

Citation: Winkler v. Lower Mainland
Publishing Ltd.
2002 BCSC 1204

Date: 20020813
Docket: 49820
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PAUL WINKLER

PLAINTIFF

AND:

LOWER MAINLAND PUBLISHING LTD.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Counsel for the Plaintiff

A. C. Kempf and
R. S. MacLeod

Counsel for the Defendant

M. K. Woodall

Date and Place of Trial:

21-25 & 28-30 January 2002
and
Written Submissions: 11,
20 & 25 February 2002
Kelowna, B.C.

INTRODUCTION

[1] The plaintiff was employed by the defendant as general manager of a group of its community newspapers under a contract of employment that provided for 12 months notice of termination. The issues to be decided are: 1. whether the plaintiff was constructively dismissed; 2. whether the defendant breached the employment contract by failing to give 12 months notice; and 3. whether, as the defendant contends, the plaintiff resigned.

THE EVIDENCE

[2] In addition to the daily newspapers, there are community newspapers that serve smaller regions and circulate from once to three times a week. At the lower end of the newspaper product hierarchy are "shoppers" that consist mainly of advertising and have little or no editorial content. The dailies often compete with the community newspapers for readership and advertising dollars.

[3] The plaintiff Paul Winkler is 48 years old. He has worked in the newspaper industry since the age of 18. For 18 years he managed groups of community newspapers in southern Ontario, and battled the dailies for market share. Mr. Winkler thrived on competing with the dailies, but along with

the newspaper mergers and acquisitions of the 80s and 90s, the battlegrounds changed. In 1990 his employer was acquired by Southam and what once was an "enemy" paper became a "sister" paper. Mr. Winkler did not enjoy the lessening of competition and in the spring of 1996, he negotiated a severance package and an amicable parting of the ways with John Craig, an executive vice-president with Southam. Through Mr. Craig, Mr. Winkler was introduced to the executives of the defendant, Lower Mainland Publishing Ltd. ("LMPL"), that was expanding beyond its group of community newspapers in the Lower Mainland to the Okanagan.

[4] LMPL was formed in 1990 by a merger of Madison Venture Corp. and Southam. Although Southam owned 62 per cent of LMPL, as a result of Competition Bureau concerns, the company was controlled and managed by Madison.

[5] In June 1996 Mr. Winkler flew to Vancouver to meet a number of LMPL's executives, including Rick O'Connor, its vice-president. They told Mr. Winkler about LMPL's new battleground in the Okanagan, and its acquisition of the *Kelowna Capital News* (the "Capital"), a major Okanagan community newspaper, and some of the smaller Okanagan community newspapers, including Enderby, Salmon Arm, Vernon, Lumby, and Merritt. The other competitors in the Okanagan

battleground were the Thompson newspaper empire, which owned the dailies in Kelowna and Penticton, and David Black whose company Black Press owned several community newspapers in the north Okanagan. The *Capital's* major competitor was the *Kelowna Daily Courier* (the "Daily").

[6] The LMPL executives outlined to Mr. Winkler their vision of what they saw happening in the Okanagan, including the plan to acquire the *Penticton Western News* (the "*Penticton Western*"), another community newspaper, and integrate all of the newspapers with a common printing and publishing operation. The eventual plan was to have a general manager for its Okanagan group of newspapers.

[7] In August 1996 Mr. O'Connor told Mr. Winkler that LMPL was moving ahead with the general manager position and invited him to formally apply. He did, and he was successful.

[8] The parties entered into a four page written contract of employment dated November 19, 1996, which provided amongst other matters, that LMPL would employ Mr. Winkler "as General Manager of the Okanagan group of Lower Mainland Publishing Ltd. based in Kelowna, B.C.", a base salary of \$103,000, and an annual bonus of up to 30 per cent of the base salary, or \$30,900. The agreement also provided that LMPL could

terminate Mr. Winkler's employment at any time on 12 months notice or pay in lieu of notice.

[9] Mr. Winkler sold his home in Kitchener, Ontario and moved his wife and four children to Kelowna where he purchased a new home. He started work for LMPL on October 13, 1996, and within about three weeks, learned that the *Capital's* publisher, Jim Clark, was maintaining that he had been constructively dismissed because he had not been promoted to the position for which Mr. Winkler had been hired. In March 1997, Mr. Clark resigned and Mr. Winkler was asked to temporarily assume his position until a new publisher was hired.

[10] In early fall 1997, Orest Smysniuk, LMPL's Chief Financial Officer, told Mr. Winkler to remove from the budget, the funds that were being allocated for hiring a new publisher. Around the same time, Mr. Winkler learned that as a result of recent ownership changes in its parent company, the *Penticton Western* was not for sale, at least not in the foreseeable future. The newspaper was strategically important to LMPL, and there is no doubt that Mr. Winkler's position would not have been created if LMPL did not think at the time that it could acquire the *Penticton Western*.

