in the Human Rights context.[2] These decisions generally recognize the inherent tension that exists between upholding the statutory protection afforded under the relevant legislation and the compelling public policy reasons for encouraging parties to reach settlements of their disputes.[3] In BC, the Human Rights Tribunal in *Gareau v. Kersey and others*, 2003 BCHRT 87, considered the dismissal of a human rights complaint which was filed after the complainant had entered into a settlement agreement and signed a release of liability relating to the termination of her employment. In dismissing the complaint, the Tribunal summarized the following principles in determining whether to uphold a settlement and release:

"[17] In deciding whether it furthers the purposes of the Code to allow a complaint to proceed in the face of a settlement agreement, the Tribunal will consider the terms of the agreement and all of the circumstances in which it was executed. In so doing the Tribunal will consider the following issues:

1. Did the employee understand the significance of the release?
2. What was included either explicitly or implicitly in the language of the release or agreement itself?
3. Was there consideration for the release?
4. Was the complainant in such serious financial need that there was no choice but to accept the package offered?
5. Was there an inequality of bargaining power and a substantially unfair settlement?
6. Is there any evidence of coercion, oppression, abuse of power or authority, or compulsion in order to obtain the release?
7. Was the complainant provided the opportunity to seek independent legal advice?
8. Did the complainant understand his or her rights under the Code?
9. Are there any other considerations particular to the circumstances of the case which may include lack of capacity, timing of the complaint, mutual mistake, forgery, or fraud."

In drafting employment law releases that encompass statutory claims it is therefore helpful to address some

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of these principles. In particular, it may be helpful to:

1. explicitly refer to the employee releasing the employer from claims under the *Human Rights Code* and the *Employment Standards Act*, including the particulars of any applicable claims asserted: e.g. age discrimination, or claims for overtime, etc.;
2. specifically allocate the settlement funds to the different categories of claims that have been settled, including individual allocations to the claims for wrongful dismissal, and alleged *Human Right Code* claims and any claims for compensation under the *Employment Standards Act*. In addition to underscoring the fact that each such claim has been specifically considered and settled, the allocation of the settlement funds in this manner may also be helpful in clarifying the tax that must be withheld on different components of the settlement funds;
3. have the employee acknowledge that they were advised to obtain independent legal advice before signing the release and that they were given sufficient opportunity to do so (and if such advice was in fact obtained, including a provision that confirms this in the release);
4. if no express statutory claims have been alleged, then it may be prudent to include an express representation by the employee confirming that there is no factual basis for any claim under the *Human Rights Code* or the *Employment Standards Act;* and
5. an express covenant by the employee to not file a claim under either the *Human Rights Code* or the *Employment Standards Act*, and an acknowledgement that the employer can rely on such covenant (and the employee's representation in point 4 above) in making an application to have any subsequently filed claim by the employee dismissed.

D. Confidentiality and Non-Disclosure Provisions

A confidentiality and non-disclosure clause is not an implied condition of a settlement and cannot be included in a release unless it has been specifically negotiated: *Abouchar* (supra) at para. 11.

If, however, the parties have settled an action on the understanding that a release will be provided which contains a confidentiality provision, then at a minimum, the clause should stipulate that there is to be no disclosure of information respecting the settlement of the lawsuit to anyone, including members of the media, unless compelled to do so by law: *Hughes v. The City of Moncton*, 2006 N.B.C.A. 83 (CanLII), 304 N.B.R. (2d) 92. In the *Hughes* decision, which involved the settlement of a wrongful dismissal claim brought by the former city solicitor, the New Brunswick Court of Appeal specifically approved the wording of a confidentiality clause at para. 9 which stated:

"IT IS FURTHER UNDERSTOOD AND AGREED that due to the nature of the subject matter of the within

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action, the parties have agreed that absolute confidentiality with respect to all terms and conditions of the discontinuance and settlement of the action is essential and is a condition of the within Release. The Releasor and Releasee expressly undertake and agree that there will be no disclosure or release by either of them of any information respecting the discontinuance or settlement of the within action to any person, including, but not limited to, all magazine, newspaper, radio, television and broadcast media and all journalistic or publishing interests unless compelled to do so by law."

E. Non-Disparagement Provisions

Again, as with a confidentiality and non-disclosure clause, a non-disparagement provision is not an implied condition of a settlement and cannot be included in a release unless it has been specifically negotiated.

We are not aware of any British Columbia case which has specifically considered the enforceability of a non-disparagement provision in a wrongful dismissal context. Furthermore, while there are clearly causes of action and remedies for defamation, there would appear to be no common law cause of action for disparaging or derogatory statements which fall short of being defamatory. Any claim to enforce such a provision would therefore have to be framed as a claim for breach of the contractual non-disparagement term in the release and settlement contract.

