See paras. 63, 66, 104, 105

** Preliminary Version **

*Case Name:*

# Potter v. New Brunswick Legal Aid Services Commission

**David M. Potter, Appellant;**
**v.**
**New Brunswick Legal Aid Services Commission, a statutory body corporate pursuant to a special act of the Province of New Brunswick, Respondent.**

[2015] S.C.J. No. 10

[2015] A.C.S. no 10

2015 SCC 10

2015 CSC 10

[2015] 1 S.C.R. 500

[2015] 1 R.C.S. 500

249 A.C.W.S. (3d) 802

381 D.L.R. (4th) 1

2015 CarswellNB 87

468 N.R. 227

2015EXP-830

2015EXPT-425

J.E. 2015-438

D.T.E. 2015T-173

EYB 2015-248943

21 C.C.E.L. (4th) 1

33 B.L.R. (5th) 1

432 N.B.R. (2d) 1

18 C.C.P.B. (2d) 1

[2015] CLLC para. 210-017

File No.: 35422.

Supreme Court of Canada

Heard: May 12, 2014;
Judgment: March 6, 2015.

**Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.**

(183 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

*Employment law -- Contract of employment -- Breach -- Fundamental breach -- Remedies -- Appeal by Potter from Court of Appeal judgment which affirmed the dismissal of his action for constructive dismissal allowed -- The Board lacked the authority to suspend Potter indefinitely with pay to facilitate the negotiation of a buyout of his contract -- The trial judge erred in placing the burden on Potter to show that the suspension was unreasonable -- It was reasonable for Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract -- Legal Aid Act, s. 39.*

*Employment law -- Wrongful dismissal -- Civil procedure -- Evidence -- Burden of proof -- Constructive dismissal -- Change to job content or status -- Discipline -- Variation of contract -- Dismissal without cause -- Remedies -- Damages -- Appeal by Potter from Court of Appeal judgment which affirmed the dismissal of his action for constructive dismissal allowed -- The Board lacked the authority to suspend Potter indefinitely with pay to facilitate the negotiation of a buyout of his contract -- The trial judge erred in placing the burden on Potter to show that the suspension*

*was unreasonable -- It was reasonable for Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract -- Trial judge's assessment of wrongful dismissal damages adopted, with exception that pension benefits not to be deducted -- Legal Aid Act, s. 39.*

*Employment law -- Wrongful dismissal damages -- Deductions -- Appeal by Potter from Court of Appeal judgment which affirmed the dismissal of his action for constructive dismissal allowed -- Trial judge's assessment of wrongful dismissal damages adopted, with exception that pension benefits not to be deducted -- Provision under Public Service Super Annuation Act did not displace the private insurance exception and preclude Potter from collecting both his pension benefits and the equivalent of his salary -- Public Service Superannuation Act, s. 16.*

Appeal by Potter from a judgment of the New Brunswick Court of Appeal affirming a decision which dismissed his claim for wrongful dismissal brought against the New Brunswick Legal Aid Services Commission (Commission). Potter was appointed as Executive Director of the Commission for a seven-year contract. In the spring of 2009, Potter and the Board of directors had begun to negotiate a buyout of his contract. If successful, that process would have culminated in Potter's resignation in exchange for an agreed-upon compensation package. In October 2009, after Potter had completed nearly four years of the contract, his physician advised him to take time off for medical reasons. On January 5, 2010, the Board decided - without alerting Potter - that if the buyout negotiations were not resolved before January 11, 2010, it would request that the Lieutenant-Governor in Council revoke Potter's appointment for cause pursuant to s. 39(4) of the Legal Aid Act (Act). On January 11, 2010, unbeknownst to Potter, the Chairperson of the Board sent a letter to the Minister of Justice recommending that Potter be dismissed for cause and outlining in general terms the grounds for dismissal. On the same day, counsel for the Commission sent a letter to counsel for Potter advising him that Potter was not to return to work until further direction. On March 9, 2010, Potter commenced an action for constructive dismissal. The trial judge found that, under the Act, the Board had the statutory authority to place Potter on an administrative suspension with pay. He held that Potter's administrative suspension with pay did not in the circumstances of the case, despite its indefinite term, constitute constructive dismissal. The Court of appeal concluded that the trial judge had committed no reversible error in concluding that Potter had not been constructively dismissed.

Appeal allowed. The Commission lacked the authority, whether express or implied, to suspend Potter indefinitely with pay for the reasons it provided. Potter was constructively dismissed and he was therefore entitled to damages for constructive dismissal. Two branches of the test for constructive dismissal had emerged. The court was required to first identify an express or implied contract term that has been breached, and then to determine whether that breach was sufficiently serious enough to constitute constructive dismissal. However, an employer's conduct would also constitute constructive dismissal if it more generally showed that the employer intended not to be bound by the contract. Accordingly, constructive dismissal could take two forms: that of a single unilateral act that breached an essential term of the contract, or that of a series of acts that, taken

together, showed that the employer no longer intended to be bound by the contract. The question of whether Potter's suspension amounted to constructive dismissal turned in part on whether it was authorized by contract. In light of the indefinite duration of the suspension, of the fact that the Commission failed to act in good faith insofar as it withheld valid business reasons from Potter, and of the Commission's concealed intention to have Mr. Potter terminated, the trial judge erred in concluding that the suspension was authorized by the contract of employment. Furthermore, the contract breach amounted to a substantial change to the essential terms of the contract that was imposed unilaterally by the employer. The trial judge erred in finding that the Commission did not have a duty to provide Potter with work, and as a result he failed to inquire into whether it had discharged its burden by showing that the suspension was justified. Although the Board privately recommended in its letter to the Minister of Justice that Potter's appointment be revoked for cause, it did not suspend Potter for disciplinary reasons. The Board gave no reason when it suspended Potter on January 11, 2010. The Board lacked the authority to suspend Potter indefinitely with pay to facilitate the negotiation of a buyout of his contract. In a constructive dismissal case involving an administrative suspension, the burden shifted to the employer to show that the suspension was reasonable. The trial judge erred in placing the burden on Potter to show that the suspension was unreasonable. It was reasonable for Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract. In most cases in which a breach of an employment contract resulted from an unauthorized administrative suspension, a finding that the suspension amounted to a substantial change would be inevitable. On the basis of the private insurance exception outlined in the Waterman case, Potter's pension benefits were not to be deducted from the damages awarded to him at trial as a consequence of his employer's breach of the employment contract. Section 16 of the Public Service Superannuation Act did not displace the private insurance exception and preclude Potter from collecting both his pension benefits and the equivalent of his salary.

**Statutes, Regulations and Rules Cited:**

Act Respecting Pensions under the Public Service Superannuation Act, S.N.B. 2013, c. 44, s. 2

Civil Code of QuÚbec, S.Q. 1991, c. 64,

Interpretation Act, R.S.N.B. 1973, c. I-13, s. 1(1(a), s. 21(1)

Legal Aid Act, R.S.N.B. 1973, c. L-2, s. 2, s. 39, s. 40(1), s. 41(1), s. 42, s. 50(2), s. 51(1), s. 52(8), s. 53(2), s. 53(3)

Public Service Superannuation Act, R.S.N.B. 1973, c. P-26, s. 16

Public Service Superannuation Act (1966), S.N.B. 1966, c. 23, s. 16

**Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

**Court Catchwords:**

*Employment law -- Constructive dismissal -- Administrative suspension -- Commission suspending Executive Director indefinitely with pay -- Commission alleging that suspension was authorized by express or implied term of contract -- Whether administrative suspension constitutes unilateral act that amounts to breach of employment contract -- If so, whether decision to suspend could reasonably be perceived as having substantially changed essential terms of contract.*

*Employment law -- Wrongful dismissal -- Damages -- Employee drawing pension benefits upon dismissal -- Whether pension benefits should be deducted from damages for wrongful dismissal -- If not, whether s. 16 of Public Service Superannuation Act displaces private insurance exception and precludes employee from collecting both pension benefits and equivalent of salary -- Public Service Superannuation Act, R.S.N.B. 1973, c. P-26 [rep. 2013, c. 44, s. 2], s. 16.*

**Court Summary:**

P was appointed as the Executive Director of the New Brunswick Legal Aid Services Commission ("Commission") for a seven-year term. In the first half of that term, the relationship between the parties deteriorated and they began negotiating a buyout of P's employment contract. P took sick leave before the matter was resolved. Just prior to his return, and unbeknownst to P, the Commission wrote a letter to the Minister of Justice recommending that P's employment be terminated for cause. The Commission's legal counsel wrote to P's lawyer on the same date, advising that P was not to return to work until further direction from the Commission. Before the conclusion of his sick leave, the Commission suspended P indefinitely with pay and delegated his powers and duties to another person. P claimed that he was constructively dismissed and commenced litigation. The Commission took the view that in doing this, P had voluntarily resigned. The trial judge found in favour of the Commission, as did the Court of Appeal.

*Held:* The appeal should be allowed.

*Per* Abella, Rothstein, Moldaver, Karakatsanis and **Wagner** JJ.: P was constructively dismissed. In light of the indefinite duration of his suspension, of the fact that the Commission failed to act in good faith insofar as it withheld reasons from him, and of the Commission's concealed intention to have him terminated, the suspension was not authorized by his employment contract. Nor did the Commission have the authority, whether express or implied, to suspend P indefinitely with pay and that suspension was a substantial change to the contract, which amounted to constructive dismissal.

The test for constructive dismissal has two branches. The court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. However, an employer's conduct will also

constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract. Given that employment contracts are dynamic in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract.

The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract. For that second step of the analysis, the court must ask whether, at the time that the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. In determining this, a court must not consider evidence consisting of information that was neither known to the employee nor reasonably foreseeable.

Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer intended to no longer be bound by the contract. In all cases, the primary burden will be on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer, which must then show that the suspension is reasonable or justified. If the employer cannot do so, a breach will have been established, and the burden will shift back to the employee at the second step of the analysis.

A finding of constructive dismissal does not require a formal termination, but a unilateral act by the employer to substantially change the contract of employment. In this case, the Commission was P's employer for most purposes, although the Crown was his employer for the purposes of appointment, reappointment and termination. In other words, the Commission had the power to substantially change P's contract, and thus to constructively dismiss him.

The express terms of P's employment contract are found in the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, and in the terms and conditions of employment established by the Commission pursuant to s. 39(2) of that Act. However, none of those terms nor conditions, or even the Act itself, refer to suspension for administrative reasons. There is simply no express grant of power to suspend.

There is also no implied grant of power to suspend. Given the nature of the Executive Director's position and the detail in which his statutory obligations were defined in the contract, the Commission had an obligation to provide P with work. Even if the Commission had an implied authority to relieve P of some or all of his statutory duties, such an authority is not unfettered, but is subject to a basic requirement of business justification. Because the Commission has failed to establish that the suspension was reasonable or justified, it cannot argue that it was acting pursuant

to an implied term of the contract, which means that the suspension constituted a unilateral act. To begin with, P was given no reasons for the suspension. In most circumstances, an administrative suspension cannot be found to be justified in the absence of a basic level of communication with the employee. At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid and forthright. Failing to give an employee any reason whatsoever for his suspension is not being forthright. Moreover, the limited evidence presented in support of the Commission's ostensible purpose of facilitating a buyout is undercut by the actions that the Commission took to have P terminated. The Commission's letter to the Minister in which it recommended that P be terminated ought to be admitted at this stage of the analysis. Add to this the facts that P was replaced during the suspension period and that the period was indefinite, and there remains no doubt that the suspension was unauthorized.

Furthermore, on the evidence, it cannot be said that P acquiesced in the change. Even if P was interested in a buyout, that interest can in no way be taken as consent to his suspension, nor can it be prejudicial to his position in his action. P simply did what most employees would do if their employer raises the possibility of a buyout: listen to the offer and, depending on its terms, consider accepting it.

With respect to the second step of the first branch of the test for constructive dismissal, it was reasonable for P to perceive the unauthorized unilateral suspension as a substantial change to the contract. As far as he knew, he was being indefinitely suspended and had been given no reason for the suspension. The letter to P stated that the suspension was to continue until further direction from the Commission. When P had his lawyer write to request clarification of the Commission's instructions, the Commission persisted in its silence regarding the reason. That is sufficient to discharge P's burden here. Knowledge of the reasons given by the Commission at trial should not be imputed to P as of the time of the suspension.

In short, P has proven that the Commission's unilateral act breached his employment contract and that the breach substantially changed the essential terms of the contract. P was constructively dismissed and therefore entitled to damages for wrongful dismissal. The trial judge's provisional assessment of those damages should be adopted, with the exception that on the basis of the private insurance exception from *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, P's pension benefits should not be deducted from the damages awarded to him. Those benefits were not intended to compensate P in the event of his being wrongfully dismissed. Section 16 of the *Public Service Superannuation Act*, R.S.N.B. 1973, c. P-26, does not displace the private insurance exception. Neither the ordinary meaning of the words of s. 16 nor its context support the position that the provincial legislature intended to preclude the common law rule in *Waterman*. Rather, they support the position that s. 16 is intended for situations in which a former employee who is receiving pension benefits returns to employment in the public service. It therefore neither applies to wrongful dismissal cases nor precludes P from collecting both the full damages amount and his pension benefits.

*Per* McLachlin C.J. and **Cromwell** J.: The trial judge made two related errors of law in his analysis of whether the Commission had repudiated P's employment contract and thereby constructively dismissed him. First, the trial judge failed to recognize that constructive dismissal may be established not only on the basis of a sufficiently serious breach, but also by conduct which, in light of all of the surrounding circumstances and viewed objectively by a reasonable person in the position of the employee, shows that the employer does not intend to be bound in the future by important terms of the contract of employment.

In this case, the surrounding circumstances reveal the following: (i) the Commission wanted to bring P's employment to an end before the expiry of the term of his contract; (ii) the Commission wanted him to stay out of the workplace indefinitely; and (iii) the Commission provided no assurances that it would continue to honour the remuneration terms of his contract in the future. Had the trial judge taken these surrounding circumstances into account, as the relevant legal principles require, rather than focusing simply on how serious a breach of contract the suspension was, he would inevitably have concluded that the Commission had evinced a clear intention not to be bound in the future by important provisions of P's employment contract.

The trial judge's second error was to exclude from consideration the fact that on the same day the Commission counsel instructed P to stay out of the workplace indefinitely, the Commission sent a letter to the Minister of Justice seeking to have P's appointment revoked for cause. The trial judge decided that he could only consider what P knew at the time he claimed to have been constructively dismissed.

While the law on this point is not as clear or as settled as one would wish, a non-breaching party claiming repudiation is entitled to rely on grounds actually in existence at the time of the alleged repudiation but which were unknown to him at the time. In other words, P is entitled to rely on the Commission's conduct up to the time he accepted the repudiation and sued for constructive dismissal, even if he was unaware of it at that time. This is important for the purposes of this case: the trial judge excluded from consideration the fact, unknown to P at the time, that the Commission on the very day that it suspended him, sent a letter seeking to have his appointment revoked for cause. The trial judge therefore erred in failing to take this into consideration in deciding whether P had been constructively dismissed. Contrary to the opinion of the Court of Appeal, the judge's error was not harmless. The letter, understood in the context in which it was written, made it clear that the Commission did not intend to be bound in the future by important provisions of his contract of employment. This was one of the surrounding circumstances that the judge was obliged to consider in deciding whether the suspension, viewed in light of all of the circumstances, evinced the Commission's intention not to be bound by the contract.