[11] There is also no doubt that Mr. Winkler had excellent leadership skills, and he worked hard and aggressively. With no prior experience as a newspaper publisher, Mr. Winkler rapidly improved the *Capital's* readership and profitability; its market share increased from 32 per cent to more than 51 per cent, and he helped the paper win top honours in Canada. The *Capital's* gains were at the expense of the *Daily's*: Mr. Winkler was winning the war.

[12] Despite his success, Mr. Winkler felt that he was hired to be the general manager of a group of community newspapers, and not the publisher of one of the newspapers. In a March 23, 1998 memorandum to Mr. O'Connor, Mr. Winkler outlined his concerns about not being able to do what he was hired to do:

To: Rick O'Conner [sic]
From: Paul Winkler
Re: My roles and responsibilities
Date: March 23, 1998

Rick, the purpose of this memo is to confirm what has occurred in my position along with my roles and responsibilities. ...

Let me be clear, I am not unhappy or disgruntled. On the contrary, I have quite enjoyed most aspects of what I am doing professionally, especially the role of publisher of the *Capital News* and overseer of the related printing and distribution businesses. That said, this position is not the one I was appointed to perform.

When I was hired as General Manager for the Okanagan Group in October 1996, it was my understanding both

verbally and contractually that I was moving here to be responsible for these operations 'and entitled to exercise all such authority as is customarily held and exercised by a general manager of a company carrying on in the business of community newspaper publishing, printing and distributing'. ...

Furthermore, upon accepting this position, I understood several key strategic purchases were likely including the Penticton Western. ...

...

[13] In the summer of 1998, Madison executives, including Mr. O'Connor, started leaving LMPL as Hollinger acquired control of the company. Around the same time, the Thomson Group was divesting itself of its newspapers in the Okanagan, except for the *Daily* and the *Penticton Herald*. In September 1998, David Black announced that his company had purchased the *Daily*.

[14] In October 1998, several Hollinger executives, including David Radler, its President and Chief Operating Officer, were in Kelowna and met with Mr. Winkler. Mr. Radler sent a strong message that Hollinger would lend whatever support it could to compete with Mr. Black and the *Daily*. He mentioned bringing in Sam Sousa of the Chicago Cubs, and Robert Ebert, the movie critic, to lend support for the *Daily*. (Mr. Radler is also the publisher of the Chicago Sun Times.) In Mr. Winkler's presence, Mr. Radler even left a telephone message for the

chair of Sun Media, telling him to add the *Penticton Western* to the list of papers he wanted to acquire.

[15] In November 1998, Hollinger formally took over management of LMPL and David Dodd became its president. Mr. Dodd has worked closely with Mr. Radler for more than 25 years. While Mr. Radler did what Mr. Dodd called "the deal", he, that is, Mr. Dodd, looked after the due diligence and closing the deal. Mr. Dodd was also involved in reorganizing various operations of newspapers, and generally ensuring that they made money.

[16] Mr. Dodd was well aware of the *Capital's* battle with the *Daily* for market share. In a December 10, 1998 memorandum to Mr. Dodd, Mr. Winkler wrote:

...
Re: Strategic Direction for LMPL Okanagan Group
Date: December 10, 1998

Given the many changes that have taken place in recent months in ownership, competitive forces and reporting structures, I thought I should take the time to document my thoughts on LMPL's Okanagan Group. ...

...

Regional Overview/Current Reality

It's clear that LMPL has only one financial asset in the Okanagan Group, the Kelowna Capital News and its appendages. The other three papers are all secondary, start-up products, each, locked in a battle with David Black's more established 'paper of record'. Our mandate has been, and continues to be

aggressive in each of these markets. ... We'd like to knock off David Black's products, ...

... We are there primarily to 'be in the face' of David Black. ...

...

The Challenge

There are essentially two options for Southam in the Interior: Aggressively go after David Black, or, attempt to 'sort things out'. My understanding based on your visit with David Radler is to be aggressive. ...

...

What I need from you

1. Your approval of this plan with the understanding that we are engaging in a stepped-up war with relatively weak operations in Vernon, Salmon Arm and Merritt. Please don't read into this that I am not willing to go into battle, or, that I am not prepared to make personnel changes if necessary. ...

2. ... [*Penticton Western*]... as previously discussed.

...

[17] In early January 1999, Mr. Winkler tried to speak to Mr. Dodd about his personal concerns and the job of general manager, but Mr. Dodd told him not to worry and said bluntly (as is his style): "You either learn how to like the way we operate or you leave. I've worked for David Radler for 26 years, and I've had 20 different jobs."

[18] If Mr. Winkler expected to manage a growing group of community newspapers, the group was shrinking. Instead of turning Vernon into a higher-end paper, Mr. Dodd wanted it turned into a lower-end market spoiler; instead of competing with other newspapers in Salmon Arm, Mr. Dodd suggested selling the Salmon Arm newspaper to a competitor; and, the acquisition of the *Penticton Western* was not on the horizon.

