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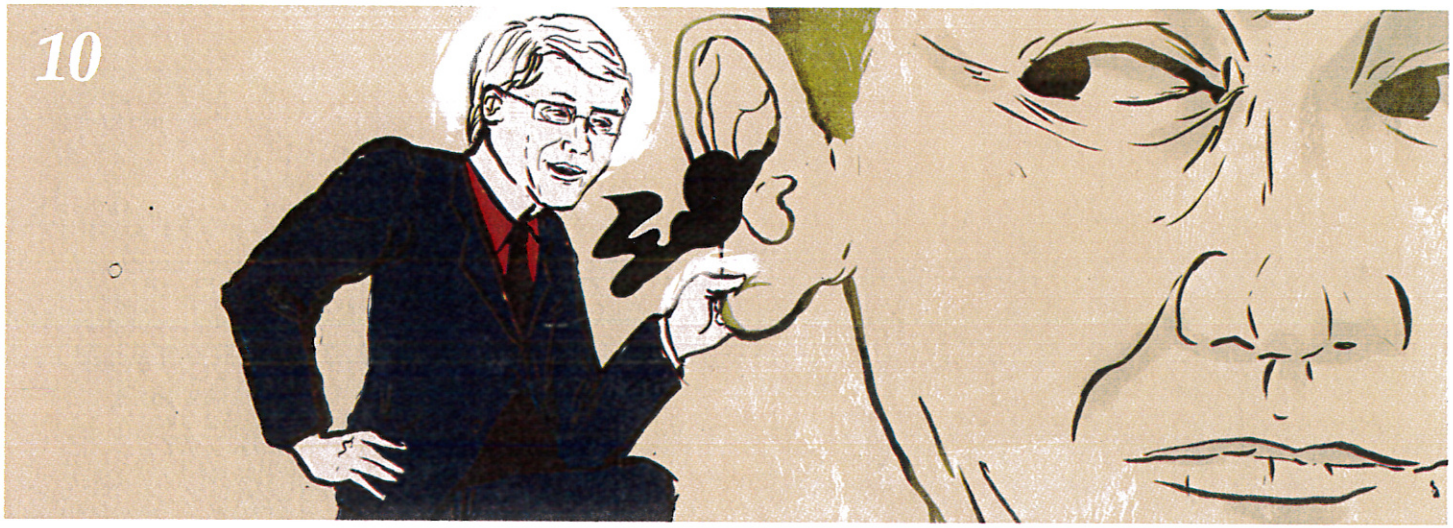


Rodney King and the subtle legacy of

Machtinger v. HOJ Industries Ltd.

Ryan Wozniak

At 3:15 p.m. on April 29, 1992, a clerk of the United States District Court for the Central District of California announced that a predominantly white jury of eight men and four women had acquitted Los Angeles Police Department sergeant Stacey Koon and police officers Laurence Powell, Theodore Briseno and Timothy Wind of charges that they committed assault and used excessive force during their videotaped beating of Rodney King one year earlier following a high-speed alcohol-induced car chase through the San Fernando Valley. Within hours of the verdict, angry mobs began to brew in the streets of Los Angeles. By the following afternoon, rioters had transformed the city into a fiery mash of violence and destruction, adding yet another stain on America's already severely blemished racial past.

Less than 24 hours later and more than 4,000 kilometres away, in Ottawa, the Supreme Court of Canada quietly released its decision in *Machtinger v. HOJ Industries Ltd.*,[1] in which it ruled that the defendant, a used car dealer, had, by way of contracts it drafted several years earlier, illegally capped the termination pay of two former employees, Marek Machtinger and Gilles Lefebvre. Hence, while Mr. Machtinger and Mr. Lefebvre were celebrating the vindication of their common-law contractual rights, Rodney King was searching in vain for their civil cousin.

Accidental accomplices

The timing of these two events could not have been more coincidental – on the one hand, an ethnological conflagration that would come to define a decade, at least for the citizens of Los Angeles (as evidenced by the fallout from the O.J. Simpson murder trial three years later); and, on the other, a significant but relatively unsurprising ruling by Canada's highest court concerning the interplay between an employee's statutory and common-law rights at the time of dismissal. Today, they remain united only in the extent to which their respective legacies continue to affect the modern-day legal landscape.