According to this Court's decision in *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, the pension benefits that P received should not be deducted from his damage award for wrongful dismissal.

**Cases Cited**

By Wagner J.

**Applied:** *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985; **adopted:** *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195; *Devlin v. NEMI Northern Energy & Mining Inc.*, 2010 BCSC 1822, 86 C.C.E.L. (3d) 268; *Reininger v. Unique Personnel Canada Inc.* (2002), 21 C.C.E.L. (3d) 278; **discussed:** *Park v. Parsons Brown & Co.* (1989), 39 B.C.L.R. (2d) 107; **referred to:** *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *General Billposting Co. v. Atkinson*, [1909] A.C. 118; *Freeth v. Burr* (1874), L.R. 9 C.P. 208; *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161; *Universal Cargo Carriers Corp. v. Citati*, [1957] 2 All E.R. 70; *Carscallen v. FRI Corp.* (2005), 42 C.C.E.L. (3d) 196, aff'd (2006), 52 C.C.E.L. (3d) 161; *Labarre v. Spiro Méga inc.*, 2001 CarswellQue 1753; *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81; *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161; *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206; *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653; *Suleman v. B.C. Research Council* (1990), 52 B.C.L.R. (2d) 138; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Sûreté du Québec et Association des policiers provinciaux du Québec*, [1991] T.A. 666; *Fraternité des policiers de la Communauté urbaine de Montréal et Communauté urbaine de Montréal*, [1984] T.A. 668; *Re Ontario Jockey Club and Mutuel Employees' Association, Service Employees' International Union, Local 528* (1977), 17 L.A.C. (2d) 176; *Pierce v. Canada Trust Realtor* (1986), 11 C.C.E.L. 64; *MacKay v. Avco Financial Services Canada Ltd.* (1996), 146 Nfld. & P.E.I.R. 353; *Bhasin v. Hrynew*, 2014 SCC 71; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157.

By Cromwell J.

**Applied:** *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985; **approved:** *Stolze v. Addario* (1997), 36 O.R. (3d) 323; *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *General Billposting Co. v. Atkinson*, [1909] A.C. 118; *Freeth v. Burr* (1874), L.R. 9 C.P. 208; *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713; *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.*, [1980] 1 All E.R. 571; *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1979] A.C. 757; *Eminence Property Developments Ltd. v. Heaney*, [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm.) 223; *Universal Cargo Carriers Corp. v. Citati*, [1957]

2 All E.R. 70; *British and Beningtons, Ltd. v. North Western Cachar Tea Co.*, [1923] A.C. 48; *Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce*, [1997] 4 All E.R. 514; *Taylor v. Oakes, Roncoroni, and Co.* (1922), 127 L.T. 267; *Scandinavian Trading Co. A/B v. Zodiac Petroleum S.A.*, [1981] 1 Lloyd's Rep. 81; *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553.

**Statutes and Regulations Cited**

*Act Respecting Pensions under the Public Service Superannuation Act*, S.N.B. 2013, c. 44, s. 2.

*Civil Code of Québec*.

*Interpretation Act*, R.S.N.B. 1973, c. I-13, ss. 1(1)(*a*), 21(1).

*Legal Aid Act*, R.S.N.B. 1973, c. L-2 [am. 2005, c. 8], ss. 2, 39, 40(1), 41(1), 42, 50(2), 51(1), 52(8), 53(2), (3).

*Public Service Superannuation Act*, R.S.N.B. 1973, c. P-26 [rep. 2013, c. 44, s. 2], s. 16.

*Public Service Superannuation Act (1966)*, S.N.B. 1966, c. 23, s. 16.

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**History and Disposition:**

APPEAL from a judgment of the New Brunswick Court of Appeal (Drapeau C.J.N.B. and Richard and Bell JJ.A.), 2013 NBCA 27, 402 N.B.R. (2d) 41, 1044 A.P.R. 41, 6 C.C.E.L. (4th) 1, [2013] CLLC para201-032, [2013] N.B.J. No. 122 (QL), 2013 CarswellNB 196 (WL Can.), affirming a decision of Grant J., 2011 NBQB 296, 384 N.B.R. (2d) 14, 995 A.P.R. 14, 94 C.C.E.L. (3d) 302, [2011] N.B.J. No. 361 (QL), 2011 CarswellNB 579 (WL Can.). Appeal allowed.

**Counsel:**

*Eugene J. Mockler* and *Perri Ravon*, for the appellant.

*Clarence L. Bennett* and *Josie H. Marks*, for the respondent.

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The judgment of Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

**WAGNER J.**:--

I. Introduction

**1** The issue in this appeal is whether and in what circumstances a non-unionized employee who is suspended with pay may claim to have been constructively dismissed. The case involves the indefinite suspension of an employee with pay in the context of negotiations for a buyout of his

contract of employment. The courts below found that the suspension did not amount to constructive dismissal and that the employee, Mr. Potter, had therefore repudiated the contract when he brought an action for constructive dismissal. For the reasons that follow, I respectfully disagree. Mr. Potter's employer, the New Brunswick Legal Aid Services Commission ("Commission"), lacked the authority, whether express or implied, to suspend him indefinitely with pay for the reasons it gave. I find that Mr. Potter was constructively dismissed and that he is accordingly entitled to damages for wrongful dismissal. I would adopt the trial judge's provisional assessment of those damages, with the exception that the pension benefits Mr. Potter received should not be deducted from them.

## II. Background and Judicial History

### A. *Background*

**2** Mr. Potter is a lawyer who was admitted to the Law Society of New Brunswick in 1977. After serving in various positions primarily with the Province of New Brunswick, Mr. Potter became the Province's interim Director of Legal Aid in 1993. He remained in that position until 2005, when the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, was amended to create a new scheme under which staff lawyers would represent litigants (S.N.B. 2005, c. 8). Under the former system, lawyers in private practice had been paid for performing legal aid work. The amendments also created the position of Executive Director of Legal Aid ("Executive Director").

**3** On December 12, 2005, the day the amendments were proclaimed, the Board of Directors ("Board") of the newly created Commission nominated Mr. Potter for appointment as the Executive Director. The Lieutenant-Governor in Council formally appointed him to that office on March 16, 2006 by means of Order-in-Council 2006-85. The appointment was for a seven-year term that was to expire on December 12, 2012.

**4** Mr. Potter's appointment as the Executive Director was governed by s. 39 of the *Legal Aid Act*, which reads as follows:

> **Executive Director**
>
> **39** (1) The Lieutenant-Governor in Council shall appoint as the Executive Director of Legal Aid the person nominated by the Board.
>
> **39** (2) The Board shall establish the terms and conditions of the Executive Director's appointment.
>
> **39** (3) An Executive Director shall hold office for a term of 7 years from the date of his or her appointment.

> **39** (4) The appointment of an Executive Director may be revoked for cause by the Lieutenant-Governor in Council.
>
> **39** (5) An Executive Director is eligible for reappointment and subsections (1) to (4) apply with the necessary modifications in respect of a reappointment.
>
> **39** (6) The Executive Director shall perform the duties and may exercise the powers imposed on the Executive Director by this Part, the regulations or the Board.

**5** The Board had also established the terms and conditions of Mr. Potter's appointment, as required by s. 39(2), in a resolution dated December 12, 2005 that included provisions on remuneration, insurance benefits, pension benefits, vacation and sick leave, and a vehicle allowance. Section 39(6) provides that certain powers and duties are attributed to the Executive Director by the *Legal Aid Act* itself, by the regulations or by the Board. The powers and duties attributed by the Act include the following (Court of Appeal reasons, at para. 15):

* "the hiring of employees (s. 40(1))";
* "contracting with lawyers not employed by the Commission (s. 41(1))";
* "directing employees and contractors (s. 42(1), (2))";
* "assisting the Legal Aid Committee with investigations (s. 50(2))";
* "appointing area legal aid committees (s. 51(1))";
* "acting as one of the signing officers of the Legal Aid Fund (s. 52(8))";
* "administering Legal Aid New Brunswick ('the plan') in accordance with Part III, the regulations and any policies established under Part III and the regulations (s. 53(2))"; and
* "subject to Board approval, establishing policies to govern the administration of the plan (s. 53(3))".

**6** In October 2009, after Mr. Potter had completed nearly four years of his seven-year contract, his physician advised him to take time off for medical reasons. Although initially one month, the period of his medical leave was subsequently extended, first to January 4, 2010, and then to January 18, 2010. The second extension was accompanied by a note in which Mr. Potter's physician observed that he "needs to be reassessed before [going] back" (Court of Appeal reasons, at para. 31). In his absence, Mr. Potter delegated his powers and duties to Peter Corey, the Commission's Director of Criminal Operations.

**7** Before then, in the spring of 2009, Mr. Potter and the Board had begun to negotiate a buyout of his contract. If successful, that process would have culminated in Mr. Potter's resignation in exchange for an agreed-upon compensation package.

**8** On January 5, 2010, the Board decided -- without alerting Mr. Potter -- that if the buyout negotiations were not resolved before January 11, it would request that the Lieutenant-Governor in Council revoke Mr. Potter's appointment for cause pursuant to s. 39(4) of the *Legal Aid Act*. Its decision was reflected in the following resolution:

> The Chair shall send correspondence to the Minister of Justice (with a cc to the Deputy Minister) requesting that David Potter's appointment as Executive Director of the Legal Aid Services Commission be revoked for cause, such letter to be sent only if Gordon Petrie, Q.C. is unable to negotiate a resolution with Mr. Potter before Monday, January 11, 2010 (on the basis that Mr. Potter receive no more than 18 months' salary including his retirement allowance). [Emphasis deleted.]
>
> (Court of Appeal reasons, at para. 32)

**9** On January 11, unbeknownst to Mr. Potter, the Chairperson of the Board sent a letter to the Minister of Justice recommending that Mr. Potter be dismissed for cause and outlining in general terms the grounds for dismissal.

**10** Also on January 11, counsel for the Commission sent a letter to counsel for Mr. Potter advising him that Mr. Potter was not to return to work "until further direction":

> Our client, the Legal Aid Services Commission, has instructed us to advise you that David Potter ought not to return to the work place until further direction from the Commission. He will continue to be paid until instructed otherwise.

**11** On January 12, counsel for Mr. Potter replied, acknowledging receipt of that letter and requesting clarification of the Commission's instructions:

> I have received your letter dated January 11, 2010. I note the use of the phrase that "Mr. Potter *ought not to return* to the work place...". The phrasing could be interpreted as advisory as opposed to directive.
>
> Given that Mr. Potter occupies a position which sets out a statutory obligation to perform the duties of his position, can you confirm whether the Board has suspended Mr. Potter. [Emphasis in original.]

**12** On January 13, counsel for the Commission confirmed that the statement was directive: "I am surprised that you and your client are confused. He is not to return to work until further notice."

**13** Mr. Potter was not aware of the Board's letter recommending that he be dismissed for cause,

and there is no evidence that the Lieutenant-Governor in Council took any steps towards acting on the recommendation. Mr. Potter's sick leave was due to expire on January 18, 2010, but having received the instruction of January 11, as clarified in the letter of January 13, he did not return to work. The Board delegated the powers and duties of the Executive Director to Mr. Corey, to whom Mr. Potter had previously delegated them.

**14** On March 9, 2010 -- eight weeks after the Board's instruction to stay away from the workplace, and seven weeks after Mr. Potter had been scheduled to return from sick leave -- Mr. Potter commenced an action for constructive dismissal. He claimed the following relief: damages with respect to salary and benefits through December 12, 2012 (the end of his term), general damages, damages arising from the manner of dismissal like those defined in *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, a declaration that the Board had no authority to suspend Mr. Potter, a declaration that the Board had unlawfully obstructed Mr. Potter from exercising his statutory powers, declarations that the Board had unlawfully usurped the functions of both the Executive Director and the Lieutenant-Governor in Council by delegating those statutory powers to someone who had not been duly appointed, and post-judgment interest.

**15** In response, the Board stopped Mr. Potter's salary and benefits. Counsel for the Commission advised his counsel of this in a letter of March 15, 2010:

> Based upon your clients' legal action claiming constructive dismissal, our client takes the position that he has effectively resigned his position.
>
> Therefore, salary and benefits were stopped on March 9, 2010.
>
> Furthermore, he is directed to return to the Commission the following items:
>
> a) Blackberry;
> b) Cell phone;
> c) Home computer; and
> d) On Star.
>
> We thank you for your anticipated cooperation.

**16** Counsel for Mr. Potter replied that same day, indicating that Mr. Potter had not resigned: "To be clear, Mr. Potter has not resigned from any position or office and your Client is incorrect in that regard." The letter went on to say that Mr. Potter might be "forced" to draw on his pension, retirement/severance and other benefits, but that his doing so would not constitute acquiescence in the Commission's view that he had resigned. A similar letter of clarification was sent to the Deputy

Minister of Justice, also on March 15. On March 23, 2010, counsel for Mr. Potter notified the Deputy Minister, in a letter that was copied to counsel for the Commission, that Mr. Potter was taking steps to draw on his pension and other benefits "[f]or financial reason[s]". This letter went on as follows:

> However, we ask that your Office take immediate steps to direct reinstatement of his salary and benefits until the matter is finally determined. As you are aware, Mr. Potter's appointment to his Office by Order in Council remains in effect. The Commission has deprived him of his duties and now his pay. That action is reserved exclusively to the Crown upon showing just cause.
>
> We ask for your intervention as noted. Again, as set out in previous correspondence, Mr. Potter has not resigned his Office or refused to carry out the duties of his Office. The fact that Mr. Potter now feels he must access his pension plan or other benefits ought not to be considered in anyway [*sic*] as a resignation of his Office or duties, but only as a matter of financial necessity forced upon him by the actions of the Commission.

B. *New Brunswick Court of Queen's Bench, 2011 NBQB 296, 384 N.B.R. (2d) 14 (Grant J.)*

**17** Grant J. found that the Board had the statutory authority, under the *Legal Aid Act*, to place Mr. Potter on an administrative suspension with pay. Although that Act clearly grants the Lieutenant-Governor in Council the authority to retain and dismiss the Executive Director (s. 39(1) and (4)), Grant J. found that s. 39(6) of the Act gives the Board a broad discretion to supervise the Executive Director in the performance of his or her duties and that this discretion includes the power of suspension.

**18** On the central question of constructive dismissal, Grant J. held that Mr. Potter's administrative suspension with pay did not in the circumstances of the case, despite its indefinite term, constitute constructive dismissal.

