EYB 2020-345423 – Résumé
Cour supérieure

Leyne c. PSP Investments
500-17-096069-169 (approx. 28 page(s))
29 janvier 2020

Décideur(s)
Immer, Christian

Type d'action
DEMANDE en réclamation d'une indemnité tenant lieu de délai de congé. ACCUEILLIE en partie.

Indexation
TRAVAIL; CONTRAT DE TRAVAIL; CONTRAT À DURÉE INDÉTERMINÉE; CONGÉDIEMENT; MOTIF SÉRIEUX; RÉSILIATION; PRÉAVIS; DÉLAI DE CONGÉ; importante société d'État canadienne dans le domaine de l'investissement; multiples cadres supérieurs; sous cadre supérieur responsable de la gestion d'un *value opportunity portfolio* (VOP); congédiements après cinq ans et demi de service; absence de recrutement agressif de l'employeur; absence d'efforts raisonnables pour se replacer rapidement; évaluation du caractère suffisant de l'indemnité de neuf mois versée par l'employeur; détermination des postes de rémunération devant être pris en compte dans le calcul de la somme versée;

Résumé
L'employeur est une importante société d'État canadienne qui oeuvre dans le domaine de l'investissement. Le salarié a été embauché pour établir la stratégie commerciale visant à constituer et gérer un *value opportunity portfolio* (VOP). Il dirigeait neuf personnes en tant que directeur général du VOP et faisait partie de l'un des neuf cadres supérieurs qui relèvent du vice-président des marchés publics, qui à son tour doit se rapporter au vice-président exécutif, lequel relève finalement du directeur général de l'entreprise. Il a été congédié sans motifs sérieux après cinq ans et demi de service à la suite de problèmes de gestion. Son salaire, composé d'un montant de base, d'une allocation de dépenses, de contributions à un régime de retraite et de primes d'incitation, était très substantiel. Il est passé de 634 581 $, la première année, à 1 645 469 $, l'année avant son congédiement, pour redescendre à 891 362 $ la dernière année en raison de la performance désastreuse du VOP. S'il ne s'est pas retrouvé un emploi comparable dans l'année suivant son congédiement, c'est en parti à cause de la recherche ciblée qu'il a effectuée qui a eu pour effet de réduire ses opportunités, alors que son expérience lui permettait pourtant de rechercher un large éventail d'employeurs. Il s'est, en outre, consacré au développement d'une entreprise en particulier plutôt que de chercher activement un emploi. Il appert également que lorsque l'employeur l'a approché, il était en fin d'emploi dans son ancien poste et il s'est négocié une importante indemnité de licenciement.

Le présent dossier ne comporte pas de circonstances particulières justifiant un délai de congé plus long que la moyenne. La revendication par le salarié d'une indemnité tenant lieu de délai de congé équivalant à un an de salaire est démesurée. Le préavis totalisant neuf mois accordé par l'employeur est suffisant.

La valeur de l'indemnité devait être calculée en fonction de la rémunération brute que le salarié aurait gagnée pendant la période de préavis. Cette rémunération comprend le salaire de base, une allocation de dépenses, les cotisations au régime de retraite et des primes. En effet, même si certains de ces avantages sont entièrement discrétionnaires, s'ils ont été accordés d'office pendant la durée de l'emploi et que le salarié a une attente raisonnable de les percevoir, ils doivent être inclus dans le calcul de la rémunération. En l'espèce, s'il est vrai qu'en cours d'emploi il n'y avait pas véritablement de corrélation entre le rendement du salarié et son augmentation de salaire annuel, force est d'admettre que l'année durant laquelle le préavis aurait dû être consenti, aucune augmentation n'aurait été accordée, vu la piètre performance du VOP dont la valeur a chuté drastiquement, mais également considérant les lacunes du salarié quant à la gestion de son équipe et de ses dépenses personnelles. Pour ce qui est des plans d'incitation, il en existait deux. Le salarié a reçu tout ce qui lui revenait en vertu du plan d'incitation à long terme, cependant un ajustement est nécessaire pour ce qui est du plan à court terme. À cet égard, la renonciation, signée en début d'emploi, à la réclamation de ce boni en cas de congédiement est sans effet. Le salarié ne pouvait renoncer sans savoir ce que visait réellement cette renonciation, soir la valeur du boni, et il s'agissait de toute façon d'une renonciation illicite au sens de l'art. 2092 C.c.Q. C'est un montant de 186 843 $ qui lui revient à ce poste. L'employeur soutient qu'il y aurait un trop payé en vertu du régime à long terme ce qui entraînerait le rejet de la réclamation pour le programme à court terme. Il a tort. Il s'agit de deux dispositions contractuelles distinctes qui ne donnent pas ouverture à compensation l'une envers l'autre. Du reste, tout ce qui était dû a été payé en ce qui a trait aux allocations de dépenses, toutefois l'employeur, contrairement à ce qu'il soutient, aurait dû verser, pendant la période de préavis, un montant équivalent à la cotisation de retraite qu'il aurait déposée au nom du salarié dans son régime de retraite, ce qui équivaut à une somme de 11 362,50 $.

Pour ces motifs, l'employeur est condamné à verser une somme de 198 205,50 $ au salarié.

Suivi

- Déclaration d'appel, C.A. Montréal, no 500-09-028878-205, 4 mars 2020

Jurisprudence citée

1. *Aksich c. Canadian Pacific Railway*, EYB 2006-107599, [2006] R.J.D.T. 997, 2006 QCCA 931, J.E. 2006-1480 (C.A.)
2. *Bramson c. Trustifi inc.*, EYB 2018-we)290591, 2018 QCCS 542, 2018 QCCS 542

(C.S.)
3. *Château inc. c. Niro*, EYB 2009-167338, 2009 QCCA 2314, J.E. 2010-43 (C.A.)
4. *Dawe v. Equitable Life Insurance Company*, 2019 ONCA 512 (Ont. C.A.)
5. *Ellingsen c. PWC Management Services, l.p.*, EYB 2014-241743, 2014 QCCS 4199, J.E. 2014-1650 (C.S.)
6. *Fieldturf Tarkett Inc. c. Gilman*, EYB 2014-232275, 2014 QCCA 147, J.E. 2014-263 (C.A.)
7. *Gignac c. Sandoz Canada inc.*, EYB 2011-198765, 2011 QCCS 6216, J.E. 2011-2118 (C.S.)
8. *Gilman v. Fieldturf Tarkett Inc.*, EYB 2012-204941, 2012 QCCS 1429, J.E. 2012-916 (C.S.)
9. *Guerchon c. Rubble Master Systems Inc. (9218-1445 Québec inc.)*, EYB 2012-204138, 2012 QCCS 1093, J.E. 2012-770 (C.S.)
10. *IBM Canada ltée c. C. (D.)*, EYB 2014-239491, 2014 QCCA 1320, J.E. 2014-1301 (C.A.)
11. *Kugler c. IBM Canada Limited*, EYB 2016-275044, 2016 QCCS 6576 (C.S.)
12. *Melanson c. Groupe Cantrex Nationwide*, EYB 2014-233022, 2014 QCCS 394, J.E. 2014-355 (C.S.)
13. *Québec (Commission des normes du travail) c. Asphalte Desjardins inc.*, [2014] 2 R.C.S. 514, 2014 CSC 51, EYB 2014-240167, J.E. 2014-1336
14. *Rippeur c. Société canadienne des postes*, EYB 2016-264565, 2016 QCCS 1696, J.E. 2016-869 (C.S.)
15. *Shire Biochem Inc. c. King*, REJB 2003-51938, 2003 CanLII 10770, J.E. 2004-207 (C.A.)
16. *Spiering c. Novartis Pharma Canada inc.*, EYB 2008-131292, [2008] R.J.D.T. 703, [2008] R.J.Q. 792, 2008 QCCS 1051, J.E. 2008-729 (C.S.)
17. *Standard Broadcasting Corporation Limited c. Stewart*, REJB 1994-64347, 1994 CanLII 5837, J.E. 94-1199 (C.A.)
18. *Stepanian c. Réseaux sans fils Calamp inc.*, EYB 2018-290781, 2018 QCCS 611 (C.S.)
19. *Structures Lamerain inc. c. Meloche*, EYB 2015-249364, 2015 QCCA 476, J.E. 2015-562 (C.A.)
20. *Transforce inc. c. Baillargeon*, EYB 2012-210518, [2012] R.J.D.T. 587, [2012] R.J.Q. 1626, 2012 QCCA 1495, J.E. 2012-1739 (C.A.)

