BIRD RICHARD
LAWYERS FOR EMPLOYERS

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Bird Richard Welcomes New Partner and Senior Associate

Bird Richard is pleased to announce that Annie G. Berthiaume has joined the Firm as a Partner and Lynne Poirier has joined as a senior associate.

Annie was called to the Bars of Quebec and Ontario in 2002. Fluently bilingual, Annie represents employers in labour and employment matters and has appeared before various administrative tribunals, the Federal Court, the Federal Court of Appeal and the provincial courts in both Quebec and Ontario.

Lynne was called to the Bar of Ontario in 1999 and the Bar of Nova Scotia in 2011. Lynne has practiced labour and employment law exclusively on behalf of employers throughout her legal career. She regularly provides advice and representation to employers in labour arbitrations, human rights, employment standards and wrongful dismissal litigation, in both official languages.

Cause of Action for Invasion of Privacy Recognized in Ontario

In *Jones v. Tsige*, the Ontario Court of Appeal recognized the right to bring a civil action for damages for invasion of personal privacy.

Two employees of the Bank of Montreal, Sandra Jones and Winnie Tsige, worked at different branches of the bank and did not know each other. However, Tsige had formed a common-law relationship with Jones' former husband.

In 2009, Jones discovered that, despite the bank's policy against doing so, Tsige had surreptitiously looked at her banking records on numerous occasions, with no legitimate reason for doing so. Tsige had thereby gained access to a variety of information contained in Jones' banking records, including transaction details and personal information including her date of birth, marital status and address.

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Although Tsige did not record, publish or distribute any of the information, she nevertheless accessed the account information more than 174 times over the course of four years.

When Jones raised her suspicions that her account was being accessed, the bank confronted Tsige, who explained that she was involved in a financial dispute with Jones' former husband and simply wished to confirm that he was paying child support to Jones. Tsige recognized that what she had done was contrary to the bank's Code of Business Conduct and Ethics, as well as her professional responsibility. She apologized for her actions and ceased looking at the account information. The bank responded by disciplining Tsige, suspending her from work for one week and denying her bonus.

However, Jones brought a claim against Tsige, alleging that her privacy interest in her confidential banking information had been "irreversibly destroyed". She claimed damages in the amount of $70,000 for invasion of privacy and breach of fiduciary duty, as well as punitive and exemplary damages in the amount of $20,000.

Jones sought to have the case dealt with by way of summary judgment, and Tsige brought a cross-motion for summary judgment to have the action dismissed.

The motion judge determined that Tsige did not owe Jones a fiduciary obligation and dismissed that claim. With respect to invasion of privacy, the motion judge concluded that there is no "free-standing" right to privacy under the *Canadian Charter of Rights and Freedoms* or at common law, and Jones' case was dismissed.

Jones appealed to the Ontario Court of Appeal, which allowed her appeal and awarded her $10,000 in damages.

In its decision, the Court first addressed the notion of "informational privacy" or, the claim of an individual, group or institution to determine for themselves when, how, and to what extent information about them is communicated to others. The Court determined that such a characterization would include Jones' claim to privacy in respect of her banking records.

The Court then addressed the *Charter* argument, explaining that the right to privacy has been accorded constitutional protection, and that an attempt has been made by the courts to ensure that the common law develops in a way that is consistent with the *Charter*. The Court found that this supported the recognition of a civil action for damages for intrusion upon Jones' privacy.

On the basis of the jurisprudence and legislation, the Court of Appeal chose to recognize the tort of "intrusion upon seclusion" and adopted the following criteria:

The plaintiff must show:

1. an unauthorized intrusion;
2. that would be highly offensive to a reasonable person;
3. upon a private matter; and,
4. that caused anguish and suffering.

This decision will likely have major implications across Canada, given that it has recognized a new common law tort: intrusion upon seclusion. Further, despite the fact that this case involved an action between two employees, the decision will have important implications for employers, particularly in Ontario. Employers may wish to exercise increased caution in respect of activities such as video surveillance of employees and computer monitoring, as these actions may give rise to a claim for damages on the basis of an intrusion upon employees' seclusion.

