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Lawgic

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DID YOU KNOW ...

DO YOU NEED TO HIRE A LAWYER?

BY: LORI KRUSE
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A party under a disability must be represented by a lawyer as must a party who acts in a representative capacity. A person acting under a power of attorney and a person acting on behalf of a class of litigants are examples of parties acting in representative capacities (Rule 15.01(1) Ontario *Rules of Civil Procedure*).

A Corporation must be represented by a lawyer to appear in Court (outside of Small Claims) in Ontario. Judges may exercise their discretion and allow for non-lawyer representation for a Corporation, but will only exercise their discretion in limited situations (Rule 15.01(2) Ontario Rules of Civil Procedure).

A recent Ontario decision, **Ward v. 1121720 Ontario Ltd., 2015 Carswell Ont 9642**, released June 25, 2015, serves as a good reminder as to what factors a Court will consider before granting leave for non-lawyer representation of a Corporation. In this case, the Plaintiff (Ward) sued the Defendant Corporation (1121720 Ontario Ltd) for injuries allegedly sustained in a slip and fall on the Defendant's property. The Defendant Corporation brought a motion seeking leave to allow Ms. Carolyn Krebs (part owner and director of the Defendant Corporation) to represent the Defendant in the action.

The factors the Court considered in **Re Ward, supra** were as follows:

- What is the internal situation of the Corporation? Is the person seeking to represent the Corporation a properly elected, authorized representative for the Corporation? Will the interest of the Corporation's shareholders, officers, directors, employees, creditors or other potential stakeholders be adequately protected by the granting of leave?

- What is the nature of the action and the issues in dispute? Would it be seriously unfair to the opposite party to have a non-lawyer representing the Corporation?

- Will the person be able to properly carry out the duties of a litigant under our Rules that govern Court procedure in Ontario? Is the person reasonably capable of comprehending the issues and articulating the case on behalf of the Corporation?

- Is the Corporation financially capable of retaining and instructing counsel?

In **Re Ward, supra**, the Court refused to grant leave to allow Ms. Krebs to represent the Defendant Corporation. Although Ms. Krebs had been a part owner and director of the Corporation since 1995 and was involved in the day-to-day operation of the Corporation, she failed to show that she had been duly authorized to represent the Corporation. There was no evidence as to who comprised the Board of Directors or whether it had authorized her representation. Furthermore, no evidence of the Corporation's financial ability or inability to retain and instruct counsel was put forth. The Court, in this case, stated (at paragraph 10) that the, "failure to produce relevant financial documentation can be taken as an assumption that the Corporation indeed has the financial means to retain counsel. There is no evidence in this case to suggest otherwise." While Ms. Kreps had represented the Corporation on a number of occasions in the past, those appearances were either before tribunals or a Small Claims Court (which did not require lawyer representation) or were unopposed cases in the Superior Court so leave was granted. Last, having been given a chance to file better supporting evidence, Ms. Kreps failed to do so. This "strongly" suggested to the Court that Ms. Kreps would be unable to properly carry out the duties expected of her in the litigation. As a result, the Defendant Corporation was given 30 days to appoint counsel. Rule 15.01(3) permits any other party to a civil proceeding to act in person or to be represented by a lawyer. However, any individual who chooses self-representation must comply with the *Rules of Civil Procedure*, in the same manner that a lawyer must comply.

Is the person reasonably capable of comprehending the issues and articulating the case on behalf of the Corporation?

The rules governing representation in federal courts are substantially similar to those described above. The rules in both the federal and provincial jurisdiction favour legal representation in civil proceedings. Why? Parties who are not represented by a lawyer operate at a disadvantage in the litigation process. The disadvantage arises due to a lack of familiarity with the law, the process and the players. Administrative tribunals do not typically require a party to be represented by a lawyer; however, unrepresented litigants before administrative tribunals are similarly disadvantaged by lack of familiarity with the law, the process and the players.

TO COMMENT OR NOT TO COMMENT

BY: DOUGLAS TREILHARD
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"I can't comment, the matter is before the courts", is an excuse we hear from time to time when a public figure or an organization is asked to respond to criminal or civil allegations of wrongdoing. Think of comedian Bill Cosby who has refused to comment on criminal allegations of sexual assault, or former Toronto Mayor Rob Ford who rebuffed reporters' questions about the infamous crack smoking video. Is there a legal basis for refusing to comment on the subject matter of court proceedings?