Doctrine citée

1. MOREAU, P.-E., « Tableau sommaire des indemnités tenant lieu de délai de congé

octroyés lors d'une fin d'emploi » dans *dans Développements récents en matière de cessation d'emploi et d'indemnité de dépôT (2014),* Service de la formation permanente, Barreau du Québec, vol. 387, Montréal, Éditions Yvon Blais, 2014, p. 57-99, EYB2014DEV2142

Législation citée

1. *Code canadien du travail*, L.R.C. (1985), ch. L-2
2. *Code civil du Québec*, L.Q. 1991, c. 64, art. 1619, 2091, 2092

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-096069-169

DATE: January 29, 2020

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

TIMOTHY LEYNE
Plaintiff
v.
PSP INVESTMENTS
Defendant

JUDGMENT

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[1] As a result of the termination of his employment by PSP Investments (**PSP**), Timothy Leyne is claiming an indemnity equivalent to the gross remuneration he would have received during a twelve month notice period, net of the amounts already paid by PSP.

[2] PSP maintains that the nine notice period it provided to Leyne is appropriate and that its calculations are correct.

1. CONTEXT

[3] PSP is a Canadian Crown Corporation which invests funds equal to the net contributions by participants in various branches of public service. These investments serve to fund eventual pension plan liabilities.

[4] PSP invests in different asset classes, including public markets. In 2010, it wished to further diversify its public markets assets by constituting and managing a value opportunity portfolio ("VOP"). It therefore was looking to hire a vice president to establish VOP's business strategy and to carry it out. At that time, Leyne was responsible for the winding down and divestment of the assets of two divisions at Rio Tinto Alcan ("RTA"). After a first unsuccessful approach, Leyne expressed interest as his work at RTA was coming to an end and other opportunities at RTA were not materializing.

[5] Leyne's remuneration as set out in his employment agreement was comprised of a base salary, a discretionary expense allowance and contributions to a pension program.[1] He also was eligible for annual short term bonuses and a long term incentive plan where awards were granted yearly but paid out four years later on the basis of the intervening performance. Throughout Leyne's tenure, his salary increased yearly, and he received very substantial incentive awards and payments.[2]

[6] Having drawn up a business plan approved by PSP's Board,[3] Leyne led the efforts to acquire positions in various publicly traded corporations in order to constitute VOP. At the beginning of August 2015, certain investments performed very poorly and this only got worse throughout the year.[4] The composition and the limited number of investments in the VOP was a matter of increasing concern for PSP. Leyne's interpersonal skills and certain issues regarding management of personal expenses were also found by PSP to be problematic. Leyne was terminated on November 4, 2015.[5] Despite its dissatisfaction, PSP did not invoke a serious reason within the meaning of article 2094 of the Civil Code of Quebec.

[7] After Leyne's termination, no further investment activities in VOP were carried out and PSP progressively divested itself of the assets held, after having unsuccessfully attempted to hire a successor to Leyne.

[8] PSP paid, upon termination, an indemnity in lieu of the two week notice period and the two week severance period required by the *Canadian Labour Code*.[6] In July 2016, PSP also paid a lump sum equivalent to 39 weeks of base salary and of a discretionary expense allowance (referred to as perquisites or perks). Certain payments

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[1] Exhibit P-2.
[2] Exhibit P-9.
[3] Exhibit P-23.
[4] Exhibit D-22.
[5] Exhibit P-10.
[6] Exhibit D-25; *Canada Labour Code*, R.S.C. 1985, c. L-2.

were made on account of the incentive plans based on the pay-out formula set out therein for events of dismissal without serious reason.[7]

[9] Leyne claims that the nine month notice period that was paid is insufficient and he contends that he is entitled to the monetary equivalent to all the salary, incentives, expense allowances and pension contributions he would have received during a twelve month notice period. Any provisions limiting his rights in the incentive plans should be inoperative as they are contrary to article 2092 C.C.Q.

2. ISSUES IN DISPUTE

[10] The Civil Code permits either party to a contract of employment for an indeterminate term to terminate it by giving notice of termination to the other party.

[11] In practice however, in order not to be placed in an uncomfortable transition period, the employer will often elect to put an end immediately to the employment by paying a compensatory indemnity in lieu of notice.[8]

[12] Two components will determine the appropriate amount of this indemnification: the length of a notice period and the global remuneration which would be earned during this notice period.

[13] To determine the appropriate amount of indemnification to Leyne, the Court must therefore answer the following questions: what is the appropriate notice period (section 2.1 below) and what elements of salary, incentives, expense allowance and pension contributions must be taken into consideration during this period and in which amount (section 2.2 below).

2.1 What is the notice period?

[14] The employment agreement contains no provision dealing with the length of the notice period, as the parties agreed that this should be determined at the time of termination by the applicable legal principles.[9]

[15] Article 2091 C.C.Q. specifies that in determining the length of this notice period, the employer must take into account, in particular, the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work.

[16] The courts have further fleshed out what criteria must be taken into account. The Court of Appeal in *Stewart* notes that many factors must be evaluated in a "perspective

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[7] Exhibit D-27.
[8] *IBM Canada Ltd.* v. *D.C.,* 2014 QCCA 1320, par 55.
[9] Exhibit P-2.1, p. 4: draft employment agreement, handwritten notes.

globale".[10] Courts principally weigh the following factors in setting an appropriate severance period:[11]

- the circumstances of the hiring;
- whether the employee was lured away from another position;
- the nature and importance of the position;
- the expected remuneration;
- the length of the employment period and the difficulty to find similar employment.

[17] Notice periods must not be so long as to render illusory the employer's right to terminate.[12] Twenty four (24) months is the high end of the notice period spectrum[13] and is awarded only in very particular circumstances.[14]

[18] Notice periods are, generally, commensurate with length of service; the longer the service period, the longer the notice.[15] Several cases use a rule of thumb of four weeks of notice per year of service, as a useful starting point to which they may add additional weeks considering the factors set out above.[16] This method must be applied with caution when determining appropriate notice periods for high level employees. Indeed, the Court of Appeal has confirmed judgments awarding an eleven month notice period to an employee who only worked 38 days[17] and a one year severance period to an employee who only worked 12 days.[18] Each case must therefore be considered on its own merits.

[19] The employee has a duty to mitigate his damages. He must therefore actively seek alternate employment and any revenue he earns during the notice period will be deducted from his damages in lieu of notice.

[20] Leyne argues that a twelve month notice period is appropriate. He emphasizes the following factors: very few positions are comparable to managing a portfolio of the magnitude of VOP, he left France and RTA to join PSP, he held a senior position, he worked five and a half years and he had a very significant remuneration.

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10 *Standard Broadcasting inc.* v. *Stewart*, 1994 CanLII 5837 (QC CA).
11 *Transforce Transport inc.* c. *Baillargeon,* 2012 QCCA 1495, par. 53 and 54.
12 *Standard Broadcasting inc.* v. *Stewart, supra*, note 10, p. 1758.
13 *Aksich* c. *Canadian Pacific Railway*, 2006 QCCA 931.
14 *Allstate du Canada* c. *Daunais*, 2014 QCCA 586, par. 5.
15 See for example the very complete table of cases set out in: Pierre E. MOREAU, « Tableau sommaire des indemnités tenant lieu de délai de congé octroyés lors d'une fin d'emploi » dans *Développements récents en matière de cessation d'emploi et d'indemnité de dépôt*, vol. 387, Service de la formation continue du Barreau du Québec, Cowansville, Éditions Yvon Blais, 2014, p. 57-99.
16 *Gignac* c. *Sandoz Canada inc.,* 2011 QCCS 6216; applied in *Guerchon* v. *Rubble master Systems Inc., (9218-1445 Québec inc.),* 2012 QCCS 1093; *Ellingsen* v. *PWS Management Services l.p.,* 2014 QCCS 4199.
17 *Transforce Transport inc.* c. *Baillargeon, supra*, note 11.
18 *Shire Biochem inc.* c. *King,* 2003 CanLII 10770 (QC CA).

