IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dibble v. Creative Music Therapy Solutions Inc.,* 2024 BCSC 1066

Date: 20240619
Docket: S231074
Registry: Vancouver

Between:

Christine Dibble

Plaintiff

And:

Creative Music Therapy Solutions Inc.

Defendant

And:

Christine Dibble personally and dba "Music for Life"

Defendant by Counterclaim

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff:	G. Stratton S. Solsona
Counsel for the Defendant:	M. Pytlewski
Place and Dates of Trial:	Vancouver, B.C. April 8, 9, 10 and 12, 2024
Place and Date of Judgment:	Vancouver, B.C. June 19, 2024

Table of Contents

Introduction

[1] In this action, the plaintiff, Christine Dibble, seeks damages for wrongful dismissal against the defendant, Creative Music Therapy Solutions Inc. ("CMTS" or the "company"). CMTS denies that it had an employment relationship with Ms. Dibble, and has advanced a counterclaim against Ms. Dibble, alleging that Ms. Dibble breached non-competition and non-solicitation obligations owed to CMTS.

Background

[2] CMTS is a company in the business of providing music therapy services to individuals and groups at various facilities. It provides these services through accredited music therapists who provide music therapy services to CMTS' clients.

[3] Ms. Dibble is a music therapist who has a Bachelor's degree and a Master's degree in music therapy. She is also a professional musician. Since approximately 2010, Ms. Dibble has operated a business called "Music for Life", first as an incorporated sole proprietorship and later as a company. Ms. Dibble describes Music for Life as a "music therapy and music education company".

[4] In 2009 and 2010, Ms. Dibble reached out to CMTS seeking a music therapy position. On June 15, 2010, Ms. Dibble signed a written agreement entitled "Terms of Agreement" (the "Contract") and commenced work for CMTS in the role of "Music Therapist".

[5] Between 2010 and 2022, Ms. Dibble worked for CMTS under the Contract. There were other written agreements prepared during this period but none was signed. Neither party took the position that any of these other documents constituted a binding contract.

[6] On October 21, 2022, CMTS terminated the Contract pursuant to a written "Letter of Discipline/Termination" (the "Termination Letter").

[7] Ms. Dibble received no severance pay following the termination.

Issues

[8] This action gives rise to the following issues which will be addressed in turn below:

a) What was the legal nature of the working relationship between CMTS and Ms. Dibble?

b) Was Ms. Dibble wrongfully dismissed or was the Contract terminated for just cause?

c) If Ms. Dibble was wrongfully dismissed, what was the appropriate notice period?

d) What damages ought to be awarded to Ms. Dibble, and how should mitigation principles be applied?

e) Is Ms. Dibble entitled to aggravated or punitive damages?

f) Did Ms. Dibble owe non-competition or non-solicitation obligations to CMTS and, if so, did she breach these obligations?

Witnesses and Credibility

[9] The only witnesses who were called to testify at this trial were Ms. Dibble, on her own behalf, and Sandy Pelley, the owner and founder of CMTS, on behalf of the company.

[10] At various points during their testimonies, both witnesses were argumentative and sought to persuade the Court of their positions rather than simply recounting the facts. However, those occasions were relatively rare and, overall, I found both to be reasonably straightforward and reliable witnesses. As will be seen below, there are not many direct conflicts in the evidence in any event, and this case will not turn on whether the evidence of one witness is generally preferred over that of the other.

Analysis

Nature of the Parties' Relationship

[11] Historically, a worker's legal status as an employee or independent contractor was regarded as an important issue, since an "employment relationship" formed the basis for finding a duty to provide reasonable notice of dismissal.

[12] In this case, it is reasonably clear that Ms. Dibble was not an employee of CMTS. She did not receive a T4 "Statement of Remuneration Paid" slip from CMTS. CMTS did not pay benefits to Ms. Dibble, and it did not deduct statutory amounts from Ms. Dibble's pay for employment insurance premiums or tax. Ms. Dibble was able to deduct business expenses on her income tax return. She was also responsible for her own Worksafe BC premiums.

[13] However, that is not the end of the analysis, as not all non-employees are disentitled from receiving notice. Some non-employees fall on the spectrum between independent contractors and employees. In *Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 701, this Court held:

> [71] There have been recent cases where an individual is determined not to be an employee but is still entitled to reasonable notice because the worker falls somewhere on the continuum between an employee and an independent contractor. These are referred to as "intermediate" cases*:* *Marbry Distributors Ltd. v. Avrecan International Inc.*, 1999 BCCA 172 [*Marbry*]. The factors particular to the analysis are: (1) the duration/permanency of the relationship; (2) the degree of reliance/closeness of the relationship; and (3) the degree of exclusivity: *Marbry* at para. 38. No single factor is conclusive and "not every factor need be present in order to classify a relationship as one requiring notice to terminate": *Marbry* at para. 38.

[14] These "intermediate" cases are referred to in the case law as "dependent contractors". Dependent contractors are entitled to reasonable notice. In *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761, Justice Rogers held as follows:

> [44] As a general proposition, a person on an employer's payroll and for whom the employer makes conventional statutory deductions from his pay will be considered to be an employee. If his contract does not provide otherwise, that person is entitled to reasonable notice of termination of his employment. An independent contractor, on the other hand, is not an

> employee. Between those two states lies a construct of the common law: the dependent contractor. The dependent contractor is not on payroll, but in most other ways operates and is treated as an employee. A dependent contractor is entitled to reasonable notice of termination of his contract.

[15] In *Glimhagen* at para. 45, Justice Rogers went on to identify the following *indicia* of a dependent contractor relationship, based on authorities from British Columbia and Ontario:

> 1. Whether the agent was largely limited exclusively to the service of the principal;
>
> 2. Whether the agent was subject to the control of the principal, not only as to the product sold but also as to when, where and how it was sold;
>
> 3. Whether the agent had an investment in or interest in the tools necessary to perform his service for the principal;
>
> 4. Whether by performing his duties the agent undertook risk of loss or possibility of profit apart from his fixed rate remuneration;
>
> 5. Whether the agent's activity was part of the principal's business organization – in other words 'whose business was it?';
>
> 6. Whether the relationship was long standing – the more permanent the term of service the more dependent the contractor; and
>
> 7. Whether the parties relied on one another and closely coordinated their conduct.