The answer is yes and no. Yes, there is a rule that limits commentary on the subject matter of a court proceeding. No, the rule does not apply to all comments on the subject matter of court proceedings. The rule is known as the sub judice rule, which means "under judicial consideration". It applies only to public statements that risk prejudicing the fair trial of a case.

A person accused of wrongdoing is not prevented from publicly proclaiming innocence. On the other hand, a reporter who publishes inflammatory material about the accused during a trial would risk being found in contempt of court. Although the rule applies to everyone, it is statements made by members of the news media or by public officials that are most likely to offend the rule.

The sub judice rule is stricter in Canada than in the United States, where a greater range of public comment on ongoing court proceedings is considered permissible. For example, President Obama routinely appeals to public opinion in an effort to pressure the Supreme Court to reach a particular result; this would certainly violate the sub judice rule in Canada.

The fact is, those who find themselves on the wrong end of criminal charges, a civil lawsuit or a complaint to an administrative tribunal must take care to say nothing that compromises their ability to defend themselves in front of the legal decision-maker. While saying nothing ensures that a person's legal defence is not compromised, it may damage that person's reputation with the broader public – because a refusal to comment can look like guilt. The preparation of a good legal defence to criminal charges, a civil lawsuit or a complaint before an administrative tribunal often includes a consideration of both the legal and the public relations consequences of a refusal to comment.

THE INTERSECTION OF SPORTS AND THE LAW:
TOM BRADY AND DEFLATEGATE

BY: DEREK ZULIANELLO
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From a legal perspective, this case has almost everything – forum shopping, allegations of a biased decision-maker, apparently inconsistent penalties imposed for somewhat similar workplace misconduct and attempted application of policies that are not part of an employment contract. Tom Brady and the NFL are currently embroiled in litigation. Brady is contesting the four-game suspension without pay that was handed down by the NFL in relation to Brady's alleged role in the underinflation of footballs used in the 2015 AFC Championship Game between the New England Patriots and the Indianapolis Colts.

The litigation is a judicial review of the arbitration decision delivered by NFL Commissioner Roger Goodell upholding the initial suspension of Brady. In Canada, the decision of a labour arbitrator is, in all but the rarest of cases, subject to review by a court on a standard of reasonableness. The recent trend in Canadian law – as directed by the Supreme Court of Canada – is toward expansive deference to labour arbitrators. In order to succeed on his judicial review application, Brady will need to successfully argue that Commissioner Goodell acted contrary to general labour relations law (e.g. a fundamentally unfair process and/or a partial decision-maker) or made findings that were not permissible in relation to the Collective Bargaining Agreement between the NFL and the NFLPA (e.g. inconsistent penalties and/or attempting to punish Brady for conduct that is not actually contrary to the Collective Bargaining Agreement or other ancillary policies of the NFL). Though the bar for a successful review in these circumstances is high, it is not unpassable – see the successful vacating of the arbitration ruling in the Adrian Peterson case earlier in 2015.

With the NFL's regular season just around the corner, Brady should know his fate soon.

Thank You To ... OUR SUMMER STUDENTS

SHOUT OUT to **KATY COMMISSO** and **VICTORIA LOCS** (Lakehead University Law School Students who joined us for the summer).

Katy and Victoria have been a great addition to the firm. We are grateful for their hard work, fresh perspectives and cheerful demeanors.

Victoria, good luck in year two!

Katy, we are delighted that you will be joining us for a fall placement!

MANDATORY PENSION PLANS ARE COMING

BY: MARY CATHERINE CHAMBERS
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On May 5, 2015, Bill 56, the Ontario *Retirement Pension Plan Act, 2015* received royal assent. On May 28, 2015, Bill 57, *Pooled Registered Pension Plans Act, 2014* received royal assent. Both bills were originally introduced by the provincial government on December 8, 2014 and both aim to assist working Ontarians to achieve a reliable stream of income in retirement.

Bill 56 requires the government to introduce legislation no later than January 1, 2017 that creates the Ontario Retirement Pension Plan (ORPP). The basic tenets of the ORPP, as outlined in the very brief Bill 56 are as follows:

- Participation in the ORPP will be mandatory for eligible employers and employees;
- Eligible employers are those that employ eligible employees;
- Eligible employees will be individuals who:
  - are between the ages of 18 and 70 and are employed in Ontario;
  - have an annual salary and wages above the minimum threshold (as yet to be determined);
  - are not in receipt of a retirement benefit from the Ontario Retirement Pension Plan; and
  - do not participate in a comparable workplace pension plan;
- Eligible employees will contribute up to 1.9% of their annual earnings to the ORPP, earnings in excess of $90,000.00 will be exempt from inclusion in the calculation. Eligible employers will match this contribution on behalf of their employees;
- Employers and employees with comparable pension plans will be exempt from the ORPP; and
- Retirement benefits under the ORPP shall be indexed to inflation.