[19] In March 1999 Mr. Winkler heard rumours that David Black had walked away from the *Daily* and the *Penticton Herald*, and the new purchaser was Todd Vogt of Horizon Publications Inc. Mr. Winkler also heard rumours that Mr. Vogt was close to Mr. Radler and Horizon was in some way related to Hollinger or Mr. Radler.

[20] At the first opportunity, Mr. Winkler asked Mr. Dodd if the rumours he heard about Todd Vogt were true. He assured him they were. Mr. Winkler then asked questions relating to common ownership of the two papers and whether it might not cause a problem with the Competition Bureau. Mr. Dodd's terse reply was, "this is beneath their radar".

[21] That comment concerned Mr. Winkler. Having worked for a Southam newspaper in Ontario, he was aware that the Competition Bureau was concerned over the Madison and Southam merger because LMPL owned not only Greater Vancouver's two

major daily newspapers, but also the major community newspapers. Southam's battle with the Competition Bureau, according to Mr. Dodd, went to the Supreme Court of Canada, took eight years and \$8 million. Mr. Winkler was also a little nervous because he thought Hollinger might try to change the competitive landscape. He knew that Hollinger preferred the dailies over the communities, and he was afraid that Hollinger might want to turn the *Capital* into a shopper. He was also concerned that the job for which he was hired might never come to fruition. He started making notes.

[22] In May 1999, Horizon acquired the *Daily*, the *Penticton Herald*, and roughly 40 other Hollinger papers in the United States. Mr. Dodd told Mr. Winkler he could expect stiffer competition. Mr. Winkler did not hide the fact that he was concerned with ownership of the *Daily*.

[23] Mr. Dodd repeatedly told Mr. Winkler not to concern himself or anyone else with the ownership of the newspapers, and made it clear that in the case of the dailies verses the communities, he considered the dailies the dominant product. That statement left Mr. Winkler feeling uneasy, and rightly or wrongly, that the *Capital* might be marginalized and reduced to a shopper.

[24] It was common knowledge that the unionized workers at the *Daily* were without a contract. In June 1999, Mr. Dodd told Mr. Winkler that the workers at the *Daily* might go on strike and Mr. Winkler could help the company make a lot of money by printing Mr. Vogt's paper.

[25] To say that Mr. Winkler was taken aback is an understatement. As he said, he prayed for the day when the daily had a strike and could not publish. To Mr. Winkler, a strike at the daily was the greatest competitive advantage a community paper could have. The last time the *Daily* went on strike, it lasted three weeks, and during that time, the *Capital* acquired the Sears' and The Bay's advertising accounts, and solidified its position in the marketplace.

[26] Mr. Winkler responded to Mr. Dodd's suggestion that he print his competitor's paper by stating that if the plan was to marginalize his operations, he wanted a buyout. Mr. Dodd replied by telling Mr. Winkler to "lie low" and enjoy his family and skiing in the Okanagan. He told Mr. Winkler that once he had to lie low for a couple of years.

[27] A few days later, Mr. Dodd told Mr. Winkler that he had heard that he was being critical about Mr. Vogt and Horizon's \$8 million loan from Hollinger. Again, Mr. Winkler told Mr. Dodd that if the plan was to marginalize the *Capital*, and the

job of general manager was not going to develop, he wanted a buyout. The discussion ended with Mr. Dodd saying they would talk later. Mr. Winkler indicated that in the meantime, he would continue with the way things were.

[28] At a meeting in Kelowna on October 8, 1999, Mr. Dodd announced that Mr. Radler was coming to town the following week but that no one should be too concerned. After the meeting Mr. Winkler was driving Mr. Dodd and Mr. Smysniuk to the airport when Mr. Dodd told Mr. Winkler that he should "think outside the box" and look into setting up a printing press in a barn some place. Mr. Winkler took the comment to mean that the *Daily* was going on strike and he was being asked to print the newspaper. He became quite agitated. Mr. Dodd shot back: "I want you to be completely unemotional about what's going on. I can assure you Conrad Black and David Radler are."

[29] Mr. Dodd bristles at the suggestion that he told Mr. Winkler to set up a press in a barn. He says that any suggestion along those lines is "ridiculous" because it takes two years and \$2 million to set up a printing press and it makes no economic sense to set up a printing press just for a strike. He tried to explain that American Publication Company, a Hollinger subsidiary, had consolidated press

facilities in southern Illinois - a large rectangular regional press facility he calls "the barn" - that Hollinger tries to duplicate whenever it makes economic sense.

[30] Mr. Smysniuk testified. He was present at many of the meetings with Mr. Winkler and Mr. Dodd, and said that Mr. Winkler was concerned with what he perceived was common ownership or control of the two newspapers, but Mr. Dodd said that Mr. Vogt was "on a leash", which Mr. Smysniuk took to mean Mr. Radler. Mr. Dodd said that it was a difficult situation, but it was what it was, and they all had to make the best of it.