[21] For the reasons that follow, the Court disagrees with Leyne and holds that upon weighing all factors, the nine month notice period calculated by PSP is appropriate.[19]

[22] The Court agrees that Leyne's remuneration is very substantial[20]. Once both the short and long term incentive awards kick in, Leyne's remuneration is $1,562,222 in FY 2014 and $1,645,469 in FY 2015. However, in 2016, given VOP's poor performance, the total remuneration would have been reduced to $891,362. A long employment search is foreseeable to replace an employment with such a remuneration potential.

[23] He also clearly holds a senior position. He led a 9 person team as managing director of VOP. However, it must be noted that he is one of nine senior employees who report to the Public Markets vice-president[21], who in turn reports Executive Vice President and Chief Investment Officer who ultimately reports to the Chief Executive Officer.

[24] It is also true that he did not find replacement employment at comparable financial conditions during the twelve months he is claiming as notice period. The Court considers that this delay is not as telling as Plaintiff suggests, since he did not take full advantage of the employment counselors,[22] he excluded the banking industry from the outset deeming that the domain had changed too much since he left it fifteen years ago, and that he limited his efforts to tap into his extended network including sending out a number of emails.[23] This focused search reduced the scope of opportunities.

[25] More importantly, in September 2016, he began consulting work with Agendize, a firm which provides all-in-one Booking and CRM applications and he led efforts to obtain financing. There was an interesting potential payout as is highlighted by the success Fees and Payment provisions of the Agreement.[24] Ultimately, no transaction materialized in 2016 and he earned no revenue.[25] Courts will limit notice periods if the employee chooses to dedicate himself after his or her termination to business ventures rather than actively seek employment.[26] The Court finds that Leyne made such a choice. The materialization of Leyne's negotiations with Agendize and the moment at which he began to work as their consultant coincides roughly with the expiry of a nine month notice delay.

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19 This includes the two week severance allocation and the indemnity in lieu of the two week notice period owing under the Canadian Labour Code, R.S.C. 1985, c. L-2.

20 Leyne's yearly global remuneration totals: $634,581 (FY 2011), $699,453 (FY 2012) and $932,429 (FY 2013). Once the LTIP pay outs kick in, the total remuneration increases to $1,562,222 (FY 2014) and $1,645,469 (FY 2015). In 2016, had he worked the entire year, and given VOP's disastrous performance, his total remuneration would have fallen to $891,362 taking into account a base salary of $263,500, a STIP award of $149,452 and a LTIP payout of $478,320.

21 Exhibit D-35.

22 Exhibit D-40.

23 Exhibit P-22.

24 Exhibit D-30.

25 Exhibit P-26.

26 *Bramson* c. *Trustifi inc.*, 2018 QCCS 542, par. 60.

[26] Contrarily to Leyne's assertions, other factors do not militate for an extended period. Despite the fact that PSP is no doubt one of the largest investment funds and that there are limited number of similar employers, Leyne's experience permits him to seek out a broad spectrum of employers far beyond public pension funds. He is not in the position of an employee who has devoted his entire career to a highly specialized field where employment opportunities are very limited.[27] From 1995 to 2002, Leyne worked in the North American Corporate Banking division of the National Bank of Canada ("NBC"). He then was an investment banker at NBC's investment banking subsidiary and at Lazard Canada.

[27] When Lazard closed its Montreal office, he decided to leave the financial institutions and investment banking sectors to join Alcan to work as a director of mergers and acquisitions. From 2002 to 2006, while stationed in France, Leyne led Alcan's first unsolicited bid for the French giant Pechiney. In 2006, he moved to an operational role as Vice-President Packaging Food, in Alcan's Europe Division. In this capacity, he had full balance sheet responsibility for manufacturing operations in Central Eastern Europe, and led a team of 10 people including 3 vice-presidents representing business and corporate functions to whom another 500 employees reported.[28] In April 2008, after Rio Tinto takes over Alcan, he assumed the function of General Manager, Business Development.[29] Contrary to what this title suggests, he in fact led the divestment of Alcan's downstream business which RTA no longer had any interest in, namely Packaging and Engineered Products, via six distinct transactions.

[28] PSP did not lure Leyne away from his employment at RTA. To the contrary, when PSP approached him, Leyne was winding-up his divestment work and RTA paid him a very substantial termination package contemporaneously to his hiring by PSP. Indeed, while he was agreeing with PSP on the terms of his employment agreement, Leyne also negotiated his employment's termination with RTA whereby he was to receive the monetary equivalent of 18 months of his $332,313 base salary and short term incentive plan award set at 50% of base salary. Payouts were also stipulated for the long term incentive plan. An allowance covered the costs of the removal of his personal goods and effects from Paris to Montreal and one way class airfare. His T4 slips for 2010 and 2011 (which also includes some salary earned before termination for the period from January 1 to March 31, 2010) show payments from RTA totalling $1,188,500.80.[30]

[29] Leyne worked for PSP for a period of five and a half years. This does not in of itself warrant an extended notice period. Contrarily to the situation which presented itself in *Baillargeon* or *Shire*,[31] Leyne did not leave another position to join PSP to be shortly dismissed thereafter. The loss of a remunerative position and the stigma of being

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27 Contrarily to *Shire Biochem Inc.* c. *King*, supra, note 22.
28 Exhibit P-19, p. 2.
29 Exhibit D-48: letter of March 25, 2008.
30 Exhibit P-24.
31 *Transforce Transport inc.* c. *Baillargeon*, *supra*, note 11; *Shire Biochem inc.* c. *King*, *supra*, note 18.

dismissed quickly after being hired, will necessarily have an impact on the ability to find an alternate position. In such abrupt circumstances, the need for lengthy notice periods is evident. This is not Leyne's situation. He had five and a half years to establish the business strategy and roll it out. Unfortunately, VOP performed very poorly in the summer and fall of 2015. He knew that PSP's board of directors had concerns with some of VOP's investments in September 2015.[32] On October 26, 2015, he wrote to his former spouse indicating:[33]

> I have spend [sic] most of the evening trying to dose [sic] a growing fire back at PSP. I will call in the morning to explain but, in short, my team's financial returns are very poor so far this year – and that is putting it mildly. […] I will speak to my Boss tomorrow mid-afternoon to discuss what is expected and necessary but the tone of the exchanges has been unusually terse.
>
> (…)
>
> While I try to sleep, I will be praying for reason to reign back in Montreal.
>
> [The Court's underlinings]

[30] This situation is very different than that which prevailed in *Baillargeon* or *Shire* and failing such exceptional circumstances, a nine month is appropriate for a senior employee having worked five and a half years.

2.2 To what indemnity is Plaintiff is entitled in lieu of notice?

[31] The courts have clearly stated that when an employer terminates the employment immediately and an employee does not continue active employment throughout the notice period, the employee is to be indemnified for the gross remuneration he or she would have otherwise earned during this notice period. The governing principles are set in *Aksich* by Justice Nuss, to whom the majority defers on this point:[34]

> Thus, as a matter of law, an employee whose services are terminated without cause, and whose employment is for an indeterminate term, is entitled to damages in compensation for all the benefits which would have accrued or which would have been vested in him or her during a reasonable notice period during which he or she is not given the opportunity to work.

[32] Hence, the Court must decide which of the following components of Leyne's remuneration should be included in the calculation of gross remuneration and in what amount: base salary, STIP and LTIP payouts, discretionary expense allowance and pension plan contributions.

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32 Exhibit D-50.
33 Exhibit D-20.
34 *Aksich* c. *Canadian Pacific Railway*, *supra*, note 13.

2.2.1 Base salary

[33] PSP has paid 9 months of Leyne's FY 2016 base salary. Hence, no further amount is in principle owing. Leyne claims, however, that he is entitled to a 2.5% salary increase in FY 2017, representing the average of previous salary increases. He alleges that he received yearly salary increases, regardless of his overall evaluation.

[34] The parties have spent an inordinate amount of time on this issue which ultimately has a small dollar value. Nevertheless, since it was addressed in great detail in the testimony and in the pleadings and it could have had an impact on the pay out of incentives for FY 2016 and FY 2017 the Court will review the arguments.

