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EMPLOYERS' ADVISOR

A Newsletter from Mathews, Dinsdale & Clark LLP March 2015

17th Annual National Labour Arbitration Competition

Mathews Dinsdale would like to extend its congratulations to **Hilary Grice** and **Alex Ognibene** of the **University of Toronto**, winners of the 2015 Mathews Dinsdale National Labour Arbitration Competition!

Mathews Dinsdale would also like to recognize **Anthony Salandra** and **Nathan Vandermey** of **Western University**, the other finalists in this year's Competition.

The Competition, held at the end of January, required law students from across Canada to research and argue both sides of a case that centred on whether an employer was entitled to implement random drug and alcohol testing.

The students made their arguments in front of panels of judges, adjudicators, and practitioners in the labour and employment law field. On Sunday, the finalists made their arguments before The Honourable Mr. Justice Thomas Cromwell of the Supreme Court of Canada; Mr. Bernard Fishbein, Chair of the Ontario Labour Relations Board; and Ms. Jane Devlin, Arbitrator.

Mathews Dinsdale would like to congratulate all of the competitors and thank all of the judges, adjudicators, practitioners, and coaches who volunteered their time to make this year's Competition possible.

Our Workplace Just Got Brighter

Mathews Dinsdale is pleased to announce that Gradin D. Tyler from the Vancouver office, has joined our partnership.

INSIDE:

Grady regularly appears before Labour Relations Boards and represents employers at arbitration. He frequently acts as employer spokesperson in collective bargaining, and also represents employers' interests in health and safety and workers' compensation matters.

In addition we are delighted to welcome our new associates to Mathews Dinsdale: Kris Israel, Natasha Jategaonkar, Jeff Rochwerg, Sarah Smith and Katie Van Nostrand. As a continuing commitment to excellence, we employ a smart and diverse group of people who share the common goal of helping employers manage the complex laws of the workplace.

Recent Decisions by Canada's High Courts May Have a Significant Impact on Employers

In January of this year, two decisions were released by Canadian Courts, each of which may have a significant impact on Employers. In *Wilson v. Atomic Energy of Canada Ltd.* ("*Wilson*") the Federal Court of Appeal held that "without cause" dismissals were permitted by federally regulated employers under s. 240 of the *Canada Labour Code* ("the *Code*"), and in *Saskatchewan Federation of Labour v. Saskatchewan* ("*Saskatchewan*") the Supreme Court of Canada ruled that a "right to strike" exists and is recognized by the Charter.

In *Wilson*, the employee had been dismissed without cause and offered 6 months' pay. Wilson brought an unjust dismissal complaint under s. 240 of the *Code* (a provision that creates an adjudication process similar to arbitration for non-union, non-management employees of federally regulated employers) and was initially successful. The Company sought judicial review of the adjudicator's decision, and the case eventually travelled to the Federal Court of Appeal. The main question for the Court of Appeal was whether or not the *Code* permitted "without cause" dismissals.

The Court of Appeal, in seeking to reconcile the split case law on the issue (the majority of decisions had historically treated s. 240 as requiring just cause, though there was a minority line of cases that disagreed), concluded that a without cause dismissal of employees subject to s. 240 was not automatically "unjust" under the *Code*. The Court of Appeal determined that if Parliament intended to limit the right of an employer to terminate an employment relationship to only cases where "just cause" existed, it would have done so explicitly. Since this was not done, the Court of Appeal found that it is up to each individual adjudicator assessing a claim to determine whether the dismissal was "unjust," not whether the dismissal was "without cause."

While the *Wilson* decision appears to be a significant change, it should not be assumed that there are no limitations in this area on employers' rights under s. 240. There certainly remains room for adjudication decisions to impose significant limitations on employer's rights, and an appeal to the Supreme Court of Canada is also a possibility. Only as the law in this area develops will those restrictions, and what is considered "unjust," become clear.

In *Saskatchewan*, the Supreme Court of Canada was asked to assess the constitutionality of Saskatchewan legislation that prevented public-sector employees from striking. In finding that the legislation was unconstitutional, the Supreme Court noted that the right to strike corrects a historical imbalance which existed between employees and an employer. As a result, prohibiting an employee from participating in strike action amounts to a substantial interference with an employee's right to a meaningful process of collective bargaining.

While the right to bargain collectively has been long recognized, the Supreme Court added that the threat of, and actual ability to, strike is essential to the process

of collective bargaining, and further that the level of political pressure necessary for meaningful bargaining to occur cannot be achieved without having the threat of strike action.

The Supreme Court held that the "historical, international and jurisprudential landscape" has arrived at the point, in Canada, where the right to strike is "an essential part of a meaningful collective bargaining process in our system of labour relations."