[16] Similar factors are cited in *Liebreich v. Farmers of North America*, 2019 BCSC 1074 at paras. 59–60, citing *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940 at paras. 124–125.

[17] In this case, the first *Glimhagen* factor – whether the agent was largely limited exclusively to the service of the principal – ought to be viewed in the context of dicta from *McKee v. Reid's Heritage Homes Ltd*., 2009 ONCA 916 at paras. 24–30, wherein the Ontario Court of Appeal concluded that it was appropriate to recognize an intermediate status between employee and independent contractor based at least, in part, on economic dependency between the worker and the principal.

[18] According to a document prepared by Ms. Dibble, she earned between 14% and 92% of her income from CMTS each year between 2010 and 2021. It appears

that most, or all, of the years in which these percentages were low were years in which Ms. Dibble was going to school.

[19] Notably, in her last full year with CMTS, Ms. Dibble earned 92% of her income from CMTS. In the ten months from January to October 2022 before her Contract was terminated, Ms. Dibble earned approximately 70% of her income from CMTS.

[20] Accordingly, although it might not be fairly said that Ms. Dibble was "largely limited exclusively" to the service of CMTS, in my view she was economically dependent upon her income from CMTS. Indeed, she testified that she was devastated and became concerned about being homeless when the Contract was terminated, having suddenly lost more than 60% of her income.

[21] In my view, the second factor – whether the agent was subject to the control of the principal – also favours Ms. Dibble's position that she was a dependent contractor.

[22] On one hand, work was offered to CMTS' music therapists, not assigned. Therefore, she could refuse any contract which she did not think was suitable for her or did not fit her schedule.

[23] On the other hand, CMTS exercised considerable control over Ms. Dibble through the terms of the Contract. For example, the Contract required the music therapists to "always be a few minutes early for contract positions"; "provide CMTS with relevant information which comes up at contracted placements"; "provide CMTS with changes in schedule as they occur"; and "respond to emails or phone calls from CMTS immediately". Further, the Contract significantly restricted other work that a music therapist could take on, as one of the terms of the Contract was that "[a]ny work coming from work placements will go through CMTS" and music therapists will "not provide locum work outside of CMTS".

[24] The third factor regarding tools and equipment favours CMTS' position that Ms. Dibble was an independent contractor. The music therapists who worked with

CMTS either supplied their own instruments or used instruments and other equipment supplied by the facilities at which they worked.

[25] The fourth factor – whether the agent undertook risk of loss or possibility of profit apart from her fixed rate remuneration – favours Ms. Dibble's position. Ms. Dibble provided CMTS with a monthly invoice which included a list of the facilities and individuals to which she had provided music therapy services during that month under the Contract. CMTS then paid Ms. Dibble directly once it approved those invoices.

[26] Importantly, Ms. Pelley testified that CMTS would pay its music therapists even if CMTS' client did not pay for the session, and that CMTS would pay its music therapists almost immediately after the work was provided. These facts again favour Ms. Dibble's position that she was not an independent contractor.

[27] The fifth factor – whether the agent's activity was part of the principal's business organization – also favours Ms. Dibble's position. At the outset of their working relationship, Ms. Pelley asked for Ms. Dibble's biography and photograph so that they could be published on the CMTS website. Ms. Dibble testified that her biography and photograph were on the website throughout the 12 years that she worked for CMTS.

[28] Further, Ms. Dibble testified, and it was uncontested, that staff reviews took place annually. Ms. Pelley would call the facilities to review their work and subsequently discuss the feedback with the music therapists.

[29] Moreover, the music therapists were given name tags with the CMTS logo and wore them when providing music therapy services through CMTS. As will be seen later in these reasons in relation to an incident in which a client complained about one of Ms. Dibble's tattoos, CMTS regarded Ms. Dibble as a representative of CMTS when she was on a contract. This fact is further reinforced by the Contract's terms requiring music therapists to "always be professional" and "dress professionally".

[30] With respect to the sixth factor – whether the relationship was long-standing – CMTS argues that the contractual relationship was "punctuated by her coming and going", and her hours fluctuated significantly. Nonetheless, the relationship was 12 years in duration which weighs in favour of Ms. Dibble being a dependent contractor.

[31] The seventh factor – whether the parties relied on one another and closely coordinated their conduct – does not clearly favour one party's position over the other. On one hand, as discussed above, a music therapist in Ms. Dibble's position was entitled to refuse any contract which she did not think was suitable for her or did not fit her schedule. Ms. Pelley testified that music therapists were entitled to negotiate their own schedules with clients. On the other hand, as discussed above, the Contract required music therapists to provide CMTS with relevant information which they learned at contracted placements. It also required music therapists to call and inform CMTS when they were sick so that CMTS could "provide locum coverage whenever possible". In my view, this factor slightly favours CMTS' position that Ms. Dibble was an independent contractor.

[32] I have concluded that five of the seven *Glimhagen* indicia favour Ms. Dibble's position. Weighing all of these indicia together, it is my view that Ms. Dibble has met the evidentiary burden of establishing that she was a dependent contractor during her working relationship with CMTS.

[33] I should note that the parties have cited documents and correspondence in which Ms. Dibble has referred to herself as a "contractor" and in which CMTS personnel have referred to the music therapists as "employees". While these documents are some evidence of Ms. Dibble's status, they are not determinative of the issue and do not change the conclusion I have reached above.

