

 **Employment News**

This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

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DISMISSED EMPLOYEE ENTITLED TO RELY UPON OPPRESSION REMEDY TO ENSURE COLLECTION UPON JUDGMENT

A recent decision of the Ontario Court of Appeal entitled a dismissed employee to an "oppression remedy" where a corporate reorganization prior to trial would otherwise have had the affect of depriving the employee of any right to recovery on his judgment.

The Court held that "oppressive" conduct need not be undertaken with the intention of harming the complainant, provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests.

In the circumstances of this case, the employee had commenced legal proceedings for his alleged wrongful dismissal prior to a reorganization. The reorganization resulted in the complete transfer of assets out of the hands of the company named in the lawsuit as the employer. The Court found that in those circumstances a duty arose on the part of the shareholders and directing minds of the company to ensure that the company retained a reserve to meet the contingency associated with the claim.

The employee was found to be entitled to recover judgment against all the respondents accordingly.

EMPLOYEES MAY BE ENTITLED TO PURSUE BOTH EMPLOYMENT STANDARDS ACT AND COMMON LAW REMEDIES

The Supreme Court of Canada in an unanimous decision refused to apply the issue estoppel doctrine to bar a Plaintiff employee's claim for wrongful dismissal on the basis that the matter was already adjudicated upon by an employment standards officer.

The Plaintiff employee filed an *Employment Standards Act* ("ESA") complaint for wrongful dismissal and in addition, claimed outstanding commissions. The complaint was still under investigation when the employee commenced a court action claiming damages for wrongful

dismissal, unpaid wages and commissions. The ESA claim was eventually rejected without the employee being made aware of the employer's submission or being given the opportunity to respond. There was no automatic right of appeal, although the employee was entitled to apply for a statutory review of the decision, which the employee elected not to pursue. The employer brought a motion to strike out the statement of claim insofar as it overlapped the ESA proceeding.

The Supreme Court of Canada held that to apply the issue estoppel doctrine would be contrary to the principles of justice.

The Honourable Mr. Justice Binnie on behalf of the Court held there to be

"The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done in the facts of the particular case."

The Court went on to conclude that the employee's failure to seek judicial review was not fatal because the preconditions for issue estoppel were present, and justice dictated that it not be applied in the circumstances of this case.

While this decision does not purport to declare absolutely that bringing an ESA complaint does not bar subsequent civil proceedings, we can expect those waters will now be tested more frequently by those dissatisfied with the ESA process or outcome.