**19** The question was whether, by taking Mr. Potter's duties and powers away from him for an indefinite period of time, the Board had repudiated his contract of employment. Grant J. held that this question should be examined in light of what Mr. Potter knew at the time of what he alleged to be a constructive dismissal, "because he could hardly allege that he was constructively dismissed based on something the employer did unbeknownst to him" (para. 36). Since there was no evidence that the Board had advised Mr. Potter that it intended to arrange for his termination, he could not rely on the Board's letter to the Minister of Justice recommending termination for cause. If the situation is viewed only in light of what Mr. Potter knew at the time he commenced his action, although he was clearly suspended from work and unable to perform his duties, "the Commission

[had] not do[ne] or sa[id] anything that would lead an objective observer to conclude that they had removed those duties from him permanently" (para. 38).

**20** On the contrary, Grant J. found that Mr. Potter and the Board had been engaged in ongoing discussions about a buyout of his contract, and that an administrative suspension pending resolution of these discussions was consistent with the relationship between the parties (paras. 40 and 43). In suspending Mr. Potter, the Board was "buying time" for further negotiations, "and while the duration of the suspension was becoming lengthy, there is nothing on the record before me [Grant J.] to indicate that a reasonable person looking at the matter objectively would have concluded that the employer had repudiated the contract" (para. 42). Grant J. noted that if Mr. Potter was concerned about the indefinite nature of the suspension, he could have corresponded with the Board or given them notice that after a certain date he would consider himself to have been constructively dismissed, rather than taking the "precipitous course" or making the "dramatic move" of starting legal proceedings (paras. 39 and 44). Grant J. distinguished this situation of a suspension pending negotiations from the one in *Park v. Parsons Brown & Co.* (1989), 39 B.C.L.R. (2d) 107 (C.A.), in which a decision to strip an employee of all his powers and duties had been found to amount to constructive dismissal (paras. 41-42).

**21** Grant J. went on to find that by commencing an action for constructive dismissal, Mr. Potter had effectively destroyed any chance of a productive working relationship between the parties and had therefore repudiated the employment contract by what amounted to a resignation (paras. 50-51).

**22** In case his decision on the constructive dismissal issue should be reversed on appeal, Grant J. also made a provisional assessment of damages. He found that any damages would be measured by calculating the balance of salary and benefits to which Mr. Potter would be entitled from the date the Board stopped paying him (March 9, 2010) until the date his term was to expire (December 12, 2012) (paras. 61-62). He held that by virtue of s. 16 of the *Public Service Superannuation Act*, R.S.N.B. 1973, c. P-26 (repealed by *An Act Respecting Pensions under the Public Service Superannuation Act*, S.N.B. 2013, c. 44, s. 2), Mr. Potter would not be entitled to collect both his salary and pension benefits, and that any amounts received or to be received under his pension would be deducted from the award of damages (paras. 63-64). Grant J. added that Mr. Potter had had no duty to mitigate his damages by seeking other employment, given his age (66 in March 2010) and "the small likelihood he would find any employment let alone a job analogous to the [Executive Director] position" (para. 71). Finally, he refused to award *Wallace*-type damages or general damages, which were being claimed for the manner of the alleged dismissal, as he found no evidence that Mr. Potter had been mistreated or that the Board had acted in bad faith (paras. 72-76).

### C. *New Brunswick Court of Appeal, 2013 NBCA 27, 402 N.B.R. (2d) 41(Drapeau C.J.N.B. and Richard and Bell JJ.A.)*

**23** Drapeau C.J.N.B., writing for a unanimous panel of the New Brunswick Court of Appeal, dismissed the appeal. He began by addressing the question whether the Commission was truly Mr.

Potter's employer or whether the employer was instead the Crown, which was the only entity empowered to appoint, reappoint or dismiss the Executive Director. In his view, the action for constructive dismissal could not succeed if the Crown was the true employer. After giving reasons in support of this position, Drapeau C.J.N.B. declined to dispose of the appeal on this ground, as it had not been pursued by the parties (paras. 58-69). Instead, he confirmed Grant J.'s interpretation to the effect that the *Legal Aid Act* confers on the Board power over all aspects of the Executive Director's employment other than his or her appointment, reappointment and removal. The Board's discretion to supervise the Executive Director includes the power of administrative suspension (paras. 70-79).

**24** Drapeau C.J.N.B. held that the trial judge had committed no reversible error in concluding that Mr. Potter had not been constructively dismissed. He noted that the question whether an indefinite suspension with pay constitutes constructive dismissal depends on the circumstances of the case, quoting *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195, at para. 71, in this regard (para. 82). The test, as this Court had stated in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 33, is whether the suspension constitutes "a fundamental or substantial change to an employee's contract of employment". To this end, Drapeau C.J.N.B. applied the following "useful list" of factors that had been formulated in *Devlin v. NEMI Northern Energy & Mining Inc.*, 2010 BCSC 1822, 86 C.C.E.L. (3d) 268, at para. 50:

1. the duration of the suspension;
2. whether someone was appointed to replace the suspended employee;
3. whether the employee was asked for his or her keys;
4. whether the employee continued to be paid and receive benefits;
5. whether there is evidence that the employer intended to terminate the employee at that time; and
6. whether the employer suspended the employee in good faith, for example, for *bona fide* business reasons.

**25** For Drapeau C.J.N.B., although the indefinite duration of the suspension weighed in favour of a finding that the suspension constituted constructive dismissal, it did not trump the other factors, all of which supported Grant J.'s "amply justified" conclusion that Mr. Potter had not been constructively dismissed (para. 81). Thus, no one was formally appointed to replace Mr. Potter during his suspension, and the person tasked with assuming his responsibilities had been designated by Mr. Potter himself upon going on sick leave. Nor was Mr. Potter asked to turn in his BlackBerry, cell phone, laptop and "On Star" until after he had launched his action. Mr. Potter continued to be paid his full salary, and to be eligible for benefits, during the period of the suspension. The Board did not intend to terminate Mr. Potter, as it was operating under the honest conviction that only the Lieutenant-Governor in Council could prescribe termination. Finally, the Board acted in good faith in suspending Mr. Potter, as was shown by the unchallenged testimony of Dr. Doherty, the Board's Vice-Chair (paras. 86-90).

**26** Drapeau C.J.N.B. also suggested, although without deciding this point, that Grant J. may have erred by limiting his assessment to facts known to Mr. Potter at the time of his alleged constructive dismissal: "It may be that the trial judge was required to consider all of the circumstances, including those unknown to Mr. Potter prior to commencing his action" (para. 94). He nevertheless stated that such an error would have been "wholly harmless" because, had Grant J. considered the Board's letter to the Minister of Justice recommending that Mr. Potter's employment be terminated, this would only have confirmed that the Board understood it could not itself terminate Mr. Potter (*ibid.*).

**27** Drapeau C.J.N.B. went on to hold that, by suing for damages for constructive dismissal, Mr. Potter had terminated not only his employment with the Board, but also his appointment by the Lieutenant-Governor in Council (para. 101). Although Mr. Potter had cautioned the Board that he was prepared to continue to perform his duties and that the filing of his action did not constitute a resignation, he had done so only after taking legal action, in an attempt to avoid the legal consequences that flowed from his lawsuit (para. 95). In Drapeau C.J.N.B.'s view, Mr. Potter had, by equating his indefinite administrative suspension with pay to a constructive dismissal, elected to repudiate his contract of employment and resign. His resignation had been effected by operation of law, and it had to be what Mr. Potter intended, since it was a corollary to his action for constructive dismissal (para. 100).

**28** Drapeau C.J.N.B. did not address the issue of damages in his reasons.

## III. Issues

**29** This appeal raises three questions, which I will answer in turn:

(1) Did the trial judge err in concluding that Mr. Potter was not constructively dismissed?
(2) If Mr. Potter was not constructively dismissed, did the trial judge err in concluding that Mr. Potter resigned when he launched his action in damages?
(3) If Mr. Potter was constructively dismissed, did the trial judge err in finding that the amounts Mr. Potter received under his pension should be deducted from his damages for wrongful dismissal?

## IV. Analysis

### A. *Was Mr. Potter Constructively Dismissed?*

**30** When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal. This was clearly stated in *Farber*, at para. 33, the leading case on the law of constructive dismissal in Canada. See also *In re Rubel Bronze and Metal Co. and Vos*,

[1918] 1 K.B. 315, at p. 322. Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterized by the law (J. A. Yogis and C. Cotter, *Barron's Canadian Law Dictionary* (6th ed. 2009), at p. 61; B. A. Garner, ed., *Black's Law Dictionary* (10th ed. 2014), at p. 380).

**31** The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. In *Farber*, the Court surveyed both the common law and the civil law jurisprudence in this regard. The solutions adopted and principles applied in the two legal systems are very similar. In both, the purpose of the inquiry is to determine whether the employer's act evinced an intention no longer to be bound by the contract.

**32** Given that employment contracts are dynamic in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract. There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal: J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at p. 5-5; P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), at ss. 13.36 and 13.70. Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial: see, e.g., G. England, *Individual Employment Law* (2nd ed. 2008), at pp. 348-56. In the words of McCardie J., in *In re Rubel Bronze*, at p. 323, "[t]he question is ever one of degree".

**33** However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable: see, e.g., *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.). This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.

**34** The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract (see Sproat, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.

**35** In *Farber*, Gonthier J. identified such a change as a "fundamental breach". The term "fundamental breach" has taken on a specific meaning in the context of exclusionary or exculpatory clauses: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104-23. To avoid confusion, I will therefore use the term "substantial breach" to refer to breaches of this nature. The standard nevertheless remains unchanged -- a finding of constructive dismissal requires that the employer's acts and conduct "evince an intention no longer to be bound by the contract": *In re Rubel Bronze*, at p. 322, citing *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122, *per* Lord Collins, quoting *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at p. 213.

**36** The two-step approach to the first branch of the test for constructive dismissal is not a departure from the approach adopted in *Farber*. Rather, the situation in *Farber* was one in which the identification of a breach required only a cursory analysis. The emphasis in *Farber* was on the second step of this branch, as the evidentiary foundation for the perceived magnitude of the breach was the key issue in that case. However, the identification of a unilateral act that amounted to a breach of the contract was implicit in the Court's reasoning. In many cases, this will be sufficient. The case at bar, however, is one in which the claim can be properly resolved only after both steps of the analysis have been completed.

**37** At the first step of the analysis, the court must determine objectively whether a breach has occurred. To do so, it must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, to qualify as a breach, the change must be detrimental to the employee.

**38** This first step of the analysis involves a distinct inquiry from the one that must be carried out to determine whether the breach is substantial, although the two have often been conflated by courts in the constructive dismissal context. Gonthier J. conducted this inquiry in *Farber*, in which an employee had been offered a new position that was found to constitute a demotion. He stated that "the issue of whether there has been a demotion must be determined objectively by comparing the positions in question and their attributes": *Farber*, at para. 46.

**39** Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, "at the time the [breach occurred], a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed" (*Farber*, at para. 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.

**40** The kinds of changes that meet these criteria will depend on the facts of the case being considered, so "one cannot generalize": Sproat, at p. 5-6.5. In each case, determining whether an

employee has been constructively dismissed is a "highly fact-driven exercise" in which the court must determine whether the changes are reasonable and whether they are within the scope of the employee's job description or employment contract: R. S. Echlin and J. M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (2001), at pp. 4-5. Although the test for constructive dismissal does not vary depending on the nature of the alleged breach, how it is applied will nevertheless reflect the distinct factual circumstances of each claim.

**41** The uniqueness of the application of this first branch of the test is evident in cases involving administrative suspensions. In all cases, the primary burden will be on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer, which must then show that the suspension is justified. If the employer cannot do so, a breach will have been established, and the burden will shift back to the employee at the second step of the analysis.

**42** The second branch of the test for constructive dismissal necessarily requires a different approach. In cases in which this branch of the test applies, constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer "evince[s] an intention no longer to be bound by the contract": *In re Rubel Bronze*, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. Gonthier J. said the following in this regard in *Farber*:

> In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. [para. 33]

**43** Thus, constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract. The distinction between these two forms of constructive dismissal was clearly expressed by Lord Denning M.R. in a leading English case, *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713 (C.A.). First of all, an employer's conduct may amount to constructive dismissal if it "shows that [he] no longer intends to be bound by one or more of the essential terms of the contract": p. 717. But the employer's conduct may also amount to constructive dismissal if it constitutes "a significant breach going to the root of the contract of employment": *ibid.* In either case, the employer's perceived intention no longer to be bound by the contract is taken to give rise to a breach.

**44** In applying the first branch of the test for constructive dismissal to the facts of the case at bar, this Court must ask, first, whether the Board's suspension of Mr. Potter amounted to a breach of the

employment contract. For this, it must determine whether the suspension was a unilateral act. On its face, the Board's decision to suspend Mr. Potter was clearly unilateral, since he did not consent to the suspension. But the Commission counters that the suspension does not evince an intention no longer to be bound by the contract, as it was authorized by an express or an implied term of the contract, which is a way of saying that Mr. Potter consented to such a change by signing the contract. I agree that the question whether the suspension amounted to constructive dismissal turns in part on whether it was authorized by the contract. If there was an express or an implied term that authorized the Board to suspend Mr. Potter as it did, then there was no unilateral act and, therefore, no breach of the contract -- let alone a substantial change to the essential terms of the contract -- and the constructive dismissal claim must fail.

**45** If, however, the suspension was not authorized by the contract, then it satisfies the requirements of the first step of this branch of the test, that is, it constitutes a unilateral change that amounts to a breach of the contract. It would then be necessary to turn to the second step and ask whether the Board's unilateral decision to suspend Mr. Potter could reasonably be perceived as having *substantially changed the essential terms of the contract*. It is clear that a suspension can amount to constructive dismissal: *Cabiakman*, at paras. 71-72. In determining whether the unauthorized suspension constituted a substantial breach, the Court must consider whether a reasonable person in the employee's circumstances would have perceived, *inter alia*, that the employer was acting in good faith to protect a legitimate business interest, and that the employer's act had a minimal impact on him or her in terms of the duration of the suspension. With respect, the trial judge erred in failing to consider the two steps of the inquiry independently.

**46** Applying the principles discussed above to the facts of the instant case, I find that Mr. Potter was constructively dismissed by the Board. In light of the indefinite duration of the suspension, of the fact that the Commission failed to act in good faith insofar as it withheld valid business reasons from Mr. Potter, and of the Commission's concealed intention to have Mr. Potter terminated, I respectfully find that the trial judge erred in concluding that the suspension was authorized by the contract of employment. Moreover, for the reasons set out below, I find that this breach of the contract amounted to a substantial change to the essential terms of the contract that was imposed unilaterally by the employer.

**47** With respect, I cannot agree with Cromwell J.'s assertion that this analysis is unnecessary or that constructive dismissal can be established on the basis of the second branch of the test. First, little, if any, support can be found for the position that a reasonable person in Mr. Potter's situation would conclude that the suspension evinced an intention on the employer's part no longer to be bound by the contract without addressing the question of whether the suspension was authorized. If the contract expressly or impliedly authorized the suspension in the manner in which it was carried out, this cannot contribute to the determination that a course of conduct amounted to a breach. The same is true of the buyout negotiations, which, as far as Mr. Potter knew, were being conducted in good faith. Moreover, although this is not central to Cromwell J.'s analysis, the Board's letter to the Minister of Justice is not, in light of the discussion that follows, relevant to the analysis under this

branch. The only relevant evidence is therefore the letter advising Mr. Potter that he would "continue to be paid until instructed otherwise". I concede that this letter unnecessarily introduced some uncertainty into Mr. Potter's employment situation. Nevertheless, a reasonable person in his situation could not have concluded on this basis that the Commission's conduct evinced a clear intention no longer to be bound by the contract.