A consultation paper published by the government in December of 2014 suggests that the only comparable pension plans will be defined benefit pension plans and target benefit multi-employer plans. Further, those earning less than $3,500 annually would be exempt as would the self-employed.

At this time, the plan is to introduce ORPP participation in waves, beginning with employers with 500 or more employees - contributions to start in January of 2017. The next wave will impact medium employers with between 50 and 499 employees and it will take effect January of 2018. Wave three (3) will apply to employers with fewer than 50 employees as of January of 2019. Bill 57 will implement Pooled Registered Pension Plans (PRPPs) in Ontario.

These are large-scale defined contribution plans that work like registered retirement savings plans by holding assets that are pooled together by many participating employers. PRPPs will be administered by the Ontario Superintendent of Financial Services.

This legislation adopts the federal pooled registered pension plan legislation that came into effect in 2012.

RICHARD BUSET

managing partner of Buset & Partners LLP established his office in 1980. That same year ...

... CNN became the first 24 hours news station.

... the Winter Olympics were held in Lake Placid where Team USA Hockey defeated the Soviet Union in what was later called the "Miracle on Ice".

... Blondie's "Call Me" was number 1 on Billboard's Year End Top 100.

... Kramer vs. Kramer won Best Picture at the Oscars.

... Pac-Man video game is released.

... Pierre Elliot Trudeau was elected as Prime Minister of Canada.

... Ronald Reagan was elected President of the United States of America.

... after 143 days and 5,373 kilometres Terry Fox stopped running outside of Thunder Bay after learning his primary cancer had spread to his lungs.

MYTH BUSTING : EMPLOYMENT CONTRACTS

BY: MARY CATHERINE CHAMBERS
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All contracts of employment are NOT created equally. Enduring misconceptions about employment contracts continue to undermine their efficacy in the workplace. Take this three (3) minute quiz and test your ability to separate fact from fiction in relation to employment contracts. Are the following statements true or false?

Unless a contract of employment is reduced to writing, it will not be enforceable.

FALSE A contract of employment can be implied (verbal) or express (written) and both types of contracts of employment can be binding and enforceable. Written contracts of employment are preferable because they increase the likelihood that the employer and the employee will have a shared understanding of the terms and conditions of employment – reducing the risk of conflict over what the actual terms and conditions of are.

A written contract of employment, negotiated before the employee began working and executed after the employee began working, is binding and enforceable.

FALSE Employers and employees often negotiate and agree to terms of employment before the employee begins work but wait until the employee actually begins working to have the employee execute the written contract of employment. This is bad practice and risks a finding that the written contract is not binding and enforceable. Why? If an employee has already begun to perform work, logically, the terms and conditions of employment have already been established and an implied (verbal) contract exists. To alter that verbal contract of employment once it has been established (i.e. on the first day the employee reports to work) the employer MUST provide the employee with fresh (new) consideration (value) for the alteration or change to the contract of employment. In the absence of fresh consideration flowing to the employee, the new written contract of employment may not be binding or enforceable. (The new consideration need not be large or onerous but must be fresh and ideally should be identified expressly in the written contract of employment.)

An employer may lawfully terminate an employee's employment, without cause, by providing the employee with the minimum amounts of statutory termination and severance pay.

TRUE AND FALSE In the absence of a written, binding and enforceable contract of employment, it is very unlikely that an employer may lawfully terminate the employment of an employee, without cause, by providing the employee with minimum standard notice/termination pay and severance pay, if applicable. For both federally and provincially-regulated employers, the right to terminate an employee's employment by providing minimum standards notice and/or pay MUST be reserved to the employer expressly and clearly in a written, binding and enforceable contract of employment. Why? The right to terminate an employee's employment on minimum standard notice (that is statutory termination pay and statutory severance pay, if any) represents a drastic limitation on the employee's common law rights and, therefore, courts simply will not confirm the existence of such a right unless the employee clearly and unambiguously agreed to the onerous term as evidenced by a written contract of employment.

