

EMPLAWYERS' UPDATE

A Special Edition Newsletter on
Labour and Employment Law Issues

Update on Supreme Court Decisions & Firm Announcement

***Jordan* Decision is Applicable to Employers and Supreme Court Reaffirms Right to Speedy Trial**

The Supreme Court of Canada's decision in *R. v Jordan*, 2016 SCC 27 rocked the foundations of the criminal law community by imposing tight timelines for trying criminal cases: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts.

Importantly, *Jordan* also provided some relief for employers charged criminally with health and safety violations. In *R. v Stephenson's Rental Services*, the Ontario Court of Justice applied the principles in *Jordan* to an employer charged under the *Occupational Health and Safety Act* following a workplace fatality. In that case, the Ontario Court stayed the charges pending against Stephenson's Rental Services because the matter had been before the courts for 55 months and the trial had started over two years prior. The Court found that the Crown had failed in its duty to provide disclosure and complacently conducted an "endless protracted prosecution". In so doing, the Crown had breached the Employer's rights to a speedy trial under the *Charter of Rights and Freedoms*.

The Supreme Court of Canada recently reaffirmed the principles in *Jordan* in *R. v Cody*, 2017 SCC 31, wherein an accused waited 5 years for a 5 day trial regarding alleged drugs and weapons offenses. The Supreme Court upheld the lower courts' stay of proceedings and stated that any delay attributable to the defence must be subtracted from the calculation of time. The Crown must then show why the net delay was justified. As the Crown was unable to justify its delay, the stay was upheld.

The Jordan and Cody decisions are of primordial importance to employers charged criminally under the occupational health and safety legislation. While both parties must make diligent efforts in bringing the case to trial in a timely manner, employers will be entitled to a stay of proceedings where the Crown's delay is unjustified.

Supreme Court finds Employer did not Discriminate Against Coke-Addicted Employee

The Supreme Court of Canada recently handed a clear win to employers in *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30. Mr. Stewart was a loader operator working in a mine operated by Elk Valley Coal, the employer. As the mine was a dangerous workplace, Elk Valley Coal had a policy which required employees to reveal any drug addiction issues. If they did so, employees would be given addiction treatment. If they failed to come forward and were involved in an accident and tested positive for drugs, they would be dismissed.

Mr. Stewart took cocaine off-duty, was involved in an accident, and tested positive for cocaine use. After revealing that he was addicted, Elk River dismissed him from employment. In a complaint to the Alberta Human Rights Tribunal, Mr. Stewart argued that he was dismissed because of his addiction and thus had been the subject of workplace discrimination. The Tribunal disagreed, finding instead that Mr. Stewart's breaching of the policy was the reason for his dismissal, not his addiction.

The Alberta Court of Queen's Bench and Court of Appeal upheld the Tribunal's decision. Mr. Stewart appealed to the Supreme Court of Canada.

The Supreme Court of Canada found that Mr. Stewart had not established discrimination. Mr. Stewart was able to comply with the policy, knew that he should not take cocaine before work, and knew he would be dismissed from employment regardless of whether he was "addicted" or a casual user. As the Supreme Court had no reason to doubt the Tribunal's finding that Mr. Stewart's addiction was not a factor in deciding to dismiss him from employment, it dismissed the appeal with costs to Elk River.

This case reinforces longstanding principles of workplace discrimination. The settled view is that, to establish discrimination, a protected ground or characteristic (disability, gender expression, sex, age, creed) need only be factor in the decision-making process. Absent such consideration in the decision-making process, a case of discrimination will not be made out and the discrimination claim shall fail.

For He's a Jolly Good Fellow!

Bird Richard is pleased to announce that its founding Partner Stephen Bird has been made a Fellow of the College of Labor & Employment Lawyers. The College is a professional association honouring the leading lawyers in the practice of labour and employment law, who have been recognized by their peers as distinguished members of the labour and employment community who promote achievement, advancement and excellence in the practice by setting standards of professionalism and civility, by sharing their experience and knowledge and by acting as a resource for academia, the government, the judiciary and the community at large.

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