**48** I will begin by addressing two preliminary issues. First, I will dispel the doubts expressed by the Court of Appeal regarding the existence of an employment relationship between the Commission and Mr. Potter. Second, I will review the terms of the contract to determine whether there was an *express* grant to the Board of authority to suspend Mr. Potter. Having concluded that there was no such express grant, I will then turn to the central question in this appeal: whether there was an *implied* grant of authority to do so. The trial judge found that the suspension was authorized, but I am of the view that this finding was based on an erroneous understanding of the law applicable to suspensions in the constructive dismissal context. My conclusion is that the Board did not have the authority, whether express or implied, to suspend Mr. Potter indefinitely with pay for the reasons it gave, and that the suspension was a substantial change that amounted to constructive dismissal.

(1) The Employment Relationship Between Mr. Potter and the Commission

**49** The Court of Appeal held that if the Commission was not Mr. Potter's employer, his action could not succeed "as a matter of common sense and law" (para. 60). Although Drapeau C.J.N.B. accepted that neither party was contesting the existence of an employment relationship between Mr. Potter and the Commission, he did so "with some hesitation" (para. 69), and only after providing several reasons why such a relationship might not exist. At the hearing in this Court, the Commission once again conceded that it was Mr. Potter's employer. Given that this position was accepted by both parties throughout the proceedings, I agree with Drapeau C.J.N.B. that "it would be unfair to recast the case and dispose of the appeal on a ground that has not been pursued by the Commission" (para. 69). That being said, I do not share Drapeau C.J.N.B.'s hesitation in reaching this conclusion. I find, in light of the "common employer" doctrine, that the Commission was in fact Mr. Potter's employer for the purposes of this case and that it was therefore correctly designated as the defendant to Mr. Potter's action.

**50** Although it is true that under the *Legal Aid Act*, the Lieutenant-Governor in Council retains the formal power of appointment, reappointment and termination of the Executive Director, the power of appointment is fettered by an obligation to appoint the person nominated by the Commission's Board of Directors: s. 39(1). The Board is also responsible for establishing the terms and conditions of the Executive Director's appointment. In addition, it has the authority under s. 39(6) to attribute duties and powers to the Executive Director, an authority that, according to the courts below, includes the power of suspension. These powers conferred on the Board, including its nomination power, which gives it effective control over the Crown's power of appointment, cover nearly all aspects of the employment relationship. Drapeau C.J.N.B. suggested that the Board's lack

of authority to formally terminate the Executive Director might undermine Mr. Potter's claim, but such a conclusion would conflict with the common employer doctrine and with the law applicable to constructive dismissal.

**51** I accept that the Commission was Mr. Potter's employer for most purposes, even though the Crown was his employer for the purpose of formal appointment, reappointment and termination. What a finding of constructive dismissal requires is not formal termination, but a unilateral act by the employer to substantially change the contract of employment. As is clear from the wide-ranging powers discussed above, the Commission has the power to alter fundamental aspects of the Executive Director's contract of employment, and thus to constructively dismiss him. To conclude otherwise would be to allow a permissible complexity in organizational arrangements to work an injustice by undermining the legitimate entitlements of wrongfully dismissed employees: see *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at para. 36. It would protect an employer from liability for acts amounting to constructive dismissal on the basis that it lacked the power to formally terminate the employee.

(2) Can the Words of the Contract be Interpreted to Mean that It Established an Express Grant of Authority to Suspend Mr. Potter for Administrative Reasons?

**52** If the Commission had the authority under the contract to suspend Mr. Potter for the administrative reasons it gave, then the contract was not breached and Mr. Potter's constructive dismissal claim must fail. The express terms of the contract are found in the *Legal Aid Act*, and in the terms and conditions of employment established by the Board pursuant to s. 39(2) of the Act. The possibility of suspension is not mentioned in the terms and conditions. Nor does the *Legal Aid Act* refer to suspension. However, s. 21(1) of the *Interpretation Act*, R.S.N.B. 1973, c. I-13, reads as follows:

**21** (1) Words authorizing the appointment of a public officer include the power

(*a*) of removing or suspending him,

(*b*) of re-appointing or reinstating him,

(*c*) of appointing another in his stead or to act in his stead, and

(*d*) of fixing his remuneration and varying or terminating it,

> in the discretion of the authority in whom the power of appointment is vested.

**53** At trial, Mr. Potter argued that this provision should be applied in interpreting s. 39(1) of the *Legal Aid Act*, which provides that "[t]he Lieutenant-Governor in Council shall appoint as the Executive Director of Legal Aid the person nominated by the Board." He submitted that, since these are "[w]ords authorizing the appointment of a public officer", the power of suspension lies not with the Board, but with the Crown, and that the Board therefore lacked the authority to suspend him for administrative reasons.

**54** The trial judge disagreed, relying on s. 39(6) of the *Legal Aid Act*, which I reproduce here once again for convenience:

> **39** (6) The Executive Director shall perform the duties and may exercise the powers imposed on the Executive Director by this Part, the regulations or the Board.

According to Grant J., the Board's general supervisory powers referred to in s. 39(6) include the power to suspend and replace the Executive Director. Were this not the case, if the Executive Director were to become ill or otherwise incapacitated, the Commission would be unable to function unless the Lieutenant-Governor in Council appointed a replacement. Grant J. found that such an outcome would run counter to the primary purpose of the *Legal Aid Act*, which is to establish a functioning legal aid plan: s. 2.

**55** The Court of Appeal gave additional reasons in support of this interpretation of the contract. Drapeau C.J.N.B. pointed out that s. 1(1)(*a*) of the *Interpretation Act* provides that the *Interpretation Act* applies in this case only if it is not "inconsistent with the intent or object" of the *Legal Aid Act*. Section 39 of the *Legal Aid Act* does not merely consist of "[w]ords authorizing the appointment of a public officer". It goes further than that in that it grants additional powers to the Lieutenant-Governor in Council, the Board and the Executive Director, and s. 21(1) of the *Interpretation Act* is inconsistent with the provisions establishing some of those powers. For instance, s. 39(5) of the *Legal Aid Act* fetters the Lieutenant-Governor in Council's reappointment power, and s. 39(2) grants the Board the authority to establish the terms and conditions of the Executive Director's appointment, including remuneration. Section 21(1) of the *Interpretation Act* is inconsistent with both of these provisions.

**56** Even if the *Interpretation Act* did apply, Drapeau C.J.N.B. suggested that the power of "suspending" provided for in s. 21(1)(*a*) is limited to disciplinary measures, since that word is used in conjunction with "removing" (para. 73).

**57** In my view, for the reasons given by Grant J. and by Drapeau C.J.N.B., the *Legal Aid Act* comprehensively sets out the various powers applicable to the Executive Director's contract of employment, and the *Interpretation Act* is inconsistent with some of the provisions establishing those powers. The Lieutenant-Governor in Council's power of appointment does not necessarily

include the power of suspension, and even if it did include that power, I agree that the power of suspension contemplated in s. 21(1)(*a*) of the *Interpretation Act* is limited to disciplinary suspension. As a result, any power to suspend the Executive Director for administrative reasons can only lie with the Board.

**58** I also agree with Grant J. that s. 39 of the *Legal Aid Act* attributes to the Board jurisdiction over all aspects of the Executive Director's employment -- except for his or her formal appointment or reappointment, and the formal revocation of an appointment -- and that the Board's jurisdiction in this regard includes establishing the terms and conditions of the appointment (s. 39(2)) and directing the Executive Director in the performance of his or her duties and the exercise of his or her powers (s. 39(6)). That being said, these broad powers conferred on the Board do not *expressly* include the power of suspension for administrative reasons. I will now turn to the question whether such a power can be found to be implied in the contract of employment.

(3) Was There an Implied Grant of Authority to Suspend Mr. Potter for Administrative Reasons?

**59** Since there was no express grant of authority to suspend Mr. Potter for administrative reasons, any such authority would have to be found to be implied in the contract. This requires us to inquire into whether the Board's authority under s. 39(6) of the *Legal Aid Act* to attribute powers and duties to the Executive Director includes the authority to suspend Mr. Potter indefinitely with pay for the administrative reasons the Board gave. In my view, it does not. In reaching the opposite conclusion, the trial judge was led astray by an incorrect articulation of the law applicable to administrative suspensions. Grant J. erred in finding that the Commission did not have a duty to provide Mr. Potter with work, and as a result he failed to inquire into whether it had discharged its burden by showing that the suspension was justified. For the reasons set out below, I conclude that the Commission did not discharge that burden and that, as a result, the suspension was unauthorized.

(a) *Admissibility of Evidence Adduced to Prove That an Act Constitutes Constructive Dismissal*

**60** The onus is on the employee to prove that an act constitutes constructive dismissal. The employee must prove on a balance of probabilities that the employer's unilateral act breached the contract and that that breach substantially changed the essential terms of the contract. As I mentioned above, the evidence produced to establish that the breach was substantial must be assessed from the perspective of a reasonable person. The test is "whether, at the time the [breach occurred], a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed" (*Farber*, at para. 26). In the instant case, the trial judge, purporting to apply the above test, commented as follows:

> ... it is necessary, in my view, that I only consider what [Mr. Potter] knew at the time he alleges he was constructively dismissed because he could hardly allege that he was constructively dismissed based on something the employer did

> unbeknownst to him. For example he was not aware of the letter to the Minister of Justice at that time. He can't therefore say that by sending the letter the defendant repudiated the contract and thereby constructively dismissed him. [para. 36]

**61** The Court of Appeal questioned the trial judge's conclusion on this issue, stating that "[i]t may be that the trial judge was required to consider all of the circumstances, including those unknown to Mr. Potter prior to commencing his action" (para. 94). However, Drapeau C.J.N.B. said that such an error would have been "wholly harmless" because, even if Grant J. had considered the excluded evidence, that evidence would only have confirmed the view that the Board had acted in a manner consistent with its obligations under the contract, given that it could not itself terminate Mr. Potter (*ibid.*).

**62** With respect, I am of the view that the trial judge was indeed in error and that this error was not harmless. The error stemmed from a failure to make a distinction between the individual steps of the test for constructive dismissal. As I mentioned above, this Court's test from *Farber* has two steps. Grant J. should have begun by asking whether, from an objective viewpoint, a breach of the contract had occurred. It was only after determining that a breach had in fact occurred that he should have proceeded to the second step, that of determining whether the breach was a substantial one. It is at this second stage of the analysis that the perspective shifts and that "what is relevant is what was known by the appellant at the time of the [breach] and what ought to have been foreseen by a reasonable person in the same situation" (*Farber*, at para. 42). The trial judge failed to deal with the first step of the test.

**63** This shift in perspective demonstrates the balance that is struck in the doctrine of constructive dismissal. On the one hand, the doctrine is based on a recognition that the employee is in a vulnerable position vis-à-vis the employer; however, the ensuing accommodations are not unlimited. Accordingly, the perspective at the second step of the first branch of the test, at which the issue is whether the breach was substantial, and in the second branch of the test is that of a reasonable person *in the same circumstances as the employee*. There is no requirement that the employer actually intend no longer to be bound by the contract. The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it. However, with respect for Cromwell J.'s opinion, the perspective here cannot be stretched so far as to allow the employee to rely on grounds that, although real, were unknown to him or her at the relevant time. Such an approach would risk encouraging disgruntled employees who have quit their jobs to allege constructive dismissal and engage in fishing expeditions against their employers in the hope of identifying evidence in support of their claims.

**64** In the instant case, at the first step of the first branch of the constructive dismissal analysis, the trial judge was required to inquire, from an objective viewpoint, into whether the administrative suspension amounted to a breach of contract. To exclude evidence such as the evidence excluded by

the trial judge in this case would be to make the employee's right to claim constructive dismissal depend on whether the employer was "artful enough to conceal his state of mind": *Universal Cargo Carriers Corp. v. Citati*, [1957] 2 All E.R. 70 (Q.B.), at p. 91.

**65** As I mentioned above, the question whether a suspension amounts to a breach will often require a more careful analysis than might be necessary in constructive dismissal cases involving other types of changes. This is because, unlike with such unilateral changes as a demotion, a reduction in wages or a modification to the pay structure, an employer's ability to suspend an employee can be found to be implied in the contract. The court must therefore determine whether the suspension was implicitly authorized by the contract. In *Carscallen v. FRI Corp.* (2005), 42 C.C.E.L. (3d) 196 (Ont. S.C.J.), aff'd (2006), 52 C.C.E.L. (3d) 161 (Ont. C.A.), for example, the Ontario Court of Appeal, in inquiring into whether an employee's disciplinary suspension amounted to a breach, considered multiple factors, including the facts that the suspension was without pay and that it was indefinite. A similar approach was taken in *Labarre v. Spiro Méga inc.*, 2001 CarswellQue 1753, in which the Quebec Superior Court also considered a notice sent to other employees to inform them of the suspension, as well as the revocation of a company credit card and of the use of a vehicle.

**66** When faced with a unilateral change by the employer, the employee is placed in the unenviable situation of having to decide whether to accept the change or to resign and bring an action for constructive dismissal: see *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.), at paras. 25-26. This life-altering decision must be made in circumstances in which the information available to the employee is limited and there is an imbalance of power between the employer and the employee. As was made clear in *Farber*, it would be unfair to rely on information that undermines the employee's claim and that the employee did not know about or could not be expected to have foreseen. In *Farber*, as I mentioned above, Gonthier J. first determined that a breach had occurred -- the employee had been confronted with a unilateral change that involved "a significant, even a serious, demotion" (para. 38). He then inquired into whether the demotion constituted a substantial change to the essential terms of the employment contract. The employer argued that because the commission the employee would actually have earned in the new position had turned out to be higher than the amount he would have earned had he remained in his former position, the demotion did not constitute a substantial change. Gonthier J. held that this evidence should be excluded, however, on the basis that a court must not, in determining whether a breach is substantial, consider evidence consisting of information that was neither known to the employee nor reasonably foreseeable.

**67** The reason why the evidence was excluded in *Farber* does not apply in the instant case. In *Farber*, the Court excluded the evidence in question not in determining whether a breach had occurred, but in determining whether the change was substantial. This distinction has a significant impact on the determination of whether evidence is relevant. The Board's letter recommending that Mr. Potter's employment be terminated for cause is plainly relevant to the circumstances at the time of the alleged breach. Also, as I will explain in the next section, the employer's intentions are

relevant to the determination of whether the suspension was wrongful, which is the key issue in Mr. Potter's constructive dismissal action. The exclusion of the evidence was therefore far from "wholly harmless". It deprived the trial judge of evidence that was relevant to the central issue of the case.

