

The \$5 Million Reprisal: Ontario Superior Court of Justice Interprets Securities Act Anti-Reprisal Provisions for the First Time

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October 15, 2025

Overview

In a recent decision, the Ontario Superior Court of Justice in *McPherson v. Global Growth Assets Inc.*¹ awarded a former executive \$5.37 million in damages under the Ontario *Securities Act* (the Act), finding that the termination of his employment was, at least in part, a reprisal for the executive raising concerns about potential breaches of securities laws.

This decision provides the first judicial interpretation of the anti-reprisal provisions which were first introduced in 2016 under Part XXI.2 of the Act.

The decision confirms that an employer will be found to be in breach of the Act's anti-reprisal provisions if they take any adverse action against an employee that is, in any way, motivated by the employee having engaged in a "protected activity" under the Act. In coming to this finding, the Court rejected the employer's attempts to point to the executive's performance concerns as a rationale for the termination and confirmed that were it necessary to do so, it would have concluded that the predominant reason for the termination of employment was because the employee engaged in protected activity.

In awarding damages, the Court applied the statutory remedy under the Act and awarded damages equal to double the income the executive would have earned from the time of his termination of his employment to the date of the decision, in this case exceeding \$5.3 million, without any obligation to mitigate.

Notably, the Court declined to award the executive additional damages for wrongful dismissal, aggravated damages, or punitive damages, finding that the statutory award for the reprisal more than compensated him for the effect of his wrongful dismissal.

This decision confirms that terminating an employee who has raised concerns with an employer's compliance with Ontario's securities laws is a significant risk that surpasses the typical exposure for damages arising from wrongful dismissal claims.

Background

In February 2019, the Chief Executive Officer and ultimate designated person (UDP) (the Plaintiff) of Global Growth Assets Inc. and Global RESP Corporation (together, Global) was terminated from his employment. The UDP is ultimately responsible for promoting a culture of regulatory compliance and overseeing the effectiveness of a company's compliance with Ontario securities laws. The Plaintiff challenged Global's decision to terminate his employment and alleged that the termination was, in part, motivated by his engagement in a protected activity under the Act.

Global was a seller of education savings plans and is regulated by the Ontario Securities Commission (OSC). In 2013, the OSC issued a notice of hearing alleging that Global, its then CEO and UDP Issam El-Bouji (Mr. Bouji) and others had violated Ontario securities laws. The parties entered into a settlement agreement in 2014 which provided for (among other things) Mr. Bouji's permanent suspension as Global's UDP. Global subsequently appointed a new CEO and UDP, who retired in 2017.

In 2017, Global's attempt to approve Mr. Bouji's daughter, Hanane Bouji (Ms. Bouji), as CEO and UDP was rejected by the OSC, which found her conduct to be "inconsistent with what is expected from an individual seeking to become a UDP" because of her failure to restrict her father's activities in order to ensure compliance with the terms of the 2014 settlement agreement.

In 2018, Global appointed the Plaintiff as CEO and UDP. In order to discharge his obligations as UDP, the Plaintiff determined that he needed full oversight of all compliance-related functions at Global, including having direct supervision of Ms. Bouji, who at the time controlled key departments at Global and was a director of the board.

In January 2019, Global's board of directors decided to remove Ms. Bouji's executive functions from the Plaintiff's oversight. Instead, Ms. Bouji was appointed as Global's Executive Chair, where she would report directly to the board (and not to the Plaintiff). In response to this structural change, the Plaintiff raised concerns to the board that removing Ms. Bouji from his oversight may lead to Mr. Bouji reinserting himself into Global's operations through his daughter in direct violation of the 2014 OSC settlement.

In mid-January of 2019, the Plaintiff requested confidential in-camera meetings with Global's independent board members to discuss his concerns about the reporting change. Rather than arrange the in-camera meetings, Global terminated the Plaintiff's employment, without cause, following which Mr. Bouji immediately returned to Global and "resumed behaving as he wished and doing so in the open".

The Anti-Reprisal Provisions Under the Act

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In coming to its decision that Global had in fact engaged in reprisal by terminating the Plaintiff's employment, the Court made a number of findings with respect to the proper statutory interpretation of the anti-reprisal provisions of the Act.

First, the Court considered the meaning of the word "because" in subsection 121.6(2) of the Act which prohibits reprisals against an individual *because* the individual has engaged in one of the "protected activities" listed in part (a) of subsection 121.6(2).