[31] Mr. Smysniuk recalls the ride to the airport with Mr. Dodd and Mr. Winkler. He said that Mr. Dodd told Mr. Winkler that he should think outside the box and think about setting up a printing press in a barn someplace. Mr. Dodd did not say why, but at the time they were discussing the *Daily*, and the inference was that Mr. Winkler should print the *Daily*.

[32] Against Mr. Dodd's protestations, I find that he told Mr. Winkler to think outside the box and set up a printing press in a barn someplace, inferring that Mr. Winkler should print and distribute the *Daily* in the event the unionized workers at the *Daily* went on strike.

[33] On October 13, 1999 Mr. Winkler picked up the telephone to hear: "Paul, it's David Radler. I'm at the enemy".

[34] A while later, Mr. Radler arrived at the *Capital's* office and met with Mr. Winkler. Mr. Radler told Mr. Winkler that in a labour dispute, Hollinger considered the union to be the enemy, and that if there was a labour disruption at the *Daily*, Mr. Winkler's operation would print the paper. Mr. Winkler thought what he was being asked to do was inappropriate.

[35] Both Mr. Dodd and Mr. Radler testified that it is not unusual to print a competitor's paper. For example, under a contract, Hollinger printed the *Globe & Mail* when it owned the *National Post*. However, Mr. Dodd was unable to give an example of when Hollinger has printed a competitor's paper when its workers were on strike.

[36] Mr. Radler's evidence did however shed light on why Mr. Winkler was told he could help make money by printing and distributing the *Daily*. Mr. Radler and Conrad Black each have a 24 per cent voting interest in Horizon, for a combined voting interest of 48 per cent. Mr. Vogt has a 33 or 35 per cent interest. The remainder of the shares are held by others who are connected to Hollinger, which lent \$8 million to Horizon to assist in financing its acquisition of the *Daily* and other Hollinger newspapers in the United States.

[37] On October 25, 1999, Mr. Dodd telephoned Mr. Winkler, and after telling him that he would receive the maximum annual bonus, told him that they needed to talk about his career because things had not worked out the way he had intended. Mr. Winkler responded by saying that his reasons for coming had evaporated. Mr. Dodd agreed by telling Mr. Winkler that he was competing in an artificial environment.

[38] Mr. Dodd said he was away for a couple of weeks, and would meet Mr. Winkler in mid-November.

[39] On November 2, 1999, Mr. Dodd told Mr. Winkler that he needed to see him immediately. He gave him no explanation, but they arranged to meet in Vancouver on November 4.

[40] At the meeting of November 4, 1999, Mr. Winkler told Mr. Dodd that he needed to know what the company's plans were for the Okanagan. He had heard rumours that Mr. Vogt's company was going to acquire the *Capital*. He needed to know whether the plans were to marginalize the *Capital*, or shut down the *Daily*. Mr. Dodd shot back, "David Radler will never close a daily newspaper." Mr. Winkler said he needed clarity. Mr. Dodd responded "Everybody wants clarity. Spence [another LMPL executive] wants clarity. You want clarity. There is no clarity!"

[41] Mr. Winkler repeated his reasons for taking the job, and what he considered his job to be, at which point, Dodd drew two circles. One circle was the *Daily* and the other circle was the *Capital*. Above the two circles, he drew a third unnamed circle, and said, "Let me get this straight. You'd like to be running both of them", referring to the two newspapers. Mr. Winkler said that if legally, you could have a common owner of both newspapers, he wanted to discuss it." Mr. Dodd said that the subject was not open for discussion.

[42] Frustrated, Mr. Winkler then suggested that perhaps he should take a year away from the market, they would pay him, and he would return after the dust had settled. When he met with no response, Mr. Winkler told Mr. Dodd that he had received legal advice, mentioned "breach of contract" or "constructive dismissal", and that he expected the severance arrangements in his contract to be honoured. Mr. Dodd was shocked.

[43] Mr. Dodd testified that he invited Mr. Winkler to the November 4 meeting to offer him a promotion to the position of general manager or regional executive of LMPL's Lower Mainland operations because the general manager for the Lower Mainland operations had resigned. However, the offer was put on hold because he was shocked by the mention of a contract and

shocked that Mr. Winkler had sought legal advice. Instead of offering Mr. Winkler a promotion, Mr. Dodd told him to send him a copy of the contract, and ended the meeting by saying, "Paul, it's such a shame. You're just too pure."

