



MTW *TODAY*

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It is with pleasure that Mullin Thwaites Ward, LLP takes this opportunity to publish the third of what is becoming a regular newsletter for our clients. We believe that it is important for us to communicate with our clients in an effort to keep them abreast of developments in the law (in Ontario) touching their personal or business life or the life of the community. We would like to extend our appreciation to our clients who we have had the privilege of serving in the past year. We look forward to serving you in the upcoming year. We invite our readers to contact us by telephone, fax or at our website to learn more about us and our practice.

Family Law:

Spousal Support

On April 26th., 2001 the Ontario Court of Appeal delivered a decision in *Miglin*. The Court decided that Courts had the jurisdiction to reconsider the issue of spousal support notwithstanding the existence of Separation Agreements in which the spouses released each the other from any claim for spousal support. The Court decided, if it was demonstrated that a material change in the circumstances had occurred from the time which the Separation Agreement had been executed and the material change had not been contemplated, reasonably by the parties, that the Court could and may make an Order for spousal support. This decision, while still under appeal to the Supreme Court of Canada, has had, a significant impact on the way in which Separation Agreements are negotiated and Courts are approaching variation applications. This decision impacts not only future

Separation Agreements but also those who have already executed Separation Agreements. This decision is a further example that nothing is final in family law and that there is no certainty in a contract despite the intentions of the parties at the time of execution.

Family Responsibility Office - Driver Licence Suspensions:

The Family Responsibility Office has pursuant to the legislation enacted by the Province of Ontario, the jurisdiction to enforce child and spousal support obligations whether contained in Court Orders or Separation Agreements. The Family Responsibility Office has as part of its' enforcement mechanism the ability to direct the Registrar of Motor Vehicles to suspend the driver's licence of a support payor who is in default. The Family Responsibility Office must give Notice to the payor of the intention to direct the licence suspension giving the payor time to either make satisfactory arrangements for the payment of the arrears or to bring Court proceedings seeking a variation or relief from the arrears. The payor must, if it wishes to avoid the driver's licence suspension bring an application before the Court to obtain a "*refraining Order*". The Order must be obtained within thirty (30) days of the Notice from the Family Responsibility Office, as the Courts have otherwise determined that there is no jurisdiction or ability in the Courts to extend the time or to waive compliance with the legislation. It is therefore of the utmost importance for persons receiving Notice to move and respond in a timely manner.

Employment Law:

a) Employment Standards Act

As of September 4th, 2001, the amendments to the *Employment Standards Act*, enacted in December, 2000, become effective. The amendments create a new regime for employers and employees dealing with any number of issues including benefits, overtime and hours of work. Changes have also been made to the provisions dealing with termination and severance entitlements on the employment relationship being ended.

b) Is Employee Dishonesty Just Cause for Dismissal?

The Supreme Court of Canada has recently decided in the decision of *McKinley & B.C. Tel* has decided that employee dishonesty does not automatically give an employer the right to terminate the relationship for "just cause". The Court decided that in each case it will be necessary to examine the relationship and the nature of the dishonesty. The Court has decided, for an employer to terminate an employee for an act of dishonesty and without having to pay any compensation to the employee, that the employer must demonstrate that the act of the dishonesty was of a type that would undermine the ongoing employer-employee relationship.

c) Disability of Employee/Termination of Employment

On April 30th, 2001, the Ontario Court of Appeal rendered two (2) decisions which have brought some clarity to the rights of employees who have had their employment terminated. The basic premise of employment law is that an employee is entitled, on dismissal without cause, to receive reasonable notice or compensation in lieu of notice from the employer. It is also accepted that if an employee receives income from another source during the "notice period" that the employer will receive a credit from its' obligations. There has been a question of whether a "terminated" employee who was disabled or becomes disabled during the notice period, must give credit to the employer for disability payments (short-term or long-term)

received.

The Supreme Court of Canada had held in 1997 in *Sylvester v. British Columbia* that an employee could not benefit from both disability income and the obligations of the employer on termination. The rationale was that since the employer paid for the disability premium, and the disability plan was established as a substitute for salary, the employee would be receiving a double benefit if he/she were to receive both the disability payments and employment income during the notice period.