[34] Rather, it is likely that both parties created those documents without any awareness of the legal implications of the words that they were using at the time. Further, the parties' own characterization of the relationship is not found among the factors to be considered in either *Glimhagen* or *Liebreich*, and the law is clear that the labels that parties use for their relationships are not always conclusive of their

legal status, both in the employment context and elsewhere: see e.g. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 49; *Lycar v. Lonnie W. Orcutt Farms Ltd.*, 2002 ABQB 903 at para. 13; *Royal Bank of Canada v. Swartout*, 2011 ABCA 362 at para. 45.

Just Cause

[35] In *Scorpio Security Inc. v. Jain*, 2018 BCSC 978, cited with approval in *Dove v. Destiny Media Technologies Inc.*, 2023 BCSC 1032, Justice Branch held:

> [49] Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances: *Roe v. British Columbia Ferry Services Ltd*., 2015 BCCA 1 at para. 35.
>
> [50] Both the circumstances surrounding the alleged misconduct and the degree of misconduct must be carefully examined. The analysis requires a contextual approach including an examination of the category of misconduct and its possible consequences, all of the circumstances surrounding the misconduct, the nature of the particular employment contract, and the status of the employee: *McKinley v. BC Tel*, 2001 SCC 38 at paras. 33-34, 51.
>
> [51] The court must consider the context of the alleged misconduct, examining how minor or how serious it was: *Hawkes v. Levelton Holdings Ltd*., 2012 BCSC 1219 at para. 30, aff'd 2013 BCCA 306. As explained by the Supreme Court of Canada in McKinley at para. 48, "the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship."

[36] It is clear that the law of just cause equally applies to dependent contractors: *Liebreich* at paras. 75–76.

[37] In this case, the Termination Letter is not well-drafted and it is somewhat confusing, but, in my view, there were essentially two complaints: first, that Ms. Dibble had taken work with a facility without first discussing it or routing the contract through CMTS; and, second, that she had conducted herself unprofessionally in relation to an incident in which a client complained about one of her tattoos.

[38] In the following sections, I will assess whether either or both of these complaints were sufficient to constitute just cause for CMTS to terminate the Contract with Ms. Dibble.

Taking Work at a Client Facility

[39] On October 12, 2022, Ms. Pelley received a call from Louise Cadrin, who had contracted with CMTS to provide music therapy services at a facility called the Waterford House (the "Waterford"). Ms. Cadrin reported that she had seen Ms. Dibble at the Waterford.

[40] Ms. Dibble does not deny being at the Waterford but testified that she provided only music entertainment services at that facility. Her evidence in this regard was uncontroverted.

[41] On October 15, 2022, Ms. Pelley spoke with Ms. Dibble on the phone and took the position that Ms. Dibble had to give up her work at the Waterford. Ms. Dibble refused.

[42] The relevant term of the Contract (the "Work Placement Term") states:

> 20. Any work coming from work placements will go through CMTS Inc.

[43] With respect to this issue, CMTS took the following position in the Termination Letter:

> Any new possible contracts resulting from CMTS work placements MUST be directed to the CMTS manager immediately to be discussed.
>
> Whether the contract is entertainment or specifically a music therapy session, the same guideline applies…

[44] It appears uncontested that if a music therapist working for CMTS has an opportunity for *music therapy work* that has arisen from a CMTS work placement, that music therapist must first discuss that new work with CMTS or route the new work through CMTS. However, the parties do not agree on whether the Work Placement Term applies to *any* work.

[45] The Contract is not entirely clear in this regard. On one hand, the Contract refers to "work" without any qualification. On the other hand, Ms. Dibble testified that she had, in the past, taken music entertainment jobs from facilities which also had music therapy contracts with CMTS, with Ms. Pelley's knowledge and without any complaint from her. Ms. Pelley did not contradict this evidence. In any event, in my view, it is doubtful that the parties intended to preclude music therapists from finding *any* work through their music therapy placements. For example, what if a music therapist learned about an opportunity during a music therapy work placement to work in a facility's cafeteria, or in its office?

[46] In *Abstract Projects Inc. v. The Owners, Strata Plan EPS6069*, 2023 BCSC 42, this Court held:

> [144] The legal principles to be applied when interpreting contracts are discussed in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 [*Sattva*]. In *Sattva,* the Supreme Court clarified and affirmed principles to be used in interpreting contracts, emphasizing that the interpretation of contracts engages common sense principles and is "not dominated by technical rules of construction" (at para. 47). The goal of contractual interpretation is "to ascertain the objective intention of the parties": *Sattva* at para. 49.
>
> [145] Contracts must be interpreted as a whole rather than interpreting individual parts: *Sattva* at para. 47. The factual matrix extant at the time of contract formation can be considered without any precondition that the terms of the agreement are ambiguous; rather, considering the factual matrix surrounding the making of a contract is one part of the interpretive exercise: *Sattva* at paras. 46-50.

[47] The factual matrix in this case includes the fact that CMTS is a music therapy business and that Ms. Dibble is a music therapist. Ms. Dibble explained that music entertainment is different than music therapy. Music therapy requires the therapist to assess the client, understand their medical diagnosis, and formulate a treatment plan based on medical goals and objectives. By contrast, music entertainment is simply that – entertainment. It is not a therapeutic application of music as medicine.

[48] Ms. Pelley took the position that CMTS' business is broader than music therapy, but this position is belied by the evidence. It is admitted in the agreed statement of facts that CMTS is in the business of providing music therapy services.

Ms. Dibble was specifically retained to provide music therapy services. If it was CMTS' intention to preclude its therapists from taking any additional work at all from CMTS work placements, in my view, it was incumbent upon CMTS to make that clear in its contracts.

[49] In my view, it can be reasonably inferred that the objective intention of the Work Placement Term was to protect CMTS' business against music therapists contracting for music therapy services with CMTS clients directly. The Work Placement Term must therefore be read so as to restrict the music therapists from taking music therapy work from client facilities in competition with CMTS.

[50] For these reasons, in my view, CMTS did not have just cause to terminate the Contract on the basis that Ms. Dibble was providing music *entertainment* services to the Waterford.