[35] Leyne argues that salary increases at PSP are not directly related to performance, and that even when PSP is very dissatisfied with performance, it provides salary increases. He explains that performance is reflected by the attribution of either a plus (+), equal (=) or minus (-). A "-" is rarely given to managers. At the end of FY 2012, his overall evaluation is "="[35] and his salary increased by 4% for FY 2013. At the end of FY 2013,[36] his evaluation is "+"[37] and his increase for FY 2014 is 3,8%.[38] At the end of FY 2014, he receives a "-"[39] which according to Garant is very poor, but his salary is nevertheless increased by 1% for FY 2015.[40]

[36] Although it is true that there are not strict correlations between evaluations and the level of salary increase and that a 1% increase was given in one year even though Leyne's evaluation was a "-", the Court considers that a salary increase would not have been granted at the end of FY 2016 for FY 2017 due in very large measure to VOP's performance, but also to some extent because of Leyne's personal performance shortcomings.

- **VOP's financial performance**

[37] Six months into FY 2016, VOP's value has plummeted by close to $400 000 000.[41] In fact, over the course of FY 2016, VOP's value will decrease by over $700 000 000. To understand why Leyne's superiors, Daniel Garant and Annick Lanthier, hold him responsible for this, it is necessary to review the chronology of events. When VOP was started, it was understood by all concerned that setting up VOP portfolio would take time. The business plan laid out that "for the first few years, the portfolio will be very concentrated with only a handful of holdings and exposure to still fewer sectors/industries"[42] and this ramp up period would have an obvious impact on

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35 Exhibit P-5, p. 7.
36 Exhibit P-9, p. 9.
37 Exhibit P-6, p. 3.
38 Exhibit P-9, p. 9.
39 Exhibit P-7, p. 4.
40 Exhibit P-9, p. 5.
41 Exhibit D-22: P&L Report for VOP.
42 Exhibit P-23

VOP's risk profile. It was "estimated that a minimum of 20 investments is the necessary number to be maintained in VOP after which diversification impact is marginal".[43]

[38] This is why Garant became increasingly concerned when he felt that the pace of the investments' ramping up was too slow. It resulted in a high level of concentration and risk. He set investment targets both in value and in number for FY 2014[44] but was annoyed by the fact that Leyne and his team were refining their theoretical investment process rather than aggressively seeking out investment opportunities to reduce concentration and risk.[45] In the FY 2015 review, Garant remained unsatisfied with the lack of investment opportunities being presented and the slow pace of the ramp up.[46]

[39] When values dropped in late summer early fall 2016, shares were held in twelve companies, a far cry from the 20 investments envisaged in the business plan. Nine had a substantially lower value than at the start of FY 2016.[47] Significant investments made in two distinct tranches in a transportation logistics company, XPO, were performing particularly poorly. The situation was sufficiently worrisome that Lanthier addressed this at the PSP board meeting on September 29, 2015.[48] Garant and Lanthier concluded that more than five years into the investment strategy set out in the business plan, VOP held insufficient investments resulting in unacceptable concentration in certain industries. VOP's disastrous performance in FY 2016 was the result of poor investment decisions.

[40] Leyne replies that VOP's investments performed very well from FY 2011 to FY 2015. Certain events prevented him from adding positions in FY 2016, namely that the benchmark was changed from a fixed 7% rate to one pegged on market indicia performance. Also, his team was forced to work on deals for other subclasses, which detracted it from its work of seeking further investment opportunities.

[41] No doubt, there is some merit in these explanations. Decreases in value may indeed be inevitable and may be temporary. A significant part of the drop in value of VOP in FY 2016 is attributable to one position, XPO Logistics. In the long term, XPO did regain the lost ground and performed very well.[49] A change in the benchmark may cause the team to have to review their investment strategy and make in pause in investments. However, it is inescapable that VOP's portfolio performed very poorly in FY 2016 and that five years into the business plan, one position's poor performance (XPO) still had an inordinate impact on the portfolio's value. The Court accepts Garant's and Lanthier's testimony that this was an intolerable situation and that Leyne is the person ultimately responsible for it.

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43 *Ibid.*
44 Exhibit P-6.
45 Exhibit P-7: FY 2014 performance review.
46 Exhibit P-8: FY 2015 performance review.
47 Exhibit D-23: ACS, AIG, Anthem inc., Denbury, Devon, Dufry, Inmarsat, Korian, Pearson, State Street, Telefonica and XPO Logistics.
48 Exhibit D-50: September 29, 2015 Board minutes, Item 7.
49 Exhibit P-29.

- **Personal performance issues**

[42] Garant testified that as Leyne began deploying his investment strategy and dealing with various intervenors, communication issues arose. The FY 2014 personnel review attributed a "-" for his verbal communication skills. Leyne was perceived as arrogant, condescending with the legal and finance group and lacking transparency. Leyne accepted this criticism and adopted a truly constructive approach. A coach was hired to assist him. Garant indicated, in the FY 2015 review, the following areas for improvement: "Communications, communications and communications. There is a perception that VOP is difficult to deal with that should be addressed".[50] Leyne was still being supported by his coach and the communications issues had not diminished.

[43] Garant also raises the fact that PSP had reservations as to how Leyne managed his expense accounts. He submitted expenses which he should have covered with his $15,000 discretionary expense allowance. When she became vice-president of Public Markets, Lanthier refused a number of charges related to taxis to and from home and breakfast and dinner charges with the VOP team. She was shocked that such claims were being made as such expenses should have been assumed by Leyne given that he was receiving a $15,000 perquisite allocation. She was very irritated that she must spend time reviewing the expense report line by line for an employee as senior as Leyne.[51] Leyne argues that there were no clear directives on this and that he stopped the practice as soon as he was advised by Lanthier that she objected.

[44] However, a new issue arose. He decided to attend a conference in New-York City, which began on September 28, 2015. It was his birthday the weekend before and he decided to celebrate it with his partner in New-York. He therefore travelled with his car and stayed with friends. On the Sunday evening, he registered at the Nolitan hotel in the Soho district, which is very far from the hotel. Lanthier learned that Leyne was accompanied by his partner, when she picked up the phone when Lanthier called Leyne from London where she was attending a PSP board meeting to discuss amongst other topics, XPO's performance. She is of the opinion that there clearly was a personal component to the trip which she should have been advised of and that PSP's Travel and Business Expenses procedure should have been followed.[52] The hotel should have been booked through PSP's designated Travel Agency as set out in the aforementioned procedure[53] and the reservation should have been made by Natalee Tremblay, the PSP employee responsible for such matters. She handled the conference reservation and there is no reason why she could not have handled the hotel reservation.

[45] Leyne contends that given that the arrangements were made at the last minute, the block of rooms attributed to the conference goers was no longer available. The total hotel charge for the Nolitan hotel for three nights is $2,873.29 USD. In addition, he

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[50] Exhibit P-8, p. 9.
[51] Exhibit D-16, p. 256 to 320.
[52] Exhibit D-15, p. 2.
[53] *Ibid,* p. 3.

accepted to reduce his claim to the cost that would have been incurred had he reserved at the conference hotel without arguing.

[46] Even though Leyne is clearly receptive to Lanthier's criticisms, it remains that his management of his expenses is not in line with PSP's procedure and practices and that this is surprising for a higher level employee with five and a half years of experience. The Court understands that PSP, which manages retirement funds for numerous federal civil servants, is concerned that expense claims be handled rigorously. It further agrees that employees in managerial positions must set an example and that their expense reports should not warrant interventions by controllers or managing directors. It therefore sympathizes with the level of exasperation felt by Lanthier during the aforementioned events.

[47] In conclusion, the Court is of the opinion that VOP's FY 2016 performance and Garant and Lanthier's reservations regarding Leyne's communication skills and handing of personal expenses, are sufficiently significant, for it to conclude that PSP would not have given a salary increase for FY 2017.

2.2.2 Incentives

[48] Leyne's employment agreement specifies that he will participate in two incentive plans: a short term incentive plan (**STIP**)[54] and a long term incentive plan (**LTIP**).[55]

- **The STIP**

[49] At target, Leyne can earn annually 80% of his base salary under the STIP. Actual awards are calculated by the weighing of three components: an evaluation of personal objectives (Scorecard), a component linked to the total PSP fund performance (Total fund) and a component linked to the Public Market asset class. The latter is further divided in two performance subcomponents: public markets globally and VOP's performance in particular. The relative weight of the VOP subcomponent grows as investments are ramping up as is summarized in the following table:

[54] Exhibit P-14.
[55] Exhibit P-15.