Another Arbitral Look at Bill 168

In *National Steel Car Ltd. v. United Steelworkers, Local 7135*, Arbitrator Craven addressed a situation of workplace violence and the impact of Bill 168.

The grievor was a radio control crane operator who worked under the direction of Al Gogo, a lead hand, and under the supervision of foreman Albert Cule. There was a history of conflict between the grievor and Mr. Gogo.

On May 31st, 2011, Mr. Gogo believed that the grievor had taken an extended lunch break and reported this to the grievor's supervisors. Later that same day, the grievor approached Mr. Gogo and called him a "rat". The two men began to yell and exchange obscenities, and Mr. Gogo suggested to the grievor that they "take it outside" and "do this like a man." The grievor walked away from the suggestion of a fistfight, but was overheard saying that he was going to "get" or "bring" his "ammo". Mr. Gogo interpreted the comment as a threat of gun violence, given that he was aware that the grievor owned firearms.

Mr. Gogo complained of the incident to his supervisor, and the Company launched an investigation. It was revealed during the investigation that witnesses had heard the grievor say something about bringing or loading ammo. However, when the grievor was interviewed, he stated that he had said he would "use his intuition", which his colleagues had likely heard as "ammunition" and later reported as ammo.

Following further interviews, it was determined that: the grievor had in fact stated that he would bring in or load ammo, the comment amounted to a threat of workplace violence, and the grievor had been dishonest in denying the

allegations during the investigation. The grievor was discharged. A criminal charge was also laid, but was withdrawn after the grievor entered into a peace bond.

On the evidence, Arbitrator Craven determined that the grievor had said something similar to "next time I'll bring my ammo". It was also found that the grievor had not been forthright during the investigation, nor at arbitration.

Although the evidence revealed that the common reaction to the event by witnesses had been surprise, rather than terror, the arbitrator relied on the definitions of "workplace violence" under both Bill 168 and the Company policy, and found that it was reasonable for Mr. Gogo and witnesses to have understood the grievor's comment to be a threat to exercise physical force against them in the workplace.

Arbitrator Craven also found that Mr. Gogo had also engaged in a form of workplace violence, which the employees who witnessed it were obliged to report, and which the Company was required to investigate. However, Mr. Gogo's workplace violence had not been investigated by the Company, and was not the subject of the arbitrator's award.

In determining whether discharge was an appropriate disciplinary response, the arbitrator considered the traditional mitigating and aggravating factors, including the fact that the grievor was treated differently than Mr. Gogo, the grievor's outburst was a one-time, momentary flare-up, and the grievor was unlikely to engage in another act of workplace violence.

After consideration of these factors, the arbitrator concluded that a short suspension should be substituted for the discharge. The grievor was reinstated to employment on the condition that, for a period of two years following the date of the award, any act of workplace violence would result in discharge.

Employers are thus reminded that, while incidents of workplace violence must be taken seriously, a dismissal based on workplace violence is unlikely to be upheld if it is not in accordance with sound labour law principles, including: conducting a proper investigation, treating similar cases similarly, and giving consideration to mitigating factors.

Ontario Labour Relations Board Cannot Extend Time Limits, Says Divisional Court

In a recent decision, the Ontario Divisional Court held that the Ontario Labour Relations Board (the "Board") cannot extend the time limits for the referral of a grievance to arbitration.

In *Greater Essex County District School Board v. United Association*, the Collective Agreement between the parties contained a time limit for the referral of a grievance to arbitration, which read as follows:

> "…[the grievance] may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later…
>
> Any grievance submitted by…the Union…that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance."

In 2004, the Union filed a grievance regarding construction work that was being done by non-unionized workers at two schools. The Union referred the grievance to arbitration four months after the 14-day time limit had expired, without any explanation for the delay.

As a result of intervening decisions that affected the parties in 2006 and following, the School Board was declared to be the employer of the workers. Thus, five years after the grievance was filed, the Board found that the Collective Agreement time limits could be extended and that the grievance was therefore arbitrable. The Board finally concluded that the School Board had in fact breached the Collective Agreement six years after the grievance was filed.