(b) *Characterizing Mr. Potter's Suspension*

**68** The broad question of an employer's right to temporarily discontinue an employee's work in a non-unionized workplace has been the subject of much debate. Before addressing the question whether the Board had the authority to suspend Mr. Potter as it did in this case, I wish to make it clear that certain points are not at issue in this appeal. First, this case does not concern a layoff for economic reasons. Because Mr. Potter's salary and benefits continued to be paid, he was not laid off, and the question of an implied authority to lay employees off temporarily does not arise: Barnacle, at ss. 18.29 to 18.39.

**69** Second, this case does not concern an administrative suspension for reasons unrelated to the employee's conduct. In *Cabiakman*, this Court drew a distinction, albeit in the civil law context, between extrinsic and intrinsic factors that might support a finding that an administrative suspension is justified (para. 33). Some possible extrinsic factors are financial difficulties, a shortage of work, technological change or reorganization of the business, but no such factors are alleged in the case at bar. Rather, the decision to suspend Mr. Potter was based on intrinsic factors in that it related to the actions of Mr. Potter himself.

**70** Third, this case does not concern a disciplinary suspension. Although the Board privately recommended in its letter to the Minister of Justice -- and gave reasons for doing so -- that Mr. Potter's appointment be revoked for cause, it did not suspend Mr. Potter for disciplinary reasons. The parties agree, as did the courts below, that by directing Mr. Potter to stay home and delegating his powers to someone else, the Board placed him on an "administrative suspension" (Court of Appeal reasons, at para. 3). In this Court, the Commission conceded that the suspension was administrative and not disciplinary. Questions related to an implied authority to suspend an employee for disciplinary reasons, or an implied obligation to impose a lesser sanction such as suspension where there is cause for dismissal, do not arise: see *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, at para. 52; *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206 (C.A.); Barnacle, at s. 18.40.

**71** Incidentally, given that cause was not alleged in the instant case, I question the relevance of the Court of Appeal's lengthy summary of what it calls the "deterioration" of Mr. Potter's relationship with the Board (paras. 2 and 21-26). Drapeau C.J.N.B. stated that he was including this evidence "to show the Board's revocation recommendation was *bona fide* and anything but frivolous" (para. 21). However, these facts had not been litigated at trial, and they consisted mostly of unproven allegations that had been made by the Commission. Unless they relate to the specific administrative reasons given by the Board for suspending Mr. Potter, they are not relevant.

**72** The question I must answer is whether the Board had an implied authority to suspend Mr.

Potter indefinitely with pay for the administrative reasons it gave. It should be noted that the Board gave no reason when it suspended Mr. Potter on January 11, 2010. When asked for clarification the next day, the Board simply confirmed that Mr. Potter was not to return to work. There were no further communications between the Board and Mr. Potter until he commenced his action for constructive dismissal on March 9, 2010.

**73** The trial judge found that the reason for the suspension had been to facilitate the negotiation of a buyout of Mr. Potter's contract. Because Mr. Potter had met with the Board in the spring of 2009 to discuss a buyout, the Board "had every reason to believe that he was interested in a buyout of his contract" (para. 42). In light of the ongoing negotiations, "[a]n administrative suspension pending [their] resolution is entirely consistent with what [the parties'] relationship was at the time" (para. 40). Grant J. went on as follows:

> In my view, the Commission's directive that he was not to come to work merely reflected what Mr. Potter already knew and indicated he would accept if the terms were right, viz. that the Commission wanted to buy out his contract. It also ensured that nothing would occur that might complicate the settlement negotiations.
>
> There is no evidence that the Board advised him that they intended to arrange for his termination. On the evidence before the Court I find that he made his dramatic move of starting legal action against his employer in response to no unilateral act by the employer that could be construed by a reasonable person as a repudiation of the contract. He was still being paid his full salary and benefits and if, as he says, he was feeling the pressure of the uncertainty of his situation, he only had to create a paper trail asking for clarification. [paras. 43-44]

**74** Even if I were to adopt Grant J.'s characterization of the Commission's reason for suspending Mr. Potter, I would nevertheless find that the Board lacked the authority to suspend Mr. Potter indefinitely with pay to facilitate the negotiation of a buyout of his contract.

**75** I will now address the Commission's main argument that it had no duty to provide Mr. Potter with work. Before doing so, however, I would note that the Board did not merely withhold work from Mr. Potter; it ordered him to stay away from the office and designated a replacement. Moreover, even if the Board had an implied authority to relieve Mr. Potter of some or all of his statutory duties, it is my view that such an authority is not unfettered, but is subject to a basic requirement of business justification. Because no legitimate business reasons were given in this case, I find that the suspension was unauthorized.

(c) *The Commission Had a Duty to Provide Mr. Potter With Work*

**76** In the Commission's view, the question is not whether it had the authority to suspend Mr.

Potter, but whether it had a duty to provide him with work. Since most employment contracts do not impose such an obligation, and since there was traditionally no general common law duty to provide work, the Commission submits that an administrative suspension with pay would only rarely constitute a breach of contract: *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653 (C.A.). The traditional common law principle was that "the obligation to keep an employee retained and employed did not necessarily import an obligation on the part of the employer to supply work" (*Park*, at p. 113). There are recognized exceptions to this principle:

> One exception relates to contracts of employment where there is a benefit to the employee, such as an actress, or a radio or television performer, from the performance of the work. A second is where the employee's remuneration is by commission. [*ibid.*]

However, the trial judge held, and the Commission argues, that these exceptions do not apply in the case at bar.

**77** In *Park*, a company's president and CEO was given notice of termination and ordered not to go the office during the notice period. The court found that both of the exceptions applied: first, part of Mr. Park's remuneration was in the form of a bonus and, second, he derived a reputational benefit from the performance of his work in that, "[a]s the chief executive officer he was primarily responsible for the operations of the company, and the success or failure of the company was a reflection of his performance in that role" (p. 113). Mr. Park's suspension was accordingly found to be wrongful, and he was awarded damages. The opposite result was reached in *Suleman v. B.C. Research Council* (1990), 52 B.C.L.R. (2d) 138 (C.A.), in which an administrative assistant was given notice of termination "on the basis of insufficient work" (p. 139). Because no attempt had been made to show that Ms. Suleman's circumstances fell under either of the exceptions to the traditional rule, there was no obligation to provide her with work, and the reduction of her workload during the notice period was found not to be wrongful.

**78** In the case at bar, Grant J. distinguished *Park* on the basis that it had involved not a suspension, but a "complete removal of [Mr. Park's] duties and powers", whereas this case does involve a suspension, one that was imposed pending the resolution of negotiations aimed at buying out Mr. Potter's contract (para. 42). With respect, I find this distinction unpersuasive. Although Mr. Potter was not paid by commission, he was the executive director of a government program whose success, like that of the company run by Mr. Park, was associated with his performance. I have no doubt that Mr. Potter derived a reputational benefit from the performance of his work.

**79** Grant J. seemed to suggest that Mr. Park's suspension was more troubling because it was for a finite period -- the period of his notice of termination -- but in my opinion the opposite is true. The indefinite duration of Mr. Potter's suspension created uncertainty that exacerbated the impact of the suspension. In both cases, the employee was directed to stay away from the office and was replaced for the duration of the suspension.

**80** Finally, whereas Mr. Park's powers and duties had been assigned to him solely by the company's directors, those of Mr. Potter were set out comprehensively in the *Legal Aid Act*: see ss. 39(6), 40(1), 41(1), 42, 50(2), 51(1), 52(8), 53(2) and 53(3). His suspension made it impossible to fulfill numerous statutory obligations. Mr. Potter recognized this when his counsel requested clarification of the suspension: "Given that Mr. Potter occupies a position which sets out a statutory obligation to perform the duties of his position, can you confirm whether the Board has suspended Mr. Potter."

**81** In short, by arguing that it did not have a duty to provide Mr. Potter with work, the Commission effectively denies that he was suspended on the basis that no term of the contract was changed. For the above reasons -- the nature of the Executive Director's position and the detail in which Mr. Potter's obligations were defined in the contract -- I cannot accept the view that the Board had no obligation to provide Mr. Potter with work. For the reasons that follow, however, I would prefer not to rest my conclusion solely on the particular features of Mr. Potter's employment situation.

(d) *An Employer's Authority to Withhold Work Is Never Unfettered*

**82** In my view, even if the exceptions under which an employer would be required to provide an employee with work do not apply, the employer does not have an unfettered discretion to withhold work. To the extent that the proposition that the employer's discretion is absolute was ever valid, it has been overtaken by modern developments in employment law.

**83** Work is now considered to be "one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). Thus, it is clear that the benefits derived from performing work are not limited to monetary and reputational benefits. Although I accept that employees who receive earnings from commissions or who derive a reputational benefit from the performance of their work are placed at a particular disadvantage should their employers refuse to provide them with work and that this justifies finding that an obligation to provide work is implied in the contract, I would caution against assuming that the converse is also true, namely that workers who are not included in those narrow categories derive no benefit whatsoever from the performance of their work and that their employers therefore have an unfettered discretion to suspend them with pay. Is it really the case that a president and CEO has, by virtue of his or her reputation, an implied right to work, whereas an administrative assistant, because his or her reputation is not valued, lacks any such right?

**84** In my view, the trial judge, in taking this category-based approach, on which the Commission relies, paid insufficient attention to the role of proportionality and balancing in modern employment law: *McKinley*, at para. 53. Even at common law, where the employer is not under a general

obligation to provide work, the employer may not withhold work in bad faith or without justification. It may reduce an employee's workload or abolish his or her position for legitimate business reasons, as was done in *Suleman*, in which the employee's workload was reduced pending her termination owing to a shortage of work. However, I reject the proposition that an employer can refuse to provide work to an employee to whom the exceptions discussed above do not apply -- let alone suspend and replace such an employee -- for just any reason. That would undermine the non-monetary benefit all workers may in fact derive from the performance of their work. It would also be inconsistent with the employer's duty of good faith and fair dealing that has been gaining acceptance at common law: see D. J. Doorey, "Employer 'Bullying': Implied Duties of Fair Dealing in Canadian Employment Contracts" (2005), 30 Queen's L.J. 500.

**85** To summarize, it is not true that one category of employees benefits from a duty to provide work that means that a suspension with pay amounts to constructive dismissal, whereas suspension with pay is authorized for another category of employees that benefits from no such duty. The determination will be fact-specific in each case. The common law exceptions remain useful as indicators that an employer has implied contractual obligations. For employees who receive earnings from commissions or who derive a reputational benefit from the performance of their work, suspension with pay will constitute a direct breach of an implied contractual term. That being said, no employer is at liberty to withhold work from an employee either in bad faith or without justification. The question is whether, in the circumstances of the particular case, the employer has demonstrated that the administrative suspension of the employee with pay is justified.

(e) *An Administrative Suspension Must Be Both Reasonable and Justified*

**86** Courts have developed a number of approaches to determining whether an administrative suspension is authorized by a contract. None of them apply directly to the situation in this case, but the principles on which they are all based are relevant. In my view, common threads can be identified in this Court's multi-factored approach in *Cabiakman* to the administrative suspension of an employee against whom criminal charges were pending in Quebec, the approach to the same issue taken by courts in the common law provinces, and the approach adopted by the New Brunswick Court of Appeal in the case at bar. All the courts in question have imposed on the employer a basic requirement of a good faith business justification. The factors they have applied include, but are not limited to, the existence of legitimate business reasons, good faith, the duration of the suspension, and whether the suspension was with pay. All the relevant factors go to the fundamental question whether the employer's decision to suspend was both reasonable and justified in the circumstances. As was made clear in *Cabiakman*, it is the employer that bears the burden of establishing that the suspension satisfies these two criteria (para. 67).

**87** In *Cabiakman*, this Court addressed, albeit in the civil law context, the scope of an employer's authority to impose an administrative suspension on an employee against whom criminal charges have been laid. The Court defined the employer's "residual power" to suspend as follows:

> This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay. [para. 62]

In *Cabiakman*, the employee, a sales manager, had been charged with conspiracy to extort money from his securities broker, and after pleading not guilty to the offence, was suspended by his employer without pay pending resolution of the charges. The suspension was found to have been justified, as the employer had imposed it for legitimate business reasons relating to the company's image and reputation. However, the employer could not justify its decision not to pay the employee during the suspension period: "... in the context of a suspension that at all times remained administrative in nature, there was no reason to refuse to pay the salary of an employee who remained available to work" (para. 79; see also paras. 76-78 and 80).

**88** The Court did not hold that an employer that pays its employee during the period of an administrative suspension need not show that the suspension is justified: "Even if an employee is suspended with pay, it may be that the suspension will ultimately be treated as a unilateral resiliation of the contract if the end result is not the reinstatement of the employee. Also, the initial suspension could turn into a constructive dismissal or be regarded as one because of its length or because of an indefinite or excessive extension" (para. 71).

**89** The Court emphasized that its reasoning applied in the context of the *Civil Code of Québec* ("C.C.Q."), which includes the following reciprocal obligations: "The employer agrees to allow the employee to perform the work agreed upon, to pay the employee remuneration and to take any necessary measures to protect the employee's health, safety and dignity (art. 2087 C.C.Q.). The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly toward the employer (art. 2088 C.C.Q.)" (para. 29). The same reasoning cannot therefore be applied routinely to contracts in the common law context, as the same obligations do not exist at common law.

**90** That being said, in *Farber*, the leading authority on constructive dismissal and a case that originated in Quebec, Gonthier J. had noted, at para. 35, that the law of constructive dismissal in Quebec is similar to that of the rest of Canada: "Thus, although decisions from the common law provinces are not authoritative, it may be helpful to refer to them to see what types of changes the courts have considered substantial changes to an employment contract resulting in the termination

of that contract." Likewise, the principles underlying the Court's analysis of administrative suspensions in *Cabiakman* were drawn from a large body of arbitral jurisprudence that has influenced both common law and civil law employment norms. In that case, the Court referred, *inter alia*, to the Quebec case of *Sûreté du Québec et Association des policiers provinciaux du Québec*, [1991] T.A. 666, in which an arbitrator, citing *Fraternité des policiers de la Communauté urbaine de Montréal et Communauté urbaine de Montréal*, [1984] T.A. 668, at p. 671, in which another arbitrator, relying on D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (2nd ed. 1984), the leading Canadian authority on labour arbitration, had stated:

> ... in assessing the appropriateness of a suspension pending trial, rather than inquiring into the guilt or innocence of the accused employee, arbitrators will attempt to determine whether the effects of the alleged offence on the employment relationship are such that continuation of the employment pending the decisions of the competent authorities would create sufficient serious and immediate risk, contrary to the employer's legitimate interests, which encompass the employer's financial integrity, the safety and security of its property and of the other employees, and its reputation.
>
> (*Cabiakman*, at para. 66)

**91** In the common law provinces, as in Quebec, courts have begun to apply the principles discussed above in the context of non-unionized workplaces by imposing a basic requirement of business justification on an employer that suspends an employee for administrative reasons. In one case, *Reininger v. Unique Personnel Canada Inc.* (2002), 21 C.C.E.L. (3d) 278 (Ont. S.C.J.), a truck driver was suspended without pay for a 90-day period during which his driver's licence was to be suspended and then until after his trial on criminal charges. After finding that an authority to suspend was implied in the contract on the basis of company policy and practices, as well as other factors (paras. 17-20), Howden J. inquired into whether the suspension was reasonable or justified. Finding that no framework had yet been developed by common law courts, he drew factors from arbitral jurisprudence on the same question, and in particular from a test adopted in *Re Ontario Jockey Club and Mutuel Employees' Association, Service Employees' International Union, Local 528* (1977), 17 L.A.C. (2d) 176 (Ont.), and adapted them to the case before him. He synthesized these factors as follows (*Reininger*, at para. 42):

> 1) The onus is on the employer to demonstrate to the court on a civil standard of proof that a reasonably serious and immediate risk to the employer's legitimate interests exists. The employer must establish that the nature of the charge is such as to be potentially harmful to the employer's reputation or product, or that it will render the employee unable properly to perform his duties, or that it will have a harmful effect on its employees or customers.