Communications Arising from the Tattoo Incident

[51] CMTS advances a second ground of termination arising from an incident in which Ms. Dibble was intercepted by the Director of Care of a facility referred to as "Evergreen Baptist" on her way to a music therapy session. The Director of Care raised an issue about one of Ms. Dibble's tattoos.

[52] The Contract was not terminated simply because Ms. Dibble has tattoos. The question is whether Ms. Dibble behaved unprofessionally in her communications with the Director of Care or Ms. Pelley with regard to this particular incident.

[53] Although there were other complaints about Ms. Dibble's conduct set out in the Termination Letter, CMTS relied on the following primary complaints in terminating Ms. Dibble's Contract:

a) "unprofessional behavior when interacting with the Director of Care of a contracted facility"; and

b) "[a]cting unprofessionally to the owner of CMTS".

[54] The Director of Care did not testify at trial and so any evidence about this interaction given by anyone other than Ms. Dibble is inadmissible as hearsay. Ms. Dibble's evidence regarding her interaction with the Director of Care is uncontroverted.

[55] Ms. Dibble testified that she did not know who the Director of Care was. She testified that the Director of Care told Ms. Dibble that one of the clients at the facility had been "frightened" by one of Ms. Dibble's tattoos. The Director of Care asked her to cover it up. Ms. Dibble said that she could not do this because it was too hot, and that she had to go to her shift. She then left the discussion and continued into the premises where she was to conduct a music therapy session.

[56] Ms. Dibble and Ms. Pelley had two phone calls regarding this incident on October 13 and 15, 2022. The two calls dealt with both the tattoo issue and the issue regarding Ms. Dibble's provision of entertainment services at the Waterford, among others.

[57] Ms. Pelley testified that the second of these calls was lengthy – perhaps an hour in duration. Based on the evidence, it appears that the main topic of discussion was Ms. Dibble's continued refusal to withdraw her services from the Waterford. Ms. Pelley testified that she told Ms. Dibble: "This [withdrawal from the Waterford] is what has to happen in order to continue the relationship". Ms. Dibble replied that "this wasn't going to happen. I'm not doing that, I'm not doing anything wrong." Ms. Pelley also testified that Ms. Dibble cursed at her, dominated the conversation and abruptly ended it.

[58] Ms. Dibble testified that she did not curse at Ms. Pelley but that she did use curse words in the conversation. She admits that she was upset and hung up on Ms. Pelley at the end of the first call. Ms. Dibble testified that she did not hang up the phone on the second call. She said that the discussion was unproductive and she was ending the call. Ms. Dibble said that she would consult with "ethics", by which she meant the Canadian Association of Music Therapists' Ethics Committee.

[59] In my view, neither Ms. Dibble's interaction with the Director of Care nor her communications with Ms. Pelley, even on Ms. Pelley's version of the events, were sufficiently egregious to justify immediate termination of the Contract. In *Liebreich*, this Court held:

> [79] Put simply, as dismissal is the "capital punishment" for workplace offences, and as the punishment must meet the crime, the workplace offence must be sufficiently serious such that lesser disciplinary measures are inappropriate in the circumstances. The governing question is whether the worker has engaged in behaviour that is seriously incompatible with the duties forming the root of their contract with the employer – that is, conduct fatal to the employment relationship – from the objective view of a reasonable employer informed of all the circumstances.

[60] In my view, to the extent that Ms. Dibble's behaviour was rude, a reprimand or lesser disciplinary measure would have sufficed. I note that the impasse between them largely concerned Ms. Dibble's work at the Waterford, and I have concluded above that Ms. Dibble's position on that issue was correct. Therefore, to some degree, it was understandable that Ms. Dibble was upset at Ms. Pelley's insistence that she give up her work at that facility.

[61] For these reasons, I am unable to find that Ms. Dibble's conduct was "fatal to the employment relationship … from the objective view of a reasonable employer informed of all the circumstances": *Liebreich* at para. 79.

Timing and Steps to Termination

[62] During the course of Ms. Dibble's working relationship with CMTS, CMTS developed a set of disciplinary guidelines (the "Disciplinary Guidelines"). It is common ground that Ms. Dibble had not signed or expressly accepted the Disciplinary Guidelines, and they were therefore not binding on Ms. Dibble. Nonetheless, in my view, they indicated CMTS' views as to what was fair and appropriate.

[63] The Disciplinary Guidelines provided for a three-step disciplinary process. They first required a verbal warning, followed by two additional steps:

> SECOND WARNING (Written): Initial concerns will be reviewed after a one month time period. If little or no reasonable change has occurred, a written warning will be put in the therapists [sic] file.
>
> FINAL NOTICE (Termination): If significant change has not been made to professional conduct within … (1) month of second warning, therapist will [be] terminated immediately…

[64] In this case, Ms. Pelley gave Ms. Dibble a "verbal warning" on October 15, 2022 and delivered the Termination Letter six days later on October 21, 2022. The Termination Letter purports to give the second written warning and final termination notice simultaneously, stating:

> This letter constitutes a second warning and notice of termination for the above therapist.

[65] CMTS' own policies call for two warnings and specific time periods between the warnings, but these policies were not followed in relation to Ms. Dibble. Although the Disciplinary Guidelines did not constitute a contract between the parties, they inform this Court's assessment of the conduct of a reasonable employer in these circumstances, and whether lesser disciplinary measures, including warnings and more time between them, might have been more appropriate than termination. In my view, the Disciplinary Guidelines provide a further reason that CMTS' immediate termination of its Contract with Ms. Dibble was unjustified.

Conclusion Regarding Just Cause

[66] For the reasons above, I have concluded that CMTS did not have just cause to terminate its working relationship (the Contract) with Ms. Dibble.

Reasonable Notice

[67] It is well-established that dependent contractors are entitled to reasonable notice of the termination of their contracts: *Liebreich* at para. 98, citing *Glimhagen* at para. 44.