[44] Mr. Winkler left the meeting feeling that the company wanted him out of the marketplace and that his job would end soon. Mr. Winkler's evidence on this point is corroborated by Mr. Smysniuk with whom Mr. Winkler had dinner on November 4. Mr. Winkler told Mr. Smysniuk about his meeting earlier that day with Mr. Dodd. He also told Mr. Smysniuk that he did not think his employment with the company was going to exist for very long. He thought it was coming to an end. He said nothing however about resigning. He asked Mr. Smysniuk whether Hollinger had honoured severance arrangements in the past, and mentioned that Mr. Dodd had asked him to send him a copy of his employment contract. Mr. Smysniuk had a copy of the contract and said that since he said he worked in the same office as Mr. Dodd, he would send a copy to him, which he did, a day or so later.

[45] Mr. Winkler heard nothing from Mr. Dodd for almost 2 weeks. He wanted to be satisfied that LMPL would pay him the 12 months severance as well as his moving expenses to return

to Ontario. Under the terms of his employment contract, the company paid his moving expenses to Kelowna.

[46] On the morning of November 17, 1999, Mr. Winkler faxed to Mr. Dodd the following strongly worded letter that was largely drafted by his lawyer:

November 17, 1999

...

Mr. David Dodd
President, Lower Mainland Publishing

Dear David:

As we have discussed David, my purposes for having moved to Kelowna has failed to materialize for a variety of reasons well beyond my control. As I have repeated to you, I am not interested in continuing to be the temporary publisher of the Capital News, or assuming any other role, without the assurance that I will be assigned the general manager's position and original mandate that I was promised within a specified period of time in the near future. You have now confirmed that this will not happen.

With that in mind, I would like to commence severance arrangements with you. I have contacted the Vancouver legal firm of Harris & Co. to give me advice on this matter. Their review of my circumstances confirms that I have a clear case for constructive dismissal. I have also been advised that I have a case of negligent misrepresentation against the Company based on the representations that were made to me with respect to my position and which never materialized.

Pursuant to my employment contract, I am entitled to 12 months pay in lieu of notice. In addition, under the circumstances, I am advised that I am entitled to further compensation for damages that I have

incurred as a result of my move from Kitchener to Kelowna. I therefore propose to settle my claim against Lower Mainland Publishing on the following terms:

1. I will continue in my position until January 3, 2000. As I have 14 days of holidays remaining, I will stop reporting to work on December 10, 1999, although I will continue to be paid until January 3, 2000.

2. I will receive in the normal course of events, the bonus I am owed for the period of September 1, 1999 to December 31, 1999 in the amount of \$10,611.

3. By January 15, 2000 you will make a lump sum payment to me representing 12 months of my current salary plus my bonus for the 12 month period. I calculate the total to be \$143,943.

4. You will continue all of my current benefits until December 31, 2000. If you are unable to do so pursuant to the terms of the individual plans, you will compensate me for the loss of the benefit(s) for a 12 month period.

5. You will pay me for my costs associated with selling my home in Kelowna and moving expenses as follows:

a. Real Estate fees:	\$18,000
b. Moving expenses:	\$21,700
c. Property purchase tax on current home:	\$ 3,600
d. Legal fees on purchase and sale of current home:	\$ 1,500
Total:	\$44,800

6. You will compensate me my anticipated legal fees associated with this matter in the amount of \$1,500.

I would expect the Company would comply with any reasonable requests concerning the payment of the above in the most efficient manner permissible by law.

I am deeply saddened that events have turned out as they have, but I must remain true to my beliefs and

principles. I must also keep the well-being of my family in mind.

David, I understand your frustration with my need for clarity, reasonable control and independence over what I am responsible for. I also believe you do have some understanding of where I am coming from.

I look forward to hearing from you by November 26. Please call me if you wish to discuss things.

Yours truly,

"Paul Winkler"
Paul Winkler

[47] Mr. Winkler went to work as usual on November 17, and the following day. On November 18, he was listening to the radio when he heard the news announcement that he had resigned from his employment. After calling the radio station to tell them that he was still employed at the *Capital*, he telephoned Mr. Dodd and left a message. They spoke that evening and agreed to meet at a restaurant the next evening. At the restaurant on November 19, 1999, Mr. Dodd handed to Mr. Winkler the following letter accepting his resignation:

November 19, 1999

...

Dear Paul,

I write in reply to your letter of November 17, 1999, in which you advise that you have sought legal advice and wish to commence severance arrangements with your employer.

I do not agree that you have been constructively dismissed. I have made no changes to the terms and conditions of your employment. You state in your letter that "I am not interested in continuing to be the temporary publisher of the Capital News, or assuming any other role, without the assurance that I will be assigned the general manager's position and original mandate promised within a specified period of time in the near future." Further, you allege that I "confirmed" that the above would not happen. I have no knowledge of your assertion that you are the "temporary publisher" and I at no time confirmed that any of the above would, or would not, happen.

However, as you advise that you are severing your employment, I accept your resignation.

"David Dodd"
David Dodd

[48] On November 20, 1999, Mr. Dodd issued an announcement that Mr. Winkler had severed his employment with LMPL.

[49] I will now comment on my assessment of the credibility of the witnesses.