The defendants argued that the word "*because*" in the legislation should be read narrowly to mean the prohibition applies only to reprisals where an individual is terminated "solely" or "primarily" because they engaged in a "protected activity", and that, as long as they could articulate a legitimate non-retaliatory purpose for the termination, the employer's actions would not violate the Act.

The Court rejected this argument and instead applied a mixed-motive test for a finding of reprisal, namely that the prohibition on reprisal is breached if an employee's protected activity formed *any part* of the employer's decision to terminate the employee's employment. In other words, the Court confirmed that to defend against a reprisal allegation, the onus is on the employer to establish, on a balance of probabilities, that the employee's protected activity played *no role* in the decision to terminate their employment.

This finding aligns the anti-reprisal provisions of the Act with the accepted interpretations of the anti-reprisal provisions under section 74 of the Ontario *Employment Standards Act, 2000* and section 50 of Ontario's *Occupational Health and Safety Act*, which both apply the same mixed-motive standard.

Reasonable Belief

The Court further considered the meaning of "reasonably believes" in subsection 121.6(2) of the Act, which provides that an employee is only protected from reprisal if the employee provides, or expresses an intention to provide, information about an act that the employee "reasonably believes" is contrary to Ontario securities law.

In interpreting this provision, the Court found that given Global's history of non-compliance with securities laws, including the 2014 orders in which the OSC found that Ms. Bouji was "unwilling or unable" to prevent her father from interfering with the company's operations, the Plaintiff's belief that the new reporting structure violated Ontario securities laws was found to be objectively reasonable.

The Court also found that the Plaintiff repeatedly provided this information, or expressed his intention to provide this information, to Global in accordance with the Act.

Crucially, the board's reaction to the Plaintiff's complaints included a warning from one director to the

Cassels

Plaintiff stating: “don’t do anything you will regret,” which was construed by the Court as direct evidence of Global’s retaliatory intent against the Plaintiff’s discharge of his duties as UDP.

Global’s Evidence and Credibility Issues

The Court concluded that Global’s stated reason for the Plaintiff’s termination (poor performance) was merely pretext, relying on Global’s failure to produce key corporate records and credibility issues with its witnesses. In coming to this finding, the Court noted that Global did not produce board minutes for key decision-making meetings, including board minutes relating to the meeting in which the defendants claimed the decision to terminate the Plaintiff for performance reasons was made. The Court further found that the evidence of Global’s directors was not credible with respect to the timing of the termination decision due to inconsistent statements between the directors. On this basis the Court was satisfied that the decision was most likely made on February 20, 2019 directly following the Plaintiff’s final email reiterating his concerns as UDP.

A Significant Remedy

The Court awarded statutory damages totaling \$5,379,808.22, plus prejudgment interest, and confirmed that the statutory compensation remedy under the Act was designed to punish and deter, rather than merely to compensate. The Court further noted that the statute does not place any obligation on an employee to mitigate damages and, on that basis, declined to deduct any of the Plaintiff’s post-termination earnings from the award.

Finally, the Court adopted an expansive view of “remuneration,” stating that the Plaintiff’s entitlement to a discretionary bonus ought to be included in the award as its exclusion would “significantly undercompensate” him.

Displacement of Common Law Claims

The Court considered but ultimately dismissed all other claims for damages and found that that the statutory award fully compensated the Plaintiff for the effect of the wrongful termination, therefore dismissing the common law claim for wrongful dismissal damages.

Similarly, the Court dismissed the claims for aggravated and punitive damages, despite finding that the defendants had conducted themselves in a high-handed manner, including advancing a counterclaim for \$53.5 million (which was found to be a strategic lawsuit brought by the defendants and was struck as such).

The Court ultimately held that the magnitude of the double-remuneration penalty was sufficient punishment and deterrent, rendering it unnecessary to award additional and exemplary damages.

Key Takeaways

This decision is an important reminder for employers that terminating the employment of an employee who has raised a reasonable and genuinely held concern about the organization's compliance with securities laws can trigger substantial liability under the anti-reprisal provisions of the Act.

Similar to other statutory regimes that protect employees against retaliatory actions from an employer, to defend against a reprisal claim, the onus will be on the employer to prove that the reason for termination was completely unrelated to the employee having raised compliance concerns. Where the employee's protected activity under the Act is found to play *any* role in the decision to terminate their employment, the employer will be found to have engaged in an act of reprisal in breach of the Act.

¹ 2025 ONSC 5226.