[68] In *Pasche,* this Court held:

> [79] The key factors in calculating the appropriate amount of notice are the character of employment, age, length of service, and the availability of similar employment: *Machtinger; Ansari v. British Columbia Hydro and Power*

> *Authority* 1986 CanLII 1023 (BC SC), [1986] 4 W.W.R. 123 (S.C.) [*Ansari*]. Courts have generally applied the principles articulated in *Bardal v. Globe and Mail Ltd.*, 1960 CanLII 294 (ON SC), [1960] O.J. No. 149 (Ont. H.C.) [*Bardal*], where the Chief Justice stated at p. 145:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[69] The factors set out in the passage above are referred to in these reasons at the "*Bardal* Factors".

[70] Ms. Dibble seeks damages in lieu of 15 months' notice. She contends that this quantum of damages is appropriate given her age (37 years old), her 12 years of service at CMTS and her experience and training as a music therapist.

Application of the Bardal Factors

Character of Employment

[71] In assessing the character of employment, a higher level of responsibility occupied by an employee imports a longer period of reasonable notice: *Spalti v. MDA Systems Ltd.*, 2018 BCSC 2296 at para. 9. In this case, Ms. Dibble was not a manager and no one reported to her.

[72] Further, while this Court has held that dependent contractors are not entitled to less notice than employees as a matter of principle, it may well be that a dependent contractor's work will be less integral to the company than that of an employee. If so, this fact may be reflected when applying the *Bardal* factor relating to the character of employment. In this regard, the Court held as follows in *Liebreich*:

> [106] In my view, there is no principled basis to automatically give less notice to a dependent contractor than an employee; rather, the fact that a plaintiff is a dependent contractor can be analysed in relation to the first *Bardal* factor: the character of the work. While it may be the case that the character of a dependent contractor's work will be less integral and structurally or organizationally embedded than that of an employee, it is this substantive connection and character of the employment that ought to be the

> focus of the analysis, and not merely the plaintiff's formal status or designation.

Length of Employment

[73] The cases tend to recognize periods of reasonable notice that are proportionate to the length of service, with exceptions for employees who were employed for short or very long periods: *Spalti* at para. 16. In support of her position, Ms. Dibble cites five cases in which this Court has awarded between 1.0 and 1.25 months of notice per year of service to employees who were approximately the same age as her. CMTS has not cited any authorities in support of its position on reasonable notice.

Age of the Plaintiff

[74] The cases also recognize that reasonable notice is longer in the case of an older employee than a younger employee: *Spalti* at para. 17. In this case, Ms. Dibble's age weighs in favour of her ability to obtain re-employment.

Availability of Similar Employment

[75] There was scant evidence regarding whether there are other companies in the Vancouver area at which music therapists may be retained on a long-term basis, either as employees or otherwise, and the evidence that was advanced was conflicting. Ms. Dibble asserted that "there are little to no comparable work opportunities in the lower mainland" while Ms. Pelley described competitor companies which have grown significantly in the past few years.

[76] It appears that music therapy skills are reasonably transferable; however, the real issue is how many organizations other than CMTS might be prepared to hire someone with Ms. Dibble's qualifications and skills. Based on the evidence advanced at trial, this factor does not weigh heavily in favour of either party.

Conclusion Regarding Reasonable Notice

[77] As stated above, the decisions cited by Ms. Dibble provide for a notice period in the order of 1.0 to 1.25 months per year of service, which would mean 12 to 15

months in this case. In my view, the character of Ms. Dibble's employment and her age militate in favour of a notice period at the shorter end of that range.

[78] Taking all of the above into account, and subject to the issues of mitigation and aggravated damages which will be addressed below, I consider a notice period of 12 months (the "Notice Period") to be reasonable in all of the circumstances.

Damages and Mitigation

[79] The court's task is, first, to assess what Ms. Dibble would have earned from CMTS during the Notice Period had the Contract not been terminated and, second, to determine whether her damages ought to be reduced on the basis of mitigation principles.

Assessment of Lost Earnings During the Notice Period

[80] As stated, the Notice Period is comprised of the 12 months following October 2022. In determining what Ms. Dibble would have earned from CMTS during the Notice Period had the Contract not been terminated, in my view, it is appropriate to look primarily at 2021 and 2022, since those years are recent and likely the most representative of her income going forward. In 2017–2019, her earnings were much lower as she was going to school during that period. In 2020, her earnings were also lower because her work with CMTS was limited due to the COVID-19 pandemic.

[81] Ms. Dibble earned $30,343 from CMTS in 2021, and $17,958 from CMTS in the first ten months of 2022. Therefore, over the course of the 22 months between January 2021 and October 2022, she earned $48,301 or $2,195.50 per month from CMTS. I find that her damages flowing from the Notice Period are $2,195.50 per month or $26,346 for 12 months, subject to mitigation.

Mitigation

[82] There are two potential questions to be addressed with regard to mitigation during the Notice Period, as described by the Court of Appeal in *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23:

> [36] In the assessment of damages for breach of contract, mitigation can arise in one of two ways. First, it can be argued that the claimant could have reduced the loss by taking reasonable steps to replace the lost income through new employment. This is somewhat awkwardly referred to as the "duty to mitigate" but would be more accurately expressed as the principle that the party not in breach cannot recover for avoidable loss.
>
> …
>
> [38] The second way in which principles of mitigation can lead to a reduction in damages for breach of contract arises when the party not in breach does in fact reduce the loss by replacing the income with new income that would not have been earned if the employment relationship had continued. This is termed "avoided loss" and is the issue raised by B & B in this appeal.
>
> [Emphasis added.]

The Obligation to Mitigate or the Principle of Avoidable Loss

[83] With respect to the first question, Ms. Dibble's evidence is that she did not actively search for another company to work for during the Notice Period, but that she focussed on seeking business through her Music for Life business instead. She testified that clients sought her out, but she did not apply for any positions other than a choir accompanist job.