FY	Target % of base salary Scorecard	Target % of base salary Total Fund	Target % of base salary Asset Class	
			Public Markets	VOP
2011	16%	16%	48%	N/A
2012	25%	16%	33%	6%
2013	25%	16%	33%	6%
2014	22%	16%	30%	12%
2015	19%	16%	30%	14.4%
2016	16%	16%	24%	24%

[50] The monetary value of these financial components for the Total fund and Public Markets Asset class are calculated by applying a multiplier to each target percentage of base salary. This annual multiplier is established by comparing the Total Fund's or Asset Class' performance to a benchmark. In addition, the multiplier is a weighted average of up to four annual multipliers prior to pay out.[56]

[51] Upon termination, Leyne was only paid a prorated part of the FY 2016 STIP award for the period up to the termination date. Hence, no indemnification was given for STIP during the notice period. The payout was calculated using target for the Scorecard component and the actual financial results up to the date of termination.

[52] Leyne claims he is entitled to the full FY 2016 STIP payout and a prorated payment for FY 2017. He establishes the amount owing by using average of the FY 2013, 2014 and 2015 payouts he received.

[53] PSP replies that it paid Leyne all he is entitled to relying on the terms of sections 10.1 and 11.3 of the STIP which disentitles Leyne to any payment during the notice period. No STIP award would have been made in 2017 as awards under the plan are discretionary and the STIP was discontinued.

- **The LTIP**

[54] Under the LTIP plan, Leyne receives an award in a given year, but an eventual payout only occurs in a one-time payment at the end of a 4 year “Performance Period”. Just as with the STIP, the payout value is measured by applying multipliers to the target salary for PSP's Total Fund, the Public Markets class of assets and the VOP sub class. There is no Scorecard component. For example, the payout for the FY 2011 LTIP award, will be calculated using the average of the multipliers relating to during FY 2011,

[56] Exhibit P-14, p. 15.

FY 2012, FY 2013 and FY 2014. Payment occurs sometime in June 2014 when the actual financial results and therefore the multipliers for all four years are known.[57]

[55] Leyne received LTIP annual awards for FY 2011 to FY 2016. At the date of termination, the four year Performance periods for FY 2011 and FY 2012 had run their course and Leyne received pay-outs of $791,568[58] and $878,066[59] in June of 2014 and 2015 respectively. The four year Performance Periods for FY 2013, FY 2014, FY 2015 and FY 2016 awards had however not completed their four year Performance period at the date of termination.

[56] As per the terms of the LTIP, PSP paid out a sum of $670,258 corresponding to the prorated value for FY 2013 to FY 2016, as of the date of the expiry of the two week statutory notice period, namely November 15, 2015 and using the PSP actual results for 2016. Leyne claims that he is entitled to greater payments under the LTIP. The prorated value of the LTIP must be made as of the end of the notice period. He therefore argues that he is entitled to the full FY 2013 LTIP award payout which would have vested during the notice as well as more significant unvested portions of the FY 2014, 2015 and FY 2016 awards calculated as of November 4, 2016. He also contends that a FY 2017 award would have been given at the end of FY 2016 and that he is also entitled to the value thereof as of November 4, 2016. The value of these payouts should be calculated using the average of payouts on the FY 2011, FY 2012 and FY 2013 payouts.

[57] For the reasons more fully set out below, the Court finds that Leyne should receive an indemnification for the STIP component during the notice period, but that he is not entitled to any further indemnification on account of the LTIP.

2.2.2.1 Legal principles

[58] Employers can provide a variety of incentives to employees such as bonuses, short term and long term incentives, restricted funds/stock units (RSUs/RUFs), stock options or phantom shares. Courts have given varying responses as to whether payouts of such incentives must be included during the notice period and whether clauses contained in the defining plans which disentitle the participant in the event of termination without cause or serious reason are enforceable.

[59] Bonuses which are an integral part of the employee's remuneration will generally be included in establishing indemnification in lieu of notice.[60] Even when they are entirely discretionary, if they were granted as a matter of course for the duration of the employment and the employee has a reasonable expectation that they will be paid, they

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57 Exhibit P-9, p. 7.
58 *Ibid*.
59 *Ibid*, p. 3.
60 *Fieldturf Tarkett Inc. (Tarkett inc.)* c. *Gilman*, 2014 QCCA 147, par. 18; *Gilman* c. *Fieldturf Tarkett Inc.*, 2012 QCCS 1429, par. 46 to 48; *Rippeur* c. *Société canadienne des postes*, 2016 QCCS 1696; *Melanson* v. *Groupe Cantrex Nationwide*, 2014 QCCS 394, par. 61 to 68.

must be included in the employee's global remuneration for the purposes of establishing the indemnity to be paid in lieu of notice.[61]

[60] If no method of calculation is provided, the courts will commonly establish the value of the bonuses which would have been paid during the notice period using an average of previous awards.[62]

[61] If no bonuses are awarded company-wide during the notice period, either because the employer has in its discretion chosen not to pay any, or because the financial components on which the level of bonus to be paid is calculated do not meet the threshold for payout, the Courts will not include any bonus component in the calculation of the indemnity in lieu of notice.[63]

[62] Clauses which purport to disentitle employees to indemnification even if they are terminated without serious reason may run afoul of article 2092 C.C.Q. As stated by the Supreme Court in *Asphalte Desjardins inc.* this article is of public order. It reads as follows:

> The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.[64]

[63] Article 2092 C.C.Q is concerned not with the notice of termination itself, but "with the employee's right to claim an indemnity if the notice is insufficient".[65] It "relates not to a right to receive a notice of termination, that is, to an actual period of work, but to its monetary equivalent".[66] The Supreme Court confirms that it is legitimate for an employer to terminate the employee's contract immediately without permitting him to work during the notice period, but that it must provide an indemnification in lieu of notice.[67]

[64] A clause which disentitles an employee to payment of incentives on the date the termination occurs when the employer opts to terminate immediately and not at the end of the notice period may therefore be problematic as the employee is not indemnified for the insufficient notice period and renounces to a right to such indemnification.

[65] The sufficiency of the indemnity must be evaluated at the time of the termination of the employment.[68] Hence, as the Superior Court finds in *Melanson*, the

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61 *Gilman* c. *Fieldturf Tarkett Inc.*, 2012 QCCS 1429, par. 45 à 47 confirmed in appeal in *Fieldturf Tarkett Inc. (Tarkett inc.)* c. *Gilman*, *supra*, note 60.

62 See for example: *Kugler* v. *IBM Canada Limited*, 2016 QCCS 6576; *Melanson* v. *Groupe Cantrex Nationwide*, *supra,* note 60, par. 81.

63 *Structures Lamerain inc.* c. *Meloche*, 2015 QCCA 476, par. 42 and 43; *Aksich, supra,* note 13; *Kugler* v. *IBM Canada Ltd.*, *supra*, note 62.

64 Art. 2092 C.C.Q.

65 *Québec (Commission des normes du travail)* v. *Asphalte Desjardins inc.*, 2014 SCC 51, par. 54.

66 *Ibid*, par. 55.

67 *Ibid*, par. 56.

68 *Kugler* v. *IBM Canada Limited, supra,* note 62, par. 89 and 90.

reasonableness of a renunciation to a bonus when establishing the indemnity to be paid can only be evaluated at the time of the dismissal.[69] It is at that moment that the employee truly understands the full measure of his or her renunciation.

[66] The parties referred to common law cases emanating from British Colombia and Ontario dealing with the enforceability of termination clauses in incentive plans. These cases must be approached with prudence as there appears to be no common law or equitable principles giving courts the same powers as a Quebec tribunal has in applying art. 2092 C.C.Q. In *Dawe*,[70] the Ontario Court of Appeal summarizes the case law on this question and indicates that three questions must be answered when faced with a claim for vesting of incentives during a notice period:

> (1) Was the bonus an integral part of the employee's compensation package, triggering a common law entitlement to damages in lieu of bonus?;
>
> (2) If so, is there any language in the bonus plan that would specifically remove the employee's common law entitlement?; and
>
> (3) Was the termination provision properly communicated to the employee?

[67] There is apparently no place for courts of common law jurisdictions to grant indemnification for the bonus during the notice period if the Court answers yes to all three questions.

2.2.2.2 STIP analysis

[68] PSP raises three arguments why it should not pay the STIP: Leyne is bound by section 10.1 and 13.4 of the STIP which does not provide for payment after termination, the STIP payments do not form an integral part of his remuneration and their payment is discretionary.