The absence of a non-compete clause in an employment contract permits a former employee to use the employer's confidential information to compete with the former employer.

FALSE Employees owe their employers a duty of loyalty and good faith. That duty includes the duty to maintain confidentiality in respect of the employer's confidential information that the employee gained access to through his or her employment. The duty to maintain confidentiality regarding an employer's confidential information survives the employment relationship; indeed the duty has no end.

An employee must have independent legal advice for a contract of employment to be binding and enforceable.

FALSE An employee needs to have sufficient time to review and consider a written contract of employment – if the contract of employment is to be binding and enforceable. How much time is a sufficient period of time? Enough that the employee can reasonable seek and secure independent legal advice should she or he wish to do so – typically this would be a week or two. The receipt of independent legal advice is not a prerequisite to a binding and enforceable contract of employment - but the receipt of independent legal advice does make it more likely that the contract is enforceable.

An employer is well-served by using a template contract of employment for all of its employees.

TRUE AND FALSE Templates can be a useful starting point – but reliance on boiler–plate contracts will not ultimately be helpful. The specific circumstances of each employment situation should be considered and addressed. One size does not fit all when it comes to contracts of employment.

An employment contract never gets stale.

FALSE A written contract of employment that is binding and enforceable at the outset of an employee's employment may become outdated quickly by promotions, changes in reporting relationships and increases in pay. As a general rule, a new contract of employment should be executed when an employee accepts a new position within an organization and otherwise every five years or so.

GOT A PROBLEM YOU CAN'T SOLVE?

WE'RE HERE FOR YOU!

Photo Submission by Lori Kruse

"Our dog Quinn trying to chase after her prey into a culvert.

Both came out of this situation completely unharmed."

TOP 10 WAYS TO HELP YOUR LAWYER WITH YOUR LITIGATION MATTER

BY: PAUL RATCLIFFE
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1 PROVIDE CLEAR INSTRUCTIONS

Your Lawyer works for you based on what you have instructed them to do. It is important that you are clear with your instructions so your Lawyer understands what you are seeking and can advise you of your options.

2 TELL YOUR LAWYER EVERYTHING

Your Lawyer needs to be fully informed about your matter so they can properly assess it and determine the next steps. It is better to tell your Lawyer everything and let them decide what is important.

3 COMMUNICATION

Advise your Lawyer on how frequently you would like to be informed about your case and by what method, such as telephone or email. Talk to your Lawyer about the cost of the litigation and how you will be billed.

4 KEEP DETAILED RECORDS

Keep copies of all documents regarding your matter in one place. This will help you stay organized and informed about your matter.

5 ASK QUESTIONS

If you don't understand something about your case, ask your Lawyer to explain it. This is your case and you should be well informed.

6 KEEP YOUR LAWYER UP TO DATE ON YOUR SCHEDULE

If you know you will be away for a couple of weeks or months, please let your Lawyer know well in advance.

Often, events in a litigation matter are scheduled weeks or months in advance. If your Lawyer knows you will be away at a certain time, they can often accommodate your schedule. However, you should be prepared to change your schedule should a judge decide that a certain event i.e. your trial, is to occur on a certain date, regardless of your availability.

7 YOUR LAWYER ISN'T YOUR ONLY SOURCE OF INFORMATION

Your Lawyer's Assistant is well informed about your file and is an important resource for you to use. They can often provide you with a quick update on your file or advise you of any important events coming up on your file. Note: Legal Assistants do not give legal advice.

8 AVOID TALKING ABOUT YOUR CASE ON SOCIAL MEDIA

There is no need to post information about the litigation on social media and posting may well harm your case.

9 QUICK RESPONSES

Your Lawyer will need further information / documents from you as the litigation progresses. The sooner you can provide the information/documents the more time your Lawyer has to review the material and determine how best to use the material.

10 PATIENCE

Litigation is a slow process and can take years for it to work its way through the court system. Your Lawyer will outline the litigation process with you so you are well informed about the process and timelines.

Buset & Partners LLP

ANNOUNCEMENTS

JUNE 27TH

Mike Maher, Buset & Partners LLP's newest associate was called to the bar. Mike will practice in the areas of litigation, corporate, and employment law. You can see his full profile at mikemaher.ca.

SEPTEMBER 22ND

Mary Catherine Chambers and Derek Zulianello will be providing an employment and labour update at the AMCTO Zone 9 Fall Meeting.

... NOW YOU KNOW!