[84] CMTS relies on this evidence in an attempt to establish a failure to mitigate, but the authorities are clear that an employee's lack of effort to mitigate is only part of the analysis.

[85] In *James v. The Hollypark Organization Inc.*, 2016 BCSC 495, aff'd 2018 BCCA 217, this Court held:

> [55] An employee who was wrongfully dismissed generally has a duty to minimize his or her loss by taking reasonable steps to secure a comparable position of employment: *Greene v. Chrysler Canada Ltd*. (1982), 1982 CanLII 234 (BC SC), 38 B.C.L.R. 347 at para. 26 (S.C.), aff'd (1983), 7 C.C.E.L. 166 at 175 (B.C.C.A.). It is the employer who bears the onus of proving that the employee failed to properly mitigate his or her damages: *Michaels v. Red Deer College*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at para. 13. The employer must show not only that the employee did not make a sufficient effort but that similar employment was available: *Graham v. Galaxie Signs Ltd.*, 2013 BCCA 266 at paras. 48-49, leave to appeal ref'd [2013] S.C.C.A. No. 345.
>
> [Emphasis added.]

[86] Similarly, in *Wilkinson v. Valgold*, 2021 BCSC 572, this Court held:

> [64] … Valgold [the employer] bears a heavy onus to establish not only that Mr. Wilkinson failed to take adequate steps to mitigate but also that had he taken those steps he could likely have found equivalent employment.

[87] CMTS has not established that if Ms. Dibble had taken reasonable steps, similar employment was available and it is likely that she would have obtained comparable employment. As stated in the cases above, it is the employer's obligation to prove a failure to mitigate by showing both that the employee had failed to take reasonable steps and that similar employment was available, and CMTS has not done so.

Avoided Loss

[88] As stated in *Pakozdi*, the second way in which the mitigation principle can lead to a reduction in damages is when the party that is not in breach in fact reduces their loss by replacing the income with new income that would not have been earned if the employment relationship had continued.

[89] The decision in *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 at para. 140 stands for the proposition that if an employment contract permits simultaneous employment with another employer, and the first employer terminates her without notice, any income from the second employer that she *could* have earned while continuing with the first is not deductible from the employee's damages. That principle is reiterated in *Pakozdi*, wherein the Court of Appeal held:

> [46] … It is not *all* income from the second job that is excluded from the damage calculation, but rather income from the second job that could have been earned had the employment from the first job continued. In other words, the question is whether the new income is replacement income regardless of the source of the income or a continuation of supplementary income being earned prior to the dismissal.

[90] During the Notice Period, Ms. Dibble earned $26,097 or $2,175 per month from her Music for Life business. When considering the issue of avoided loss, the question to be asked is: what could Ms. Dibble have earned from Music for Life during the Notice Period had her Contract with CMTS continued?

[91] There is scant evidence upon which to make this determination. On one hand, in 2021, Ms. Dibble earned $2,608 from sources other than CMTS, including her Music for Life business. In the first ten months of 2022, she earned $7,880 from Music for Life. Therefore, over the course of the 22 months between January 2021 and October 2022, she earned approximately $477 per month from other sources.

[92] On the other hand, the highest amount Ms. Dibble earned in any one year from Music for Life was approximately $25,000 in 2016, when she also made $17,557 from CMTS.

[93] When Ms. Dibble's income from CMTS was higher in a particular year, her income from Music for Life was lower. I do not accept the proposition that Ms. Dibble could have earned an amount from Music to Life equal to her highest earnings ever for that business while simultaneously earning close to the highest amounts that she ever earned from CMTS.

[94] That said, it seems clear that Ms. Dibble could have earned more than $477 per month from Music for Life during the Notice Period even if she was also working at CMTS, and even though she did not do so during the 22 months before she was terminated.

[95] At the end of the day, this Court must make the best assessment that it can based on the evidence before it. Upon a review of the records before the Court, I have concluded that the amount Ms. Dibble could have earned through Music for Life, while making more than $26,000 per year at CMTS, is best represented by what happened in 2012, 2013 and 2014, when she made between $25,308 and $30,860 per year at CMTS while simultaneously earning approximately $8,500 to $9,500 from other sources.

[96] Based on these figures, I find that Ms. Dibble could have continued earning $9,000 per year, or $750 per month, from Music for Life had she continued working for CMTS during the Notice Period. As stated, during that period, Ms. Dibble actually earned $26,097 or $2,175 per month from her Music for Life business. Accordingly,

during the Notice Period, she earned $1,425 more per month from Music for Life than she could have had the Contract not been terminated. Subject to the discussion below regarding statutory entitlements, this amount must be deducted from Ms. Dibble's damages as avoided loss.

Calculation of Damages

[97] I have concluded above that Ms. Dibble's damages through the Notice Period are $2,195 per month, but that she has avoided much of that loss – in the amount of $1,425 per month – as the result of an increase in her income through Music for Life.

[98] Apart from common law damages, a plaintiff in a wrongful dismissal lawsuit is entitled to certain amounts set out in s. 63 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113. The statutory entitlement in this case is eight weeks' notice as the result of the application of s. 63(2)(b), which provides:

> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

[99] A plaintiff's entitlements under s. 63(2)(b) do not constitute damages, and the income earned by an employee during their statutory entitlement period is not subject to deduction as "mitigation income": *Brake* at para. 111.

[100] The result of the foregoing is that, for the first eight weeks (or two months) of the Notice Period, Ms. Dibble is entitled to damages that are unreduced by the avoided loss principle. Her damages for the last ten months of the Notice Period must account for the loss which she has in fact avoided.

[101] Accordingly, Ms. Dibble's common law damages for wrongful dismissal total $12,090, calculated as follows:

a) $2,195 x 2 for the months of November and December 2022; plus

b) ($2,195 − $1,425) x 10 for the months of January to October 2023.