A month after Rodney King was pummelled and tasered on a Los Angeles sidewalk, then-mayor Tom Bradley formed the Christopher Commission, as it was informally known, to examine the "structure and operation" of the Los Angeles Police Department. The Commission released its report in July 1991 and concluded, among other things, that the LAPD was guilty of racial bias, thereby bringing to the surface a long-festering tension between the citizens of Los Angeles and their police force and, in turn, highlighting an urgent need to overhaul the LAPD. In *Machtinger*, the Supreme Court of Canada convened in order to remedy another power imbalance, that between employer and employee, and, as with the Christopher Commission, its decision was a watershed moment, albeit a markedly more subtle one. The following

paragraphs will expound on the legacy of the *Machtinger* case and its overarching message, beginning with a brief discussion of the decision itself.

Machtinger v. HOJ Industries Ltd.

Marek Machtinger ("Machtinger") and Gilles Lefebvre ("Lefebvre") had been continuously employed by HOJ Industries Ltd. ("HOJ") from 1978 until June 1985, when they were dismissed without cause. Machtinger was a car salesman for HOJ at the time of his dismissal and Lefebvre held the position of sales manager. Each man earned more than $70,000 annually. At issue in the case were their contracts of employment, which purported to limit their payouts on dismissal to an amount that was less than what they were entitled to receive both at common law and pursuant to the provisions of the Ontario *Employment Standards Act*, RSO 1980, c 137 ("*ESA 1980*," or the "*Act*"). More specifically, the terms of Machtinger's contract employment stated that he was entitled to "0 weeks'" notice of dismissal, while Lefebvre's contract stipulated

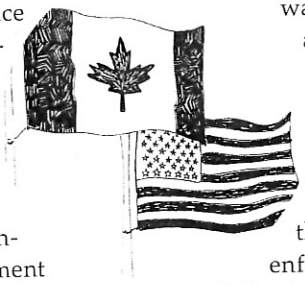
a notice period of two weeks.

According to the *ESA 1980*, both Machtinger and Lefebvre were entitled to no less than four weeks' notice of termination. At trial, Justice Hollingworth (as he then was) found that because the termination provisions contained in their contracts of employment were in violation of the *ESA 1980*, Machtinger and Lefebvre were entitled to reasonable notice at common law. However, the Court of Appeal for Ontario reversed Justice Hollingworth's ruling, finding instead that their recovery was limited to the benefits conferred on them by the *Act*. The case was then appealed to the Supreme Court of Canada.

Justice Iacobucci (as he then was), who wrote on behalf of a majority of the court, began his analysis by taking note of the fact that, in Canada, it has been established since at least 1936 that employment contracts of an indefinite duration require an employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause. The common-law requirement to provide reasonable notice of dismissal is a presumption that is rebuttable *only* if the applicable contract of employment clearly specifies some other period of notice that is also compliant with provincial employment standards.

The court was thus left with the following question: "If an employment contract stipulates a period of notice less than that required by the [*Act*], is an employee who is dismissed without cause entitled to reasonable notice of termination, or to the minimum period of notice required by the Act?" Iacobucci J.'s answer was simple: The employee is entitled to common-law notice. More specifically, if the contractual term governing notice is null and void on the basis that it contravenes applicable employment standards legislation, then it is null and void "for all purposes" and cannot be used as evidence of the parties' intentions at the time the contract was formed. If the "intention of the parties is to make an unlawful contract, no lawful contractual term can be derived from their intention." Iacobucci J. then went on to identify the following policy justifications for the court's decision:

> [I]f an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted. Employers will have an incentive to comply with the Act to avoid the potentially longer notice periods required by the common law, and in consequence more employees are likely to receive the benefit of the minimum notice requirements. Such an approach is also more consistent with the legislative intention expressed by s. 6 of the Act [now section 8 of the *Employment Standards Act, 2000* (the "*ESA*")], which expressly preserves the civil remedies otherwise available to an employee against his or her employer.



The aftermath of *Machtinger* and its irreverent conception

The doctrine of sanctity of contracts is entrenched in Anglo-American law as a manifestation of freedom of trade and the lifeblood of commercial efficiency. Courts are therefore loath to interfere with agreements freely negotiated between commercially sophisticated parties even when such bargains prove to be improvident for any or all of the signatories. However, the principle of freedom of contract has garnered much less deference in the employment law realm owing to the immutable power imbalance inherent in the typical employee–employer relationship. This unequal balance of power led the majority of the Supreme Court of Canada in *Slaight Communications Inc. v. Davidson*[2] to conclude that employees are a "vulnerable group in society." In that vein, the court's ruling in *Machtinger* three years later was nothing if it not inevitable and, to a large extent, obvious.

Nevertheless, the release of *Machtinger* was a significant development in Canadian employment law – no longer can employers attempt to skirt the consequences of legally unenforceable severance clauses by falling back on the *ESA*. On a broader and arguably more significant level, the Supreme Court of Canada put employers on notice that, going forward, their employees will not be required to swallow ambiguously worded contracts that are forced on them at the time of hiring, and most certainly not ones that are in violation of statutorily prescribed minimum employment standards.