2) The employer must show that it made a genuine attempt to assess the risk of continuing employment, including making its own investigation or inquiry. The fact that the police have investigated the matter and have acquired the evidence to lay the charge significantly lessens the burden of investigation on the employer.
3) The employer must also show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.
4) There is a continuing onus on the employer during a period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances that may come to its attention.

**92** On the facts of the case before him, Howden J. found that the suspension without pay was justified for the 90-day period during which the employee's driver's licence was suspended and no other position was available. However, he considered it unreasonable for the employer to have imposed a further suspension pending the outcome of the employee's criminal trial.

**93** Although the tests from *Reininger* and *Cabiakman* were developed in the contexts of different legal systems, they both incorporate principles from the collective bargaining context and are, as a result, quite similar. For the determination of whether a suspension is justified, both tests focus on the need for legitimate business reasons, good faith and a minimal impact in terms of duration. (Incidentally, the test from *Reininger*, unlike the one from *Cabiakman*, does not address the requirement that the employee be paid, given that in the former case, the issue was analyzed through the lens of a disciplinary suspension, which means that it was assumed that the employee would not be paid.)

**94** As I mentioned above, the test relied on by the Court of Appeal in the instant case was taken from *Devlin*. In that case, the employee, the president and CEO of a company, had been suspended by a newly elected slate of directors who were dissatisfied with his management record. Silverman J., citing *Pierce v. Canada Trust Realtor* (1986), 11 C.C.E.L. 64 (Ont. H.C.J.), and *MacKay v. Avco Financial Services Canada Ltd.* (1996), 146 Nfld. & P.E.I.R. 353 (P.E.I.S.C. (T.D.)), set out the following list of factors -- reproduced here once again for ease of reference -- to consider in determining whether a suspension of an employee amounts to a constructive dismissal (para. 50):

1. the duration of the suspension;
2. whether someone was appointed to replace the suspended employee;
3. whether the employee was asked for his or her keys;
4. whether the employee continued to be paid and receive benefits;
5. whether there is evidence that the employer intended to terminate the employee at that time; and
6. whether the employer suspended the employee in good faith, for example, for

*bona fide* business reasons.

The court also noted, citing *Carscallen*, at para. 34, that a suspension with pay is less likely to be found to amount to a constructive dismissal than one without pay (*Devlin*, at para. 51).

**95** Although *Devlin* did not involve a suspension pending the resolution of criminal charges, these factors, like the ones considered in *Cabiakman* and in *Reininger*, focus on a need for legitimate business reasons, good faith, and minimization of the duration of the suspension. As in *Cabiakman*, the *Devlin* factors also emphasize the importance of the employee's being paid during the suspension period. In my view, the additional factors in the test from *Devlin* are consistent with the approach taken in *Cabiakman* and *Reininger*, and they help answer the fundamental question whether the suspension was reasonable and justified.

**96** For instance, the appointment of a replacement would suggest that the suspension was not temporary and would rule out certain possible business reasons, such as a shortage of work. Requiring that the employee turn in his or her keys would suggest a degree of permanence to the change and would indicate that the reasons for suspension were more likely related to the employee's conduct than to extrinsic business concerns.

(f) *The Commission Has Failed to Establish That the Suspension Was Reasonable or Justified*

**97** I do not find it necessary to articulate a rigid framework for determining whether a particular administrative suspension is wrongful. The approach to be taken and the factors to be considered will depend on the nature and circumstances of the suspension. The overriding question will be whether the suspension was reasonable and justified. That said, it is clear from the above discussion that certain factors, while they may not be necessary, will always be relevant. These factors include the duration of the suspension, whether the suspension is with pay, and good faith on the employer's part, including the demonstration of legitimate business reasons.

**98** In my view, legitimate business reasons constitute a requirement for a finding that an administrative suspension based on an implied authority to suspend is not wrongful. Other than in the context of a disciplinary suspension, an employer does not, as a matter of law, have an implied authority to suspend an employee without such reasons. Legitimate business reasons must always be shown, although the nature or the importance of those reasons will vary with the circumstances of the suspension.

**99** In the instant case, this basic requirement was not met. To begin with, Mr. Potter was given no reasons for the suspension. It seems to me that, in most circumstances, an administrative suspension cannot be found to be justified in the absence of a basic level of communication with the employee. At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright: *Bhasin v. Hrynew*, 2014 SCC 71, at para. 66. Failing to give an employee any reason whatsoever for his suspension is, in my opinion, not being forthright.

Moreover, the limited evidence presented in support of the Board's ostensible purpose of facilitating a buyout is undercut by the actions the Board took to have Mr. Potter terminated. As I mentioned above, the Board's resolution of January 5, 2010 and the January 11, 2010 letter to the Minister in which the Board recommended that Mr. Potter be terminated ought to have been admitted at this stage of the analysis. With respect, this constituted a significant error on the trial judge's part. Add to this the facts that Mr. Potter was replaced during the suspension period and that that period was indefinite, and there remains no doubt in my mind that the suspension was unauthorized. To reiterate, which factors must be considered will vary with the context and will depend on the nature and circumstances of the suspension.

**100** The Court of Appeal applied the *Devlin* factors in upholding the trial judge's decision. I find that, in doing so, it overemphasized the fact that the suspension was with pay, underemphasized the absence of legitimate business reasons and disregarded the evidence of the Board's intention to terminate Mr. Potter. Even where an administrative suspension is with pay, an employer must still meet the basic requirement of a good faith business justification: see *Cabiakman*, at para. 71. The Commission had not shown that the suspension in this case was reasonable and justified.

**101** I would stress that, on the evidence, it cannot be said that Mr. Potter acquiesced in this change. Even if Mr. Potter was interested in a buyout, that interest can in no way be taken as consent to his suspension, nor can it be prejudicial to his position in his action, as the trial judge seemed to imply. In my opinion, Mr. Potter simply did what most employees would do if their employer raises the possibility of a buyout: listen to the offer and, depending on its terms, consider accepting it.

**102** I wish to go back for a moment to situate the analysis within the framework of the test for constructive dismissal. The fact that the suspension was unauthorized establishes that a breach of the employment contract has occurred. Because the Board has failed to establish that the suspension was reasonable or justified, it cannot argue that it was acting pursuant to an implied term of the contract, which means that the suspension constituted a unilateral act. Mr. Potter has accordingly discharged his burden at the first step of the analysis. As I explained above, whether a breach has occurred must be determined objectively, and what a reasonable person in the employee's circumstances would have known or ought to have foreseen is not relevant at this step.

**103** As I also explained above, in a constructive dismissal case involving an administrative suspension, the burden shifts to the employer to show that the suspension was reasonable. With respect, the trial judge therefore erred in placing the burden on Mr. Potter to show that it was unreasonable. And he also erred in conflating the first and second steps of the constructive dismissal analysis and in restricting evidence of the existence of the breach to what Mr. Potter knew or ought reasonably to have foreseen at the time of the unilateral act.

(4) <u>The Unauthorized Suspension Amounts to Constructive Dismissal</u>

**104** Having established that the suspension was unauthorized and therefore amounted to a breach

of the employment contract, Mr. Potter must also satisfy the criteria of the second step of the first branch of the test for constructive dismissal. As I mentioned above, what must be determined at this step is whether at the time of the suspension, "a reasonable person in the same situation as [Mr. Potter] would have felt that the essential terms of the employment contract were being substantially changed" (*Farber*, at para. 26). It is at this stage of the analysis that the fact that Mr. Potter neither knew about nor could reasonably have been expected to know about the letter recommending the termination of his employment becomes relevant and that that letter must accordingly be excluded. As I will explain below, however, the exclusion of the letter does not affect the outcome of the analysis.

**105** It was reasonable for Mr. Potter to perceive the unauthorized unilateral suspension as a substantial change to the contract. As far as he knew, he was being indefinitely suspended and had been given no reason for the suspension. The letter to Mr. Potter stated that the suspension was to continue "until further direction from the Commission". When Mr. Potter had his lawyer write to request clarification of the Board's instructions, the Board persisted in its silence regarding the reason and simply stated that he "is not to return to work until further notice". In my opinion, that is sufficient to discharge Mr. Potter's burden here. Knowledge of the reasons given by the Commission at trial should not be imputed to Mr. Potter as of the time of the suspension.

**106** I would suggest that in most cases in which a breach of an employment contract results from an unauthorized administrative suspension, a finding that the suspension amounted to a substantial change is inevitable. If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract. Any exception to this rule would likely arise only if the unauthorized suspension was of particularly short duration.

B. *Repudiation by the Employee*

**107** Because I have concluded that Mr. Potter was constructively dismissed, the question whether the bringing of his action for constructive dismissal amounted to a resignation does not arise. The contract had already been repudiated by the Board. Although the courts below both ruled on this issue and submissions were made on it in this Court, it would in my view be inadvisable to reach any conclusions with respect to the resignation of an employee in the absence of circumstances requiring me to address the issue.

**108** I would note, however, that in many failed constructive dismissal cases, the reason why the question of resignation by the employee does not arise will be that it is clear that the employee has resigned, given that, after the employer acted unilaterally to, for instance, demote the employee or transfer him or her to a new position, the employee elected to quit work and sue the employer. In this typical situation, if the constructive dismissal action fails, the employee cannot then argue that he or she did not quit work.

**109** Nevertheless, there are instances in which it will not be necessary to conclude that the employee has resigned in bringing the constructive dismissal suit. One such case would be where, following the changes to the contract, the employee has continued to work under protest. This Court has held that employees have a duty to mitigate their damages by remaining in the workplace, provided that doing so would not be objectively unreasonable: see, e.g., *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661. Where the employment relationship has not become untenable, it is not evident that by commencing legal action the employee should be held to have resigned by operation of law.

**110** In the case at bar, the unilateral change by the employer was an indefinite suspension with pay. After the suspension had continued for approximately eight weeks, Mr. Potter sued for damages for constructive dismissal. He did not, as has happened in other cases, clearly *resign*, given that he had already stopped performing his duties while continuing to be paid and that, in his view, the fact that he continued to "work" -- i.e. that he remained on suspension with pay -- was consistent with the position he was taking in his constructive dismissal action. The Board of course viewed Mr. Potter's action as a resignation and promptly cut his salary and benefits. Were I to uphold the trial judge's decision that Mr. Potter was not constructively dismissed, I would then have to determine whether Mr. Potter resigned when he commenced his action for constructive dismissal, or was wrongfully terminated by the Board when it cut his salary and benefits.

**111** The courts below took the view -- as does the Commission -- that a resignation had been effected by operation of law. In *Suleman*, for example, an employee whose workload had been reduced had failed to make out a case of constructive dismissal and was found to have repudiated her contract "by the position she took in her statement of claim" (p. 144; Court of Appeal reasons, at para. 99). This view certainly finds support in the traditional principles of the law applicable to constructive dismissal, and I have no doubt that the employee will be found to have resigned in the majority of failed constructive dismissal cases. However, I will leave open the question whether there are factual circumstances in which an employee whose constructive dismissal action is unsuccessful might nevertheless argue that he or she did not resign.

### C. *Deduction of Pension Benefits*

**112** I will now turn to the question whether the pension benefits Mr. Potter received should be deducted from his damages. According to the Board's resolution dated December 12, 2005 that established the terms and conditions of Mr. Potter's appointment, the Public Service Superannuation pension plan applied to him (Court of Appeal reasons, at para. 14). The plan in question is governed by the *Public Service Superannuation Act*. It is a contributory plan and is not intended to provide compensation to a contributor who has been wrongfully dismissed. The resolution also provided that Mr. Potter was entitled to a regular retirement allowance and a special retirement allowance, both of them equivalent to 25 weeks' pay.

**113** Section 16 of the *Public Service Superannuation Act* read as follows:

> **16** Where a contributor in receipt of an immediate pension or an annual allowance under this Act, the *Superannuation Act*, the *Teachers' Act* or the *Teachers' Pension Act* becomes employed in full time employment in the Public Service, his or her entitlement to such immediate pension or annual allowance is to be suspended effective the date of his or her appointment and if he or she becomes a contributor under this Act, the period of such re-employment is to be additional pensionable service for the purposes of this Act.
>
> (See also the French version.)

**114** In this Court, Mr. Potter submits that the trial judge should not have deducted amounts received under the pension plan from the damages to be awarded. He relies on this Court's decision in *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, arguing that payments received under a defined benefit pension plan should not be used to reduce damages payable for wrongful dismissal. Mr. Potter argues that s. 16 of the *Public Service Superannuation Act* should apply only to employees in receipt of pension benefits who return to employment in the public service and that it does not apply in a wrongful dismissal case.

**115** The Commission contends that the trial judge was right to deduct the amounts Mr. Potter had received under his pension plan. In its view, s. 16 of the *Public Service Superannuation Act* is intended to prevent employees, regardless of the circumstances, from collecting pension benefits at the same time as they are receiving a salary, and thus falls within the exception to the common law rule from *Waterman* that I will discuss below.

**116** This Court must decide whether, in accordance with its decision in *Waterman*, Mr. Potter's receipt of pension benefits should result in a reduction of the damages awarded to him. If the answer to this first question is no, the Court must decide whether s. 16 of the *Public Service Superannuation Act* precludes Mr. Potter from collecting pension benefits in addition to his damages for wrongful termination.

(1) <u>Does the Compensation Principle Require That the Pension Benefits Be Deducted From Mr. Potter's Damages?</u>

**117** First of all, I recognize that the trial judge did not have the benefit of this Court's decision in *Waterman* when he decided to deduct Mr. Potter's pension benefits from the award of damages. That case is central to our decision in the case at bar.

**118** In *Waterman*, Cromwell J. wrote that "[t]he general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract" (para. 2). However, there are exceptions to this rule. One of them is the private insurance exception, which concerns, *inter alia*, "pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered" (para.

16). Such benefits should generally not be deducted from damages awarded for breach of contract.

**119** In *Waterman*, as in the case at bar, the question was whether pension benefits received by the plaintiff should be deducted from damages that had been awarded to him. There was a clear compensating advantage, as the plaintiff had received both his full pension benefits and the salary he would have earned had he worked. In addition, there was a "but for" causal link between the defendant's breach and the plaintiff's receipt of pension benefits: by wrongfully dismissing the plaintiff, the defendant had obliged him to claim those benefits.