F. Complex or Unusual Terms

Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc., [1995] O.J. No. 721 (Ont. Gen. Div.) is a decision which follows the BC Court of Appeal decision in *Fieguth v. Acklands Ltd.* (supra). At paragraph 24 of *Cellular Rental*, Chapnik J. states:

"It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, **no party is bound to execute a complex or unusual form of release:** although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice." (emphasis added)

The *Cellular Rental* decision was affirmed on appeal: [1995] O.J. No. 3773 (Q.L.) (Ont. C.A.).

VI. EXECUTION OF RELEASES AND SETTLEMENT AGREEMENTS

Many release forms are drafted so as to only be signed by the employee, and are not signed by the employer who is agreeing to pay the consideration that is being provided in exchange for the employee's release of his or her claims.

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From the employee's perspective, the simplest approach to addressing any concerns about the enforceability of the employer's covenants would be for both parties to sign the document, and to therefore make it clear that the employee's release is being provided in consideration of the employer's promise to pay.

The absence of the employer's signature on a release, however does not make the employer's covenant to pay unenforceable. This is because there is no strict legal requirement for a party to sign an agreement in order to be bound by its terms. The signing of the agreement by the employer is only evidence of the employer's intention to be bound by the employer's covenant to pay the settlement amount in consideration for the employee's release. Provided that evidence of the employer's intention to be bound by the covenant to pay can be proven by other means, the employer will be bound by this covenant. For example, the covenant to pay, and the evidence of the employer's intention to be bound by this covenant, is usually referred to in the release itself, and in collateral correspondence which confirm the terms of the settlement that has been reached between the employer and employee.

As a practical matter, in simple cases any question regarding the employer's compliance with its obligation to pay, can be addressed by the employee only tendering the release in direct exchange for the employer's payment, or through delivery of the executed release on acceptable undertakings negotiated between the employee and employer's lawyer. In more complex settlements involving covenants by the employer that extend beyond a mere payment of funds, it may be prudent to negotiate and draft a more comprehensive release and settlement agreement which will be signed by all parties. Finally, in some cases (i.e. where one or both parties are required to comply with terms after execution of the release and settlement agreement) it may even be appropriate for the executed release and settlement agreement to be held in escrow pending completion of the terms of a settlement and for the escrow terms to specifically stipulate the effect of any non-compliance by a party on the effectiveness of the release and settlement agreement and the overall validity of settlement.

VII. SUMMARY

By presenting the form of settlement agreement and mutual release your client wants, at the beginning of negotiations, you can avoid some of the problems created by settling an action without specifying the terms and conditions to be included in a release. If you enter into a settlement agreement without specifying the content of the release, then you will be limited to a general release with respect to the matters at issue in the specific causes of action pleaded. If you wish to include causes of action not specifically pleaded, indemnities, confidentiality and non-disclosure provisions, or complex or unusual terms, then those matters must be specifically negotiated because they are not part of the general release which is implied as a

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covenant into every settlement agreement.

APPENDIX "A"

RELEASE, INDEMNITY AND SETTLEMENT AGREEMENT

Effective as of the _____ day of _____ 20___ (the "**Effective Date**").

Whereas:

A. Jill Smith (the "**Employee**") was employed by the ABC Company (the "**Company**").

B. On _____, 20___ the Company terminated the Employee's employment.

C. The Employee and the Company have now reached an agreement regarding the settlement of all matters outstanding between them on the terms and conditions set out in this Release, Indemnity and Settlement Agreement (the "**Agreement**").

THEREFORE in consideration of the agreements and covenants set out herein the parties agree as follows:

1.0 Payment Terms

1.1 In consideration of the releases, covenants and acknowledgements of the Employee set out in this Agreement, the Company agrees on execution of this Agreement to pay:

(a) $X,XXX to the law firm of XYZ LLP as reimbursement for legal fees incurred by the Employee in connection with the termination of her employment from the Company;

(b) $X,XXX to the Employee as compensation for loss of dignity and all other claims for compensation with respect to the Company's alleged breach of the British Columbia *Human Rights Code*;

(c) $XX,XXX to the Employee's RRSP (to be deposited directly to the Employee's RRSP account at the Humungous Bank of Canada, 1234 Burrard Street, Vancouver BC, V1V 1X1, Transit Number XXXX-XXX, Account Number XXXXX)

(d) $XX,XXX to the Employee (less withholding for income tax of $X,XXX) as compensation for the alleged wrongful dismissal of the Employee by the Company; and

(e) $X,XXX to the Employee (less withholding for income tax of $X,XXX) as compensation for all claims by the Employee under the British Columbia *Employment Standards Act.*

