IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ursic v. Country Lumber Ltd.,*
2025 BCSC 970

Date: 20250527
Docket: S242403
Registry: Vancouver

Between:

Boris Ursic and Borly Holdings Ltd.

Plaintiffs

And:

Country Lumber Ltd.

Defendant

Before: The Honourable Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiffs:	B. Tarnow
Counsel for the Defendant:	C. Overholt, K.C. K. Chieh G. Lo, Articled Student
Place and Dates of Trial:	Vancouver, B.C. March 24 – 28, 2025
Place and Date of Judgment:	Vancouver, B.C. May 27, 2025

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Introduction

[1] The corporate plaintiff, Borly Holdings Ltd. (“Borly”) provided trucking delivery services to the defendant, Country Lumber Ltd. (“Country Lumber”). After 14 years, Country Lumber terminated Borly’s services without notice. The present dispute centres on the nature of the relationship between Borly and Country Lumber to determine whether notice prior to termination was required.

Factual Background

[2] The individual plaintiff, Boris Ursic, is 61 years old and is an experienced truck driver. He has owned and operated businesses involving commercial trucks in Alberta and British Columbia. Since 1999, Mr. Ursic has solely owned and operated Borly. Borly is an incorporated company in which Mr. Ursic is the sole shareholder and director.

[3] The defendant is in the business of selling construction materials to large and small construction and building customers. As a component of its business, Country Lumber delivers materials to many of its customers. Country Lumber accomplishes its delivery services using its own fleet of trucks and employee drivers, but it also contracts with “owner-operators” who provide trucking services to Country Lumber.

[4] In or around April 2010, Country Lumber entered into an agreement with Borly, under the direction of Mr. Ursic, under which Borly would provide its truck delivery services to Country Lumber (the “Contract”). This agreement was not formally committed to writing.

[5] Borly owned and provided its services by way of three trucks. One of the trucks was owned and operated by Borly at the time the Contract began, while the other two trucks were acquired during the course of the contractual relationship. Mr. Ursic, through his company Borly, worked exclusively for Country Lumber from the time of the Contract to March 15, 2024.

[6] On February 9, 2024, Scott Rexworthy, Country Lumber's Yard Manager, advised Mr. Ursic that business was slow and that he would "strongly suggest" that Mr. Ursic "look for work […] somewhere else".

[7] On March 15, 2024, Country Lumber terminated the Contract. On March 16, 2024, it provided a written letter of termination of services to Borly along with a letter of reference. There is no cause alleged by the defendant for the termination.

Parties' Positions

[8] The plaintiffs argue that Borly was a dependent contractor and, as such, was entitled to notice of termination. They submit that Borly was economically dependent on Country Lumber, making it closer to an employee than an independent contractor relationship.

[9] The defendant submits that the relationship between Borly and Country Lumber cannot be characterized as an employee or dependent contractor relationship. Rather, the defendant argues that the agreement was an independent contract for services between two businesses which equally benefitted from the arrangement between them. As such, the defendant maintains that no notice of termination was required.

[10] In the alternative, if Borly was a dependent contractor, then the defendant submits that the highly commercial nature of the agreement warrants a notice period of one month. The plaintiffs propose that the reasonable notice period for Borly in the circumstances of this case is 16 months' notice. The defendant accepts that the plaintiffs discharged their burden to mitigate.

Issues

[11] The issues to be determined by this Court are as follows:

a) What was the legal nature of the working relationship between the plaintiffs and the defendant?

b) If Borly was a dependant contractor:

i. What is the reasonable notice entitlement?

ii. What is the appropriate measure of damages during the reasonable notice period?

iii. Has Borly discharged its duty to mitigate?

iv. What were Borly's mitigation earnings?

[12] I will briefly address a preliminary issue raised by the defendant, as well as credibility, before turning to my analysis of these issues.

Preliminary Issue

[13] As an initial point, Country Lumber submits that an employee or dependent contractor relationship could not exist between Country Lumber and both the individual and the corporate plaintiffs. I agree that the plaintiffs cannot reasonably sustain a claim that both Mr. Ursic and Borly were simultaneously dependent contractors of the defendant.

[14] The plaintiffs clarified that they do not advance a claim that Mr. Ursic was an employee or dependent contractor of Country Lumber. Rather, the principal position they advance is that Borly was a dependent contractor of Country Lumber.

[15] In line with this position, the evidence led by the plaintiffs focused on the relationship between Borly and Country Lumber and very little evidence was led to support the existence of any contractual relationship between Mr. Ursic as an individual and Country Lumber.

[16] As a result, I focus my analysis on the relationship between Borly and Country Lumber.

Credibility and Reliability

Legal Principles

[17] Credibility and reliability are distinct but related concepts. Credibility is an assessment of whether the witness is telling the truth. The assessment of a witness's credibility involves a consideration of the trustworthiness of the witness's testimony based on the sincerity of their evidence. Reliability is an assessment of a witness's ability to observe, recall, and recount the events in question. Both credibility and reliability affect a witness's testimony.

[18] In *Gichuru v. Smith,* 2013 BCSC 895, aff'd 2014 BCCA 414, at para. 129, Justice Adair articulated a number of factors that affect the assessment of a witness's evidence. These factors include:

a) the witness's ability and opportunity to observe events;

b) the firmness of the witness's memory;

c) the witness's ability to resist the influence of interest to modify their recollection;

d) whether the witness's evidence harmonizes with independent evidence that has been accepted by the court;

e) whether the witness changes their testimony during direct and cross-examination;

f) whether the witness's testimony seems unreasonable, impossible, or unlikely;

g) whether a witness has a motive to lie; and

h) the demeanour of a witness generally.

[19] A trial judge may believe some, all, or none of the testimony of a witness and attach different weights to different parts of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207 (SCC), per L'Heureux-Dubé J. (in dissent in the result). However, assessments of credibility must not be based on unfair or inaccurate external viewpoints that are not founded in the record: *R. v. Delmas*, 2020 SCC 39.

[20] Ultimately, the validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Bradshaw v. Stenner,* 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. As stated in the leading case *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), the test of the truth of a witness's testimony is its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the circumstances.

Analysis

[21] In litigation, each party has distinct interests from the other. Some parties tend to assert their own interests and have trouble making any concessions regarding the other's point of view. In this case, while I did not find that Ms. Terry Koudys, the General Manager at Country Lumber, was unable to make any concessions, I found her testimony to be positional. This was particularly the case regarding the testimony about the ability of managerial staff of Country Lumber's ability to discipline Borly drivers.

[22] Given this finding, I have approached Ms. Koudys' evidence, particularly with respect to the issue of discipline, with caution. As with all witnesses, I examined her testimony for its consistency with other reliable evidence presented at trial. I assess each party's evidence for its reasonableness in light of uncontroverted facts, consider whether it has remained consistent despite meaningful and probing cross-examination, and examine whether it harmonizes with other independent evidence I have accepted: *Bradshaw* at paras. 186–188; *M.P. v. P.P.*, 2024 BCSC 2138 at para. 29.

