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Employment Law Meets Construction: ONCA's Guidance on Mitigation

Key Takeaway

The Ontario Court of Appeal recently clarified that the burden of proof for the defence of mitigation is not limited to proving the plaintiff's failure to take steps to mitigate. The defendant must also prove that mitigation opportunities were available and would have indeed mitigated the damage.

Williamson v Brandt Tractor Inc

The Ontario Court of Appeal's recent employment law decision in *Williamson v Brandt Tractor Inc*[1] provides important guidance with respect to the burden of proof when alleging a failure to mitigate damages generally. The employer, Brandt Tractor Inc ("**Brandt**") argued that its former employee, Williamson, should have sought a comparable sales position and that his damages should be reduced for failing to do so.[2] The Superior Court declined to reduce Williamson's entitlement, concluding no failure to mitigate.

Brandt appealed, arguing that the Superior Court erred because Williamson did not even attempt to find a comparable position. The Court of Appeal denied the appeal and held that Brandt had not established the failure to mitigate because it was insufficient for Brandt to prove that Williamson failed to pursue comparable employment. To establish a failure to mitigate, the Court of Appeal found that Brandt was also required to provide that such comparable employment was actually available.[3]

Application to Mitigation in Contractual Breaches

While *Williamson v Brandt* was decided in the employment law context, its findings extend beyond employment law and apply to the common law duty to mitigate damages in the event of a breach of contract. Consistent with a terminated employee, when anyone suffers losses from a breach of contract, they owe a common law duty to take reasonable steps to mitigate their damages. A plaintiff cannot sit idle and allow losses to accumulate. Losses that could have been avoided through reasonable action are not recoverable against the defendant but are said to be occasioned by the plaintiff's failure to act reasonably. The duty to mitigate is succinctly expressed by the Supreme Court of Canada in *Michaels v Red Deer College* as follows: "*In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation*."[4]

Of course, much mischief could ensue by the expansion of this common law duty as it effectively imposes an undefined obligation to mitigate. A party that suffers damage from breach of contract is given no specific roadmap as to what steps it must take to avoid a finding of a failure to mitigate. This mischief is guarded against by the Supreme Court of Canada's ruling that a plaintiff is not expected to take any step which a reasonable and prudent person would not ordinarily take in the course of business.[5] However, while the concept of "*what a reasonable and prudent person*" would do may be familiar to lawyers, it remains an undefined criteria leaving impacted

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[1] *Williamson v Brandt Tractor Inc*, 2026 ONCA 272 [*Williamson v Brandt*].
[2] *Williamson v Brandt Tractor Inc*, 2025 ONSC 2571.
[3] *Williamson v Brandt* at para 6.
[4] *Red Deer College v Michaels*, 1975 CanLII 15 (SCC) [*Red Deer*] at page 331.
[5] *Red Deer*.

parties in a challenging position. This is exemplified by the Supreme Court of Canada's 2012 decision clarifying that what is reasonable is a question of fact and depends upon the circumstances of each case.[6]

The Ontario Court of Appeal's recent decision in *Williamson v Brandt* assists plaintiffs by clarifying that it is insufficient for a defendant to prove that the plaintiff failed to take steps to mitigate, but that the burden of proof also requires the defendant to establish that mitigation was available and would have been achieved if reasonable steps were taken.[7]

Application to the Construction Context

The duty to mitigate is front and center in construction law contexts. Not only does the duty to mitigate damages at common law exist, but most construction contracts also contain a contractual obligation to mitigate, and indeed such contractual obligation is often drafted as a precondition to a contractor's entitlement to additional compensation from their client. As a result, construction disputes almost inevitably include questions of mitigation and there is an implied obligation on the plaintiff to prove that it took reasonable steps to mitigate.

Williamson v Brandt, however, provides important guidance by clarifying that the burden sitting with the defendant is substantial. It is not enough for a defendant to allege a failure to mitigate and expect the onus to shift to the plaintiff to prove that it made appropriate attempts to mitigate. Instead, before any burden shifts to the plaintiff, the defendant must prove not only that mitigation was available but that if the plaintiff had taken reasonable steps, mitigation would have been achieved.

For example, if a contractor on a lump sum contract is in default and the owner terminates the contractor for default and then sues for the incremental costs incurred to complete the project with another contractor, the defendant contractor will inevitably argue that the owner failed to mitigate. Consider a scenario where the owner sole-sourced a replacement contractor on a cost-plus-fee basis; surely the defendant contractor will argue that the owner ought to have gone out for competitive pricing and obtained a fixed price to complete the project and the fact that the owner did not even attempt to do so demonstrates a failure to mitigate.

On the face, the defendant contractor's argument is compelling. The defendant contractor had no control over the process or selection of the replacement contractor so why should the defendant contractor be beholden to the pay the costs of the owner's unilateral decisions? However, *Williamson v Brandt* changes the calculus and says that the owner's failure to go to competitive tender is only relevant if the defendant contractor can first prove that had the owner done so, it would have resulted in a lower cost.

The same mitigation principles arise in disputes involving defective work, where a defendant alleging failure to mitigate must establish that practical remediation opportunities existed that would have indeed mitigated the damages claimed.

In the construction context, it is often impracticable to prove that mitigation opportunities existed and would have resulted in mitigation of the damages claimed. This is so due to the high degree of complexity and unique nature of construction projects or the specific issues in question.

Of course, this does not mean that a plaintiff should not attempt to mitigate. Indeed they should and should document those steps. In fact, where a plaintiff considers mitigation options but ultimately elects not to pursue them, documenting the basis of that decision will likely be beneficial evidence for the plaintiff.

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[6] *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51.
[7] *Williamson v Brandt* at para 6.

But *Williamson v Brandt* shifts more onus onto defendants and, as a result, defendants should consider the practical steps they could take to improve their defence of mitigation. For example, if defendants believe mitigation opportunities exist, they should communicate those to the plaintiff in writing; which, in our view, might assist in shifting some of the burden to the plaintiff.

Certainly, defendants should be wary of allegations of the failure to mitigate without evidentiary support. Forcing litigation of the issue of mitigation could be a costly endeavor (particularly in complicated construction disputes) and therefore failing to establish the higher burden articulated by the court of appeal, could result in significant cost consequences.

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