[69] The Court must however first deal with Leyne's preliminary argument that he was not given a copy of the STIP before signing the employment agreement and that therefore he cannot be bound by it. The evidence shows that Leyne was given copy of the STIP and LTIP plans prior to signing the employment agreement and that he had the opportunity to receive all necessary explanations.[71] At any rate, when he received the annual letters confirming the STIP[72] and the LTIP awards,[73] he could have asked for a copy of the plans if he no longer had them. He never did. The plans are therefore binding subject to any argument he may make under articles 2091 and 2092 C.C.Q.

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69 *Melanson* v. *Groupe Cantrex Nationwide*, *supra*, note 60; *Kugler* v. *IBM Canada Limited*, *supra*, note 62, par. 95 and 96.
70 *Dawe* v. *Equitable Life Insurance Company*, 2019 ONCA 512.
71 Exhibits D-42 and D-47: email exchanges; exhibit D-61: explanatory solemn declaration.
72 Exhibits D-5 to D-9.
73 Exhibit D-10.

[70] Section 10.1 of the STIP states that Leyne must be actively employed by PSP at the date of payment, which he is not:

> Subject to Section 13, in order to be eligible for payment of an Incentive Award, a Participant must be actively employed by PSP Investments as at the date of payment of the Incentive Award.[74]

[71] Section 13.4 of the LTIP plan provides that, in the event of Termination without serious reason, a prorated payment will be made until the last day worked of the financial year in which termination occurs:

> If a Participant's employment is terminated without serious reason, he or she will be eligible for a prorated Incentive Award in respect of the Fiscal Year not yet completed. The Incentive Award for this partially completed Fiscal Year will be calculated based on Investment Performance as at the last day of the Fiscal Year during which the termination occurred and on Base Salary earned up to the last day worked. The prorated Incentive Award payable due to termination without serious reason will be payable upon receipt of a signed release from such Participant in favour of PSP Investments, in a form satisfactory to PSP Investments and shall be paid out in accordance with Section 10.3.[75]

[72] As a result, in July 2016, PSP made a STIP payment for the period up to November 4, 2015, the last day worked, based on the actual financial results for FY 2016.

[73] The STIP is an essential component of Leyne's remuneration. The target payment when he signs his employment agreement is 70% of his base salary. It is increased to 80% in November 2010.[76] His employment agreement contains a minimum guarantee of payment in the first year of employment:[77]

> Furthermore, in order to partially offset the loss of accrued incentive compensation at your current employer, the organization is prepared to provide you with the following:
>
> - A guarantee in respect of your short term incentive compensation payment for fiscal year 2011, provided you have not resigned or been dismissed for "a serious reason" before the payment date. For fiscal year 2011 (in your case from your employment start date until March 31, 2011), we will guarantee a minimum short term incentive bonus payment equivalent to 70% of your earned base salary, while still allowing for a possible annual maximum award of 161% of earned base salary, based on maximum multiplier for each component of your incentive compensation as discussed with you. This guarantee payment will be made no later than June 30, 2011.

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[74] Exhibit P-14, p. 9, section 10.1.
[75] Exhibit P-14, p. 12, section 13.4.
[76] Exhibit D-6.
[77] Exhibit P-2, p. 2.

[74] The following table demonstrates that in every given year of Leyne's employment, the STIP exceeds or greatly exceeds his base salary.

FY	Base Salary	Total STIP Payout	Scorecard	Total Fund	Asset Class	
					Public Market	VOP
2011	230,000	361,545	35,829	81,429	244,286	N/A
2012	235,000	386,448	63,429	93,969	193,812	35,238
2013	244,400	644,963	81,500	174,275	315,922	73,266
2014	253,800	516,854	40,000	162,316	165,106	149,432
2015	256,300	513,103	52,000	157,025	120,690	183,388

[75] For 2016, the STIP payout is unusually low given the disastrous performance of VOP and the impact this has on public markets. Payout is generated almost solely by the Total Fund and personal Scorecard components. Even then, the $149,542 payout is still close to 60% of his base salary.[78]

[76] STIP awards are paid yearly to him regardless whether his evaluation was considered a +, an = or a -. Aside from the Scorecard, financial components are wholly objective, driven only by financial performance of the Total fund or the asset class or sub-class.

[77] The Court is therefore of the opinion that STIP payment is an integral and essential part of Leyne's employment conditions and should be included in his remuneration during the notice period for purposes of calculating the indemnity. The table set out above offers stark evidence of the dramatic effect of applying sections 10.1 and 13.4 of the STIP.

[78] Section 10 and 13.4 which prevent Leyne to be indemnified for the STIP he would have received had he worked during the notice period are a renunciation to indemnification in light of the inexistent notice period.[79] Art. 2092 of the *Civil Code of Quebec* renders sections 10.1 and 13.4 of the STIP inoperative insofar as they constitute a renunciation by Leyne "of his right to obtain an indemnity for any injury".

[79] The Court also does not find that the application of the STIP is discretionary and that PSP could have refused to make a pay-out for FY 2016 or FY 2017 had Leyne remained employed.

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78 Exhibit D-27, p. 3.

79 *Melanson* v. *Groupe Cantrex Nationwide*, *supra*, note 60, par. 72; *Aksich* v. *Canadian Pacific Railway*, *supra*, note 13, par. 136.

[80] Contrary to PSP's assertions, the STIP does not explicitly provide any discretion to refuse payout to an employee who qualifies for payment. The human resources director, Julie Prévéreault, testified that the board of directors have the theoretical discretion to refuse an award, but that this power has never been exercised. If in any given instance, PSP would be so dissatisfied with an employee that it envisages not paying a STIP, then it would simply terminate this employee. It is inconceivable that an employee whose performance is so unsatisfactory that he or she would not receive a STIP award, would nevertheless remain an employee of PSP.

[81] There remains the question of the value of the STIP which is used to determine the indemnity.

[82] For the five months that run in FY 2016, the parties agree on quantum. The STIP payout is to be calculated on the true annual payout of $149,542 less the $93,852 paid in July 2016 by PSP, leaving an unpaid balance of $55,690.

[83] For the remaining four months which will run in FY 2017, the matter is more complicated. The STIP Plan was discontinued at the end of FY 2016 and was replaced by a very different plan which merges both the LTIP and STIP awards and payouts in a single integrated incentive plan. The STIP component was replaced by an Annual cash payment.[80] Nevertheless, PSP does accept that at target, the new integrated plan, coincidentally, generated approximately the same cash FY 2017 award as the three year average of $393,459 used by Plaintiff for calculation purposes.[81] Hence, the four month portion of the notice period which runs in FY 2017 is equivalent to $131,153.[82]

[84] Therefore, the total value that Leyne is entitled to as indemnification for the STIP component of his remuneration is $186,843.

2.2.2.3 LTIP analysis

[85] The LTIP plan provides certain provision which deal with LTIP awards (Performance Units) which have not yet completed the Performance periods when there is an event of termination without serious reason:

> **11.3 Termination without Serious Reason**
>
> If a Participant's employment is terminated without serious reason, he or she will be eligible for payment in respect of Performance Units for which the Performance Periods are not yet completed at the time of the Participant's termination, based on Total Fund Actual Value Added and Asset Class Actual Value Added, as the case may be, in accordance with PSP Investments historical practices, to be measured as at the last day of the Fiscal Year during which the termination occurred. The payment amounts for Performance Units payable due to termination without

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80 Exhibit D-55, sections 5.1 and following.
81 Exhibit P-28.
82 Exhibit D-54.

serious reason will be payable upon receipt of a signed release from such Participant in favour of PSP Investments, in form satisfactory to PSP Investments and shall be paid in accordance with Section 9.2.

11.4 Pro Rata Amount

Any amount payable under Sections 11.1 and 11.3 will be pro-rated based on the period ending on the later of the date of the event or the end of any statutory notice period in the case of termination as compared to the period that should have applied had the Participant not been subject to the event described in Section 11.1 or 11.3.

[86] Leyne claims that he is entitled to the benefits of the LTIP as set out in clause 11.3 and 11.4, but that the notice period must be taken into account when calculating the prorated amount as per section 11.4. The expression “period ending on the statutory notice period” of section 11.4, in his view, should include the twelve month notice period he claims should be provided under article 2091 C.C.Q. Alternatively, a one year period for purposes of calculation should be read into section 11.4 as otherwise the indemnity would be insufficient based on article 2092 C.C.Q. Therefore, using sections 11.3 and 11.4 and the additional twelve month notice period scenario, he argues that:

- The FY 2013 award would be paid shortly after the year end on March 31, 2016 as the four year Performance Period has been completed.