Was Borly a dependent contractor?

Legal Principles

[23] Whether reasonable notice is implied by the common law depends on the nature of the working relationship. As a general proposition, an employee/employer relationship gives rise to an obligation on the employer to provide reasonable notice of termination unless the contract provides otherwise.

[24] Our Court of Appeal has recognized that employment relationships may exist on a continuum between pure employee and pure independent contractor: *TCF Ventures Corp. v. The Cambie Malone's Corporation,* 2017 BCCA 129. An "intermediate" category on this continuum, referred to as "dependent contractors", has been recognized at common law: *TCF Ventures Corp.* at paras. 19–21; *Marbry Distributors Ltd. v. Avrecan Int. Inc.*, 1999 BCCA 172; *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.), 1936 CanLII 75 (ON CA); *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, 1992 CanLII 102 (SCC).

[25] In answering the question of whether a relationship requires notice to terminate, the heart of the inquiry is the true nature of the relationship: *Marbry* at para. 9. Where the relationship bears more resemblance to, or is akin to, employer/employee status, the relationship will be treated as an employee/employer relationship for the purpose of implying an obligation to provide reasonable notice: *TCF Ventures Corp.* at para. 24. In other words, dependent contractors are entitled to reasonable notice.

[26] The common law recognizes the concept of a "dependent contractor" in order to provide protection to economically vulnerable and dependent workers: *Glimhagen v. GWR Resources Inc.,* 2017 BCSC 761 at para. 45, citing *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at para. 24. Indeed, the concept of economic dependence has been an area of focus in identifying dependent contractor relationships: *Erb v. Expert Delivery Ltd.* (1995),167 N.B.R. (2d) 113, 1995 CanLII 8874 (N.B.K.B.).

[27] In *Glimhagen*, Justice Rogers identified a non-exhaustive list of factors which can be used to determine whether the relationship was that of a dependent contractor:

a) Whether the agent was largely limited exclusively to the service of the principal;

b) 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;

c) Whether the agent had an investment in or interest in the tools necessary to perform his service for the principal;

d) Whether by performing his duties the agent undertook risk of loss or possibility of profit apart from his fixed rate remuneration;

e) Whether the agent's activity was part of the principal's business organization – in other words 'whose business was it?';

f) Whether the relationship was long standing – the more permanent the term of service the more dependent the contractor; and

g) Whether the parties relied on one another and closely coordinated their conduct.

[28] These factors were recently applied by this Court in *Dibble v. Creative Music Therapy Solutions Inc.*, 2024 BCSC 1066. Similar factors are also referenced in *Liebreich v. Farmers of North America*, 2019 BCSC 1074 at paras. 59–60 and *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940 at paras. 124–125.

[29] I apply these factors to the facts in the case at bar.

Analysis

Whether the agent was largely limited exclusively to the service of the principal

[30] The Contract was an oral, rather than a written, contract regarding the parties' working relationship. Unfortunately, the evidence regarding the terms of the Contract was limited.

[31] Mr. Ursic testified that for 14 years Borly earned 100 percent of its revenue through its services to Country Lumber. The plaintiffs argue that Borly was therefore highly economically dependent on Country Lumber.

[32] The plaintiffs submit that Borly was required to provide its services exclusively to Country Lumber, either impliedly within the Contract or practically because of the work limitations placed on Borly by Country Lumber. The defendant argues that Borly's exclusivity was by choice and that Country Lumber never placed a requirement of exclusivity on Borly.

[33] Mr. Ursic stated that Borly worked regular Monday to Friday, full-time hours for Country Lumber. Raj Rai, a former shipping manager at Country Lumber, testified that Country Lumber expected that Borly would be available to work at Country Lumber whenever required. Mr. Rai further stated it was not open for Borly to turn down work when its services were required by Country Lumber.

[34] While there was no written contract requiring Borly to provide services exclusively to Country Lumber, the plaintiffs submit that it was an implied term that Borly was required to provide exclusive services to Country Lumber. They point to the testimony of Ms. Koudys, where she agreed that prior to February 2024, Country Lumber never advised Borly to look for work elsewhere.

[35] Mr. Ursic testified that the working arrangement proceeded in a manner in which Borly did not have a choice but to provide services exclusively to Country Lumber. For example, Country Lumber insisted that Borly have professionally installed decals on its trucks with the company name. Mr. Ursic stated that if he provided services elsewhere with Country Lumber signage on his truck, Borly's services would have been terminated by Country Lumber. In cross-examination, Ms. Koudys agreed that Borly would have had to remove the decals from its truck if it were to provide services elsewhere. Ms. Koudys stated that magnetic decals could have been used instead, but agreed that no owner-operators at Country Lumber have magnetic decals.

[36] I agree with the defendant that there is insufficient evidence to demonstrate that, contractually, Borly had to work exclusively for Country Lumber. Mr. Ursic agreed on cross-examination that Country Lumber never stated to him explicitly that it was an exclusive arrangement. This distinguishes this case from *Marbry*, where the majority of the Court of Appeal emphasized that the defendant specifically told the plaintiff not to work elsewhere.

[37] Despite this factual difference, I find that the practical reality of Borly's work for Country Lumber made it very difficult for Borly to take on any additional external work. Borly and, in particular, Mr. Ursic worked a regular Monday to Friday shift for Country Lumber, as well as occasional, but consistent, weekend work. Mr. Ursic testified that when business slowed down at Country Lumber he would take his vacation.

[38] I find that Borly was in a position of "economic dependence" on Country Lumber: *JKC Enterprises Ltd. v. Woolworth Canada Inc.,* 2001 ABQB 791 [*JKC*]. Borly and Mr. Ursic relied exclusively on Country Lumber for their revenue for 14 years and the expectation was that Borly would be available whenever Country Lumber required their services.

[39] The defendant argues that the economic dependence was as a result of Borly's choices, referring to *1159273 Ontario Inc. v. The Westport Telephone Company Limited*, 2022 ONSC 1375 [*Westport Telephone*]. I do not find that Borly attempted to "design a mechanism" to make it "look economically dependent" on Country Lumber: *Westport Telephone* at para. 164. Rather, Borly reasonably accepted Country Lumber's demand for regular and full-time work over the course of 14 years, making it economically dependent on Country Lumber. The relationship cannot be viewed as a concerted attempt to craft economic dependence when the volume and demands of the work itself created exclusivity.

[40] Country Lumber also argues that the exclusivity in this case was one-sided. The defendant highlights that while Borly may have exclusively provided its services

to Country Lumber, Country Lumber used the delivery services of multiple owner-operators and their own employees, in addition to Borly.

[41] The defendant raises *JKC* and emphasizes that in reaching the conclusion that the plaintiff was a dependent contractor, the Court explicitly noted that the exclusivity went both ways: para. 91. The defendant also raises *Marbry,* where the Court of Appeal noted that, “had the exclusivity ran in both directions, this factor would more heavily weigh in favour of a classification more akin to employer/employee”: para. 42.