The Ontario Court of Appeal on April 30th, 2001 decided in *McNamara v. Alexander* that when an employee contributed to the disability plan and the disability plan was paid from a third person (insurance company) that this was a different situation than faced the Court in *Sylvester*. The Court concluded that as a matter of contract law, the employee did not have to give the employer credit for disability benefits received during the termination notice. In *Sills & The Children's Aid Society of Belleville*, the Ontario Court of Appeal also decided that an employee who has been disabled during the period of the termination notice was entitled to both the income and the disability benefits. The Court concluded that when an employee pays or contributes to the premium or the disability benefit is part of the compensation package then the employer is not ultimately entitled to an offset or credit.

The decisions are certainly consistent with the law dealing with *wrongful dismissal*. The law has long held that an employer must give reasonable notice on terminating an employee based on the principle that the "notice" is what it would otherwise reasonably take for an employee to obtain alternate comparable employment. If an employee is disabled either prior to or during a termination notice period then the disability will obviously prolong or make it impossible for an employee to obtain such comparable employment. It therefore makes eminent sense that an employee would receive both the notice as well as disability benefits. If an employer wishes to avoid this result then the issue

needs to be clearly addressed in a written employment contract at the outset of the employment relationship.

For employers and employees who are considering the issue at the time of terminating the relationship, it is important to recognize that disability insurers will generally, as a term of the insurance policy, not make disability insurance available to an employee who has been terminated. If, therefore, an employee is disabled during a notice period the question to be determined will be whether an employer has an obligation to pay the employee during the disability period and in addition to any notice period. Employees need to appreciate the importance of the issues at the time both at the time of negotiating the terms of employment and on receiving notice of termination of employment.

Bankruptcy:

A commonly asked question by both creditors and bankrupts on a bankruptcy is *whether unnamed creditors are affected by the bankruptcy and whether it will affect the discharge rights of a bankrupt*. On June 29th, 2001, the Ontario Court of Appeal decided that if a bankrupt person fails to name a creditor on the list of creditors that it does not affect the rights of a bankrupt to be discharged and in fact, unnamed creditors have their debt discharged. Failure to name a creditor would only have an impact or effect the discharge if the failure to name was demonstrated to have been intentional or fraudulent.

Money Laundering & Terrorism:

Persons seeking or receiving legal services should be aware that lawyers are now subject to new *federal legislation* which requires lawyers to release and disclose information to a government agency (*FINTRAC*) in certain situations despite the fact that the information may or was otherwise received in a solicitor/client relationship. Further information will be provided to clients as more information becomes available with the passing of the Regulations and once the Courts have dealt with several constitutional challenges made to the legislation by various groups, namely the various law societies across Canada. The

legislation affects not only lawyers but financial institutions. The legislation provides *FINTRAC* with significant rights to information and documentation. There are significant penalties for those who do not comply with the legislation.

Estate Planning:

We are often asked by clients how often they should review their Wills. There is no set time frame to do so but we encourage all of our clients to review their estate documents every five years. The following is a list of events that might require you to change the instructions as set out in your Will:

- (a) if you change your name, or anyone mentioned in your Will changes theirs;
- (b) if an Estate Trustee (Executor) dies or becomes unsuitable to act due to age, ill health, etc.;
- (c) if a Beneficiary dies;
- (d) if you have specifically bequeathed a property which you subsequently sell, that you have gifted during your lifetime or which changes in nature;
- (e) if you marry, become divorced or remarried;
- (f) if you adopt children; or
- (g) if your estate increases significantly in value.

We invite our clients to visit our website to receive information about our firm, the services provided and to be kept updated on our newsletters at the following address: www.mtwlawoffice.com.

Our law firm is proud to support *The Orangeville Theatre, The Orangeville Minor Hockey Association and The Orangeville Minor Lacrosse Association*.

This MTW *TODAY* is provided as an information service to our clients and is a summary of legal matters. It is not meant to be a legal opinion. Readers are cautioned not to act on information provided herein without seeking specific legal advice with respect to their unique circumstances. Comments and suggestions are welcome.



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