On judicial review, the Court found that the grievance was inarbitrable as a result of the time limit in the Collective Agreement. The Court explained that the words in the Collective Agreement must be given their plain meaning, and the intention of the parties in this case was to establish *mandatory* time limits. The Collective Agreement specified clear consequences in the event that time limits were not met. On the basis of this Collective Agreement language, the Court found that the grievance no longer existed, and was deemed to have been settled.

Significantly, the Court further explained that section 48(16) of the *Labour Relations Act, 1995* cannot be applied to extend the time limits for referring a grievance to arbitration, as it applies only to the *filing* of a grievance, and not to the *referral* of a grievance to arbitration.

The Court in this case therefore determined that the Board's decision was unreasonable, and the Board's decision was quashed.

This decision provides Ontario employers with certainty that, if a grievance is not referred to arbitration in a timely manner, the Board will not be permitted to hear the grievance, so long as the relevant collective agreement time limits are of a mandatory nature, as they were in this case.

Ministry of Labour Proposes New Regulation under the *OHSA*

As part of the initiative to implement recommendations put forward by the Expert Advisory Panel on Occupational Health and Safety led by Tony Dean, the Ministry of Labour has proposed a new regulation under Ontario's *Occupational Health and Safety Act* ("*OHSA*", "the *Act*"). The regulation would assist workers who believe they have suffered a reprisal for bringing a health and safety issue to the attention of their employer. Further, and significantly for employers, the regulation would also assist smaller employers in responding to a reprisal allegation made by a worker.

Section 50 of the *OHSA* provides that employers are prohibited from disciplining, dismissing, penalizing or intimidating a worker because he or she has acted in accordance with, or sought enforcement of, the *Act*. Workers who allege that a reprisal has taken place may resolve their complaint by way of binding arbitration under a collective agreement, if available, or otherwise by filing a complaint with the Ontario Labour Relations Board (OLRB).

The proposed regulation would expand the mandate of the Office of the Employer Advisor (OEA) and the Office of the Worker Advisor (OWA), who already provide assistance in respect of workplace insurance matters. The new OWA functions would include the provision of education, advice and representation to non-unionized workers who make a reprisal complaint to the OLRB, or who are referred by a Ministry Inspector to the OLRB.

The new OEA functions would similarly be to provide education, advice and representation to employers with less than 50 employees (unionized or non-unionized) in regards to reprisal complaints that are referred to the OLRB. All services would be provided free of charge. Legal representation services, however, would be limited to proceedings before the OLRB.

Earlier this year, the Ministry of Labour requested written submissions from interested parties in respect to this proposed regulation, for which draft text has not yet been released. We will keep readers apprised of the development of this regulation.

Potential New Legislation to Govern Human Resources Professionals

Since the enactment of the *Human Resources Professionals Association of Ontario Act, 1990*, human resources professionals in Ontario have been a self-regulated profession, governed by the Human Resources Professionals Association (HRPA). Currently, the HRPA sets standards of practice and grants designations, including the Certified Human Resources Professional (CHRP) designation and the Senior Human Resources Professional (SHRP) designation. The *Act* also provides the HRPA with the authority to establish by-laws in respect of registration, standards of conduct and practice, and the power to address professional misconduct and issues of competency.

Bill 28, the *Registered Human Resources Professionals Act, 2012* has been referred to the Standing Committee on General Government. If enacted, the Bill would expand the HRPA's structure to include:

- membership qualification;
- professional designations;
- unauthorized use of designations;
- procedures for making complaints against members of the Association;
- a disciplinary and appeal process;
- the appointment of investigators and inspectors; and
- authorized inspections.

Similar to other professional regulatory bodies, the Bill provides for a wide range of investigative powers. If enacted, Bill 28 would allow the Association to attend at a workplace in order to investigate a member of the HRPA, without the employer's consent and without a warrant. Although the current HRPA by-laws allow the HRPA to fine members, Bill 28 would further grant the HRPA the ability to fine non-members who are use the CHRP designation without authorization.

Membership in the Association, as well as obtaining a designation, would remain voluntary.

Third Reading and a vote in the Legislature are required before the Bill can receive Royal Assent.