[42] Importantly, in *Marbry* the exclusivity was solely on the part of the manufacturer to the contractor. The Court’s comment was focused on the absence of exclusivity *from the contractor*. I do not take *Marbry* or *JKC* to be saying that a plaintiff’s claim is weakened by the fact that their employer did not exclusively use their services. This may be relevant when considering the coordination of their conduct, but the focus of the present analysis is the economic dependence of the contractor. This is consistent with the factors articulated in *Glimhagen*.

[43] Just as the presence of other employees does not diminish the nature of the relationship between an employer and an employee, the presence of other contractors does not change the nature of the relationship between the employer and any one contractor. In fact, that Country Lumber had its own employees doing the exact work that Borly was undertaking, in a similar fashion, supports the claim that Borly was closer to an employee than an independent contractor.

[44] The evidence demonstrates that there was a high degree of economic reliance between Borly and Country Lumber, as well as exclusivity on the part of Borly, that made the relationship more akin to an employer/employee relationship than that of an independent contractor. This factor strongly militates in favour of Borly being a dependent contractor.

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

[45] Mr. Ursic testified that, while there were no written contractual terms stating so, Country Lumber controlled the day-to-day activities of Borly. He provided the following examples:

a) Country Lumber assigned work to Borly; it was not offered. It was not open for Borly to turn down work from Country Lumber.

b) Country Lumber controlled the working hours of Borly. It required two trucks to start at 6:00am, and a third truck to start at 6:30am.

c) Country Lumber had strict requirements for how Borly drivers were to carry out their responsibilities each day. Country Lumber provided the direction to Borly as to when, where, and how the products were to be delivered to customers of Country Lumber. Borly had no input into how its services were to be carried out on behalf of Country Lumber.

d) Country Lumber required Borly drivers to punch in and out at the beginning and end of their shifts.

e) Country Lumber required Borly drivers to be in regular communication with shipping throughout the workday.

f) From late 2012 to 2015, Country Lumber permitted Mr. Ursic to participate in its group extended health and dental benefits plan. The evidence established that this was the same coverage that Country Lumber's employee staff enjoyed.

g) Upon completing a set of deliveries to customers, Country Lumber required Borly drivers to return to Country Lumber if additional loads needed to be picked up by drivers and delivered to customers.

h) Country Lumber required Borly drivers to have Biz Track technology installed on their phones. Once product was delivered to the customer, confirmation would be sent to Country Lumber's computer system.

i) With few exceptions, Country Lumber required Borly trucks to be parked at their property in the evening so that they could be loaded the following day.

j) Borly drivers were expected to attend safety meetings of Country Lumber.

k) There was a group text message thread amongst all of the driving fleet that included the Borly drivers.

[46] Despite the above examples, Mr. Ursic's evidence was qualified with the following points:

a) Mr. Ursic clarified on cross-examination that individual Borly drivers were not required to punch in and out at the beginning and end of their shifts, rather the truck numbers were required to punch in and out. Ms. Koudys testified that employee drivers had a biometric scan taken at the outset of their employment, but this was voided for owner-operators.

b) Ms. Koudys agreed that Mr. Ursic was on Country Lumber's benefits plan for a period of time. However, Country Lumber's benefits provider subsequently advised Country Lumber that because Mr. Ursic was an owner-operator rather than an employee of Country Lumber, he could not participate in the benefits plan. He was therefore removed from the benefits plan on the advice of the provider.

c) Mr. Rexworthy testified that Country Lumber paid partial fuel costs for Borly pursuant to a fuel surcharge policy it had in place with its owner-operators. Country Lumber covered the cost of over-length and over-width permits and paid Treo toll invoices. However, Borly was responsible for its own costs such as servicing of its trucks and insurance which were treated as expenses of Borly.

[47] Further, it is undisputed that Borly hired its own drivers to operate Borly trucks. Whether or not a plaintiff hired its own helpers has been identified as a relevant factor: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 47 [*Sagaz*]. The Borly drivers were paid by Borly, not by Country Lumber, for the work they performed. Country Lumber had no control over hiring those drivers. Nevertheless, Mr. Ursic would send their driver's license, crane certification, and driver abstract to Mr. Rexworthy. Mr. Ursic testified that Country Lumber did not have the discretion to accept or reject any of the Borly drivers. Mr. Rexworthy testified that Mr. Ursic would be responsible for showing the Borly drivers what to do to deliver the products.

[48] There was considerable dispute between the parties regarding Country Lumber's control over the Borly drivers' vacation requests and discipline.

[49] In his testimony, Mr. Rai confirmed that all drivers of Country Lumber, including Mr. Ursic and the Borly drivers, were required to fill out written vacation request forms in order to take time off. The defendant submits that Mr. Rai's evidence on this point should not be relied upon as Mr. Rai simply drew a conclusion regarding what was required of Mr. Ursic and the Borly drivers based on the standard operating procedures of Country Lumber toward its employee drivers. However, I note that in cross-examination Mr. Rai was specifically asked whether this procedure was also followed for owner/operators, to which he agreed that "all drivers" had to make a vacation request and fill out the form.

[50] In contrast, Mr. Rexworthy testified that no official form was used for the owner-operators, who would simply reach out to shipping or to Mr. Rexworthy himself about time off. Mr. Ursic admitted on cross-examination that if he was able to find another driver for a truck, there wouldn't be an issue regarding absences. Mr. Ursic would tell the shipping department of Country Lumber if he wanted to take certain dates off. If there were multiple drivers already off work, there would be a discussion to find a workaround.

[51] I do not find this evidence to be determinative. I take judicial notice of the fact that it is not uncommon for a more informal system of finding replacements for shifts to be used for employees as well.

[52] Mr. Rai also testified that in several instances he disciplined or terminated Borly drivers when performance or conduct issues arose. He testified that as Shipping Manager it was within his scope of responsibilities to oversee the entire driving fleet. Mr. Rai stated he was in regular contact with Mr. Rexworthy in the course of his duties and that Mr. Rexworthy was aware of situations either before or after they occurred. When asked what gave him the right to discipline Borly drivers, Mr. Rai simply stated it was part of his responsibilities as a manager.

[53] Mr. Rexworthy testified that he was not aware of Mr. Rai disciplining or terminating Borly drivers from working in Country Lumber's operation.

[54] Ms. Koudys was adamant that no managers had the authority to impose progressive discipline on Country Lumber employees. She testified that Borly drivers received no training from Country Lumber. This was inconsistent with the testimony of other witnesses (that I accepted) that Borly employees were expected to attend safety meetings when they were on shift and that they were paid for their time at the meetings.