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2.0 Release

2.1 The Employee hereby releases the Company, ABC Subco Inc., ABC Affiliate Co. and all of their subsidiaries, affiliates and associated entities, and all of their respective officers, directors and employees (collectively the "**Releasees**") from all claims, demands, damages, actions or causes of action of any sort which the Employee may have or will have for any claim arising out of, or in connection with, the Employee's employment with the Company, or the termination of such employment and including, without limiting the generality of the foregoing, any claims:

(a) for damages for termination of the Employee's position or loss of status, loss of future job opportunity, relocation costs, loss of reputation, harassment, negligence, defamation, the timing of the termination and the manner in which it was effected;

(b) arising out of or in connection with the employment agreement between the Employee and the Company, dated _____, 20__ (the "**Employment Agreement**");

(c) for wrongful dismissal, severance, pay in lieu of notice or termination pay, including any claims for a retiring allowance or other termination payment under the Employment Agreement or any prior employment agreement;

(d) for loss of wages, salary, commissions, bonuses, incentive compensation or variable compensation, including any claims for compensation under the Employment Agreement or any prior employment agreement;

(e) in any way related to vested or unvested Company stock options, including the termination or expiry of any Company stock options, or the loss of any opportunity to exercise any Company stock options which vested before the termination of the Employee's employment or which may have vested during any reasonable notice period following the termination of the Employee's employment with the Company;

(f) for loss of dignity, discrimination, failure to accommodate or any other claim for damages or compensation under the British Columbia *Human Rights Code*;

(g) for vacation pay, overtime pay or wages or any other claim under the British Columbia *Employment Standards Act*; or

(h) loss of employment benefits, including but not limited to, life insurance, AD&D insurance, short-term and long term disability coverage,

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and any other type of damages in any way related to the terms of the Employee's employment or the termination of that employment by the Company.

2.2 The Employee further agrees that the payments set out in Article 1.1 above, include any and all amounts to which the Employee may be entitled under the terms of her employment with the Company, including without limitation the Employment Agreement, and that the Employee will not file in any court or with any administrative tribunal any claim for damages or compensation for negligence, defamation, wrongful dismissal, bad faith discharge, termination without notice, termination pay, relocation costs, wages, commissions, overtime, bonus, incentive compensation, variable compensation, loss of vested or unvested stock options, vacation pay, damages for injury to dignity, harassment, or any other remedy to which the Employee may be entitled nor will the Employee file any claim under the British Columbia *Employment Standards Act*, the *Human Rights Code* or any similar legislation in any other jurisdiction in any way related to her employment with the Company.

2.3 If contrary to Article 2.2, the Employee does file in any court or with any administrative tribunal any claim against any of the Releasees, then the Employee hereby irrevocably consents to such Releasee relying on this Agreement to obtain a stay or dismissal of such claim. The Employee also hereby irrevocably consents to any proceeding raising such claim being stayed or dismissed.

3.0 Indemnity

3.1 The Employee understands that the Company will withhold income tax from the gross amount of the payment to be made to the Employee under Article 1.1(d) and (e) and the Employee hereby agrees to indemnify the Releasees from and against any liability for tax, penalty, interest or any other amount of any kind whatsoever arising under one or more of the *Income Tax Act (Canada)*, the *Employment Insurance Act (Canada),* the *Pension Plan Act,* the *Income Tax Act (British Columbia),* or any other similar statute of Canada or British Columbia that arises out of or with respect to the payments to the Employee in accordance with the terms of this settlement or the terms of the Employee's employment with the Company.

4.0 General

4.1 This Agreement will be interpreted in accordance with the laws of British Columbia.

4.2 If any part, section, clause, paragraph or subparagraph of this Agreement shall be held to be indefinite, invalid, illegal or otherwise voidable or unenforceable, the entire Agreement shall not fail on account thereof, and the balance of this Agreement shall continue in full force and effect.

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4.3 The Employee acknowledges and agrees that:

(a) she will not make any claim or take any proceedings against any other person or entity who might claim contribution or indemnity from the Releasees with respect to any of the matters referred to in this Agreement;

(b) she will keep strictly confidential the terms of the resolution of the matters set out in this Agreement, and will not divulge, either directly or indirectly in any manner whatsoever, the terms, details or facts thereof or related discussions about this Agreement, to any person other than her legal or financial advisers or unless required to do so by court order or by compulsion of law, and furthermore will not use or disclose information acquired by the Employee in the course of her employment with the Company which is not public knowledge, including all information regarding the Releasees' business operations, methods and practices, sales and marketing strategies, product pricing, costs, margins and all information regarding the Releasees' projects, customers, clients, suppliers, referral sources, and the nature of the Releasees' relationships with such customers, clients, suppliers and referral sources;

(c) she will not make any derogatory, disparaging or defamatory written or oral statements regarding the Company or any of the other Releasees;

(d) the provisions of Article X.X (Confidentiality) and Article X.Y (Intellectual Property) of the Employment Agreement remain in full force and effect; and

(e) nothing in this Agreement constitutes an admission of liability on the part of the Company or any of the other Releasees.