- For the FY 2014, FY 2015 and FY 2016 awards which will have completed their four year Performance Period after the expiry of the twelve month notice period, he will be eligible for payment, based on the Total Fund, Asset Class (Public markets and VOP) added value measured as at November 04, 2016.[83]

[87] In addition, he argues that a LTIP award would have been granted at the end of FY 2016 for FY 2017. This award should also be taken into account.

[88] The following table compares the monetary impacts of Leyne’s position with regard to the LTIP based on a 12 month notice period and PSP’s position using the prorated value as at November 18, 2015:

[83] Exhibit P-15, section 11.4.

Fiscal Year	Leyne (awards prorated to November 4, 2016)		PSP (awards prorated at November 18, 2015)	
	% paid out	Amount	% paid out	Amount
2013	100%	$479,438[84]	90,8%	$434,473
2014	90,8%	$649,847[85]	65,8%	$185,304
2015	65,8%	$470,925	40,8%	$42,550
2016	40,8%	$292,002	15,8%	$7,931
2017	15,8%	$113,079	N/A	N/A
Total		**$2,005,291**		**$670,258**

[89] The interpretation that Leyne gives to the words "statutory notice period" which would include the nine month theoretical notice period is not correct. These words clearly refer to the two week notice period set out at section 230 of the *Canadian Labour Code*. They do not refer to the theoretical notice of termination (*délai de congé*) period which is used to quantify an indemnity in lieu of notice. This period is calculated on a case by case basis by applying the factors set out art. 2091 C.C.Q. and cannot be held to be "statutory".

[90] Hence, if Leyne is to succeed, he must convince the Court that sections 11.3 and 11.4 must be modified, using the Court's power under art. 2092 C.C.Q.

[91] The Court concludes that article 2092 C.C.Q. and the principles enunciated in the case law in regards thereto, do not give Leyne a right to a greater indemnity for the LTIP than that which PSP has paid, namely $670,258.

[92] The purpose of the LTIP is succinctly set out in the LTIP plan:

> PSP Investments' LTIP is designed to:
>
> i) reward participants for the achievement of superior and sustained investment performance by PSP Investments;
>
> ii) attract and retain high-calibre employees; and
>
> iii) align the interests of participants with those of PSP Investments' stakeholders.
>
> The LTIP is a cash-based plan that pays a percentage of base salary to participants holding senior positions, solely taking into account the achievement of investment performance on the assets managed by PSP Investments. It requires above-threshold performance over a four-year period before a payout is earned.

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84 Using actual FY 2016 results.

85 Using average FY 2011, 2012 and 2013 results.

[93] If the Court were to set aside sections 11.3 and 11.4 of the LTIP plan and were to use the same approach as that adopted in its analysis for the STIP, it would indemnify Leyne for the LTIP awards which would have vested during the nine month notice period. Only the FY 2013 award would thus be paid out during this nine month notice period (or during a twelve month notice period for that matter). Leyne would have therefore been entitled to $478,494, which is far less than the $670,258 paid to Leyne by PSP applying sections 11.3 and 11.4 of the LTIP.[86]

[94] This is not what Leyne wants. He wishes to maintain the benefits of sections 11.3 and 11.4 which provide him with prorated payments for all LTIP awards which have not vested but wants to extend the calculation period for purposes of prorating to the end of the notice period used for purposes of calculation of the indemnification which in his submission was November 4, 2016, but which the Court has set at August 4, 2016. The Court does not have any legal basis to so improve the contractual provisions of the LTIP.

[95] Courts distinguish incentives which are paid for performance and which are compensatory in nature, generally in the form of annual bonuses, and long term incentives which are prospective.[87] Indeed, by their nature and their purpose, long term incentive plans, such as stock options, RSUs/RFUs or phantom shares are usually crafted to be paid out in the long term in order to ensure that the employee remains loyal to the company and focuses on long term profitability as opposed to a short term gain.

[96] When the employment is terminated with immediate effect, the eventual value of the incentive is not foregone because the employee was given insufficient, or no notice of termination. It is lost because the termination of the employment does not allow the employee to be present in the long term and to capitalize on any award. It is the termination of the employment and not the insufficient notice which is the cause of the employee's loss of chance to capitalize on unvested awards.[88] Article 2092 C.C.Q. is therefore of no use to the employee as it addresses the consequences of insufficient notice, not of the termination of the employment. Indeed, the Civil Code of Quebec allows either party to terminate a contract of employment.

[97] This being said, and although the case law is far from unanimous on the point,[89] there are instances where Courts have awarded indemnification to compensate for long term prospective incentives, if these incentives would have vested during the notice period. Hence, in *Fieldturf Tarkett Inc* where employees were awarded phantom shares

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86 Exhibit D-27.
87 *Ibid*.
88 *Aksich* v. Canadian Pacific Railway, *supra*, note 13, par. 144.
89 See *contra*: *Stepanian* c. *Réseaux sans fils Calamp inc.*, 2018 QCCS 611, par. 74 and 75; *Château inc. (Le)* c. *Niro*, 2009 QCCA 2314, par. 36.

which had not vested prior to their termination, but which would have vested during the notice period, the Court of Appeal writes:[90]

> [17] Ici, le régime temporaire mis en place avait somme toute la même finalité qu'un régime de bonus et le juge ne s'est pas trompé en s'inspirant des principes applicables en matière de bonus et de délai-congé pour statuer sur la question de l'éligibilité.
>
> [18] Le droit québécois reconnaît que des bonis et des programmes d'option d'achat d'actions font partie de la rémunération globale et sont généralement dus dans le cadre du délai de congé.
>
> [19] La terminaison sans motif sérieux de leur contrat d'emploi par l'appelante avant la date butoir ne saurait ainsi faire obstacle à l'éligibilité des intimés.
>
> [The Court's underlinings]

[98] As mentioned above, Leyne obtained more than what would have resulted as a result of the application of this principle.

[99] The Court is not aware of any case which provides an indemnification for the loss of long term incentives that do not vest during the notice period, but only thereafter. Well to the contrary, for example, in *IBM Canada Ltée*, the Court does not grant any indemnification on account of the Supplemental Executive Retirement Plan (SERP) because the employee being 53 years old at the end of the twenty four month notice period was not entitled to the benefit of the SERP regime as he did not attain the minimum age of 55.[91]

[100] There is therefore no other basis than the advantageous provisions articles 11.3 and 11.4 to justify the partial payment of LTIP awards that have not vested at the date of termination or during the notice period.

[101] Leyne's argument that he would have been entitled to a LTIP award in FY 2017 cannot stand either. Indeed, the Court of Appeal has stated that it is illogical to claim that new long term incentives would have been awarded by the employer during the notice period, when it is clear that the employee will not be present to see these incentives mature.[92] This all the more true in the present case as the LTIP plan was cancelled at the end of FY 2016 and the terms of the new plan, including indemnification in the event of termination are very different. The participants are now awarded a Total Incentive. Part thereof is paid out in cash (Annual cash) within 90 days following the end of the Fiscal Year. This Annual cash replaces the previous STIP award. The other portion of the Total Incentive is granted as Deferred Fund Units (DFU)'s which will vest over three years after the end of the Fiscal Year in which they

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[90] *Fieldturf Tarkett Inc. (Tarkett inc.)* c. *Gilman*, *supra*, note 69, par. 17 to 19.

[91] *IBM Canada ltée* c. *D.C.*, 2014 QCCA 1320; *Spiering* c. *Novartis Pharma Canada inc.*, 2008 QCCS 1051.

[92] *IBM Canada ltée* c. *D.C.*, *supra*, note 91, par.107 to 110.

are awarded.[93] These DFU's replace the former LTIP awards. Contrary to the LTIP, payouts are made at the end of each of the three years. The logic of payouts of DFUs is very different than that of the LTIP. No right to partial payment accrues to participants who are terminated without serious reason during the first months of FY 2017.