[55] Ms. Koudys testified that she had no interactions with Mr. Ursic regarding human resources issues because he worked with the shipping department and Mr. Rexworthy. She acknowledged that Country Lumber had GPS trackers installed in Borly's trucks. Ms. Koudys also mentioned an incident when she received a call that the truck Mr. Ursic drove was seen throwing garbage out the window. She testified she did nothing because he was not an employee. Yet she admitted that if there were further complaints, she would have discussed the issue with Mr. Ursic. Lastly, Ms. Koudys testified that she would ask Borly drivers to wear safety vests if they were not wearing them. While none of these factors indicate discipline of Borly drivers, all them fall within human resources responsibilities.

[56] Based on all these factors, I accept Mr. Rai's testimony on the issue of discipline. Mr. Rai was able to provide a number of specific examples of times where he terminated, suspended, or otherwise disciplined Borly drivers. To the extent that management of Country Lumber was unaware of these examples, it demonstrates that there was no direction to Mr. Rai that he could not discipline Borly drivers.

[57] In *Lightstream,* the Court was faced with a situation in which the corporate defendant disciplined the individual plaintiff without clear contractual authority. The Court noted that the ultimate contractual power to suspend or dismiss the individual plaintiff rested with the corporate plaintiff, but found that the actual actions of the defendant in suspending the corporate plaintiff rendered the factor neutral.

[58] I find that *Lightstream* can be distinguished from the present case on one important point. Unlike in *Lightstream,* the parties had no written contract, making the subsequent conduct and practices of the defendant more significant in determining the meaning of the terms of the contract: see e.g. *Kim v. Argo Ventures Inc.*, 2024 BCSC 763 at para. 45, citing *Broer v. Multiguide GmbH*, 2023 BCCA 134 at para. 53. Subsequent conduct includes discipline. At the very least, Country Lumber's actions regarding discipline are a neutral factor.

[59] Overall, the evidence demonstrates that while Borly maintained some independence regarding its drivers, their operations were largely dictated by Country Lumber. This militates in favour of Borly being a dependent contractor.

Whether the agent had an investment in or interest in the tools necessary to perform his service for the principal

[60] Borly invested in its own trucks and other equipment necessary to provide services to Country Lumber. Borly also covered the vast majority of expenses related to upkeep and maintenance of the trucks. Mr. Ursic confirmed on cross-examination that he wrote off Borly's expenses on its taxes.

[61] The plaintiffs have admitted that this factor militates towards Borly being in an independent contractor relationship. I agree.

Whether by performing its duties the agent undertook risk of loss or possibility of profit apart from the fixed rate remuneration

[62] The defendant argues that as an independently operating business Borly held a significant opportunity of profit and loss in the performance of its services. The plaintiffs argue that Borly was provided with steady work for the vast majority of the working relationship, with little opportunity for significant profits or losses.

[63] Notably, Borly did not receive a monthly salary or any set remuneration from the defendant. Borly would get remunerated by Country Lumber at an agreed upon hourly rate for its services provided by its three trucks. The amounts payable to Borly fluctuated depending on the amount of business available and the time taken by Borly drivers to complete deliveries. For the entirety of the relationship, Borly received payment based on the trucks, rather than the individual drivers. Borly also charged GST. Mr. Ursic testified in direct examination that Borly would invoice Country Lumber every two weeks and, after he had sent the invoice, Country Lumber would produce three individual cheques, one for each of the three trucks owned by Borly.

[64] Due to the nature of this work, Borly did have an opportunity for loss. While Country Lumber supplied steady work for Borly over the majority of their working relationship, there was no evidence that Borly was explicitly guaranteed a set number of hours every week. This is exemplified by the course of events once Country Lumber's business slowed down: one of Borly's trucks sat mostly unused in the year prior to the termination of the Contract. While the exact nature of this loss was not in evidence, this demonstrates that some degree of financial risk existed.

[65] On the other hand, Borly was paid a set hourly rate. Unlike in *Lightstream,* Borly's payment would not increase based on the number of deliveries the drivers completed: para. 153. There was no particular financial incentive for Borly to provide its services more efficiently. Borly was required to provide trucking services until Country Lumber determined there was no more product to be delivered on a particular day. As already established, Borly worked exclusively for Country Lumber,

so there was no incentive to finish Country Lumber's deliveries to take on other work: see e.g. *Farren v. Elite Service Group Inc.,* 2020 BCSC 23 at para. 25. There was also no risk for Borly in not getting paid for the work it completed. It would get paid by Country Lumber regardless of whether Country Lumber would get paid by its customers.

[66] I also note that some amount of work appeared to be guaranteed to Borly, given the long-term relationship with consistent hours. This guarantee is bolstered by the fact that at the end of the relationship, Country Lumber terminated Borly instead of just further reducing its trucks' hours or even providing the three trucks with no hours.

[67] Overall, I find this factor to militate in favour of Borly being a dependant contractor.

Whether the agent's activity was part of the principal's business organization – in other words, 'whose business was it?'

[68] The evidence demonstrates that Borly's services were not peripheral to the defendant's business but were instead closely integrated into Country Lumber's business.

[69] First, the defendant acknowledges that there were features of the relationship which resulted in Mr. Ursic and the Borly drivers representing Country Lumber's business to outside third parties.

[70] Mr. Ursic testified that at the outset of the relationship, Country Lumber required its logos to be installed on Borly's trucks. Country Lumber also required one of Borly's trucks to be painted white to match the rest of its trucking fleet. In the beginning stages of the working relationship, Country Lumber produced a TV commercial that featured Mr. Ursic and his truck. In cross-examination, Mr. Rexworthy testified that Borly drivers were representing Country Lumber when trucking Country Lumber products to its customers. There was no evidence that

Borly engaged in any of its own advertising at any time or that Borly drivers represented themselves as working for Borly when carrying out its services.

[71] Second, Borly's work was an integral part of Country Lumber's operation. While I accept the testimony of Ms. Koudys that Country Lumber sold its products in a variety of ways, the company was in the business of distributing construction supplies. Truck deliveries of these building supplies was an essential component of the business model. Ms. Koudys agreed that Borly was an integral part of Country Lumber's trucking team and that there were often periods in which Borly would be busier than Country Lumber's own employee drivers.

[72] The defendant highlights that Borly's services could easily be replaced by another owner-operator and that there was no evidence that the termination of Borly's services materially affected the defendant's operations. The defendant therefore attempts to distinguish this case from *Liebreich,* where the Court noted that it took four people to replace the plaintiff after she was let go, and quickly concluded that the relationship was one of a dependent contractor: see also *Farren* at para. 26; *Lightstream* at para. 160. While replaceability can certainly demonstrate the importance – or lack thereof – of a plaintiff's role, the pertinent consideration here is not of uniqueness. Rather, it is the importance of the function to the business – not the individual entity completing the function – that is relevant. In this case, Country Lumber is in the business of selling building materials that are not easily transported without specialty vehicles. As a result, delivery is an essential element of the business.

[73] This factor also militates towards a dependent contractor relationship.