The decision was not without dissent, however. The dissenting minority of the Supreme Court found that the Court should not ignore the established jurisprudence, which has warned of the dangers of creating an artificial imbalance within labour relations in favour of either employees or employers. The dissenting minority also noted that international law is not determinative of Canadian Charter rights issues and cited an article by Mathews Dinsdale's Sonia Regenbogen in its consideration of the status of the right to strike under international law.

Both of these decisions may well have significant impact on labour relations across Canada as their implications are explored in further jurisprudence. It goes without saying however, that employers, and particularly federally regulated employers subject to the *Code*, should seek legal advice with respect to strike issues and the termination of employees who could seek relief under s. 240 of the *Code*.

Misuse of Confidential Information and An Uncommon Remedy: An Anton Piller Order

Employers are often concerned, when an employee departs for a competitor, that he or she may use confidential information to unfairly compete. In *Peters & Co Limited v Ward,* 2015 ABCA 6, the Alberta Court of Appeal recently upheld an uncommon remedy for an employer in such circumstances, known as an Anton Piller Order, which helps protect evidence where there is a risk it might otherwise be destroyed before trial.

In this case, one of the principals in an investment firm tendered his resignation and accepted employment with a competitor. Following his resignation, the employer commenced an internal investigation to determine if the former employee had engaged in any improper conduct prior to his departure. As a result of that investigation, the employer learned that the former employee had downloaded the firm's entire contact list to his iPhone; printed various documents belonging to the firm's clients (including sensitive information about corporate transactions and board-level advisory presentations); and removed numerous banker boxes from the employer's offices on a weekend. The latter activity was recorded on security video.

The employer commenced legal action against the former employee, alleging he had breached his contractual, common law, and fiduciary duties to the firm by taking confidential information for his own benefit and by exploiting or misappropriating corporate opportunities belonging to the firm. Pending trial, the firm sought to protect the material it believed the former employee had in his possession, by obtaining an Anton Piller order to allow its representatives to oversee a search of the defendant employee's premises and seize any of the firm's property found there, including electronic media.

Because an Anton Piller order is highly intrusive, the legal test for obtaining one is very strict. First, the plaintiff must demonstrate it has a strong case. Second, the damage to the plaintiff resulting from the defendant's alleged misconduct must be very serious. Third, there must be convincing evidence that the defendant is in possession of incriminating documents or things. Fourth, a real possibility that the defendant

may destroy such material pending trial must be shown.

The employer in *Peters & Co Limited* argued that, without the Anton Piller order, it would suffer very serious damage to its ability to prove its case in court. The primary issue in considering whether to grant the order was not the adverse financial impact the company would suffer as a result of the defendant's use of the confidential documents but the risk of losing crucial evidence. In the circumstances of this case, the court noted that in order for the employer to prove the former employee had breached his contract, recovery of the downloaded information (which ought not to have been in his possession once he resigned) would be extremely helpful in the trial.

In coming to its conclusion, the court noted that, while it will often be difficult, or even impossible, for a plaintiff to show that a defendant *will* actually destroy evidence, it is still open to the court to draw reasonable inferences that he or she will do so. Where a defendant has acted dishonestly, or has acquired material in suspicious circumstances, the courts may infer that a risk of destruction exists. In this case, the judge noted that the removal of the material from the employer's offices had been undertaken in a surreptitious manner, and the timing of the removal in relation to the former employee's departure to a rival firm also raised suspicion. The former employee's actions were found to be a flagrant disregard of his duties to the employer, and the Anton Piller order was granted at trial and later upheld on appeal.

While an Anton Piller order remains an extreme exercise of the court's powers, the case of *Peters & Co Limited* demonstrates circumstances in which such an order may be obtained in the employment law context, particularly where confidential and sensitive information is at issue. Employers with convincing evidence to that effect following an employee's departure may have this extraordinary remedy available to them.

Seminars and Presentations

Interactive Workplace Investigations Workshop – April 21
Speakers: Sonia Regenbogen, Partner; Facilitators: Sara Malkin, Associate; Stephanie Ramsay, Associate and Stephanie Sangster, Associate

Contracting for Services and Construction Projects: OHS Liabilities and Due Diligence – May 7
Speakers: Cheryl Edwards, Partner and Jeremy Warning, Partner

Medical Terminology & Disability Management for Non-Medical Professionals – May 14
Speakers: Debbie Martin, Workers' Compensation Specialist and Dr. Greenwood

NEER Experience Rating for Employers – June 11
Speakers: Laura Russell, Partner and Debbie Martin, Workers' Compensation Specialist

For more details on all Mathews Dinsdale seminars please visit our website: **mathewsdinsdale.com/seminars** or contact **seminars@mathewsdinsdale.com**