[50] Mr. Winkler is, as Mr. O'Connor testified, extremely passionate about his work and extremely competitive. He saw the *Daily* as the *Capital's* main competitor. I find Mr. Winkler highly ethical, and acutely aware of what he thought he could do, or not do, within the confines of the law. He asked many questions and received few satisfactory answers; at least, none from Mr. Dodd.

[51] Mr. Dodd's communication style is radically different from Mr. Winkler's. Mr. Dodd said that Mr. Winkler was quite emotional about his job. Mr. Dodd describes himself as "unemotional about business matters". It is an apt description. At times in giving evidence, he was brusque and overbearing. To his credit, Mr. Dodd is an extremely capable lieutenant who asks few questions, and carries out the orders of his superior.

[52] At trial, Mr. Dodd denies telling Mr. Winkler ownership of the *Daily* was beneath the radar of the Competition Bureau, while on examination for discovery he admits that he possibly made the comment. He also admits that he told Mr. Winkler when he was asking questions about ownership and control of the *Daily* that he should "stick to his knitting". He denies telling Mr. Winkler that he was working in an "artificial environment" although I find that he did.

[53] On cross-examination, Mr. Dodd was extremely uncomfortable and skirted around questions he did not want to answer. Often, he insisted on writing down word for word, fairly simple questions, before he would answer, and when he finally answered, his answer was not responsive. At times I had the distinct impression he was reconstructing the

evidence, or reluctant to answer the question because the answer would not be favourable for him or LMPL.

[54] I find that Mr. Winkler had a much better recollection of the events and the sequence of events than did Mr. Dodd. That may be a result of Mr. Dodd having to attend to all of LMPL's operations, not just the Okanagan, and the fact that Mr. Winkler made notes of the events as they occurred. However, I have no hesitation in finding that where there is a conflict between the evidence of Mr. Winkler and Mr. Dodd, I prefer and accept the evidence of Mr. Winkler.

[55] At trial, counsel for LMPL objected to the admissibility of Mr. Winkler's contemporaneous notes. In view of my findings on credibility, I do not find it necessary to determine the admissibility of the notes.

WAS THERE A CONSTRUCTIVE DISMISSAL?

[56] The plaintiff, by his amended statement of claim, sets out the following matters alleged to amount to a constructive dismissal:

19.A In the alternative, the Plaintiff says that he was constructively dismissed by the Defendant as a result of the matters referred to in paragraphs 12 and 13 above and as a result of the following matters:

- (a) When the Plaintiff took employment with the Defendant it was apparent that significant inroads could be made throughout the entire Okanagan marketplace and in individual communities especially Kelowna, the region's hub. The Kelowna Daily Courier and its sister daily newspaper, the Penticton Herald, had a history of labour problems and financial losses. It was widely thought that the Thomson Group, the owner of these papers was not prepared to support them much longer - it had recently closed it's [sic] daily newspaper in Vernon. The Defendant and Plaintiff agreed that the Plaintiff would have the full support of the Defendant in increasing the sales and profitability of the Okanagan group;
- (b) The Defendant became wholly owned and controlled by the Hollinger Group of Companies ("Hollinger") in 1998. Prior to 1998 Hollinger had a 60% ownership interest in the Defendant although it did not directly control its operations;
- I In May of 1999 Horizon Operations Ltd. ("Horizon") purchased the Kelowna Daily Courier and Penticton Herald from Thomson. Horizon's president, Tod [sic] Vogt, a former Hollinger executive was and continues to be closely associated with David Radler. Mr. Radler is the President of Hollinger. Hollinger provided financing for Horizon. Both Mr. Radler and Conrad Black, Hollinger's chairman, own shares in Horizon. The Plaintiff was advised by David Dodd, his supervisor at the Defendant, that he was a long-time associate of Mr. Radler and that Mr. Vogt took direction from Mr. Radler in the operation of Horizon;
- (d) Upon the acquisition of the Thomson newspapers by Horizon, the Defendant changed its strategy in the Okanagan without seeking any input or consent from the Plaintiff. The new strategy was opposite to its former strategy to compete head-on for the business of the Kelowna Daily Courier. Instead the new strategy was to support the newspapers owned by Horizon in such

a manner so as to avoid the attention and scrutiny of the Federal Competition Bureau. The effects of most strategy changes were to benefit Horizon and hurt the Defendant's operations. Examples of such changes in strategy are as follows:

- (i) Todd Vogt, with the knowledge or consent of the Defendant advised those of the Defendant's employees he was recruiting that the Okanagan Group newspapers would be restricted from competing with Horizon's newspapers in the future and therefore their careers could be in jeopardy unless they moved over to Horizon. He used Mr. Radler's name in these conversations. Mr. Vogt also made statements concerning the planned acquisition of the Defendant's properties by Horizon which would transition them from quality newspapers with editorial content to predominantly advertising publications commonly referred to as "shoppers";
- (ii) Shortly after Horizon purchased the Thomson papers as aforesaid, Hollinger supported Horizon's start up of a new daily newspaper in Vernon. This gave Horizon a newspaper in all three major Okanagan cities which is something that the Defendant had promised the Plaintiff it would endeavour to accomplish by the acquisition of the Penticton Western. Horizon's ownership of newspapers in these cities was a major competitive advantage;
- (iii) Early in October of 1999, Mr. Dodd instructed the Plaintiff to look into setting up a press operation in an outlying area of Kelowna to assist Horizon in the event of a strike or lockout of Horizon's unionized employees. A week later Mr. Radler told the Plaintiff to be prepared to assist Horizon in the event of a labour disruption including printing Horizon papers at the Defendant's

facilities. Printing a competitor's paper is unheard of in the newspaper industry. Having a unionized daily newspaper unable to publish is a significant advantage to a community newspaper publisher in its battle to win the market;

(iv) On a visit by senior Hollinger executives to Kelowna in the summer [*sic*] of 1999, they spend more time with Todd Vogt at the Kelowna Daily Courier than they did with the Plaintiff and the staff of the Kelowna Capital News. One of the executives, Mr. Radler, toured the Kelowna Capital News facility carrying a copy of the Kelowna Daily Courier;

(v) In or about October 1999, the Hollinger's corporate sales division, Aditus, prepared an advertising sales presentation for Save-On Foods and Overwaitea for all of its newspapers in western Canada. In making this presentation, Hollinger directed Aditus to exclude the Kelowna Capital News and include the Kelowna Daily Courier. This account was an existing and exclusive Kelowna Capital News account and one of the paper's largest. The Plaintiff was not consulted by the Hollinger Group or the Defendant about this substitution of the Kelowna Daily Courier for the Kelowna Capital News in the presentation;

(e) The Plaintiff was embarrassed and threatened by the matters as aforesaid. It had become obvious to the Plaintiff and his staff that Hollinger and the Defendant heavily favoured Horizon and were actively assisting it in gaining competitive advantage over the publications of the Okanagan Group, specifically the Kelowna Capital News and Vernon Sun-Review. When the Plaintiff approached the Defendant concerning the matters referred to above, he was advised by the Defendant that he should "lie low", "keep quiet", "be helpful" and was later told that he should consider employment opportunities elsewhere with Hollinger or with Horizon. He was also advised that the common ownership issues

involving the Kelowna Daily Courier and Kelowna Capital News were not to be discussed. He was told the Competition Bureau would not likely act since the relationship between Hollinger and Horizon was "beneath their radar".

[57] Paragraphs 12 and 13 read:

12. Within several months of the commencement of his employment with the Defendant, the Plaintiff discovered that the position he had accepted was not as described in the Employment Agreement or represented to him by the Defendant during the discussions which preceded the Defendant making an offer of employment to the Plaintiff. In particular, the Plaintiff did not have sufficient general managerial responsibility to keep him busy and he therefore was asked to take on a subordinate role as the publisher of the Kelowna Capital News which was of the community newspapers in the Okanagan Group. From March of 1997 the Plaintiff spent the majority of his time publishing the Kelowna Capital News.

13. The Plaintiff accepted this modification to his position and duties on the understanding that it was temporary, pending the acquisitions in Penticton, Revelstoke, and other expansions of operations.

[58] While perhaps the pleading is more than what is required by Rule 19, I am satisfied that the plaintiff has established all the material facts alleged to amount to a constructive dismissal. I find that the position of general manager of LMPL's Okanagan group would not have been established had the company not anticipated at the time it hired Mr. Winkler that it could acquire the *Penticton Western*. I find that Mr. Winkler was never able to adequately perform the position for

which he was hired. The time spent managing LMPL's newspapers in the Okanagan, other than the *Capital*, took at most, ten per cent of his time. There is no doubt that before the Hollinger take-over of the *Capital* and Horizon's acquisition of the *Daily*, the two newspapers competed for market share. LMPL contends that Mr. Winkler was never told to restrict competition with the *Daily*. Mr. Dodd says that Mr. Winkler may have wanted to put the *Daily* out of business, but that was not the corporate mandate. Whatever the corporate mandate might have been, it was not made known to Mr. Winkler who was fighting a battle with a fictitious or unnamed enemy.