Whether the relationship was long standing

[74] The more permanent the term of service, the more dependent the contractor is on the principal. It is not disputed that the business relationship between Borly and Country Lumber lasted for approximately 14 years. This, in my view, establishes a longstanding relationship.

[75] The expansion of Borly's services also points to the permanent nature of the services provided to Country Lumber. Over several years, Borly and Country Lumber negotiated and ultimately agreed on rates for two additional trucks that were to be acquired by Borly and put to the exclusive use in Country Lumber's delivery service. The defendant points out that there was no evidence that Country Lumber directed Borly to acquire the additional trucks. In fact, Mr. Ursic agreed in cross-examination that the acquisition of both trucks were business opportunities that he seized in order to make money.

[76] Mr. Ursic testified that he first negotiated the rates for the new trucks before acquiring them to be put into use in Country Lumber's operation. Mr. Rexworthy agreed in cross-examination that the additional trucks had greater craning capacity which allowed Country Lumber to offer a more extensive level of service to its customers.

[77] While I accept the testimony of Mr. Rexworthy that there was no guarantee of hours provided to Mr. Ursic for the new trucks, it is clear from the evidence that substantial coordination and negotiation between Mr. Ursic and the defendant went into the purchase of the two additional trucks. The expectation was that the new trucks would be put to use with Country Lumber, and that Country Lumber saw a use for the additional trucks. Mr. Ursic did not unilaterally decide that Borly should add more trucks to work for Country Lumber.

[78] This factor militates towards a dependent contractor relationship.

Whether the parties relied on one another and closely coordinated their conduct

[79] The defendant maintains that the parties were not closely integrated and coordinated. Relying on *Farren,* Country Lumber argues that simple communication regarding work that is "routine and repetitive" does not indicate close integration or coordination between the parties.

[80] In *Farren,* the plaintiff was a repair worker who performed regular maintenance work for the defendant at approximately 20 Starbucks stores. The defendant assigned the plaintiff to locations, but the plaintiff worked independently according to his pre-existing skill and expertise, within certain set time frames.

[81] I agree with the defendant that Borly's work was fairly routine and did not require complex levels of coordination. However, unlike in *Farren,* I do not consider Borly's work to be standalone; rather it was a part of a wider integrated work process. The parties had to coordinate regarding delivery times, shipments, and staffing. This is demonstrated by Country Lumber's choice to install GPS devices in Borly's trucks and to have the trucks punch in and out. The Borly drivers were not free to come and go as they pleased: *Lightstream* at para. 160. Moreover, Borly and Country Lumber worked together to find efficiencies and negotiated for several years to come to an agreement regarding the two additional trucks.

[82] It is clear that Country Lumber relied on Borly's work. As stated above, Ms. Koudys agreed that Borly was an integral part of Country Lumber's trucking team and that there were often periods in which Borly would be busier than Country Lumber's own employee drivers. However, I also find it relevant that Country Lumber did not solely rely on Borly for this function; it had other employees and owner/operators performing the same job.

[83] While not the strongest factor, I find the parties' coordination supports Borly being a dependent contractor.

Tax Consequences

[84] In addition to the *Glimhagen* factors, the defendant highlights the parties' intentions. The defendant raises the fact that Mr. Ursic classified the relationship between Borly and Country Lumber as a "partnership" in his testimony and that Borly obtained the favourable tax treatment associated with being a contractor.

[85] While the parties' intentions, as demonstrated by the labels they use and tax implications, can be relevant to determining the form of the relationship, it is not

determinative. The parties' own characterization of the relationship is not found among the factors to be considered in either *Glimhagen* or *Liebreich*. 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: *Sagaz* 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.

[86] As articulated by the Federal Court of Appeal in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85, while parties are free to set out in contract their duties, responsibilities, and titles, "the legal effect that results from that relationship, i.e. the legal effect of the contract, as creating an employer-employee or an independent contactor relationship, is not a matter which the parties can simply stipulate": para. 36.

[87] That said, I will consider Borly's tax treatment in my assessment of the reasonable notice entitlement below.

Conclusion

[88] Considering the above factors from *Glimhagen*, I conclude that Borly falls within the 'intermediate' category. Borly was neither an independent contractor nor an employee. Rather, Borly falls somewhere on the continuum and can be classified as a dependent contractor of Country Lumber: *TCF Ventures Corp.* at paras. 19–21.

What is the reasonable notice entitlement?

[89] In the absence of just cause, an employee or dependent contractor is generally entitled to compensation for what would have been a reasonable period of notice. Given that I have determined that Borly is a dependent contractor, I must determine:

i. What is the reasonable notice entitlement for Borly?

ii. What is the appropriate measure of damages during the notice period?

iii. Has Borly discharged its duty to mitigate?

iv. What were Borly's mitigation earnings?

Parties' Positions

[90] The plaintiffs argue that the reasonable notice period is 16 months and that Borly is owed damages in lieu of notice for this period.

[91] The defendant submits that the highly commercial nature of the agreement requires a much shorter notice period than that proposed by the plaintiffs. The defendant submits that the reasonable notice period is one month's notice.

Legal Principles

[92] 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. Where an express without-cause termination provision is not included in a commercial agreement, including a distributorship agreement, termination of the agreement without cause can only occur upon the terminating party providing reasonable notice of termination: *Hillis Oil & Sales Ltd. v. Wynn's Canada,* [1986] 1 S.C.R. 57 at 67, 1986 CanLII 44 (SCC); *Brown-Forman Corporation v. Charton-Hobbs Inc.,* 2024 ABKB 261 at para. 67.

[93] In determining what constitutes a reasonable notice period, courts have generally applied the four factors articulated in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, 1960 CanLII 294 (ON SC):

a) the character of the work;

b) the length of service;

c) the age of the plaintiff; and

d) the availability of similar work, having regard to the experience, training, and qualifications of the plaintiff.

[94] The parties disagree on whether the notice period should automatically be decreased due to Borly being a dependent contractor rather than an employee. The plaintiff argues that Borly should not automatically have its notice period reduced by virtue of being a dependent contractor and not an employee. The defendant argues that the plaintiffs are not accurately representing the state of the law and not fully addressing the considerations with respect to a dependent contractor's character of work. It argues that it remains open to the Court to discount a dependent contractor's notice period based on the substance of their work.

[95] Before turning to the above factors, I will address this initial point of dispute.

Should a lower notice period be applied to dependent contractors?

[96] Certain authorities suggest that the amount awarded to a dependent contractor will always be somewhat less than what would be payable to an employee: *Pasche v. MDE Enterprises Ltd*., 2018 BCSC 701 at para. 83. However, this is not settled law: *Liebreich* at paras. 98–106. In *Cvjetkovich v. Breezemax Web (Ca) Ltd.,* 2024 BCSC 808*,* the Court adopted the reasoning in *Liebreich* and rejected any hard and fast rule. This Court concluded that the notice period ought to reflect where the relationship falls on the continuum between employee and independent contractor, after considering the *Bardal* factors: paras. 44–45.