**120** After carefully reviewing the jurisprudence of this Court and of other common law jurisdictions on the deduction of private insurance benefits from damages, Cromwell J. formulated some general propositions to help in determining whether such benefits should be deducted in a given case:

> * Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit ... .
> * Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit ... .
> * Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit ... . [Emphasis in original.]
>
> (*Waterman*, at para. 56)

**121** Had the trial judge in the instant case had the benefit of *Waterman*, he would have concluded that Mr. Potter's pension benefits should not be deducted from the damages awarded to him as a consequence of his employer's breach. As I mentioned above, those benefits were not intended to compensate Mr. Potter in the event of his being wrongfully dismissed. The pension plan was a contributory plan. For the foregoing reasons, on the basis of the private insurance exception from *Waterman*, the pension benefits received by Mr. Potter should not be deducted from the damages to which he is entitled.

(2) Does Section 16 of the *Public Service Superannuation Act* Displace the Private Insurance Exception and Require That the Pension Benefits Be Deducted?

**122** Having concluded that the pension benefits should not be deducted from the damages to be awarded to Mr. Potter on the basis of the exception to the common law rule from *Waterman*, I must now inquire into whether s. 16 of the *Public Service Superannuation Act* displaces the private insurance exception and precludes Mr. Potter from collecting both his pension benefits and the

equivalent of his salary. The Commission argues that s. 16 precludes the application of *Waterman*. Mr. Potter contends that this section is intended for situations in which a former employee who is receiving pension benefits returns to employment in the public service and that it therefore neither applies to wrongful dismissal cases nor precludes Mr. Potter from collecting both the full damages amount and his pension benefits.

**123** I agree with Mr. Potter. Section 16 of the *Public Service Superannuation Act* does not require that the pension benefits received by Mr. Potter be deducted from the damages to which he is entitled as a result of his wrongful dismissal. This section applies to a "contributor in receipt of an immediate pension or an annual allowance" on being appointed to employment in the public service. It therefore prevents a retired employee who returns to employment in the public service from collecting pension benefits while at the same time receiving a salary as an employee. Section 16 does not establish a general bar on the receipt of both a pension entitlement and employment income. More specifically, it does not apply to an employee who has been wrongfully dismissed and is entitled to receive damages as a result of that wrongful dismissal.

**124** The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1. Furthermore, Iacobucci J., in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, wrote the following about situations in which it is argued that a statutory provision overrides a common law rule:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

**125** The ordinary meaning of the words of s. 16 does not support the assertion that the New Brunswick legislature intended to preclude the rule in *Waterman*. On the contrary, it supports Mr. Potter's position that the section applies to the situation of a retired employee who returns to employment in the public service. It applies to "a contributor in receipt of an immediate pension or an annual allowance [who] becomes employed in full time employment in the Public Service" or, in the French version of the section, "*un cotisant qui reçoit une pension à jouissance immédiate ou une allocation annuelle [et qui] est affecté à un poste à plein temps dans les services publics*". Further,

pension benefits are suspended as of "the date of his or her appointment", or the "*jour de sa nomination*" in the French version. The Commission's position could succeed only if the circumstance in which the section applies -- where the contributor "becomes employed" and as of "the date of his or her appointment" -- were disregarded. According to the *Concise Oxford English Dictionary* (12th ed. 2011), "appointment" means "the action or process of appointing someone", while "appoint" means "assign a job or a role to" (p. 63). *Le Petit Robert* dictionary (new ed. 2012) defines "*nomination*" as "*[a]ction de nommer (qqn) à un emploi, à une fonction, à une dignité*" (p. 1699) ([TRANSLATION] "action of appointing (someone) to a job, position or office").

**126** Section 16 of the *Public Service Superannuation Act* does not therefore apply to an employee who has been wrongfully dismissed and was obliged to claim pension benefits as a consequence of the breach of the employment contract. Where a court decides that a wrongfully dismissed employee is entitled to damages, he or she does not "becom[e] employed in full time employment in the Public Service" at the time of the breach. It would be wrong to equate such a decision to an "appointment" or a "*nomination*". The court is simply finding that the employee *should* have continued to be employed by the employer and that he or she is entitled to damages.

**127** As for the context of s. 16, there is nothing in the *Public Service Superannuation Act* to suggest an intention to preclude the receipt of pension benefits in the circumstances covered by the rule from *Waterman*. Nowhere does that Act say that pension benefits should be deducted from damages awarded to wrongfully dismissed employees. And at no time in the legislative debate leading up to the enactment of s. 16 was it suggested that the section was to apply where an employee is wrongfully dismissed (*Synoptic Report: Legislative Assembly of the Province of New Brunswick*, June 16, 1966, at pp. 1235-54). Moreover, s. 16 has not changed significantly since being enacted in 1966 (S.N.B. 1966, c. 23), when it read as follows:

> 16. Where a contributor in receipt of an immediate pension or an annual allowance under this Act, the *Superannuation Act*, the *Teachers' Act* or the *Teachers' Pension Act* (1966) becomes employed in full time employment in the Public Service, his entitlement to such immediate pension or annual allowance is to be suspended effective the date of his appointment and if he becomes, or would have become but for the provisions of subsection (2) of section 4, a contributor under this Act, the period of such re-employment is to be additional pensionable service for the purposes of this Act.

**128** I therefore conclude that s. 16 of the *Public Service Superannuation Act* does not override the rule from *Waterman* and does not preclude Mr. Potter from collecting both the equivalent of his salary and his pension benefits.

## V. Conclusion

**129** I would answer the questions raised by the appeal as follows:

(1) Did the trial judge err in concluding that Mr. Potter was not constructively dismissed?

Yes.

(2) If Mr. Potter was not constructively dismissed, did the trial judge err in concluding that Mr. Potter resigned when he launched his action in damages?

It is unnecessary to answer this question.

(3) If Mr. Potter was constructively dismissed, did the trial judge err in finding that the amounts Mr. Potter received under his pension should be deducted from his damages for wrongful dismissal?

Yes.

## VI. Disposition

**130** I would allow the appeal with costs throughout, set aside the Court of Appeal's judgment and allow Mr. Potter's action for constructive dismissal. Mr. Potter is entitled to damages for wrongful dismissal as assessed by the trial judge, with the exception that the pension benefits Mr. Potter has already received are not to be deducted from those damages.

The reasons of McLachlin C.J. and Cromwell J. were delivered by

CROMWELL J. (Concurring reasons):--

## I. Introduction

**131** I agree with the disposition of this appeal proposed by my colleague Wagner J. My understanding of the legal principles that apply to this case is somewhat different from my colleague's and there are some issues which he discusses on which I prefer not to comment. I therefore will briefly set out my reasons for thinking that the appeal should be allowed.

**132** My colleague's thorough and careful recitation of the facts and judicial history has saved me from having to set out this background. The key facts for my purposes are these.

**133** Mr. Potter was employed for a fixed term of seven years which expired on December 12, 2012. The intent was to provide him with a term of employment that would take him to retirement: trial reasons, 2011 NBQB 296, 384 N.B.R. (2d) 14, at para. 71. Some difficulties in Mr. Potter's relationship with his employer developed and by the spring of 2009, the New Brunswick Legal Aid Services Commission initiated discussions with him with the objective of obtaining a "buyout" of the remaining term. Mr. Potter had shown himself open to discuss this approach.

**134** Beginning in October 2009, Mr. Potter was on approved sick leave which was ultimately extended to January 18, 2010. As Mr. Potter's January date of return to work approached, the ongoing discussions about a buyout had not borne fruit. Early in January (January 5, 2010), and unbeknownst to him, the Commission's Board of Directors acted to bring things to a head. The Board passed a resolution directing the Board's Chair to request of the Minister of Justice that Mr. Potter's appointment be revoked for cause if the Commission's counsel was not able to negotiate a resolution by January 11th that would bring Mr. Potter's term to an end in exchange for no more than 18 months' salary including his retirement allowance: Court of Appeal reasons, 2013 NBCA 27, 402 N.B.R. (2d) 41, at para. 32. Under the terms of his appointment, Mr. Potter at that point had just short of three years left on his term appointment and at the end of his term he became entitled to a retirement allowance of 25 weeks' pay as well as a special retirement allowance of 25 weeks' pay: trial reasons, at para. 8.

**135** There was no agreement between the parties with respect to the buyout and so, on January 11th, the Board followed the course of action set out in its January 5th resolution. The Chair wrote to the Minister of Justice recommending that Mr. Potter's employment be terminated for cause. On the same date, the Commission's counsel wrote to Mr. Potter's counsel instructing that Mr. Potter was not to return to the workplace until further direction from the Commission and that he would continue to be paid "until instructed otherwise". As noted earlier, Mr. Potter had been set to return to work from his approved sick leave on January 18th. Mr. Potter's counsel sought clarification as to whether Mr. Potter had been suspended. The Commission's counsel responded by expressing surprise that there was any confusion and indicating simply that "[h]e is not to return to work until further notice".

**136** Two months later, Mr. Potter started an action for wrongful dismissal. On these facts, the trial judge concluded that Mr. Potter had not been constructively dismissed and that conclusion was upheld by the Court of Appeal.

**137** The main issue on the further appeal to this Court is whether the trial judge made a reviewable error in finding that these facts did not constitute a constructive dismissal of Mr. Potter. To approach this question, we must apply the well-accepted standards of appellate review: errors of law are reviewed for correctness while errors of fact and errors of mixed law and fact, unless tainted by a legal error, are reviewed for palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

## II. Analysis

### A. *Introduction*

**138** In my respectful opinion, the trial judge and the Court of Appeal made two related errors of law in their analysis of whether the Commission had repudiated Mr. Potter's contract of employment and thereby "constructively" dismissed him.

**139** First, the trial judge failed to recognize that an employer can repudiate a contract of employment other than by breaching an important term of that contract, such as by unilaterally changing one or more of its important terms. Repudiation may also consist of conduct which, when viewed in light of all of the circumstances, shows that, in the mind of a reasonable person viewing the matter objectively, the employer did not intend to be bound in the future by the terms of the contract. As a result of failing to recognize this, the trial judge erroneously focused only on the employer's suspension of Mr. Potter with pay and asked whether that constituted a sufficiently serious breach of contract to constitute repudiation and therefore constructive dismissal. Even if the suspension was not a sufficiently serious breach on its own to constitute repudiation, the trial judge had to consider whether, viewed in light of all of the circumstances, the employer's conduct evinced the intention not to be bound by the terms of the contract in the future.

**140** I do not find it necessary to decide whether Mr. Potter's contract of employment permitted his employer to suspend him indefinitely with pay. Even assuming that it did, the suspension in this case, viewed as it must be in light of all of the surrounding circumstances and the correct legal principles, showed that his employer did not intend to be bound in the future by essential terms of the contract of employment. In short, the trial judge's legal error led him into a palpable and overriding error of mixed law and fact.

**141** The judge further erred, in my view, by excluding from consideration the fact, unknown to Mr. Potter at the time, that the employer was seeking to have him dismissed for cause. The Court of Appeal assumed without deciding that this was an error, but found that if it was, such error was harmless. In my respectful view, this was one of the surrounding circumstances which the judge was obliged to consider in deciding whether the suspension, viewed in light of all of the circumstances, evinced the employer's intention not to be bound by the contract of employment.

### B. *First Error: Anticipatory Repudiation Must Be Assessed in Light of All of the Circumstances*

**142** To explain why I think the trial judge erred in his approach to the constructive dismissal issue, I have found it helpful to take a step back from the details of wrongful dismissal law and to put the analysis in the broader context of the underlying, general principles of contract law. In doing this, I am following the approach taken in what the Court has characterized as the leading case in this field, *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 33.

(1) Repudiation, Anticipatory Breach and Constructive Dismissal

**143** The whole of the law of wrongful dismissal is grounded in the broader contract law principles relating to repudiation and anticipatory breach: see, e.g., G. England, *Individual Employment Law* (2nd ed. 2008), at pp. 346-47.

**144** The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

**145** There is a wealth of learning about the types of breach that constitute repudiation. Without getting into the details, we may say in brief that a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para 590; McCamus, at pp. 676-77.

**146** I pause here to deal with three problems of terminology that can cause confusion.

**147** The first relates to the word "repudiation"; it is used in at least two different senses. Sometimes it refers to the conduct of the breaching party in committing a breach that is sufficiently serious to give the non-breaching party the right to treat the contract as over. At other times the term is used to refer to the choice of the non-breaching party, faced with this sort of serious breach, to treat the contract as over. I will use the word "repudiation" to refer to the acts of the party alleged to be in breach. I will refer to the choice of the non-breaching party to treat the contract as over as "acceptance" of the repudiation.

**148** The second terminological clarification deals with the term "fundamental breach". The types of breach that are sufficiently serious to constitute repudiation are often referred to as "fundamental" breaches. However, use of the term "fundamental breach" can cause confusion because it is also used in the distinct context of deciding whether a contractual provision excluding or limiting liability is effective in the face of a radical departure from the contractual obligations: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104-23. To avoid that confusion, I prefer to refer to breaches of this nature as breaches of "sufficiently important terms" or "repudiatory" breaches: see, e.g., McCamus, at p. 651.

**149** The final point of terminology is concerned with "anticipatory" breach. An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": McCamus,

at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at s. 7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

**150** How do these general contract principles play out in wrongful dismissal cases?

**151** The most straightforward case is one in which the employer expressly dismisses the employee in breach of the contract of employment. This is an express, anticipatory repudiation: the employer states expressly that he or she will not observe the terms of the employment contract in the future. As McCardie J. put it in *Rubel Bronze*, "in the ordinary case of wrongful dismissal a master purports completely to terminate the contract. He refuses to accept further service. He wholly declines to pay further remuneration. The repudiation, as a rule, is undoubted, decisive, and complete": p. 321. The employer's express and complete repudiation of the contract in the future gives rise to the employee's right to treat the contract as over at that point and to sue for damages for its breach.

**152** More complicated are cases of so-called "constructive" dismissal in which there is no express repudiation by the employer. As my colleague points out, the employer's acts are treated as a dismissal because of the way they are characterized by the law.

**153** Constructive dismissals may be the result of repudiatory breach -- that is, an actual breach of a condition or other sufficiently significant term of the employee's contract. As McCardie J. put it in *Rubel Bronze*, "If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract": p. 323. These sorts of breaches relate to unilateral and important changes to the employee's terms of employment; the question of how significant the change must be is one of degree: England, at pp. 348-56; *Rubel Bronze*, at p. 323.

**154** Constructive dismissal may also occur even if the employee cannot point to an actual, specific, important change in compensation, work assignments, etc., that on its own constitutes a repudiatory breach. This occurs, for example, where the employer, through a course of conduct, "evince[s] an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322, citing *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122, *per* Lord Collins, quoting *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at p. 213. The focus in these sorts of anticipatory repudiation cases is not simply on the seriousness of any actual breach, but on what the employer's intent is with respect to *future* adherence to the contract of employment.

**155** Thus, an employee is constructively dismissed in two situations: where the employer's conduct is "a significant breach going to the root of the contract of employment"and where the

employer's conduct otherwise "shows that the employer no longer intends to be bound by one or more of the essential terms of the contract": *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713 (C.A.) at p. 717.

