
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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COURT OF APPEAL DISMISSES EMPLOYEE'S CLAIM ON SUMMARY JUDGMENT MOTION

The Alberta Court of Appeal, in a decision released June 17, 2009, overturned a Motion Court's refusal to award summary judgment, and held there was no genuine issue for trial as to whether or not the Plaintiff employee was terminated for cause.

In this most unusual decision, the Court of Appeal found that it could determine, based upon the undisputed evidence, that the employee had: (i) acted contrary to the employer's Code of Conduct in accepting gifts from suppliers, which were in excess of nominal value; (ii) been involved with a subordinate in soliciting these services; and (iii) forwarded pornographic images to fellow employees from his workplace computer, even though he had previously been warned in writing about the prohibition against pornography in the workplace.

The Court of Appeal was also able to conclude on the undisputed evidence that the employee had a positive obligation to actively take steps to stop the flow of pornography, and to ensure that he maintained a non-sexist, non-racist environment which he clearly violated. For all of these reasons, the Court of Appeal held there was no genuine issue for trial and that summary judgment dismissing the employee's claim should have been awarded.

In arriving at its conclusion that the employee's wrongful dismissal claim had no real chance of success, the Court of Appeal applied the contextual approach dictated by the Supreme Court of Canada in *McKinley* but did so without a trial. The Court of Appeal reasoned that a trial was unnecessary because the Plaintiff's claim was based upon "excuses" and had no bearing or merit in view of the employer policy which forbade his behaviour. The Court of Appeal also relied on the fact that there was a complete absence of evidence that the employer had condoned the employee's behaviour or that there was an alleged "industry practice". In providing its reasons, the Court of Appeal stated that "Courts should not deny summary judgment on the off-chance that a party might, were there to be a trial, present evidence refuting what are undisputed facts at the summary judgment hearing. If that approach were permitted, the rationale for the summary judgment rule would be seriously compromised."

Poliquin v. Devon Canada Corporation [2009] ABCA 216 (CanLII)

AFTER-ACQUIRED CAUSE GROUNDS FOR RETURN OF A SEVERANCE PACKAGE

The New Brunswick Court of Queen's Bench Trial Division, in a decision issued on July 13, 2009, surprised not only the Plaintiff employee who had claimed an increased severance package from his former employer but also the employer itself.

Spielo Manufacturing Inc. started out as a coin-operated video lottery terminal company in the late 1980s. Doucet, the Plaintiff employee, started his employment with Spielo in 1993, initially as a consultant, and eventually became vice-president of its on-line lottery division.

In 1998, the employee, by then vice-president of Spielo, had also started working for Dovico, a time management system company owned by his sister. When eventually questioned about it, the employee indicated that he was only giving "advice" to his sister.

Doucet's employment was terminated by Spielo without cause, after a significant decline in business. At the time of his termination, Doucet was provided with 12 months' pay in lieu of notice in the amount of \$190,550, a discretionary bonus of \$47,638 and profit sharing of \$14,658. Spielo also bought back Doucet's shares in the company at their book value at the time.

After the termination, Spielo discovered that Doucet had been the president of Dovico while still actively employed as vice-president of Spielo. It also learned that he had used the services of Spielo employees for the benefit of Dovico, without permission or compensation during this same time period and that he had obtained personal financial gain from contracts Spielo had entered into with service providers under his direction.

Notwithstanding all of this, Doucet commenced an action for wrongful dismissal against Spielo seeking a severance package of 24 months plus compensation for unjust enrichment once he learned that his shares in Spielo had been sold to another company for far more than he had been paid for them. Spielo and its principal filed a counterclaim seeking repayment of the severance package originally provided to Doucet at the time of his dismissal relying on an "after-acquired cause for dismissal" theory.

The Court dismissed Doucet's claims and ordered that he repay the original severance package plus interest. The Court reasoned that the employee's conduct while employed with Spielo, which the company only discovered after providing him with a severance package, established just cause for his termination.

The Court's willingness to accept the "after-acquired cause for dismissal" counterclaim should give pause to other employees contemplating a legal claim for increased severance from their employer - especially when there may be employment "skeletons in their closet."

Doucet v. Spielo Manufacturing Inc. [2009] NBJ No. 217

EMPLOYEES' STATUTORY ENTITLEMENTS IN CCAA PROCEEDINGS NO HIGHER IN STATUS THAN OTHER CREDITORS' UNSECURED CLAIMS

In a decision rendered by Mr. Justice Morawetz on June 18, 2009, the Court was asked to determine certain claims filed by, and on behalf of, former unionized and non-unionized employees of Nortel Networks Corporation and related entities under the *Companies' Creditors Arrangement Act* (the "CCAA").

The former employees brought a motion seeking, among other relief, an Order directing Nortel to recommence certain periodic and lump sum payments, including termination and severance payments, and amounts payable under various retirement and retirement transition programs pursuant to Collective Agreements and pursuant to employment contracts and Ontario's *Employment Standards Act, 2000* (the "ESA") and similar legislation in other provinces. Nortel had ceased the payments as at January 14, 2009; the date of the CCAA filing and the Initial Order.

The Initial Order made upon the commencement of the CCAA proceeding stated, among other things, that:

- Nortel is entitled but not required to pay outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments.
- Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement.
- there is a stay of proceedings and a suspension of rights and remedies *vis a vis* Nortel.
- those having agreements with Nortel for the supply of goods and/or services are restrained from, discontinuing, altering or terminating the supply of such goods or services; although Nortel was to pay for such goods and services in accordance with normal payment practices.

Mr. Justice Morawetz dismissed the employees' motions on the basis that there was no obligation, at that time, for Nortel to make the payments being sought. Further, he found that there was no basis to treat either the unionized or non-unionized employees differently than any other unsecured creditors whose claims were all stayed.

In coming to his decision, Mr. Justice Morawetz emphasized that Nortel was under financial pressure and that the purpose of the CCAA proceedings was to facilitate the making of a compromise or arrangement between the insolvent debtor and its creditors such that the debtor is able to continue in business. The primary way of doing so was to stay past debts but require the continuance of present obligations to the debtor. Mr. Justice Morawetz further stated that the statutory exception to the general stay provision, which allows a claimant to require immediate payment for goods and services provided after the Order is made, should be construed narrowly. As well, he held that "services", as defined in the statute, contemplated some activity on behalf of the service provider performed after the making of the Initial Order, rather than simply the fact that the Collective Agreements remained in force and contained obligations owed to the unionized employees for past services.

Finally, the Court stated that the effect of its decision was not to allow Nortel to contract out of the *ESA* or to repudiate the Collective Agreements, but rather to delay the enforcement of the payouts resulting from any breach of the *ESA* and the Collective Agreements during the stay period.

Interestingly, the Court nonetheless directed the CCAA Monitor to review Nortel's declared assets available for distribution, and the current circumstances of the employees, to determine and report back to the Court as to whether a partial distribution could be made to those demonstrating hardship.

Justice Morawetz's decision is currently under appeal to the Court of Appeal for Ontario

Nortel Networks Corporation (Re), 2009 CanLII 31600 (Ont. S.C.)

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