[102] PSP argued that if the Court applies the principle that payouts under the STIP must be maintained during the notice period, setting aside notice period provision in section 10.1 and 11.3 of the STIP, then it should also recognize that if it applies the same reasoning to the LTIP and sets aside sections 11.3 and 11.4 and concludes that Leyne is entitled to the $478,320 FY 2013 payout only, PSP in fact overpaid Leyne $191,939 on the LTIP component. Hence in applying the overpayment of $191,939 to the $186,843 owing under the STIP, no amount would be due.

[103] The Court does not accept this position. The LTIP and STIP are distinct contractual agreements. As set out above, the Court does not agree that section 11.3 and 11.4 are abusive or inoperative and applies them and concludes that PSP correctly paid $670,258 on the account of the LTIP. There is no overpayment; PSP paid what it owed contractually, no more, no less.[94]

- **Remarks on quantum**

[104] Even though it dismisses Leyne's claim regarding an indemnity for the LTIP, the Court will nevertheless make certain remarks regarding how payouts would be calculated if the date at which the LTIP awards are prorated under sections 11.3 and 11.4 is August 4, 2016.

[105] The Court cannot accept the methodology adopted by Leyne as it is not in conformity with PSP's Total Fund, Public markets asset class and VOP sub class of assets actual results.

[106] As Leyne did not have access to actual figures to calculate the multipliers applicable for FY 2016 and FY 2017, Leyne uses a three year average of $715,691 of the FY 2011, FY 2012 and FY 2103 LTIP payouts to calculate the prorated payouts for the FY 2014, FY 2015 and FY 2016 awards.[95] This is inappropriate.

[107] The Court recognizes the difficulty that Leyne faced in attempting to assess the value of the LTIP multipliers, not having access to the relevant data namely actual results and predetermined multipliers. However, this does not allow the Court to substitute his hypothetical scenarios to reality.

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93 Exhibit D-55, p.4: DFU Annual Vesting Period.

94 Even if this reasoning is not directly applicable, Courts have held that contractual provisions which provide for an indemnity in lieu of notice are not subject to reduction if the employee mitigates his damages: *Aksich* v. *Canadian Pacific Railway*, supra, note 13, par. 128-143.

95 FY 2011 ($791,568), FY 2012 ($876,066) and FY 2013 ($479,438).

[108] As stated in the case law reviewed above, indemnification for bonus payouts during the notice period which are tied to financial components must reflect actual financial results. Otherwise, the employee may benefit from a windfall and be placed in a more advantageous position than if he had received sufficient notice. This would be contrary to the *raison d'être* of article 2092 C.C.Q.

[109] Leyne's approach of using the three year average of FY 2011[96], FY 2012[97] and FY 2013[98], gives weight to years where VOP and Public Markets were performing very well. The dismal FY 2016 is not taken into account, save for the multipliers of year four of the FY 2013 award.[99]

[110] It also does not take into account that PSP used fixed multipliers in FY 2017 to calculate LTIP payouts for the other employees after Leyne's termination. Indeed, since PSP decided not to carry out further investments in VOP and to divest itself of the investments in due course when and if appropriate, it concluded that it would be unfair to calculate multipliers for VOP and Public Markets for the remaining participants as if it were operating on a going concern basis when calculating payouts of the FY 2014, FY 2015 and FY 2016 multipliers. The Calculation summary for two employees of the VOP group who are participants in the LTIP for the FY 2014 award filed as evidence of this practice in FY 2017[100] contain a note which explains this *modus operandi*:

> Note: 1) (…) 2) <u>Étant donné la fin du régime de prime à long terme et tel que communiqué aux employés, le multiplicatif cumulatif pondéré basé sur le rendement du portefeuille global sera calculé en utilisant les multiplicateurs prédéterminés de transition LTIP</u>.
>
> [The Court's underlinings]

[111] For FY 2017, a 2.5 multiplier was used for Total Fund and a 1.0 multiplier for Public markets and VOP.[101]

[112] If it had accepted that the prorated payout mechanism set out at section 11.3 and 11.4 were indeed to be calculated as of August 4, 2016, the Court would have granted damages using the calculations set out at p. 3 of exhibit D-60, but adding the prorated FY 2015 and FY 2016 grants which PSP excluded in its calculations. The amounts owing would therefore have been:

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96 For FY 2011 award, see multipliers breakdown at exhibit P-20, p. 6 and 7.
97 For FY 2012 award, see multipliers breakdown at exhibit P-20, p. 2 and 3.
98 For FY 2013 award, see multipliers breakdown at exhibit D-27, p. 4.
99 *Ibid*.
100 Exhibit D-62.
101 Exhibit D-61.

Fiscal years	Grant ($)	Vested Grant of August 4, 2016 (%)	Vested Grant of August 4, 2016 ($)	Payout
2013	$195,520	100%	$195,520	$478,320
2014	$203,040	83,6%	$169,764	$331,658
2015	$205,800[102]	60,4%[103]	$124,303	$239,619
2016	$210,800[104]	35,4%[105]	$74,623	$140,439
Total				**$1,190,036**

[113] Hence, using the real numbers and the predetermined multipliers for the FY 2014 to FY 2016 awards and the ensuing total payout of $1,190,036 and taking into account the payment already made by PSP of $670,258, this would leave a balance owing of $519,778.

2.2.3 Discretionary expense allowance

[114] Leyne received a $15,000 discretionary expense allowance as part of his annual remuneration. It is paid out in equal instalments in each pay instalment. This amount can be used at Leyne's entire discretion. Julie Prévéreault explains that it is a taxable benefit. Leyne is not required to provide supporting invoices to PSP.

[115] PSP paid a sum of $11,250 equivalent for the nine month notice period.[106] No amount is therefore owing in this regard since the Court has not extended the notice period to twelve months.

2.2.4 PSP pension contributions

[116] As an employee of PSP having been hired before January 1, 2014, Leyne participates in the defined benefit pension plan. The mechanics of the plan are summarily set out in the 2016 Annual Report as follows:[107]

> Employees participating in the DB Pension Plan and the DB SERP contribute 5.75% of their base salary, up to the maximum contribution allowable under the *Income Tax Act* (Canada). This contribution was increased from 5% on January 1, 2015 and will represent a 50/50 cost-sharing ratio by January 1, 2017.

[117] PSP contends that it must not make any contributions after termination.

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102 Exhibit D-10, p. 6.
103 29 months out of 48.
104 Exhibit D-10, p. 7.
105 17 months out of 48.
106 Exhibit P-10.
107 Exhibit P-17, p. 77.

[118] In *Rippeur,*[108] the Superior Court reviews the applicable principles and concludes that under Quebec law, the employer must pay, during the notice period, an amount equivalent to the pension contribution it would have made on behalf of the employee to the pension plan.

[119] 5,75% of Leyne's base salary corresponds to $15,150.00.[109] Taking into account that the cost sharing is 50/50, PSP's share of pension contributions during the nine month notice period is $11,362.50. Leyne is entitled to payment thereof.

3. <u>CONCLUSIONS</u>

[120] For all the above mentioned reasons, the Court concludes that Leyne is entitled to an indemnity in lieu notice representing a nine month equivalent of the FY 2016 base salary, of the discretionary expense allowance and of PSP's share of pension costs, the full FY 2016 STIP payment and a four month prorated Cash payment for FY 2017 as per the terms of the new incentive plan adopted for FY 2017.

[121] He is not entitled to any further payout with regard to any past LTIP awards other than what is provided in section 11.3 and 11.4 of the LTIP which PSP has already paid.

[122] Taking into account the amounts already paid by PSP, Leyne is entitled to the following damages:

- A total amount of $186,843.00 on account of the STIP pay-out and the new incentive plan cash payment;
- $11,362.50 representing the contributions which PSP would have made to his pension plan during a nine month period.

WHEREFORE, THE COURT:

[123] **GRANTS** in part Timothy Leyne's Re-Re-Amended Motion to Institute proceedings;

[124] **CONDEMNS** PSP Investments to pay Timothy Leyne the sum of $198,205.50, with legal interest and the additional indemnity of article 1619 C.C.Q., from the date of institution of the proceedings;

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[108] *Rippeur* c. *Société canadienne des postes*, *supra*, note 60, par. 147 to 156.

[109] This is commensurate with Leyne's last pay slip, for the period ending on November 14, 2015, which evidences deductions on account of contributions for the year totaling $13,005, as of the November 4, 2015 date of termination.

[125] **THE WHOLE**, with Court costs.

____
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Hearing date: September 17, 18, 19, 20, 23 and 24, 2019

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