Aggravated Damages

[102] Aggravated damages in wrongful dismissal cases are governed by the decision in *Honda Canada Inc. v. Keays*, 2008 SCC 39, wherein the Supreme Court of Canada re-evaluated the law stated in *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, 1997 CanLII 332, which had previously permitted courts to award damages additional to those in lieu of notice by extending the notice period.

[103] Justice Marzari summarized the present state of the law in *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 as follows:

> [120] … *Honda* provides that compensatory damages beyond damages in lieu of notice, often referred to in BC as aggravated damages, may be awarded in the context of a wrongful dismissal case, but the entitlement to these damages must arise from the manner of dismissal.
>
> [121] Such damages are available because employers have a duty of good faith and fair dealing in the manner of dismissal. A breach of this duty through conduct that is untruthful, misleading, or unduly insensitive can be the basis of "foreseeable, compensable damages" that are contemplated by the employment contract itself (*Honda* at para. 58). However, the ordinary distress and hurt feelings that are part and parcel of the loss of employment are not compensable.
>
> …
>
> [123 As a result, it is now settled that an aggravated damages award does not require an independent actionable wrong.
>
> [124] In *Ram* at para. 115, Justice Warren, summarized these principles in two parts, whereby the employee must establish that:
>
> > a) the employer's conduct in effecting the termination was unfair or in bad faith because, for example, it was untruthful, misleading or unduly insensitive; and
> >
> > b) the employee has suffered mental distress as a result of the manner of the dismissal and not just as a result of the dismissal itself.
>
> [125] More recently, in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at para. 15, our Court of Appeal stated the burden this way:
>
> > An award of aggravated damages resulting from the manner of dismissal requires: (a) a finding that an employer engaged in conduct during the course of dismissal that was unfair or in bad faith, and (b) a finding that the manner of dismissal caused the employee mental distress: *Honda* at para. 59.
> >
> > [Emphasis in original.]

[104] Ms. Dibble seeks $20,000 in aggravated damages. As discussed above, she testified that she was shocked at her termination. She experienced heightened depression, anxiety and insomnia. She described herself as feeling “incredibly upset, betrayed, angry” and “devastated”. As she was earning 60% of her income from CMTS, she did not know how she was going to pay her rent or living expenses, and she feared being homeless.

[105] In my view, however, while Ms. Dibble has furnished evidence that probably satisfies the second part of the two-part test above, I am unable to find that the first part of the test is met. In particular, Ms. Dibble has not established that Ms. Pelley’s conduct in effecting the termination was “unfair or in bad faith because, for example, it was untruthful, misleading or unduly insensitive”: *Deol* at para. 124, citing *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212 at para. 115.

[106] As discussed above, Ms. Pelley purported to terminate the Contract largely because of Ms. Dibble’s music entertainment work at the Waterford and because of what she believed to be “unprofessional communications” between Ms. Dibble and both Ms. Pelley and the Director of Care.

[107] Although I have found that Ms. Pelley’s position with regard to work obtained by music therapists from work placements was incorrect, I am unable to find that Ms. Pelley took that position in bad faith or in an unfair manner.

[108] Further, although I have found that Ms. Dibble’s conduct during her phone conversations with Ms. Pelley on October 13 and October 15, 2022 was insufficient to warrant termination, it appears on the evidence that those discussions were acrimonious, to say the least, and that Ms. Dibble was not without fault. Although Ms. Pelley acted precipitously by purporting to immediately terminate the Contract, I cannot conclude that she did so unfairly or in bad faith as those words are used in *Honda.*

[109] Ms. Pelley testified that following her phone conversation with Ms. Dibble on October 15, 2022, she felt that she had “no choice” but to send the Termination

Letter on October 21, 2022, because Ms. Dibble was no longer communicating with her. She further testified that she tried, unsuccessfully, to reach out to Ms. Dibble by text message on October 22 in an attempt to "work things out". It is my view that when Ms. Pelley terminated the Contract, she acted in what she thought were the best interests of her company and did not conduct herself in an untruthful, misleading or unduly insensitive way in doing so.

[110] For these reasons, Ms. Dibble's claim for aggravated damages is dismissed.

Punitive Damages

[111] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the Supreme Court of Canada held:

> [36] Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[112] In *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189 at para. 78, the Court of Appeal, citing *Whiten* at para. 94, held that punitive damages should only be ordered in exceptional cases where the conduct in question is deserving of punishment – that is, where there has been "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour", and where the compensatory damages ordered are insufficient to "achieve the objectives of retribution, deterrence, and denunciation".

[113] For the same reasons that I have dismissed Ms. Dibble's aggravated damages claim, CMTS' conduct in this case did not rise to a level which warrants punitive damages. Ms. Dibble has not persuaded me that Ms. Pelley's conduct was malicious, oppressive, high-handed or reprehensible, and so the test in respect of punitive damages in *Whiten* has not been made out.

CMTS' Counterclaim

[114] CMTS brought a counterclaim based on the following provision of the Contract (the "Restrictive Covenant"):

> 11. The contractor agrees that on the termination of this contract, the contractor will not solicit or accept work with the facility outside of Creative Music Therapy Solutions for a period of 3 years (time period) from the date of termination of this contract.

[115] There are three potential questions to be answered by the Court in relation to the counterclaim. First, is the Restrictive Covenant enforceable? Second, if it is enforceable, did Ms. Dibble breach its terms? Third, if the first two questions are answered affirmatively, what damages ought to be awarded for the breach?

[116] With respect to the enforceability of the Restrictive Covenant, the applicable law is set out in the Court of Appeal's decision in *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 [*IRIS*], wherein the Court held:

> [16] A covenant not to compete is a restraint of trade and presumptively unenforceable. However a restraint of trade will be enforceable if it is reasonable as between the parties and with reference to the public interest: *Elsley v. J.G. Collins Insurance Agencies*, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916 at 923-924.
>
> …
>
> [25] Once the degree of scrutiny to be applied to the non-competition clause has been determined, three questions must be addressed: Does the claimant have a proprietary interest worthy of protection (*Elsley* at 925)? If so, can that interest be adequately protected by other less restrictive measures than a covenant prohibiting competition (*Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 at para. 49)? If not, is the non-competition clause in the agreement reasonable by reference to the activity prohibited, the geographical area of the prohibition and the duration of the prohibition (*Shafron* at para. 26)?