**156** At least two factors have contributed to some lack of clarity in the law. There has been a blurring of the distinction between the two categories of repudiation which constitute "constructive" dismissal flowing from a lack of precision in describing the actual or future breach underlying them. For example, it is often said that a breach will be sufficiently significant to constitute repudiation if it is of such a nature as to show the intent of the breaching party not to be bound by the contract in the future. But this way of describing the breach risks confusing repudiation inferred from the importance of an actual breach of contract with anticipatory repudiation inferred from conduct which may or may not be a breach, but that nonetheless evinces the intention not to be bound by the contract, or at least by some of its important terms, in the future.

**157** Both of these problems are apparent in plausible readings of the discussion of the common law of unjust dismissal in *Farber*, a civil law case. In my view, we should take this opportunity to clarify these points. As I see it, these are the points that led in this case to the errors both at trial and in the Court of Appeal.

**158** The issue in *Farber* was whether unilateral changes made by the employer to the employment contract amounted to a constructive dismissal of the employee: para. 1. The employer eliminated the employee's position, but offered him a different position. *Farber* was therefore, in common law terms, a case about alleged repudiation by significant breach; the question was whether the employer's alleged breach of contract -- that is, the elimination of his position coupled with the offer of a new one -- was sufficiently important to constitute a repudiation of the contract by the employer. The Court referred to such a breach as a "fundamental breach" to signify "fundamental changes" to the contract in the sense that they were "substantial" changes to "essential" terms: see, e.g., para. 35. For the reasons that I have just discussed, I suggest that it would be more helpful in future to avoid the term "fundamental breach" in this context.

**159** *Farber*'s discussion of the common law is capable of being read as saying that there are not two categories of repudiation constituting constructive dismissal, but only one. Constructive dismissal only occurs when the employer commits what the Court referred to as a fundamental breach, or to use the language that I prefer, where the employer has committed a sufficiently significant breach: para. 33. On this reading of the decision the employer's conduct that is not a breach or is not a sufficiently significant breach cannot constitute constructive dismissal. However, I do not think that this is the correct interpretation of the common law discussion in *Farber*. It is well established in the common law that an employer may constructively dismiss an employee even though the employer's conduct which evinces an intention not to be bound by the contract in the future does not constitute a present breach of contract or, if there is a present breach, is not sufficiently important to constitute repudiation on its own.

**160** Two judgments of the Ontario Court of Appeal have addressed this point and provided useful clarification with which I respectfully agree.

**161** In *Stolze v. Addario* (1997), 36 O.R. (3d) 323 (C.A.), at p. 326, the Court of Appeal, relying on *Farber*, stated the common law test for constructive dismissal as follows: "The court must ... consider whether the act or acts of the employer have been such as to constitute a repudiation of the fundamental terms of the contract" (emphasis added). I agree with this statement of the law which leaves in place both of the categories of repudiation that I have discussed -- that is, repudiation by significant breach and anticipatory repudiation.

**162** In *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44, the Court of Appeal rejected the employer's contention that constructive dismissal could be established *only* if the employer had unilaterally changed a fundamental term of the employment contract. The court held, instead, that even if there is no change to a specific term of the contract of employment, an employer will be found to have constructively dismissed an employee if it demonstrated an intention no longer to be bound by the contract in the future, such as, for example, by a course of conduct which made the employee's position intolerable: paras. 8 and 10. I agree that *Farber* does not stand for the proposition that constructive dismissal can be established only by actual breach of a fundamental term of the employment contract.

(2) The Trial Judge's Decision

**163** This brings me to what in my view was the first of the trial judge's errors which the Court of Appeal failed to correct. The trial judge framed the issue as being "whether or not the Commission breached the terms of [Mr. Potter's] employment contract by removing from him all the duties and powers of the [Executive Director] for an indefinite period of time": para. 34. The judge held that "the Commission did not do or say anything that would lead an objective observer to conclude that they had removed those duties from him permanently. On the contrary, the evidence supports a finding that the parties had been discussing what his future with the Commission would be and those discussions were not completed": para. 38. The Court of Appeal upheld this conclusion, focusing, as had the trial judge, on the question of whether the suspension with pay "substantially altered the essential terms of the employee's contract of employment": para. 83, citing *Farber*, at para. 26.

**164** In my respectful view, the approach followed by the trial judge and affirmed by the Court of Appeal was based on a legal error. This error resulted from failing to recognize that constructive dismissal may be established not only on the basis of an actual important breach, but also by conduct which, in light of all of the circumstances, shows that the employer does not intend to be bound in the future by important terms of the contract of employment. It follows that in assessing whether the employer's conduct constituted a repudiation of the contract of employment, the court must not only consider the importance of any actual breach in isolation, but must also consider the impact of the employer's conduct, in light of the circumstances and viewed objectively, on a

reasonable person in the position of the employee. Consideration must be given not only to whether the suspension itself constituted a sufficiently serious breach of contract to constitute repudiation, but whether the suspension, viewed in light of all of the surrounding circumstances, constituted an anticipatory breach in the sense that the employer evinced the intention not to be bound by important terms of the contract in the future. As Lord Scarman put it in *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.*, [1980] 1 All E.R. 571 (H.L.), at p. 590, the trial judge and the Court of Appeal in this case were "concentrating too much attention on one act isolated from its surrounding circumstances and failing to pay proper regard to the impact of the party's conduct on the other party".

**165** What were the surrounding circumstances and what was their legal relevance? The suspension occurred in the context of the Commission wanting to "buy out" Mr. Potter's fixed term contract: trial reasons, at para. 43. As the trial judge put it, the Commission "made no secret that it wanted to negotiate a buy-out of Mr. Potter's contract": para. 40. The trial judge did not recognize that this intention to "buy out" Mr. Potter's contract was consistent only with the Commission's intention that Mr. Potter would leave his position before the end of his contractual term. The purpose of the buyout negotiations was to bring his contract of employment to an end through negotiation of a new contract on terms more favourable to the employer than Mr. Potter's existing fixed term of employment. Moreover, as the trial judge found, the Commission did not want Mr. Potter to return to the workplace to ensure "that nothing would occur that might complicate the settlement negotiations": para. 43. Once again, the trial judge failed to recognize that Mr. Potter's indefinite suspension in the context of the buyout negotiations further underlined the Commission's intention that Mr. Potter's employment would come to an end otherwise than in accordance with his existing contract of employment. The suspension was of indefinite duration: the letter from the Commission's counsel instructed that he not return to the workplace "until further direction". Moreover, the letter gave no assurance that the Commission would in the future feel itself bound by the remuneration and benefit provisions of the contract of employment. The letter simply indicated that Mr. Potter would continue to be paid "until instructed otherwise". The inescapable inference is that the Commission felt entitled to depart from the remuneration provisions of the contract at any time in the future.

**166** The surrounding circumstances therefore reveal the following: (i) the Commission wanted to bring Mr. Potter's employment to an end before the expiry of the term of his contract; (ii) the Commission wanted him to stay out of the workplace indefinitely; and (iii) the Commission provided no assurances that it would continue to honour the remuneration terms of his contract in the future. Had the trial judge taken these surrounding circumstances into account, as the relevant legal principles require, rather than focusing simply on how serious a breach of contract the suspension was, he would inevitably have concluded that the Commission had evinced a clear intention not to be bound in the future by important provisions of Mr. Potter's employment contract. As my colleague Wagner J. concludes, the Commission was not entitled to unilaterally impose a purported "administrative suspension" of this nature.

### C. *The Trial Judge's Second Error: Excluding Relevant Evidence*

**167** The trial judge's second error was to exclude from consideration the fact that on the same day the Commission counsel instructed Mr. Potter to stay out of the workplace indefinitely, the Chair of the Commission sent a letter to the Minister of Justice seeking to have Mr. Potter's appointment revoked for cause. The trial judge decided that he could only consider what Mr. Potter knew at the time he claimed to have been constructively dismissed because "he could hardly allege that he was constructively dismissed based on something the employer did unbeknownst to him": para. 36. The Court of Appeal, while conceding that this might have been an error, found that if it was, it was "wholly harmless": para. 94.

**168** While the law on this point is not as clear or as settled as one would wish, my view is that a non-breaching party claiming repudiation (i.e. Mr. Potter) is entitled to rely on grounds actually in existence at the time of the alleged repudiation but which were unknown to him at the time. I am also of the view that, contrary to the opinion of the Court of Appeal, the judge's exclusion of this letter from consideration was not a harmless error. The letter, understood in the context in which it was written, made it crystal clear that the Commission did not intend to be bound in the future by important provisions of his contract of employment.

#### Evidentiary Framework for Assessing the Employer's Intention

**169** Where the question is simply whether the employer's actual breach of the contract of employment was sufficiently serious to constitute a repudiation of the contract, the test is purely objective and is judged on the basis of what a reasonable person in the position of the other party would conclude. As held in *Farber*, the question of whether the employer has substantially altered the essential terms of the employee's contract is assessed by asking whether, at the time, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed: para. 26. It is not necessary for the employer to have intended to force the employee to leave and the employer's motives are not controlling: *Farber*, at para. 27; *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1979] A.C. 757 (H.L.). The relevant time is the time at which the employee had to decide whether to treat the employer's actions as a repudiation of the contract. As stated in *Farber*, "what is relevant is what was known by the [employee] at the time of the offer and what ought to have been foreseen by a reasonable person in the same situation. Evidence of events that occurred *ex post facto* is not relevant unless [those events] could reasonably have been foreseen": para. 42.

**170** These principles reflect common sense and justice as, otherwise, "a party in breach could remove the other's right to terminate by accompanying the substantial breach with an expression of hope that the contract would continue": Waddams, at para 595.

**171** These principles do not mean, however, that the breaching party's motives or subjective intention are irrelevant in all cases or that the other party is always restricted to relying on information of which that party was actually unaware at the relevant time. So, for example, where

the employee claims that the employer's course of conduct evinces an intention not to be bound in the future by the contract, the court must evaluate that conduct in light of all of the circumstances. In doing so, while the breaching party's motives as such are irrelevant, they may throw light on the way the alleged repudiatory conduct would be viewed by a reasonable person: see, e.g., *Eminence Property Developments Ltd. v. Heaney*, [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm.) 223, at para. 63; see also *Woodar*, at p. 574, *per* Lord Wilberforce. Moreover, a party alleging repudiation (in this case Mr. Potter) may rely on the other party's conduct up to the time he accepted the repudiation and sued for constructive dismissal, even if he was unaware of it at that time.

**172** This last point is the important one for the purposes of this case: the trial judge excluded from consideration the fact, unknown to Mr. Potter at the time, that the Commission on the very day that it suspended him, sought as well to put in motion the steps to have him dismissed for cause. Moreover, the Commission's counsel admitted on discovery that at the time of the suspension, the Commission had decided that Mr. Potter's use to the Commission had come to an end.

**173** To exclude this evidence from consideration, as I see it, would be to make the employee's right to claim constructive dismissal depend on whether the employer has succeeded in concealing his or her true state of mind: *Universal Cargo Carriers Corp. v. Citati*, [1957] 2 All E.R. 70 (Q.B.), at p. 91. Happily, the authorities do not support that unattractive position.

**174** Lord Sumner set out the relevant principle in *British and Beningtons, Ltd. v. North Western Cachar Tea Co.*, [1923] A.C. 48 (H.L.), at pp. 71-72:

> I do not think ... that a buyer, who has repudiated a contract for a given reasons which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is of course very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in futuro or dispenses the opposite party from performing his own obligations any further; but <u>I do not see how the fact, that the buyers have wrongly said "we treat this contract as being at an end, owing to your unreasonable delay in the performance of it" obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether</u>. [Emphasis added.]

**175** This principle was reiterated more recently in *Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce*, [1997] 4 All E.R. 514 (C.A.), at p. 526, where Evans L.J. cited with approval the rule set out in *Taylor v. Oakes, Roncoroni, and Co.* (1922), 127 L.T.

267 (C.A.), at p. 269, *per* Greer J.:

> It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not. [Emphasis added.]

**176** This principle must be qualified in certain situations, such as the case in which the ground advanced is one that, had it been advanced at the time, could have been corrected by the other party: see *Glencore*. But those sorts of qualifications of the principle are not relevant here. See also *Universal Cargo Carriers*, at p. 89; *Scandinavian Trading Co. A/B v. Zodiac Petroleum S.A.*, [1981] 1 Lloyd's Rep. 81 (Q.B.), at p. 90.

**177** This principle is the mirror image of the common law principle that (subject to contractual and procedural considerations) an employer who dismisses an employee for cause may generally rely on any cause that in fact existed at the time of dismissal even if the employer was not aware of it at that time: see, e.g., *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553, at pp. 563-64.

**178** I conclude that Mr. Potter, having accepted what he thought was the Commission's repudiation of his contract of employment, is entitled to rely on acts of the Commission up to that time which constituted evidence of repudiation even though he was not aware of those acts at that time he accepted the repudiation. The trial judge therefore erred in failing to take this into consideration in deciding whether Mr. Potter had been constructively dismissed.

**179** The Court of Appeal was of the view that if this was an error, it was a harmless one because the Commission did not think that it had the authority to dismiss Mr. Potter: para. 94. With respect, the Commission's belief about the question of its legal authority is beside the point. The question is whether a reasonable person, viewing all of the circumstances objectively, would conclude that the Commission had evinced an intention not to be bound by the contract of employment in the future. When its attempt to have Mr. Potter dismissed for cause is added to the other circumstances that I have reviewed above, the inescapable conclusion is that, as the Commission's counsel put it during discovery, the Commission had concluded that Mr. Potter's usefulness had come to an end. I agree with Mr. Potter when he argues that when the Commission suspended him indefinitely, it intended that he would never return to work and, I would add, it had no intention of paying him what his fixed term contract of employment required. If that does not evince a firm and clear intention on the part of the employer not to be bound in the future by the terms of his contract of employment, it is difficult for me to conceive of what would.

D. *Other Issues*

**180** I prefer not to address the common employer doctrine. Both parties accept that the Legal Aid Commission may be treated for all intents and purposes as Mr. Potter's employer.

**181** The Commission also argued that if Mr. Potter did not succeed in establishing constructive dismissal, he resigned by starting his action. Given my conclusion that he was constructively dismissed, I prefer not to address this additional and thorny question. Of course, under the general law, the non-breaching party faced with a repudiatory breach by the other party has a choice to either affirm the contract or to accept the repudiation and treat the contract as over. That principle of the general law of contract does not fit comfortably with contracts of employment given the obvious difficulty of an employee affirming the contract but suing for damages for its breach. The issue is further complicated by questions of mitigation. I would leave these questions for another day.

**182** The appellant submits that the pension benefits that he received should not be deducted from his damage award for wrongful dismissal. Our decision in *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, which was not available at the time of the trial or the appeal to the Court of Appeal, settles this point in favour of Mr. Potter.

III. Disposition

**183** I would allow the appeal with costs throughout as proposed by my colleague Wagner J.

*Appeal allowed with costs.*

**Solicitors:**

*Solicitors for the appellant: EJ Mockler Professional Corporation, Fredericton; Heenan Blaikie, Ottawa.*

*Solicitors for the respondent: Stewart McKelvey, Fredericton.*

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