All of that being said, the true legacy of *Machtinger* would appear to be one of noncompliance. Although the decision was released more than 22 years ago, disputes over the enforceability of restrictive termination clauses in employment contracts continue to reach symphonic levels. This despite the fact that both the provisions of the *ESA* and the common-law principles which govern without-cause dismissals in Canada are abundantly clear and have been made all the more so by an ever-expanding body of jurisprudence that cogently, if not exhaustively, explains their meaning and purpose. It is easy to understand, therefore, why judges in this province have become increasingly intolerant, even disdainful, of well-heeled employers who come to the dais requesting that they weave silken threads of meaning through poorly drafted termination clauses and, in effect, sew a security blanket to shield them from the consequences of their own carelessness or, worse, ignorance. To find evidence of this trend, one need look no further than the recent decision of Justice Kane in *Paquette v. Quadraspec Inc.*,[3] wherein His Honour states caustically that:

> The provisions [of the *ESA*] are not difficult to grasp. It is unreasonable that discharged employees should still have to litigate their meaning.

In other words, courts in Ontario are now disinclined to provide interpretive support to employers who, despite their significant financial and legal resources, nevertheless prove incapable of drafting clear and unambiguous termination clauses – or worse, those who draft termination clauses that violate well-established provincial employments standards. According to Justice Low (as she then was) in *Wright v. The Young and Rubicam Group of Companies*:[4]

> There is, in my view, no particular difficulty in fashioning a termination clause that does not violate either the minimum standards imposed by the [*ESA*] or the prohibition against waiving statutory minimum requirements and there is no compelling reason to uphold a termination clause which the draftsman may reasonably be understood to have known was not enforceable either at all or under certain circumstances.

In the late 1970s, American epidemiologist Seymour Grufferman is said to have coined the term "Texas Sharpshooter effect" – a man shoots at the side of a barn and then proceeds to draw targets around the holes, thereby making every shot into a bull's-eye. The term is a reference to the tendency in human cognition to interpret patterns

where none actually exist. Dr. Grufferman's expression is especially apt in the context of wrongful dismissal law – i.e., our courts will flatly refuse to draw large circles of meaning around any missed shots fired at employees by employers armed with faulty employment contracts.

Errors of the past are not the wisdom of the future

While Rodney King was speeding unknowingly toward imminent doom, Justice Iacobucci and his law clerks were busy drafting the *Machtinger* decision and, like Mr. King, probably did not anticipate the representative significance of their actions. As many of us know, the labour rights movement has been a very gradual one. However, what most of us likely don't stop to consider is that *Machtinger*, and later the court's decision in *Wallace v. United Grain Growers Ltd.* (establishing a duty on the part of employers to act in good faith at the time of dismissal),[5] which together comprise the altar of Canadian employment law, are only two centuries removed from the onset of the Industrial Revolution in Great Britain and the explosion in urban poverty that came with it as hoards of displaced vassals migrated to cities in search of work. The resulting oversupply of labourers drove down wages, and working conditions were, by most accounts, harsh and dangerous. The revolution arrived in North America not long afterward. When viewed against the backdrop of this broader historical mosaic, the significance of decisions such as *Machtinger* becomes self-evident and serves to underscore the degree to which our social and legal system has progressed from the conditions encountered by our forebears.

But if history has taught us anything, it is that social progress is forever chasing an unattainable panacea. No sooner do we identify some new and supposedly optimal social, legal or economic order, than its application is frustrated by the woolly and unavoidable irrationality of human decision-making. Thus, whether it's employers continuing to fumble the law of wrongful dismissal or the higher authorities in Florida, Missouri and Maryland neglecting to pay careful heed to the race-tainted maelstrom that followed the unjustified curbside assault of Rodney King in 1991, we seem destined to continue shipwrecking ourselves on the rocky shores of injustice. And while economists have been trying in vain for centuries to quantify and predict how people think and act, from Adam Smith's "invisible hand" to Thorstein Veblen's theory of "conspicuous consumption," the truth appears to be that we are, and will forever be, unpredictably and immeasurably irrational. I suppose that is good news for lawyers since most of us would be out of business if all individuals were preprogrammed to learn from the errors of our past. However, as Messrs. Machtinger, Lefebvre and King (if he were alive today) would no doubt argue, we really should pay more attention to them.

Notes

1. [1992] 1 SCR 986.
2. [1989] 1 SCR 1038.
3. 2014 ONCS 2431.
4. 2011 ONSC 4720.
5. [1997] 3 SCR 701