[117] Further, in *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, the Court of Appeal held:

> [53] To be reasonable, a clause which constitutes a restraint of trade must be clear in its meaning. In *Shafron*, consideration was given to the ambiguity in the meaning of a geographical description ("Metropolitan City of Vancouver") contained in prohibitive non-competition provisions of a contract for the continuing employment of the principal of a business that had been sold. There it was said:

> [27] However, for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous. The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity.
>
> [Emphasis added.]

[118] In my view, the Restrictive Covenant is *prima facie* unreasonable within the meaning of *IRIS* and *Rhebergen* for at least two reasons.

[119] First, the Restrictive Covenant is ambiguous because its ambit is unclear. The reference to “the facility” appears to be a typographical error but it is unclear what the intended meaning was: was it to bar a music therapist from soliciting or accepting work from any facility that therapist worked at while at CMTS, or from any facility which was a client of CMTS? Ms. Pelley testified that she intended that the provision would apply to all of CMTS’ clients, and she gave evidence that she had a general practice of discussing the Terms of Agreement with all new music therapists; however, she did not have any independent memory of her discussion with Ms. Dibble in this regard.

[120] Further, it is not entirely clear what is meant by “work” in the Restrictive Covenant. This issue raises questions similar to those addressed above in relation to the just cause issue. For example, did CMTS intend to, or was it entitled to, restrict its music therapists’ activities with respect to work other than music therapy work?

[121] Second, and in any event, it is my view that the Restrictive Covenant is unreasonable both by reference to its geographical scope and the duration of the prohibition. It is geographically unlimited and, in my view, a three-year term is not necessary to adequately protect CMTS’ business interests.

[122] Ms. Pelley gave evidence that it could take up to two years for CMTS to secure a new contract. Assuming for the purpose of this analysis that this evidence ought to be accepted, it still does not justify a three-year non-competition clause.

[123] I also note that the last paragraph of the Termination Letter states that "the therapist will not solicit or accept work with any facility previously worked at during contract with CMTS or connected to CMTS for a period of **2 years** from the date of termination of this contract". It appears that this term was quoted in error from a more recent version of the Terms of Agreement in which the duration of the standard restrictive covenant is two years, not three years.

[124] Overall, it is my view that the Restrictive Covenant is unreasonable and therefore unenforceable, both because it is ambiguous and because its scope is excessive geographically and temporally.

[125] I have considered whether non-offending parts of the Restrictive Covenant might be saved or severed, and I have concluded that they may not. In *IRIS*, the Court held:

> [71] The law has traditionally been disinclined to fix a defective restrictive covenant by severing offending language to create a reasonable restriction. In *Elsley*, Dickson J. made these comments at 925-926 about overbroad restrictions on competition:
>
> > The next and crucial question is whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employer. In a conventional employer/employee situation the clause might well be held invalid for that reason. The fact that it could have been drafted in narrower terms would not have saved it, for as Viscount Haldane said in *Mason v. Provident Clothing and Supply Co., supra, p.* 732, "... the question is not whether they could have made a valid agreement but whether the agreement actually made was valid."
>
> [72] The issue was considered more recently in the Supreme Court's judgment in *Shafron*. Speaking for a unanimous court, Rothstein J. held that:
>
> > [36] … blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.

> [37] However, I am also of the view that notional severance has no place in the construction of restrictive covenants in employment contracts.

[126] As I have concluded that the Restrictive Covenant is unenforceable, it is not necessary for me to consider whether Ms. Dibble breached its terms or what damages might be awarded for any breach.

Summary

[127] I have concluded that Ms. Dibble was a dependent contractor, that a notice period of twelve months is reasonable, but that the damages to which she is entitled ought to be reduced by the avoided loss principle. After subtracting the loss that Ms. Dibble has avoided, her damages for wrongful dismissal total $12,090.

[128] Ms. Dibble's claims for aggravated damages and punitive damages, as well as CMTS' counterclaim for breach of contract, are dismissed.

Costs

[129] Overall, it is my view that Ms. Dibble was substantially successful in this action.

[130] At the commencement of this hearing, both parties confirmed that this is a fast track action. Both parties have invited me to depart from the costs rule generally applicable to fast track actions, but neither has persuaded me that it would be appropriate to do so. Ms. Dibble submits that a departure from the fast track rule is warranted given CMTS' refusal to respond to discovery requests, but, in my view, CMTS' conduct in this regard does not rise to a level which justifies special or increased costs.

[131] Subject to the possibility that settlement offers may impact this Court's decision on costs, it is my view that the assessment of costs in this action ought to be governed and limited by Rules 15-1(15) to (17) of the *Supreme Court Civil Rules*, which provide:

> **Costs**
>
> (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
>
> (a) if the time spent on the hearing of the trial is one day or less, $8 000;
>
> (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9 500;
>
> (c) if the time spent on the hearing of the trial is more than 2 days, $11 000.
>
> **Settlement offers**
>
> (16) In exercising its discretion under subrule (15), the court may consider an offer to settle as defined in Rule 9-1.
>
> **Taxes to be added to costs**
>
> (17) If tax is payable by a party to a fast track action in respect of legal services, an additional amount to compensate for that tax must be added to the costs to which the party is entitled under subrule (15), which additional amount must be determined by multiplying the amount of costs to which the party is entitled under subrule (15) by the percentage rate of the tax.

[132] Pursuant to R. 15-1(15)(c), and subject to any settlement offers, CMTS is liable to Ms. Dibble for costs in the amount of $11,000, exclusive of taxes and disbursements.

[133] If there were offers which ought to be considered by the Court in respect of costs, the parties may arrange through the registry to make brief written submissions.

"The Honourable Justice Loo"