[97] I adopt the same analysis that was utilized in *Liebreich* and *Cvjetkovich*. I do not accept the proposition that dependent contractors should automatically have their notice periods arbitrarily reduced: *Fasslane Delivery v. Purolator Courier Ltd.,* 2007 BCSC 1879 at paras. 121–122. Rather, the period of notice should reflect where a relationship falls on the continuum between employee and independent contractor.

[98] I note that in the vast majority of cases, this will amount to a distinction without a difference. The fact that a plaintiff was a dependent contractor and not an employee will always be a relevant consideration when assessing the first *Bardal* factor. For example, in *Cvjetkovich,* Justice Branch determined that an employee in the same position as the plaintiff would be entitled to 13 months notice, which he

reduced to 12 months to account for the “somewhat less interwoven relationship” between the parties: para. 49.

[99] The very purpose of the initial assessment as to the nature of the relationship is to determine the character of the work and to assist in determining the appropriate notice period, if any.

Analysis

[100] Considering the *Bardal* factors, I conclude that Borly is not entitled to the length of notice period the plaintiffs seek.

[101] Borly exclusively worked for the defendant for 14 years, because Country Lumber relied on Borly’s availability, which made it difficult to secure alternative contracts. However, Borly was not an employee of Country Lumber, and I find that the character of the relationship between the parties was “intermediate”, warranting a lower notice period than that which would be awarded to an employee.

[102] I base this conclusion, in part, on the authorities that state that, absent exceptional circumstances, a plaintiff should not be allowed to obtain the benefits of a contractor relationship for tax purposes and then deny that such a relationship exists for employment law purposes: *Cvjetkovich* at para. 39, citing *Pasche* at paras. 75, 90–92. Borly obtained the tax benefits of working as a contractor rather than as an employee, and Mr. Ursic was clearly aware of the benefits of structuring his business in this way.

[103] Additionally, courts should not lose sight of the fact that long periods of notice between parties in a commercial relationship is not consonant with commercial reality: *JKC* at para. 118. The period of notice should reflect where a relationship falls on the continuum between employee and independent contractor. Here, Borly is a corporate entity that hired its own employees. The structure of Borly significantly distinguishes the relationship from an employee/employer relationship.

[104] I therefore apply a lower notice period to reflect the true nature of the relationship between Borly and Country Lumber. However, I do not agree with the defendant that notice should be as low as one month. As noted above, Borly had been working *exclusively* for Country Lumber for 14 years at the time of his termination. This was a significant period of time.

[105] Based on the *Bardal* factors, I conclude that Borly is entitled to damages in lieu of a reasonable notice of 10 months. Ten months reflects the length of the relationship, the control that Country Lumber exercised over Borly, the commercial nature of Borly, and the tax benefits Borly received as a result of not being a direct employee of Country Lumber.

What is the appropriate measure of damages during the reasonable notice period?

Parties' Positions

[106] The parties have differing views on how to quantify damages over the reasonable notice period.

[107] The defendant takes the position that damages should be measured based on the personal remuneration that Mr. Ursic received through Borly. The plaintiffs maintain that the salary or dividends that Mr. Ursic earned from Borly in any given year is simply a matter of bookkeeping and is not a true indicator of the loss sustained as a result of Country Lumber's failure to give reasonable notice of termination.

[108] The plaintiffs submit the proper measure of damages is the loss of profits or net income (after expenses) to Borly throughout the notice period. There is no loss being claimed by Mr. Ursic in his personal capacity.

[109] The plaintiffs tendered an expert report to support their position on the appropriate measure of damages during the notice period. I first address the admissibility of this report.

Admissibility of the Plaintiffs' Expert Report

Legal Principles

[110] To assist the Court in assessing the appropriate measure of damages, the plaintiffs seek to lead an Expert Report from Darren Benning of PETA Consultants Ltd., an expert in economic loss and pecuniary loss calculation.

[111] The defendant objects to the admission of the Expert Report on the ground that its findings go to an ultimate issue to be decided by this Court.

[112] The plaintiffs submit that the Expert Report provides necessary assistance to the Court in quantifying damages. The plaintiffs argue that the ultimate issue before the Court is not the quantum of damages, but is rather the entitlement to damages.

[113] Mr. Benning was provided the following documents to produce his Expert Report:

a) Borly's corporate tax returns for tax years 2011 to 2021;

b) Borly's invoices to Country Lumber from 2022 through to the termination of the Contract;

c) spreadsheets prepared by Country Lumber which includes data regarding working hours and earnings for each truck at Country Lumber including the trucks owned and operated by Borly; and

d) the bookkeeping ledger for Borly's 2020-2021 fiscal year ending July 31, 2021.

[114] The Expert Report contains:

a) a summary of Borly's Income Statement information, including Borly's revenue, operating expenses, and net income for the fiscal years 2010 to 2021;

b) a growth analysis based on Borly's revenue in the fiscal years 2010 to 2021;

c) Borly's income-expense ratios for the fiscal years 2010 to 2021; and

d) a tabulation of Borly's invoices to Country Lumber from December 27, 2021 to March 17, 2024.

[115] In *R. v. Mohan,* [1994] 2 S.C.R. 9, 1994 CanLII 80 (SCC), the Supreme Court of Canada set out the two-stage analysis to determine the threshold admissibility of expert opinion evidence. As stated in *Mohan*, the evidence must first meet the following four factors:

a) relevance;

b) necessity in assisting the trier of fact;

c) the absence of an exclusionary rule; and

d) a properly qualified expert.

[116] At the second stage, the Court performs its function as a gatekeeper by weighing the probative value of the evidence against its prejudicial effect.

[117] The defendant's 'ultimate issue' objection to the Expert Report is relevant to the third factor articulated in *Mohan*, the absence of an exclusionary rule. The defendant argues that in determining the estimated loss of the corporate plaintiff over a given notice period, Mr. Benning makes certain recommendations or findings that effectively usurp the Court's role in determining how damages should be calculated, including:

a) the determination of Borley's representative (average) income over a period of time; and

b) the apportionment of Borly's net income based on gross income.

[118] At para. 15 of *Murray v. Galuska*, 2002 BCSC 1532, the Court stated that the following exclusionary rules apply to expert reports:

a) experts are not permitted to make findings of fact or rulings of law as this is the role of the trial judge;

b) experts cannot make findings of law as that is also within the role of the trial judge; and

c) experts should not make arguments in the guise of opinions.

[119] It is well understood that expert opinions are not refused admission in trials simply because they address the ultimate issue: *Shortreed Joint Venture Ltd. v. Guvi,* 2024 BCSC 1610 at para. 145. Expert evidence on matters of fact is not excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *R. v. Burns,* [1994] 1 S.C.R. 656 at 666, 1994 CanLII 127 (SCC).

