

# ONTARIO COURT OF APPEAL: EMPLOYMENT STANDARDS ACT, 2000 DOES NOT APPLY TO SHAREHOLDER RIGHTS

Posted on July 30, 2019

**Categories:** [Insights](#), [Publications](#)

Ontario's Court of Appeal has issued an important decision – in *Mikelsteins v. Morrison Hershfield Limited*<sup>[1]</sup> – that draws a clear distinction between employment rights and shareholder rights.

## Background

Mikelsteins was employed by Morrison Hershfield Limited (“MHL”) for more than 30 years, most recently in the position of Director, Business Development. In addition to salary and benefits, Mikelsteins' senior position meant that he was eligible to purchase shares of MHL. Mikelsteins' annual compensation package also included a payment called a “Share Bonus” that was based on the number of shares held by him.

Both Mikelsteins' shares and the Share Bonus were subject to the terms of a shareholders' agreement, including a “Transfer Notice” provision that automatically deemed Mikelsteins to have sold his shares to MHL or the existing shareholders at fair market value effective 30 days following the date of written notice of his dismissal:

*Termination: A Shareholder whose association with [MHL] and its Affiliates ceases by reason of termination by [MHL] of his/her employment with [MHL] and its Affiliates shall, immediately after such termination, be deemed to have given a Transfer Notice covering all the Shares held by him/her on a date which is 30 days from the date he/she is notified of such termination by [MHL].*

After Mikelsteins' employment was terminated by MHL on a without cause basis, he brought a summary judgment motion for damages for wrongful dismissal, including payment for his shares with the value calculated at the end of the reasonable notice period (and not 30 days following the date of written notice of his dismissal) and his lost Share Bonus.

In deciding for Mikelsteins, the motion judge found that the shareholders' agreement did not contain “clear language” to oust his share-related entitlements during the reasonable notice period (which the motion judge determined to be 26 months). For the same reasons, the motion judge also found that Mikelsteins was entitled to damages for the loss of his Share Bonus that would have been payable during the reasonable notice period.

However, MHL appealed the motion judge's decision to the Court of Appeal.

### **Court of Appeal**

The Court of Appeal held that the motion judge erroneously applied the common law regarding compensation for breach of an employment contract to Mikelsteins' share-related entitlements. In particular, the cases that the motion judge had relied upon in order to decide for Mikelsteins – including the oft-cited [Paquette v. TeraGo Networks Inc.\[2\]](#) – had no application in this case. Rather, Mikelsteins' share-related entitlements were governed by the shareholders' agreement, which clearly stated that the process of repurchasing Mikelsteins' shares was triggered the moment that he was told of his dismissal (rather than at the end of any notice period).

The Court of Appeal also disagreed with Mikelsteins' alternative argument that the terms of the shareholders' agreement were void and unenforceable because they violated the *Employment Standards Act, 2000* (the legislation that prescribes minimum standards of employment in Ontario, hereinafter the "ESA"). According to this argument, the 30-day rule in the "Transfer Notice" provision was an unlawful attempt to contract out of section 60(1)(a) of the ESA, which says that an employer "shall not reduce the employee's wage rate or alter any other term or condition of employment" during the statutory notice period.

However, the Court of Appeal held that the ESA had no application to Mikelsteins' shares or his Share Bonus. In the Court of Appeal's words: "Mikelsteins' entitlement respecting the shares that he owned is determined in accordance with the terms of the shareholders' agreement and only that agreement ... Mikelsteins received that to which he was contractually entitled when [MHL] paid him for his shares".

In the result, MHL's appeal was allowed and the part of Mikelsteins' claim dealing with his shares and the Share Bonus was dismissed.

### **Lessons for Employers**

This case stands for the principal that the rights of a shareholder once their employment is terminated differ from the rights of an employee under his or her employment contract (such as the employee's right to receive damages for lost benefits or pension payments during the reasonable notice period). Further, a shareholder's rights with respect to shares acquired under a shareholders' agreement (or other similar agreement) are governed by the terms of that agreement, and not by the ESA.

That said, the terms of the shareholders' agreement still need to be clear and unequivocal, particularly as such terms relate to the termination of a shareholder's rights. For more information about the Court of Appeal's decision, please contact a member of McMillan's Employment & Labour Relations group.

by Paul Boshyk

[1] 2019 ONCA 515[ps2id id='1' target='']

[2] 2016 ONCA 618[ps2id id='2' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2019