

# “Never Having To Say You’re Sorry”: Are Canadian Punitive Damage Awards On The Rise?



Punitive damage awards in Canada appear to be on the rise, with a number of significant punitive damage amounts awarded of late.

## **Recent trend**

The following cases suggest a trend towards rising punitive damage awards:

- *Branco v American Home Assurance Co.*<sup>1</sup> Disability insurance case – **\$4.5 million** in punitive damages awarded at the Saskatchewan Queen’s Bench level (currently subject to appeal);
- *Fernandes v PennCorp Life Insurance Co.*<sup>2</sup> Disability insurance case – **\$200,000** in punitive damages awarded at the Ontario Superior Court level (currently subject to appeal, scheduled to be heard March 5, 2014);
- *Cinar Corporation v Robinson.*<sup>3</sup> Copyright infringement case – **\$500,000** in punitive damages awarded by the Supreme Court of Canada.

## **Pate Estate**

The recent Ontario Court of Appeal decision in *Pate Estate v Galway-Cavendish and Harvey (Township)*<sup>4</sup> appears to further substantiate this trend.

Mr. Pate was the township’s chief building official for almost 10 years when he was fired because of discrepancies with respect to building fees. The township turned some, but not all, information over to the police who reluctantly laid charges against Mr. Pate, but only after pressure from the township. At the criminal trial, Mr. Pate was acquitted of all charges.

Following his acquittal, Mr. Pate sued the township for wrongful dismissal, malicious prosecution and reputational injuries, and also sought punitive damages. The claim for wrongful dismissal succeeded and Mr. Pate received punitive damages of \$25,000 based on the township’s conduct, which the trial judge described as “reprehensible.”

In 2011, Mr. Pate successfully appealed the claim for malicious prosecution and the quantum of the punitive damage award. The Ontario Court of Appeal referred the matter back to the Superior Court, which increased the punitive damage award to \$550,000 and

found the township liable for malicious prosecution. The township appealed to the Court of Appeal in 2013.

The Ontario Court of Appeal upheld the finding of malicious prosecution, and substituted a punitive damage award of \$450,000, noting that it was a sum sufficient to satisfy the purpose of punitive damages (i.e., retribution, deterrence and denunciation). Although this punitive damage award constituted a reduction from the Superior Court amount, the decision is notable for its high punitive damage award rendered by an appellate court. It is also noteworthy that Lauwers J.A., writing for the dissent, would have maintained the higher \$550,000 award.

The decision in *Pate Estate* is appellate court confirmation of what appears to be a trend towards increased punitive damage awards.

## **Take-away**

Courts have wide discretion when imposing punitive damage awards. The modest punitive damage awards originally envisioned by the Supreme Court of Canada appear to be trending upward. Employers, insurers, and defendants generally should take note and be cognizant of this apparent trend in their dealings with opposing parties, both before and during litigation.

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## **Footnotes**

1 2013 SKQB 98.

2 2013 ONSC 1637.

3 Cinar Corporation v Robinson, 2013 SCC 73 [Cinar].

4 2013 ONCA 669 [*Pate Estate*]. This decision is not being appealed to the Supreme Court of Canada.

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