4.4 The terms contained in this Agreement which require performance by the Employee and the Company after the date of execution of this Agreement shall be and remain in force after execution of this Agreement. In particular, the Employee acknowledges that the terms set out in Article 4.3 of this Agreement are fundamental to the basis upon which the Company has agreed to enter into this settlement with the Employee and that a breach of these terms can result in loss and harm to the Company or any of the other Releasees that may not be adequately compensated for in an award of monetary damages. Accordingly, the Employee agrees that if there is any breach of Article 4.3, then in addition to all other remedies available at law or in equity, any of the Releasees shall be entitled as a matter of right to apply to a court of competent jurisdiction for relief by way of restraining order, injunction, decree or otherwise, as may be appropriate to ensure compliance with those terms and the Employee will not oppose any such application.

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4.5 **The Employee confirms that she has obtained independent legal advice before signing this Agreement and has read this Agreement and fully understands its terms. The Employee also acknowledges that she has not been influenced to any extent whatsoever in signing this Agreement by any representations or statements made by the Releasees other than as set out in this Agreement and that she is signing this Agreement freely, voluntarily and without duress.**

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

WITNESS:)
)
)
)

Witness Signature **Jill Smith**

_____
_____
Witness Address

ABC Company by its authorized signatory:
Authorized Signatory

RELEASE, CONFIDENTIALITY AND SETTLEMENT AGREEMENT

In exchange for the payment by **ABC Company** (the "**Company**") to me, **Jill Smith**, of the gross amount of $XX,XXX (less statutory deductions), I have agreed to sign and be bound by the terms of this Release, Confidentiality and Settlement Agreement.

I understand that by signing this Agreement I am giving up my right to sue the Company or bring any claim against the Company for any reason up to the date of signing this Agreement. By claims, I understand this includes any wrongful dismissal claim, any complaint under the British Columbia *Employment Standards Act*, the *Human Rights Code* or any claim I might have against the Company for the loss of my benefits. The term benefits include my Long Term Disability and Short-Term Disability coverage, Life Insurance, profit sharing, performance bonus and any other benefit of employment.

By signing this Agreement not to sue or make any claim against the Company, I also mean any employee, officer or director or owner of the Company or any affiliated company of the Company. I further agree that the amount being paid to me by the Company under this settlement includes any amounts to which I may be entitled under the terms of my employment with the Company, and under the British Columbia *Employment Standards Act* and that I will not file with the Employment Standards Branch any claim against

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the Company relating to my termination, overtime, vacation pay or any other remedy to which I may be entitled.

I also understand that it is a term of this settlement that I will not disparage the Company, or make derogatory comments or statements about the Company or any of its employees or representatives now or in the future.

I understand that this settlement is a compromise of a disputed claim and is not an admission of liability on the part of the Company.

I understand that this Agreement is to be a strictly confidential agreement between the Company and me, and I agree not to tell anyone about this settlement, its terms or the amount paid to me by the Company other than my financial or legal advisors. I also agree to maintain in strict confidence all information received by me during my employment with the Company which is not public knowledge.

I also agree that the significance and effect of this Agreement have been explained to me and that I have been given the opportunity to receive independent advice on whether to agree to this settlement. **I understand that by signing this Agreement I am signing away my legal right to sue or make a claim against the Company.**

Dated _____ 20__

_____

Signature of _____ [Print name]

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[1] A "month" is defined in the *Interpretation Act,* R.S.B.C. 1996, c. 238 as a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day. In computing the six month period, the BC Employment Standards Tribunal has applied s. 25(5) of the *Interpretation Act*, which states that: "In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included": *Schermerhorn*, BC EST D#205/98;

[2] For an excellent summary and analysis of the court and tribunal decisions in this area see: Settlement Dénouement: When is a Human Rights Dispute Really Over? Judith Doulis, CLE Human Rights – 2007 Update;

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[3] See, for example *Thompson v. Providence Health Care*, (2003) BCHRT 58, at para. 38 where the Tribunal states: “There is a strong public policy interest in encouraging parties to resolve their disputes on a voluntary, consensual basis. This public policy would be severely undermined if parties who had entered into a final settlement of their human rights dispute were, absent public policy considerations to the contrary, permitted to come forward and pursue a complaint with the Tribunal.”

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