Analysis on Admissibility

[120] Considering the first *Mohan* step, three of the four factors are easily met here. First, the Expert Report has logical relevance to the issues at hand: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 23. Second, the appropriate method of projecting lost income by a company over a set period of time when that company has variable income is "likely to be outside the knowledge of a judge or jury": *Mohan* at 23; *R. v. Abbey,* [1982] 2 S.C.R. 24 at 42, 1982 CanLII 25 (SCC).

[121] Third, Mr. Benning has a Master's Degree in Economics and has worked on more than 5,000 assignments involving the quantification of pecuniary damages in civil litigation matters. I have no concerns about his independence and impartiality.

[122] Turning to the defendant's 'ultimate issue' objection, Mr. Benning has not opined on whether Borly was a dependent contractor. This is the central legal question before the Court. The Expert Report does not purport to determine the legal status of the plaintiffs' relationship with the defendant, but rather quantifies damages if such status is found.

[123] It is not unusual for expert evidence to be led regarding the income loss sustained by a corporate plaintiff. I agree with the defendant that this is more common in personal injury litigation, but I fail to see how the context here makes a significant difference. Expert evidence regarding damages in employment-related claims is not unprecedented: *Brown-Forman Corporation v. Charton-Hobbs Inc,* 2024 ABKB 261.

[124] Here it was open to Country Lumber to tender their own rebuttal report. It chose not to do so.

[125] Turning to the second step of *Mohan*, I find that the probative value of the Expert Report outweighs any prejudicial effect. The necessity and reliability of the Expert Report outweighs any of the defendant's concerns that the report addresses the ultimate issue. In particular, given that the plaintiffs and the defendant have differing views as to how to quantify damages, the Expert Report is of assistance to the Court.

[126] The Expert Report is admissible.

Mr. Benning's Evidence

[127] Mr. Benning calculated Borly's loss of income based on its representative income between December 27, 2021 to March 17, 2024 and its income-expense ratio for the 2021 fiscal year.

[128] Tables 1A and 1B of the Expert Report compile Borly's income statements for the 2010 to 2021 fiscal years, ending July 31, 2021. Mr. Benning's report goes back to 2010, but I have only included the figures going back to 2015 as an illustration. The tables can be summarized as follows:

Year (fiscal end Jul 31)	Gross Revenue	Expenses	Net income (pre-corporate tax)	Net income (pre-tax)	Net income (after corporate tax)	Net income (after tax) as a

				as a % of Revenue		% of Revenue
2015	$497,716	$362,104	$135,612	28%	$116,589	25%
2016	$817,191	$543,263	$273,928	34%	$236,305	30%
2017	$797,106	$517,791	$279,315	36%	$242,508	31%
2018	$738,160	$492,417	$245,743	34%	$215,104	30%
2019	$536,635	$352,137	$184,498	34%	$162,642	30%
2020	$690,596	$440,785	$249,811	37%	$222,127	33%
2021	$592,317	$361,414	$230,903	40%	$205,360	36%

[129] As demonstrated above, Mr. Benning found that in 2021 Borly had total expenses that were approximately 60 percent of its gross revenue, and a net income that was 40 percent of its gross revenue pre-tax (and 36 percent of its gross revenue after tax).

[130] Mr. Benning notes that Borly's gross revenue peaked in 2016 at $817,191, and was generally on a declining trend in the years following. Borly's gross revenue for 2021 was $592,317.

[131] Borly did not file tax returns after 2021. Mr. Ursic testified this was due to an unfortunate incident in which Borly's expense records were destroyed. Mr. Ursic is currently in the process of rectifying the situation.

[132] To account for this, Mr. Benning used Borly's invoices to calculate Borly's revenue for 2022-2024. He then used the historical revenue and net income ratios from 2021 to calculate net income going forward.

[133] At Table 2 of the Expert Report, Mr. Benning set out Borly's revenue for 2022 through to 2024, using the invoices provided by Mr. Ursic. This can be summarized as follows:

Year	Revenue/Billings
2022	$428,237

2023	$385,515
2024	$43,917

[134] The invoices spanned a 116-week period, with the first invoice period being December 27, 2021 to January 9, 2022 and the last being March 4, 2024 to March 17, 2024. Mr. Benning used the above invoices to calculate an annualized revenue for Borly of $384,000 (after rounding), based on 52 weeks per year.

[135] Mr. Benning then used the historical income/revenue ratio from 2021 of 36 percent and applied it to the annualized revenue for Borly calculated from Table 2. This resulted in a net income of $138,240 per year. Using a 14 month notice period, Mr. Benning calculated Borly's total loss as $161,280 ($138,240 x (14/12)).

Analysis: What are Borly's Damages?

[136] Borly is entitled to be put in the position it would have been in had it been given 10 months' notice and the contract continued through the notice period: *Matthews v. Ocean Nutrition Canada Ltd.,* 2020 SCC 26 at para. 54.

[137] The plaintiffs submit that Mr. Benning's calculations are a reasonable approach for the assessment of Borly's prospective damages, bearing in mind all the possible contingencies. Some of these negative contingencies would have involved slow business periods for Country Lumber which would reduce the number of Borly's trucks operating.

[138] The plaintiffs' submission uses Mr. Benning's method above, but uses the historical income/revenue ratio before tax (40 percent) and adjusts the notice period to 16 months. This results in a net income of $204,800 prior to mitigation. With mitigation, the plaintiffs submit that Borly's overall loss is $183,659.91.[1]

[1] Mr. Ursic testified that Borly earned $13,640.09 in net income for the (approximately) 10-month period following the termination. The plaintiffs submit that a contingency discount of $7,500 is appropriate, representing Borly's estimated further (net) mitigation earnings.

[139] The defendant argues that the plaintiffs rely on dated data that is not applicable to Borly's net income at the time the Contract was terminated. In particular, the defendant points to changes in the housing market from mid-2023 onwards and the general downward trend in Borly's yearly net income. Mr. Ursic, Ms. Koudys, and Mr. Rexworthy gave evidence regarding the downturn of trucking demand in the lumber industry – and the business – and the financial challenges experienced by Country Lumber from the beginning of 2024 to the present time. Ms. Koudys gave specific evidence regarding the impact of a depressed housing market on the lumber industry and in cross-examination Mr. Benning agreed that there was a decline in the housing market from mid-2023 onward.

[140] The defendant also takes the position that damages should be measured based on the personal remuneration that Mr. Ursic received through Borly. They rely on *JKC* for this proposition.

[141] I do not agree that the personal remuneration that Mr. Ursic received through Borly is an appropriate method of calculation here. First, the plaintiffs explained that Mr. Ursic is not seeking damages in his personal capacity. Second, the facts here can be distinguished from *JKC.* While *JKC* also involved a corporate plaintiff and individual plaintiff owners, there were a number of unique factors that made it logical to assess damages with regard to the individual plaintiffs, rather than the corporate plaintiff. For example, in *JKC*, the corporate plaintiff sustained a net loss for the two years prior to termination. As there was no corporate profit prior to termination, the Court found that the appropriate measure of damages was based on shareholder wages or income. In the present case, Borly was profitable during the entire contractual relationship with Country Lumber. Moreover, in *JKC* the income earned after the contract ended was earned by the individual plaintiffs, not the corporate plaintiff. Neither party in that case suggested that this mitigation income should be ignored: para. 141. This is not the case here as Borly, not Mr. Ursic as an individual, earned income after the termination.