[59] While Mr. Winkler may have been constructively dismissed, or if I am wrong and he was not constructively dismissed, I nevertheless find that he was under an obligation to mitigate his damages and act reasonably by continuing in his position as publisher for the *Capital*, which is what he did, at least, up until November 19, 1999. In ***Campbell v. Merrill Lynch Canada Inc.*** [1992] B.C.J. No. 2294, (1993) 47 C.C.E.L. 248 (B.C.S.C.) Finch J. (as he then was) citing Lambert J.A. in ***Farquhar v. Butler Brothers Supplies Ltd.*** (1988), 23 B.C.L.R. (2d) 89 (B.C.C.A.) stated at paras. 34 and 35:

34 The law concerning mitigation of damages by continuing employment with the same employer is considered at length in *Farquhar* [(1988), 23

B.C.L.R. (2d) 89 (C.A.)]. At pp. 94 and 95 Lambert J.A. for the court said this:

The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One or the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship between the employer and the employee will have become so frayed that a reasonable person would not expect both sides to work together again in harmony. But sometimes it would be unreasonable for the employee to decline to continue in employment through the period equal to reasonable notice, while he looks for other work. That was so in *Lesiuk*, where the constructive dismissal, if any, was caused only by the hard times facing the employer. Indeed, in the *Lesiuk* case, the employer frequently expressed satisfaction with the employee, and the hope that the employment relationship would continue at no reduction in salary, but at different duties forced by the economic climate.

The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other's interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given or where there is a constructive dismissal and an offer of a new working relationship.

35 This is not a case where the plaintiff would have been required to work "in an atmosphere of hostility, embarrassment or humiliation". Nor is it a case where the relationship between the employee and the employer had become "frayed". Up to, and including, the meetings and correspondence in February, 1991 the relationship between the plaintiff and the defendant was one of civility and respect. Nothing had passed between the plaintiff and any of her superiors which would have impaired a continuing harmonious relationship.

DID MR. WINKLER RESIGN FROM HIS EMPLOYMENT?

[60] I accept Mr. Winkler's evidence that he had no intention of resigning. Rather, he thought from his November 4, 1999 meeting that his employment relationship with LMPL was close to an end. As he put it, he thought they wanted him out of the marketplace. His main concern was ensuring that LMPL

lived up to its contractual severance obligation and he wanted to move the "process" along.

[61] I find that Mr. Dodd knew that Mr. Winkler did not intend to resign, and that the letter of November 17, 1999, did not amount to a resignation. Rather, at the meeting of November 4, 1999, Mr. Dodd was, to use his words, "shocked" and his "antennae started to quiver" on hearing that Mr. Winkler had an employment contract and had sought legal advice. I find that Mr. Dodd decided then and there to put the promotion permanently "on hold", because he knew nothing about the contract and he thought Mr. Winkler "was trying to set up a financial claim".

[62] I find it surprising that Mr. Dodd claims he interpreted Mr. Winkler seeking legal advice as meaning that there was some issue that Mr. Winkler chose not to speak to him about, when almost in the same breathe he admits that Mr. Winkler should ask few questions and stick to his knitting.

[63] Mr. Winkler did nothing wrong by seeking legal advice. However, Mr. Dodd thought it was wrong, and that it had irretrievably harmed the employment relationship. Instead of terminating Mr. Winkler's employment and providing 12 months salary, Mr. Dodd took the opportunity of using Mr. Winkler's

letter of November 17 – which Mr. Dodd described as “a lawyer’s letter” – as his resignation. In his notes in preparation for a meeting with the staff at the *Daily*, Mr. Dodd wrote, “Today I have accepted Paul’s resignation. It will probably be a dogfight”. It would be a dogfight because Mr. Dodd knew that Mr. Winkler did not resign.

DID LMPL BREACH THE EMPLOYMENT CONTRACT?

[64] Having found that Mr. Winkler did not resign from his employment, I find that LMPL breached the terms of the employment contract by failing to give him 12 months notice or salary in lieu of notice.

DAMAGES

[65] The parties have agreed to the amounts under the various heads of damage. Mr. Winkler was not paid his bonus for the period September 1, 1999 to the date of his termination on November 19, 1999. There does not appear to be any dispute that had Mr. Winkler continued to work during the 12 month notice period, he would have achieved his maximum bonus. Mr. Winkler is entitled to be put in the position he would have been if LMPL had not breached the employment contract and provided him with the agreed to 12 months notice. He is therefore entitled to the base salary and the bonus he would

have earned if he had continued to work for a further 12 months, the employer's RRSP contributions during that period, and his out-of-pocket costs for replacing the fringe benefits.

[66] Mr. Winkler is entitled to judgment in the following amounts:

Salary and bonus for notice period:	\$146,044.00
Bonus for 1999:	7,477.00
Cost of replacing benefits:	1,669.08
Employer's regular RRSP contribution:	<u>5,305.56</u>
Total:	<u>\$160,495.64</u>

[67] Mr. Winkler claims moving costs of \$14,613.02 in order to move his family back to Ontario, and commission costs of \$6,810.55 for listing and selling their home in Kelowna, and legal fees of \$480 for the sale and transfer of the home. I find that Mr. Winkler is not entitled to recover these amounts as they would have been incurred by him in any event, even if LMPL had not breached the employment contract and provided him with notice.

[68] Mr. Winkler will have judgment for a total of \$160,495.64, costs, and court order interest.

"L.A. Loo, J."
The Honourable Madam Justice L.A. Loo