[142] Mr. Ursic is not claiming damages in his capacity as an employee of Borly and thus whatever salary he chose to pay himself as a driver is irrelevant. Moreover, as the sole owner what Mr. Ursic chose to do with Borly's profits (e.g. pay himself out dividends or reinvest them into his company) should not be determinative of the loss caused by the termination without notice.

[143] I agree with the defendant, however, that a more recent time period should be chosen as exemplary of Borly's projected income going forwards. This is what was done in *Weber v. Coco Homes Inc.,* 2013 ABQB 180, where the first five months of 2008 before the plaintiff's contract was terminated was used to account for fluctuations in the housing market: para. 105.

[144] The defendant proposes using only the invoices from January 1, 2024 to March 17, 2024, a period of less than three months. In my view, taking too small a snapshot of revenue is also unreliable. As demonstrated by the invoices provided by Borly, even when the company was experiencing an overall downward trend, the amounts earned by each truck could vary significantly from month to month. Therefore, I find it fair to use the past six months of revenue as illustrative of Borly's projected financial situation during the notice period.

[145] I adopt Mr. Benning's methodology, but only use the invoices from six months prior to termination, rather than the full 116 weeks used by Mr. Benning. This includes the invoices from September 18, 2023 until March 17, 2024 and results in an annualized revenue of $321,978.64 ($159,666.12/181 days x 365).[2] The plaintiffs did not give a reason for using the pre-tax income/revenue ratio in their calculations. Borly would have had to pay corporate taxes for this period of time, and Mr. Benning uses the after-tax ratio in his calculations. Consequently, I use the after-tax

[2] I have used Mr. Benning's summary of invoices with two exceptions. First, the invoices from January 22 to February 4, 2024 and February 5 to February 18, 2024 contain handwritten changes that were not taken into account by Mr. Benning. The actual payments that were included in evidence appeared to reflect these changes and I therefore used the adapted number for both of these invoices. Second, there is a letter in evidence providing for an additional $47.15 (GST excluded) for February 17, 2024 that was paid out a month later. I have added this payment into my calculation.

income/revenue ratio from 2021 of 36 percent. This results in an annualized net income of $115,912.

[146] Applying this to the notice period of 10 months that I determined above, results in a net income loss (before mitigation) of $96,594.

Mitigation

Legal Principles

[147] The law imparts a duty on the terminated employee or dependent contractor to be in "constant and assiduous application for alternative employment" and to explore "what is available through all means": *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 at para. 31.

[148] The employer must establish on a balance of probabilities that the plaintiff had an opportunity to mitigate its damages and unreasonably failed to take that opportunity or, alternatively, that the plaintiff mitigated some or all of its damages. In either case, the overall damages will be reduced by the mitigation or by the estimated amount of mitigation that reasonably should have occurred: *Southcott Estates Inc. v. Toronto Catholic District School Board,* 2012 SCC 51 at para. 24.

[149] Mr. Ursic testified that immediately after Country Lumber terminated the contract of Borly he made efforts to look for new trucking work, including contacting other companies. Mr. Ursic testified that despite his experience in the trucking industry, his re-employment prospects were challenging because, prior to the termination, he had spent 14 years working exclusively for Country Lumber.

[150] Mr. Ursic testified that, through his efforts, Borly earned some revenue after the termination, although substantially less than it did while working for Country Lumber.

Analysis: Mitigation

[151] Both parties agreed that Borly mitigated its damages through alternative trucking work post-termination. However, the defendant takes issue with the calculation of Borly's mitigated earnings.

[152] Mr. Ursic testified that, through its mitigation efforts, Borly earned $120,459 (inclusive of GST) from March 16, 2024 through to January 13, 2025. Mr. Ursic also testified that Borly incurred expenses of $106,818.91 through to January 2025. After deducting the expenses, Borly earned $13,640.09 in net income for the approximately 10-month period following the termination.

[153] The defendant argues that net income is an inappropriate measure to calculate Borly's mitigation earnings and that I should use revenue rather than profits. From my understanding of their argument, the defendant takes issue with the fact that if the mitigation amount is expressed as profits, rather than revenue, the defendant may be unduly required to compensate Borly for increased expenses incurred following termination.

[154] The defendant submitted calculations reflecting the difference between the mitigation revenue earned by Borly in the 10 months following termination and the projected revenue they would have earned under the Contract, and suggests the Court use this approach to calculate damages.

[155] According to the Expert Report it is true that Borly's proportional expenses during this period are higher than is typical. This is to be expected, considering that Borly had some fixed costs (i.e. insurance) and experienced a drop in revenue after it lost its only customer. Moreover, Borly's expenses over these 10 months, annualized, are actually significantly lower than in previous years ($128,183). The drop in net income appears to be attributable to a fall in revenue, rather than a rise in expenses.

[156] There was no allegation that any of the actual expenses incurred by Borly after termination were unreasonable. Borly is entitled to be put in the position it

would have been in had the Contract not ended. Borly has discharged its duty to mitigate. Therefore, the fact that Borly had to continue paying certain fixed costs while it re-built a client base, resulting in higher proportional expenses in comparison to revenue, rightfully forms part of its loss. I accept the plaintiffs' calculation of mitigation earnings.[3]

[157] Reducing the damages above by the $13,640.09 net income earned by Borly in the 10 months following termination, Borly's loss as a result of the termination without notice is $82,953.91.

Conclusion

[158] For the reasons given, I have concluded that Borly is a dependent contractor and is entitled to a notice period of 10 months. Based on Borly's projected net income and after taking into account mitigation, I award Borly the sum of $82,953.91 in lieu of notice.

Costs

[159] Based on the outcome, the plaintiffs are entitled to costs. If the parties are unable to agree on an appropriate cost order, or if there are matters relevant to costs that the parties wish to bring to my attention, they are at liberty to submit written submissions, not to exceed ten pages. The original submission should be within 45 days of the date of these Reasons. Any response submissions should be submitted within 15 days of the receipt of the original submissions. Any reply submissions are limited to five pages and may be submitted within ten days of the receipt of the response submissions.

[3] I note that the plaintiffs use the amount Borly was actually paid over these 10 months, rather than the amount that they invoiced their clients. I consider this to be a fair representation of Borly's mitigation earnings over this time. The plaintiffs also use Borly's revenue inclusive of GST. Though this is inconsistent with their pre-termination calculation of income, for the purposes of mitigation it is to the defendant's benefit and I therefore accept their calculation.

[160] The parties should submit any written submissions to me through Supreme Court Scheduling.

"D. MacDonald J."